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“RECONSIDERED”
A CRITICAL ANALYSIS

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**THE GOLDSTONE REPORT
“RECONSIDERED”
A CRITICAL ANALYSIS**

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edited by

Gerald M. Steinberg

&

Anne Herzberg

Foreword by **Dore Gold**

NGO MONITOR

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FOREWORD
**THE DANGEROUS BIAS OF THE UNITED
NATIONS GOLDSTONE REPORT**

Dore Gold

The U.N. Fact-Finding Mission on the Gaza War, known more popularly as the Goldstone Report, best illustrates the fundamental problems associated with reliance on international mechanisms for assuring true accountability in a conflict like Operation Cast Lead. The Goldstone Report turned out to be heavily flawed. Originally, it was the initiative of the Geneva-based U.N. Human Rights Council, which named South African Justice Richard Goldstone to head it. It was promoted at the time by Cuba, Egypt, and Pakistan – not exactly the beacons of human rights – and had no support from Western democracies.

Strictly speaking, the report was primarily directed against Israel, which was seeking to bring to a complete halt the indiscriminate rocket and mortar fire by the international terrorist organization Hamas against Israeli towns and villages that had been going on for nearly eight years. The Goldstone Report alleged that Israeli troops had committed “war crimes” by attacking purely civilian targets in the Gaza War. To make matters worse, the report failed to link Hamas to any violations of the laws of war, even though its continuing rocket attacks on Israeli civilians caused the Gaza War to begin with. There was only mention of anonymous “Palestinian armed groups.” It is probably for that reason that the Hamas second-in-command in Damascus, Musa Abu Marzuq, told the Saudi satellite channel Al-Arabiya that “the report acquits Hamas almost entirely.”

The net results of this attempt to create accountability in the war on terrorism were actually dangerous for pursuing the war against terror in the future. For what emerged was that an official report, with the stamp of the United Nations, made serious, but largely unsubstantiated allegations about a state engaged in lawful self-defense, while letting the aggressor, an international terrorist organization, completely off the hook. Running through the report in incident after incident is the charge that Israel intentionally attacked civilian targets. It did not conclude that civilian injuries were a product of collateral damage that occurs in many wars, but rather it resulted from a

deliberate policy of the IDF. Israeli President Shimon Peres understandably called the Goldstone Report “scandalous” when he met U.N. Secretary-General Ban Ki-Moon in Jerusalem on March 20, 2010.

How did the Goldstone team produce such a result? It is essential to understand that its members had a very specific outlook of the nature of this kind of armed conflict that affected their conclusions. Colonel Desmond Travers of Ireland was the senior military figure on Goldstone’s panel and probably its most important member after Justice Goldstone. In a wide-ranging interview in *Middle East Monitor* from February 2, 2010, he utterly rejects that there is something called “asymmetric warfare” in which insurgent forces are introducing civilians into the battlefield against modern armies in a way that changes the nature of warfare. This outlook directly affected what Travers and his colleagues looked for as they gathered evidence, and how they went about the interviews that they conducted with Palestinians in the Gaza Strip.

Take, for example, the case of Muhammad Abu Askar, a longtime Hamas member who served as the director-general of the Ministry of Religious Endowments in the Gaza government. He appeared before the Goldstone panel arguing that his house had been “unjustly” blown up by Israel, though he admitted that he was warned in advance by the IDF, who telephoned him directly, informing him that his home was to be targeted and he had better vacate the area. The Goldstone Report concludes that Abu Askar’s home was of an “unmistakably civilian nature.” If that was the case, then Israel would have violated one of the basic principles of international law by failing to discriminate between military and civilian objects and personnel during wartime.

Because the U.N. actually posted on its website video clips with the questioning of Abu Askar by the Goldstone panel, it is possible to examine how panelists reached their conclusions. They asked him detailed questions about the warning he received. They also asked about the other homes in the area. But the most pivotal question that would help them determine whether Abu Askar’s house was purely civilian in nature or was a legitimate military target was not even asked. No one even bothered to confront him with the unpleasant but necessary question of whether Hamas munitions were being stored in his house. In short, the investigation into what happened to Abu Askar’s house was deeply flawed.

In January 2010, the Israel Defense Forces completed its own internal investigation of many of the incidents that appeared in the Goldstone Report, including the case of Abu Askar. Israeli representatives submitted their findings to the U.N. secretary-general. It turned out that the cellar and other parts of Abu Askar’s house served as a storage facility for large stockpiles of weapons and ammunition, including

Iranian-supplied Grad rockets that had been used against Israeli cities like Ashkelon, Ashdod, and Beersheba.

Indeed, the area around the house had been used as a launch site for attacking many Israeli towns and villages. If the U.N.'s research division would have bothered to check the Arabic website of the Izz al-Din al-Qassam Brigades of Hamas, they would have disclosed that Khaled Abu Askar, Muhammad's son, worked for the military supply unit of Hamas and provided its operatives with rockets and military equipment. The failure of the Goldstone panel to look into these issues and to ask the most basic questions of Muhammad Abu Askar regarding his use of his house to store rockets illustrates how unprofessional this investigation really was.

The Abu Askar case is only one of many incidents that appear in the Goldstone Report, but it is representative of a pervasive problem that appears throughout. In trying to reconstruct the reality of what occurred in the Gaza War, the team members refused to consider that Hamas was exploiting civilian areas to gain military advantage. In late October 2009, Colonel Travers confidently told *Harper's*: "We found no evidence that mosques were used to store munitions." He then added his own ideological position on the matter that helped him make such a conclusive assertion: "Those charges reflect Western perceptions in some quarters that Islam is a violent religion."

When Travers was asked how many mosques he inspected, he answered that he visited two. He did not even think that he needed to be more thorough, for he dismissed the very possibility that anyone would hide munitions in a place of worship. In contrast, in January 2010, Col. Tim Collins, a British veteran of the Iraq War, visited Gaza for *BBC Newsnight* and actually inspected the ruins of a mosque that Israel had destroyed because it had been a weapons depot. He found that there was evidence of secondary explosions caused by munitions stored in the mosque cellar. Travers clearly did not think it was necessary to make the same effort.

In other theaters of war in the Middle East, the militarization of mosques was very common. In 2004, U.S. forces in Iraq found weapons and insurgents in no less than 60 mosques in the town of Fallujah. While the Goldstone Report itself stated that it was unable to make a determination whether mosques were used for military purposes by the Palestinians, it nonetheless concluded that mosques were a "civilian object" and that Israeli operations against them were a violation of international law.

There was also the case of the Ibrahim al-Maqadma Mosque, which Justice Goldstone believed had been attacked deliberately by Israel on January 3, 2009 during Operation Cast Lead. Goldstone stated during an appearance at Brandeis University on November 5, 2009 that this was "the one attack that certainly affected" him the

most, since it involved, in his judgment, a deliberate Israeli strike against a mosque, when some 350 worshipers were praying inside. Fifteen Palestinians were killed in the attack.

Are there other possible explanations for what happened? It turned out that there was an Israeli attack on Hamas operatives outside the mosque, near its entrance, but not on the mosque itself. Goldstone described the shrapnel he found near its entrance months later. But he failed to mention important details that would be relevant for determining Israeli intent about what exactly motivated the attack.

A final Israeli report on the Ibrahim al-Maqadma Mosque disclosed that the structure did not have a minaret. Goldstone said at Brandeis that the mosque was only three years old. But he said nothing about the issue of the minaret, whose absence he should have noticed when he visited the site. In fact, the final Israeli report revealed that Israeli commanders had no idea it was a mosque, and it was not marked as such on their operational maps. If that was the case, then how could Goldstone assume that Israeli deliberately launched a missile at Palestinians engaged in prayer.

The Goldstone panel did not have to wait for the results of the Israeli investigations to draw different conclusions from the ones they presented to the U.N. For example, according to websites affiliated with Hamas not long after Operation Cast Lead, four of those killed outside the mosque belonged to the Izz al-Din al-Qassam Brigades. There were also two operatives killed from the al-Quds Battalions of the Islamic Jihad. A Hamas website explained that one of those killed, Hamad Abu Ita, was ordered to go to the mosque to meet other fighters. But the Goldstone team did not take these Palestinian websites into account. As a result of this serious methodological flaw, Goldstone and his colleagues had only the most sinister interpretation for Israeli intentions.

Because they were driven by this view of Israeli intent, the Goldstone team simply refused to accept the argument that Hamas had used the Palestinian population in the Gaza Strip, as well as its civilian infrastructure, as human shields – a hallmark of the asymmetric warfare used by insurgents. Speaking about Hamas, Travers in his 2010 interview states point blank: “We found no evidence for the human shield phenomenon.” As a result, from the Goldstone panel’s worldview, Hamas had no responsibility for exploiting the Palestinian population to shield its military operations. Travers, in particular, was operating with ideological filters that prevented him from seeing evidence that contradicted his worldview.

From Israel’s military experience, it was clear that Hamas used human shields effectively. A report by Israel’s Intelligence and Information Center contains Israeli

Air Force video showing how on December 27, 2008, the first day of the Gaza War, after the residents of a building serving as a munitions storehouse were warned of an imminent Israeli air operation, they did not evacuate but ran to the roof of the building. As a result, Israel aborted the air strike it had planned. Other Israeli Air Force videos show Hamas operatives deliberately moving toward groups of children or using them in the fighting in order to escape possible Israeli attack. Detained Hamas combatants confirmed this had been part of their military tactics.

However, the Goldstone panel did not want to consider the possibility that the Gaza War was part of an emerging battlefield in which private homes, mosques, and innocent civilians are being intentionally exploited by terrorist groups that seek to fight the West. In February 2010, Afghan officials reported that the Taliban were increasingly using human shields against U.S. and allied forces trying to make inroads in Helmand province. Similar tactics have been employed by the Taliban in Pakistan as well.

With respect to the Gaza Strip, the Goldstone Report recommended that states open up criminal investigations against those whom it alleges may have committed war crimes. It also seeks the intervention of the International Criminal Court. Already, British courts have sought the arrest of former Israeli officers on the basis of complaints issued by Islamic and radical left-wing groups in London. Might not U.S. and other NATO officers be exposed to the same treatment on the basis of these precedents? Hamas created a legal arm, called al-Tawthiq (lit. documentation), which fed information to the Goldstone panel and today provides British lawyers with material to seek the arrest of Israelis in Britain. Why can't the Taliban find lawyers to do the same?

Another difficulty that emerges with the Goldstone Report is how evidence was gathered long after the events being investigated transpired, in an environment in which witnesses may be intimidated by militant groups like Hamas. Local police always try to protect a "crime scene" from being tampered with. But when Hamas is waging an international legal battle with Israel, and is determined to prove Israeli guilt at all costs, then its tampering with various battle zones has to be considered.

The Goldstone Report alleges that Israel launched an air strike against the al-Bader Flour Mill in order to deny sustenance to the local Gaza population. Israel's own investigation found there was no air strike on the facility, and that a tank shell had been properly fired in light of the battle that raged there. Subsequently, a U.N. investigative body found an unexploded air force munition at the al-Bader Flour Mill, leading the IDF to conclude that the area had been tampered with by Hamas.

What needs to be done is to recognize that Western armies are going to be dealing increasingly with situations in which terrorist groups are embedding their military capabilities in the heart of civilian areas. In these circumstances, Western armies have three choices if their countries come under attack: 1) to surrender to terrorism and not defend their citizens, 2) to act like the Russians in Chechnya and use indiscriminate firepower, or 3) to find a way to separate the civilians from the military capabilities they hope to destroy.

Israel clearly chose the last option, using an unprecedented system of warnings to the Palestinian population by means of leaflets, breaking into Hamas radio broadcasts with special Arabic transmissions, and finally by telephone calls and text messages to the residents of a targeted area to evacuate and avoid danger.

The Goldstone Report never suggests how Israel was supposed to respond to eight years of rocket fire. Despite the multiple warnings that Israel issued to the Palestinian population, the report has the audacity to charge that Israeli soldiers “deliberately” killed Palestinian civilians, basing this accusation on biased interviews with Gaza residents whom it admitted were in “fear of reprisals.” The Goldstone Report does not ask how it could charge that Israel had a policy of deliberately killing civilians, if Israel actually took extraordinary measures to warn the very same civilian population of impending attacks. But rather than being discredited, unfortunately the Goldstone Report picked up steam. The U.N. General Assembly voted on the report on November 5, 2009.

It was noteworthy that countries with forces deployed in insurgency wars, like in Afghanistan, either opposed or abstained. Yet in a second vote in late February 2010, Britain and France changed their vote from abstention to support for the Goldstone Report. In mid-March 2010, the European Parliament voted to endorse the report as well.

Yet Justice Goldstone decided a year later to reconsider the central accusation against Israel made in his U.N. report. Writing in the *Washington Post* on April 2, 2011, Goldstone appeared to be retracting when he wrote about Israel’s operations in Gaza: “...civilians were not intentionally targeted as a matter of policy.” This was a significant shift in his conclusions. After this admission, it might seem that this entire analysis of the Goldstone Report is superfluous. It should be recalled that the other members of the Goldstone panel did not agree with his changed position. Hina Jilani, Christine Chinkin, and Desmond Travers together wrote in *The Guardian* on April 14, 2011 that they still “firmly stand” by the report’s original conclusions. For the other members of the U.N. panel, its accusations against Israel still stand.

No one is suggesting that human rights be sacrificed on the altar of national security. The laws of war need to be carefully protected along with the lives of the innocent. The problem with the Goldstone Report is not the result of the need to revise those laws: They need to be applied correctly and not in a way that ignores what insurgent forces are doing on the ground. If a public building filled with munitions needs to be attacked at night when civilians are not present, it is not for reasons of revenge but rather from military necessity. The Goldstone panel did not want to consider that possibility because of its own prejudices and mind-set. Should that mind-set spread, then not only will Israel's security be endangered but also the security of the West as a whole.

EDITOR'S NOTE

Due to variations in the formats of the articles as originally published, footnote styles and the spellings of names and places may differ from chapter to chapter. Some spellings and styles have been changed from the originals to increase uniformity.

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We thank the staffs of NGO Monitor and the Jerusalem Center for Public Affairs for their dedication and assistance in preparing this volume.

FROM DURBAN TO THE GOLDSTONE REPORT: EXPLOITING HUMAN RIGHTS FOR POLITICAL WARFARE

Gerald M. Steinberg

As I said at the United Nations last year...efforts to chip away at Israel's legitimacy will only be met by the unshakeable opposition of the United States...So when the Durban Review Conference advanced anti-Israel sentiment, we withdrew... In the wake of the Goldstone Report, we stood up strongly for Israel's right to defend itself.
- U.S. President Barack Obama, May 22, 2011¹

*If I had known then what I know now, the Goldstone Report would have been a different document...The allegations of intentionality by Israel were based on the deaths of and injuries to civilians in situations where our fact-finding mission had no evidence on which to draw any other reasonable conclusion..., the investigations published by the Israeli military and recognized in the U.N. committee's report indicate that civilians were not intentionally targeted as a matter of policy...
- Judge Richard Goldstone, April 2, 2011²*

The intense criticism of the “Report of the United Nations Fact-Finding Mission on the Gaza Conflict” (the Goldstone Report) resulted from a number of factors. From the beginning, the processes and publication, as well as the events that followed, were entirely inconsistent with the requirements of due process in judicial or fact-finding frameworks. This deeply flawed process reflected the degree to which universal human rights and international law are repeatedly distorted and exploited for narrow partisan political campaigns, particularly directed at Israel.

Before Judge Richard Goldstone welcomed the invitation to head this misleadingly

¹ President Barack Obama, “Remarks by the President at the AIPAC Policy Conference 2011,” Walter E. Washington Convention Center, 22 May 2011. Accessed 31 May 2011. <http://www.whitehouse.gov/the-press-office/2011/05/22/remarks-president-aipac-policy-conference-2011>

² Richard Goldstone, “Reconsidering the Goldstone Report on Israel and war crimes,” *Washington Post*, 2 Apr. 2011. Accessed 31 May 2011. http://www.washingtonpost.com/opinions/reconsidering-the-goldstone-report-on-israel-and-war-crimes/2011/04/01/AFg111JC_story.html

named “fact-finding mission,” former U.N. High Commissioner for Human Rights Mary Robinson had refused to accept, citing a clearly biased mandate. The U.N. Human Rights Council (UNHRC) formed this committee in order “to investigate all violations of international human rights law and international humanitarian law by the occupying Power, Israel, against the Palestinian people throughout the Occupied Palestinian Territory, particularly in the occupied Gaza Strip.”³ As is standard practice in the UNHRC, there was no mention of the thousands of rockets fired at Israeli civilians from Gaza during the period preceding Israel’s military response. Each of these rocket attacks constituted a war crime, but these lethal weapons were, and continue to be, ignored.

Goldstone’s actions demonstrate that he was entirely aware of the blatant double standards, and he attempted to defuse criticism by claiming that the mandate had been altered by the temporary president of the UNHRC in order to remove the bias. In contrast, neither the report nor UNHRC documents reflected any such change.⁴ The inherent bias was also reflected by the appointment of Goldstone and the other three members of the “mission” – all were involved with non-governmental organizations (NGOs), such as Human Rights Watch (HRW) and Amnesty International, which had a clear record of anti-Israel campaigning and whose allegations were reflected in the report. As a result of this obvious prejudice, the Israeli government refused to cooperate with what was seen as a “kangaroo court,” whose results were predetermined and in the absence of any investigation.

Yet rather than acting transparently and seeking to demonstrate that this perception was incorrect, Goldstone and his colleagues, including the U.N.-appointed staff that put this publication together, were far from open in their “investigation,” thereby compounding the lack of legitimacy. The 452-page publication (in its revised form)⁵ claiming to document 36 war-time incidents⁶ in detail (all focusing on allegations of

³ UNHRC Res. S-9/1, 12 Jan. 2009. Accessed 31 May 2011. <http://domino.un.org/unispal.nsf/0/404e93e166533f828525754e00559e30>

⁴ Richard Goldstone, “My mandate on Gaza was even-handed, my loyalty is to justice,” *The Guardian*, 5 May 2010. Accessed 1 June 2011. <http://www.guardian.co.uk/commentisfree/2010/may/05/richard-goldstone-united-nations>

⁵ United Nations Human Rights Council, “Report of the United Nations Fact-Finding Mission on the Gaza Conflict,” 25 Sept. 2009. Accessed 31 May 2011. <http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/factfindingmission.htm>

⁶ UNHRC, “Report of the Committee of independent experts in international humanitarian and human rights laws to monitor and assess any domestic, legal or other proceedings undertaken by both the Government of Israel and the Palestinian side, in the light of General Assembly resolution 64/254, including the independence, effectiveness, genuineness of these investigations and their conformity with international standards,” 21 September 2010. Accessed 15 June 2011. http://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.50_AEV.pdf

Israeli violations, and none on Hamas attacks), was published just five months after Goldstone's appointment. Much of the text was taken directly from the reports of politicized NGOs, which consisted of "eyewitness testimonies" that were generally unverified and unverifiable. Additional chapters deviated far from the Gaza conflict, attacking Israel policy for allegedly "anti-democratic" practices, condemning the Israeli judiciary, and seeking to justify the "lawfare" campaigns that exploit the universal jurisdiction statutes and institutions established for entirely different contexts.⁷ The text claimed that: "In their search for justice, victims of serious violations of human rights have often looked for accountability mechanisms in other countries when there were none at home or the existing ones did not offer an effective remedy."⁸ These sections also relied heavily on accusations from political advocacy NGOs – particularly B'Tselem and Breaking the Silence, as well as the Palestinian Center for Human Rights, Al Haq, and Human Rights Watch. These NGOs were active in promoting anti-Israel campaigns throughout the Gaza War, and their claims lacked credibility. The Commission also held secret hearings in Geneva and possibly in Gaza, so the full extent of NGO participation remains unknown.

The Goldstone Report concluded with a series of stern indictments that accused the Israeli political and military leadership of "war crimes," "crimes against humanity," and deliberately targeting "the people of Gaza as a whole ... in furtherance of an overall policy aimed at punishing the Gaza population for its resilience and for its apparent support for Hamas." Among its recommendations, the U.N. publication called for, among other actions, the U.N. Security Council to refer the situation in Gaza to the Prosecutor of the International Criminal Court,⁹ for Israel to immediately cease the border closures and restrictions on passage through border crossings with the Gaza Strip and release Palestinians in Israeli prisons,¹⁰ and for other countries to start criminal investigations in national courts using universal jurisdiction.¹¹

For the leaders of the campaigns to brand Israeli soldiers and political leaders as war criminals, and to promote the "complete international isolation of Israel," the

⁷ For an analysis of universal jurisdiction and its abuse, see Anne Herzberg, "NGO 'Lawfare': Exploitation of Courts in the Arab-Israeli Conflict," *NGO Monitor Monograph Series*, Second Edition, December 2010; see also Gerald M. Steinberg, "NGOs, soft power and demonization in the 'lawfare' strategy," *Justice*, The International Association of Jewish Lawyers and Jurists, 48, Winter 2011.

⁸ United Nations Human Rights Council, "Report of the United Nations Fact-Finding Mission on the Gaza Conflict," 399. Accessed 21 June 2011. <http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf>

⁹ Id. at 424

¹⁰ Id. at 425

¹¹ Id. at 399

Goldstone Report became a sacred text, ostensibly “proving” the allegations and justifying the long-standing bias. Arab League and Palestinian officials presented versions of the allegations (in a parallel report that used many of the same sources quoted by Goldstone) to the prosecutor of the International Criminal Court seeking proceedings against Israelis.¹² Human Rights Watch and its allies in the NGO network ran campaigns seeking the endorsement of the Goldstone Report and its recommendations.¹³

The report played a key role in growing efforts to delegitimize and isolate the State of Israel through economic and legal means, including BDS – boycotts, divestment and sanctions. Many of the main anti-Zionist BDS activists contributed to an abbreviated version of the report, subtitled “The Legacy of the Landmark Investigation of the Gaza Conflict,” (2010) published by Nation Books, the publisher of *The Nation*, a self-styled “progressive” magazine that frequently singles out Israel for attack.¹⁴ In her contribution, Naomi Klein, a leading anti-Israel and post-colonial activist, stated that “[t]he findings of the Goldstone Report have become a powerful tool in the hands of the growing movement for Boycott, Divestment and Sanctions” against Israel. For opponents of BDS and supporters of Israel, Klein asserts that Goldstone presents a particular problem due to “his record as a judge on the world stage.”¹⁵

The Goldstone Report also became a cornerstone of the organized campaign calling for the prosecution of Israeli officials in the International Criminal Court and through exploitation of universal jurisdiction in foreign national courts. According to Ali Abunimah, co-founder of Electronic Intifada and another contributor to *The Nation’s* reprint, “the publication of the Goldstone Report may in hindsight be seen as a key turning point ... as a new wave of global civic mobilization sought justice and accountability...” (p. 392).

As this campaign accelerated, the report’s principle author, Judge Richard Goldstone, began to express doubts in public presentations regarding the moral foundations and factual basis for the publication and process which bears his name. On April 2,

¹² Yael Ronen, “ICC Jurisdiction over Acts Committed in the Gaza Strip: Article 12(3) of the ICC Statute and Non-state Entities,” *Journal of International Criminal Justice* 8 (2010), 3(27), 9. Accessed 15 June 2011. <http://jicj.oxfordjournals.org/content/8/1/3.full.pdf>

¹³ See for example: Human Rights Watch, “Israel/Gaza: Implement Goldstone Recommendations on Gaza,” 16 September 2009. Accessed 15 June 2011. <http://www.hrw.org/en/news/2009/09/16/israelgaza-implement-goldstone-recommendations-gaza>

¹⁴ Philip Weiss, Adam Horowitz and Lizzy Ratner, eds. *The Goldstone Report: The Legacy of the Landmark Investigation of the Gaza Conflict*, (New York: Nation Books, 2011).

¹⁵ Naomi Klein, “Goldstone’s Legacy for Israel,” *The Nation*, 14 Feb. 2011. Accessed 31 May 2011. <http://www.thenation.com/article/158098/goldstones-legacy-israel>

2011, Goldstone publically renounced his own report, stating, “If I had known then what I know now, the Goldstone Report would have been a different document... [T]he investigations published by the Israeli military and recognized in the U.N. committee’s report ... indicate that civilians were not intentionally targeted as a matter of policy.”¹⁶ In this way, Goldstone separated himself from the other U.N.-appointed commission members and from the anti-Israel campaigners who have used the Goldstone Report as their primary weapon. While Goldstone has not revealed the reasons for this belated reversal, it is clear that even he has come to recognize the inherent bias, the obvious façade of “fact-finding,” and the irreconcilable differences between the evidence and the claims made in the report. Two years after he eagerly accepted the biased U.N. mandate, Goldstone appears to have understood that he, as well as the language of human rights and international law, had been exploited by the ideologically driven leaders of Human Rights Watch and similar organizations.

Origins

The Goldstone Report and the process that produced it were the culmination of a series of U.N. publications containing similar allegations targeting Israel – each one with a growing impact. The use of such pseudo-“fact-finding” reports, repeating unverified claims and allegations provided by NGOs, is at the center of a political strategy focusing on Israel that was adopted in the NGO Forum of the 2001 U.N. Conference Against Racism, held in Durban, South Africa. The NGO Final Declaration referred to Israel as an “apartheid state,” guilty of “racist crimes against humanity including ethnic cleansing, acts of genocide,” and called for “comprehensive sanctions and embargoes” as well as “the full cessation of all links.” This was a declaration of total political war through the use and abuse of the language of international law and human rights.¹⁷

Therefore, in analyzing the Goldstone Report and its context, it is necessary to examine the Durban process, and the ongoing political campaigns of the UNHRC and the powerful NGOs that claim expertise in human rights and international law. The 2001 Durban NGO Forum was a formidable and unique gathering, which included thousands of representatives from an estimated 1,500 organizations. The participants included major global actors such as HRW and Amnesty International, and were joined by dozens of Palestinian NGOs such as MIFTAH, the Palestinian Committee for the Protection of Human Rights and the Environment, BADIL, Al

¹⁶ Goldstone, *Washington Post*.

¹⁷ U.N. World Conference Against Racism NGO Forum Declaration, September 3, 2001. Accessed 15 June 2011. http://www.eyeontheun.org/assets/attachments/documents/durban_ngo_declaration_2001.pdf

Haq, and the Palestinian NGO Network (PNGO). The final text was drafted during U.N.-sponsored regional and preparatory conferences, including one in Tehran during February 2001, from which Israelis and Jewish delegates were excluded.¹⁸ At the Durban NGO Forum, copies of anti-semitic literature, such as the “Protocols of the Elders of Zion” and cartoons of hook-nosed Jews with “pots of money surrounding their victims,” were distributed by the Arab Lawyers Union and similar groups,¹⁹ and Jewish and Israeli participants were subject to physical intimidation.²⁰

The centrality of the U.N. Commission on Human Rights – renamed the U.N. Human Rights Council in 2006 – and the role granted to NGOs promoting anti-Israel agendas at Durban and in subsequent activities, including the Goldstone process, reflect the power of the Organization of the Islamic Conference (OIC) in these activities. The OIC members, along with allies among closed totalitarian regimes such as Cuba, China, and Russia, dominate the U.N.’s human rights mechanisms, set the agendas, and select the officials, including the commissioners, rapporteurs, and their staffs. Sessions are often chaired by officials from Libya or Iran, who focus attention on allegations against Israel, as do many of the “mainstream” NGOs represented in Geneva, such as HRW and Amnesty. This framework created the basis for the Durban Conference, including the NGO Forum, with the primary focus on Israel.

In this environment, and with the active participation of NGOs such as HRW and AI, the NGO Forum adopted a Final Declaration that focused on Israel. Article 164 asserts that, “Targeted victims of Israel’s brand of apartheid and ethnic cleansing methods have been in particular children, women and refugees.” Article 425 advocated “a policy of complete and total isolation of Israel as an apartheid state ... the imposition of mandatory and comprehensive sanctions and embargoes, the full cessation of all links (diplomatic, economic, social, aid, military cooperation, and training) between all states and Israel.” And Article 426 condemned states that “...are supporting, aiding and abetting the Israeli apartheid state and its perpetration of racist crimes against humanity including ethnic cleansing, acts of genocide.”²¹ (Similar language was removed from the text of the document adopted by the governmental forum of the Durban Conference, which was amended following a walkout by American and

¹⁸ Paul Lungen, “Iran tries to exclude CIJA from Durban II Conference,” *The Canadian Jewish News*, 24 Apr. 2008. Accessed 15 June 2011. http://www.cjnews.com/index.php?option=com_content&task=view&id=14521&Itemid=86

¹⁹ William Korey, *Taking on the World’s Repressive Regimes: The Ford Foundation’s International Human Rights Policies and Practices*, (Palgrave Macmillan: New York, 2007), 251.

²⁰ *Id.* at 249

²¹ U.N. World Conference Against Racism NGO Forum Declaration

Israeli delegations.²²) As Anthony Julius wrote, this new “anti-Zionism,” as reflected in the Durban NGO Forum and subsequent actions, is “predicated on the illegitimacy of the Zionist enterprise.” Israel, in this view, was “established by the dispossession of the Palestinian people...enlarged by aggressive wars waged against militarily inferior forces, and ...maintained by oppression and brutality.”²³

For some supporters of human rights, the Durban NGO Forum was recognized as a disaster. In writing about the Ford Foundation’s role as one of the main funders for NGO participants, Korey notes that “Durban turned out to be a propagator of vulgar anti-Semitism.”²⁴ Previous “world conferences against racism” had focused on South African apartheid. With the end of the apartheid regime, many of the participants in the Durban process turned their focus and energies to resuming the attempts to label Zionism as racism. This campaign, which is a continuation of the efforts to delegitimize Israel that began with the recognition of the State in 1948, produced UNGA resolution 3379 on November 10, 1975. While this resolution was repealed by a majority vote of the UNGA in 1991, the campaign continued and was revived globally at the Durban Conference. The false accusations of the Goldstone Report, and their use as primary weapons in the efforts to isolate Israel and to resume the “Zionism is racism” campaign, were the direct results of the “Durban strategy.”

Implementing the Durban Strategy – Template for Goldstone

The first case in which the Durban NGO strategy was implemented took place in April 2002, following the IDF’s Defensive Shield counter-terrorist operation in the West Bank, in response to a series of Palestinian suicide bombing attacks that killed and injured hundreds of Israeli civilians. From the beginning, Palestinian officials repeatedly claimed that the IDF had committed a “massacre” in the Jenin refugee camp,²⁵ and NGO officials immediately echoed these claims. On April 16, *Le Monde* cited HRW’s statements alleging that Israel had committed “war crimes” and

²² Irwin Cotler, “Durban’s Troubling Legacy One Year Later: Twisting the Cause of International Human Rights Against the Jewish People,” *Jerusalem Issue Brief* 2:5, Institute for Contemporary Affairs/Jerusalem Center for Public Affairs, Aug. 2002. Accessed 15 June 2011. <http://www.jcpa.org/brief/brief2-5.htm>

²³ Anthony Julius, *Trials of the Diaspora: A History of Anti-Semitism in England*, (London: Oxford University Press, 2010), 456.

²⁴ Korey, 250.

²⁵ The IDF entered the Jenin refugee camp following a series of terror attacks against Israeli civilians. In response, Palestinian officials such as Saeb Erakat alleged that Israel had killed five hundred people and committed “war crimes.” Dore Gold, *Tower of Babel: How the United Nations has Fueled Global Chaos*, (New York: Crown Forum, 2004), 212–8. See also Dr. David Zangen, “Seven Lies about Jenin,” IMRA, 8 Nov. 2002 (translated from *Maariv*).

demanding the appointment of what they referred to as an “independent investigative committee.”²⁶ And on April 18, the BBC quoted an Amnesty official, Derrick Pounder, who repeated these massacre allegations.²⁷ Shortly afterwards, an AI statement declared, “The evidence compiled indicates that serious breaches of international human rights and humanitarian law were committed, including war crimes,” and, like HRW and Palestinian officials, also called for an “independent inquiry.”²⁸ Other influential NGOs issued similar statements, reports, and condemnations, including Caritas (a European Catholic group),²⁹ as well as Palestinian NGOs funded by European governments, such as MIFTAH.

HRW was particularly active in this campaign, issuing 15 press releases and reports condemning Israel in 2002,³⁰ and reflecting the obsessive and highly ideological focus on Israel that is characteristic of the overall organization and the Middle East and North Africa division.³¹ In May, HRW’s 50-page report, “Jenin: IDF Military Operations,” was composed of claims from unverifiable “eyewitness testimony” from Palestinians.³² Only one sentence mentioned the justification for the operation, noting that “the Israelis’ expressed aim was to capture or kill Palestinian militants responsible for suicide bombings and other attacks that have killed more than seventy Israeli and other civilians since March 2002.”³³ In contrast, HRW’s detailed indictment against Israel included allegations that “IDF military attacks were indiscriminate ... failing to make a distinction between combatants and civilians ... the destruction extended well beyond any conceivable purpose of gaining access to fighters, and was vastly

²⁶ Martin Seiff, “Analysis: Why Europeans Bought Jenin Myth,” UPI, 20 May 2002. Accessed 15 June 2011. http://www.upi.com/Business_News/Security-Industry/2002/05/21/Analysis-Why-Europeans-bought-Jenin-myth/UPI-34731022008462/

²⁷ BBC News, “Jenin ‘massacre evidence growing,’” 18 April 2002. Accessed 15 June 2011. http://news.bbc.co.uk/2/hi/middle_east/1937048.stm

²⁸ Margaret Wente, “Call it Sham-nesty International, an Apologist for Terror,” *Toronto Globe and Mail*, 9 May 2002. Accessed 12 Dec. 2009. <http://www.ngo-monitor.org/article.php?id=585>

²⁹ Catholic Agency for Overseas Development, “Caritas Aid Workers Witness the Horror of Jenin,” 29 April 2002. Reprinted on ReliefWeb. Accessed 15 June 2010. <http://www.reliefweb.int/rw/rwb.nsf/db900sid/ACOS-64BMEG?OpenDocument>

³⁰ HRW, “News: Israel and the Occupied Territories,” 2002. Accessed 15 June 2011. <http://www.hrw.org/en/news-filter/228?page=27>

³¹ Sarah Mandel, “Experts or Ideologues: Systematic Analysis of Human Rights Watch,” *NGO Monitor Monograph Series*, Sept. 2009; Benjamin Birnbaum, “Minority Report: Human Rights Watch fights a civil war over Israel,” *The New Republic*, 27 April 2010. Accessed 21 June 2011. www.tnr.com/print/article/minority-report-2

³² HRW, “Jenin: IDF military operations,” May 2002. Accessed 23 June 2010. www.hrw.org/reports/2002/israel3/

³³ Id. at 3

disproportionate to the military objectives pursued.” It alleged that the IDF had used Palestinian civilians as human shields “to screen Israeli soldiers from return fire.” It also referred to the death of Munthir al-Haj, acknowledged as an “armed Palestinian militant,” as a case of “murder” and “willful killing.”³⁴ (Such claims, categorizations, and legal analysis by human rights NGOs in the context of armed conflict have been shown to be inconsistent and highly problematic.³⁵)

The campaign led by NGOs and Palestinian supporters had a direct influence on U.N. Secretary-General Kofi Annan, who appointed a “fact-finding team” to “investigate” the allegations of Israeli war crimes. Committee members included Finnish politician Martti Ahtisaari, who was referred to as “a long-time Arafat favorite: on December 12, 1994, after receiving his Nobel Peace Prize, Arafat flew to Finland to thank Ahtisaari personally for Finland’s support of the Palestine Authority.” Later, Ahtisaari joined an organization known as The Elders, led by Jimmy Carter and Archbishop Desmond Tutu, who are known for their hostility towards Israel (see below). The two other members of the U.N.’s Jenin investigation committee were also seen as pre-disposed towards the Palestinian narrative of victimization.³⁶

The Israeli government refused to cooperate with what it viewed as a biased committee, and this group was disbanded. However, the General Assembly then adopted resolution ES-10/10 on May 7, 2002, “in which the Assembly requested the Secretary-General to present a report... on the recent events that took place in Jenin and other Palestinian cities.” Israel also rejected the legitimacy of this group, and denied its members access, as noted in the report issued by the Secretary-General.³⁷

This report generally followed the lead of HRW and other NGOs, and, as the Israeli government had anticipated, was similarly one-sided.³⁸ And this process, from the prejudicial NGO allegations to the unverifiable and false “evidence” presented in parallel to their campaigns for “independent inquiries” in the structurally biased U.N. framework, in order to promote legal and other sanctions against Israel, provided the step-by-step template used in the Goldstone Report seven years later.

³⁴ Id. at 17

³⁵ Asher Fredman, “Precision Guided or Indiscriminate? NGO Reporting on Compliance with the Laws of Armed Conflict,” *NGO Monitor Monograph Series*, June 2010.

³⁶ Dov B. Fischer, “Who will watch the watchdogs?,” *Jerusalem Post*, 28 April 2002. Accessed 1 Aug. 2011. <http://www.jpost.com/Editions/2002/04/28/Opinion/Opinion.47850.html>

³⁷ U.N. General Assembly, “U.N. Report of the Secretary-General prepared pursuant to GA resolution ES-10/10.” Accessed 15 April 2011. <http://www.un.org/peace/jenin/>

³⁸ Id.

From Jenin to Beit Hanoun – Improving the Template

Between Jenin and the Gaza War that began in December 2008 and was the trigger for the Goldstone Report, the Durban strategy was expanded and revised in numerous instances. Each instance followed a similar pattern in which Israeli military responses to attack were condemned by NGOs (with HRW often in the lead) as alleged war crimes and violations of human rights, accompanied by demands for “independent investigations,” followed by the formation of “fact-finding mission” under the auspices of the UNHRC. The members of the mission often reflected a strong anti-Israel prejudice, and their reports included significant portions of statements and reports from NGO publications and submissions, which themselves were based on unverifiable “eyewitness testimony,” combined with distorted international legal claims and constructions.

In 2004, NGOs joined the campaign to condemn Israel’s separation or security barrier, which was constructed in response to large scale terror attacks. They issued press releases, letters, and reports calling on the U.N. to take action, and demanding that the U.S. and the E.U. penalize Israel.³⁹ NGOs active in this campaign included HRW, Amnesty International, Christian Aid, World Vision,⁴⁰ the Palestinian Environmental NGO Network (PENGON), the Palestinian Grassroots Anti-Apartheid Wall Campaign, Palestinian affiliates of the Geneva based International Commission of Jurists, the UK-based War on Want, the Mennonite Central Committee, and *Médecine du Monde* (France). Christian Aid lobbied the British government, issuing a press release entitled “Why the Israeli ‘barrier’ is wrong,” which referred to Palestinian hardships inflicted by Israel’s “land grab.”⁴¹ In this case, instead of an investigation, report, and condemnation by the U.N. Commission on Human Rights, the NGO-led process contributed to the U.N. General Assembly adoption of a highly one-sided resolution that sent the allegations of Israeli violations regarding the security barrier to the International Court of Justice in the Hague for an “advisory opinion.”⁴² After a political majority issued the expected advisory decision condemning Israeli actions (accompanied by a blistering minority opinion and critique), the NGOs began

³⁹ HRW, “Israel: West Bank Barrier Endangers Basic Rights: U.S. Should Deduct Costs From Loan Guarantees,” 1 Oct. 2003. Accessed 9 Jan. 2010. <http://www.hrw.org/en/news/2003/09/30/israel-west-bank-barrier-endangers-basic-rights>

⁴⁰ Tim Costello, “For the Children’s Sake, Tear Down this Wall!,” *The Age* (Melbourne), 14 July 2004. Accessed 15 June 2011. <http://www.theage.com.au/articles/2004/07/13/1089694355635.html?from=storylhs>

⁴¹ Christian Aid, “Why the Israeli ‘Barrier’ is Wrong,” 24 Feb. 2004. Reprinted on Relief Web. Accessed 15 June 2011 <http://reliefweb.int/rw/rwb.nsf/0/f45d12968829b6c585256e45007cb1cb?OpenDocument&Click=>

⁴² U.N. GAOR, A/RES/ES-10/14 (A/ES-10/L.16) adopted on 8 Dec. 2003.

to quote and cite the majority text as if it were legally significant and not merely advisory.⁴³

Another effort based on the Durban strategy of delegitimizing Israel was initiated over what was known as the “Gaza Beach incident,” again led by HRW and other NGOs. On June 9, 2006 an explosion occurred on the Beit Lahiya beach in Gaza, resulting in the reported death of eight Palestinian civilians. Though the details were and remain confused, HRW immediately initiated a major campaign condemning Israel, based on the analysis of Marc Garlasco, their “senior military analyst.” In a series of highly publicized statements and a press conference, the purported details of the explosives and technical information, which relied on dubious sources such as a “forensics” facility in Gaza, changed rapidly. HRW and Garlasco repeatedly accused the IDF of being “incapable of uncovering the truth,” and repeated the call for an “independent, international investigation.”⁴⁴ (Garlasco’s “military expertise” has been widely questioned – see discussion below.⁴⁵)

In the following months, Gaza was the main focus of the NGO network’s campaign focusing on Israel and implementing the Durban strategy. Increasing rocket fire followed by the abduction of Gilad Shalit (June 25, 2006) in a cross border raid triggered an Israeli response⁴⁶ that was condemned by Palestinian and international NGOs as “collective punishment”⁴⁷ and creating a “humanitarian crisis.”⁴⁸ After the violent Hamas takeover of Gaza in June 2007 and the imposition of a blockade, these claims were amplified and used to accuse Israel of human rights violations in a series of joint reports by major NGOs such as Amnesty International and Save the Children.

⁴³ See for example: Al Haq, “The Wall in the West Bank,” November 2006. Accessed 20 June 2011. <http://www.alhaq.org/pdfs/AlHaq%20brief%20on%20the%20state%20of%20implementation%20of%20the%20Advisory%20Opinion%20on%20the%20Wall%20in%20the%20West%20Bank.pdf>

⁴⁴ See NGO Monitor, “Gaza beach incident: Timeline of HRW involvement and activities June 9-21 2006,” 21 June 2006. Accessed 16 June 2011. http://www.ngo-monitor.org/article/gaza_beach_incident_timeline_of_hrw_involvement_and_activities_june_

⁴⁵ Jonathan Foreman, “Nazi scandal engulfs Human Rights Watch,” *The Sunday Times*, 28 March 2010. Accessed 15 June 2011. http://www.timesonline.co.uk/tol/news/world/us_and_americas/article7076462.ece

⁴⁶ Ilene R. Prusher and Joshua Mitnick, “Israel’s return to Gaza – multiple motives,” *The Christian Science Monitor*, 29 June 2006. Accessed 16 June 2011. <http://reliefweb.int/node/212411>

⁴⁷ PCHR, “OPT: Israeli Occupation Forces (IOF) paralyze lives of civilians in the Gaza Strip,” 27 June 2006. Accessed 16 June 2011. <http://reliefweb.int/node/212379>

⁴⁸ Christian Aid, “OPT: Gaza invasion targets civilian infrastructure,” 28 June 2006. Accessed 16 June 2011. <http://reliefweb.int/node/212408>

These reports repeated almost exclusively unsubstantiated allegations by Israeli and Palestinian NGOs.⁴⁹

The Durban/Jenin pattern was also followed in the 2006 Lebanon War,⁵⁰ which began in July with a Hezbollah missile bombardment and cross-border raid in which eight Israelis were killed and two kidnapped. The Israeli military response in Lebanon, rather than the initial attack, drew a barrage of intense NGO and UNHRC condemnations, which continued throughout the six-week war and for many months afterwards.

HRW, for example, issued over fifty documents, including letters, op-eds, and long reports on the war. These reports emphasized claims that the IDF had “deliberately indiscriminately” bombed civilian targets, used “indiscriminate force,” and displayed a “disregard” towards international law. Most of the condemnations were published during the war, and while HRW mentioned Hezbollah activity briefly, its only report on Hezbollah’s indiscriminate rocket fire into Israel was published a full year after the war ended.⁵¹ As in the past, the numerous reports focusing on Israel were based mainly on “eyewitness” accounts that had little credibility and could not be verified. On this thin basis, HRW argued that “Israeli Commanders who... ordered such attacks would be subject to prosecution for war crimes.”⁵²

Following the by-now standard pattern, the UNHRC created a committee with a clearly one-sided mandate: “to investigate the systematic targeting and killings of civilians by Israel in Lebanon; To examine the types of weapons used by Israel and their conformity with international law; To assess the extent and deadly impact of Israeli attacks on human life, property, critical infrastructure and the environment.” The resolution also condemned the many “massacres” committed by Israel.⁵³

Because the “fact-finding” took place only in Lebanon, the question of Israeli cooperation was moot in this case (and perhaps mitigated by Israel’s own commission

⁴⁹ See for example: Crisis Action, “The Gaza strip: a Humanitarian Implosion,” 6 March 2008. Reprinted on ReliefWeb. Accessed 16 June 2011. http://reliefweb.int/sites/reliefweb.int/files/resources/D1C8F2FBA35F3DC5C1257402004495FD-Full_Report.pdf

⁵⁰ See Abraham Bell and Gerald M. Steinberg, “Methodologies for NGO Human Rights Fact-Finding in Modern Warfare: The 2006 Lebanon War as a Case Study,” forthcoming.

⁵¹ HRW, “Civilians under Assault: Hezbollah’s Rocket Attacks on Israel in the 2006 War,” 28 Aug. 2007. Accessed 20 June 2011. <http://www.hrw.org/en/reports/2007/08/28/civilians-under-assault>

⁵² HRW, “Why They Died: Civilian Casualties in Lebanon during the 2006 War,” 5 Sept. 2007, 64. Accessed 15 June 2011. <http://www.hrw.org/en/reports/2008/07/14/why-they-died>

⁵³ UNHRC, “Special session resolution S-2/1/:The grave situation of human rights in Lebanon caused by Israeli military operations,” 11 Aug. 2006. Accessed 20 June 2011. http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/2/docs/A.HRC.S-2.1_en.doc

looking into the conduct of the war). The U.N. inquiry was completed and published less than three months after the formation of the commission. The three commission members (João Clemente Baena Soares – Brazil, Mohamed Chande Othman – Tanzania, and Stelios Perrakis – Greece) were not well known and had not displayed a strong bias.⁵⁴ While the committee members noted the inherent bias in the mandate, the report stated that “[i]t is not for the Commission to comment on the political-legal context of the adoption of resolution S-2/1, nor to make judgment on the content of its mandate.”⁵⁵ Their report, based on material supplied by the Lebanese sources, U.N. agencies, NGOs, and the Hezbollah affiliated “Jihad el-binaa,”⁵⁶ refers to “grave violation of international humanitarian law, which may amount to war crimes”⁵⁷ and “systematic targeting of civilians and their property.”⁵⁸ But the report attracted little attention, and the recommendations were not acted upon.

At the end of 2006, following an IDF shelling incident of Beit Hanoun in Gaza on November 8, in which 19 Palestinian civilians were allegedly killed, the NGO-UNHRC network escalated their application of the Durban strategy. Palestinian leader Mahmoud Abbas described the killings as a massacre and demanded intervention by the United Nations.⁵⁹ Human Rights Watch added its voice to this demand calling for a “comprehensive independent investigation,” and rejecting the Israeli investigations into the event. Amnesty International also called for “an immediate, independent investigation and for those responsible to be held accountable.”⁶⁰

A special session of the UNHRC was convened and, as in the past, adopted a resolution creating a “fact-finding investigation.” As in the previous cases, and later, in the Gaza-Goldstone example, the mandate prejudged the outcome, condemning the IDF’s alleged “gross and systematic” human rights violations “in the occupied Palestinian territories” and calling on the committee to “recommend ways to protect Palestinian civilians against further Israeli attacks.” The context and details of the

⁵⁴ See UN Watch, “Report by UN Lebanon Inquiry is One-Sided,” 23 Nov. 2006. Accessed 20 June 2011. <http://www.unwatch.org/site/apps/nlnet/content2.aspx?c=bdKKISNqEmG&b=1316871&ct=3264691>

⁵⁵ UNHRC, “Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council resolution S-2/1,” 23 Nov. 2006, 2. Reprinted on ReliefWeb. Accessed 15 June 2011. http://reliefweb.int/sites/reliefweb.int/files/resources/AFEDF3CEF422952E492572E9001CF0EB-Full_Report.pdf

⁵⁶ *Id.* at 89

⁵⁷ *Id.* at 56

⁵⁸ *Id.* at 73

⁵⁹ BBC News, “Thousands mourn Beit Hanoun dead,” 9 Nov. 2006. Accessed 16 June 2011. http://news.bbc.co.uk/2/hi/middle_east/6131860.stm

⁶⁰ Amnesty International, “Israel/Occupied Territories: Amnesty International delegate visits scene of Gaza Strip killings,” 8 Nov. 2006. Accessed 16 June 2011 <http://reliefweb.int/node/217947>

deadly Palestinian attacks that triggered the IDF response were erased and ignored.⁶¹ At this session, HRW and PCHR claimed that “[t]he level of killing and destruction was unprecedented by all means and standards” and that “[a]lmost all shelling attacks on Gaza had targeted civilians.”⁶²

In this case, the Palestinian-NGO-U.N. alliance approached international personalities to officially head the pseudo-investigation, including Canadian Professor Irwin Cotler, a leading human rights expert and advocate, who had defended Nelson Mandela, among other prominent dissidents; and Archbishop Desmond Tutu, who was a leader of the anti-apartheid struggle in South Africa. Cotler, who was also a member of the Canadian Parliament at the time, and would become Minister of Justice, refused the appointment, stating that he “could not accept a mandate to hear only one side of a dispute... which denied the other side the right to a hearing... and which denied the presumption of innocence.”⁶³

In contrast, however, Tutu accepted the position and the mandate.⁶⁴ Tutu was known for his positions in support of the PLO⁶⁵ and against Israel and the Jews, stating that the Jewish lobby in the U.S. is “very powerful” as were the “apartheid government” and “Hitler, Mussolini, Stalin, Pinochet, Milosevic, and Idi Amin.”⁶⁶ Tutu had already repeated the allegations regarding the Beit Hanoun incident, calling it an “outrage that cries out to heaven.”⁶⁷ Prof. Christine Chinkin was appointed as Tutu’s “co-expert” – and, as Israelis noted, Chinkin had also expressed consistent anti-Israel prejudice. Given the bias in the mandate and the composition of the committee, the Israeli government rejected the legitimacy of the investigation and refused to cooperate or to allow it to work in Israel.

⁶¹ UNHRC, “Special session resolution S-3/1,” 15 Nov. 2006. Accessed 16 June 2011. http://www2.ohchr.org/english/bodies/hrcouncil/docs/specialsession/res_S_3_1_en.doc

⁶² UNHRC, “Council decides to urgently dispatch a high-level fact-finding mission to Beit Hanoun,” 15 Nov. 2006. Accessed 14 June 2011. <http://reliefweb.int/node/218690>

⁶³ “Cotler addresses UN Human Rights Council in Geneva: Reveals for the first time why he did not take part in UN mission,” 13 June 2007. Accessed 14 June 2011. http://www.ngo-monitor.org/data/images/File/Irwin_Cotler_june1307.pdf

⁶⁴ BBC News, “Tutu to lead Beit Hanoun mission,” 29 Nov. 2006. Accessed 16 June 2011. http://news.bbc.co.uk/go/pr/ft/-/2/hi/middle_east/6158223.stm

⁶⁵ Maurice Ostroff, “Archbishop Tutu, Please Be Fair,” *Jerusalem Post*, 5 Dec. 2006. Accessed 6 June 2011. <http://fr.jpost.com/servlet/Satellite?cid=1164881826126&pagename=JPost/JPArticle/ShowFull>

⁶⁶ BBC News, “Tutu condemns Israeli ‘apartheid,’” 29 April 2006. Accessed 20 June 2011. <http://news.bbc.co.uk/2/hi/1957644.stm>

⁶⁷ “ADL slams UN body for making Tutu head of Beit Hanun mission,” *Haaretz*, 30 Nov. 2006. Accessed 20 June 2011. <http://www.haaretz.com/news/adl-slams-un-body-for-making-tutu-head-of-beit-hanun-mission-1.205864>

In May 2008, Tutu acknowledged that “We have tried three times in 18 months to secure the cooperation of the Israeli Government to no avail...”⁶⁸ In contrast to the Jenin case, the Israel government’s refusal to grant the mission legitimacy or access did not terminate the process, and the report and recommendations, written largely on the basis of NGO statements, were particularly damaging when they were presented to the UNHRC and adopted in late 2008, just prior to the beginning of the Gaza War.⁶⁹ This 24-page report endorsed the Palestinian narrative without hesitation, and claimed that Israel, as “the occupying power,”⁷⁰ had committed “gross violations of human rights and international humanitarian law.” The report also repeated the NGO claim that the Israeli blockade of Gaza was “collective punishment.”

The commission’s bias was reflected in the “rights-based definition of ‘victim’” used to analyze the event. Israel was found to be in violation of the “right to life”; “[t]he right to physical and mental health”; “[t]he right to an adequate standard of living.” Israel was also found to be infringing on the “freedom of movement” and women’s rights, including a “rise in domestic violence in Gaza as a result of the blockade.”⁷¹ The report asserted that “there is evidence of a disproportionate and reckless disregard for Palestinian civilian life, contrary to the requirements of international humanitarian law and raising legitimate concerns about the possibility of a war crime having been committed.”⁷² All of the information that formed the basis of these allegations came from unverifiable Palestinian sources more than 18 months after the event, and from Israeli, Palestinian, and international NGOs.⁷³

Goldstone and Gaza: The Perfect (Durban) Storm

The resumption of the deadly rocket attacks from Gaza to Israel, and the resulting Israeli military operation that began on December 28, 2008, provided the framework for an expanded implementation of the Durban strategy. Each of the elements that had been used in the previous rounds – from Jenin to Beit Hanoun – were employed

⁶⁸ “Statement by Archbishop Desmond Tutu, Leader of the High Level Fact-Finding Mission into events at Beit Hanoun on 8 November 2006,” Press Conference, Gaza, 29 May 2008. http://www2.ohchr.org/english/bodies/hrcouncil/docs/Statement_by_Archbishop_Desmond_Tutu.pdf

⁶⁹ UNHRC, “Report of the High-Level Fact-Finding Mission to Beit Hanoun established under Council resolution S-3/1,” 1 Sept. 2008. Accessed 20 June 2011. <http://www.unhcr.org/refworld/country,,COUNTRYR/EP,PSE,4562d8cf2,48cfa3a22,0.html>

⁷⁰ *Id.* at 5

⁷¹ *Id.* at 19

⁷² *Id.* at 15

⁷³ *Id.* at 4, 24

in a highly coordinated and intensive manner. Because the Israeli military operation was anticipated, the Palestinians and their supporters in the U.N. framework and among the NGO network were able to plan the tactics of the political assault in detail. The Gaza conflict was an opportunity to perfect the procedures and processes that had been used with increasing success to attack Israel using charges of “war crimes” and violations of international law. This objective was embodied in the UNHCR’s Goldstone “fact-finding mission” and report, which has served as the justification for a major increase in the Durban strategy.

On the Israeli side, the political and legal assault was also anticipated, and some new tactics were employed, particularly by the Foreign Ministry’s legal division and the Prime Minister’s spokesman.⁷⁴ However, as events began to unfold, it became clear that Israel was still unable to respond effectively to the scale and nature of the allegations of “war crimes,” violations of international law, and similar claims, as well as the nature of the campaign. The Israeli government was certainly surprised and out-flanked by the appointment of Judge Richard Goldstone to lead this assault.

As in the past, the NGO network led the process, and during the three weeks of this conflict, their activities far exceeded the rate during the 2006 Lebanon War. Over 500 NGO documents and statements were published, often accompanied by press conferences, op-ed articles, and media interviews. Human Rights Watch again played a leading role in this assault, with particular emphasis on allegations of “illegal” use of white phosphorous. As in “Gaza Beach,” Marc Garlasco, HRW’s “senior military analyst,” led the campaign, which resulted in wide-spread media focus on this issue. (Garlasco, whose sparse credentials as a weapons expert and record of false claims have been documented,⁷⁵ was later dismissed by HRW after he was revealed to be an obsessive collector of Nazi memorabilia. In addition, the heads of the Middle East and North Africa division of HRW are political activists rather than experts on international law. These individuals have led HRW’s obsessive focus on attacking Israel.⁷⁶)

On this foundation, HRW and other NGOs resumed the campaigns demanding an independent investigation. HRW’s executive director Ken Roth called on U.N. Secretary-General Ban Ki-Moon to “lean on all actors, protect civilians, and

⁷⁴ Israel Ministry of Foreign Affairs, “Responding to Hamas Attacks from Gaza – Issues of Proportionality,” December 2008. Accessed 21 June 2011. http://www.mfa.gov.il/NR/rdonlyres/A1D75D9F-ED9E-4203-A024-AF8398997029/0/Responding_to_Hamas_Attacks_from_Gaza_december_2008.pdf

⁷⁵ For critiques of Garlasco’s claims, see Dan Williams, “Human Rights Watch accuses Israel over Gaza drones,” Reuters, 30 June 2009. Accessed 22 June 2011. <http://www.reuters.com/article/2009/06/30/us-israel-palestinians-drones-idUSTRE55T37A20090630>

⁷⁶ Mandel, 10-19; Birnbaum.

ensure accountability. Only an impartial international investigation can achieve that.”⁷⁷ Amnesty International demanded “a comprehensive international investigation that looks at all alleged violations of international law.”⁷⁸ PCHR supported an inquiry commission “to investigate crimes committed by IOF [Israel Occupation Forces- sic] against Palestinian civilians, including IOF’s use of internationally prohibited weapons.”⁷⁹

A UNHRC special session (January 9-12, 2009) adopted a resolution establishing the framework for a “fact-finding investigation.” The resolution was passed with 33 countries voting in favor, led by the members of the OIC and other non-aligned countries.⁸⁰ During this session, a number of NGOs also submitted their publications to the council and their representatives participated in the meetings, including the Palestinian NGOs BADIL and Al Haq, together with Arab-Israeli NGO Adalah. These NGOs accused Israel of “grave breaches of international humanitarian law... that amount to war crimes.”⁸¹

Following the Beit Hanoun precedent, the leaders of this campaign sought another high-profile figure, such as Desmond Tutu, as the commission chair. After Mary Robinson, the former U.N. Commission of Human Rights, declined to head this “fact-finding mission,” citing the imbalance in the mandate, Judge Richard Goldstone was offered the position.

In many ways, Goldstone was the perfect candidate for the Durban strategy. As a South African judge, he became involved in the transition from the Apartheid regime, and was later appointed by Nelson Mandela to the Constitutional Court. As in the 2001 U.N. conference held in Durban, South Africa, and the appointment of Tutu, Goldstone’s recruitment to head the UNHRC’s Gaza “fact-finding mission” highlighted the campaign to link Israel and Zionism to the apartheid label.

⁷⁷ HRW, “Israel: End Gaza’s Humanitarian Crisis at Once,” 13 Jan. 2009. Accessed 21 June 2011. <http://www.hrw.org/en/news/2009/01/12/israel-end-gaza-s-humanitarian-crisis-once>

⁷⁸ Amnesty International, “UN Urged to Extend Gaza Investigation,” 13 Feb. 2009. Accessed 21 June 2011. <http://www-secure.amnesty.org/en/news-and-updates/news/un-urged-extend-gaza-investigation-20090213>

⁷⁹ PCHR, “OPT: IOF offensive on the Gaza Strip makes it like earthquake zone and claims civilian and property,” 19 Jan. 2009. Accessed 21 June 2011. <http://reliefweb.int/node/294729>

⁸⁰ UNHRC, “Res. S-9/1: The grave violations of human rights in the Occupied Palestinian Territory, particularly due to the recent Israeli military attacks against the occupied Gaza Strip,” 12 Jan. 2009. Accessed 21 June 2011. <http://domino.un.org/unispal.nsf/0/404e93e166533f828525754e00559e30>

⁸¹ BADIL Resource Center for Palestinian Residency and Refugee Rights, Adalah – The Legal Center for Arab Minority Rights in Israel, Al Haq, and The Arab Association for Human Rights (HRA), “Written Statement A/HRC/S-9/NGO/4: Gross Human Rights Violations and War Crimes in the Occupied Gaza Strip,” 8 Jan. 2009. Accessed 21 June 2011. <http://domino.un.org/unispal.nsf/0/d5b4483b6d667c018525753d006ee179?OpenDocument>

Furthermore, Goldstone's Jewish background and affiliation with Zionist causes added to the impact he would have as Israel's main accuser in this process. Robert Bernstein, the founder of HRW, noted the efforts of UNHRC officials to recruit "prominent Jews known for their anti-Israel views to head their investigations."⁸² As in the case of Richard Falk, the UNHRC's Special Rapporteur on "the situation of human rights in the Palestinian territories occupied since 1967,"⁸³ having Goldstone as head of the Gaza inquiry was seen as a means of neutralizing the claims of bias against Israel in the process.

HRW was deeply involved in the nomination of Goldstone. Ken Roth, a friend of Goldstone, was instrumental in offering him the position. Goldstone was also a member of HRW's board and only resigned after this conflict of interest was pointed out. Between Goldstone's appointment in April 2009 and the September 15 release date, HRW issued more than fifteen calls praising the establishment of the inquiry, promoting Goldstone's "eminent" character, demanding that Israel cooperate despite the inherent bias, and lobbying the U.S. and others to pressure Israel.

Other members of the fact-finding mission included Prof. Christine Chinkin, who, as noted above, had been a consultant for Amnesty and joined Desmond Tutu in the UNHRC-appointed "fact-finding" mission on Beit Hanoun. During the Gaza conflict, Chinkin signed a controversial public letter claiming that "Israel's bombardment on Gaza is not self-defense – it's a war crime."⁸⁴ The other members of the team – Hila Jilan, Desmond Travers, and Goldstone himself – also signed a highly biased letter spearheaded by Amnesty accusing Israel of "war crimes," before their appointment to the U.N. body.⁸⁵

Between April and September 2009, the four committee members and their staff took testimony from invited witnesses in Geneva and during two short visits to Gaza, reviewed NGO submissions, and held meetings also involving NGOs such as Amnesty and HRW. (The process was reportedly funded by the Arab League.⁸⁶) As in Jenin

⁸² Robert L. Bernstein, "Human Rights in the Middle East," The Shirley and Leonard Goldstein Lecture on Human Rights University of Nebraska at Omaha, 10 Nov. 2010. Accessed 21 June 2011. <http://www.unwatch.org/site/apps/nlnet/content2.aspx?c=bdKKISNqEmG&b=1317489&ct=8884881>

⁸³ Marc Perelman, "U.N. Taps American Jewish Critic of Israel as Rights Expert," *The Forward*, 27 March 2008. Accessed 22 June 2011. <http://www.forward.com/articles/13037/#ixzz1Q0dKnMvY>

⁸⁴ "Israel's bombardment of Gaza is not self-defense – it's a war crime," Letters: *The Sunday Times*, 11 Jan. 2009. Accessed 22 June 2011. <http://www.timesonline.co.uk/tol/comment/letters/article5488380.ece>

⁸⁵ Amnesty International, "World's leading investigators call for war crimes inquiry – open letter," 16 March 2009. Accessed 22 June 2011. <http://reliefweb.int/node/301118>

⁸⁶ Statement by ICC Prosecutor Moreno-Ocampo in a December 4, 2009 press conference, <http://www.reliefweb.int/rw/rwb.nsf/db900sid/MUMA-7YF4EF?OpenDocument>, cited by Herzberg.

and Beit Hanoun, the Israeli government rejected any cooperation with Goldstone's group, citing the one-sided mandate and inherent bias of both the UNHRC and the members of the "fact-finding mission."

The Goldstone Report, issued on September 29, 2009, was a massive 452-page tome, and purported to document 36 incidents of alleged war crimes in detail, using primarily the same unverified NGO claims, as well as other complaints against Israel unrelated to the Gaza War. Goldstone publicized the report and its recommendations in a press conference, broadcast live on CNN and elsewhere, held at the U.N. headquarters in New York.

As expected when the Goldstone process began, the allegations and recommendations repeated the themes of the NGO Forum declaration at the 2001 Durban Conference, and in the U.N. reports regarding Jenin and the other incidents. Once again, Israel was singled-out and subject to unique criteria and methodologies that are not applied to other nations in considering counter-terror defense. As in the previous reports, testimony on alleged war crimes was not subject to cross examination, blatant internal contradictions were ignored, and much of the "evidence" was never made public or subjected to critical analysis. At the time, Goldstone himself acknowledged that while the language and framework of the report and proceedings were rigidly legalistic, the analyses and recommendations would not have been accepted by a duly constituted court of law.⁸⁷

The Goldstone Report had more force and did more damage to Israel than the others, including accusations of systematic "war crimes," "crimes against humanity," and deliberately targeting "the people of Gaza as a whole." Goldstone's reputation gave the recommendations much greater force than in past – including calling on the U.N. Security Council to refer the situation to the International Criminal Court⁸⁸ and for other countries to start criminal investigations in national courts using universal jurisdiction.⁸⁹

In the month immediately after the publication of Goldstone's report, HRW issued 12 statements in support of Goldstone, and HRW officials were widely quoted in the media.⁹⁰ Many repeated the central accusation that Israel had been guilty of

⁸⁷ Gal Beckerman, "Goldstone: 'If This Was a Court Of Law, There Would Have Been Nothing Proven,'" *The Forward*, 7 Oct. 2009. Accessed 22 June 2011. <http://www.forward.com/articles/116269/#ixzz1Q0jkSSb2>

⁸⁸ "Report of the United Nations Fact-Finding Mission on the Gaza Conflict," 424.

⁸⁹ *Id.* at 399

⁹⁰ NGO Monitor, "Human Rights Watch: Selling Goldstone's Indictment," 15 Oct. 2009. Accessed 22 June 2011. http://www.ngo-monitor.org/article/human_rights_watch_selling_goldstone_s_indictment0

“willfully” killing civilians. HRW’s campaign continued in 2010, with 14 publications alleging the “inadequacy” of Israeli investigations into the Gaza War.⁹¹

More broadly, as noted above, the Goldstone Report was embraced and exploited by the supporters of intense efforts to delegitimize Israel, including the BDS (boycott, divestment, and sanctions) movement, “lawfare” campaigns, and “Israel Apartheid Week” activities.

Goldstone Recants

As the campaign to sell the report expanded, the numerous fundamental flaws in the entire process slowly received greater attention. Such cynical exploitation of moral and legal frameworks was seen to be highly destructive to international norms, as well as a major threat to the existence of Israel as the nation state of the Jewish people, and its sovereign equality among the nations. The obsessive assault on Israel through the use of false claims and the gross distortion of legal arguments was increasingly understood to go beyond any substantive aspects of the Gaza conflict.

In addition, an examination of the ways in which the claims were being used refutes the pretense that the numerous false claims of Israeli war crimes are responses to the post-1967 occupation, settlements, and related issues. Similarly, there is no basis for the speculative belief that had Israel agreed to cooperate with a series of U.N.-appointed and biased “investigations,” the allegations of “war crimes” would have been mitigated. An equally persuasive thesis would posit that any Israeli submissions to the Goldstone Commission on the Gaza War, for example, would most likely have been twisted and distorted to suit the predetermined conclusions.

In the months that followed publication of the report, details of many of the factual claims and refutation of the legal arguments increased. In March 2010, the semi-official Intelligence and Terrorism Information Center published a 341-page compilation of the results of Israeli military investigations into many of the allegations, demonstrating that the evidence cited in the Goldstone Report was often inconsistent with the facts.⁹²

As the criticism of the committee and the report expanded, Judge Goldstone’s speeches and public comments reflected increasing unease and greater efforts to explain and

⁹¹ NGO Monitor, “HRW in 2010: More Bias, Even Less Credibility,” 6 Jan. 2011. Accessed 25 June 2011. http://www.ngo-monitor.org/article/hrw_in_more_bias_even_less_credibility

⁹² Intelligence and Terrorism Information Center (Israel), “ Hamas and the Terrorist Threat from the Gaza Strip: The Main Findings of the Goldstone Report Versus the Factual Findings,” Mar. 2010, Accessed 25 June 2011. http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/pdf/g_report_e1.pdf

defend the publication. This reconsideration began to be visible while Goldstone was at Yale University, during the Fall of 2010, approximately one year after the report was published, and increased steadily during a series of lectures during a visiting faculty appointment at Stanford University in the first months of 2011.⁹³ In his public presentations during this period, Goldstone did not take questions, perhaps in the effort to avoid having to respond to the evidence that demonstrated his lack of understanding of many of the false claims and the contradictions contained in the report written in his name. However, with each of Goldstone's presentations, the emphasis on the discrepancies and inconsistencies became stronger.

On April 2, 2011, Goldstone published an op-ed article in *The Washington Post*, in which he recanted the essential claims of the report. Eighteen months after the U.N. publication, Judge Goldstone acknowledged that "our fact-finding mission had no evidence" to verify the allegations supplied by the radical NGOs. He retracted the allegations that Israel had deliberately targeted civilians, confessed to having ignored the war crimes of Hamas, and recognized that the UNHRC is fundamentally biased against Israel.

Goldstone's retraction slowed the efforts to use this report to further promote the international isolation of Israel through the Durban NGO strategy, including the efforts to initiate proceedings in the International Criminal Court. While Goldstone's colleagues in this process, as well as the major NGO contributors, particularly HRW and Amnesty International, pretended that Goldstone's reversal was based on minor issues, the political momentum that had propelled the process may have dissipated.

While the impact of the Goldstone Report on Israel may not be clear for a number of years, it is possible that this will be seen as having marked the turning point in the NGO-led assault on Israel through international legal claims about responses to terror attacks. As noted, the campaigns resulting from the Gaza War constituted the most intense efforts to promote this agenda, and a failure to produce results may mark the beginning of the end of the Durban strategy.

⁹³ Gerald M. Steinberg, "Judge Goldstone vs. the Goldstone Report?," *Washington Jewish Week*, 23 March 2011. Accessed 25 June 2011. http://www.ngo-monitor.org/article/judge_goldstone_vs_the_goldstone_report_

THE GOLDSTONE MISSION TAINTED TO THE CORE¹

Irwin Cotler

After nearly a decade of rocket-fire from Gaza targeting Israeli civilians – including armed attacks that continued and escalated for the three years after Israel withdrew from Gaza in 2005 – this year’s conflict in Gaza was nothing if not preventable and predictable.

From the moment Hamas officially announced that it would not extend its truce with Israel in December 2008, military confrontation appeared unavoidable. In the conflict that ensued, Israel – even if acting in self-defense – was bound to the rules of war like any other combatant. Yet despite the fog of war immediately covering the on-going hostilities, the international community was rife with “experts” who were ready to convict Israel of war crimes.

Among those supposed experts was Christine Chinkin, a law professor in England. As events would turn out, Chinkin would become both a member of, and an apt metaphor for, the seriously-flawed Goldstone Commission that would be called upon by the United Nations Human Rights Council (UNHRC) to investigate the conflict.

If one wanted to have a distinguished person to head up an inquiry into the events of the Gaza War, Richard Goldstone would be a natural candidate. He was the chief prosecutor of the United Nations International Criminal Tribunals for the former Yugoslavia and Rwanda. He headed the South African commission on violence and intimidation. And he was a distinguished member of the Constitutional Court of South Africa. He brings to the table a special expertise and experience in matters of the intersection between international human rights law and humanitarian law.

Goldstone, it would seem – and his record would indicate – is also a man preoccupied with fairness. As he himself declared: “I’m just not prepared to be involved in any inquiry, in any mission, in any report that has any unprofessional or inappropriate political agenda. I can give you that absolute assurance.” It is somewhat surprising then that he now heads yet another infamous United Nations mission to investigate

¹ Originally published in the *Jerusalem Post* in two parts, on August 16 and August 21, 2009, one month before the first draft of the Goldstone Report was released.

Israel. That Goldstone is heading an inherently tainted inquiry whose formal mandate is to investigate Israel and not Hamas is as disturbing as it is evident.

Indeed, the mandate that was handed over to Goldstone was deeply one-sided and flawed, by his own admission. For the resolution of the UNHRC creating the mandate already served as a direct indictment of Israel – it began by “strongly condemn[ing] the ongoing Israeli military operation which has resulted in massive violations of the human rights of the Palestinian people and systematic destruction of Palestinian infrastructure.” Canada, Japan, France, Germany, Italy, Switzerland, and the United Kingdom – among others – accordingly refused to support it.

Former U.N. High Commissioner for Human Rights Mary Robinson stated that “the resolution is not balanced because it focuses on what Israel did, without calling for an investigation on the launch of the rockets by Hamas. This is unfortunately a practice by the Council: adopting resolutions guided not by human rights but by politics. This is very regrettable.” Asked to head up the mission before Goldstone, Robinson refused.

Goldstone admits that he also refused the appointment – at least initially. “More than hesitate, I initially refused to become involved in any way [with the inquiry], on the basis of what seemed to me to be a biased, uneven-handed resolution of the U.N. Human Rights Council,” he explained. But he felt comfortable enough to proceed when the then-president of the Council, Martin Ihoeghian Uhomoibhi, purportedly expanded the mission’s mandate for him, even though the enabling resolution behind the inquiry would remain unchanged, and though he would still be accountable to the Council that passed this resolution.

How Goldstone could have considered his personal conversation with Uhomoibhi sufficient to quell his fears is surprising to say the least. One-sided or not, the mandate in the enabling Human Rights Council resolution is the one that determined the scope and tenor of the “fact-finding” mission. Uhomoibhi could no more have altered that mandate unilaterally than Goldstone could have himself, in defiance of the Council.

Indeed, any faith Goldstone possessed in the re-definition of his mandate should have dissipated when Uhomoibhi publicly stated on the day the inquiry was announced: “I am confident that the mission will be in a position to assess in an independent and impartial manner all human rights and humanitarian law violations committed in the context of the conflict which took place between 27 December 2008 and 18 January 2009.”

The alleged expansion of the mandate’s timeframe that Goldstone apparently fought for, to include reference to Hamas’ provocation (apparently from June 2008), was

nowhere to be found in the description of his mandate.

I know from first-hand experience the baggage that comes with participating in a mission created by the U.N. Human Rights Council – a U.N. body systematically and systemically biased against Israel. For this is a Council that has a special and permanent agenda item targeting Israeli violations of human rights, and another agenda item for the rest of the world – thereby singling out Israel for differential and discriminatory treatment. This is a Council that targets some 80% of its resolutions at one member state, Israel, while the major human rights violators enjoy exculpatory immunity. This is a Council that has had more emergency “Special Sessions” directed against Israel than against all the other countries of the world combined. This is a Council that excludes only one country – Israel – from membership in any regional grouping, thereby denying it international due process.

As it happens, I was invited to participate in one of the U.N. Council’s exercises in *Alice in Wonderland* justice – where the conviction is secured even before the hearing begins – in 2006. The context was a fact-finding mission to investigate the Israeli “wilful killing of Palestinian civilians” in Beit Hanoun, Gaza, without reference to the targeting of Israeli civilians in Sderot, Israel. Then, as now, the mandate was one-sided from the start.

Then, as now, the conviction preceded the investigation. Then, as now, the mission was designed less as a true independent inquiry than as an imprimatur of legitimacy on the Council’s own, biased declarations.

I felt obliged to decline. I was told that at least I could play a part in the inquiry and, if I disagreed with its conclusions, write a dissenting opinion. But I realized that I could not validate this mission in any way, including through my mere presence, for the integrity of United Nations mandates was at stake.

Notably, one Professor Christine Chinkin accepted the appointment. Now Chinkin joins Goldstone in an inquiry that bears the hallmarks of bias and politicization that he supposedly shunned. Indeed, before the mission began – as if to add insult to injury – Chinkin notoriously signed her name to a public letter that was titled “Israel’s bombardment of Gaza is not self-defense – it’s a war crime.” Why she feels qualified at this point to hear witness evidence along with the rest of the commission – without triggering a reasonable apprehension of bias – is not entirely clear.

Rather than bestow legitimacy upon the Council’s mandate, Goldstone’s role should have been to act as a corrective. Now occupying the same Jewish figurehead role that I would have in 2006, he does not appear to have realized this fact.

Or, perhaps, he did. Though it was somewhat softer than Chinkin's, Goldstone did also sign his name to a public letter on the Gaza conflict, stating that the events "shocked [him] to the core." Yet he signed no such letter about Hamas' terrorist crimes in the years that preceded the war. In an interview earlier this month, he had the temerity to excuse away the U.N.'s inaction vis-à-vis Hamas based on the fact that Israel never brought the matter to the Security Council's attention.

The only problem, of course, is that Israel repeatedly did.

Disturbing as it may be, the failure to include a thorough review of Hamas' continuous rocket attacks in the resolution establishing the Goldstone Commission – and to then staff the mission with a member who has already decided that such attacks do not alter Israel's guilt – can be seen as evidence of the reductionist narrative that the U.N. Human Rights Council seeks to promulgate.

None of this is intended to suggest, nor would I wish to have it inferred, that Israel is somehow above the law, or that Israel is not to be held accountable for any violations of law. On the contrary, Israel is accountable for any violations of international law or human rights like any other state. The Jewish people are not entitled to any privileged protection or preference because of the particularity of Jewish suffering.

But the problem is not that Israel seeks to be above the law; it is that Israel has been systematically denied equality before the law in the international arena. The issue is not whether Israel must respect human rights, but that the human rights of Israel and its people have not been respected. The discrimination emerges not from suggesting that human rights standards should be applied to Israel – which they must be – but from the fact that these standards have not been applied equally to anyone else.

It is on this basis that the Goldstone Commission should be opposed: not because it represents an objective inquiry into Israel – because independent and impartial inquiries should be welcomed by democracies – but precisely because it does not represent such an objective inquiry.

Consistently applying discriminatory standards has the effect not only of demonizing Israel, but of undermining the integrity of the U.N. and the edifice of international law. Decades from now, historians looking back at the meetings of the council will be led to believe that more Palestinians died at the hands of Israelis than Darfurians at the hands of Sudan; that discrimination was institutionalized in Israel to a larger extent than in apartheid South Africa; and that Israel – the lone democracy in the Middle East – was a greater threat to international peace and security than any other state since its inception.

But yet it was Hamas that fired deliberately on Israeli civilians. It was Hamas that boasted – only days before the conflict exploded in December – that Israel was “hopeless and desperate” when faced with its attacks. It was Hamas that promised to continue firing rockets, that painted Israel and Jews as the sons of apes and pigs, and that called for their murder in its charter and publicly incited to their genocide.

Once the war began, it was Hamas that continued to target Israeli civilians – not infrequently but as part of a systematic, widespread attack. It was Hamas that chose to position its fighters in Palestinian civilian areas. It was Hamas that decided to misuse humanitarian symbols – such as using an ambulance to transport fighters – to launch attacks. It was Hamas that recruited children into armed conflict. These are all indisputable war crimes. Yet they do not find their way, at any point, into the resolution establishing the Goldstone Commission.

The mission’s mandate is tainted through more subtle ways of prejudging its conclusions as well. For instance, the council’s enabling resolution refers to Gaza as being “occupied Palestinian territory.” Such a description is loaded, and ignores the reality on the ground – that Israel fully withdrew from Gaza years ago. Indeed, the territory’s status under international law remains unclear. By adopting this vernacular, the council – and Goldstone himself, who uses a similar characterization – implicitly predetermines an essential part of its analysis. For under international law, what constitutes a legitimate response will be very different depending on whether rocket attacks are coming from territory a state “controls,” or whether they are coming from territory that is controlled by the attacking terrorist government, as in the case of Hamas.

In the end, whatever bargain Goldstone personally struck about his mandate, and whatever intentions he has of examining both sides of the conflict, his work will nonetheless be regrettably tarnished by its connection to the U.N. Human Rights Council, and may well be manipulated to satisfy the council’s ends.

And thus we are left with the reality that Judge Richard Goldstone, previously shocked to the core, has become the leader of a mission that is tainted to the core.

Goldstone has, to his credit, opened his commission – and listened – to the witness testimony of both Israelis and Palestinians. They heard eloquent words from, among others, Noam Schalit, whose son Gilad remains in Hamas captivity under conditions that plainly violate international law. Moreover, while many may welcome an ultimate finding from the inquiry that Hamas was guilty of human rights violations as well, such an outcome should not be considered enough.

The commission's report is not yet written, and I would not wish to prejudge its findings. Suffice it to note, however, that the legitimacy of the report cannot be determined solely based on whether Hamas' heinous and significant crimes are revealed; the legitimacy of the report also rests – perhaps primarily – on the fairness of its findings with respect to Israel. And this fairness, in turn, is compromised not only by the tarnished mandate, but by the witness testimony and documentary evidence controlled by the Hamas terrorist government – while there is an absence of evidence from the Israeli government, which refused to cooperate with the mission to begin with.

Moreover, there is also a clear international legal asymmetry in the conflict between Israel and the terrorist group. This asymmetry exists not only in what lawyers call *jus ad bellum* – or the legal context of aggression and self-defense – but also in *jus in bellum* – the application of international human rights law to the combatants. With respect to Hamas, any attempt at “evenhandedness” will not do justice to this reality. Indeed, no analysis of the principle of proportionality can be undertaken without a keen understanding of intentionality. Accordingly, the commission should thus be singling out Hamas' deliberate and unprovoked acts of war, as well as its avowed and publicly-declared intention to destroy Israel and kill as many of its citizens as possible. Such intentions on the part of Hamas need to be contrasted with Israel's objective – to prevent and deter such armed attacks in order to better protect its innocent citizens.

The paradigm of false moral equivalence not only wrongly puts Israel and Hamas on the same level, but it also undermines the importance of intentionality in international law.

For this reason, we should be looking for the Goldstone Report not merely to observe that Hamas fired rockets at Israeli civilians while imperilling Palestinian civilians – a double war crime – but to look at this practice as the reason behind innocent Palestinian deaths. We should be looking for the Goldstone Report not merely to mention Gilad Schalit in passing, but to look at his situation as a case study in Hamas terror and impunity.

In brief: We should be looking for the Goldstone Report not just to mention Hamas' violations of international law, but to identify them as the root cause of the Gaza conflict. Simply put, if there had been no Hamas war crimes, there would have been no need for an Israeli response.

As the Goldstone inquiry is currently set up, however, expecting such an analysis to emerge clearly from its final report is likely unduly optimistic. The tarnish of the U.N. Human Rights Council, the enabling resolution it drafted, the personnel it grouped

together, and the legal asymmetry cannot be so easily redressed. Indeed, between Goldstone – a renowned Jewish jurist who played right into the hands of a partial process – and Christine Chinkin – a law professor willing to sign off on an indictment before the evidence is in – the U.N. Human Rights Council no doubt found its ideal inquisitors.

And the council will no doubt be looking for their final report to be a final stamp of confirmation on the verdict it already determined.

THE U.N.'S BOOK OF JUDGES¹

Ed Morgan

And the borders of the Canaanites went ... until Gaza.

–Genesis 10:19

Gaza has historically been on the border of the Middle East conflict, a Palestinian hinterland and a footnote in the larger dispute between Israel and its neighbors. The publication in September 2009 of the report of Justice Richard Goldstone's fact-finding mission on the Gaza conflict changed all that for international lawyers. This essay examines the legal discourse about the armed confrontation between Israel and Hamas as it moved from the periphery to the core of debate in the United Nations, using the opportunity to theorize about the nature of international judging. It concludes that, although there are important legal issues raised by the Gaza conflict – including the status of the conflict as a domestic or international one, the legal assessment of Hamas' attacks on Israeli civilians, and the proportionality of Israel's military response – international law has gone beyond the point of usefulness. In a peculiar parallel to the ancient world, the law has matured to where it is the primary discipline for international governance, yet its content has decayed to where it provides few objective constraints on the self-serving positions taken by its judges.

A Time of Judging

In November 2009, Farukh Amil, the deputy permanent representative of Pakistan, speaking on behalf of the Organization of the Islamic Conference, introduced General Assembly Resolution 64/10 endorsing the Goldstone Report. In his speech, the Pakistani delegate condemned Israeli forces for war crimes and stressed “the urgent need to ensure accountability.”² His colleague A. K. Abdul Momen, the representative of Bangladesh, concurred, pronouncing his country's verdict that

¹ Originally published in *Global Governance*, Vol. 16, No. 2, p.160, April-June 2010.

² Ma'an News Agency, “U.N. Body Endorses Goldstone Report,” available at www.mecaforpeace.org/article.php?id=503.

Israel had “committed systematic violations against Palestinian people.”³ In the result, the General Assembly affirmed the conclusion reached the previous month by U.N. Human Rights Council (UNHRC) Resolution S-12/1, which the Kuwaiti representative to the council, Dharar Abdul-Razzak Razzoqi, summarized by declaring Israel guilty of being “an occupying power, which instead of defending civilians, is destroying the Geneva Convention.”⁴

The Kuwaiti assessment reflects the premise of previous Human Rights Council missions that Gaza is still an occupied territory by virtue of Israel’s control of all entry and exit points; overlooking, of course, the doorway from Egypt through which Justice Goldstone himself entered and left at the beginning and end of his mission.⁵ This premise is a crucial element in the Goldstone analysis and the judgments that flow from it because it forms the basis of the view that Israel owes a higher duty of care to the domestic Gaza population than it would to a foreign nation. On the other hand, it goes against Palestinian legal positioning, which has elsewhere claimed that the Palestinian Authority is in full control of its territory and should therefore enjoy the judicial immunities of an already established sovereign state.⁶ Given Hamas’ domestic governance of the Gaza Strip, the conclusion that Israel’s belligerent occupation continues also seems at odds with the classical formulation of that status; that is, where the occupier “exercises governmental authority to the exclusion of the established government (of the occupied).”⁷ Little wonder, then, that Secretary-General Ban Ki-Moon demurred when asked for his institution’s best judgment about whether Gaza is still under occupation, stating that he is “not in a position to say on these legal matters.”⁸

The *sui generis* nature of Gaza’s legal status found no place for discussion in the polarized U.N. considerations of the Goldstone Report. Israel rested its case on its

³ General Assembly news release GA/10895, “General Assembly Concludes Debate on Question of Palestine,” 64th General Assembly, 1 December 2009.

⁴ Ynetnews.com, “Kuwait: Israel Killed Civilians Intentionally,” 16 October 2009, available at www.ynet.co.il/english/articles/0,7340,L-3790951,00.html.

⁵ BBC News, “Goldstone’s U.N. Inquiry Team Arrives in Gaza,” 1 June 2009, available at <http://news.bbc.co.uk/2/hi/8076690.stm>.

⁶ *Estates of Ungar ex rel. Strachman v. Palestinian Authority et al.*, 153 F. Supp. 2d 76 (Dist. Ct. R.I., 2001) (Ungar I); affirmed 402 F.3d 274 (5th Cir., 2005).

⁷ *United States v. List et al.* (Hostages Case), 8 L. Rep. Trials of Maj. War Crim. 38, 55 (U.N. War Crimes Commission), 1949.

⁸ “The O Word: Is Gaza Occupied Territory?,” *New York Sun*, 11 February 2008, available at www.nysun.com/foreign/o-word-is-gaza-occupied-territory/71079/.

own Supreme Court ruling that the Gaza conflict is a strictly international one,⁹ arguing that the country's inherent right of self-defense includes dictating how the airspace, seacoast, and armed forces of its neighbor can be used. The Palestinians, on the other hand, echoed the rhetorical salvo issued by legislator Hanan Ashrawi that the Israelis were "re-invading occupied territory,"¹⁰ as if there were nothing unusual about a military occupier that is so absent from the territory that it has to reenter to establish its presence. None of this, however, gave any pause to the Human Rights Council, which finished the Goldstone episode the same way that it started it: "strongly condemning the ongoing Israeli military operation carried out in the Occupied Palestinian Territory, particularly in the occupied Gaza Strip."¹¹ On the other side of the coin, there were some dissenters from the pronouncement of Israel's guilt. Sweden's ambassador to the U.N., Anders Liden, speaking on behalf of the European Union, opined that Palestinians must cease and desist from rocket attacks and release captive Israeli soldier Gilad Shalit.¹² For her part Miranda Brown, Australia's deputy permanent representative to the U.N. Security Council, held that the situation was more complex, and less one-sided, than portrayed by the Arab League, which had originally sponsored the General Assembly resolution.¹³ Canada's representative, Keith Morrill, reasoned that the General Assembly had erred in "assuming that Israel was wholly culpable" and in leaving out any mention of Hamas.¹⁴ Playing the supposedly impartial role as mediator of the General Assembly session, Egyptian Ambassador Maged Abdelazziz retorted that Hamas is a cooperative and democratically elected government, and called for prosecution of "all those responsible for crimes against the civilian population of the Gaza Strip."¹⁵ Given the centrality of international institutions in creating modern international

⁹ *Public Committee Against Torture in Israel v. Government of Israel*, HCJ 769/02 (2006), available at http://elyon.lcourt.gov.il/fdes_eng/02/690/007/a34/02007690.a34.pdf.

¹⁰ CNN.com, "Is Gaza 'Occupied' Territory?," 6 January 2009, available at www.cnn.com/2009/WORLD/meast/01/06/israel.gaza.occupation.question/.

¹¹ U.N. Human Rights Council press release, "Human Rights Council Decides to Dispatch Fact-Finding Mission to Investigate Violations Against Palestinians in Occupied Territory," 12 January 2009, available at www.unhcr.ch/hurricane/hurricane.nsf/0/47667EA2AA07F253C125753C004DAFB2?opendocument.

¹² Unifeed, "GA/Goldstone Report," 4 November 2009, available at www.unmultimedia.org/tv/unifeed/d/13837.html.

¹³ General Assembly news release GA/10895, "General Assembly Concludes Debate on Question of Palestine," 64th General Assembly, 1 December 2009.

¹⁴ *Id.*

¹⁵ Australia.to News, "Non-aligned Movement Urges U.N. General Assembly to Act Upon Goldstone Report," World News, 10 December 2009, available at www.australia.to/index.php?option=com_content&view=article&id=16075:non-aligned-movement-urges-un-gcneral-assembly-to-act-upon-goldstonc-report&catid=116:breaking-news&Itemid=298.

law, there is nothing like a U.N. transcript and its related legal opinions to make one crave the Deuteronomic injunction: “You shall not pervert justice. You shall not show partiality” (*Deut.* 16:19).

The Goldstone Report’s final appeal lies at the Security Council on referral by the Secretary-General. Russia and China went on record in advance opposing consideration of the report altogether, while the Permanent Five, led by the United States, announced their position against the report before the hearing was even scheduled. On the other hand, the report was favorably introduced by rotating member Libya and prejudged as meritorious by the Security Council’s then newest member, Turkey. It is trite to say that the United Nations, whose organs can turn soft norms into hard rules, provides the genesis for much contemporary international law; indeed, it is the sturdy roof under which international legal discourse is now housed. Nevertheless, there is something unseemly about the process of it all. U.N. instruments, of which the formal resolutions flowing from the Goldstone Report are but a prominent example, hardly seem to have been created “in the days when judges judged” (*Ruth* 1:1).

Or were they? It is commonplace to say that public international law is horizontal in structure. States enjoy ultimate legal authority by virtue of their sovereignty, and the international legal system is, as a consequence, based on consent. Whether those consensual actions are evidenced by treaty or by customary practice, the international system is grounded in the enlightened self-interest of states in forming and obeying its laws. Such a system by definition lacks hierarchical institutions and authority. As legal scholar Lassa Oppenheim said in his early twentieth-century treatise on international law, “for the existence of law neither a law-giving authority nor courts of justice are essential.”¹⁶ Nevertheless, the international system has, without giving up much of its nonhierarchical structure, moved from a paucity of institutions in Oppenheim’s day to a wide variety of quasi-judicial, dispute resolution, reporting, committee review, and other institutional processes to which states now routinely answer.

The United Nations, whose Charter is a multilateral treaty, and the International Court of Justice (ICJ), whose statute and “compulsory jurisdiction” are entered on a voluntary opt-in basis by sovereign litigants only (Article 36), provide the contemporary system’s best examples. The Security Council, with its Chapter VII mandate to implement binding rulings addressing international peace and security, and the General Assembly, Human Rights Council, and other U.N. bodies, with their mandates to enter formal resolutions reflecting the normative consensus or majority

¹⁶ L. Oppenheim, *International Law*, 3rd ed. (Clark, NJ: Lawbook Exchange, 2005), p. 5.

votes of their members, all play a similar role in the legal structure. States are not bound to obey a superior body of law in the way that citizens of a state are bound to obey the acts of a legislature or court; rather, states assess each other's conduct in a process of mutual self-judging where the players and the judges are one and the same. Every state might agree, for example, that proportionality is crucial to the use of armed force, but each gets to judge its neighbor in accordance with its own perception of the battle. Are two Israeli missiles that hit their target proportionate to a thousand Hamas rockets where all but two miss their mark? If Israeli attacks result in many civilian deaths that are collateral to their objective, and Hamas attacks result in only a few civilian deaths but are themselves the intentional objective, which actions are the disproportionate ones? In a system where the judges are all participants, none reflects strictly nonpartisan authority.

While the system of participant-judges seems at odds with the modern judicial function, one finds a surprisingly similar process put forth in the ancient world. The *Book of Judges* itself unfolds not so much as a set of reasoned judgments but as a series of action tales. The *Judges* stories convey law neither in the direct, positive, and unqualified sense of the Ten Commandments, nor in the reasoned, qualified, and condition-specific interpretative sense of the covenant code (*Exod.* 21-23). Instead, these narratives are a series of tales about judicial heroes. They form a historical bridge between the death of Joshua without a successor just after the twelfth-century BCE entry of nomadic Israelite tribes into Canaan (*Judg.* 1:1), and the tenth-century BCE establishment of the unified monarchy under Saul – a development that only transpired following the tribal elders' beseeching of Samuel, last of the judges, to "make us a king to judge us like all the nations" (*1 Sam.* 8:5). The judges were battlefield commanders: from Othniel, a Judean leader who delivered the people from reconquest by an oppressive Mesopotamian ruler, through Deborah, the woman judge who liberated Israelites from their own apostasy and defeated a cruel general leading a well-equipped Canaanite army, through Samson of the tribe of Dan, who partially overcame the coastal Philistines with muscle-bound feats. They also include the leaders of intertribal conflict among the Israelite confederation, culminating with the massacre of the tribe of Benjamin at the battle of Gibeah, putting an end to the judges' era.

The key to understanding the *Book of Judges* is in the essential disunity of people existing under a single normative umbrella. The judges are a strikingly realistic combination of fearlessness, frailties, virtues, faults, cleverness, and faith,¹⁷ whose character traits are less passive adjudicators than they are warrior leaders of a tribal

¹⁷ Robert G. Boling, "Introduction," in Robert G. Boling, trans, and commentary, *Judges* (New York: Doubleday, 1975), pp. 3-4.

society struggling to attain equilibrium among adversarial and violent partners. Despite the Sinai Covenant of a previous generation, the nation continuously turned away from its suzerain who, in turn, inflicted “thorns in the side” and foreign gods as “snares” for the increasingly fractious confederation (*Judg.* 2:3). While each of the judges is portrayed as answering the collective deity’s calling, the societal dynamic is such that they engage in a process of reciprocal and horizontal self-assessment and confrontation. Their followers march into battle, or sue for peace, not so much under a single monotheistic sovereignty as they had done when they defeated the hosts of Egypt (*Exod.* 1-15), but rather in an attempt to vanquish their mutual moral and spiritual corruption and to thereby regain physical liberty.

In the ancient biblical and modern international order, judges serve what legal theorists have called a *dedoublement fonctionnel*¹⁸ (i.e., they are statesmen making as many executive decisions as adjudicative ones). When times are good they have, in words coined by Chief Justice John Marshall in 1812 in *The Schooner Exchange*, a “common interest compelling them to mutual intercourse.”¹⁹ When times are bad they keep, as the International Court of Justice put it in the *Corfu Channel* case, “a jealous guard” on their territory and interests, with a legal vigilance “sometimes going so far as to involve the use of force.”²⁰

Accordingly, Justice Goldstone could observe in an interview after publication of his report that “if this had been a court of law, there would have been nothing proven.”²¹ At the same time, Libyan representative Ahmed H. M. Gebreel could with confidence opine to the sixty-fourth session of the General Assembly that Israel was guilty of “ongoing practices and violations [that] are inhumane and illegal.”²² Since evidence is assessed in the eye of the beholder, Gaza can be both abandoned and occupied by Israel, and Israeli force can be far less and far greater than the Hamas threat. Israel may look back to the legislated word at Sinai or the U.N. Charter, or look forward to a kingdom of reasoned law, but at the moment international society and its judges are little more than the sum of the world’s tribal parts.

¹⁸ Georges Scelle, “La phenomene juridique du dedoublement fonctionnel,” in W. Schatzel and H.-J. Schlochauer, eds., *Rechtsfragen der Internationalen Organisation* (Frankfurt: Vittorio Klostermann, 1956), pp. 324-342.

¹⁹ *Schooner Exchange v. M’Faddon*, 11 U.S. (7 Cranch) 116 (1812), 137.

²⁰ *Corfu Channel case (Great Britain v. Albania)*, [1948] I.C.J. Rep. 15, 19.

²¹ “Goldstone: If This Was a Court of Law, There Would Have Been Nothing Proven,” *The Forward*, 7 October 2009, available at www.forward.com/articles/116269/.

²² “General Assembly Concludes Debate.”

Ambiguities and Reversals

The lead-off biblical judge is also, on the surface at least, the most straight-forward. Othniel, son of Kenaz, is connected to illustrious lineage through his uncle Caleb, one of the spies that Moses sent from the wilderness to inspect the promised land. Since the generation of people who knew Moses had all but died out by the time the Israelites entered Canaan, this personal link with the law-giver is charged with significance for the first warrior judge. Othniel's battles reflect the politics of the moment, but at the same time they carry the covenant forward.

The first judge's story begins with a dark period. Roughly thirty years after the conquest of Jericho and the death of Joshua, the Israelites "forgot the Lord their God, and served the [pagan gods] Baals and the Asheroth" (*Judg.* 3:7). In anger, God allowed them to fall under the oppressive rule of a Mesopotamian king who reigned over them for eight years. Upon hearing the people cry out for salvation, God raised a leader in Othniel, who had already proven himself in local battle. Othniel conquered the foreign ruler's stronghold at Kiryat Sepher, driving the oppressors out and delivering the Israelite tribes into a period of forty peaceful years.

The State of Israel is also, of course, closely connected with its society's lawgiver, having been conceived with General Assembly Resolution 181 dividing the British Mandate for Palestine into a Jewish and an Arab state. In addition, like Othniel, whose name alternatively means "strength of God" (*Judg.* 2:10) or, according to Talmudic interpretation, "word of God" (*Terumah* 15B-16A), Israel is a product of its own deeds as much as it is of legal words. When compared with its stillborn Palestinian twin, the *fait accompli* of the Jewish state's creation seems more important than the General Assembly's resolution. On the other hand, the new state's *de facto* existence was recognized as *de jure* by its admission to the U.N. by General Assembly Resolution 273 of 1949. That same year, in the ICJ's *Reparations* case, Israel was made to pay compensation for the death of a U.N. diplomat in West Jerusalem, effectively acknowledging Israeli sovereignty over all the territory it controlled, including that not ceded to the Jewish state in the General Assembly's partition resolution. The words of international governance and the deeds of the governed combine in the law to form an inseparable pair.

Othniel's nexus to the word of God and his executing of God's partisan battle together make for an equally ambiguous message about legal sources. In *Judges*, as in much of the Hebrew Bible, God plays two simultaneous roles. On one hand, the Israelite nation is unified under a theological covenant, whose breach is punished as in the beginning of the Othniel tale. On the other hand, divine intervention into politics is

often done on a partisan basis – salvaging all Israel when it is convenient to do so, and preferring Judah above the other tribes by making Othniel, the one Judean judge, the first and most straightforwardly successful. It is as if God is at once the house and one of the competing residents.

An analogous role is played by the United Nations. The *Reparations* case, as indicated, validated Israeli sovereignty, but is best known for its statement of the U.N.'s rights. The doctrinal issue that most occupied the court is whether the United Nations, which had lost one of its diplomats, had standing to bring an ICJ claim equivalent to that enjoyed by any sovereign state. In finding that the international community has “equipped that center with organs,”²³ the court effectively held that the state signatories to the U.N. Charter have created a state-like institution in their own image (*Gen.* 1:27). Since under the Statute of the ICJ only a state may commence a formal claim, authorizing the U.N. to bring an action makes the institution both the field of play and a player with interests of its own.

This ambiguity in the nature of God is replicated as an ambiguity in the nature of law. Othniel liberated Kiryat Sepher (literally, “town of the book”), which in turn was renamed Devir (“oracle”) after the deliverance (*Judg.* 1:11). To put it another way, the book only became an oracle of the law once it was acted on by man; prior to that, even God’s own book is just an abstraction. Likewise, the lofty ideals of the U.N. Charter – the prohibition on force (Article 2[4]) and the right of self-defense (Article 50) – are mere abstractions until given meaning and interpreted by self-interested state practice.

Even within the confines of the international judiciary, the partisanship is unremitting. Thus, Egyptian judge Nabil Elaraby could sit in judgment of Israel in the *Legal Consequences of the Construction of a Wall* case (hereinafter *Legal Consequences* case) shortly after having served as a diplomat in his government’s Middle East confrontations. U.S. judge Thomas Buergenthal could then call him out for having two months previously condemned Israel in the press for “the atrocities perpetrated on Palestinian civilian populations,”²⁴ all without upsetting the equilibrium of the international judicial institution or disqualifying the biased judge. Likewise, the Goldstone Mission could include Professor Christine Chinkin, who prior to her appointment had already passed judgment in the *Sunday Times* that “Israel’s actions

²³ *Reparations* case (Advisory Opinion), 178, [1949] I.C.J. Rep. 174.

²⁴ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Order, 30 January 2004, 8), [2004] I.C.J. Rep. 3; (Advisory Opinion), [2004] I.C.J. Rep. 136.

amount to aggression, not self-defense.”²⁵ The judges on international panels, like the diplomats in the Security Council and General Assembly, the representatives at the Human Rights Council, and tribal leaders everywhere, are simultaneously judges and warriors, adjudicators and partisans, courts and litigants. They can reverse roles at the drop of a writ.

It requires no elaborate literary archeology to unearth in the *Book of Judges* that the ambiguities of the law are also coupled with thematic, and dramatic, reversals. One of the central tales of liberation is the story of Deborah, “a prophetess” (*Judg.* 4:4) who ruled in an ancient society that valued militaristic, masculine character traits above all leadership criteria. To bring the gender reversals even closer to the surface, the story opens with Deborah’s order to Barak, the commandant of her forces, to attack the enemy led by the notorious General Sisera and his 900 iron chariots. Barak’s response is more like a child to his mother than a military man to the commander in chief: “If you go with me I will go, but if you will not I will not go” (*Judg.* 4:8). The reversals are immediately embraced by the highest authority as Deborah, whose name translates as “honey bee,” issues a stinging, but accurate prediction: “The Lord will sell Sisera by the hand of a woman!” (*Judg.* 4:8).

Reversals are as dramatic, but often not as superficially apparent, in international legal forums. As an example, Resolution 2002/8 of the now defunct U.N. Commission on Human Rights, enacted on April 15, 2002, affirmed in the first paragraph of its final draft “the legitimate right of the Palestinian people to resist the Israeli occupation.” The session leading to the resolution took place in the aftermath of the Israeli-Palestinian battle in the West Bank town of Jenin, which was itself an immediate response to the Passover 2002 bombing of the Park Hotel in Netanya at the height of the second intifada. The first draft of the commission’s resolution supported Palestinian resistance “by all available means,”²⁶ which was taken to endorse violence against civilians as in the Park Hotel attack. The subsequent draft removed the four words that had been inserted by the resolution’s sponsors (Syria, Saudi Arabia, and the Arab League) and which were protested by the resolution’s opponents (Spain, Ireland, and the European Union). The final draft of the resolution found compromise wording by affirming the Palestinian struggle without the four problematic words, and by recalling the obscure General Assembly Resolution 37/43 of 1982, which had itself authorized Palestinian resistance “by all available means, including armed struggle.”

²⁵ Times Online, “Israel’s Bombardment of Gaza Is Not Self-defense, It’s a War Crime,” 11 January 2009, available at www.timesonline.co.uk/tol/comment/letters/article5488380.ece.

²⁶ U.N. Commission on Human Rights, Res. 2002/8, draft resolution (9 April 2002) and final resolution (15 April 2002), thirty-ninth meeting.

The Commission on Human Rights resolution did more, however, than to surreptitiously introduce a contentious phrase. It endorsed violence in a way that reversed the prohibition on the use of armed force except in self-defense that was previously thought to lie at the heart of the U.N. Charter. Indeed, in the *Legal Consequences* case, the ICJ deemed the ban on force so stringent that even the building of a stationary structure like a fence or wall could be deemed a form of prohibited military action rather than an act of self-defense. Accordingly, as between the Palestinians and the Israelis, it has become impossible to know what tactic is legitimate and what is legally taboo. If a security fence between combatants is for the ICJ an act of aggression, then an assault on Hamas rockets hidden in Gaza qualifies as a disproportionate military campaign. And if Palestinian armed incursions into downtown Netanya are for the U.N. Commission of Human Rights a permissible shield, then rocket attacks on the town of Sderot qualify as a proportionate defense. In a world where an immovable wall becomes an unstoppable force and vice versa, little of meaning can be said about the proportionality of violence.

Moreover, as indicated at the outset of this essay, the question of proportionality in the use of force turns on whether the Israeli-Palestinian conflict is a domestic or international one, and the conclusions in this regard have been reversible at the whim of whomever happens to be pronouncing the law. The fact of occupation, for example, was deemed by the ICJ to bring the Palestinian territory within Israel to the extent that “the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory,”²⁷ leaving Israel with no international right of self-defense. At the same time the ICJ found that “the Fourth Geneva Convention is applicable in any occupied territory arising between two or more High Contracting Parties”²⁸ (for which Israel and Jordan qualify), thus making the West Bank an international rather than a domestic conflict. International judges may aspire, as Justice Roslyn Higgins said in her separate concurrence, to “provide a balanced opinion,” but they seem structurally incapable of doing so.²⁹

In a world of surprising reversals, Deborah’s prescient statement that the enemy would be defeated by a woman did more than to turn the Bible’s gender tides. It foreshadowed the fact that Sisera, the opposing general who served the Canaanite king Jabin, would meet his demise not only at the hands of a female adversary, but a non-Israelite one at that. In fleeing the losing battle, Sisera entered the tent of Heber the Kenite, a member of a local group with which Jabin had struck a peace treaty.

²⁷ *Legal Consequences of the Construction of a Wall*, par. 139.

²⁸ *Id* at, par. 101.

²⁹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (separate opinion of Higgins, J.), [2004] I.C.J. rep. 207, 215, par. 17.

Sisera then had Heber's wife, Yael, prepare him a drink, a bed, and, presumably, herself, for his pleasure. But when the malevolent general fell asleep, Yael took the peg of the tent in one hand and a mallet in the other and pounded the peg into his head until it sunk into the ground. When Barak, the Israelite commander of Deborah's forces, arrived in pursuit of his nemesis, he found Sisera had already met his demise at the hands of the foreign woman.

In the final verse of the Deborah story, the narrator relates: "On that day God subdued Jabin, king of Canaan, before the Israelites" (*Judg.* 4:23). It was not the nation that defeated the national enemy because it was a non-national that struck the fatal blow. Putting the victory in God's hands, however, takes the ambiguities about the biblical deity—being both a universal force and a bearer of particular interests – and makes for a final reversal of the usual expectations. God's intervention this time has little to do with the politics of the battle, as Yael is not a partisan in the fight. Rather, the victory over the Canaanites and their charioteers transforms Deborah's conquest into a statement of morality for all to follow. The very army defeated by women had been portrayed all along as rapists and abusers. Even Sisera's mother, in pondering her son's late return from battle, assumes that the Canaanite boys will be boys: "Are they not looting/dividing the spoil? One or two girls/for each man" (*Judg.* 5:30). Deborah's victory is not so much for the nation she leads, but for the gender, and moral superiority, she represents.

Just as a set of ancient tales about warring nations can be transformed into a lesson in transnational norms, so a set of modern cases about principles of international justice can be transformed into a lesson in partisanship. Because it is ambiguous as to whether the U.N. and its judicial arm reflect the sovereignty of the law or the sovereignty of their members, the interests of each can be reversed to suit the moment's need. In the biblical world of waning nations and in the modern world of warring nations, judges can serve the law or the law can serve the judges; apparently, either way will do.

A Time of Decay

There is little doubt that the January 2009 conflict in Gaza was a show of immense Israeli power that followed a sequence of Hamas provocations. The Goldstone Mission took note of the long string of rocket attacks on the Israeli town of Sderot and surroundings, and then described how these mostly non-lethal, but illegal attacks, had tempted Israel into unleashing its military might. As it is written: "Samson went to Gaza, saw a prostitute there" (*Judg.* 16:1); seduced into battle, he eventually rained

destruction down on Philistia: “Those whom he killed at his death were more than he had killed in his lifetime” (*Judg.* 16:29).

The fact-finding mission led by Justice Goldstone was not, of course, the first such U.N. initiative in Gaza. There have been numerous reports issued by the Human Rights Council’s permanent office investigating the situation in the Palestinian Territories. The series of reports prior to the outbreak of fighting in January 2009 was authored by special rapporteur John Dugard, commencing in 1993 and continuing through 2008. These documents for the most part focused on Israel’s sealing of its border with Gaza, labeling this closure a form of “collective punishment.” Among their other disquieting features, the Dugard Reports failed to explain how the sealing of a border – one of the badges of legal sovereignty – is a violation of international law. In fact, the special rapporteur did not condemn Egypt for the closure of its own border with Gaza, nor did any Human Rights Council report ever condemn Syria, Lebanon, or any other country for the closure of their borders with Israel since 1948. Justice Louise Arbour, as human rights commissioner, also entered the pre-Goldstone legal fray, extolling the right to food and medicine for the Gaza population and, by an extension previously unknown to humanitarian law, thereby condemning Israel’s border closure for Gaza’s shortage of electricity and gasoline.³⁰

In addition, the Council’s special rapporteur redefined terrorism for the Israeli-Palestinian conflict. Thus, the Dugard Report of January 2008 opined that a “distinction must be drawn between acts of mindless terror, such as acts committed by Al Qaeda, and acts committed in the course of a war of national liberation against colonialism, apartheid or military occupation.”³¹ The pronouncement was directly contrary to prior international law instruments, including Security Council Resolution 1566 of October 2004, which had declared that terrorist acts “are under no circumstances justifiable.” Nevertheless, the Human Rights Council embraced the report and opened yet another special session on the situation in the occupied Palestinian Territories on January 23, 2008. It is against this background that one must assess Israel’s decision not to cooperate with the UNHRC’s Goldstone Mission. When Goldstone commenced his work in mid-2009, international law as pronounced by the council, its special rapporteur, and its predecessor commission was well along in its race to the normative bottom.

By the time Samson’s brothers brought his corpse from the ruined Philistine temple to the tomb of his father, “he had judged Israel twenty years” (*Judg.* 16:31). Despite

³⁰ “Gaza Blockade Risks Peace,” *Jordan Times*, 25 January 2008, available at www.jordanembassyus.org/new/newsarchive/2008/01252008001.htm.

³¹ J. Dugard, Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967, U.N. Human Rights Council, 23 January 2008, par. 4.

this substantial reign, Samson was in many respects the most unusual of judges. He had been God's Nazirite – taking a vow not to cut his hair in return for great physical strength – but he lacked strength of character. He fell for the Philistines' Delilah whose very name means temptress, or the one who makes you weak after having spent an entire career lusting after women of all varieties. He was a lone figure, performing heroics without ever leading a tribe or uniting the nation, and eventually committed treason against his vow to God in giving away his secret and allowing his hair to be cut. His victory in demolishing the crowded Philistine temple was both a heroic feat of strength and a taboo suicide bombing: "Then said Samson, Let me die with the Philistines! and pushed with all his might" (*Judg.* 16:29).

Ultimately, Samson's victory was only a partial one. It was not until the reign of David, hundreds of years after Samson's death, that the Philistines, who had invaded Canaan by sea several decades after the Israelite arrival, were finally cleared from the land leaving only their name for posterity. Not only that, but Samson's moral legacy is mixed at best. Despite his great strength and achievements in battle, his overriding characteristics are lust, treason against his sworn principles, failure to lead, and success only in inflicting numerous deaths without achieving national salvation. Although later lessons have attempted to place Samson in a line of leaders who "through faith conquered kingdoms, administered justice" (*Heb.* 11:33), the text of *Judges* presents the Israelite nation during Samson's time as being in a process of political and spiritual decay. From Othniel's simple victory over darkness, to Deborah's complex turning of both military and thematic tides, to Samson's corrupt and partial victory, things had gone from bad to worse. After Samson, it will take no time at all for civil war to break out among the tribes, for one of them to be all but annihilated, and for a cry for a unifying monarchy to arise. There is still a monotheistic covenant league when Samson's demise leads to the final *Judges* stories, but it has badly deteriorated.

The same can be said of the United Nations in the twenty-first century. Israel's noncooperation with a legal investigation appointed by the UNHRC cannot be read adversely; rather, it represented an attempt to ignore a spent force. The Goldstone Report ends with a call to "involve Israeli and Palestinian civil society in devising sustainable peace agreements based on respect for international law."³² However, it is clear from the drafting of the report; the special rapporteurs and resolutions that came before it; and the alternate viewpoints, judgments, and resolutions that follow on its heels that the law of nations itself has badly decayed.

From an institutional setting that once could take charge of repromising the land

³² U.N. Human Rights Council, "Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict," U.N. Doc. A/HRC/12/48 (15 September 2009), par. 1774.

when the British Mandate for it ended, U.N. resolutions and reports have been rent with divisive contradiction. The legal discourse has seen a parallel shift from the original concoction of objective norms from subjective action to an entirely self-serving process of rule creation. Thus, Israel's troop and settler withdrawal from Gaza was commended as compliance with the law by Secretary-General Kofi Annan in September 2005,³³ and condemned in 2009 by the Goldstone Report as an inconsequential "so-called disengagement."³⁴

U.N. instruments, it turns out, are now composed of the very raw politics that law is supposed to rise above. Justice Goldstone and his colleagues may not have intended to have done "evil in the eyes of God and served Baal" (*Judg.* 2:11), but they certainly fell short of their articulated desire for "an independent and impartial analysis of ... international human rights and humanitarian law."³⁵ As the dust settles on the multiple resolutions issuing out of the Goldstone Report, there is still a United Nations, but it is in a state of deterioration. One day it will be written that the world body, as a society of judges, entered a time of decay some six and a half decades after its institutional birth. In those days, as the *Book of Judges* relates, there was no sovereign principle, and "everyone did what was right in his own eyes" (*Judg.* 21:25).

³³ "Statement by Secretary-General on the Israeli Withdrawal from the Gaza Strip," Office of the Spokesperson of the Secretary-General of the United Nations, 12 September 2005, available at www.un.org/apps/sg/sgstats.asp?nid=1665.

³⁴ U.N. General Assembly, "Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict," 2009 (Goldstone Report), par. 193, available at www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/FactFindingMission.htm.

³⁵ *Id.* at par. 17.

GOLDSTONE'S GAZA REPORT: A FAILURE OF INTELLIGENCE¹

Richard Landes

*Introduction*²

In response to the Israeli attack on Gaza, Operation Cast Lead (December 27-January 18, 2009), several major NGOs and public figures called for an investigation. On April 3, 2009, the U.N. Human Rights Council (UNHRC) appointed a “Fact-Finding Mission.” The mission was made up of four members, including Hina Jilani, Desmond Travers, Christine Chinkin, and at its head, Richard Goldstone, former member of the South African Supreme Court and distinguished international jurist. On the basis of the animus of the founding organization (UNHRC) and the pervasive bias of the members of the team, Israel refused to cooperate with what some observers called “a kangaroo court.”³ In May 2009, the mission met in Geneva. It later made two visits to Gaza (from June 1-5, 2009 and June 26-July 1, 2009), held further hearings in Geneva (in early July 2009), and eventually presented its findings to the UNHRC (first draft, 575 pages, September 15, 2009; final draft, 430 pages, September 29, 2009).

The report found both Israel and unspecified “Palestinian armed forces” guilty of

¹ Originally published in the *MERIA Journal*, December 2009.

² Much of the material cited in this paper is available at the Understanding the Goldstone Report (UtGR) website, <http://www.goldstone.org>. Many thanks to all the participants at that site (<http://www.goldstonereport.org/about-us>) for their help, inspiration, and hard work on this massive project. It is not sufficient to read the report carefully, but also to know the history of coverage of the incidents it depicts. The members of the site are rare cases of such thorough knowledge. As a methodological point, it should be noted at the start of this essay that the works of such watchdog groups as NGO Monitor and CAMERA are cited. Their work is often dismissed in some circles as “partisan.” This author’s experience with their work is that they are careful both to reason and cite sources scrupulously. For those readers who might be tempted to dismiss not only their work, but this author’s as well, they are urged to read these references carefully and check their sources, rather than rely on a dismissal that is at least as partisan as that with which it charges others. When compared to many of the reports Goldstone uses (e.g., below, n. 42), this author would argue that these sources are significantly more accurate.

³ Irwin Cotler, “The Goldstone Mission: Tainted to the Core,” Part I, <http://www.jpost.com/servlet/Satellite?cid=1249418620191&pagename=JPArticle%2FShowFull>, and Part II, <http://www.jpost.com/servlet/Satellite?cid=1249418640232&pagename=JPArticle%2FShowFull> [Reprinted in this volume 23–29]; Alan Dershowitz, “Double Standard Watch: The U.N. Kangaroo ‘Investigation’ of Israeli ‘War Crimes,’” *Jerusalem Post*, July 2, 2009, http://cgis.jpost.com/Blogs/dershowitz/entry/the_un_kangaroo_investigation_of.

“war crimes” and “possibly crimes against humanity.” It focused primarily on Israel, concluding that Israel had deliberately targeted civilians and sought to destroy the viable infrastructure of Gazan life, providing numerous detailed and specific cases of these crimes. The Goldstone Report constitutes the most high-level, extensive international indictment of Israel to date, and may play a significant role in the attempt to pursue Israel before various international judicial venues such as the International Criminal Court in the Hague.

The report met with instantaneous hostility from Israeli sources, even those normally quite critical of Israel Defense Force (IDF) behavior⁴ and with almost instantaneous approval from Palestinian sources, including Hamas.⁵ It then became the focus of both U.N. and diplomatic struggles that involved the larger dynamics of peacemaking in the Middle East.⁶ Goldstone has given numerous media interviews (Amanpour, Zakaria, al-Jazeera, *Tikkun*, and Moyers),⁷ engaged in one quasi-debate (with Dore Gold at Brandeis University),⁸ and visibly ducked another (with Alan Dershowitz at Fordham University, where Goldstone is a visiting professor).⁹ On the one hand, critics have laid to bare the extensive flaws and emphasized the unintended negative consequences,¹⁰ while on the other, supporters have hailed it as a major victory in the campaign to delegitimize the State of Israel in the world of public opinion and as a major source of diplomatic leverage.¹¹ “The Goldstone Report,” noted one pro-Palestinian writer, “represents the highest and most prestigious leverage of the Palestinian initiative throughout their 60 years of oppression...”¹²

There is perhaps no subject that embodies and sheds light on so many of the issues

⁴ Most notably both David Landau (*Haaretz*), http://www.nytimes.com/2009/09/20/opinion/20landau.html?_r=1&emc=tnt&tntemail1=y, and Jessica Montell (B’Tselem), <http://www.jpost.com/servlet/Satellite?cid=1254163545977&pagename=JPost/JPArticle/ShowFull>.

⁵ Hamas initially rejected the report’s criticism of its own actions, but rapidly changed its tune. “Hamas Welcomes Vote in Favor of Goldstone Report,” *Earth Times*, October 16, 2009, www.earthtimes.org/articles/show/290546.hamas-welcomes-vote-in-favor-of-goldstone-report.html.

⁶ See “U.N. Politics,” UtGR, <http://www.goldstonereport.org/un-politics>.

⁷ See “Interviews,” UtGR, <http://www.goldstonereport.org/interviews>.

⁸ Richard Goldstone – Dore Gold “Debate,” <http://www.goldstonereport.org/goldstone-debates/388-richard-goldstone-dore-gold-brandeis-qdebateq>.

⁹ “Alan Dershowitz Challenging the Goldstone Report,” <http://israelactivism.com/video/>.

¹⁰ “Critics,” UtGR, <http://www.goldstonereport.org/pro-and-con/critics>.

¹¹ “Defenders,” UtGR, <http://www.goldstonereport.org/pro-and-con/defenders>.

¹² Daniel Corder, “The Sun-Tzu of Palestinian Resistance,” *Salem News*, November 20, 2009, http://www.salem-news.com/articles/november202009/israel_dc.php.

that torment the early twenty-first century, more than the Goldstone Report and its controversies. The report's many and complex facets detail the dysfunctions of global public discourse, from the themes it explicitly addresses (universal human rights, international law of war, terrorism, asymmetrical warfare, the Arab-Israeli conflict), to its framework (politics of the U.N. Human Rights Council, reporting of the mainstream news media, the role of NGO research), to the dynamics of its reception in public discourse (critique, Israeli and Palestinian ambivalences, Western and U.N. politics, and Goldstone's public appearances). Indeed, a close analysis of the report's method and conclusions raises some of the fundamental cognitive issues of our time: religious and cultural discontinuities, scapegoating, cognitive egocentrism, post-modern epistemology, jihadi mentalities, antisemitism, and Jewish self-criticism. Anyone who understands the Goldstone Report and its devastating ironies of content and impact gains a basic insight into how and why the very nations that have inaugurated modernity and globalization are losing a cognitive war with pre-modern forces.

Flawed Report Throughout

It is difficult to specify what is wrong with the Goldstone Report since its failures are so pervasive. This article will highlight four fundamental errors of this report, all of which compounded each other and literally inverted the understanding of its readers as to what happened during Operation Cast Lead.¹³ These include:

- 1) Failure to investigate Hamas' use of civilian shields
- 2) Credulity of Palestinian sources
- 3) Systematic attribution of malevolent intention to Israeli forces and studied agnosticism about Palestinian intentions
- 4) Exceptionally judgmental conclusions for admittedly inadequate evidence.

After going over each of these items, the article reviews some of the reasons for these pervasive failures, both in terms of the previous research on what happened during Operation Cast Lead (journalism, NGO reports) and in terms of the cognitive failures that underlie this style of reporting. This essay is not intended to question the fact that Gazans suffered from the war. What this essay does challenge is the Goldstone Report's presentation of the cause of that suffering and the diagnosis for dealing with it.

¹³ See Moshe Halbertal, "The Goldstone Illusion," *The New Republic*, November 6, 2009, <http://www.tnr.com/article/world/the-goldstone-illusion>. [Reprinted in this volume 277–290.]

Failure to Investigate Hamas (Civilian Shields, Suppression of Dissent, Provocation)

The first and most critical failure of the Goldstone Report comes from what it did not do: investigate Hamas. Despite Goldstone's insistence that he investigated both sides, where Hamas is concerned, he focused on two fairly obvious issues and ignored the most problematic and consequential. On the one hand, the report looks into the rocketing of Israeli civilians and calls that a war crime, possibly a crime against humanity, and it looks at Hamas treatment of Fatah during the conflict, which it condemns for its brutality. Yet the commission falls silent on the subject of how armed factions (including Hamas) treated their own civilians.

The significance of such an approach will become apparent throughout the discussion of the mission's procedures and rulings. Yet the failure itself deserves attention. The Israelis contended that Hamas deliberately provoked Israeli retaliation from the midst of civilian populations and that these civilians were the unfortunate hostages of a ruthless organization bent on destroying Israel at any cost, even the victimization of its own people. Lorenzo Cremonesi, the first journalist to make it independently into Gaza quotes 42-year-old Abu Issa and his cousin Um Abdallah, age 48, residents of the Tel Awa neighborhood: "The Hamas militants looked for good places to provoke the Israelis. They were usually youths, 16 or 17 years old, armed with submachine guns. They couldn't do anything against a tank or jet. They knew they were much weaker. ***But they wanted the [Israelis] to shoot at the [the civilians'] houses so they could accuse them of more war crimes*** [emphasis added]."¹⁴

More recently, Bassam Zakarneh, head of the Palestinian Authority (PA) Workers' Union, made some remarks on PA TV suggesting that knowledge of Hamas' behavior is widespread in Palestinian circles: "...Hamas leaders... used these [1,400] martyrs as sandbags, while they hid in tunnels. They would place a missile, cover it with a tent, amid buildings with 200 children and old people, and they would launch the missile and hide."¹⁵

The Israeli government published a paper enumerating with multiple notes and links the extensive ways that Hamas embedded itself in the population, used civilian sites

¹⁴ Lorenzo Cremonesi, "Cosi i ragazzini di Hamas ci hanno utilizzato come bersagli," *Il Corriere della Sera*, January 21, 2009, http://www.corriere.it/esteri/09_gennaio_21/denuncia_hamas_cremonesi_ac41c6f4-e802-11dd-833f-00144f02aabc.shtml, translation by Noa Landes, <http://www.theaugeanstables.com/2009/01/28/cremonesi-article-in-english/>.

¹⁵ Middle East Media Research Institute (MEMRI) Clip 228, November 9, 2009, http://www.memritv.org/clip_transcript/en/2288.htm.

to launch military operations, disguised themselves as civilians, used ambulances and schools, and exploited children for war purposes.¹⁶

In other words, if Hamas used human shields as a central strategy, then by ignoring this aspect of the conflict, Goldstone's mission played directly into the hands of a militia that actually targeted their own civilians.¹⁷ Far from protecting innocent Palestinian civilians then, the mission may have confirmed the tactics of those who deliberately sacrificed them for the sake of a public relations victory against their enemy, a PR victory that the mission then inscribed in law.¹⁸

Although the mission members ran across repeated hints that such activity went on,¹⁹ they did not investigate it directly and in more than a dozen passages, pointedly insisted that they found “no evidence” of such activity:²⁰

35. *The Mission found no evidence [emphasis added], however, to suggest that Palestinian armed groups either directed civilians to areas where attacks were being launched or that they forced civilians to remain within the vicinity of the attacks.*

36. *The Mission did not find any evidence [emphasis added] to support the allegations that hospital facilities were used by the Gaza authorities or by Palestinian armed groups to shield military activities or that ambulances were used to transport combatants or for other military purposes.*

¹⁶ The Operation in Gaza – Factual and Legal Aspects, July 29, 2009, http://www.mfa.gov.il/MFA/Terrorism+Obstacle+to+Peace/Terrorism+and+Islamic+Fundamentalism-/Operation_in_Gaza-Factual_and_Legal_Aspects.htm.

¹⁷ For a good summary of both the video evidence for Hamas' use of human shields and the Goldstone Report's systematic denial on the subject, see Carl in Jerusalem, “The Goldstone Commission on Human Shields,” *Israel Matsav*, September 15, 2009, <http://israelmatzav.blogspot.com/2009/09/goldstone-commission-on-human-shields.html>.

¹⁸ For the most recent example of such a case, see the case of Hamas repressing warnings about swine flu in order to assure maximum turnout at a planned rally, <http://www.palpress.ps/arabic/index.php?maa=ReadStory&ChannelID=66409>; comment with translation at Elder of Ziyon, <http://elderofziyon.blogspot.com/2009/12/hamas-tried-to-silence-swine-flu.html>. For an excellent analysis of this strategy from a military perspective, see Michael D. Snyder, “Information Strategies against a Hybrid Threat: What the Recent Experience of Israel versus Hezbollah/Hamas Tell the U.S. Army,” in Lieutenant Colonel Scott C. Farquhar (ed.), *Back to Basics: A Study of the Second Lebanon War and Operation CAST LEAD* (Fort Leavenworth, Kansas: Combat Studies Institute Press, U.S. Army Combined Arms Center, 2009), <http://carl.army.mil/download/csipubs/farquhar.pdf>, pp. 103-146.

¹⁹ ¶452. “In view of the information communicated to it and the material it was able to review, the Mission believes that there are indications that Palestinian armed groups launched rockets from urban areas.”

²⁰ The term “no evidence” (and alternatives such as “did not find any evidence”) appears 15 times in the report. In 13 cases, it refers to no evidence supporting accusations against Hamas (¶32, 35, 36, 449, 465, 469, 475, 480, 483, 487, 494, 495, 1953) and twice in the matter of evidence of Hamas investigating its own infractions of humanitarian law (¶1183, 1841). As a historian, this author notes that the expression “no evidence” is generally viewed by historians as a piece of dismissive rhetorical excess used to avoid mentioning evidence. There is almost never “no evidence” for most significant phenomena.

The use of the expressions “no evidence” and “not any evidence” is curious here. As will be shown, there is extensive evidence for such actions, which even the report itself offers the attentive reader. What the report really means here is that they did not hear any testimony to the effect that Hamas acted in this fashion. Of course, as any lawyer could explain, there are two possible reasons for a lack of testimony:

- a) there is nothing to talk about;
- b) the witnesses are intimidated.

Notes Cremonesi significantly: “It was difficult to get these testimonials. In general, fear of Hamas prevails and ideological taboos, fed by this century of wars with the Zionist enemy, reign. Anyone who tells a different version than the story imposed by the Muhamawa (resistance), is automatically an Amil (collaborator), and risks his life.”²¹

The mission itself acknowledged this problem (see below), but it repeatedly ignored its significance. Just before concluding that there was no evidence that Hamas behaved in the fashion described above, the mission noted: “The Mission was faced with a certain reluctance by the persons it interviewed in Gaza to discuss the activities of the armed groups.” Such an observation, however, had no impact on their analysis or their concluding denial on the subject of evidence.

On the contrary, the mission seemed to go out of its way to avoid considering evidence, most egregiously in two particular cases the one, of Hamas’ Fathi Hamad extolling Palestinian uses of human shields, and the other, of Richard Kemp extolling Israel’s concerns for protecting Palestinian civilians despite Hamas’ embedding themselves among them.

One of the videos that several memoranda cited, and the mission apparently did not feel it could ignore, concerned a startling speech by Hamas MP Fathi Hamad broadcast on al-Aqsa TV:

*[The enemies of Allah] do not know that the Palestinian people have developed its [methods] of death and death-seeking.... For the Palestinian people, death has become an industry, at which women excel, and so do all the people living on this land. The elderly excel at this, and so do the mujahidin and the children. This is why they have formed human shields of the women, the children, the elderly, and the mujahidin, in order to challenge the Zionist bombing machine. It is as if they were saying to the Zionist enemy: “We desire death like you desire life.”*²²

²¹ Cremonesi, “Così i ragazzini di Hamas.”

²² View video at: <http://www.youtube.com/watch?v=g0wJXf2nt4Y>.

The report, however, after expressing disapproval of these “repugnant” sentiments, dismissed the speech as evidence because it occurred (shortly) before Operation Cast Lead, and therefore it did not consider it to “constitute evidence that Hamas forced Palestinian civilians to shield military objectives against attack” (478). Strictly speaking, this is true, but certainly there is enough evidence of a deliberate public attitude – this Hamas official is bragging about turning children into human shields – to indicate the value of a serious investigation of the issue. An article in *Palestine Today*, the Islamic Jihad’s publication, boasted about the use of civilians as shields and the fact that high civilian deaths reduced the number of soldiers killed:

There is no visibility of the men of the resistance in the streets of the [Gaza] strip. No one sees their known means of transportation, and even light weapons can no longer be seen with people publicly in the Gaza Strip. The resistance is totally even as its actions are felt. Anti-aircraft artillery fires on the aircraft without them knowing the location. The whereabouts of rockets launched from the heart of the strip cannot be seen or known until they’re shot.... The residents of the Gaza Strip were surprised with the rockets of the resistance being fired from the heart of the cities of the Gaza Strip, without seeing how the launchers were put up, or their place, in order for deception to prevent exposure to the Israeli intelligence planes of the place of the firing of the rockets.... According to medical sources, the number of martyrs and wounded of the warriors of the Palestinian resistance are few in comparison to the number of civilian martyrs who were killed since the start of the Israeli war on Gaza, except for the large number of Palestinian policemen who were martyred on the first day....²³

The significance of the mission’s avoidance of this issue, of course, becomes particularly acute when it is a question of judging whether or not Israel targeted civilians. If Hamas fired from their midst, if they tried to draw Israeli fire to kill their own civilians in order to accuse them of war crimes, then the mission is in a double bind:

- a) How can they judge Israeli actions without knowing what IDF soldiers were aiming at when they fired their weapons?
- b) How can they avoid becoming the dupes of this strategy of waging war intended to maximize one’s civilian casualties for the public relations victory?

According to one military observer, a British colonel with extensive command experience in Iraq and Afghanistan, this picture of Israelis targeting civilians actually

²³ “‘Camouflage Hat’ Tactics of Resistance to Gaza to Mislead the Occupation Army and Its Collaborators on the Ground,” *Palestine Today*, <http://www.paltoday.com/arabic/News-33008.html&tbb=1&usg=ALkJrhikBicq9NmZArZHadplJEQDd3u11A>, translation by Shammai Fishman. The title’s reference to the “camouflage hat” is a strategy to mislead both the Israelis and their Palestinian collaborators; hence they endanger their people to fool those who might inform the Israelis of their location.

inverted the empirical situation. Comparing Israel to all other militaries including that of his own country, Richard Kemp stated:

The truth is that the IDF took extraordinary measures to give Gaza civilians notice of targeted areas, dropping over 2 million leaflets, and making over 100,000 phone calls. Many missions that could have taken out Hamas military capability were aborted to prevent civilian casualties. During the conflict, the IDF allowed huge amounts of humanitarian aid into Gaza. To deliver aid virtually into your enemy's hands is, to the military tactician, normally quite unthinkable. But the IDF took on those risks.²⁴

One might expect an even-handed mission to hear out Colonel Kemp's reasoning and explore with him the data based upon which he made these remarks, especially for the sake of gaining some comparative perspective on other armies that attempt to fight by the laws of war established by the Geneva Conventions. Yet the mission turned down Colonel Kemp's offer to testify before it, and Goldstone explained:

There was no reliance on Col. Kemp mainly because the Report did not deal with the issues he raised regarding the problems of conducting military operations in civilian areas and second-guessing decisions made by soldiers and their commanding officers in the fog of war. The Mission avoided having to do so in the incidents it decided to investigate.²⁵

Indeed, the mission did not consult any military experts on these issues.²⁶ One begins to understand why the mission found "no evidence."

The problematic significance of the Goldstone Mission's non-treatment of Palestinian combatants using human shields becomes even greater in the failure of the mission to investigate or even inform itself on the topic of Palestinian incitement to hatred and violence. From the point of view of basic progressive principles of "human rights" and respect for human life, the values that specifically drive both the NGOs and Goldstone and his mission, nothing offers more damning evidence of Hamas' culpability in this conflict than the steady stream of genocidal hate-mongering that issues daily from Palestinian, and more specifically, Hamas sources.²⁷ Indeed, the

²⁴ View video at: <http://www.unwatch.org/site/apps/nlnet/content2.aspx?c=bdKKISNqEmG&b=1313923&ct=7536409>.

²⁵ Personal email from Richard Goldstone to Maurice Ostroff, posted with permission of author, <http://maurice-ostroff.tripod.com/id233.html>.

²⁶ See discussion in David Matas, "The Goldstone Report: Stone or Gold?," http://www.goldstonereport.org/pro-and-con/critics/495-david-matas-the-goldstone-report-stone-or-gold_#9.

²⁷ Palestinian Media Watch, <http://www.palwatch.org/main.aspx?fi=113> and Middle East Media Research Institute (MEMRI), <http://www.memri.org/subject/en/51.htm>.

unrelenting virulence of this discourse goes far to explain the death cult of which Fathi Hamad and so many other officials and imams (clerics) speak – the combination of constant violence against Israel and the eagerness to sacrifice Palestinian lives in the service of the cause. Moreover, the mission was warned about this issue repeatedly in memoranda emphasizing and documenting the phenomenon.²⁸

As a motor to violence, this kind of discourse represents *prima facie* evidence of incitement to war crimes, and given Goldstone's previous experience with real genocide in Rwanda and Bosnia, ignoring such evidence seems inexplicable.²⁹ Indeed, this constitutes brainwashing a captive audience of children through television shows, radio, schools, posters, and sermons toward the commission of violence and murder. However, not only did the Goldstone Report not investigate the issue, they never even addressed the phenomenon, and as will be shown below, allowed a Palestinian psychologist to project the crime onto the Israelis.

Credulity of Palestinian Sources

Defenders of the report would dismiss these critical observations by claiming that they simply tried to change the subject from the substance of the report, which – in Goldstone's own words – focused on 36 incidents chosen "...because they seemed to be, to represent the most serious, the highest death toll, the highest injury toll. And they appear to represent situations where there was little or no military justification for what happened."³⁰

Aside from the fact that these 36 incidents do not represent even a remotely balanced investigation of Israeli and Hamas "war crimes," they also constitute a case of prejudice that reinforces the problems raised above in terms of the mission ignoring Hamas' behavior.³¹ The whole idea that an incident shows "little or no military justification" for an Israeli attack depends in large part on an assumption that in these cases Hamas

²⁸ Richter and Ostroff memoranda, <http://www.goldstonereport.org/procedural-flaws/concealed-evidence>.

²⁹ On Goldstone's previous experience with the role of incitement to genocide, see Madeline H. Morris, "The Case of Rwanda," http://www.unc.edu/depts/diplomat/AD_Issues/amdipl_6/morris.html#context and Elihu Richter, "Goldstone, Rwanda, Hamas, Iran and Incitement to Genocide," *Jerusalem Post*, September 29, 2009, http://cgis.jpost.com/Blogs/guest/entry/right_of_reply_goldstone_rwanda.

³⁰ Interview with Bill Moyers, October 23, 2009 [transcript], http://www.kibush.co.il/show_file.asp?num=36316; view interview at: <http://www.goldstonereport.org/interviews/397-bill-moyers-interviews-goldstone-october-25-2009>.

³¹ The Chatham House Report, http://www.chathamhouse.org.uk/files/15572_il271109summary.pdf, had "no problem" with the choice of incidents since the mission "presumably selected those incidents which were the most well-documented, where it would not have to rely on witnesses who would be unwilling to speak freely." [Reprinted in this volume 89–98.]

is not embedded in a civilian population that has been hit. Notably, the mission members did not even ask witnesses if Hamas members were present, which in a number of cases was verifiable from external sources.³²

However, even if one were to focus only on the 36 incidents, the mission's approach to acquiring testimony about them undermines the core of its credibility. If indeed, as the mission documented in the case of Hamas' treatment of Fatah, Hamas used ruthless and brutal means of intimidation including ready recourse to beatings, knee-capping, and summary execution – in some cases, thrown hands tied behind their back from roof-tops – then the question of whether the public had been intimidated becomes central. It is one thing for Hamas to announce to the press that Palestinians love death and support their glorious leaders no matter what the personal cost; it is quite another to believe such claims are true without checking to see whether they are slogans reinforced with repression. Hamas may claim that Gaza's wounded "rejected an Egyptian offer to receive medical treatment in Cairo in protest against Cairo's 'support' for the IDF operation," but it is not clear that wounded Gazans felt the same way.³³ Yet Goldstone did not investigate the incident.

What should be clear to any astute observer, and certainly to someone who himself has investigated the workings of systematic intimidation by ruthless rulers,³⁴ is the difficulty for "ordinary Gazans" to voice any criticism of Hamas, indeed even to voice their fear of Hamas. One would expect a fact-finding mission to explore with subtlety this issue and seek ways to encourage "frank" testimony. Moreover, the Goldstone Report itself alludes to some problems in this sense: "The Mission was faced with a certain reluctance by the persons it interviewed in Gaza to discuss the activities of the armed groups..."³⁵

One would therefore expect Goldstone's mission to keep Hamas at arm's length, especially when hearing testimony. In an interview with the Palestinian *Ma'an News*

³² Jonathan Dahoah Halevi, "Blocking the Truth in Gaza," Jerusalem Center for Public Affairs, September 18, 2009, <http://www.jcpa.org/JCPA/Templates/ShowPage.asp?DBID=1&LNGID=1&TMID=111&FID=253&PID=0&IID=3086>.

³³ Richard Landes, "Revealing Silence at the Egyptian Border," *PajamasMedia*, January 3, 2009, <http://pajamasmedia.com/blog/revealing-silence-at-the-gaza-egypt-border/> (for the same article with embedded videos, see <http://www.theaugeanstables.com/2009/01/03/revealing-silence-at-the-egyptian-border-why-does-hamas-victimize-its-own/>). For a more recent case, Hamas has blocked dozens of Gazans from coming to Israel for treatment, <http://translate.google.com/translate?hl=en&ie=windows-1256&langpair=auto%7Cen&u=http://www.palpress.ps/arabic/index.php%3Fmaa%3DReadStory%26ChannelID%3D66408&tbb=1&url=translate.google.com>.

³⁴ Richard Goldstone, *For Humanity: Reflections of a War Crimes Investigator* (New Haven, CT: Yale University Press, 2000), chapter 3.

³⁵ The Goldstone Report, ¶35. See also ¶148.

Agency, Goldstone firmly rejected the implication that Hamas had intimidated his witnesses:

You know, this allegation keeps being made... It is absolutely without any truth at all... Hamas didn't follow us at all, [much less] at every stage [of the visit]. They were nowhere near any of the interviews we held, and there was just no question; there was no issue... Had they attempted in any way to do that, I would have found that objectionable and I would not have accepted it – but it just didn't happen.

Yet what makes Goldstone think that he knew who among those in attendance were Hamas or Hamas informers; what makes him think that his witnesses were as unfamiliar with the people in his courtroom as he? Indeed, the report noted that some tried to warn them about just this: “The contents seemed to imply that the originators of these anonymous calls and messages regarded those who cooperated with the Mission as potentially associated with armed groups (148).” This means that people were warning the mission members that the people who were working with them came from Hamas and the other martyrdom-cult militias.

Yet even if one were to grant the highly unlikely prospect that Hamas was not present, Goldstone video-broadcast the testimony,³⁶ essentially giving Hamas full access. Any witness foolish enough to testify against them would know the risks involved. This would explain the furtive, anonymous phone calls the mission received from people fearing retribution for even contacting them.³⁷ It is thus surprising that the mission heard any criticism at all.

Yet there is a second and even more sinister element to this problem that relates directly to the issue of demonization raised above. Both in terms of what it permits and what it considers believable, the official culture in the Palestinian territories (and beyond, in the Arab and Muslim world) affirms any vicious narrative about Israel as true. This is an old and long, repeatedly documentable story and should have raised concerns among the “fact-finders” about the credibility of Palestinian witnesses. In cases where these witnesses described particularly heinous and gratuitous Israeli assaults on Palestinian civilians, such as the case of Abd Rabbo’s daughters, these concerns should be paramount: Did Hamas use the family farm to fire rockets at

³⁶ The testimony is available for viewing at the UNHRC site, <http://www.un.org/webcast/unhrc/archive.asp?go=041>.

³⁷ ¶148. “The Mission is also concerned about anonymous calls and messages received on private phone numbers and e-mail addresses by some of those who provided information to it or assisted in its work in the Gaza Strip. The contents seemed to imply that the originators of these anonymous calls and messages regarded those who cooperated with the Mission as potentially associated with armed groups. One of the recipients conveyed to the Mission apprehensions about personal safety and a feeling of intimidation. The Mission also wishes to record that there are others who have declined to appear before it or to provide information or, having cooperated with the Mission, have asked that their names should not be disclosed, for fear of reprisal.”

Israel? Were the children killed in an air strike as originally reported, or in cold blood, as later claimed? In other words, were these children victims of Hamas deliberately drawing fire against its own people or victims of Israeli malevolence? These are legitimate questions, and considerable evidence supports the former narrative.³⁸

This tradition of lethal narratives (inflating Israel's evil deeds for the sake of arousing hatred) constitutes a major trope in Palestinian discourse. In 1998, the British Broadcasting Corporation (BBC) documented the case of Arab leaders claiming rapes at Deir Yassin³⁹ as part of a media war against Israel, when those Arabs who were there made no such claims.⁴⁰ With increasing success from 1982 onward, Palestinian leaders systematically engaged in campaigns of disinformation about Israel that had the double role of inciting violent hatred of Israel among their own people, and moral indignation among Westerners.⁴¹ By the time of the first intifada, the techniques evolved into actual staging of fictional events for the cameras, designed to depict the Palestinian David bravely standing up to the Israeli Goliath. Behind the scenes, Palestinians killed almost as many of their own as did the Israeli enemy.⁴² By the second intifada, the techniques had developed into a movie industry, referred to as "Pallywood," with identifiable sets, directors, and primitive screen-plays.⁴³

This has become so much a part of Palestinian identity – the victims who have a right to their hatreds – and by far their most successful arena in their conflict with Israel that reporting lethal narratives about Israel is something of a political industry, and the heroes, sometimes tragically chosen by Palestinian "work accidents," like Houda

³⁸ See UtGR, "Abd Rabbo," <http://www.goldstonereport.org/case-study/abd-rabbo>.

³⁹ Deir Yassin was the most controversial encounter in the 1948 War of Independence/Nakba, often cited by opponents of Zionism as a terrible massacre, in which Israeli irregular troops (Etzel and Lehi) took a small village on the Western edge of Jerusalem (today Har Nof), and killed some 125 people including civilians. See Benny Morris, *1948*. (New Haven: Yale University Press, 2008), pp. 125-28.

⁴⁰ "Israel and the Arabs: The 50 Year Conflict," BBC, 1998 (key clip, <http://www.youtube.com/watch?v=72AtahY9WQ>). In this case, the attempt at cognitive warfare failed: It triggered mass flights of frightened Arabs.

⁴¹ See, for example, the case of the "poisoning" of Jenin schoolgirls in 1983, Raphael Israeli, *Poison: Modern Manifestions of a Blood Libel* (Lanham, MA: Lexington Books, 2002). For an important analysis of the role of deception in Islamic warfare, see Raymond Ibrahim, "How Taqiyya Alters Islam's Rules of War," *Middle East Quarterly* (Winter 2010), <http://www.meforum.org/2538/taqiyya-islam-rules-of-war>.

⁴² Palestinian Human Rights Monitor (PHRMG), "Collaborators': New Impetus for an Old Witch Hunt," *The Palestinian Human Rights Monitor*, Vol. 5, No. 3 (July 2001), <http://www.phrmg.org/monitor2002/feb2002-9.htm>.

⁴³ Second Draft has both unedited raw footage from Palestinian cameramen working for major Western news agencies, http://www.seconddraft.org/index.php?option=com_content&view=article&id=58&Itemid=248, (including the raw footage of Talal Abu Rahmah, http://www.seconddraft.org/index.php?option=com_content&view=article&id=452&Itemid=251) and a selection of edited material highlighting the evidence for pervasive staging, http://www.seconddraft.org/index.php?option=com_content&view=category&layout=blog&id=55&Itemid=189.

Ghalia, become brief celebrities.⁴⁴ One of many anecdotes from Operation Cast Lead illustrates the manner in which this operates on a daily basis:

*The family suddenly notices the cameras, and immediately, the expression on their faces changes. “We have no food,” they say in Arabic, as one of the youngsters suggests we interview him in English about their plight... [IDF Officer] Perry points to a stack of canned goods, water bottles and other provisions. “We provided some of that and they cook and eat quite well,” he said. The Palestinians seem to understand him and one of them smiles. It’s a war– they had to try.*⁴⁵

Imagine if when hearing the testimony about the soldiers killing his daughters in cold blood, Abd Rabbo had been confronted with the reports that they were killed by Israeli shells in response to Hamas fire from his compound? Would he too have backed off his story? Instead, Goldstone and his Mission colleagues “rarely if ever wonder[ed] whether Gazans regarded representations to the mission as acts of resistance.”⁴⁶

The default mode of Palestinian witnesses is complaint against Israel – violent, malevolent, demonic Israel. For anyone familiar with the evidence, there is only a tenuous relationship between this Palestinian victim narrative and the actual behavior of Israelis; and achieving a more accurate sense of the reliability of statements made by Palestinians about Israelis represents one of the major steps needed to find out what is really happening.

In order to assess the reliability of Palestinian narratives, one has to begin with what pressures operate in the sphere of public discourse. If, in Palestinian circles, telling lethal narratives about Israel – regardless of whether they happened that way or even occurred – gains the favor of the public, especially Hamas, whereas telling the truth about Hamas runs severe risks, then any astute observer should anticipate data skewed heavily toward the former. In taking this data as a roughly accurate representation of what happened, Goldstone and his colleagues affirmed the forces at work. Therefore, rather than offer Gazans an opportunity to speak freely, the mission reinforced the classic scapegoating bind with which Hamas holds Gazans in its talons: they dare

⁴⁴ On the Gaza Beach tragedy, in which most of the Ghalia family was killed by an explosive, but the immediate accusation that it was an Israeli shell does not hold up, see the Second Draft Investigation, http://www.seconddraft.org/index.php?option=com_content&view=article&id=421&Itemid=174, and the most recent revelations that the father was handling ordnance that blew up in his face, Amir Oren, “Not Really a War,” *Haaretz*, May 5, 2009, <http://www.haaretz.com/hasen/spages/1052622.html>.

⁴⁵ Ron Ben-Yishai, “A Day with Our Troops in Gaza,” *Ynet*, January 9, 2009, <http://www.ynetnews.com/articles/0,7340,L-3653238,00.html>.

⁴⁶ Peter Berkowitz, “Goldstone’s Failure to Give Due Attention to Military Necessity,” *Jerusalem Post*, January 10, 2010, http://cgis.jpost.com/Blogs/rosner/entry/goldstone_s_failure_to_give.

not criticize their own powerful elites who victimize them, but can, with the hearty approval of those elites, accuse another party.

This, of course, does not mean that the Israelis did not cause damage, even extensive damage to Gaza, and kill hundreds of civilians, including women and children. It does, however, mean that the evidence collected under these circumstances offers little to no real insight into how or why this happened; indeed this testimony may well be misleading precisely on key issues concerning context and motivation. In particular, it means that each of the major incidents – Abd Rabbo, Samouni Street, al-Fakhoura U.N. School, and al-Maqadmah Mosque – are all, at best, dubious as told.⁴⁷

Yet repeatedly and indeed without exception, the Goldstone Report finds Palestinian testimony credible. One of the standard tropes of the report states: “The Mission found [x, y, z] to be credible and reliable witnesses. It has no reason to doubt the veracity of the main elements of their testimony.”

In no instance does the report even question, much less reject Palestinian testimony. “Credible” and “credibility” appear over 50 times in the document, consistently in favor of Palestinian testimony and in disfavor of Israeli.⁴⁸ In some cases, as with the Maqadmah Mosque, the report dismisses Israeli evidence outright: “...taking into account the credible and reliable accounts the Mission heard from multiple [Palestinian] witnesses... strengthened in the face of the unsatisfactory and demonstrably false position of the Israeli Government.”⁴⁹

Note that this comment does not come after a serious discussion of the Israeli response in terms of reconstructing what had happened.⁵⁰ More broadly, the mission found – as with so many other cases they “investigated” of Hamas using civilians as shields – that there was “no evidence.” In a later interview, Colonel Travers revealed the politically correct cognitive egocentrism that lay behind such a finding: “Those

⁴⁷ See each of these incidents discussed with further literature at “Case Studies,” UtGR, <http://www.goldstonereport.org/case-study>.

⁴⁸ ¶467, 503, 551, 622, 645, 683, 723, 741, 752, 762, 768, 777, 798, 838, 922, 925, 1011, 1032, 1090, 1164, 1234, 1354, 1366, 1378.

⁴⁹ ¶838f; see also: 595, 675, 831, 866.

⁵⁰ This is the Maqadmah Mosque case (<http://www.goldstonereport.org/case-study/al-maqadmah-mosque>), which Goldstone gave such prominence to in his presentation at Brandeis. For an excellent example of the kinds of questions left unanswered by the mission on this topic, see the section in Ricki Hollander’s (unanswered) “Open Letter to Goldstone,” <http://www.goldstonereport.org/case-study/al-maqadmah-mosque/444-excerpt-from-open-letter-to-justice-goldstone-from-camera-on-al-maqadmah-mosque>.

charges reflect Western perceptions in some quarters that Islam is a violent religion... If I were a Hamas operative the last place I'd store munitions would be in a mosque."⁵¹

Indeed, the mission not only gave them the benefit of every doubt, but they eagerly adopted their most improbable exaggerations as "facts." For example, Amr Hamad gave testimony before the mission as follows: "The industrial sector that was destroyed, for example, the 324 factories that were destroyed, that we[re] destroyed used to employ four-hundred thous-, uh, 40,000 workers. And these have lost their uh, jobs, uh, forever."⁵² The report upon which this testimony was based (both of which the mission found "reliable and credible"), reads: "The 324 factories surveyed employed about 4000 workers just before the war."⁵³ The Goldstone Report's careful findings state: "Mr. Amr Hamad indicated that 324 factories had been destroyed during the Israeli military operations at a cost of 40,000 jobs." This incident embodies the sloppiness of the mission's research, despite its claims to the contrary,⁵⁴ and its willingness to believe all Palestinian witness reports.

From the perspective of someone reading a "draft of history," this "privileged" attitude towards Palestinian testimony – by default true – constitutes an unacceptable level of credulity. The reports epistemological pattern comes down to: "Palestinians don't lie; Israelis often do, except for those testifying against the IDF."⁵⁵ In a strikingly revealing remark, one of the mission members, Hina Jilani, apparently without any sense that such an attitude called her professional credentials as a judge into question, explained the underlying approach that produced this remarkable pattern of credulity: "I think

⁵¹ Ken Silverstein, "Six Questions for Desmond Travers," *Harpers*, October 29, 2009, <http://harpers.org/archive/2009/10/hbc-90006003>. Hamas considered the mosque a "factory educating Jihad fighters." See Hamas: Itamar Marcus and Barbara Crook, "The Mosque Is a 'Factory Educating Jihad Fighters'—Even the Muslim Fetus Seeks Jihad," May 5, 2009, http://www.pmw.org.il/Bulletins_May2009.htm#b050509. On cognitive egocentrism and its contribution to misunderstanding the conflict, see Richard Landes, "Cognitive Egocentrism," *Augean Stables*, <http://www.theaugeanstables.com/reflections-from-second-draft/cognitive-egocentrism/>.

⁵² "Public hearings: Gaza City, Morning Session of 28 June 2009," <http://3.ly/OcZ>. See also Martin Kramer's analysis, "Between Goldstone and Gaza, What's One More Zero," December 10, 2009, http://sandbox.blog-city.com/between_goldstone_and_gaza_whats_one_more_zero.htm.

⁵³ "The Need for a Post-War Development Strategy in the Gaza Strip," Palestinian Federation of Industries, March 2009, <http://www.pssc.ps/down/Gaza%20Industry%20Reconstruction%20and%20Development%20Report.pdf>, p. 13.

⁵⁴ Cf. ¶24: "The Mission's final conclusions on the reliability of the information received were based on... verifying the sources and the methodology used in the reports and documents produced by others, cross-referencing the relevant material..."

⁵⁵ See the extensive discussion of this problem in the Israeli Government's Response to the Report, <http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Hamas+war+against+Israel/Initial-response-goldstone-report-24-Sep-2009.htm>, Section 19.

it'd be very cruel to not give credence to their voices."⁵⁶ No wonder no one on the mission expressed any skepticism: who wants to be considered "very cruel"?

This "merciful credulity" seems to constitute a kind of "therapeutic" approach to the hearings – their mission was to give victims the opportunity to "bear witness" to their suffering. This may also explain why, even though it defeated the purposes of obtaining frank testimony, Goldstone chose to have the hearings broadcast. The report itself explains the public airing in its proceedings as an effort "to speak directly to as many people as possible in the region as well as in the international community" (166). Were the organizers, especially Goldstone, thinking more in terms of "truth and reconciliation" hearings rather than fact-finding?⁵⁷ The mission's faith in this "therapeutic" model – show mercy and let the healing begin – trumps any concern they may have had about Hamas intimidating its witnesses.⁵⁸

Such an approach means, *a priori* that that the side defined by the observer as "the victim" is by definition telling the truth. It excludes the possibility that in accusing the Israelis unjustly, Palestinian witnesses compounded the crime committed against themselves by their own people, that in accusing the Israelis for their suffering, they reinforced Hamas control over them. The members of the mission apparently never imagined that, in at least some of the cases they considered, by being merciful to cruel accusers, they might be cruel to merciful soldiers.⁵⁹

Patterns of Judgment

As might be expected from this attitude toward the testimony they heard, the report ruled consistently against the Israeli army. While this may not be surprising in the context of its political agenda, it is surprising from the point of view of its mission: fact-finding. As Alan Dershowitz pointed out, had the report restricted itself to

⁵⁶ Haroon Saddiqi, "Looking for Accountability in the Gaza War," *The Star*, October 15, 2009, <http://www.thestar.com/comment/article/710335>.

⁵⁷ In an interview with Christiane Amanpour, Goldstone dismisses Israeli investigations because they are closed: "that's hardly the sort of inquiry that's going to satisfy victims." See <http://www.goldstonereport.org/video/265-amanpourgoldstone>.

⁵⁸ The "experts" at Chatham House did not deny the negative effects such a "spin-off" might have on hearing reliable testimony; instead they dismissed the importance of the testimony, since "most of the evidence heard in the hearings was irrelevant to its [the mission's] mandate and its conclusions."

⁵⁹ For an example of how far Israeli soldiers will go to spare civilian lives, see the highly controversial case of an Israeli intelligence officer who refused to communicate coordinates to the Air Force because, in his judgment, too many Palestinian civilians might be killed, and many of his colleagues rallied to his defense. See <http://www.ynet.co.il/articles/0,7340,L-2462293,00.html> and <http://www.ynet.co.il/articles/0,7340,L-2462293,00.html>.

collecting testimony and asking questions for further investigation, it could have made a valuable contribution.⁶⁰ Indeed, Goldstone admitted on a number of occasions that the evidence they compiled would not stand up in court, that the mission was not “judicial, not even quasi judicial.”⁶¹

Still, under the category “legal findings” (which follow on from the “factual findings” in which testimony deemed credible established the “facts”), the report repeatedly resorts to judgments not only about what happened, but more significantly, in matters of war crimes, about the intention of the actors. Where facts are concerned, intention is irrelevant (except insofar as one has to gauge the motivations of a witness); where judgments of criminality are concerned, intention plays an indispensable role. The most striking feature of the report’s speculation about intention is the ready, even eager willingness of the mission members to attribute malevolent intention to Israelis and their exceptional reluctance to speculate when it comes to the intentions of Hamas, especially in matters of human shields. Indeed, the overall pattern reveals a pervasive eagerness to accuse Israel and exculpate Hamas.

The harshness with which the mission judged Israel comes across clearly in their discussion of Israel’s efforts to warn Gazan civilians of impending strikes. Here, the IDF expended enormous human and electronic resources to making thousands of cell phone calls and dropping millions of leaflets to warn civilians (and even Hamas operatives) of coming strikes. This represents an unprecedented effort in the history of warfare: No army has done more than Israel’s to warn civilians of impending attacks, often at serious cost to its war effort, as Colonel Kemp noted.⁶² Yet the report treats these efforts as if they were standard operating procedure and then goes on to criticize them for not being sufficiently informative. They note, for example, on the phone calls:

531. As regards the generic nature of some pre-recorded phone messages, the Mission finds that these lacked credibility and clarity, and generated fear and uncertainty. In substance, there is little difference between telephone messages and leaflets that are not specific. The Mission takes the view that pre-recorded messages with generic information may not be considered generally effective.

This severity in judging Israel’s efforts to minimize civilian casualties produce a

⁶⁰ See Dershowitz’s remarks at <http://israelactivism.com/video/>.

⁶¹ Gal Beckerman, “Goldstone: ‘If This Was a Court of Law, There Would Have Been Nothing Proven,’” *The Forward*, October 7, 2009; interview with Christiane Amanpour.

⁶² See Richard Kemp, “International Law and Military Operations in Practice,” JCPA, June 18, 2009. <http://www.jcpa.org/JCPA/Templates/ShowPage.asp?DBID=1&LNGID=1&TMID=111&FID=378&PID=0&ID=3026>.

hair-trigger willingness to accuse them of deliberately targeting civilians. In dealing with the bombing of the Maqadmah Mosque, for example, a case in which the evidence and testimony are at best dubious, the report concludes decisively:

838. In the absence of any explanation as to the circumstances that led to the missile strike on al-Maqadmah mosque and taking into account the credible and reliable accounts the Mission heard from multiple witnesses, as well as the matters it could review for itself by visiting the site, the Mission concludes that the mosque was intentionally targeted by the Israeli armed forces.

None of the evidence they present offers any proof of Israeli knowledge that the mosque was filled with people, that they fired with the intention of hitting the worshippers, or even that they deliberately targeted the mosque.⁶³

This repeated pattern of willingness to attribute criminal intent to Israelis is balanced by a marked reluctance to do so with Hamas, here on the subject of their use of human shields:

452. In those instances in which Palestinian armed groups did indeed fire rockets or mortars from urban areas the question remains whether this was done with the specific intent of shielding the combatants from counter-attack. The Mission has not been able to obtain any direct evidence on this question; nor do reports from other observers provide a clear answer.

*481. On the basis of the information it gathered, the Mission is **unable to form an opinion on the exact nature or the intensity** [emphasis added] of their combat activities in urban residential areas that would have placed the civilian population and civilian objects at risk of attack. While reports reviewed by the Mission credibly indicate that members of Palestinian armed groups were not always dressed in a way that distinguished them from civilians, the Mission **found no evidence that Palestinian combatants mingled with the civilian population with the intention of shielding themselves from attack** [emphasis added].⁶⁴*

Compare this with the testimony of Talal Abu Rahmah on January 2, 2009 to CNN: “Now Hamas, they are under cover, all of them they are civilians now, you don’t see any militants around you, even the cars... I don’t know if the car in front of me or in

⁶³ See the evidence at “al-Maqadmah Mosque,” UtGR, <http://www.goldstonereport.org/case-study/al-maqadmah-mosque>.

⁶⁴ Notes Moshe Halbertal (“The Goldstone Illusion”), not an author known for his sarcasm, “The reader of such a sentence might well wonder what its author means. Did Hamas militants not wear their uniforms because they were inconveniently at the laundry? What other reasons for wearing civilian clothes could they have had, if not for deliberately sheltering themselves among the civilians?”

the back of me, if it's a target or not."⁶⁵ Did the mission explore the news reports that even the police were ordered by Hamas to remove their uniforms, or the admission by Hamas fighters that they had circulated in civilian clothing as a matter of policy, or the footage from Arab news stations of men dressed in civilian clothing firing Qassam rockets at Israel from a tree-lined street in Jabalya?⁶⁶

This pattern of passing judgment, which closely follows that of the mission's treatment of evidence, again reconfirms the essential – and least reliable – dimensions of Palestinian claims to the Western news media, whose basic purpose is: (a) to blame Israel for all damage suffered by Palestinians, and (b) wherever possible, to attribute to them malevolent intent. For Goldstone, these lethal narratives are evidence of criminal behavior; for the Palestinians, Arabs, and Muslims (who assume these accusations are true), it mobilizes violent hatred. Indeed, one can argue that the mission's systematic credulity toward Palestinian testimony actually reinforced the dynamics of hatred and violence. It assumed and purveyed the view that if the Palestinians hate the Israelis, it is not from a culture of hate-mongering, it is from all they have suffered at Israeli hands.

In a particularly revealing exchange,⁶⁷ the mission empowered Palestinians in projecting the most hostile dimensions of their own culture on the Israelis and then excusing their own hostility on just such "reactive" grounds. Colonel Travers asked a Palestinian psychiatrist, Eyal al-Sarraj, about the atrocious behavior of the Israelis (which he believes entirely), behavior in fact characteristic of Palestinian terrorists:

Travers: I would like to put a question to, it may not be entirely within your field, but nevertheless it's a question that continuously comes around in my mind. We have heard testimony of great, uh, violence, seemingly un-militarily, unnecessary violence inflicted particularly on children. There have been instances of the shooting of children in front of their parents [i.e., Abd Rabbo]. As an ex-soldier I find that kind of action to be very, very strange and very unique. I would like to ask you if you have any professional insights as to what mindset or what conditioning or what training could bring around a state of behavior that would cause a soldier, a fellow human being to shoot children in front of their parents. Do you have any

⁶⁵ CNN, January 2, 2009: <http://www.youtube.com/watch?v=6ab1hCeJ2wc>; comment at *Augean Stables*, "Goldstone vs. Talal Abu Rahmah on Human Shields: Whom to Believe," <http://www.theaugeanstables.com/2010/01/04/goldstone-vs-talal-abu-rahmah-on-hamas-human-shields-whom-to-believe/>.

⁶⁶ See the various articles listed in "The Goldstone Report, A Study in Duplicity," Committee for Accuracy in Middle East Reporting in America (CAMERA), November 3, 2009, http://www.camera.org/index.asp?x_context=2&x_outlet=118&x_article=1736 (under "Falsehood: No Civilian Clothes").

⁶⁷ Gilead Ini, "Goldstone Commissioner Suggests Israelis Conditioned to Kill Children," CAMERA, September 21, 2009, http://www.camera.org/index.asp?x_context=2&x_outlet=118&x_article=1733.

professional insights into that kind of behavior?

Sarraj: There is a psychological process, a long-term psychological process based in the situation of dehumanization of the enemy. The Palestinian in the eyes of the Israeli soldier is not an equal human being. Sometimes this Palestinian even becomes a demon in their eyes. Therefore it is a state of demonization... This culture of demonization and dehumanization in addition to what was mentioned by, uh, my colleague, paranoia. Paranoia has two sides, the side of victimization, I am a victim of this world, the whole world is against me and on the other side, I am superior to this world and I can oppress it. This leads to what is called, uh, the, uh, arrogance of power. It is very serious is [sic] that a victim who is not treated and then is given a dangerous weapon... There we see the arrogance of power and he uses it without thinking of humanity at all.

Had the mission members read the memoranda from Ostroff and Richter carefully, they might have challenged al-Sarraj about Palestinian demonization of Israelis, a pervasive phenomenon in Palestinian culture with absolutely no parallel in Israeli society. Instead Goldstone asked him if there were not a parallel [sic] phenomenon in the Arab world, to which al-Sarraj responded first by admitting it, but only as a “reaction,” then by claiming that Palestinians are better able to view Israelis as human beings, and finally by accusing the Israelis of identifying with the Nazis. No one challenged this systematic projection of Palestinian traits onto the Israelis; indeed the report highlighted in bold al-Sarraj’s remarks in their conclusion.⁶⁸

In adopting both Palestinian claims and judgments – it would be “cruel” not to – not only did the report exceed its mandate, but it systematically misquoted and misapplied international law concerning both war and human rights.⁶⁹ It repeatedly accepted evidence of the lowest quality and then made the most stringent judgments when it came to Israel; and applied the most stringent standards to evidence and showed the greatest reluctance in judging the Palestinians. Most egregious was its deliberate confusion of disproportionate and indiscriminate response whereby the mission took “a standard military doctrine, the use of disproportionate force, and claimed, without analysis or foundation, that it is illegal.”⁷⁰

⁶⁸ Goldstone asked al-Sarraj if Palestinians did anything similar (not questioning whether Israelis did do what he claims), and allowed Sarraj to characterize of Arab demonization of Israel as a “reaction” and then launch into a long explanation of how Israelis identify with the Nazis. The report’s concluding segment reproduces much of this exchange in its own section entitled: The Impact of Dehumanization (¶1905-10).

⁶⁹ See “Legal Reasoning,” UtGR, <http://www.goldstonereport.org/procedural-flaws/legal-reasoning>.

⁷⁰ Matas, “The Goldstone Report,” #7; see the extensive discussion in Laurie Blank and Gregory Gordon, “Goldstone, Gaza and (Dis)Proportionality: Three Strikes,” *Jurist: Legal News and Research*, December 23, 2009, <http://jurist.law.pitt.edu/forumy/2009/11/goldstone-gaza-and-disproportionality.php>.

Beyond the accusation of war crimes, the report emits the possibility that Israel (and unnamed “Palestinian militant groups”) may be guilty of “crimes against humanity.” Given Goldstone’s intimacy with the details of Rwanda and Bosnia as well as the contemporary slaughter of millions in Sudan and Congo, such a statement thoroughly degrades the meaning of so important a term. “Crimes against humanity” takes the accusations to new levels, opening up additional venues for legal measures against Israel.

The pattern evident here explains why Goldstone, for all his bravado about “absolutely” investigating Hamas,⁷¹ never found any evidence of their embedding themselves among civilians. To say Hamas fired rockets at Israeli civilians merely justifies Israeli *jus ad bellum*, right to go to war. Yet as Goldstone never ceases to remind interviewers, their concern was Israel’s conduct of the war, *jus in bello*. In the former, you can have multiple sources of guilt; in the latter, there is a zero-sum relationship between Israel’s guilt and Hamas’.

The laws of war are clear, that it is legal to attack military targets even if it is absolutely certain that innocent civilians will be killed as collateral damage. Under the rule of proportionality, such collateral damage only becomes illegal if the harm to civilians is “clearly excessive in relation to the concrete and direct overall military advantage anticipated.”⁷² Consequently, whenever a group like Hamas embeds itself within a civilian population, it both: (a) violates the laws of war by using civilians as shields, and (b) increases the number of civilians that can legally be killed as collateral damage. Thus, up to the limits of proportionality, every civilian that died in Israeli operations was the result of a Hamas war crime of civilian shielding, and, at the same time, a person whose death did not involve any wrongdoing by Israel.⁷³ The failure to explore this aspect, to question the credibility of Palestinian reports, and the eagerness to judge Israel harshly while steering clear from any judgment on Palestinian use of human shields all suggest that whatever the final mandate, Goldstone and his colleagues stayed faithful to the first, vindictive one.

All of these criticisms, obvious to anyone who reads the report carefully, with attention to the problems of credibility, have justifiably produced accusations of systemic bias.⁷⁴ Indeed, the report’s reception reflects the bias: those who criticize it have done so with close attention to detail; those who support it have done so largely on the basis of

⁷¹ See his interview with Christiane Amanpour, <http://www.goldstonereport.org/interviews/494?task=view>.

⁷² See the Rome Statute, Article 8.2.b.iv. http://untreaty.un.org/cod/icc/statute/99_corr/cstatute.htm.

⁷³ My thanks to Abraham Bell and Anne Herzberg for explaining the subtleties of this legal issue.

⁷⁴ See the articles in “Critics,” UtGR, <http://www.goldstonereport.org/pro-and-con/critics>.

its conclusions, with no attention to its logic or proceedings.⁷⁵ Indeed, as of yet there is no serious defense of the report from anyone. This does not, however, prevent the report's authors from claiming that "no one has laid a glove on" it.⁷⁶

The disparity between public posturing and concrete action reveals just how little confidence Goldstone has in his own report. In response to U.S. government criticism of his report, he "lashed out" at his critics:

But I have yet to hear from the Obama administration what the flaws in the report that they have identified are. I mean, I would be happy to respond to them, if and when I know what they are... I've no doubt, many of the critics – I would say the overwhelming majority of the critics – haven't read the report. And, you know, what proves that, I think, is the level of criticism doesn't go to the substance of the report. There still haven't been responses to the really serious allegations that are made.⁷⁷

Yet Goldstone has ignored the many substantive criticisms from people who have read his report carefully. Challenged to a public debate by Alan Dershowitz on his own campus, Goldstone, the man who complained that Israel didn't face his investigation, declined: "Professor Dershowitz has conducted a very personal, demeaning and tendentious attack on me in recent months. On no account am I prepared to have a public debate with him."⁷⁸

The "non-"debate with Dore Gold at Brandeis seems to have marked a turning point for Goldstone. Presented in public with a powerful indictment of his report's handling of the evidence, and a presentation of the material available to anyone who cared to seek it out, he responded weakly, "The sort of information shown to us by Ambassador Gold should have been shown to us during the [U.N.] investigation."⁷⁹ Indeed, this material and far more was presented to them, to no effect.⁸⁰

⁷⁵ Ibid, Defenders, <http://www.goldstonereport.org/pro-and-con/defenders>.

⁷⁶ Silverstein, "Six Questions."

⁷⁷ Interview with al-Jazeera, October 22, 2009, <http://www.goldstonereport.org/interviews/348-goldstone-interviewed-on-al-jazeera-october-22-2009>, cited by Sharon Otterman, "Gaza Report Author Asks U.S. to Clarify Concerns," *New York Times*, October 22, 2009.

⁷⁸ Email to the organizers of the Fordham event.

⁷⁹ Goldstone-Gold Debate, Part IV, <http://www.goldstonereport.org/goldstone-debates/388-richard-goldstone-dore-gold-brandeis-qdebateq>.

⁸⁰ As revealed by a documentary on the Goldstone Report by Israeli Channel 1, *Mabat Sheni*, December 23, 2009, Daniel Reisner, former Head of the International Law Branch, the IDF Legal Division, served as an unofficial representative of the Israeli point of view and spoke for hours with the mission members. Goldstone's use of that testimony is restricted to a single mention (§1183-84), without any consequences for his report's conclusions. See also the extensive dossier published by the Israeli government while the mission was preparing its report: *The Operation in Gaza – Factual and Legal Aspects*, July 29, 2009.

After the revelations of the debate, one of the most careful and informed readers of his report, Ricki Hollander from the Committee for Accuracy in Middle East Reporting in America (CAMERA), sent him an open letter, pushing hard the multiple inconsistencies of his report and his remarks. His response was as follows: “Dear Ms. Hollander, I confirm receipt of your letter. I have no intention of responding to your open letter.”⁸¹ Like so many of those whose discourse inverts reality in the service of narrative, Goldstone flees a serious challenge even as he claims to meet any that are presented.

Whence these systematic flaws and pervasive denial? How could highly intelligent, well-trained legal professionals produce something so intellectually incompetent, so obviously and pervasively flawed? Moreover, how can alleged experts go over the objections and dismiss them one by one, and with what consequences?⁸²

The answer can best be understood from an understanding of the report not as an independent piece of research, but the third draft – really third iteration – of a story begun by the journalists during the war and reiterated by the “human rights” NGOs. Not only does such an approach permit one to see the direct links between each stage of the process, but it permits one to analyze the same dynamic that drives all three groups – the intimate and profoundly dysfunctional relationship of advocacy to intimidation that results in the betrayal of the very Palestinian civilians it claims to protect and the moral corruption of the global human rights community in whose voice they claim to speak.

⁸¹ Ricki Hollander, “An Open Letter to Judge Goldstone,” CAMERA, November 17, 2009, response, December 7, 2009, http://www.camera.org/index.asp?x_context=7&x_issue=76&x_article=1764.

⁸² See, for example, the Chatham House report’s analysis.

NGOs & THE GOLDSTONE REPORT¹

*Anne Herzberg*²

Introduction

For more than 60 years, the State of Israel has been subjected to violence, warfare, and terror attacks deliberately targeting civilians. Thousands have been murdered and injured in suicide bombings, mass shootings, stabbings, rocket attacks, car bombs, kidnappings, and hijackings. Today, these attacks are spearheaded by states, including Iran and Syria, and terror organizations – Hamas, Islamic Jihad, Hezbollah, Fatah's Al Aksa Martyrs Brigades, the Popular Front for the Liberation of Palestine, and even Al Qaeda. They not only outwardly reject the existence of a Jewish state within any borders, but their ideology is marred by antisemitism and calls for genocide of the Jewish people. Unfortunately, many so-called Palestinian moderates and supporters also refuse to recognize Israel as a Jewish state, and seek to reverse the November 29, 1947 U.N. General Assembly resolution calling for two states, which was accepted by the Jewish nation and rejected by the Arab states.

This “hard power” terror war is bolstered by a corresponding “soft power” political war often led by civil society or non-governmental organizations (NGOs) that claim the mantle of universal human rights and humanitarian goals. Many powerful organizations are involved in these soft power campaigns; groups whose budgets and influence rival that of large multinational corporations – such as Amnesty International, Human Rights Watch, and Oxfam.³

The NGO leadership role in this “soft power” war crystallized at the NGO Forum of the 2001 U.N. World Conference Against Racism in Durban, South Africa, where officials from 1,500 NGOs gathered, and issued a resolution singling out Israel as “a racist, apartheid state” and labeling “Israel’s brand of apartheid as a crime against

¹ This piece is adapted from Anne Herzberg, “NGO ‘Lawfare:’ Exploitation of Courts in the Arab-Israeli Conflict,” *NGO Monitor Monograph Series*, (2d ed. 2010), available at <http://www.ngo-monitor.org/data/images/File/lawfare-monograph.pdf>.

² NGO Monitor Legal Advisor.

³ See Gerald M. Steinberg, “The Centrality of NGOs in the Durban Strategy,” *Yale Israel Journal*, Summer 2006, available at <http://www.ngo-monitor.org/article.php?viewall=yes&id=1958>.

humanity.” These NGOs accused Israel of the “systematic perpetration of racist crimes including war crimes, acts of genocide and ethnic cleansing” and called upon the “international community to impose a policy of complete and total isolation of Israel as an apartheid state.”⁴

The Durban NGO Forum Declaration was the latest incarnation of the campaign that produced the 1975 U.N. General Assembly declaration that “Zionism is racism.”⁵ Although this declaration was repealed in 1991, NGOs resuscitated both the tactic and the canard at the Durban Conference in order to advance Palestinian political interests.

This “Durban strategy” is used to promote anti-Israel boycott, divestment, and sanctions (BDS) campaigns; universal jurisdiction lawsuits against Israeli officials and corporations or States doing business with Israel; and lobbying and campaigning at international institutions such as the U.N., the European Parliament, the International Court of Justice (ICJ), and the International Criminal Court (ICC). Many of these efforts are funded via large grants provided by the European Union, European governments, and prominent foundations including George Soros’ Open Society Institute (OSI), the Ford Foundation, and the New Israel Fund (NIF).

NGOs utilizing the Durban strategy adopt the rhetoric of human rights and international law in their publications and campaigns. By couching political attacks in legal terms, NGOs seek to create a veneer of credibility and expertise for their claims. Since 2001, this process has repeated itself numerous times – Jenin in 2002, the ICJ case against Israel’s security barrier in 2004, the 2006 Lebanon War, and the 2010 Gaza flotilla. Israel is faced with a spate of terror attacks targeting civilians in major populations centers; Israel responds with counter measures of increasing severity; NGOs immediately issue countless condemnations accusing Israel of “war crimes,” “crimes against humanity,” and the “intentional targeting of civilians” based on little to no hard evidence; the media and the international community adopt these claims at face value, rarely performing independent verification; the U.N., and in particular the Human Rights Council (UNHRC), engages in further one-sided condemnations, calling for international investigations and war crimes trials, and NGOs are called upon to play an integral role in these processes further entrenching their influence and claims.

Although the most recent manifestation of this process began after the full Israeli

⁴ U.N. World Conference Against Racism NGO Forum Declaration, September 3, 2001, available at http://www.eyeontheun.org/assets/attachments/documents/durban_ngo_declaration_2001.pdf.

⁵ U.N.G.A., 3d Comm., 13th Sess. Agenda Item 68, A/RES/3379, November 10, 1975, available at <http://unispal.un.org/UNISPAL.NSF/0/761C1063530766A7052566A2005B74D1>.

withdrawal from Gaza in 2005 and the violent Hamas takeover in June 2007, it greatly intensified during the December 2008-January 2009 Gaza War. The war was accompanied by obsessive media and NGO coverage: NGO Monitor tracked over 500 statements by 50 NGOs at that time. And these NGO publications repeated several themes couched in international legal terms including the alleged continued “occupation” of Gaza, “collective punishment,” “intentional targeting of civilians,” and claims of “disproportionate” force.⁶

These NGO reports minimized the more than 8,000 mortar and rocket attacks of increasing severity and range directed at Israeli civilians living in Sderot, Ashkelon, Ashdod, Be'er Sheva, and beyond. The role of Syria, Iran, and their material support of Hamas and other terror groups was similarly ignored, as were reports regarding the mass commandeering by Hamas of construction materials, fuel, and humanitarian aid. Little to no mention was made of Gilad Shalit, the Israeli soldier kidnapped from Israeli territory in June 2006 and held incommunicado in violation of the Geneva Conventions.

In contrast to the obsessive coverage of the Gaza War, many international NGOs were silent on extensive human rights abuses occurring around the world during this same period such as the more than 600 civilians killed in Congo on December 29, 2008 in a conflict that has claimed more than 5 million lives,⁷ the tens of thousands of civilians killed in Sri Lanka,⁸ and the thousands of Muslims killed at the hands of other Muslims in attacks in Iraq, Pakistan, Somalia, and elsewhere. There were few calls for emergency sessions at the UNHRC, and comparatively little media coverage or ongoing focus.

The U.N. Human Rights Council's International “Fact-Finding” Mission on the Gaza War

One of the manifestations of the Durban strategy that developed during the Gaza War was intense international pressure for the establishment of an international “fact-finding” mission to investigate alleged war crimes committed during the fighting.

⁶ NGO Monitor, “The NGO Front in the Gaza War,” *NGO Monitor Monograph Series* (Feb. 2009), available at http://www.ngo-monitor.org/data/images/File/NGO_Front_Gaza.pdf.

⁷ See U.N. Office of the High Commissioner for Human Rights, “Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003” (August 2010)(hereinafter “DRC Mapping Exercise”), available at http://www.ohchr.org/Documents/Countries/ZR/DRC_MAPPING_REPORT_FINAL_EN.pdf.

⁸ U.N. Secretary-General, “Report of the Secretary-General’s Panel of Experts on Accountability in Sri Lanka,” March 31, 2010, available at http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf.

Amnesty International, Human Rights Watch (HRW), the Fédération internationale des Ligues des Droits de l'Homme (FIDH), and the International Commission of Jurists, the most influential international NGOs, were particularly active in this process.

Establishment of the Mission

From the very outset of the war, the highly politicized U.N. Human Rights Council,⁹ in conjunction with the Arab League and Organization of the Islamic Conference (OIC), was the primary venue for NGOs to engage in anti-Israel lobbying. On the evening of January 6, 2009,¹⁰ U.N. representatives from Egypt, Pakistan, and Cuba on behalf of the Arab Group, the African Group, the OIC, and the Non-aligned Movement, called for a special session at the UNHRC on “[t]he Grave Violations of Human Rights in the Occupied Palestinian Territory including the recent aggression on the occupied Gaza Strip.”¹¹ Russia, working with the representative from “Palestine,” also joined as a co-sponsor. The request was accepted by the UNHRC that same night, and a special session was scheduled to be held from January 9-12, 2009.

In conjunction with the scheduling of the special session, UNHRC officials circulated a *note verbale* inviting NGOs with U.N. consultative status to attend a special briefing with the UNHRC President on January 7, as well as to participate in the session itself.¹² As in other U.N. frameworks, and in particular at the UNHRC, NGOs played a significant role at the Ninth Special Session.¹³

⁹ Close to two-thirds of the HRC membership are representatives from the Organization of the Islamic Conference and the Non-aligned Movement. See <http://www2.ohchr.org/english/bodies/hrcouncil/membership.htm>; www.unwatch.org.

¹⁰ The request was filed at 6:20 pm.

¹¹ http://www2.ohchr.org/english/bodies/hrcouncil/docs/9special_session/Letter_request_fromPM_Egypt_06.01.09.pdf. Countries joining this request were Angola, Azerbaijan, Bahrain, Bangladesh, Bolivia, Bosnia, Burkina Faso, Cameroon, Chile, Djibouti, Gabon, Ghana, India, Indonesia, Jordan, Madagascar, Malaysia, Mauritius, Nicaragua, Nigeria, Philippines, Qatar, Saudi Arabia, Senegal, South Africa, Zambia.

¹² http://www2.ohchr.org/english/bodies/hrcouncil/docs/9special_session/NV_9th_SS_request_06.01.09.pdf.

¹³ As of publication, there have been seventeen special sessions since the establishment of the HRC in June 2006. Six of them have solely focused on purported violations by Israel (12th Session, October 2009); (9th Session, January 2009); (6th Session, January 2008); (3d Session, November 2006); (2d Session, August 2006); (1st Session, July 2006). The other ten sessions address Syria (16th Session, April 2011), Libya (15th Session, February 2011), Cote d'Ivoire (14th Session, December 2010), Haiti (13th Session, January 2010), Sri Lanka (11th Session, May 2009), the global economic crisis (10th Session, February 2009), Congo (8th Session, November 2008), food (7th Session, May 2008), Myanmar (5th Session, October 2007), and Darfur (4th Session, December 2006). Israel is also the only country with a permanent agenda item at the Human Rights Council's regular sessions. (Agenda item 7).

On January 9, oral statements were made by representatives of Al Haq,¹⁴ Adalah,¹⁵ BADIL,¹⁶ and FIDH (on behalf of the Palestinian Center for Human Rights¹⁷). The joint statement of Al Haq, BADIL, and Adalah accused Israel's "political and military leaders" of being "criminally responsible for the commission of war crimes" and "crimes against humanity," and demanded that the U.N. General Assembly impose "collective measures on Israel."¹⁸ These organizations issued no statement for "accountability" or "collective measures" to be "imposed" on Hamas.

At the January 12 proceedings, Amnesty International called for a "thorough independent and impartial investigation" and "full accountability for war crimes and crimes against humanity."¹⁹ HRW accused Israel of "aggression,"²⁰ and "indiscriminate" and "disproportionate" attacks. It also demanded the Security Council establish a "commission of inquiry."²¹ The specific incidents raised by HRW in its statement

¹⁴ Al Haq, based in Ramallah, is funded by the governments of Norway, Sweden, the Netherlands, Switzerland, Ireland, and Denmark. It also receives funding from, Diakonia, Open Society Institute (OSI), ICCO, and Kirkenaktie. See http://www.ngo-monitor.org/article/al_haq.

¹⁵ Adalah is an Israeli-Arab NGO, based in Haifa. Its primary funders include the New Israel Fund and the European Union, as well as the Swiss, Dutch, Swedish, and Danish governments, the Ford Foundation, OSI, Oxfam NOVIB, and Christian Aid. See <http://www.adalah.org/eng/support.php#>.

¹⁶ Based in Bethlehem, BADIL's funding is entirely non-transparent. Research reveals that BADIL received \$100,000 from the NDC (joint funding of Switzerland, Sweden, Denmark, Netherlands) in 2008-9. BADIL has also received funding from DanChurchAid and Trócaire. See NGO Monitor, "BADIL," May 17, 2011, available at <http://www.ngo-monitor.org/article/BADIL>. Its funding by the Swiss government was recently frozen due to concerns regarding antisemitic material posted on the organization's website. See Benjamin Weinthal, "Swiss freeze funds for pro-Palestinian NGO," Jerusalem Post, May 22, 2011, available at <http://www.jpost.com/International/Article.aspx?id=221623>.

¹⁷ PCHR, a Gaza-based NGO, is funded by the E.U., the Swiss, Dutch, Swedish, Danish, and Irish governments, the Ford Foundation, OSI, Oxfam NOVIB, and Christian Aid. See http://www.pchrgaza.org/portal/en/index.php?option=com_content&view=article&id=3030&Itemid=178.

¹⁸ Oral Intervention to the Human Rights Council by Al Haq, BADIL, Cairo Institute for Human Rights Studies, and Adalah, January 9, 2009.

¹⁹ Amnesty International, Oral Intervention to the Human Rights Council, January 12, 2009.

²⁰ HRW's accusation of "aggression" contradicts the organization's repeated claims that "[i]n accordance with its institutional mandate, Human Rights Watch maintains a position of neutrality on these issues of *jus ad bellum* (law concerning acceptable justifications to use armed force), because we believe it is the best way to promote our primary goal of encouraging all sides in armed conflicts to respect international humanitarian law, or *jus in bello* (law concerning acceptable conduct in war)." Human Rights Watch, "Q&A on Hostilities between Israel and Hamas," December 31, 2008, available at <http://www.hrw.org/en/news/2008/12/31/q-hostilities-between-israel-and-hamas>.

²¹ Human Rights Watch, Oral Statement: "The grave violations of human rights in the Occupied Palestinian Territory including the recent aggression in the Gaza Strip," January 12, 2009. In February 2009, the U.N. Secretary-General established a Board of Inquiry (BOI) established to investigate alleged damage to U.N. facilities during the war.

solely related to alleged Israeli strikes.²² The International Commission of Jurists also called for the establishment of a “Commission of Inquiry” by the HRC.²³

Heeding the NGO calls, on January 12, the HRC passed Resolution 9/1 to:

*Dispatch an urgent independent international fact-finding mission . . . to investigate all violations of international human rights law and international humanitarian law by the occupying Power, Israel, against the Palestinian people throughout the Occupied Palestinian Territory, **particularly in the occupied Gaza Strip.***
(emphasis added)

Once the resolution passed, NGOs engaged in intense lobbying efforts to promote it, despite the explicitly biased mandate and funding for the investigation provided by the Arab League.²⁴ These campaigns further intensified once Richard Goldstone agreed to chair the HRC’s mission.²⁵ Amnesty International called “on the Israeli authorities to reconsider their refusal to cooperate with the fact-finding mission set up by the U.N. Human Rights Council and headed by Judge Richard Goldstone, who has made clear its intention to investigate violations of international law by all parties

²² NGOs, in particular HRW and Amnesty, also played a significant role in the BOI. It was headed by the former head of Amnesty, and many of the claims in the report echoed allegations made by Human Rights Watch regarding Israel’s alleged use of white phosphorous during the war and Amnesty’s charges of deliberate attacks on U.N. compounds. Because the U.N. did not release the full report or supporting materials, the precise contributions of NGOs to the BOI remains unknown. When the report was issued, Secretary-General Ban Ki-Moon did not give it an enthusiastic reception. He reluctantly transmitted the report to the Security Council, remarking that the BOI “is not a judicial body or a court of law; it does not make legal findings and does not consider questions of legal liability.” He further noted that much of the evidence obtained by the board was unbalanced and unreliable. A summary of the BOI report is available on file with the author. See also Yitzhak Benhorin, “Ban says Israelis also hurt in Gaza War,” *Ynetnews*, May 5, 2009, available at <http://www.ynetnews.com/articles/0,7340,L-3711392,00.html>.

²³ International Commission of Jurists, “ICJ Intervention on Serious Violations of Human Rights Law and Grave Braches of Humanitarian Law during the Israeli Military Operations in Gaza,” January 12, 2009.

²⁴ ICC Prosecutor Moreno-Ocampo noted in a December 4, 2009 press conference that the Arab League had financed the work of the Goldstone Mission, <http://www.reliefweb.int/rw/rwb.nsf/db900sid/MUMA7YF4EF?OpenDocument>.

²⁵ For a list of statements and examples of NGO campaigning, see NGO Monitor, “The Goldstone ‘Fact-Finding’ Mission and the Role of Political NGOs,” September 7, 2009, available at http://www.ngo-monitor.org/article/the_goldstone_gaza_fact_finding_committee_and_the_lund_london_guidelines_; NGO Monitor, “HRW: Selling Goldstone’s Indictment,” October 15, 2009, available at http://www.ngo-monitor.org/article/human_rights_watch_selling_goldstone_s_indictment0; NGO Monitor, “Amnesty International’s Goldstone Campaign,” October 22, 2009, available at http://www.ngo-monitor.org/article/amnesty_international_goldstone_s_cheat_sheet_.

to the conflict in Gaza and southern Israel.”²⁶ HRW issued statements demanding that U.N. Secretary-General Ban Ki-Moon and the U.S. government pressure Israel into cooperation with the investigation.²⁷

A driving factor behind the significant NGO support of Goldstone and the HRC mission was the close ties between these same organizations and Goldstone and the other mission members. These connections were not disclosed, even though they raised serious questions regarding the ability of panel members and staff to objectively evaluate information submitted by these groups. For example, at the time of his appointment, Goldstone was an HRW board member and a good friend of HRW’s Executive Director Kenneth Roth. Only after this conflict of interest was revealed did Goldstone step down from the board. Each of the mission members also had significant ties to Amnesty International. Three members – Goldstone, Hina Jilani, and Desmond Travers – signed a widely publicized March 2009 letter initiated by Amnesty, accusing Israel of “gross violations of the laws of war” and stating that “events in Gaza have shocked us to the core.”²⁸ The fourth member, Christine Chinkin, signed a letter published in the *Sunday Times of London* on January 11, 2009, declaring Israel’s actions to be a “war crime” and denying that the operation was a legal form of self-defense.²⁹ She was previously a consultant to Amnesty International.³⁰

²⁶ Amnesty International, “Israeli Army Probe Lacks Credibility and is No Substitute for Independent Investigation,” April 23, 2009, available at <http://www.amnesty.org/en/for-media/press-releases/israeloccupied-palestinian-territories-israeli-army-probelacks-credibil>. Ultimately, the mission did little to no serious investigation of crimes committed by Hamas in Gaza and Israel during the war. Only a few pages out of the 450-page report address such incidents. See Trevor Norwitz, “Letter to Richard Goldstone,” October 19, 2009, for a critique of this aspect of the report, available at <http://www.goldstonereport.org/pro-and-con/critics/316-trevor-norwitz-open-letter-to-judge-goldstone-191009>. [Reprinted in this volume 153–180.] Norwitz is an attorney at the premier New York firm, Wachtell Lipton Rosen & Katz.

²⁷ See HRW, “U.S.: Ask Israel to Cooperate with Goldstone Inquiry,” May 17, 2009, available at <http://www.hrw.org/en/news/2009/05/17/us-ask-israel-cooperate-goldstone-inquiry>; “U.N.: Support Goldstone Investigation into Gaza War Violations,” May 6, 2009, available at <http://www.hrw.org/en/news/2009/05/06/un-support-goldstone-investigation-gaza-war-violations>.

²⁸ Amnesty International, “World’s leading investigators call for war crimes inquiry – open letter,” March 16, 2009, available at <http://reliefweb.int/node/301118>.

²⁹ U.N. Watch, “Request to Disqualify Prof. Christine Chinkin From U.N. Fact-Finding Mission on the Gaza Conflict,” August 20, 2009, available at http://www.unwatch.org/atf/cf/%7B6DEB65DA-BE5B-4CAE-8056-8BF0BEDF4D17%7D/2207UN_Watch_Request_to_Disqualify_Christine_Chinkin_from_UN_Goldstone_Mission_on_Gaza_20_August_2009.pdf.

³⁰ London School of Economics Bio, available at <http://www.lse.ac.uk/collections/law/staff/christine-chinkin.htm>. Note that Chinkin is also a Barrister at Matrix Chambers, a UK law firm involved in providing legal support to the global BDS movement. See e.g., “Anti-Ahava activists cleared of all charges,” August 10, 2010, available at <http://richardmillet.wordpress.com/2010/08/10/anti-ahava-activists-cleared-of-all-charges/>.

NGO Participation in the Goldstone Mission

A central element of the Goldstone committee's activities consisted of inviting and receiving submissions and testimony, including oral statements, from NGO representatives. In May 2009, Goldstone convened a "townhall meeting" for NGOs in Geneva, facilitating personal connections between officials from these organizations and the mission members. NGOs were able to provide "evidence" and ask questions regarding the mission's activities. Attendees included HRW, Amnesty, Adalah, Physicians for Human Rights-Israel (PHR-I), the Public Committee Against Torture in Israel (PCATI), and the International Commission of Jurists (ICJ). During the meeting, Amnesty International presented a detailed outline to the mission members to guide their investigation.³¹ These recommendations corresponded closely to the structure of the public hearings held the following month in Gaza and Geneva, as well as to the final report. Issues raised in the outline include the "Israeli use of human shields," the "shooting of unarmed civilians," "damage to infrastructure," "environmental impact (water and sewage)," and "psychological impact." Amnesty also appears to have provided the mission with a list of "36 incidents"³² to investigate, all relating to alleged Israeli violations, which became the primary focus of the Goldstone Report.³³

³¹ A recording of the meeting is on file with the author.

³² On March 25, 2009, Amnesty International sent a letter to the Israeli authorities seeking information regarding 36 cases from the war. See Amnesty International, "U.N. Vote on Goldstone Report a Defining Step for Accountability," November 6, 2009, available at <http://amnesty.org/en/news-and-updates/news/un-vote-goldstone-report-defining-step-accountability-20091106>. NGO Monitor contacted both Amnesty and the Israeli authorities on several occasions to obtain this letter, but the requests were unanswered.

³³ According to Richard Goldstone, the Goldstone Report details 36 incidents that occurred during the Gaza War. In an interview with Bill Moyers on PBS, Goldstone explained his rationale behind the selection: "We chose those 36 [incidents] because they seemed to be, to represent the most serious, the highest death toll, the highest injury toll. And they appear to represent situations where there was little or no military justification for what happened." A list of these 36 incidents was not published in the report, nor is one available on the mission's website. Neither Goldstone, nor the mission responded to NGO Monitor's repeated requests for this information. See Anne Herzberg, "List of 36 Incidents in the Goldstone Report," NGO Monitor, December 11, 2009, available at http://www.ngo-monitor.org/article/list_of_incidents_in_the_goldstone_report0. The list was only made public as an annex to a report issued in September 2010 by the Committee of Independent Experts established by the UNHRC to monitor implementation of recommendations made in the Goldstone Report. All of the 36 incidents relate to alleged violations committed by Israel. None relate to Hamas, belying claims made by Goldstone and other mission members that their investigation had been evenhanded and evaluated violations committed by both sides in the conflict. See "Report of the Committee of independent experts in international humanitarian and human rights laws to monitor and assess any domestic, legal or other proceedings undertaken by both the Government of Israel and the Palestinian side, in the light of General Assembly resolution 64/254, including the independence, effectiveness, genuineness of these investigations and their conformity with international standards," U.N. HRC, 15th Sess., A/HRC/15/50 (Sept. 2010) at 27-28, available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.50_en.pdf.

Other NGOs assisting in the mission included the Israeli NGO B'Tselem,³⁴ which had been campaigning for an “independent and credible investigation” of the Gaza War since January 2009. This NGO urged Israel to cooperate with the Goldstone Mission,³⁵ and also “provided assistance to the investigative staff of the Goldstone mission from the beginning to the end of its research.”³⁶ PCHR provided significant assistance and met with members of the mission in advance of the June 2009 Gaza hearings.³⁷ The NGO also testified at hearings conducted by the mission in Jordan from July 1-3, 2009.³⁸ According to PCHR, “Sameeh Mohsen, Coordinator of PCHR’s West Bank office, presented a 75-minute testimony on behalf of PCHR before the Fact-Finding Mission. At the beginning of the hearing, Justice Richard Goldstone, Head of the Mission, welcomed PCHR’s testimony.”³⁹

The mission held public hearings in Gaza on June 28 and 29, 2009, and in Geneva on July 6 and 7.⁴⁰ The witnesses were selected via a secret process, and their testimonies were pre-screened. Additionally, NGO Monitor is aware that the Commission held secret hearings in Geneva, Amman, and possibly in Gaza. The full extent of NGO participation, therefore, remains hidden, as do other aspects of this highly non-transparent process. For the public hearings, Goldstone chose representatives from some of the most politicized and radical NGOs operating in Israel, Gaza, and

³⁴ A significant percentage of B'Tselem's budget comes from government donors (E.U., the UK, Norway, Switzerland, Sweden, the Netherlands, Denmark, and Ireland, Germany). It also receives substantial foundation funding (NIF, Christian Aid, DanChurchAid, Diakonia, ICCO, OSI, SIVMO, and Trócaire). See http://www.btselem.org/about_btselem/donors.

³⁵ As mentioned, a frequent theme promoted by NGOs was that Israel should cooperate with the mission. Based on the UNHRC framework, the biased mandate, and the conflicts of interest involving mission and staff members, these demands had little merit. Moreover, where facts in the public domain exonerating the IDF existed – whether from the U.N., the Israeli Foreign Ministry, or independent sources – Goldstone ignored or twisted such evidence, choosing instead to credit Hamas sources.

³⁶ B'Tselem, “Israel must investigate army’s conduct in Operation Cast Lead,” October 19, 2009, available at http://www.btselem.org/English/Gaza_Strip/20091019_BTselem_position_on_the_Goldstone_commission_report.asp.

³⁷ PCHR, “Annual Report 2009,” at 128, 167, available at http://www.pchrgaza.org/files/Reports/English/pdf_annual/PCHR%20Annual-Eng-09.pdf. These hearings were not publicized by the mission. It is, therefore, unknown what other organizations participated in these secret hearings and the nature of their cooperation.

³⁸ *Id.* at 222.

³⁹ *Id.*

⁴⁰ Testimony available at <http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/FactFindingMission.htm>.

the Palestinian Authority, including Al Haq, PCHR, the Alternative Information Center,⁴¹ and PCATI.⁴²

In addition to the hearings, Goldstone also issued a “Call for Submissions” from “interested persons and organizations to submit relevant information and documentation that will assist in the implementation of the Mission’s mandate.” Although the mission never posted these submissions on its website, several organizations made their statements public, including a joint submission by seven Israel-based NGOs (Adalah, Association for Civil Rights in Israel [ACRI],⁴³ Gisha,⁴⁴ HaMoked,⁴⁵ PHR-I,⁴⁶ PCATI,⁴⁷ and Yesh Din⁴⁸), Diakonia, and the International Commission of Jurists. Each of these statements accused Israel of deliberately targeting civilians and orchestrating a campaign to “punish” Palestinians. Diakonia, for instance, claimed that Israel did not act in self-defense. The ICJ submission repeated the standard claims that the IDF used “disproportionate” force and that “such destruction is a grave breach of IHL that cannot be justified by military necessity.” Again, these NGO claims became the central themes adopted in the Goldstone Report, even when documentary or other evidence existed to refute these claims.

⁴¹ AIC’s funders include Associazione Comunita Papa Giovanni XXIII, the Basque Government, Belgium, the Catalan Government, Diakonia (Sweden), and ICCO (Netherlands), available at <http://www.alternativenews.org/english/index.php/about/about-the-aic>.

⁴² For excerpts from this testimony, see NGO Monitor, “The Goldstone Fact-Finding Mission and the Role of Political NGOs,” September 7, 2009, available at http://www.ngo-monitor.org/article/the_goldstone_gaza_fact_finding_committee_and_the_lund_london_guidelines_.

⁴³ ACRI is funded by the E.U., the UK, Norway, Switzerland, Sweden, Netherlands, Denmark, Spain, and Germany. ACRI also receives funding from NIF, the Ford Foundation, and Christian Aid. See http://www.ngo-monitor.org/article/association_for_civil_rights_in_israel_acri_.

⁴⁴ Gisha is funded by the E.U., the UK, Norway, Switzerland, Sweden, Netherlands, Denmark, Ireland, Germany, NIF, Oxfam, Trócaire, and OSI. See <http://gisha.org/index.php?intLanguage=2&intSiteSN=141&OldMenu=137&intItemId=125>.

⁴⁵ HaMoked receives funding from the E.U., France, Canada, Spain, Norway, Switzerland, Sweden, Netherlands, Denmark, Germany, and Ireland. OSI, NIF, and Oxfam NOVIB also provide funding. <http://www.hamoked.org/donations.aspx>.

⁴⁶ Funded by the E.U., Switzerland, Sweden, Denmark, Netherlands, Germany, NIF, OSI, Christian Aid, Oxfam, and the Ford Foundation. See http://www.ngo-monitor.org/article/physicians_for_human_rights_israel_

⁴⁷ PCATI receives funding from the E.U., the UK, Norway, Switzerland, Sweden, Netherlands, and Denmark. Institutional donors include (many of these funds originate from government sources) NIF, Trócaire (Ireland), Cordaid (Netherlands), ICCO (Netherlands), SIVMO (Netherlands), and the Sigrid Rausing Trust. See <http://www.stoptorture.org/il/en/donors>.

⁴⁸ Yesh Din is funded by the E.U., Ireland, Germany, Norway, Switzerland, Sweden, Netherlands, Denmark, UK, OSI, NIF, and Oxfam NOVIB. <http://www.yesh-din.org/geninfo.asp?gencatid=4>.

Al-Bader Flour Mill

One example indicative of this process involved an alleged Israeli airstrike on the al-Bader Flour Mill in Gaza. As one of the 36 incidents detailed, the Goldstone Report included a lengthy discussion of the alleged Israeli attack, and it was highlighted repeatedly by Goldstone in many public appearances. The report claimed the mill was struck by a missile fired by an F-16 on January 9 between 3 and 4am, and shortly thereafter, “hit several times by missiles fired from an Apache helicopter.”⁴⁹ It claimed that “the nature of the strikes, in particular the precise targeting of crucial machinery, suggests that the intention was to disable the factory’s productive capacity.”⁵⁰ The resulting attack allegedly halted all flour production in Gaza.⁵¹ According to Goldstone’s assessment, the alleged strike “had no military justification,” and there was “no suggestion that the Israeli armed forces considered the building to be a source of enemy fire.”⁵² The report concludes, therefore, that the strikes were “wanton and unlawful,” and that “the only purpose was to put an end to the production of flour in the Gaza Strip”⁵³ and “for the purpose of denying sustenance to the civilian population, which is a violation of customary international law as reflected in article 54 (2) of Additional Protocol I and may constitute a war crime.”⁵⁴

These allegations and conclusions appear to have been largely based upon accounts by Amnesty International. During a visit to Gaza following the war, Amnesty officials blogged about the “methodical” and “wholesale destruction” of Gazan factories “for which it is difficult or impossible to see any possible justification.”⁵⁵ In a submission to the U.N. Committee Against Torture, Amnesty alleged that “Israeli forces destroyed more than 2,000 homes and hundreds of other properties, including factories/workshops . . . Much of the destruction was wanton and could

⁴⁹ Report of the United Nations Fact-Finding Mission on the Gaza Conflict, “Human Rights In Palestine and Other Occupied Arab Territories,” U.N. HRC A/HRC/12/48 (25 September 2009) (hereinafter, “Goldstone Report”), at para. 919, available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf>.

⁵⁰ Id. at para. 50.

⁵¹ Id.

⁵² Id. at para. 929.

⁵³ Id. at para. 930.

⁵⁴ Id. at para. 937.

⁵⁵ Amnesty International, “The Task of Reconstruction will be Truly Immense,” Livewire blog, February 5, 2009, available at <http://livewire.amnesty.org/2009/02/05/the-task-of-reconstruction-will-be-truly-immense/>.

not be justified on grounds of ‘military necessity.’⁵⁶ At the Goldstone NGO townhall in Geneva, Amnesty’s representative asked the mission to “look at patterns of destruction; the different military targets that resulted in collateral damage. Not only civilian targets, but those that also caused damages not just to homes but also to commercial properties, like factories, workshops, and animal farms.” And in its July 2009 publication “22 Days of Death and Destruction,” Amnesty claimed that Israel deliberately “targeted” the flour mill with an “air strike” on January 10, 2009. It accused Israel of engaging in the “wanton destruction” of the mill and claimed that there was no military justification for the alleged Israeli strike because the mill’s “owners are adamant that the site was neither a launch pad for rockets nor a weapons cache, and the Israeli army has provided no evidence to the contrary.”⁵⁷

HRW also chose to highlight this incident in its publications promoting the Goldstone Report. In February 2010, HRW posted a video on its website allegedly taken by the mill’s owner in February 2009, purporting to show the “remains of an Israeli MK-82 500-pound aerial bomb” at the factory.⁵⁸ It also issued an accompanying press release repeating Goldstone’s allegations regarding the alleged Israeli strike and claimed that “Israel has failed to demonstrate that it will conduct thorough and impartial investigations into alleged laws-of-war violations by its forces.”⁵⁹

Notably, aside from the reports issued by Amnesty, HRW, and Goldstone months after the war, the alleged Israeli airstrike on the flour mill was not contemporaneously reported by the Palestinian NGOs in Gaza or in the Arabic media. Both Al Mezan and PCHR were issuing comprehensive daily summaries of the fighting during the war. Yet, none of these contemporaneous summaries referenced the flour mill or even any air strike on the date, time, and location claimed by Goldstone, Amnesty, and HRW.⁶⁰

Subsequently released documentary evidence, however, including photographs of the mill published by both the United Nations Institute for Training and Research

⁵⁶ Amnesty International, “Israel and Occupied Territory Update of the Briefing Committee Against Torture,” March 2009, available at <http://www.amnesty.org/en/library/asset/MDE15/014/2009/en/c1de4d98-c43b-4983-8c31-3292e7c19663/mde150142009en.pdf>.

⁵⁷ Amnesty International, “22 Days of Death and Destruction,” July 2009, at 71.

⁵⁸ Available at <http://www.hrw.org/en/video/2010/02/05>.

⁵⁹ HRW, “Israeli Military Investigations Fail Gaza War Victims,” February 7, 2010, available at <http://www.hrw.org/en/news/2010/02/06/israel-military-investigations-fail-gaza-war-victims>.

⁶⁰ It is inconceivable that these organizations would have failed to report on the supposed destruction of the only remaining flour mill in Gaza, if such a strike had occurred.

(UNITAR)⁶¹ and the IDF, refuted Amnesty's, HRW's, and Goldstone's version of events, and in particular, the claims that there was "no suggestion that the Israeli armed forces considered the building to be a source of enemy fire." Instead, these materials clearly showed that the flour mill was damaged by artillery during a firefight with Hamas combatants, and not by an F-16 airstrike as claimed. This evidence also thoroughly discredited Goldstone's and the NGO's legal claims that there was "no military justification" for the IDF fire and that Israel's operations by the mill constituted "war crimes."

According to UNITAR, the "damage signatures" of the mill indicated "that the majority of damage in this area was caused by intense IDF ground fire." Moreover, the UNITAR report noted that the damage, "appear[s] to have occurred between 16 and 18 January 2009," more than a week later than claimed by the NGOs and Goldstone. The report did not attribute any of the damage to IDF airstrikes.⁶²

The Israeli government also issued two updates regarding the IDF investigation of the alleged attack on the mill. In its January 2010 report, "Gaza Operations Investigations: An Update," the government stated that "IDF troops came under intense fire from Hamas positions in the vicinity of the flour mill."⁶³ It reported that "as the IDF returned fire, the upper floor of the flour mill was hit by tank shells."⁶⁴ It also noted that the "mill was not a pre-planned target."⁶⁵ It further observed that "the allegations were not supported in the [Goldstone Report], nor in the testimony to the Fact-Finding Mission by [the mill's owner] who had left the area prior to the incident...Photographs, of the mill following the incident do not show structural damage consistent with an air attack."⁶⁶

The IDF conducted a follow-up investigation of the incident following HRW's and media reports that "remains of an Israeli MK-82 500-pound aerial bomb" were found at the factory. In a July 2010 report, the IDF stated that the "photographs taken by U.N. officials, and video footage examined appeared inconsistent with an airborne strike, particularly given the absence of entry holes in the roof of the mill; the lack

⁶¹ UNITAR, *Satellite Image Analysis in Support to the United Nations Fact-Finding Mission to the Gaza Conflict*, July 31, 2009, at 33, available at http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/docs/UNITAR_UNOSAT_FFMGC_31July2009.pdf.

⁶² *Id.* at 28.

⁶³ State of Israel, "Gaza Operations Investigations: An Update," January 2010 at 41-3.

⁶⁴ *Id.* at 43.

⁶⁵ *Id.* at 42.

⁶⁶ *Id.* at 43.

of trace marks on the floor...and the fact that the fire which damaged the machinery in the mill broke out on the second floor while the ordnance was found on the first floor.”⁶⁷ In addition, the Israeli Air Force examined “every aerial attack in the vicinity of the mill” and found that of “seven strikes conducted within a one-kilometer radius of the mill using the particular munitions identified, five had hit their precise target... [while] the impact sites of the two additional strikes” landed 350 meters or more from the mill.⁶⁸ The Israeli Military Advocate General was also “unable to rule out the possibility that the ordnance had been deliberately planted in the mill.”⁶⁹

Indeed, the mill’s owner, Rashad Hamada, who was a featured witness at the mission’s public hearings in Gaza,⁷⁰ never testified to seeing the remains of a “500-pound aerial bomb” at the factory, nor damage caused by an F-16 airstrike. Rather, he stated that “[w]hat I did see are the empty bullets in the factory, on the factory roof, that’s what I saw.”⁷¹

NGOs Lobby for the Goldstone Report

Despite the serious methodological and factual inconsistencies, as well as the faulty legal analysis, NGO lobbying efforts in favor of the Goldstone process intensified once the report was released, including the issuance of dozens of press releases, statements, reports on the status of State investigations; calls for arms embargos and petitions; and ultimately, efforts to prosecute Israelis under universal jurisdiction statutes and at the International Criminal Court. Given that the credibility of these NGOs hinged upon the acceptance of the Goldstone Report, due to their intense involvement in the process and the hundreds of references to their work contained in the report, these statements simply amounted to self-promotion.

⁶⁷ State of Israel, “Gaza Operations Investigations: Second Update,” July 2010 at 31.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ It appears that Hamada may have had ulterior motives for testifying in the public hearings. In his testimony, Hamada claimed that he was owed \$6,500 from UNWRA dating back to 2006 and that he asked “Mr. Ban Ki-Moon to ask Mr. John Ging to help give this money back to me for some reason or another, Mr. John Ging refused to pay this amount for reasons that I believe are unjustifiable.”

⁷¹ During the hearings, Desmond Travers asked Hamada several questions after his statement that appeared to be calculated to elicit testimony bolstering NGO claims that Israel intentionally targeted Gaza’s means of food production: “You mentioned that the strike by the F-16 was very precise or very deliberate. Can you tell us why, in your opinion, that this was so?” This question was asked even though Hamada would have had no knowledge of IDF targeting and weapons employed, and even though he had already testified that he was not at the mill at the time of the fighting. Moreover, Hamada had also made no reference to an F-16 in his earlier testimony.

HRW issued more than twenty statements, and Amnesty released more than a dozen, lobbying countries and U.N. officials for the report's acceptance and disparaging the Israeli investigative process. In one instance, HRW joined a group of NGOs from Algeria, Morocco, Jordan, Egypt, Syria, Tunisia, Bahrain, Yemen, and Saudi Arabia, praising Goldstone for adopting HRW's own conclusions that "Israeli forces unlawfully used white phosphorous munitions and heavy artillery in densely populated areas, fired upon civilians holding white flags, and deprived the civilian population of basic needs through a protracted blockade, a form of collective punishment."⁷² Amnesty called on the "the U.N. Secretary-General [October 2, 2009] to refer the report to the U.N. Security Council without delay," and on the "U.S. government to press Israel and Hamas to conduct impartial investigations that would meet international standards."⁷³

In September 2009, a coalition of international NGOs including Oxfam, Amnesty International-Europe, Diakonia, Trócaire, and Euro-Mediterranean Human Rights Network (EMHRN) chastised the E.U. for refraining from "supporting or endorsing the ongoing United Nations inquiries." The organizations issued nine demands, including the adoption of an arms embargo against Israel, and ordered that "all those accountable for violations of IHL and IHRL to be brought to justice."⁷⁴

In an open letter to members, FIDH urged the U.N. Security Council to fully endorse the Goldstone Report and threatened to "fil[e] complaints based on the principle of universal jurisdiction and [] contribute[] to the International Criminal Court Office of the Prosecutor's preliminary analyses and investigations."⁷⁵

Israeli NGOs were also active in promoting the Goldstone Report, including NIF- and European-funded ACRI, Adalah, Bimkom,⁷⁶ Gisha, HaMoked, PHR-I, PCATI, Yesh Din, and B'Tselem. These groups issued a joint statement calling on Israel to "take the

⁷² HRW, "U.N. Endorse Goldstone Report," November 3, 2009, available at <http://www.hrw.org/en/news/2009/11/03/un-endorsegoldstone-report>. It is noteworthy that HRW would join with these Middle East NGOs to condemn Israel, rather than on issues related to the far more serious abuses in both breadth and scale taking place in those countries.

⁷³ "Amnesty International Calls for U.N. Secretary-General to Refer Goldstone Report on Gaza to U.N. Security Council for Action," October 2, 2009, available at http://www.amnestyusa.org/document.php?id=EN_GUSA20091005002&lang=e.

⁷⁴ "EU's Position on the Middle East Peace Process: Key Inconsistencies," September 23, 2009, available at http://www.diakonia.se/documents/public/how_we_work/letters_decisionmakers/0909_key_inconsistencies_eu_me_peace_process.pdf.

⁷⁵ FIDH, "Open Letter to Members of the United Nations Security Council," September 28, 2009, <http://www.fidh.org/IMG/pdf/iltpoopenletter2809a.pdf>.

⁷⁶ Bimkom's funders include the E.U., the UK, Switzerland, Sweden, Netherlands, and Denmark, as well as NIF and the Ford Foundation. See <http://www.ngo-monitor.org/article/bimkom>.

report seriously” and “cooperate with an international monitoring mechanism that would guarantee both the independence of that investigation and the implementation of its conclusions.”⁷⁷

Other E.U.–and European government-funded NGOs, including Adalah, Addameer,⁷⁸ Al-Dameer,⁷⁹ Al Haq, Al Mezan,⁸⁰ the Arab Association for Human Rights (HRA), Defence for Children International-Palestine Section (DCI-PS),⁸¹ and PCHR, joined forces to issue a statement repeating Goldstone’s highly inflammatory conclusion that “[w]hile the Israeli Government has sought to portray its operations as essentially a response to rocket attacks in the exercise of its right to self defence, the Mission considers the plan to have been directed, at least in part, at a different target: the people of Gaza as a whole.” These groups demanded “accountability, whether it be through the Security Council, acting under Chapter VII of the U.N. Charter, referring the situation to the International Criminal Court or that by States fulfilling their obligations to bring perpetrators to account under universal jurisdiction.” Finally, they called on states to “re-evaluate their relationship with Israel” because “normal relations [could] not be conducted” with it.⁸²

Al Mezan issued a statement demanding the “PNA, Arab States, Islamic States and all States which support human rights to ensure the Goldstone Report is submitted to the U.N. Security Council, the U.N. General Assembly and the Public Prosecutor

⁷⁷ ACRI, “Israeli Rights Groups Respond to Goldstone Report,” September 15, 2009, available at <http://www.acri.org.il/eng/story.aspx?id=687>.

⁷⁸ Addameer’s funding does not appear to be posted on its website. However, based on reporting from institutional and government donors, it is partially funded by the governments of Switzerland, Sweden, Netherlands, and Denmark.

⁷⁹ Al-Dameer, a Gaza-based NGO, receives funding from the E.U., as well as from the governments of Switzerland, Sweden, Netherlands, and Denmark. Its funding is not fully transparent so a comprehensive list is unavailable. See <http://englishweb.aldameer.org/?p=1036>.

⁸⁰ Core donors (2009) for Al Mezan are the NGO Development Center (NDC: Switzerland, Sweden, Denmark and the Netherlands), Norway, Open Society Institute (OSI), and Medico International. As of October 2009, project donors include Diakonia (Swedish government funds), Trócaire, Care International, NDC, OSI, and the European Commission. A grant from the Ford Foundation ended in March 2009.

⁸¹ DCI-PS, located in Ramallah, does not publish a list of donors. According to its annual report, revenues in 2008 were \$1,084,357. Known support includes a €600,000 grant from the E.U. (March 2009 – March 2012) for a project entitled “Promoting and protecting the rights of Palestinian children affected by armed conflict and occupation.” The NGO is also receiving \$639,000 in 2010-2012 from NDC (joint funds from Denmark, Switzerland, Sweden, and Netherlands) and £12,500 from the UK. In 2009-2011, the Swedish government is providing 459,000 SEK via Save the Children Sweden to DCI-PS. See http://www.ngo-monitor.org/article/defence_for_children_international_palestine_section.

⁸² Adalah, et.al., “Palestinian Human Rights Organizations Support Work and Recommendations of U.N. Fact-Finding Mission: Demand Effective Judicial Redress and the Protection of Victims’ Rights,” September 16, 2009, available at http://www.adalah.org/eng/pressreleases/pr.php?file=09_09_16.

of the International Criminal Court to investigate war crimes and crimes against humanity perpetrated by the Israeli Occupation Forces (IOF).”⁸³

Violations of Ethical Guidelines and International Fact-Finding Standards

The Goldstone Mission was compromised by serious methodological defects and a failure to comply with fact-finding standards. Similarly, NGO publications, upon which the Goldstone Report was largely based, were plagued by these same problems. Goldstone and the NGO “investigations” operated in clear violation of fundamental ethical standards adopted in the Lund-London Guidelines on International Human Rights Fact-Finding Visits by the Human Rights Institute of the International Bar Association. The guidelines specify norms for the composition of such inquiries and appropriate methodologies, including “accuracy, objectivity, transparency and credibility.” In particular, the Lund-London Guidelines state:

- *Reports must be **clearly objective and properly sourced**, and the conclusions in them reached in a transparent manner...In making their findings the delegation should try to **verify alleged facts with an independent third party** or otherwise. Where this is not possible, it should be noted.*
- *The terms of reference must not reflect any predetermined conclusions about the situation under investigation.*
- *The mission’s delegation must comprise **individuals who are and are seen to be unbiased**. The NGO should be confident that the delegation members have the **competence, experience and expertise** relevant to the matters pertaining to the terms of reference. (emphasis added)*

As a result of these failings, systematic and widespread condemnation and criticism of the Goldstone process have come from across the political spectrum. University of Essex Professor Françoise Hampson has noted that the key problems with Goldstone were the “biased HRC mandate,” “the nature and confused conclusions reached,” and Goldstone’s faulty assumption that violations of IHL can be based solely upon result.⁸⁴ Hebrew University Professor Yuval Shany, who is often critical of the Israeli military, has remarked that the Goldstone Report “sets a standard that

⁸³ Al Mezan, “Al Mezan Commends HRC Endorsement of Goldstone Report Recommendations; Calls for Ensuring the Rule of Law and Accountability,” October 17, 2009, available at http://www.mezan.org/en/details.php?id=9124&ddname=Crimes&id2=9&id_dept=9&p=center.

⁸⁴ Remarks made at Hebrew University, “Securing Compliance with IHL” Conference, November 22-24, 2009.

no one applies and no one can meet.”⁸⁵ Laurie Blank, Director of Emory University Law International Humanitarian Law Clinic, found that “the Goldstone Report’s application of IHL is questionable, either because it uses the incorrect legal standard or because it applies the wrong law when more than one body of law applies.”⁸⁶ Judge Fausto Pocar, former President of the International Criminal Tribunal for the Former Yugoslavia, criticized⁸⁷ the Goldstone Report for its one-sided and discriminatory call for universal jurisdiction solely against Israel.⁸⁸

British think tank Chatham House also issued a report regarding irregularities in the Goldstone process and concluded that among other aspects, “the Mission had given insufficient acknowledgement of the difficulty in obtaining information in a political environment dominated by Hamas,” that there was a perception of bias regarding mission members, that “the criteria employed [for selection of incidents to be investigated] should have been indicated,” and that criticisms of Hamas were tentative.⁸⁹

The Goldstone process stands in stark contrast to the methodologies employed by the E.U. fact-finding mission on the 2008 Georgia Conflict, led by Swiss Ambassador Heidi Tagliavini. For instance, this mission cautioned at the outset of its report:

*[I]t was necessary to base much of the fact-finding on investigations which had been carried out soon after the conflict by international and regional organisations such as the ODIHR (OSCE), the Council of Europe and the UNHCR as well as by well-known and respected international nongovernmental organisations such as Amnesty International, Human Rights Watch, International Crisis Group and others.*⁹⁰

⁸⁵ Id.

⁸⁶ Laurie Blank, “The Application of IHL in the Goldstone Report: A Critical Commentary,” 12 *Yearbook of Int’l Humanitarian L.* (2009) at 2. [Reprinted in this volume 203–264.]

⁸⁷ Remarks made at Hebrew University, “Securing Compliance with IHL” Conference, November 22–24, 2009.

⁸⁸ See Goldstone Report at paras. 127, 1856–57. For other critiques of the Goldstone process, see Moshe Halbertal, “The Goldstone Illusion,” *The New Republic*, November 6, 2009, available at <http://www.tnr.com/article/world/the-goldstone-illusion>. [Reprinted in this volume 277–290.]

⁸⁹ Report of an Expert Meeting which Assessed Procedural Criticisms made of the U.N. Fact-Finding Mission on the Gaza Conflict (The Goldstone Report), Chatham House, (Nov. 27, 2009), available at http://www.chathamhouse.org.uk/files/15572_il271109summary.pdf. [Reprinted in this volume 89–98.]

⁹⁰ Independent International Fact-Finding Mission on the Conflict in Georgia, “Report: Vol. 1,” September 2009, available at http://www.ceiig.ch/pdf/IIFFMCG_Volume_1.pdf, p. 9.

As a result, the Tagliavini mission added the caveat that

*[T]he factual basis thus established may be considered as adequate for the purpose of fact-finding, but not for any other purpose. This includes judicial proceedings such as the cases already pending before International Courts as well as any others.*⁹¹

Similarly, a “mapping” exercise conducted by the U.N. Office of the High Commissioner for Human Rights to document violations of international humanitarian and human rights law in the Democratic Republic of Congo from 1993-2003 employed a detailed and transparent methodology to conduct its work.⁹² The mapping team evaluated more than 600 violent incidents in the Congo and the report includes more than 40 pages devoted to the methodology employed. In particular, the team detailed how information was processed:

*102. Assessing the reliability of the information obtained was a two-stage process involving evaluation of the reliability and credibility of the source, and then the pertinence and truth of the information itself. This method is known as the admiralty scale. Reliability of the source is determined using several factors, including the nature, objectivity and professionalism of the organisation providing the information, the methodology used and the quality of prior information obtained from the same source. The validity and authenticity of the information is assessed by comparing it to other available data relating to the same incidents to ensure that it tallies with already verified elements and circumstances. In other words, the process involves cross-checking the originally obtained information by ensuring that the corroborating elements do in fact come from a different source than the primary source that provided the information in the first place. Such corroboration will generally be obtained from evidence gathered in the Mapping Exercise, but may also come from other reports and documents. However, different reports on the same incident and based on the same primary source would not constitute corroboration by a separate source.*⁹³

By cross-checking original sources and requiring at least two independent sources before publication, this methodology was better positioned to eliminate the mere recycling of information, and ensure that a credible factual analysis was presented – a problem that plagued the Goldstone and NGO reports.

⁹¹ Id.

⁹² Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003, August 2010, available at http://www.ohchr.org/Documents/Countries/ZRDRDC_MAPPING_REPORT_FINAL_EN.pdf.

⁹³ Id. at 39.

Conclusion

As shown in this analysis, NGOs played a central role in every aspect of the Goldstone process. Without their participation, it is unlikely that the Goldstone Report would have been as widely publicized and had as much impact. Their role underscores the intense reliance placed on these organizations in U.N. frameworks. Due to the methodological flaws and lack of transparency that plagued the Goldstone Mission, and due to the likely and ever-increasing role for NGOs in future U.N. fact-finding endeavors, it is essential that standards for accountability and transparency are adopted and guidelines for fact-finding are developed and adhered to. Failure to do so will only lead to other Goldstone reports that continue to erode the credibility of the U.N., damaging efforts to protect against violations of the laws of armed conflict and human rights.

REPORT OF AN EXPERT MEETING ASSESSED PROCEDURAL CRITICISMS MADE OF THE U.N. FACT-FINDING MISSION ON THE GAZA CONFLICT (THE GOLDSTONE REPORT)¹

Chatham House

Introduction

This meeting was convened at Chatham House on November 27, 2009 to address some of the criticisms which have been directed against the Report of the United Nations Fact-Finding Mission on the Gaza Conflict (U.N. Doc.A/HRC/12/48, September 15, 2009) [hereinafter the Goldstone Report]. The participants in the meeting were recognized experts in public international law who have specialized in human rights and/or international humanitarian law. The aim was that they should primarily address criticisms made regarding procedural aspects of the Goldstone Report rather than its substantive conclusions, since the participants had not had access to all the evidence collected by the Mission.²

The Mandate of the Mission

The meeting considered this in response to the criticisms of the mandate under which the Mission was convened. These related primarily to the bias of resolution S-9/1 and its legal status, asserting that “as a matter of law, no statement by any individual, including the President of the Council, has the force to change the mandate of the Mission.”

¹ Originally published December 10, 2009. The meeting was organized by Chatham House and the Sir Joseph Hotung Programme in Law, Human Rights and Peace Building in the Middle East, School of Oriental and African Studies, University of London. Participants included Ms. Elizabeth Wilmshurst (Chair), Professor Matthew Craven, Dr. Catriona Drew, Professor Charles Garraway, Professor Steven Haines, Professor Françoise Hampson, and Professor Sir Nigel Rodley.

² Ambassador Leshno-Yaar’s letter to Justice Goldstone, 2 July 2009, available at http://www.mfa.gov.il/MFA/Foreign+Relations/Israel+and+the+U.N./Issues/Letter_from_Israel_Ambassador_Leshno-Yaar_to_Goldstone_2-Jul-2009.htm (last checked 10 December 2009).

The Fact-Finding Mission was created pursuant to Human Rights Council resolution S-9/1 (9 January 2009). Operative paragraph 14 of this resolution set out the original mandate of the Fact-Finding Mission. It provided that the HRC had decided:

To dispatch an urgent, independent fact-finding mission, to be appointed by the President of the Council, to investigate all violations of international human rights law and international humanitarian law by the occupying Power, Israel, against the Palestinian people throughout the Occupied Palestinian Territory, particularly in the occupied Gaza Strip, due to the current aggression, and calls upon Israel not to obstruct the process of investigation and to fully cooperate with the mission;...

The Mission was established by the President of the Human Rights Council on April 3, 2009 with an amended 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.

The first question the meeting addressed was the legal nature of the mandate of the Mission established under resolution S-9/1 and whether it was binding on the Mission.

The meeting considered that the legal status of resolutions of the Human Rights Council was a simple question: resolutions of such political bodies as this are not binding, but they can have an institutional effect. Certainly, the Mission would not have existed if not for resolution S-9/1. The question is whether it is possible to have a Mission instigated by S-9/1 which does not comply with the terms of S-9/1. Can the constitutive effect of the resolution be separated or distinguished from the terms of reference it contains? The original mandate was set out in resolution S-9/1 which confined the attention of the Mission to Israel's acts, but the President of the Council was charged with appointing the Mission. He appointed it with a different mandate, since HRC S-9/1 was aggressively biased against Israel.

A related question is whether the mandate as originally drafted was the kind of mandate the Council should have produced. Operative paragraph 3 of General Assembly resolution 46/59 (December 9, 1991), Declaration on Fact-Finding by the United Nations in the Field of the Maintenance of International Peace and Security provides "Fact-Finding should be comprehensive, objective, impartial and timely."

The underlying question is whether Israel was entitled to state that an improper mandate had been given which as a legal matter invalidated the Mission. Israel attacked the process, which is normal diplomatic practice when one wants to avoid

the facts, but the Human Rights Council gave it grounds to do so by passing a biased resolution in the first place. Whether the Mission itself was capable of being impartial under its new mandate is a practical not a legal question, which can be answered by the way in which the Mission was conducted. The meeting addressed a further criticism: that, by not examining Israel's right to self-defense, the Goldstone Mission "challenged Israel's democratic values and rule of law."³ The meeting considered this criticism to be without foundation: the right to self-defense is one enshrined in the *jus ad bellum* which governs the right to engage in a conflict; the mandate of the Mission concerned only the *jus in bello*, governing the conduct of participants in a conflict, whether or not they have a right to engage in it.

The meeting concluded that there were legal and U.N. constitutional problems with the original mandate which did not conform with the terms of the 1991 General Assembly declaration on fact-finding missions. It was necessary to adapt the mandate and it is important to note that the Human Rights Council had not objected to the new mandate however faulty the original mandate was, it did not affect the conduct of the Mission under the amended mandate; the conduct of the Mission must be assessed in terms of the mandate under which it operated.

The Range and Purposes of Fact-Finding Missions

The meeting then noted that the mandates of fact-finding missions differ according to their range and purpose. A fact-finding mission involves, first, an analysis of the law in order to determine what are relevant facts. These facts then need to be ascertained in so far as possible. Fact-finding missions are not criminal investigations and where criminal offences are revealed, it will be necessary for there to be subsequent separate investigations with a view to possible prosecution of individuals. But is the task of the mission simply to uncover the relevant facts and to produce a report for others to analyze and draw conclusions, or should the mission itself draw the conclusions?

A further point lies in the distinction between human rights and international humanitarian law investigations. Human rights investigations may be "easier" because specific rights are under investigation and the finding of the facts leads to an inevitable conclusion as to whether or not the rights in question have been breached. Investigations involving international humanitarian law may be more difficult because the conduct of hostilities, and in particular individual targeting decisions, involves working out a balance between the anticipated civilian loss and damage, and

³ Israel Ministry of Foreign Affairs, Israel's analysis and comments on the Gaza Fact-Finding Mission Report, 15 September 2009, (under "General" category), available at http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Hamas+war+against+Israel/Israel_analysis_comments_Goldstone_Mission_15-Sep-2009.htm (last checked 10 December 2009).

the anticipated military advantage. This requires some knowledge of the intelligence available to the attacker and the operational circumstances in which the attack took place as seen by the attacker. Such investigations may therefore be very difficult without the cooperation of the attacker.

In one view, insufficient acknowledgement had been given in the Report to the difficulties in reaching conclusions about violations of the law on conduct of hostilities without the cooperation of the party concerned. On the other hand, it was noted that evidential problems can be overstated. In very few domestic criminal trials will all the evidence be volunteered to the court; investigations must proceed as best they can. However, there are few situations where the matter is so entirely dependent on facts known only to one party.

There is a further difficulty with international humanitarian law; the rules can be subject to different interpretations. A commission should tease out these legal issues and should make its view clear on the interpretation it favors. The Goldstone Report does not set out in detail its interpretation of the law in order to determine which facts are relevant to determine whether a target was legitimate or not. It did not need to express a definite view in the way that a court should, but merely needed to record that different interpretations exist on a given point, and indicate the facts which would be relevant to a tribunal.

The Composition of the Mission

The meeting addressed criticisms which had been made of the composition of the Mission, in particular relating to Professor Christine Chinkin's participation. Before being appointed to the Mission, she had signed a public letter relating to the Gaza conflict. The meeting expressed its complete confidence in the personal integrity of Professor Chinkin, which had also been affirmed by Judge Goldstone, and that her participation would have had no detrimental impact on the impartiality of the Mission's conclusions.

However the meeting noted that fact-finding missions should avoid any perception of bias. An analogy was sought in the International Fact-Finding Commission created by Article 90 of the 1977 Additional Protocol I to the Geneva Conventions. The Commission's internal regulations require its members not to act in a way that would damage their impartiality, and they therefore exercise great care when writing or speaking on international disputes that could potentially be subject to an

investigation by the Commission.⁴ This is perhaps a problem which is especially acute for academics who participate in fact-finding missions regarding conflicts or disputes on which they may have written in the past. The meeting considered that context was vital: whether a person should participate depended on the situation and the content and nature of the published work.

The Conduct of the Mission: Public Hearings

The meeting addressed the criticism that the Goldstone Mission had heard evidence in public in Gaza. Was this an inappropriate method of work for a fact-finding mission? Surely more information would have been obtained by taking evidence in confidence and teasing out the information rather than trying to do so in a public forum. The meeting noted that public hearings formed only a relatively small part of the Mission's activities and that most of the evidence heard in the hearings was irrelevant to its mandate and its conclusions. On the whole, the report is based on information gathered outside the hearings. The conduct of public hearings was reminiscent of Truth and Reconciliation Commissions such as the South African one. In the context of Gaza, there could be a benefit for people in Israel being able to hear the experiences those in Gaza went through during the conflict, and equally for the latter to have heard from Israeli victims of rocket attacks. The Mission put forward a justification for the public hearings in the report on the basis that, "The aim of holding the hearings publicly was to give a voice to those who had direct experiences and expertise that related to the mandate of the Mission." While it was not part of the Mission's express mandate to perform the function of giving a voice to victims, it was a valuable spin-off. A further aim of the public hearings may have been to obtain a broader contextual understanding which could aid the further discovery of information. Nevertheless if a mission receives information in this way, it must be aware of the constraints those testifying are under when giving information in public, be sensitive to the information obtained, and the reliance that can be placed upon it.

The Conduct of the Mission: Witnesses

The meeting addressed the criticism that the witnesses heard by the Goldstone

⁴ Article 3 of the International Humanitarian Fact-Finding Commission's regulations state that "During their term of office, Members shall not engage in any occupation or make any public statement that may cast a legitimate doubt on their morality and impartiality required by the Protocol."

Mission were prescreened and pre-selected, that the witnesses were intimidated, and that none of the witnesses in the broadcast hearings were asked questions concerning “any Palestine terrorist activity or the location of weaponry and terrorists in civilian areas.”⁵ It had further been alleged that these witnesses were part of an orchestrated political campaign.

One speaker stated that witnesses were not pre-screened or selected by Hamas but were coordinated by Palestinian civil society, local lawyers, and international organisations. However, while all witnesses would have felt able to talk freely about alleged Israeli abuses, it is true that some witnesses would have felt unable to criticise, or speak openly of alleged abuses by, Hamas. Some problems were mentioned in paragraphs 164-167 of the Goldstone Report but the Mission had given insufficient acknowledgement of the difficulty in obtaining information in a political environment dominated by Hamas.

The meeting observed that access to witnesses was a perennial problem for fact-finding commissions. One speaker commented that the problems in Gaza were similar to experiences encountered in Lebanon where people would not speak out against Hezbollah, and similar to the situation in Northern Ireland where communities would intimidate witnesses. It is a factor with which fact-finding commissions have to deal and which they have to take into account in assessing the evidence. This seemed to have been attempted by the Mission.

The Conduct of the Mission: Selection of Incidents

The meeting addressed the criticism that the incidents examined by the Goldstone Mission appeared to have been selected for political effect; for example that it did not investigate allegations that the Shifa Hospital in Gaza had been used as a command centre for Hamas fighters. The meeting noted the statement by the Mission that in view of the time frame it “necessarily had to be selective in the choice of issues and incidents for investigation” (paragraph 157). Resolution S-9/1 called for the “urgent dispatch of the Mission” and as there had been an eleven week delay in its establishment, “the Mission agreed to be bound by a short time frame (about three months) to complete its work” (paragraph 135). In fact, this period was not abnormally short for a U.N. fact-finding mission (which must be contrasted with, for example, the E.U.- sponsored report into the conflict between Russia and Georgia which was given much more time to undertake its investigation and an extension to

⁵ Israeli Ministry of Foreign Affairs, Initial Response to Report of the Fact-Finding Mission on Gaza Established Pursuant to Resolution S-9/1 of the Human Rights Council, 24th September 2009, para 17, p 6, available at <http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Hamas+war+against+Israel/Initial-response-goldstone-report-24-Sep-2009.htm> (last checked December 2009).

complete its report).

It was observed that if a fact-finding mission is put in place it needs the time and resources to do the job properly. While a selection of incidents was inevitable for the Goldstone Mission, the criteria employed should have been indicated: it was not satisfactory simply to refer to the timeframe imposed on the Mission's work; other fact-finding reports are also subject to the pressure of time.

One speaker underlined that the official Israeli criticism had identified only one specific incident (the Shifa Hospital) while making general allegations that mosques had been used for weapons storage and by Hamas fighters. Presumably no civilian deaths or injuries were associated with the Shifa Hospital incident, and while the question of human shields could have been investigated, there might not have been witnesses willing to testify as the matter concerned Hamas. The investigation of such incidents could have been made possible by the intelligence Israel had in its possession.

While the meeting conceded that it did not have enough information on the incidents omitted to make any firm assessment, it noted that the Mission used information that was in the public domain, for instance in reports published by human rights NGOs, and noted that the time constraints it was under meant that it could not provide a comprehensive account of the conflict. It presumably selected those incidents which were the most well-documented, where it would not have to rely on witnesses who would be unwilling to speak freely.

The real issue was whether it was a legitimate criticism that the incidents the Mission did choose to examine could be used to extrapolate an unbalanced account of what happened in Gaza. The meeting agreed that a relevant consideration was that Israel refused to co-operate with the Mission, and thus did not provide the valuable intelligence it had concerning, for example, the alleged use of civilian facilities by Hamas fighters. Israel's refusal to cooperate in relation to the choice of incidents that the Mission should investigate presented a particularly acute problem. On this and other issues, Israel appeared to be using its refusal to take part in the process as a basis for criticising the Report's findings or procedures.

The Mission's Assessment of Domestic Review Procedures

The meeting addressed the criticism that the report had dismissively rejected Israel's extensive system of investigations of allegations of wrong-doing. The meeting considered whether it was necessary to have full cooperation from the authority concerned in order to assess the adequacy of domestic review procedures, or whether

it was possible to rely principally on external sources. The Goldstone Report had found that the system Israel employs to investigate and prosecute serious violations of human rights and humanitarian law contained major structural flaws that made it inconsistent with international standards. This finding had been criticised on the basis that it challenged the legitimacy of national legal systems, and exposed soldiers subject to this and similar review systems (such as those employed by the United States and United Kingdom) to foreign or international legal proceedings thus “hampering defensive operations throughout the world.” The meeting agreed that it is not necessary to have full cooperation from the relevant authorities before assessing domestic systems; the work of most justice systems is in the public domain.

The meeting noted that a major part of the Report’s finding on this issue was that Israel relies on operational briefings and military enquiries before any criminal enquiries are held, and these briefings both delayed and impeded the criminal process. The meeting noted that armed forces generally conduct debriefings after military operations to learn what went right and what went wrong, but these did not have the same effect as the operational debriefings employed by Israel. Although the possibility of a criminal investigation can only arise once a possible offense has been identified, which might occur as the result of a debriefing, in the Israeli system the two cannot proceed simultaneously. In 2000, Israel adopted a policy that the operational debriefing must be held first: this effectively means that criminal proceedings can only be initiated six months after the incident under investigation took place. The Goldstone Report concludes that this delay can make criminal proceedings not feasible because evidence is no longer available. In other systems, the evidence is more likely to be preserved because both the debriefing and criminal investigations can be conducted at the same time.

It was pointed out that that there will always be practical difficulties of collecting evidence in time of conflict. Apart from the question of criminal proceedings, human rights law is also relevant. Human rights law requires that investigations be held into civilian deaths in order to determine that obligations regarding the right to life have not been breached. It may be extremely difficult to do this in a conflict situation, and as the level of violence rises so does the difficulty of investigating; but this does not justify ignoring the requirement to investigate. The established international standards in some respects may outstrip the practice of other countries’ systems of military investigation. But this does not excuse non-compliance with the international requirements.

In sum, if the system creates delays and impediments to criminal investigations, as seems to be case with Israel, the system needs to be reconsidered. Although

the jurisprudence of Israel's Supreme Court is highly respected, that does not automatically give a clean bill of health to all of Israel's investigative system.

Style and Presentation of the Report

It was suggested that aspects of style and presentation in the Goldstone Report could raise criticisms about bias and prejudice on some issues. The criticisms of Hamas in the Report are tentative, for example in relation to the protection of civilians, while the language employed regarding alleged Israeli violations is stronger and more condemnatory. If the conclusions had been presented as *prima facie* findings rather than final conclusions, the Report would have been stronger. The incidents recounted in Chapters 9-11 are presented as factual narratives with little analysis. The titles appeared to disclose bias. There were hardly any documentary references. It was noted that such problems weakened the impact of the Report, not least by encouraging diversion from its substantive allegations which need to be addressed. But they did not substantively weaken the Report, and the criticisms made of it by the resolution adopted by the U.S. House of Representatives⁶ could be described as being a mirror image of the original bias of the mandate agreed on by the Human Rights Council.

Concluding Observations on the Value of the Report

The meeting concluded by addressing the general force of the criticisms it had considered, and the extent to which they might invalidate the Report. In short, should the Report be taken seriously by the international community?

The meeting was of the view that the Report was very far from being invalidated by the criticisms. The Report raised extremely serious issues which had to be addressed. It contained compelling evidence on some incidents. In conclusion it was agreed that one of the main problems caused to the mission was the non-cooperation of Israel and that this had had the effect of contributing to any perception of bias there might be. It was observed that common Article 1 of the 1949 Geneva Conventions places the obligation on States parties "to respect and ensure respect [for the Conventions] in all circumstances." If a fact-finding or other commission produces allegations regarding a State's conduct under the Conventions, is not that State under an obligation, in

⁶ U.S. House of Representatives Resolution Calling on the President and the Secretary of State to oppose unequivocally any endorsement or further consideration of the "Report of the United Nations Fact-Finding Mission on the Gaza Conflict" in multilateral fora, H. Res. 867, 3 November 2009, available at <http://thomas.loc.gov/cgi-bin/query/D?c111:2:./temp/~c111u4cfJH::> (last checked 10 December 2009).

showing its respect for international humanitarian law, at least to respond to those questions? Further, the obligation to “ensure respect” is also placed on third States by common Article 1. This should lead E.U. and other States parties to reinforce their efforts to press both parties to respond and act, including by conducting an effective investigation.

THE CASE AGAINST THE GOLDSTONE REPORT A STUDY IN EVIDENTIARY BIAS¹

Alan Dershowitz²

I. Introduction

The Goldstone Report, when read in full and in context, is much worse than most of its detractors (and supporters) believe. It is far more accusatory of Israel, far less balanced in its criticism of Hamas, far less honest in its evaluation of the evidence, far less responsible in drawing its conclusion, far more biased against Israeli than Palestinian witnesses, and far more willing to draw adverse inferences of intentionality from Israeli conduct and statements than from comparable Palestinian conduct and statements. It is worse than any report previously prepared by any other United Nations agency or human rights group. As Major General Avichai Mandelblit, the advocate general of the Israel Defense Forces, aptly put it:

I have read every report, from Human Rights Watch, Amnesty International, the Arab League. We ourselves set up investigations into 140 complaints. It is when you read these other reports and complaints that you realize how truly vicious the Goldstone Report is. He made it look like we set out to go after the economic infrastructure and civilians, that it was intentional: It's a vicious lie.³

The Goldstone Report is, to any fair reader, a shoddy piece of work, unworthy of serious consideration by people of good will, committed to the truth.

Most of the criticism and praise of the report has been based on its highly publicized and controversial conclusions, rather than on its methodology, analysis, and substantive findings. The one statement Richard Goldstone has made, with which I agree, is that many of the report's most strident critics have probably not read the

¹ Originally published in the JERUSALEM POST, January 31, 2010.

² The author wishes to express great appreciation to Josh Sharp, who provided excellent research for this paper.

³ Ethan Bronner, Israel Poised to Challenge a U.N. Report on Gaza, NEW YORK TIMES, Jan. 23, 2010, available at <http://www.nytimes.com/2010/01/24/world/middleeast/24goldstone.html>.

entire report. But it is also true, though I have not heard the report's biased author say this, that many of the report's most vocal defenders and advocates have also not read it.

It is not surprising that so few of the report's critics and supporters have actually made their way through its dense and repetitive texts. The version I originally read was 553 pages long plus appendices. There are 1,223 footnotes, though many of its most critical statements are not well sourced. It is poorly written, obviously drafted by several different hands and without the benefit of a good overall editor. It is laden with internal inconsistencies, shoddy citations of authority, and overall poor craftsmanship. If a camel is a horse designed by a committee, this report lacks even the grace of a dromedary. Most of the commentary on the report, both pro and con, seems to be based on its somewhat sanitized summary and conclusion. Some of the worst mistakes are buried very deep in the report, many of the most serious ones toward the end.

Efforts are currently underway by supporters of the report to have governments, prosecutors, non-governmental organizations, religious groups, and distinguished individuals sign on to the report, so as to give it the credibility it now lacks. No one should do so without reading the report in full – and without reading responsible criticisms (and defenses) of the report. I have read every word of the report and compared different sections. I have offered to debate Goldstone about its contents. He has refused, as he has generally refused to respond substantively to credible critics of the report. My offer to debate still stands. If he refuses, as I expect he will, let him at least respond to the serious legal, factual, and moral criticisms contained in this study and others.⁴ As the head of the mission and the report's most visible public defender, Goldstone has a public obligation to respond to responsible criticism, which to date, he has not done.

In the coming week, the Secretary-General of the United Nations will present a compilation of responses to the Goldstone Report.⁵ I am submitting this analysis for inclusion.

⁴ Goldstone has said, "I have yet to hear from the Obama administration what the flaws in the report that they have identified are. I would be happy to respond to them, if and when I know what they are." Goldstone Tells Obama: Show Me Flaws in Gaza Report, HAARETZ, Nov. 22, 2009, available at <http://www.haaretz.com/hasen/spages/1122893.html>. Yet Goldstone has repeatedly failed to respond to substantive criticism of the report. The Committee for Accuracy in Middle East Reporting in America wrote Justice Goldstone a thoughtful letter containing substantive critiques and pointing out the report's flaws. A lengthy study of the report was attached. Here is how Goldstone responded: "I confirm receipt of your letter. I have no intention of responding to your open letter." A Formal Letter to Justice Goldstone, available at http://www.camera.org/index.asp?x_context=7&x_issue=76&x_article=1764.

⁵ Israel Official Reply on Goldstone Gaza Report: Probe Biased, Flawed, HAARETZ, Jan. 24, 2009, available at <http://haaretz.com/hasen/spages/1144596.html>.

The Israeli military will soon publish a detailed rebuttal to the Goldstone Report, providing photographic and other hard evidence that contradicts its most serious “findings.” I am not in a position to deal with specific military issues. But I am in a position to consider and evaluate the evidentiary methodology employed by the Goldstone Report.

In this analysis, I will focus on the two central conclusions reached in the report. The first is that the real purpose of Operation Cast Lead was not to protect Israeli civilians from Hamas rockets, over eight thousand of which had struck Israel over a nine year period.⁶ According to the report, Israel used the rocket attacks on its citizens as a pretext, an excuse, a cover for the real purpose of the operation, which was to target innocent Palestinian civilians – children, women, the elderly – for death. This criminal objective was explicitly decided upon by the highest levels of the Israeli government and military, and constitutes a deliberate and willful war crime. The report found these serious charges “to be firmly based in fact” and had “no doubt” of their truth.⁷

In contrast, the Mission decided that Hamas was not guilty of deliberately and willfully using the civilian population as human shields. It found “no evidence” that Hamas fighters “engaged in combat in civilian dress,” “no evidence” that “Palestinian combatants mingled with the civilian population with the intention of shielding themselves from attack,” and no support for the claim that mosques were used to store weapons.⁸

As we will see, the report is demonstrably wrong about both of these critical conclusions. The hard evidence conclusively proves that the exact opposite is true, namely that:

1. Israel did not have a policy of targeting innocent civilians for death. Indeed the IDF went to unprecedented lengths to minimize civilian casualties; and
2. that Hamas did have a deliberate policy of having its combatants dress in civilian clothing, fire their rockets from densely populated areas, use civilians as human shields, and store weapons in mosques.

What is even more telling than its erroneous conclusions, however, is its deliberately

⁶ Human Rights Watch, *Rockets from Gaza 20* (Aug. 2009), available at <http://www.hrw.org/sites/default/files/reports/iopqassam0809web.pdf>.

⁷ U.N. Human Rights Council, *Fact-Finding Mission on the Gaza Conflict, Human Rights in Palestine and Other Occupied Arab Territories*, ¶¶ 1884, 1895, U.N. Doc. A/HRC/12/48 (Sept. 25, 2009) [hereinafter *Goldstone Report*].

⁸ *Goldstone Report* ¶¶ 495, 483, 486.

skewed methodology,⁹ particularly the manner in which it used and evaluated similar evidence very differently, depending on whether it favored the Hamas or Israeli side.

The evidentiary bias of the report should come as no surprise to anyone who is familiar with the members of the Mission and statements they have made both before, during and after working on the report.¹⁰ There were four members: A Pakistani woman, who was formerly Special Representative of the Secretary-General on Human Rights Defenders; an Irish man, who was formerly a Colonel in the Irish Defense Forces; a British woman, who is a professor at the London School of Economics; and a South African man, the former Chief Prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda.

The Pakistani member of the Mission, Hina Jilani, signed a letter (along with two other Mission members) before even being appointed stating that “The events in Gaza have shocked us to the core.”¹¹ After the report was completed, she made statements indicating that victims must not only be listened to, but that it would be “very cruel to not give credence to their voices.”¹² She did not mention that the “voices” of the Gaza witnesses were monitored and controlled by Hamas, since their testimony was televised, and that much of it was demonstrably false and contradicted by hard evidence.

The Irish member of the Mission, Col. Desmond Travers, refused to believe evidence that undercut Hamas’ position even when it was on videotape and utterly

⁹ As a preliminary example of the Mission’s skewed methodology, the Mission fails to verify the claims of Palestinian witnesses. For instance, Amr Hamad told the Mission, “The industrial sector that was destroyed, for example, the 324 factories that were destroyed, that we[re] destroyed used to employ four hundred thousand, uh, 40,000 workers. And these have lost their uh, jobs, uh, forever.” The witness based his testimony on a report that noted that only 4,000 workers lost their job, but the Mission blindly wrote, “Mr. Amr Hamad indicated that 324 factories had been destroyed during the Israeli military operations at a cost of 40,000 jobs.” See Richard Landes, Goldstone’s Gaza Report: Part I, MIDDLE EAST REVIEW OF INTERNATIONAL AFFAIRS, Dec. 2009, available at http://www.gloriacenter.org/meria/2009/12/landes1.html#_edn51 [hereinafter Goldstone’s Gaza Report: Part I.] [Reprinted in this volume 45–67.]

¹⁰ It should also come as no surprise to anyone familiar with the workings of the United Nations Human Rights Council. By the time the UNHRC was only three years old, it had condemned Israel 26 times and all other nations 6 times total. Israel is the only country that is permanently on the agenda of the UNHRC. Richard Landes, Goldstone’s Gaza Report: Part II, MIDDLE EAST REVIEW OF INTERNATIONAL AFFAIRS, Dec. 2009, available at http://www.gloria-center.org/meria/2009/12/landes1.html#_edn51 [hereinafter Goldstone’s Gaza Report: Part II].

¹¹ Gaza Investigators Call for War Crimes Inquiry, Amnesty International, Mar. 16, 2009, available at <http://www.amnesty.org.au/news/comments/20572/>.

¹² See Haroon Siddiqui, Looking for Accountability over Gaza War, THE STAR, Oct. 15, 2009, available at <http://www.thestar.com/comment/article/710335> (“I think it was a very ill-considered move on his [Abbas’s] part [to shelve the Goldstone Report]. I’ve been in Gaza. I’ve met the victims, as I’ve met the victims from southern Israel of rocket attacks from Hamas and other groups. And I know what the victims’ expectations are. I think it’d be very cruel to not give credence to their voices.”).

uncontradicted. This is what he said about weapons being stored in Gaza mosques: “We also found no evidence that mosques were used to store munitions. Those charges reflect Western perceptions in some quarters that Islam is a violent religion....If I were a Hamas operative the last place I’d store munitions would be in a mosque. It’s not secure, is very visible, and would probably be pre-targeted by Israeli surveillance. There are a [sic] many better places to store munitions.”¹³ Not only is there physical evidence that conclusively proves that mosques are a favorite place to store rockets and other weapons, but Hamas leaders boast of it.

The British member, Christine Chinkin, had already decided the case before hearing one bit of evidence. Here is what she said in a letter that bore her signature written before she was even appointed to the Mission:

*The rocket attacks on Israel by Hamas deplorable as they are, do not, in terms of scale and effect amount to an armed attack entitling Israel to rely on self-defense.... The killing of almost 800 Palestinians, mostly civilians, and more than 3,000 injuries, accompanied by the destruction of schools, mosques, houses, U.N. compounds and government buildings, which Israel has a responsibility to protect under the Fourth Geneva Convention, is not commensurate to the deaths caused by Hamas rocket fire....Israel’s actions amount to aggression, not self-defense, not least because its assault on Gaza was unnecessary....As things stand, its invasion and bombardment of Gaza amounts to collective punishment of Gaza’s 1.5m inhabitants contrary to international humanitarian and human rights law.... [T]he manner and scale of its [Israel’s] operations in Gaza amount to an act of aggression and is contrary to international law, notwithstanding the rocket attacks by Hamas.*¹⁴

Here is the curious manner in which Goldstone responded to claims Chinkin was biased: “This is not a judicial inquiry. If it had been a judicial inquiry, that letter she’d signed would have been a ground for disqualification.” If her bias would have been a ground for judicial disqualification,¹⁵ then surely her conclusions should not be credited by quasi-judicial bodies, such as the International Criminal Court, the U.N. Human Rights Council, and other governmental and non-governmental bodies.

Finally, the South African member, Richard Goldstone, insisted that the hearings in Gaza be televised, thereby assuring that all witnesses had to toe the Hamas party line

¹³ Ken Silverstein, Six Questions for Desmond Travers on the Goldstone Report, HARPER’S, Oct. 29, 2009, available at <http://www.harpers.org/archive/2009/10/hbc-90006003>.

¹⁴ Israel’s Bombardment of Gaza is not Self-defense – It’s a War Crime, SUNDAY TIMES, Jan. 11, 2009, available at <http://www.timesonline.co.uk/tol/comment/letters/article5488380.ece>.

¹⁵ Goldstone Walks a Fine Line in an Ancient War Zone, BUSINESS DAY (South Africa), Apr. 8, 2009, available at <http://www.businessday.co.za/articles/Content.aspx?id=77618>.

or risk certain death. Goldstone also lied about the role Hamas played in escorting and presenting evidence to the Mission. Here is what Goldstone wrote about being escorted by Hamas: “I must, however, categorically deny the allegation that Hamas officials accompanied Members of the Fact-Finding Mission at all, let alone ‘at every stage of their visit to Gaza.’” Reports to that effect are denial of truth, as I have already publically stated. I would have found this to be quite unacceptable.”¹⁶ The actual truth is quite different. According to an Associated Press article published on June 9, 2009, “Hamas security often accompanied his [Goldstone’s] team during their five-day trip to Gaza last week, raising questions about the ability of witnesses to freely describe the militant group’s actions.”¹⁷

How could Goldstone possibly know who among those escorting him were affiliated with Hamas? The reality is that nothing significant takes place in Gaza without the approval of Hamas.

Richard Goldstone has acknowledged that he accepted the role of Chairman with a clear preconceived agenda.¹⁸ He has told numerous Jewish friends and acquaintances that he agreed to take on the task in order to “help Israel.” He believed that he would bring “balance” to the report. Whether his real motive was to help Israel or to accomplish some other goal, it is always disqualifying to come to a quasi-judicial fact-finding function with a preconceived agenda. Sometimes it causes one to lean over backwards, sometimes forwards. But leaning in either direction is inconsistent with objectivity.

II. Goldstone: Israel Intentionally Kills Innocent Civilians

I begin with the Mission’s most irresponsible criticism of Israel. At bottom the report accuses the Jewish state of having implemented a policy in Gaza that borders on genocide. It blames the civilian deaths that occurred during Operation Cast Lead not on the fog of war, not on the use of human shields by Hamas, not on the inevitability

¹⁶ Letter from Justice Richard Goldstone to Ambassador Leshno Yaar (July 17, 2009), available in the appendix to the Goldstone Report.

¹⁷ Ben Hubbard, U.N.’s Gaza War Crimes Investigation Faces Obstacles, Associated Press Wire, June 9, 2009, available via the AP Archive at <http://www.aparchive.com/>. The AP has not retracted its statement, nor has Goldstone explicitly challenged it.

¹⁸ Several other well known people, with a long history of antagonism to Israel, were originally asked to serve on the mission. They all declined. Mary Robinson, whose bias against Israel has been deep and longstanding, gave the following reason for declining the assignment: “[U]nfortunately, the Human Rights Council passed a resolution seeking a fact-finding mission to only look at what Israel had done, and I don’t think that’s a human rights approach.” Quoted in *Why Mary Robinson Rejected the Mandate Accepted by Judge Goldstone*, Posting of UN Watch to UN Watch blog, <http://blog.unwatch.org/?p=405>.

of civilian casualties when rockets are fired from densely populated urban areas, not even on the use of “disproportionate force” by Israel. Instead it blames the Palestinian civilian deaths on an explicit policy devised at the highest levels of the Israeli government and military, of killing as many Palestinian civilians as possible. It concludes that Operation Cast Lead was not designed to stop the rocket attacks on Israel’s civilians – more than eight thousand over a nine year period.¹⁹ Instead, the rocket attacks merely served as an excuse for the Israeli military to achieve its real purpose: namely the killing of Palestinian civilians. Lest there be any doubt that this is the accusation being made, read the words of the report itself:

*While the Israeli Government has **sought to portray** its operations as essentially a response to rocket attacks in the exercise of its right to self-defense, the Mission considers **the plan to have been directed**, at least in part, at a different target: the **people of Gaza as a whole**.*²⁰

At other points in the report, the language “at least in part” is dropped. Instead the report concludes that Israel’s “overall policy [was] aimed at punishing the Gaza population” and that its “force [was] aimed not at the enemy,” but at “the civilian population.”²¹ It found that Israel was guilty of “the direct targeting and arbitrary killing of Palestinian civilians” and that the killings “are the result of deliberate planning and policy decisions.”²² “[T]he Mission finds that the incident and patterns of events that are considered in this report have resulted from deliberate planning and policy decisions throughout the chain of command, down to the standard operating procedures and instructions given to the troops on the ground.”²³ “[I]n every case the Israeli armed forces had carried out direct intentional strikes against civilians,” and the report considered that “the civilian population as such” was “the object of attacks,” rather than the collateral victims of military actions directed against combatants.²⁴

These are among the most serious charges ever leveled by a United Nations organization against a member state. It accuses Israel of using Hamas rocket attacks against its civilians as an excuse – a cover – for a carefully planned and executed policy of deliberately targeting innocent civilians for mass murder. As philosophy

¹⁹ HUMAN RIGHTS WATCH, *ROCKETS FROM GAZA*, 20 (Aug. 2009), available at <http://www.hrw.org/sites/default/files/reports/ioptqassam0809web.pdf>.

²⁰ Goldstone Report ¶ 1883. (emphasis added)

²¹ Id. ¶¶ 1884, 1886.

²² Id. ¶¶ 816, 61.

²³ Id. ¶ 1191.

²⁴ Id. ¶¶ 810, 841.

professor Moshe Halbertal, a strong peace advocate and frequent critic of Israeli military actions (including during Operation Cast Lead), put it:

*Now, there is a huge moral difference between the accusation that Israel did not do enough to minimize collateral civilian death and the claim that Israel targeted civilians intentionally. It might well be that Israel should have done more than it did to minimize collateral deaths – it is a harsh enough claim, and it deserves a thorough examination. But the claim that Israel intentionally targeted civilians as a policy of war is false and slanderous.*²⁵

Even Israel's most vociferous domestic critics – the Public Committee Against Torture in Israel and B'Tselem – acknowledge that “Israel did not have a policy of intentionally killing civilians...”²⁶ Jessica Montell, Executive Director of B'Tselem, wrote, “I was disturbed by the framing of Israel's military operation as part of ‘an overall policy aimed at punishing the Gaza population for its resilience.’ The facts presented in the report itself would not seem to support such a far-reaching conclusion.”²⁷ While condemning the operation as disproportionate, or worse, these organizations did not cross the “huge moral” line – the line irresponsibly and mendaciously crossed by the Goldstone Report – of accusing Israel of intentionally targeting civilians for death. As the *New York Times* reported:

*[V]irtually no one in Israel, including the leaders of Breaking the Silence and the human rights group B'Tselem, thinks that the Goldstone accusation of an assault on civilians is correct. “I do not accept the Goldstone conclusion of a systematic attack of civilian infrastructure,” said Yael Stein, research director of B'Tselem. “It is not convincing.”*²⁸

One would expect that before making so serious and unprecedented a charge, the report would present overwhelming direct evidence of such a policy. Israel is, after all, an open society with an aggressive investigative media, a strong independent judiciary, many dissenting voices, vigorous opposition parties, a vibrant peace movement, and few secrets. Yet the report presents absolutely no hard evidence to

²⁵ Moshe Halbertal, *The Goldstone Illusion*, *THE NEW REPUBLIC*, Nov. 6, 2009, available at <http://www.tnr.com/article/world/the-goldstone-illusion?page=0,5> [hereinafter *The Goldstone Illusion*]. [Reprinted in this volume, 277–290.]

²⁶ *THE PUBLIC COMMITTEE AGAINST TORTURE IN ISRAEL, NO SECOND THOUGHTS 29* (Nov. 2009), available at http://www.stoptorture.org.il/files/no%20second%20thoughts_ENG_WEB.pdf.

²⁷ Jessica Montell, *The Goldstone Report on Gaza*, *HUFFINGTONPOST.COM*, Oct. 1, 2009, available at http://www.huffingtonpost.com/jessica-montell/the-goldstone-report-on-g_b_306500.html.

²⁸ Ethan Bronner, *Israel Poised to Challenge a U.N. Report on Gaza*, *NEW YORK TIMES*, Jan. 23, 2010, available at <http://www.nytimes.com/2010/01/24/world/middleeast/24goldstone.html>.

support its serious accusations of a governmental policy of deliberately maximizing civilian deaths.

Indeed, much of the evidence cited in the report proves precisely the opposite – that Israel’s policy was to minimize civilian deaths, while attacking those responsible for targeting Israeli civilians with rocket attacks. Moreover, it ignores massive amounts of evidence – some specifically offered to it, other publicly available in open sources – that prove beyond any doubt that the central conclusions of the report are demonstrably false.

Goldstone has himself acknowledged that there is no actual “evidence” that the report’s conclusions are correct. Indeed, he has gone even further and admitted that “if this was a court of law, there would have been nothing proven.” He has also said he would not be embarrassed “if many of the allegations turn out to be disproved”²⁹ – as it appears likely they will be, by photographic and other hard evidence.³⁰ Yet Israel’s enemies cite the report as if it proved its charges beyond all doubt. That is because the report itself is written so as to suggest, quite falsely, that it had proved its case.³¹ For example:

The Mission considers this position [“The operations were in furtherance of an overall policy aimed at publishing the Gaza population...”] to be firmly based in

²⁹ Gal Beckerman, Goldstone: ‘If This Was a Court of Law, There Would Have Been nothing Proven’, THE FORWARD, Oct. 16, 2009, available at <http://www.forward.com/articles/116269/>.

³⁰ Ethan Bronner, Israel Poised to Challenge a U.N. Report on Gaza, NEW YORK TIMES, Jan. 23, 2010, available at <http://www.nytimes.com/2010/01/24/world/middleeast/24goldstone.html>.

³¹ According to THE FORWARD: “...the report itself is replete with bold and declarative legal conclusions seemingly at odds with the cautious and conditional explanations of its author. The report repeatedly refers, without qualification, to specific violations of the Fourth Geneva Convention committed by Israel and other breaches of international law. Citing particular cases, the report determines unequivocally that Israel violated the prohibition under customary international law against targeting civilians. These violations, it declares, ‘constitute a grave breach’ of the convention.” Gal Beckerman, Goldstone: ‘If This Was a Court Of Law, There Would Have Been othing Proven’, THE FORWARD, Oct. 16, 2009, available at <http://www.forward.com/articles/116269/>. Goldstone’s claim that he “wouldn’t consider it in any way embarrassing if many of the allegations turn out to be disproved,” seems disingenuous, because Goldstone has put his imprimatur – and his reputation – behind the reports conclusions. The only reason anyone is paying any attention to yet another of the serial condemnatory reports by the United Nations Human Rights Council is because Richard Goldstone – a “distinguished” Jew – allegedly wrote it and signed on to its conclusions. If he really doesn’t stand by its conclusions – if he doesn’t care one way or another whether they are true or false, proven or unproven – then no extra weight should be given to its findings or conclusions because of the “distinguished” reputation of its Jewish chairman. See Alan Dershowitz, Ad Hominem Attack on Israel, HUFFINGTONPOST.COM, Sept. 24, 2009, available at http://www.huffingtonpost.com/alan-dershowitz/adhominem-attack-on-isra_b_298681.html. But weight is being given to some of its “unproven” and uninvestigated allegations which Goldstone admits may be wrong. There have been calls for boycotts, divestments, war crime prosecutions, and other forms of condemnation based on the conclusions reached by the report.

*fact...*³²

*[T]he systematic and deliberate nature of the activities described in this report leave the Mission in no doubt that responsibility lies in the first place with those who designed, planned, ordered and oversaw the operations.*³³

The reality is that the report's central conclusions – that Israel's policy was to maximize the deaths of civilians – is not “firmly based in fact.” It is made up of whole cloth and contradicted by the evidence purportedly relied on by those who wrote the report. Moreover, it is disproved by public record evidence deliberately ignored by the report.³⁴

The report relies on five categories of evidence that purport to prove that Israel's true intention was not to defend its civilians against Hamas rocket attacks, but rather to maximize the deaths of innocent Palestinian civilians. These categories are: statements of military leaders; statements of political officials; the nature of Israeli weaponry; the number of civilian casualties; and the fact that the IDF deliberately attacked food supplies and non-human civilian targets, such as a wastewater plant.

The first category consists of statements – generally quoted with little or no context – made by Israeli military leaders before the beginning of Operation Cast Lead. These include the following:

In its operations in southern Lebanon in 2006, there emerged from Israeli military thinking a concept known as the Dahiya doctrine, as a result of the approach taken to the Beirut neighborhood of that name. Major General Gadi Eisenkot, the Israeli Northern Command chief, expressed the premise of the doctrine:

What happened in the Dahiya quarter of Beirut in 2006 will happen in every village from which Israel is fired on... We will apply disproportionate force on it and cause great damage and destruction there. From our standpoint, these are not civilian

³² Goldstone Report ¶ 1884.

³³ Id. ¶ 1895.

³⁴ Goldstone's content and tone varies, depending on his audience. When talking to largely Jewish audiences he minimizes the findings of the report, but when talking to other audiences, he maximizes them. Contrast his statement to THE FORWARD, “And I wouldn't consider it in any way embarrassing if many of the allegations [in the report] turn out to be disproved” with what he told the Human Rights Council, “[W]e detail a number of specific incidents in which Israeli forces launched direct attacks against civilians with lethal consequences. These were, with only one exception, where the facts establish that there was no military objective or advantage that could justify the attacks.” Gal Beckerman, Goldstone: ‘If This Was a Court Of Law, There Would Have Been nothing Proven’, THE FORWARD, Oct. 16, 2009, available at <http://www.forward.com/articles/116269/>; Justice Richard Goldstone, Remarks before the U.N. Human Rights Council (prepared version) (Sept. 29, 2009), available at http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/docs/OpeningStatement_GazaFFM_290909.doc.

villages, they are military bases... This is not a recommendation. This is a plan. And it has been approved.

After the war in southern Lebanon in 2006, a number of senior former military figures appeared to develop the thinking that underlay the strategy set out by Gen. Eiskenot. In particular Major General (Ret.) Giora Eiland has argued that, in the event of another war with Hezbollah, the target must not be the defeat of Hezbollah but “the elimination of the Lebanese military, the destruction of the national infrastructure and intense suffering among the population... Serious damage to the Republic of Lebanon, the destruction of homes and infrastructure, and the suffering of hundreds of thousands of people are consequences that can influence Hezbollah’s behavior more than anything else.”

These thoughts, published in October 2008 were preceded by one month by the reflections of Col. (Ret.) Gabriel Siboni:

With an outbreak of hostilities, the IDF will need to act immediately, decisively, and with force that is disproportionate³⁵ to the enemy’s actions and the threat it poses. Such a response aims at inflicting damage and meting out punishment to an extent that will demand long and expensive reconstruction processes. The strike must be carried out as quickly as possible, and must prioritize damaging assets over seeking out each and every launcher. Punishment must be aimed at decision makers and the power elite... In Lebanon, attacks should both aim at Hezbollah’s military capabilities and should target economic interests and the centres of civilian power that support the organization. Moreover, the closer the relationship between Hezbollah and the Lebanese Government, the more the elements of the Lebanese State infrastructure should be targeted. Such a response will create a lasting memory among ... Lebanese decision makers, thereby increasing Israeli deterrence and reducing the likelihood of hostilities against Israel for an extended period. At the same time, it will force Syria, Hezbollah, and Lebanon to commit to lengthy and resource-intensive reconstruction programmes...

This approach is applicable to the Gaza Strip as well. There, the IDF will be required to strike hard at Hamas and to refrain from the cat and mouse games of searching for Qassam rocket launchers. The IDF should not be expected to stop the rocket and missile fire against the Israeli home front through attacks on the launchers themselves, but by means of imposing a ceasefire on the enemy.³⁶

These polemic snippets – calculated to deter Hezbollah and Hamas from firing rockets at Israeli civilians – were selected from thousands of statements made over the years

³⁵ See page 112 *infra*.

³⁶ Goldstone Report ¶¶ 1194-1197.

by IDF officers. Even so, not a single one of them – nor any statement quoted in the entire report – calls for the maximization of Palestinian civilian deaths, or for the specific targeting of Palestinian civilians. They specifically exclude targeting civilians for death from the list of appropriate punitive actions, such as damage to “national infrastructure,” the “elimination of the Lebanese military,” and generic “suffering of hundreds of thousands of people.” Civilians always suffer from military actions, and even from lesser sanctions. For example, on December 11, 2009, U.S. Secretary of Defense Robert Gates warned that sanctions against Iran would be intended “to persuade the Iranian government that they would actually be less secure with nuclear weapons” because “their people will suffer enormously” from sanction.³⁷ Surely such a statement could not be used to prove that the United States intends to kill Iranian civilians.

The so-called “Dahiya doctrine” of responding to rocket attacks with disproportionate force intended to destroy infrastructure says nothing about specifically targeting civilians for death. To the contrary, the quoted material says that “punishment must be aimed at the decision makers,” referring to those who make the decision to allow the rockets to be fired, and to “civilian power that supports” the terrorist organization, namely Hamas. Ordinary people, civilians, are not mentioned. Their exclusion is significant. Yet the report misused this doctrine and these quotes to try to prove that the object of Operation Cast Lead was the killing of civilians.

The report itself admits that it does not know “whether Israeli military officials were directly influenced by these writings.”³⁸ But it reaches the conclusion that “what is prescribed as the best strategy appears to have been precisely what was put into practice.”³⁹ Yes! The destruction of physical infrastructure. Not the targeting of civilians. Indeed, what was “put into practice” was a policy of warning civilians by phone, emails, leaflets and other means. As we shall see, Israel went to great lengths to protect civilians, not to attack them.

Instead of looking to the hard evidence that is completely inconsistent with any Israeli policy of targeting civilians and maximizing civilian deaths, the report focused on selective statements of Israeli leaders made before Operation Cast Lead and calculated to deter rocket attacks by threatening a disproportionate response.

It is more than ironic that the same report refused to credit much more specific

³⁷ Glenn Kessler, *Iran Probably a Target of Significant Sanctions, Gates Says*, BOSTON GLOBE, Dec. 12, 2009, available at http://www.boston.com/news/world/middleeast/articles/2009/12/12/more_sanctions_ahead_for_iran_gates_says/.

³⁸ Goldstone Report ¶ 1199.

³⁹ *Id.* ¶ 1199.

statements made by Hamas leaders before Operation Cast Lead. On February 29, 2008, Fathi Hammad, a leading Hamas legislator, made the following statement:

For the Palestinian people, death has become an industry, at which women excel, and so do all the people living on this land. The elderly excel at this, and so do the mujahideen and the children. This is why they have formed human shields of the women, the children, the elderly, and the mujahideen, in order to challenge the Zionist bombing machine. It is as if they were saying to the Zionist enemy: "We desire death like you desire life."⁴⁰

The report quoted this statement and then chose to ignore it. This is what it said:

Although the Mission finds this statement morally repugnant, it does not consider it to constitute evidence that Hamas forced Palestinian civilians to shield military objectives against attack.⁴¹

Nor apparently did it consider it in any way relevant to whether Palestinian civilians willingly allowed themselves to be used as human shields – or even as to whether the IDF might reasonably have believed it to be relevant when they planned the operation.

In contrast to this dismissive attitude toward this and other specific and bellicose statements⁴² and threats of Hamas political leaders, the report attributed considerable weight to vague and general statements made by Israeli political officials during and after Operation Cast Lead. It focused particularly on one statement made by Tzipi Livni who was then Israel's Minister of Foreign Affairs. On January 13, 2009, Livni said, "We have proven to Hamas that we have changed the equation. Israel is not a country upon which you fire missiles and it does not respond. It is a country that when you fire on its citizens it responds by going wild – and this is a good thing."⁴³

The report also quotes Eli Yishai, then Minister of Industry, Trade and Labor. Yishai said on January 6, 2009, "It [should be] possible to destroy Gaza, so they will understand not to mess with us...it is a great opportunity to demolish thousands of houses of all the terrorists, so they will think twice before they launch rockets. I hope the operation will come to an end with great achievements and with the complete

⁴⁰ Israel Ministry of Foreign Affairs, Hamas Exploitation of Civilians, Jan. 13, 2009, available at http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Terror+Groups/Hamas_Exploitation_Civilians_Jan_2009.htm.

⁴¹ Goldstone Report ¶ 478.

⁴² For instance, the report notes that a Hamas fighter said he tried to fire rockets and mortars near homes "in the hope that nearby civilians would deter Israel from responding." Goldstone Report ¶ 453.

⁴³ Goldstone Report ¶ 1206.

destruction of terrorism and Hamas. In my opinion, they should be razed to the ground, so thousands of houses, tunnels, and industries will be demolished...[T]he operation will continue until a total destruction of Hamas.”⁴⁴ The report quotes Yishai as saying on February 2, 2009, “Even if the rockets fall in an open air or to the sea, we should hit their infrastructure, and destroy 100 homes for every rocket fired.”⁴⁵

With these quotes in hand the report concludes, “Statements by political and military leaders prior to and during the military operations in Gaza leave little doubt that disproportionate destruction and violence against civilians were part of a deliberate policy.”⁴⁶ There is an argument, albeit a very weak one, that these quotes suggest an unlawful policy of disproportionate destruction of property. This argument is weak because the use of the word “disproportionate” quoted on page 108 *supra* does not constitute an admission that unlawfully disproportionate force would be employed under the standards of international law. Under international law, the harm collaterally inflicted on civilians must not be disproportionate to the military objective.⁴⁷ But there is no prohibition against using overwhelming – that is disproportionate – military force against a legitimate military object.⁴⁸ Israel had a perfect right to kill every single Hamas fighter, even if that number was in the thousands, in order to stop the rockets from endangering millions of Israeli civilians. The fact that 8,000 Hamas rockets succeeded in killing only a dozen or so Israelis, does not require Israel to limit the number of Hamas combatants killed. Reading the quote on page 108 does not suggest that the speaker was urging disproportionate civilian casualties but rather he was urging military force greater than and disproportionate to the number of Israelis killed by the rockets that were being fired at Israeli civilians. This is perfectly lawful under international law. If proportionality were required in relation to military targets, it would be impossible for countries like the United States to employ its overwhelming military weapons – drones, tomahawk missiles, stealth bombers – against terrorists, who are poorly equipped but determined to kill.

To argue, moreover, that these polemical statements directed against property and

⁴⁴ Id. ¶ 1204.

⁴⁵ Id. ¶ 1205.

⁴⁶ Id. ¶ 1215.

⁴⁷ See generally JEAN-MARIE HENCKAERTS & LOUSE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW VOL. I, 46 (“Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.”).

⁴⁸ See, e.g., JUDGE ADVOCATE GENERAL’S SCHOOL, LAW OF WAR WORKSHOP DESKBOOK 166, available at <http://www.au.af.mil/au/awc/awcgate/law/low-workbook.pdf> (noting that the proportionality principle is “only applicable when an attack has the possibility of affecting civilians. If the target is purely military with no known civilian personnel or property in the vicinity, no proportionality analysis need be conducted.”).

terrorists conclusively prove a “deliberate policy” of “violence against civilians” is simply absurd. Livni suggests that Israel will “go wild” on Hamas in order to restore deterrence, and nowhere suggests civilians will be targeted. Yishai says he wants to “destroy Gaza,” but quickly clarifies that this means “complete destruction of terrorism and Hamas,” a legitimate military objective. The report concludes that Yishai’s quote regarding destruction of homes may suggest “reprisals against civilians... contrary to international humanitarian law.”⁴⁹ Unsurprisingly, the report omits that in this same speech Yishai clarifies that homes destroyed will be “terrorists’ homes while informing them in advance – so as not to hurt the family members.”⁵⁰ This deliberate omission is particularly disturbing, since it is directly relevant to the report’s most damning condemnation of Israel, and the omitted portion of the quote undercuts the report’s conclusion. One can be extremely critical of some of the statements quoted in the report without using them as a basis for the non-sequitur argument that they prove an intent to do what they pointedly do not advocate: namely the deliberate killing of babies, innocent women, and other civilians.

The report seems to realize its own weaknesses. It attempts to shore up the connection between political statements and a “deliberate policy” of “violence against civilians” by suggesting Israel sees Hamas’ supporting infrastructure as “encompass[ing] effectively the population of Gaza.”⁵¹ According to this argument, Israel intentionally targets civilians because it considers them the Hamas infrastructure. The report’s purported evidence for this dubious claim is the “indiscriminate and disproportionate impact of [Israel’s] restrictions on the movement of goods and people [into Gaza].”⁵² It simply does not follow, however, that Israel’s blockade means Israel considers all Gaza civilians to constitute Hamas supporting infrastructure, or that all Gaza civilians are appropriate military targets. A blockade is a blunt instrument; by definition it is deleterious to civilian life (see, for instance, the statement by Robert Gates, quoted at page 110 *supra*). There is an enormous difference – a difference ignored by the report but not by Israel – between depriving civilians of non-essential commodities and targeting civilians for murder. It is a classic non-sequitur to argue that a boycott proves an intent to kill.

The report’s second piece of evidence that Israel considers all Gazans to be Hamas

⁴⁹ Goldstone Report ¶ 1216.

⁵⁰ Raanan Ben-Zur, Yishai: Destroy 100 Houses for Each Rocket Fired, YNET, Feb. 2, 2009, available at <http://www.ynetnews.com/articles/0,7340,L-3665517,00.html>.

⁵¹ Goldstone Report ¶ 1211.

⁵² *Id.* ¶ 1211.

infrastructure is that Hamas won parliamentary elections.⁵³ The Mission, of course, has no evidence that Israeli leadership considers Gazan civilians who voted for Hamas to constitute Hamas infrastructure. Moreover, many civilians did not vote in the election and some who did voted against Hamas. The report stretches for any argument, no matter how unrealistic, to support its conclusion that Israel had a deliberate policy of murdering civilians.

In addition to relying on statements of military and political officials, the report also points to the IDF's advanced military capabilities in concluding that Israel intentionally targeted civilians. The argument is that, because the IDF uses such advanced weaponry, whenever civilians were killed, they must have been killed intentionally. On multiple occasions, the report notes that the IDF "possesses very advanced hardware" and that Israel is "a market leader in the production of some of the most advanced pieces of military technology available."⁵⁴ It also notes that Israel has "very significant capacity for precision strikes" and "extensive and intimate knowledge" of Gaza.⁵⁵ The report concludes that, "taking into account the ability to plan [and] the means to execute plans with the most developed technology available...the incident and patterns of events that are considered in this report have resulted from deliberate planning and policy decisions."⁵⁶

It should go without saying that, no matter how advanced or sophisticated weaponry may be, errors are made in the fog of war. A month before Operation Cast Lead, United States forces in Afghanistan attacked a wedding, killing nearly forty civilians.⁵⁷ Although everyone agrees that the United States has advanced weaponry, no reasonable person would argue that this is proof that America was targeting an Afghan wedding party. Likewise, Israeli use of sophisticated weaponry should not serve as proof that Israelis intended to kill civilians during Operation Cast Lead. After all, the IDF killed several of its own soldiers through "friendly fire" mistakes.⁵⁸

The Goldstone Report purports to connect advanced weaponry to intentional killing by erasing the possibility of error. The report paints the IDF as a military force that, unlike any other military force in the world, simply does not commit errors. The

⁵³ Id. ¶ 1210.

⁵⁴ Id. ¶ 61.

⁵⁵ Id. ¶¶ 1185, 1180.

⁵⁶ Id. ¶ 1190.

⁵⁷ Tom Coghlan, U.S. Says Sorry After Wedding Party is Bombed in Ambush, *THE TIMES* (London), Nov. 6, 2008.

⁵⁸ Goldstone Report ¶ 364.

report quotes approvingly an IDF report stating that “99 per cent of the [air force] firing that was carried out hit targets accurately.”⁵⁹ There are two problems with relying on this figure to conclude intentionality. First, the figure speaks only to the air force and does not include ground force accuracy. The air force, with its guided weapons, more often hits intended targets than, for instance, a tank attempting to shell its attackers. The overall IDF accuracy rate must be lower than 99%. The second issue with concluding intentionality from an accuracy figure is the mistake of fact issue. If an Israeli soldier targets a person he believes to be a militant and kills him, but the person killed was not a militant, the soldier still made “accurate” use of his weapon within the meaning of the 99% figure. However, because the soldier made a mistake of fact, he would not possess the requisite purpose to be liable for intentional killing of a civilian. This is particularly significant in light of the fact that so many Hamas combatants wore civilian clothing and mingled with the civilian population.

In one of the incidents the report investigated, the attack on the al-Daia residence, Israel claimed a mistake of fact defense. According to Israel, “[T]he IDF intended to strike a weapons’ storage facility located in a building next this [the al-Daia] residence. However, the IDF erroneously targeted the al-Daia residence, rather than the weapons storehouse.”⁶⁰

The report claims that it is aware of no other Israeli admissions of error besides the al-Daia incident. Therefore, the report makes the astonishing conclusion that no other errors occurred. The report reads, “[S]ince it [the al-Daia incident] appears to be the only incident that has elicited admission of error by the Israeli authorities, the Mission takes the view that the Government of Israel does not consider the other strikes brought to its attention to be the result of similar or other errors.”⁶¹ It is important to note the implication that this statement concerns all incidents, not just those incidents investigated in the report. After all, the statement is made in a section discussing “the objectives and the strategy underlying the Israeli military operations in Gaza.” The Mission’s claim, however, that “it has found only one example [al-Daia] where the Israeli authorities have acknowledged that an error had occurred,”⁶² is not made in good faith. Justice Goldstone and the Mission need only look at the Israeli government report entitled “The Operation in Gaza” (cited over 50 times in the Goldstone Report) to find other Israeli admissions of error. In “The Operation in

⁵⁹ Id. ¶ 1188.

⁶⁰ Id. ¶ 854. The report is skeptical of this defense, and claims the Israeli explanation “appears to lack coherence and raises more questions than it answers.” Id. ¶ 860.

⁶¹ Id. ¶ 1187.

⁶² Id. ¶ 1187.

Gaza,” the Israeli government claims that an attack on an oxygen truck that killed four civilians and four Hamas militants was a mistake of fact error. The IDF erroneously believed the oxygen canisters to be rockets and targeted the truck for destruction.⁶³ Four out of the nine IDF deaths were caused by friendly fire.⁶⁴ Of course these deaths were errors. Surely there were many more errors, as there always are in war.⁶⁵ To assume that all of the deaths caused by errors were, in fact, deliberate, begs the critical question and reflects the bias of the report.

The fourth category of evidence the Goldstone Report relies upon in concluding Israel had a policy of murdering civilians is simply the number of civilian casualties. At the outset it must be noted that the death of civilians does not automatically prove commission of war crimes. According to Louis Moreno-Ocampo, Chief Prosecutor of the International Criminal Court, “Under international humanitarian law and the Rome Statute, the death of civilians during an armed conflict, no matter how grave and regrettable, does not in itself constitute a war crime. International humanitarian law and the Rome Statute permit belligerents to carry out proportionate attacks against military objectives, even when it is known that some civilian deaths or injuries will occur.”⁶⁶ The report strongly implies that the number of civilians killed in Operation Cast Lead is evidence of Israel’s intent to kill civilians. Results prove intent, at least when it comes to Israel.⁶⁷ For instance, the report notes that “some of those killed were combatants directly engaged in hostilities against Israel, but many were not. The outcome and the modalities of the operations indicate, in the Mission’s view, that they were only partially aimed at killing leaders and members of Hamas, al-Qassam Brigades, and other armed groups.”⁶⁸ But a careful analysis of the results, in fact, proves the exact opposite.

The chart below illustrates a breakdown of Palestinian casualties during the Gaza operation as reported by the Palestinian Centre for Human Rights, B’Tselem, and the Israel Defense Forces. PCHR maintains that 1,417 people were killed by Israeli forces,

⁶³ STATE OF ISRAEL, *THE OPERATION IN GAZA: FACTUAL AND LEGAL ASPECTS* ¶¶ 398-400 (July 2009), available at <http://www.mfa.gov.il/NR/rdonlyres/E89E699D-A435-491B-B2D0017675DAFEF7/0/GazaOperationwLinks.pdf> [hereinafter *THE OPERATION IN GAZA: FACTUAL AND LEGAL ASPECTS*].

⁶⁴ Goldstone Report ¶ 364.

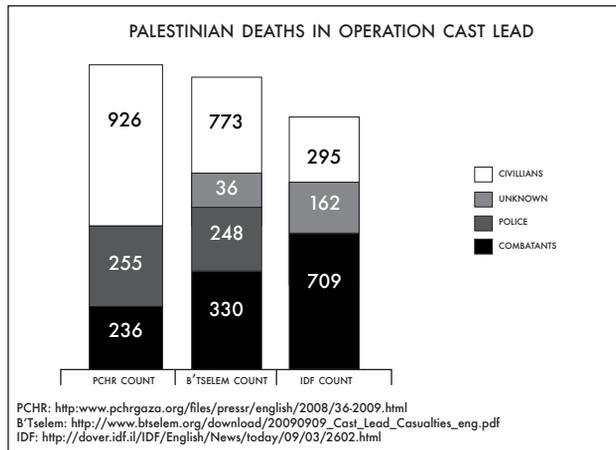
⁶⁵ See, e.g., *THE OPERATION IN GAZA: FACTUAL AND LEGAL ASPECTS* ¶¶ 377, 394-295.

⁶⁶ Letter from Louis Moreno-Ocampo, Chief Prosecutor of the International Criminal Court (Feb. 9, 2006), available at http://www2.icc-cpi.int/NR/rdonlyres/F596D08D-D810-43A2-99BBB899B9C5BCD2/277422/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf.

⁶⁷ Contrast this approach with that taken with regard to “results” attributable to Hamas, such as the wearing of civilian clothing, which the report deems to be without significance to the intentions of Hamas.

⁶⁸ Goldstone Report ¶1890.

including 926 civilians, 255 policemen, and 236 combatants. B'Tselem counts 1,387 Palestinian deaths, including 773 civilians, 248 policemen, 330 combatants, and 26 unknown.⁶⁹ The IDF claim the total number of casualties was 1,166, including 295 civilians, 709 combatants (the IDF includes policemen in the combatant category), and 162 unknown.



To deconstruct these figures properly, the status of the Gaza police must first be considered, since approximately 250 of them were among those listed as “civilians” who were killed. Although the Goldstone Report concludes that the Gaza police force was a “civilian law-enforcement agency,”⁷⁰ there is overwhelming evidence to suggest otherwise. The Gaza police has its origins in the Hamas Executive Force. When the Executive Force was formed in 2006, its commander announced that the force was “the nucleus of the future Palestinian army. The resistance must continue. We have only one enemy. They are Jews. We have no other enemy. I will continue to carry the rifle and pull the trigger whenever required to defend my people.”⁷¹ According to the report, the Executive Force merged with a reorganized PA police in October 2007.⁷² Despite the fact that the Executive Force no longer technically exists, during Operation Cast Lead a police spokesman said, “Police officers received clear orders

⁶⁹ B'Tselem has revised its casualty count slightly and now counts 762 civilian deaths. The new figures do break down the casualties into categories of unknown/civilians/police/combatants, so the older figures are used here. See B'Tselem, *One Year Since Operation Cast Lead, Still No Accountability*, Dec. 27, 2009, available at http://www.btselem.org/English/Gaza_Strip/20091227_A_year_to_Castlead_Operation.asp.

⁷⁰ Goldstone Report, ¶ 436.

⁷¹ Id. ¶ 412; New PA Police Chief Marks Jews as “Only Enemy” of Palestinians, HAARETZ, Apr. 23, 2006, available at <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=708275&contrassID=1&subContrassID=0&sbSubContrassID=0>. The Goldstone Report omitted “They are Jews. We have no other enemy,” which is present in the original quote.

⁷² Goldstone Report ¶ 414.

from the leadership to face the enemy, if the Gaza Strip were to be invaded.”⁷³ This is conclusive evidence that the Gaza police were not entitled to the protections accorded to civilians in war. In addition, evidence suggests many policemen were combatant individuals regardless of their connection with the police.⁷⁴ According to one count, 91% of the policemen killed were either members of a terrorist organization or in infantry training, with a “decisive majority” of casualties belonging to military wings.⁷⁵ In any event, reasonable people can and do disagree as to the status of the Gaza policemen killed by Israel. They cannot simply be lumped together with infants and other obvious non-combatants for purposes of listing the number of dead civilians.⁷⁶

There is clearly a large divergence between the IDF numbers and the PCHR and B’Tselem numbers. Although the Goldstone Report claims that Israel’s numbers “fall far short of international law standards,”⁷⁷ PCHR numbers that the report cites are considerably more troubling. For instance, some Palestinian casualties that were counted by PCHR as civilians were undoubtedly combatants. PCHR classified Abdullah Abdul Hamid Hussam Abu Mu’ammam, Mohammed Akram Mohammed Abu Harbid, and Belal Hamza Ali ‘Ubeid (under 18) as civilians and identified all

⁷³ Id. ¶ 416.

⁷⁴ See INTERNATIONAL INSTITUTE FOR COUNTER-TERRORISM, INTERDISCIPLINARY CENTER HERZLIYA, CASUALTIES IN OPERATION CAST LEAD: A CLOSER LOOK 9 (2009), available at http://www.ict.org.il/Portals/0/Articles/ICT_Cast_Lead_Casualties-A_Closer_Look.pdf [hereinafter CASUALTIES IN OPERATION CAST LEAD: A CLOSER LOOK].

⁷⁵ Jonathan D. Halevi, Jerusalem Centre for Public Affairs, Palestinian Policemen Killed in Gaza Operation Were Trained Terrorists, Sept. 13, 2009, available at http://www.jcpa.org/JCPA/Templates/ShowPage.asp?D RIT=1&DBID=1&LNGID=1&TMID=111&FID=442&PID=0&IID=3081&TTL=Palestinian_%E2%80%9C Policemen%E2%80%9D_Killed_in_Gaza_Operation_Were_Trained_Terrorists. The Mission dismisses this evidence as unreliable on the basis that some policemen were characterized as members of the al-Qassam Brigades simply because they were Hamas members and because terrorist groups are known to “adopt” civilians as martyrs on their websites. See Goldstone Report ¶¶ 422- 423. While the sources cited here do rely to a degree on terrorist websites, and it is possible that some civilians were “adopted” as martyrs, Israel is entitled to take the statements of Hamas at face value. Hamas simply cannot have it both ways, claiming that someone is a civilian at one point, and then claiming that he is a combatant after he dies. Not only is this hypocritical, but it shows great disrespect for the internationally recognized principal of distinction.

⁷⁶ See discussion of continuum of civilianity at page 127 *infra*.

⁷⁷ Goldstone Report ¶ 361.

three as students.⁷⁸ There are pictures of these three “civilians” on a militant website.⁷⁹

The second problem with the PCHR numbers is a statistical discrepancy that cannot be squared with the Goldstone Report’s conclusion that Israel intentionally and indiscriminately targeted civilians. The International Institute for Counter-Terrorism (ICT) at the Interdisciplinary Center Herzilya independently determined from PCHR’s casualty list 314 combatants, 239 policemen, and 363 civilians. This left 518 people with an unknown status. If Israel killed civilians intentionally and indiscriminately, we should expect the distribution within the civilian/unknown category to be proportionate to the Gaza population, roughly 25% men, 25% boys, 25% girls, 25% women.⁸⁰ Instead, ICT found the civilian/unknown category was composed of 56% men, 22% boys, and 22% girls and women combined. (“Boys” and “girls” are defined as under 18,⁸¹ and many boys and girls in Gaza are combatants by any definition of that term. Indeed 16 and 17 year olds are often used in martyr operations, precisely because of their youthful appearance.) These statistics are relevant for two reasons. First, the demographic (men) that is more likely to actually be terrorists, is vastly over-represented in the unknown/civilian category. Second, the demographic (men) that Israel is more likely to mistake as terrorists is vastly over-represented in the unknown/civilian category. In any case, these statistics are completely inconsistent with claims of intentional, indiscriminate killing of civilians.⁸²

Despite the problematic nature of the highly-biased PCHR count, even the story the raw PCHR numbers tell are not evidence of intent to kill civilians. If we count policemen as combatants, there were according to PCHR 491 combatant deaths and 926 civilian deaths. Thus, even according to one of the most biased and skewed sources available, there was a combatant casualty to civilian casualty ratio of 1 to 1.885. That is, for every Palestinian combatant killed, less than two civilians were killed. It is sad that so many innocents died during the Gaza War, but numbers alone do not prove that Israel intended to kill civilians, especially in light of how Hamas

⁷⁸ PALESTINIAN CENTRE FOR HUMAN RIGHTS, THE DEAD IN THE COURSE OF THE ISRAELI RECENT MILITARY OFFENSIVE ON THE GAZA STRIP, available at <http://www.pchrgaza.org/files/PressR/English/2008/list.pdf>. Regarding the issue of “adoption” see note 75 *supra*.

⁷⁹ http://www.alqassam.ps/arabic/sohdaa5.php?sub_action=picture&id=1305; http://www.alqassam.ps/arabic/sohdaa5.php?sub_action=picture&id=1301; <http://www.alqassam.ps/arabic/sohdaa5.php?subaction=picture&id=1439>. For more examples of militants characterized as civilians on PCHR’s list, see Cast Lead – New Species of Militants – Civilians, available at <http://www.hosem.org.il/Cast-Lead>.

⁸⁰ Gaza has a young median age. See CASUALTIES IN OPERATION CAST LEAD: A CLOSER LOOK 11.

⁸¹ *Id.* 10. It is true that males, whether terrorists or not, are more likely to be out and about, and thus in harm’s way, than females, especially in a traditional society, but if Israel had a policy of indiscriminately targeting civilians, including in their homes – as the report suggests – this factor would be negligible.

⁸² See *Id.* 12.

used civilians as shields (see section III *infra*). A United Nations report estimates that worldwide 75% of war casualties are civilians.⁸³ Some have suggested that the combatant-civilian casualty ratio for America's recent drone attacks in Pakistan is as high as 1 to 10.⁸⁴ Others have suggested that during NATO's 1999 Kosovo operation, there were four civilian casualties for every combatant casualty.⁸⁵ In late December of 2009, an American air strike killed ten civilians in Afghanistan.⁸⁶ Although there are valid arguments about the prudence of these operations, no reasonable person argues that these numbers prove an intention to kill Pakistani, Yugoslav, or Afghani civilians.

If the ratio alone proves anything it is that there was a policy of reducing civilian deaths, not targeting civilians. If Israel's intention was truly to kill civilians, why was the combatant to civilian casualty ratio only one to less than two? Certainly if one of the world's most advanced military forces intended to kill civilians it could have made that ratio one to five or even one to ten. As Professor Halbertal writes, "There are 1.5 million people in Gaza and around 10,000 Hamas militants, so the ratio of militants to civilians is 1:150. If Israel targeted civilians intentionally, how on earth did it reduce such a ratio to 1:3 or 2:3?"⁸⁷

The report's final argument, made implicitly at various points in the document, goes something like this: Israel deliberately targeted non-human civilian targets, such as a flour mill and a wastewater plant; this proves that the IDF wanted to punish civilians who relied on these facilities; it follows therefore that the IDF deliberately intended to hit human civilian targets and kill as many civilians as possible. There are two responses to this argument, the first factual, the second logical.

As to the facts, the *New York Times* has reported that the IDF study, soon to be released, will dispute the claim that Israel willfully targeted the food and wastewater

⁸³ The Secretary-General, Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict, ¶3, U.N. Doc. S/2001/331 (Mar. 30, 2001). This statistic includes both internal wars and wars in which civilians are the object of attack. It is also worth noting that many conflicts produce many more casualties yet receive much less media attention. Over the last twenty years, there have been 10,000 total casualties in the Arab-Israeli conflict. In same time period the hostilities in the Democratic Republic of the Congo have killed millions. Goldstone's Gaza Report: Part II.

⁸⁴ Daniel L. Byman, Do Targeted Killings Work?, FOREIGNPOLICY.COM, July 14, 2009, available at http://www.foreignpolicy.com/articles/2009/07/14/do_targeted_killings_work?page=full.

⁸⁵ Michael Oren, U.N. Report a Victory for Terror, BOSTON GLOBE, Sept. 24, 2009, available at http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2009/09/24/un_report_a_victory_for_terror/.

⁸⁶ Laura King, U.S. Forces Reportedly Kill 10 Afghan Civilians, BOSTON GLOBE, Dec. 29, 2009, available at http://www.boston.com/news/world/asia/articles/2009/12/29/us_airstrike_reportedly_kills_10_afghan_civilians/.

⁸⁷ The Goldstone Illusion.

plant:

The Goldstone Report asserts that the Bader flour mill “was hit by an airstrike, possibly by an F-16.” The Israeli investigators say they have photographic proof that this is false, that the mill was accidentally hit by artillery in the course of a firefight with Hamas militiamen. The dispute is significant since the United Nations report asserts that “the destruction of the mill was carried out for the purpose of denying sustenance to the civilian population,” an explicit war crime.

A second finding concerned the destruction of a wastewater plant, leading to an enormous outflow of raw sewage. The Goldstone Report contended that it was hit by a powerful Israeli missile in a strike that was “deliberate and premeditated.” The Israelis say they had nothing to do with that plant’s collapse and suggest that it may have been the result of Hamas explosives.⁸⁸

I will have more to say about these incidents following the release of the Israeli rebuttal. But even if it were true that Israel sought to punish the civilian population of Gaza by attacking food and sewage facilities, it would not follow that Israel intended to kill civilians. Israel acknowledged that it deliberately limits the flow of consumer goods into Gaza as part of an effort to impose sanctions on the Hamas government for its policy of targeting Israeli civilians with anti-personnel weapons. Just as American sanctions against Iran would cause the Iranian “people [to] suffer,”⁸⁹ so too do Israeli sanctions. But it is a far cry from sanctions to murder, and it is a non-sequitur to argue that the destructions of non-human civilian targets proves an intention to target human beings for death.

Nowhere does the report detail how difficult it is, in the fog of war, to target combatants while avoiding civilian casualties. Nowhere does the report detail the great lengths Israel goes to in order to spare civilian lives. It does not give any historical context. It does not mention how, under the leadership of air force chief Eliezer Shkedi, the IDF worked diligently to decrease the combatant-civilian air attack casualty ratio from 1 to 1 during the second intifada in 2003 to an astounding one civilian for every thirty combatants in 2007.⁹⁰ This is the best ratio ever achieved by an armed force, and it required enormous dedication of resources and commitment to reduce civilian casualties, even those closely related to terrorist leaders. Nor does Goldstone mention that routine Israeli policy sacrifices valuable military opportunities in order to protect innocent civilians. The report does not tell the reader that, when Israel

⁸⁸ Ethan Bronner, Israel Poised to Challenge a U.N. Report on Gaza, *NEW YORK TIMES*, Jan. 23, 2010, available at <http://www.nytimes.com/2010/01/24/world/middleeast/24goldstone.html>.

⁸⁹ See statement of U.S. Secretary of Defense Robert Gates, page 110 *supra*.

⁹⁰ Amos Harel, Pinpoint Attacks on Gaza More Precise, *HAARETZ*, Dec. 30, 2007, available at <http://www.haaretz.com/hasen/spages/939517.html>.

targeted a high-level Hamas meeting in 2003, it used a relatively light bomb in order to avoid civilian casualties. Since it did not attack its targets with full capacity, all of the militants (including the Hamas leader) escaped.⁹¹

The report does not even discuss Israel's professed operating procedures during Operation Cast Lead. It does not discuss how the humanitarian impact on a target was considered both at the planning stage and immediately prior to attack.⁹² It does not inform the reader that where an air force pilot saw civilians straying into the path of an already-launched missile, where possible, he diverted the missile to avoid excess civilian casualties.⁹³ The Goldstone Report does not mention that under IDF operating procedure, moving targets are to be struck when they are as far away from civilians as possible.⁹⁴ During the latter part of Operation Cast Lead the IDF, to its great detriment, "unilaterally suspended military operations for at least three hours each day, to enable re-supply of the population and other humanitarian relief activities."⁹⁵ The IDF deployed 120 humanitarian support officers during the operation.⁹⁶ How is any of this consistent with a general policy of targeting civilians?

Israel's efforts to protect civilians who were placed in harm's way by Hamas' decision to fire rockets from densely populated urban areas was unprecedented in military history. The Goldstone Mission deliberately chose to ignore the best expert testimony on precisely this issue. Here is what the former commander of British forces in Afghanistan, Colonel Richard Kemp, told the United Nations Human Rights Council on October 16, 2009:

I am the former commander of the British forces in Afghanistan. I served with NATO and the United Nations; commanded troops in Northern Ireland, Bosnia and Macedonia; and participated in the Gulf War. I spent considerable time in Iraq since the 2003 invasion, and worked on international terrorism for the UK Government's

⁹¹ Amos Harel & Arnon Regular, Hamas' Yassin Survives Gaza Strike, HAARETZ, available at <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=337342&contrassID=2&subContrassID=1&sbSubContrassID=0&listSrc=Y>; Molly Moore & John Ward Anderson, Israeli Jet Bombs Hamas Meeting, Injuring Spiritual Leader, WASHINGTON POST, Sept. 7, 2003, available via Lexis.

⁹² THE OPERATION IN GAZA: FACTUAL AND LEGAL ASPECTS ¶¶ 251-252.

⁹³ Id. ¶¶ 252, 255. See also IDF Spokesperson's Unit, IDF Vlog: Israeli Airstrikes Aborted to Protect Civilians, Jan. 14, 2009, available at <http://idfspokesperson.com/2009/01/14/idf-vlog-israeli-airstrikes-aborted-to-protect-civilians/>.

⁹⁴ THE OPERATION IN GAZA: FACTUAL AND LEGAL ASPECTS ¶ 258.

⁹⁵ Id. ¶ 276. This is despite the fact that "[h]ostilities are seldom fully or partly suspended in order to permit humanitarian action." Toni Pfanner, Asymmetrical Warfare from the Perspective of Humanitarian Law and Humanitarian Action, 87 INT'L REV. RED CROSS 149, 168.

⁹⁶ THE OPERATION IN GAZA: FACTUAL AND LEGAL ASPECTS ¶ 269.

Joint Intelligence Committee.

Mr. President, based on my knowledge and experience, I can say this: During Operation Cast Lead, the Israeli Defence Forces did more to safeguard the rights of civilians in a combat zone than any other army in the history of warfare.

Israel did so while facing an enemy that deliberately positioned its military capability behind the human shield of the civilian population.

Hamas, like Hezbollah, are expert at driving the media agenda. Both will always have people ready to give interviews condemning Israeli forces for war crimes. They are adept at staging and distorting incidents.

The IDF faces a challenge that we British do not have to face to the same extent. It is the automatic, Pavlovian presumption by many in the international media, and international human rights groups, that the IDF are in the wrong, that they are abusing human rights.

The truth is that the IDF took extraordinary measures to give Gaza civilians notice of targeted areas, dropping over 2 million leaflets, and making over 100,000 phone calls. Many missions that could have taken out Hamas military capability were aborted to prevent civilian casualties. During the conflict, the IDF allowed huge amounts of humanitarian aid into Gaza. To deliver aid virtually into your enemy's hands is, to the military tactician, normally quite unthinkable. But the IDF took on those risks.

Despite all of this, of course innocent civilians were killed. War is chaos and full of mistakes. There have been mistakes by the British, American and other forces in Afghanistan and in Iraq, many of which can be put down to human error. But mistakes are not war crimes.

More than anything, the civilian casualties were a consequence of Hamas' way of fighting. Hamas deliberately tried to sacrifice their own civilians.

Mr. President, Israel had no choice apart from defending its people, to stop Hamas from attacking them with rockets.

And I say this again: the IDF did more to safeguard the rights of civilians in a combat zone than any other army in the history of warfare.⁹⁷

Colonel Kemp had made the same points during Operation Cast Lead and they were well known to the writers of the Goldstone Report, who deliberately chose to ignore this expert testimony. Goldstone acknowledged that the omission was deliberate and tried to explain it away:

[T]here was no reliance on Col. Kemp mainly because in our Report we did

⁹⁷ Richard Kemp, Remarks at Emergency Session of the U.N. Human Rights Council (Oct. 16, 2009), available at <http://www.unwatch.org/site/apps/nlnet/content2.aspx?c=bdKKISNqEmG&b=1313923&ct=7536409>.

*not deal with the issues he raised regarding the problems of conducting military operations in civilian areas and second-guessing decisions made by soldiers and their commanding officers in the fog of war.*⁹⁸

That is a willful lie. The report dealt specifically with precisely that issue. Everything the Israeli Army did was done in the course of a difficult military operation designed to stop rockets fired from civilian areas from targeting a million Israeli children, women, and other civilians. The basic flaw of the Goldstone Report is that, without a scintilla of evidence, the biased commissioners concluded that the Israeli military action in Gaza was motivated not by the defense of its citizens but rather by desire to murder Palestinian civilians. Based on that unproven, untrue, and biased conclusion, the commission was then able to ignore massive evidence, much of it self-proving and easily available on the internet, that the Israeli Army took considerable steps to reduce civilian casualties, while engaged in military action designed to prevent the murder of its own civilians. Had it considered and credited Colonel Kemp's conclusion that "the IDF did more to safeguard the rights of civilians in a combat zone than any other army in the history of warfare," it could not come to the mendacious conclusion it reached, namely that it was the explicit policy of the IDF to target Palestinian civilians and to maximize civilian deaths. A nation's armed forces cannot at the same time do more to safeguard civilians than any army in history, while it is targeting them for death. There is a simpler and more sinister reason why the report chose to ignore the expert testimony of Colonel Kemp: it totally undercut the central conclusion of the report regarding Israel's policy, intentions, and actions. The very idea that the report "did not deal with the issues" raised so powerfully by Colonel Kemp, as Goldstone has claimed, speaks volumes about the bias of its authors.

For the most part, the report dismisses Israeli attempts to aid civilians. As Professor Moshe Halbertal wrote:

In line with [the] principles [developed for the IDF by Professor Halbertal and others], the Israeli Air Force developed the following tactic. Since Hamas hides its headquarters and ammunition storage facilities inside civilian residential areas, the Israeli army calls the residents' telephones or cell phones, asking them to move immediately out of the house because an attack is imminent. But Hamas, in reaction to such calls, brings the innocent residents up to the roof, so as to protect the target from an attack, knowing that, as a rule, the Israeli army films the target with an unmanned drone and will avoid attacking the civilians on the roof. In response to this tactic, Israel developed a missile that hits the roof without causing any actual harm in order to show the seriousness of its intention. The procedure, called

⁹⁸ E-mail from Richard Goldstone to Maurice Ostroff (Sept. 21, 2009, 22:34), available at <http://maurice-ostroff.tripod.com/id233.html>.

“roof-knocking,” causes the civilians to move away before the deadly attack.

It is rather a strange point in the Goldstone Report that this practice, which goes a long way to protect civilians, is actually criticized. Concerning such a practice, the report states that, “if this was meant as a warning shot, it has to be deemed reckless in the extreme.” The truth is that this is an admirable and costly effort to avoid civilian collateral harm. As is true with many of its criticisms, the report does not state what the alternative should be. What should Israel do in such a case? Attack the house without calling on its residents to move, or attack it while they are gathered on the roof? Or maybe avoid attacks altogether, allowing the enemy to take effective shelter among civilians?⁹⁹

Neither the report nor its author addressed Professor Halbertal’s questions.

It also ignored the vast evidence of Israeli actions on the ground that were utterly inconsistent with any purported policy of targeting civilians or maximizing civilian deaths. These actions included the evacuation to Israeli hospitals of wounded civilians,¹⁰⁰ the foregoing of appropriate military targets because the risk to civilians was too great,¹⁰¹ and – as Colonel Kemp explained – the massive repeated and expensive warnings the IDF provided to civilians. Finally, the report virtually ignores the fact that Israel choose not to invade Gaza City. Only this phase would have assured military victory by capturing or killing the Hamas fighters responsible for the planning and firing of rockets.¹⁰² At least part of the reason for not invading Gaza City was the realization that many Palestinian civilians would inevitably be killed or injured. There is a picture of Israel admitting a Gazan child for treatment through the Erez Crossing on Dec. 31, 2008.¹⁰³ As the *New York Times* recently reported:

General Halamish said in an interview that the army chose not to attack many leaders of Hamas because they lived among children and the elderly. He added that during the operation, Israel withheld fire for three hours a day so food and other aid supplies could be brought into Gaza. During these hours he said, a quarter of the shooting from Hamas took place. Hamas also ambushed the civilian supply trucks.

⁹⁹ The Goldstone Illusion.

¹⁰⁰ See, e.g., Fadi Eyadat & Dana Viler-Pollak, 12 Palestinians Hurt in Gaza Fighting Being Treated in Israeli Hospitals, HAARETZ, Jan. 1, 2009, available at <http://www.haaretz.com/hasen/spages/1051946.html>.

¹⁰¹ See, e.g., THE OPERATION IN GAZA: FACTUAL AND LEGAL ASPECTS ¶ 155.

¹⁰² See, e.g., Larry Derfner, The Obama Factor in Israel’s Gaza War, U.S. NEWS & WORLD REPORT, Jan. 14, 2009, available via Lexis.

¹⁰³ IDF Spokesperson’s Unit, Gazan Child Taken to Israel for Treatment, posted Dec. 31, 2008, available at <http://idfspokesperson.com/2008/12/31/gazan-child-taken-to-israel-for-treatment/>.

Another senior military official who spoke on the condition of anonymity following regular military practice, said that neither the military command structure nor the government wanted to invade Gaza in December 2008, but felt that the continental rocket attacks by Hamas on Israeli civilians forced their hand. The war, he said, followed the least aggressive of three contemplated routes – conquer Gaza and occupy it again as was done in the West Bank in 2002, retake Hamas’ weapons supply routes and hold them to dry out the organization’s arsenal, or attack the Hamas military and state infrastructure and leave. It was the third that occurred.¹⁰⁴

The report does not address these facts on the ground. Nor does it consider the most basic question of all: What would Israel gain by targeting civilians for death? It simply is not rational for Israel to target civilians. The Goldstone Report has brought worldwide condemnation upon Israel. Surely Israel would not want to bring such condemnation upon herself.

Every Israeli official understands that every time a Palestinian civilian – especially a child or woman – is killed, Israel loses. As a western diplomat put it several years ago: Palestinian terrorists have “mastered” the “harsh arithmetic of pain.” “Palestinian [civilian] casualties play in their favor, and Israeli [civilian] casualties play in their favor.”¹⁰⁵ Every time a Palestinian terrorist kills an Israeli civilian, Hamas wins. And every time an Israeli soldier kills a Palestinian civilian, Hamas wins. That is their strategy, and it is a win-win for terrorism and a lose-lose for democracy.¹⁰⁶ Civilian deaths are inevitable in a conflict of this kind, but the accusation that they are part of a deliberate Israeli plan or policy defies reality and is wrong as a matter of fact. Reasonable people may disagree as to whether the deaths that resulted from Israel’s military objects were proportional or disproportional to risks its civilians feared from Hamas rockets. Reasonable people could also disagree about whether Israel’s policy of destroying Hamas buildings, tunnels, and industry should be permissible under international law. But that is not the essence of what the report accuses Israel of deliberately planning – namely the deliberate targeting and killing of hundreds of innocent Palestinian women and children. On this most serious of charges, not only is there absolutely no evidence that points to this conclusion, what evidence there is points exactly the other way. Yet the report distorts the evidence, misquotes its sources, and turns the truth on its head, in order to arrive at a conclusion that at least some of its members had reached before even beginning to gather evidence for the report.

¹⁰⁴ Ethan Bronner, Israel Poised to Challenge a U.N. Report on Gaza, *NEW YORK TIMES*, Jan. 23, 2010, available at <http://www.nytimes.com/2010/01/24/world/middleeast/24goldstone.html>.

¹⁰⁵ James Bennet, Arafat’s Edge: Violence and Time on His Side, *NEW YORK TIMES*, Mar. 18, 2002.

¹⁰⁶ See ALAN DERSHOWITZ, *THE CASE FOR MORAL CLARITY* 25-28 (2009).

It is important to note that the report contains disturbing narratives accusing IDF soldiers of murdering Palestinian civilians. The Goldstone Report does not contain enough evidence to prove war crimes were committed, but parts of it do suggest investigations should be opened into the conduct of certain soldiers. Israel fully accepts the obligation to investigate and has carried out investigations of 140 incidents.¹⁰⁷ If any soldiers committed war crimes, they should be prosecuted and punished in accordance with Israeli law. It bears no repeating that the commission of war crimes must be subjected to the strongest possible condemnation. If any soldier intentionally targeted Palestinian civilians, we must condemn him in the same manner that Hamas is condemned for targeting Israeli civilians.

Rogue soldiers are a fact of war. No matter how exacting military discipline, there will always be a soldier who sees war as an opportunity to release his own brutality. Recently, an American private was convicted of murdering four innocent civilians while on duty in Iraq.¹⁰⁸ This does not mean, however, that it is the policy of the American forces to murder civilians. Yet the Goldstone Report takes the alleged instances of Israeli soldiers intentionally targeting civilians and claims it was the policy of Israel to intentionally target civilians. There is simply no evidence to support this illogical conclusion.

To its discredit, the Goldstone Report treats many complex and nuanced military, moral, and legal issues in an overly simplistic manner. The question of who is a civilian, for instance, is generally relegated to a footnote.¹⁰⁹ This is, of course, a highly complex issue, especially in the context of fighting a terrorist enemy embodied in a quasi-government. It is intellectually dishonest to say that the question of who is a civilian is a black and white matter. There is no moral equivalence between bombing a home containing a harmless Palestinian baby and bombing a home in which the IDF knows a Palestinian “civilian” has willingly stored Hamas rockets. Reasonable people must recognize that there is a “continuum of civilianity.”¹¹⁰ On one end of this continuum are those who send rockets into Israel. On the other end are those innocents who do not contribute in any way to the Hamas terrorist enterprise. At various points along the continuum are those who willingly store rockets for Hamas, who willingly provide Hamas with expertise in making rockets, and who willingly allow themselves to be used as human shields. Simply listing the numbers of civilians

¹⁰⁷ Ethan Bronner, *Israel Poised to Challenge a U.N. Report on Gaza*, *NEW YORK TIMES*, Jan. 23, 2010, available at <http://www.nytimes.com/2010/01/24/world/middleeast/24goldstone.html>.

¹⁰⁸ James Dao, *Ex-Soldier Gets Life Sentence for Iraq Murders*, *NEW YORK TIMES*, May 21, 2009, available at <http://www.nytimes.com/2009/05/22/us/22soldier.html>.

¹⁰⁹ Goldstone Report note 289.

¹¹⁰ See ALAN DERSHOWITZ, *PREEMPTION: A KNIFE THAT CUTS BOTH WAYS* 229-230 (2006).

killed during the operation does not recognize that the casualties are distributed across this continuum.

The Supreme Court of Israel has grappled with these questions at length. Contrary to the Goldstone Report's claim,¹¹¹ Israel recognizes article 51(3) of the Geneva Convention's First Protocol ("Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities") as binding customary international law in its entirety.¹¹² This internationally recognized articulation of civilian status, however, is not self-defining. As Justice Aharon Barak wrote, "[W]ithout a comprehensive and agreed upon customary standard, there is no escaping going case by case..."¹¹³ The Court, for instance, has determined that one who contributes money to a terrorist organization maintains the protection of civilian status, but that one who willingly acts as a human shield forfeits his civilian status.¹¹⁴ These are profound moral and legal questions. Reasonable people can disagree. Rather than explore these issues, however, the Goldstone Report ignores the complexity. It does not mention the possibility of differences along the "continuum of civilianity." It does not even ask how "civilian" is defined in its oft-quoted casualty figures. As with the question of who is a civilian, the report reduces the nuances entailed in the proportionality question to simplicity. Although the report quotes a statement inquiring "to what extent is a military commander obliged to expose his own forces to danger in order to limit civilian casualties,"¹¹⁵ it simply quotes that the answer is very difficult to determine.¹¹⁶ Difficult indeed! It is a small wonder, then, that in almost every instance the report condemns Israel for making the incorrect judgment.¹¹⁷ The report completely ignores the tortured Israeli debate over whether and to what extent a democracy can value the lives of its soldiers over the lives of enemy civilians. Prof. Asa Kasher of Tel Aviv University claims that "There is no army in the world that will endanger its soldiers in order to avoid hitting the neighbors

¹¹¹ Goldstone Report note 289.

¹¹² HCJ 769/02 *Public Committee Against Torture v. Israel* (Israel 2006) ¶38, available at http://elyon1.court.gov.il/Files_ENG/02/690/007/A34/02007690.A34.pdf ("As we have seen, all of the parts of article 51(3) of The First Protocol reflect customary international law, including the timerequirement.")

¹¹³ *Id.* ¶ 34.

¹¹⁴ *Id.* ¶¶ 35-36.

¹¹⁵ Goldstone Report ¶ 694.

¹¹⁶ *Id.* ¶ 695.

¹¹⁷ See, e.g., *Id.* ¶¶ 649, 697.

of an enemy or terrorist.”¹¹⁸ As such, he believes Israel should privilege the live of her soldiers over the lives of civilians. Prof. Halbertal disagrees. He writes, “It is wrong to give the commanding officer a blank check to shoot anytime his soldiers are at probable risk – but he must be given the means of protecting them as well.”¹¹⁹ Reasonable people can disagree on these questions, but the Goldstone Report leaves no room for nuance. It condemns Israel at every turn. As Prof. Halbertal writes, “These are not simple issues....They are the occasions of deep moral struggle, because they are matters of life and death. If you are looking for an understanding of these issues, or for guidance about them, in the Goldstone Report, you will not find it.”¹²⁰

Goldstone and his colleagues were criticized for their black and white views on these matters at an expert discussion sponsored by the respected think tank Chatham House. The meeting concluded, “There is a...difficulty with international humanitarian law; the rules can be subject to different interpretations. A commission should tease out these legal issues and should make its view clear on the interpretation it favors. The Goldstone Report does not set out in detail its interpretation of the law in order to determine which facts are relevant to determine whether a target was legitimate or not. It did not need to express a definite view in the way that a court should, but merely needed to record that different interpretations exist on a given point, and indicate the facts which would be relevant to a tribunal.”¹²¹ That, of course, is precisely what the report failed to do. In its rush to condemn Israel, it failed to address the difficult questions faced by democracies fighting against terrorists who fire rockets from highly populated areas. Because the conclusion of the report was predetermined, there was no need for nuance.

Even before the report was issued, I urged the mission to consider the following questions and respond to them in its report:

1. What should a democracy do when terrorist groups, with widespread support from the local populations, commit the war crime of firing thousands of deadly, anti-personnel rockets at its school children, women, and other civilians? What military options are available under international law to stop these crimes? Must they simply accept the rockets without responding? Or wait until one hits a school filled with

¹¹⁸ Amotz Harel, The Philosopher who Gave the IDF Moral Justification in Gaza, HAARETZ, July 2, 2009, available at <http://www.haaretz.com/hasen/spages/1062127.html>.

¹¹⁹ The Goldstone Illusion.

¹²⁰ *Id.*

¹²¹ Chatham House, Report of an Expert Meeting which Assessed Procedural Criticisms made of the U.N. Fact-Finding Mission on the Gaza Conflict (The Goldstone Report) 6, Nov. 27, 2009, available at http://www.chathamhouse.org.uk/files/15572_il271109summary.pdf. [Reprinted in this volume 89–98.]

children and kills hundreds?

2. Did Barack Obama incite war crimes or grave violations of human rights when he said the following in Sderot during a visit in 2008:

I don't think any country would find it acceptable to have missiles raining down on the heads of their citizens. The first job of any nation state is to protect its citizens. And so I can assure you that if – I don't even care if I was a politician. If somebody was sending rockets into my house where my two daughters sleep at night, I'm going to do everything in my power to stop that. And I would expect Israelis to do the same thing.

3. What have other nations, such as the United States, Great Britain, and Russia done when faced with far less grave threats to its civilians in Afghanistan, Chechnya, and other places?

4. What would your own nations do if any enemy whose charter calls for its destruction was firing rockets at its civilians?

5. Was British Colonel Richard Kemp, a military expert, lying when he said the following during the Gaza conflict:

[F]rom my knowledge of the IDF and from the extent to which I have been following the current operation, I don't think there has ever been a time in the history of warfare when any army has made more efforts to reduce civilian casualties and deaths of innocent people than the IDF is doing today in Gaza.

If you disagree with Colonel Kemp, list the countries that have done more to protect civilians and indicate what more Israel could have done in the face of rockets being fired from behind human shields.

6. Do you dispute the fact that Hamas deliberately fired its rockets from behind human shield in an effort to provoke the Israeli military into killing Palestinian “shields?” Do you disagree with the following statement made by Fathi Hammad, a Hamas legislator:

For the Palestinian people, death has become an industry, at which women excel, and so do all the people living on this land. The elderly excel at this, and so do the mujahideen and the children. This is why they have formed human shields of the women, the children, the elderly, and the mujahideen, in order to challenge the Zionist bombing machine. It is as if they were saying to the Zionist enemy: “We desire death like your desire life.”

7. Is it a violation of human rights to try to stop rockets that are being fired at civilians

from behind human shields? If so, what should a democracy do when faced with such a situation?

8. In the civilian context, when a criminal fires from behind a hostage, and the police, in an effort to stop the shooter, inadvertently kill the hostage, it is the hostage-taker and not the policeman who is guilty of murder. Does the same rule apply when under international law? If not, why not?

I argued that no commission could credibly investigate what Israel did, unless it first set out with clarity what it believed Israel should have done and could have done under international law to prevent Hamas rockets from continuing to target a million Israeli civilians. I said that a United Nations investigation of Israel – in the face of that body’s absolute refusal to investigate Russia, China, Zimbabwe, Iran, and so many other countries that routinely violate human rights in an egregious manner – would constitute a major victory for the Hamas double war crime strategy of targeting Israeli civilians from behind Palestinian human shields. It would send a powerful message to all terrorist groups that provoke democracies into responding to attacks on its civilians will result in United Nations condemnation.¹²²

I called for the international community, led by the experts who were appointed to investigate Israel, first to decide what the appropriate response is for democracies faced with attacks on its civilians by terrorists who hide behind their own civilians. Only after it is first decided, in a neutral manner, what rules of self-defense should apply to all democracies faced with terrorism by those who hide behind civilians, could an independent body then credibly apply these standards to the actions of a particular country.

The Goldstone Report did not address any of these issues. Instead, it simply condemned Israel without suggesting what lawful steps Israel could have taken to protect its civilians from Hamas rockets. In his public appearances defending the report, Goldstone has suggested that Israel could have sought protection from the United Nations, as if Israel had not repeatedly been rebuffed by that body. When asked what Israel should have done to prevent rocket attacks, Goldstone said, “Well, it could have used greater pressure by diplomatic means. They could have used the

¹²² The Goldstone Report is also a barrier to peace. Israel withdrew from the Gaza Strip with the expectation that its southern border would be peaceful. When it was forced to militarily enforce a peace through Operation Cast Lead, the Goldstone Report unequivocally condemned its actions. Israelis now know that if a West Bank withdrawal is greeted with rockets, they must either live with attacks on their major population centers or face worldwide condemnation by enforcing a peace. Neither option is desirable. Israel is therefore much less likely to withdraw from the West Bank. See Alan Dershowitz, Goldstone Report is Barrier to Peace, HUFFINGTONPOST.COM, Sept. 22, 2009, available at http://www.huffingtonpost.com/alan-dershowitz/goldstone-report-is-a-bar_b_294493.html.

Security Council for that purpose.”¹²³ Israel did go to the United Nations for help and sent tens of letters informing the Security Council of the continued attacks on its territory.¹²⁴ If going to the United Nations failed (which, of course, it did) he said that Israel could have used commando operations or targeted killings of terrorists – actions for which Israel has been repeatedly condemned by United Nations organs. The question remains unanswered, what could Israel have done to protect its civilians without running afoul of the Goldstone Report’s conception of international law? (The realistic answer is “nothing.”)

III. Goldstone: Hamas Does Not Use Human Shields

The report’s “findings” that Hamas fighters do not wear civilian clothes in order to hide among the civilians and that they do not store weapons in mosques or use human shields, tell us more about the composition and bias of those who wrote the report than it does about the truth of these conclusions.¹²⁵ The evidence is overwhelming, indisputable, and widely accepted by all people of good will that Hamas does: (1) Deliberately have its fighters wear civilian clothes so as to make them indistinguishable from the regular population; (2) That it does demand that women and children serve as human shields and assemble at houses that are appropriate military targets; (3) That Hamas fighters deliberately fire rockets from near schools, mosques, and other civilian buildings; (4) That Hamas uses mosques and other civilian buildings and homes to store weapons; and (5) That Hamas deliberately does all these for the very purpose of provoking Israel into taking military actions that will result in the deaths of Palestinian civilians so that Hamas can then complain to the media and to human rights and governmental organizations. No reasonable person could dispute this reality. Yet the report found “no evidence” that any of these well known facts were true. This tells us a great deal about the methodology used to gather evidence. If in fact, they found no evidence of such actions, it is for several reasons: (1) Hamas controlled their access to facts by selecting the areas they could investigate; (2) Hamas controlled the testimony that they received from Palestinians on the ground; (3) Hamas concealed and/or destroyed incriminating evidence; and

¹²³ Tikkun’s Interview with Judge Richard Goldstone, [TIKKUN.COM](http://www.tikkun.org/article.php/20091002111513371), available at <http://www.tikkun.org/article.php/20091002111513371>.

¹²⁴ *THE OPERATION IN GAZA: FACTUAL AND LEGAL ASPECTS* ¶¶ 52-54.

¹²⁵ It is worth noting here that the entire report does not mention the word “terrorism” and “Hamas” in the same sentence.

(4) the members of the Mission closed their eyes to such evidence or refused to look for it in readily available public sources.

It is important to convey the exact nature of the report's findings on Hamas. In the following sections I will show that in each and every instance the Mission's findings either understate the nature of Hamas actions or, more often than not, come to conclusions that are completely at odds with hard evidence easily available in the public domain.¹²⁶ In the final section I will demonstrate the report's deep evidentiary bias in inferring criminal intent against Israel but not Hamas.

A. Militant Activity in Residential Areas

The report concluded, in overtly tepid terms, that militants fired rockets from urban and residential areas. Here are the report's half-hearted findings:

*In view of the information communicated to it and the material it was able to review, the Mission believes that there are indications that Palestinian armed groups launched rockets from urban areas.*¹²⁷

*For the present purposes, it suffices to say, that, in some of the cases, there was evidence, of the presence of Palestinian armed groups in residential areas.*¹²⁸

The very language indicates bias. The Mission only "believes" that there are "indications" of firing from urban areas. It only "suffices to say" that "in some of the cases" there "was evidence." Compare this language to conclusions regarding Israeli actions where the Mission noted that there was "no doubt" of Israeli intentions and that the Mission's conclusions were "firmly based in fact."¹²⁹ The reality is that there is far more conclusive, self-proving, and undisputed evidence that "Palestinian armed groups launched rockets from urban areas" than that it was the policy of Israel to kill civilians. But a reader would not know that from reading the carefully selected words of the report.

Before moving on to discuss the actions of militants in schools, mosques, and around hospitals, let us first pause to describe the actual nature of militant operations in residential areas. The hard evidence is incontrovertible that at every point of the conflict, Gaza militants consistently used residential and urban areas to launch attacks and to store their weapons, gravely endangering the lives of nearby Palestinian civilians. Here is what Amnesty International, certainly no friend of Israel, wrote

¹²⁶ Much of the evidence in this section is cited in *THE OPERATION IN GAZA: FACTUAL AND LEGAL ASPECTS*. The Mission was not only in possession of this report, but as noted above, cited it over 50 times.

¹²⁷ Goldstone Report ¶ 452.

¹²⁸ *Id.* ¶ 455.

¹²⁹ *Id.* ¶¶ 1884, 1895.

about Hamas tactics: “Hamas and other groups generally store weapons in civilian areas and there is no reason to believe that it was any different during Operation ‘Cast Lead’. By doing so, it rendered such locations possible targets of attack and therefore exposed civilians who may have been present to risk.”¹³⁰ The *Los Angeles Times* reported that during Operation Cast Lead “even many purely civilian neighborhoods aren’t safe because Gaza militants often fire rockets from such areas...”¹³¹

There is specific photographic and video evidence of Hamas forces using residential areas as staging grounds for attacks. The IDF posted a January 8, 2009 aerial video of a militant setting an improvised explosive device and then climbing into a house where, when approached by the IDF, civilians began waving white flags.¹³² Other videos show: on December 30, 2008 Israeli forces destroying smuggling tunnels in the immediate vicinity of homes, with multiple secondary explosions indicating presence of rockets;¹³³ on January 6, 2009, a house struck by Israeli fire, followed by multiple secondary explosions, indicating storage of hidden rockets, and an armed rocket launcher located between homes;¹³⁴ and on January 7, 2009, an anti-aircraft gun positioned on a civilian building and a mortar being fired from a residential rooftop.¹³⁵ The IDF also posted photos showing an underground rocket launch pad located in a residential¹³⁶ area and weapons, including grenades, stored in a house during Operation Cast Lead.¹³⁷ The Israeli NGO Intelligence and Terrorism Information Center has published a report documenting even more photographic

¹³⁰ AMNESTY INTERNATIONAL, OPERATION ‘CAST LEAD’: 22 DAYS OF DEATH AND DESTRUCTION ROCKETS 75 (2009), available at <http://www.amnesty.org/en/library/asset/MDE15/015/2009/en/8f299083-9a74-4853-860f-0563725e633a/mde150152009en.pdf>.

¹³¹ Ahmed Burai & Jeffrey Fleishman, Calls for Gaza Truce Mount After School Hit, LOS ANGELES TIMES, Jan. 7, 2009, available via Lexis.

¹³² IDF Spokesperson’s Unit, Hamas Terrorist Hides Behind White Flag Gaza 8 January 2009, posted Aug. 13, 2009, available at http://www.youtube.com/watch?v=_uOug-mN3Tw.

¹³³ IDF Spokesperson’s Unit, Israeli Air Force Destroys Weapons Smuggling Tunnels 30 Dec. 2008, posted Dec. 30, 2009, available at <http://www.youtube.com/watch?v=v2Tc-B563ww>.

¹³⁴ IDF Spokesperson’s Unit, Hamas Militants and Weapons in Urban Gaza Hit by Israel Air Force 6 Jan. 2009, posted Jan. 6, 2009, available at <http://www.youtube.com/user/idfnadesk#p/u/32/n2m4HbiIKKA>.

¹³⁵ IDF Spokesperson’s Unit, Precision Airstrikes on Hamas Terror Targets 7 Jan. 2009, posted Jan. 7, 2009, available at <http://idfspokesperson.com/2009/01/07/precision-airstrikes-on-hamas-terror-targets-7-jan-2009/>.

¹³⁶ IDF Spokesperson’s Unit, Aerial Photographs of IAF Strike on Rocket Launch Site in Gaza, posted Dec. 28, 2008, available at <http://idfspokesperson.com/2008/12/28/aerial-photographs-of-iaf-strike-on-rocketlaunch-site-in-gaza/>.

¹³⁷ IDF Spokesperson’s Unit, Weapons Confiscated from the House of Terror Operative in Gaza, 15 Jan 2009, 18:20 IST, posted Jan. 15, 2009, available at <http://idfspokesperson.com/2009/01/15/weaponsconfiscated-from-the-house-of-terror-operative-in-gaza-15-jan-2009-1820-ist/>.

evidence of residences being used to store, fire, and manufacture weapons.¹³⁸ A video from Al-Aqsa TV on January 6, 2009 clearly shows men firing mortars from a civilian area in Gaza.¹³⁹ There are also photographs showing rockets fired from densely populated areas during Operation Cast Lead.¹⁴⁰

Palestinian witnesses confirm Hamas militants operating in residential areas. *The Washington Post* relayed the harrowing story of the Abu Nihil family:

*The [Abu Nihil] house sits next to a small sports stadium, favored by Hamas fighters as a place to launch rockets. So it was not a big surprise when Israeli warplanes fired missiles at the stadium after midnight on Dec. 29. For some reason, the first two missiles crashed into the stadium but did not explode, members of the family recalled. Still wearing their pajamas, parents and grandparents gathered the children and dashed outside. They managed to get a few blocks away by the time another missile struck the stadium. This one detonated, as designed. "I looked back at the house," Tarik said. "It was on fire everywhere." The Abu Nihils kept walking until they reached a relative's house, about a mile away. It was a difficult escape. Tarik's mother, Samira, 53, was recovering from a back operation and could barely move on her own. His sister-in-law, Raja, 24, was eight months pregnant.*¹⁴¹

Bassam Zakarneh of the PA's Workers' Union said, "Hamas leaders... used these [1,400] martyrs as sandbags, while they hid in tunnels. They would place a missile, cover it with a tent, amid buildings with 200 children and old people, and they would launch the missile and hide."¹⁴²

Newsweek reported that on January 17, 2009 at 11:30pm in the Nuseirat refugee camp, one of "Hamas' homemade Qassam rockets [was] launched into Israel – and the mobile launchpad was smack in the middle of the four buildings, where every apartment was full, most of them with newly made refugees."¹⁴³ A German paper

¹³⁸ INTELLIGENCE AND TERRORISM INFORMATION CENTER, ISRAEL INTELLIGENCE HERITAGE & COMMEMORATION CENTER, CIVILIANS AS HUMAN SHIELDS (Feb. 18, 2009), available at http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/pdf/hamas_e062.pdf.

¹³⁹ Al-Aqsa TV, Jan. 6, 2009, available at, http://www.terrorisminfo.org.il/malam_multimedia/Hebrew/heb_n/video/h_s_video.mpeg.

¹⁴⁰ INTELLIGENCE AND TERRORISM INFORMATION CENTER, ISRAEL INTELLIGENCE HERITAGE & COMMEMORATION CENTER, OPERATION CAST LEAD – UPDATE NO. 15 (Jan. 15, 2009), available at http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/html/hamas_e042.htm.

¹⁴¹ Craig Whitlock & Reyham Abdel Kareem, Gaza Clan Finds One Haven After Another Ravaged in Attacks, WASHINGTON POST, Jan. 16, 2009, available via Lexis.

¹⁴² Quoted in Goldstone's Gaza Report: Part I.

¹⁴³ Rod Nordland, Hamas and Its Discontents, NEWSWEEK.COM, Jan. 20, 2009, available at <http://www.newsweek.com/id/180691/page/1v>.

tells the story of Mohammed Sadala of Beit Lahia, whose home was used by Hamas during the fighting and then targeted by Israeli forces. When Sadala returned home after the fighting ended, he found the corpses of two Hamas fighters killed by Israel. In another civilian's home, militants had left a rocket launcher, assault rifle, and an ammunition belt. "The[y, Hamas,] abused civilians' homes for their own purposes. That is not right," the anonymous civilian said.¹⁴⁴ According to a *New York Times* report during Operation Cast Lead, "Shireen Shihab, 30, a resident of Gaza City, said Monday that she had seen Hamas fighters firing rockets toward Israel from a site two blocks away from her home."¹⁴⁵ Here is what a Palestinian source, quoted in the *New York Times*, said:

*This time it was different...they have more experience and they have training from Syria and Iran. They helped them rethink their strategy. They fired rockets in between the houses and covered the alleys with sheets so they could set the rockets up in five minutes without the planes seeing them. The moment they fired, they escaped, and they are very quick.*¹⁴⁶

The Goldstone Report accuses Israeli soldiers of intentionally singling out civilians for death during the Abed Rabbo incident and determined that "the Israeli armed forces were not engaged in combat or fearing an attack at the time of the incident."¹⁴⁷ Yet here is what a *Time* reporter wrote, "Most residents of Jebel al-Kashif claim there were no Hamas fighters in the area at the time of the alleged incident [Abed Rabbo], but a middle-aged farmer in a battered army jacket took me aside and said, in a near whisper, that Hamas had been firing rockets from the vicinity of where the episode took place."¹⁴⁸

Here is what Italian reporter Lorenzo Cremonesi reported about the situation during Operation Cast Lead:

"Get away! Get away from here! Do you want the Israelis to kill everyone? Do you want our children to die under the bombs? Take your missiles and weapons away," the inhabitants of the Gaza Strip yelled at the Hamas militants and their allies in

¹⁴⁴ Ulrike Putz, "Who Has Won Here?" SPIEGEL, Jan. 23, 2009, available at <http://www.spiegel.de/international/world/0,1518,603203,00.html>.

¹⁴⁵ Taghreed El-Khodary & Isabel Kershner, Warnings not Enough for Gaza Families, NEW YORK TIMES, Jan. 5, 2009, available at <http://www.nytimes.com/2009/01/06/world/middleeast/06scene.html?em>.

¹⁴⁶ Ethan Bronner, Parsing Gains of Gaza War, NEW YORK TIMES, Jan. 18, 2009, available at <http://www.nytimes.com/2009/01/19/world/middleeast/19assess.html>.

¹⁴⁷ See Goldstone Report ¶¶ 778, 812.

¹⁴⁸ Tim McGirk & Jebel Al-Kashif, Voices from The Rubble, TIME, Jan. 29, 2009, available at <http://www.time.com/time/magazine/article/0,9171,1874850,00.html>.

Islamic Jihad. The more courageous were organized and blocked the entrances to their courtyards and locked the doors to their buildings, barricading quickly and furiously the stairs to the highest rooftops. But for all of that the guerrillas didn't listen to anyone. "Traitors, collaborators with Israel, spies of Fatah, cowards! The soldiers of the holy war will punish you. And in any case you will all die, like us. Fighting the Zionist Jews we are all destined for paradise. Do you not wish to die with us?"

This is what they yelled furiously as they broke down doors and windows, hiding themselves on high floors, gardens, using ambulances and barricading themselves near the hospitals, schools and buildings of the U.N. In extreme cases the [Hammas militants] shot those who sought to block them from their streets and houses to save their own families, or they beat them savagely.¹⁴⁹

Cremonesi also reported that two Gaza residents told him, "The Hamas militants looked for good places to provoke the Israelis. They were usually youths, 16 or 17 years old, armed with submachine guns. They couldn't do anything against a tank or jet. They knew they were much weaker. But they wanted the [Israelis] to shoot at the [the civilians'] houses so they could accuse them of more war crimes."¹⁵⁰ Cremonesi explained, "It was difficult to get these testimonials. In general, fear of Hamas prevails and ideological taboos, fed by this century of wars with the 'Zionist enemy,' reign. Anyone who tells a different version than the story imposed by the Muhamawa (resistance), is automatically an Amil (collaborator), and risks his life."¹⁵¹

An Islamic Jihad newspaper boasts:

There is no visibility of the men of the resistance in the streets of the [Gaza] strip. No one sees their known means of transportation, and even light weapons can no longer be seen with people publicly in the Gaza Strip. The resistance is totally even as its actions are felt. Anti-aircraft artillery fires on the aircraft without them knowing the location. The whereabouts of rockets launched from the heart of the strip cannot be seen or known until they're shot.... The residents of the Gaza Strip were surprised with the rockets of the resistance being fired from the heart of the cities of the Gaza Strip, without seeing how the launchers were put up, or their place, in order for deception to prevent exposure to the Israeli intelligence planes of the place of the firing of the rockets.... According to medical sources, the number of martyrs and wounded of the warriors of the Palestinian resistance are few in comparison to the number of civilian martyrs who were killed since the start of the Israeli war on

¹⁴⁹ Quoted in Goldstone's Gaza Report: Part II.

¹⁵⁰ Quoted in Goldstone's Gaza Report: Part I.

¹⁵¹ Quoted in Goldstone's Gaza Report: Part I.

*Gaza, except for the large number of Palestinian policemen who were martyred on the first day....*¹⁵²

The evidence is clear and incontrovertible. In light of the evidence, how can the report possibly express in such half-hearted terms that there merely “are indications” Hamas used residential areas to fire rockets at Israeli civilians?

B. Militant Activity in Schools and Hospitals

Although half-heartedly accepting the possibility that militants may have fired from “urban areas,” and around hospitals, the report does not credit a clear pattern of militants using schools to launch attacks and store rockets. The report also ignores evidence that hospitals may have been used for military purposes.

With regard to schools, “[T]he Mission accepted, on the basis of information in the reports that it had seen, the possibility of mortar attacks from Palestinian combatants in the vicinity of the [Jabilya] school.”¹⁵³ In another part of the report, the Mission writes, “The Mission notes that the [IDF] attack [near the school] may have been in response to a mortar attack from an armed Palestinian group but considers the credibility of Israel’s position damaged by the series of inconsistencies and factual inaccuracies.”¹⁵⁴ The hard evidence shows that there were indeed militants in the vicinity of the Jabilya school. For instance, “Two residents of the area who spoke to the Associated Press by telephone said they saw a handful of militants firing mortar shells from a street near the school.”¹⁵⁵ Another reporter claims, “Local residents in the street told me that militants had been firing rockets [near the school] as the IDF claimed – and having been targeted in retaliatory fire by the IDF, they ran down the street past the school.”¹⁵⁶ The *New York Times* reported, “Witnesses, including Hanan Abu Khajib, 39, said that Hamas fired just outside the school compound, probably from the secluded courtyard of a house across the street, 25 yards from the school. Israeli return-fire, some minutes later, also landed outside the school, along the southwest wall, killing two Hamas fighters.”¹⁵⁷ Although two of these three

¹⁵² Quoted in Goldstone’s Gaza Report: Part I.

¹⁵³ Goldstone Report ¶ 446.

¹⁵⁴ *Id.* ¶ 690.

¹⁵⁵ Israel Hits Second U.N. School, Blasts Way Into Southern Gaza, FOXNEWS.COM, Jan. 6, 2009, available at <http://www.foxnews.com/story/0,2933,476664,00.html>.

¹⁵⁶ Jonathan Miller, Why U.N. ‘Reversal’ Over Gaza School Should be Treated with Caution, CHANNEL4.COM, Feb. 5, 2009, available at http://www.channel4.com/news/articles/world/middle_east/why+un+reversal+over+gaza+school+should+be+treated+with+caution/2924657.

¹⁵⁷ Steven Erlanger, Weighing Crimes and Ethics in the Fog of Urban Warfare, NEW YORK TIMES, Jan. 16, 2009, available at <http://www.nytimes.com/2009/01/17/world/middleeast/17israel.html?pagewanted=1&r=1>.

sources are cited in the report, little credence is granted to them because, according to the interviews the Mission conducted, “No witness stated that he had heard any firing prior to the Israeli armed forces’ mortars landing.”¹⁵⁸ Recall, however, that the Mission was accompanied by Hamas security, and that civilians who spoke out against the Hamas party line likely feared reprisal.

Unsurprisingly, the report does not address Hamas’ clear pattern of using schools to launch attacks. It makes a single mention of a rocket fired from a school.¹⁵⁹ The IDF has posted video or photographic evidence showing: on January 6, 2009, the presence of an anti-tank missile in a school yard in Sajalya;¹⁶⁰ on January 8, 2009, during the humanitarian ceasefire, three militants arming a rocket-launcher in a school courtyard;¹⁶¹ and on January 11, 2009, a booby-trapped school and zoo rigged with explosives.¹⁶² The IDF has also released aerial intelligence photographs locating a Hamas military camp approximately 27 meters from a school in the Northern Gaza Strip.¹⁶³ A particularly clear video shows a rocket launcher positioned between two schools on January 18, 2009.¹⁶⁴

The historical record prior to Operation Cast Lead is replete with incidents of militants using schools. One of the most damning videos shows militants firing three mortar shells from an UNRWA school on Oct. 29, 2007.¹⁶⁵

In terms of medical facilities, the report concludes, “On the basis of the investigations it has conducted, the Mission did not find any evidence to support the allegations that hospital facilities were used by the Gaza authorities or by Palestinian armed groups to shield military activities and that ambulances were used to transport combatants or

¹⁵⁸ Goldstone Report ¶ 674.

¹⁵⁹ *Id.* ¶ 449.

¹⁶⁰ IDF Spokesperson’s Unit, Missiles found in Gaza School, 6 Jan 2009, posted Jan. 6, 2009, available at <http://idfspokesperson.com/2009/01/06/missiles-found-in-gaza-school-6-jan-2009/>.

¹⁶¹ IDF Spokesperson’s Unit, Hamas Rockets During Cease-Fire and From Schoolyard, 8 Jan. 09, 23:26 IST, posted Jan. 10, 2009, available at <http://idfspokesperson.com/2009/01/10/hamas-rockets-during-ceasefire-and-from-schoolyard-8-jan-09-2326-ist/>.

¹⁶² IDF Spokesperson’s Unit, Hamas Booby Trapped School and Zoo, 11 Jan. 2009, posted Jan. 11, 2009, available at <http://www.youtube.com/watch?v=uHhs9ihSmbU>.

¹⁶³ IDF Spokesperson’s Unit, Intelligence Maps: Hamas Uses Mosques and Schools for Cover, 22 Jan 2009, 12:15 IST, posted Jan. 22, 2009, available at <http://idfspokesperson.com/2009/01/22/intelligencemaps-hamas-uses-mosques-and-schools-for-cover-22-jan-2009-1215-ist/>.

¹⁶⁴ IDF Spokesperson’s Unit, Hamas Uses Schools and Ceasefire to Shoot Rockets at Israel, posted Jan. 19, 2009, available at http://www.youtube.com/watch?v=8LGubwghyEw&feature=channel_page.

¹⁶⁵ IDF Spokesperson’s Unit, Mortar Bombs Shot from UN School in Gaza 29 Oct. 2007, posted Jan. 1, 2009, available at <http://idfspokesperson.com/2009/01/01/mortar-bombs-shot-from-un-school-in-gaza-29-oct-2007/>.

for other military purposes.”¹⁶⁶ How can the Mission claim that there is no evidence for the proposition that hospitals were not used by Hamas? The *New York Times*, in graphic terms, reported that armed militants in civilian clothes were present in the Shifa Hospital, summarily executing at least six civilians accused of collaboration. Even the Palestinian Authority’s Ministry of Health accused Hamas of “us[ing] the medical centers, especially in a number of hospitals, [and] converting them into centers for interrogation, torture, and imprisonment.”¹⁶⁷

The Mission, even though it is in possession of a *Newsweek* article suggesting otherwise, does not make factual findings whether there were militants operating in the vicinity of the Al-Quds Hospital when it was attacked by Israeli forces.¹⁶⁸ The *Newsweek* article reports, “In the Tal-al Hawa neighborhood nearby, however, Talal Safadi, an official in the leftist Palestinian People’s Party, said that resistance fighters were firing from positions all around the [Al-Quds] Hospital.”¹⁶⁹

The Israeli government alleged,¹⁷⁰ with at least some independent support,¹⁷¹ that Hamas occupied portions of Shifa Hospital during Operation Cast Lead. Israel contends that the hospital served as Hamas’ “main base of operations.”¹⁷² The Mission is aware of this allegation but “did not investigate the case of al-Shifa hospital and is not in a position to make any findings with regard to these allegations.”¹⁷³ Why does the Mission avoid investigating one of Israel’s most serious allegations? After all, hospitals have been used in the past for military purposes. In 2007, an official from the International Committee of the Red Cross told an Australian radio show, “We have noticed many armed people present inside the medical and surgical wards where even their presence have been disturbing the medical teams and frightening the patients who are treated at these hospitals. In one hospital in Beit Hanoun the Hospital is out of functioning as militants sent all the medical staff home the day

¹⁶⁶ Goldstone Report ¶ 487.

¹⁶⁷ Roe Nahmias, PA: Hamas Converts Hospitals Into Jails, YNET, Feb. 7, 2009, available at <http://www.ynetnews.com/articles/0,7340,L-3668018,00.html>.

¹⁶⁸ See Goldstone Report ¶¶ 615-623.

¹⁶⁹ Rod Nordland, Hamas and Its Discontents, NEWSWEEK.COM, Jan. 20, 2009, available at <http://www.newsweek.com/id/180691/page/1v>.

¹⁷⁰ THE OPERATION IN GAZA: FACTUAL AND LEGAL ASPECTS ¶163.

¹⁷¹ Lorenzo Cremonesi, Così i Ragazzini di Hamas ci Hanno Utilizzato come Bersagli, CORRIERE DELLA SERA, Jan. 22, 2009, available at http://www.corriere.it/esteri/09_gennaio_21/denuncia_hamas_cremonesi_ac41c6f4-e802-11dd-833f-00144f02aabc.shtml.

¹⁷² THE OPERATION IN GAZA: FACTUAL AND LEGAL ASPECTS ¶163.

¹⁷³ Goldstone Report ¶ 468.

before yesterday causing the Hospital to stop serving the whole population of Beit Hanoun.”¹⁷⁴

The report notes the accusation that militants may have attempted to hijack ambulances, but quickly dismisses it as “the exception, not the rule.”¹⁷⁵ In acknowledging this claim, the report cites to an article in which an ambulance driver says militants “ordered me to get them out, to put them in the ambulance and take them away... And then one of the fighters picked up a gun and held it to my head, to force me.”¹⁷⁶

C. Militant Activity in Mosques

The report’s conclusion regarding mosques is also contradicted by hard evidence. Although the Mission possessed evidence indicating mosques were used for military purposes,¹⁷⁷ they conclude, “The Mission is unable to make any determination on the general allegation that Palestinian armed groups used mosques for military purposes.”¹⁷⁸ This is willful blindness, or worse, on the Mission’s part. By their own admission, the Mission investigated only one instance in which the Israelis alleged mosques were used for military purposes.¹⁷⁹ Had they been interested in the truth, surely the Mission would have performed more investigations, or at the very least read credible news accounts indicating militant use of mosques.

The hard evidence, had the Mission wished to credit it, proves not only that mosques were used to store weapons, but that they also served as launching grounds for rocket attacks. The *New York Times* reported, “ Hamas fighters are also putting civilians at undue risk by storing weapons among them, including in mosques [and] schools...”¹⁸⁰ The *Los Angeles Times* reported, “Every day, the Hamas rocket teams sneak through the fire and fury of Gaza to launching sites such as trucks, rooftops,

¹⁷⁴ PM (ABC radio broadcast June 13, 2009), transcript available at <http://www.abc.net.au/pm/content/2007/s1950580.htm>.

¹⁷⁵ Goldstone Report ¶ 474.

¹⁷⁶ Jason Koutsoukis, Hamas Tried to Hijack Ambulances During Gaza War, SYDNEY MORNING HERALD, Jan. 26, 2009, available at <http://www.smh.com.au/news/world/hamas-tried-to-hijack-ambulances-duringgaza-war/2009/01/25/1232818246374.html?page=fullpage#contentSwap1>.

¹⁷⁷ Goldstone Report ¶ 464.

¹⁷⁸ *Id.* ¶ 486.

¹⁷⁹ *Id.* ¶ 465.

¹⁸⁰ Steven Erlanger, Weighing Crimes and Ethics in the Fog of Urban Warfare, NEW YORK TIMES, Jan. 16, 2009, available at <http://www.nytimes.com/2009/01/17/world/middleeast/17israel.html?th=&adxnnl=1&emc=th&adxnnlx=1232559411-5nJYDZcXlswtedPrMvDomA&>.

school courtyards and mosques.”¹⁸¹ *The Washington Post* wrote, “Ordinarily secure places have become risky. No one seeks sanctuary in the mosques, because Hamas fighters are known to store weapons there.”¹⁸² These statements from reputable news organizations all referred to the events of Operation Cast Lead and are confirmed by hard evidence provided by the IDF. For instance a video sequence showing a mortar fired from a mosque on January 7, 2009.¹⁸³

As the camera zooms in, the minaret of the mosque is clearly visible in the picture on the bottom right. Other video evidence shows secondary explosions erupting in two separate mosques after being hit by IDF fire on December 31, 2008 and January 1, 2009, indicating weapons were stored in the mosques.¹⁸⁴ The IDF also posted video and photographic evidence of soldiers searching a Zeiton mosque on January 13, 2009 and finding an anti-aircraft cannon and rockets.¹⁸⁵ More IDF photographs show an assault rifle and ammunition hidden inside a mosque pulpit on January 15, 2009.¹⁸⁶ On January 22, 2009, the IDF posted an aerial map locating a rocket launching site approximately 18 meters from a mosque in the Shaati refugee camp.¹⁸⁷ Another aerial IDF intelligence map shows Hamas activity among civilian homes, schools, hospitals, and mosques in Tel Zaatar.¹⁸⁸ A particularly convincing piece of

¹⁸¹ Sebastian Rotella, Conflict in Gaza: Hamas’ Weapon of Choice, LOS ANGELES TIMES, Jan. 15, 2009, available via Lexis.

¹⁸² Craig Whitlock & Reyham Abdel Kareem, Gaza Clan Finds One Haven After Another Ravaged in Attacks, WASHINGTON POST, Jan. 16, 2009, available via Lexis.

¹⁸³ IDF Spokesperson’s Unit, Precision Airstrikes on Hamas Terror Targets 7 Jan. 2009, posted Jan. 7, 2009, available at <http://idfspokesperson.com/2009/01/07/precision-airstrikes-on-hamas-terror-targets-7-jan-2009/>.

¹⁸⁴ IDF Spokesperson’s Unit, Weapons Hidden in Mosque Neutralized by Israel Air Force 31 Dec 2008, posted Jan. 1, 2009, available at <http://idfspokesperson.com/2009/01/01/weapons-hidden-in-mosqueneutralized-by-israel-air-force-31-dec-2008/>; IDF Spokesperson’s Office, IAF Strike on Mosque Used as Weapon Storage Site, 2 Jan 2009, posted Jan. 2, 2009, available at <http://idfspokesperson.com/2009/01/02/iaf-strike-on-mosque-used-as-weapon-storage-site-2-jan-2009/>.

¹⁸⁵ IDF Spokesperson’s Unit, Weaponized Mosque, 13 Jan 2009, 18:30 IST, posted Jan. 13, 2009, available at <http://idfspokesperson.com/2009/01/13/weaponized-mosque-13-jan-2009-1830-ist/>; IDF Spokesperson’s Office, Weapons Discovered in Zeitoun Mosque, 13 Jan 2009, 21:34, posted Jan. 13, 2009, available at <http://idfspokesperson.com/2009/01/13/weapons-discovered-in-zeitoun-mosque-13-jan-2009-2134-ist/>.

¹⁸⁶ INTELLIGENCE AND TERRORISM INFORMATION CENTER, ISRAEL INTELLIGENCE HERITAGE & COMMEMORATION CENTER, EVIDENCE FROM OPERATION CAST LEAD SHOWS HAMAS USES MOSQUES TO STORE WEAPONS AND AS SITES LAUNCH ROCKETS AND MORTAR SHELLS (Feb. 16, 2009), available at http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/pdf/hamas_e059.pdf.

¹⁸⁷ IDF Spokesperson’s Unit, Intelligence Maps: Hamas Uses Mosques and Schools for Cover, 22 Jan 2009, 12:15 IST, posted Jan. 22, 2009, available at <http://idfspokesperson.com/2009/01/22/intelligencemaps-hamas-uses-mosques-and-schools-for-cover-22-jan-2009-1215-ist/>.

¹⁸⁸ IDF Spokesperson’s Unit, Hamas Deployment in the Tel-Zaatar Region, available at <http://idfspokesperson.files.wordpress.com/2009/01/intelmaps2.jpeg>.

evidence is a seized Hamas intelligence map, posted on the IDF website, showing placement of improvised explosive devices directly next to civilian areas and sniper positions next to mosques.¹⁸⁹

The report's conclusions that ignore all this evidence is not surprising, considering what one of its members, Colonel Travers, said, namely that the accusation that Hamas uses mosques to store ammunition "reflects western perceptions, in some quarters that Islam is a violent religion." In other words, "political correctness" must trump hard evidence. As Groucho Marx once put it: "Who are you going to believe, me? Or your lying eyes?" Or in the present context, "my political bias or your lying videos?"

D. Militant Uniforms

It is widely accepted that Hamas militants often do not wear uniforms or proper insignia when attacking Israeli forces. It should come as a surprise then that "The Mission found no evidence that members of Palestinian armed groups engaged in combat in civilian dress."¹⁹⁰ Again, the hard evidence contradicts the report's conclusion. The *New York Times* noted during Operation Cast Lead that Hamas militants fought "in the midst of civilians, often in civilian clothing."¹⁹¹ "Mohammed," a member of the Izz al-Din al-Qassam Brigades told *The Times of London* that fighters wore civilian clothes during military activities.¹⁹² The *Chicago Tribune* reported, "The Israeli offensive to halt Hamas rocket attacks pitted the military against gunmen fighting among civilians, often in civilian clothes themselves..."¹⁹³ A video from Al-Aqsa TV on January 6, 2009 clearly shows men dressed in civilian clothes firing mortars.¹⁹⁴ When an NPR host asked an Al-Jazeera reporter in Gaza City whether people would be able to distinguish militant-aged civilians and actual militants, he responded, "Certainly not. The short answer to that is no. You cannot distinguish because if you were just going to base it on looks, since the first day of the attacks, we

¹⁸⁹ IDF Spokesperson's Unit, Captured Hamas Intelligence, 9 Jan 2009, 16:26 IST, posted on Jan. 9, 2009, available at <http://idfspokesperson.com/2009/01/09/captured-hamas-intelligence-9-jan-2009-1626-ist/>.

¹⁹⁰ Goldstone Report ¶ 495.

¹⁹¹ Steven Erlanger, Weighing Crimes and Ethics in the Fog of Urban Warfare, *NEW YORK TIMES*, Jan. 16, 2009, available at <http://www.nytimes.com/2009/01/17/world/middleeast/17israel.html?th=&adxnnl=1&emc=th&adxnnlx=1232559411-5njYDZcXlswtedPrMvDomA&>.

¹⁹² Martin Fletcher, Sheera Frenkel & Azmi Keshawi, Gaza's Tunnels, Traps and Martyrs, *THE TIMES* (London), Jan. 12, 2009, available at http://www.timesonline.co.uk/tol/news/world/middle_east/article5497340.ece.

¹⁹³ Joel Greenberg, Israeli Army's Conduct Questioned, *CHICAGO TRIBUNE*, Jan. 26, 2009, available via Lexis.

¹⁹⁴ Al-Aqsa TV, Jan. 6, 2009, available at http://www.terrorisminfo.org.il/malam_multimedia/Hebrew/heb_n/video/h_s_video.mpeg.

know that a lot of the services here, the police services as well as the military factions, are not dressing in particularly identifiable uniforms. They may have done on the first couple of days, but there is no clear identifiable marker to say someone is a civilian or someone is not.”¹⁹⁵ Talal Abu Ramah told CNN, “Now Hamas, they are under cover, all of them they are civilians now, you don’t see any militants around you, even the cars...I don’t know if the car in front of me or in the back of me, if it’s a target or not.”¹⁹⁶ Once again the report’s conclusion flies in the face of the clear and incontrovertible evidence. How can the members possibly explain these contradictions, which should be obvious to all?

E. Directing Civilians to Areas to Shield Military Objectives from Attack

One of the most serious charges against Hamas is that they directed or forced civilians to shield military objectives from attack, in violation of international humanitarian law. Despite hard evidence of this, “On the basis of the information it gathered, the Mission found no indication that the civilian population was forced by Hamas or Palestinian armed, groups to remain in areas under attack from the Israeli armed forces.”¹⁹⁷ Here again, the hard evidence points to the opposite conclusion. It proves conclusively that some civilians volunteered, some were coerced, and others were forced to serve as human shields.

To begin, the evidence demonstrates a pattern of directing civilians into harm’s way prior to Operation Cast Lead. For instance, in early November 2006, a group of militants in a mosque were under siege by Israeli forces. A Hamas radio station brazenly called on Gaza women to serve as “human shields” for the militants, which many willingly did.¹⁹⁸ On Nov. 20, 2006, Israeli forces called Hamas operative Wael Rajab to warn him that his home would be destroyed. According to the *Jerusalem Post*, civilians “flocked” to Rajab’s home to serve as human shields and prevent the strike.¹⁹⁹ A similar incident occurred on Nov. 18, 2006 when the head of the Popular Resistance Committees’ Qassam Division Mohammedweil Baroud received warning

¹⁹⁵ Morning Edition (NPR radio broadcast Jan. 8, 2009), transcript available via Lexis.

¹⁹⁶ Quoted in Goldstone’s Gaza Report: Part I.

¹⁹⁷ Goldstone Report ¶ 488.

¹⁹⁸ Hanan Greenberg, Palestinians: Gunmen Flee Besieged Mosque, YNET, Nov. 3, 2006, available at <http://www.ynetnews.com/articles/0,7340,L-3323131,00.html>; Gaza Women Killed in Mosque Siege, BBC, Nov. 3, 2006, available at http://news.bbc.co.uk/2/hi/middle_east/6112386.stm.

¹⁹⁹ Yaakov Katz & Khaled Abu Toameh, Gaza: Use of Human Shields Continues, JERUSALEM POST, Nov. 20, 2006, available at <http://www.jpost.com/servlet/Satellite?cid=1162378435257&pagename=JPArticle%2FShowFull>.

his house would be destroyed.²⁰⁰ After Baroud rushed to a mosque to gather human shields, hundreds of people, including women and children, surrounded the house to prevent the Israeli strike.²⁰¹ Before these two incidents, a Hamas preacher said, “Instead of running away, the owners [of threatened houses] must stay inside their homes and call the neighbors and as many people as possible. The human shields are the best way to protect the houses.”²⁰² Abu Mujahed, spokesperson for the Popular Resistance Committees, insisted, “From now on we will form human chains around every house that is threatened with demolition.”²⁰³

Even though the report claims that “No such incidents [of forcing/directing human shields] are alleged by the Israeli Government with regard to the military operations that began on 27 December 2008 [and t]he Mission received no reports of such incidents from other sources,”²⁰⁴ a simple news search reveals hard evidence that Hamas did indeed direct and force human shields during Operation Cast Lead. *The Times of London* tells the story of a Palestinian whose roof was scouted by militants as a sniper position prior to the operation. When fighting began, he was told by militants he was “part of the resistance” and was forced to serve as a human shield. The civilian recalls,

*They were resistance fighters. I did not want them there but they made it clear that this is where they would set up their positions. I went downstairs to wake my wife to tell her we would go to her sisters’. But they stopped us. [The militants said, “] If soldiers come, you must send your children to warn us. Tell them there is no one here and we will escape somewhere else.[”] They would not listen when I told them to let my youngest children go, my family. They said no, it must look normal.*²⁰⁵

Wafa Kannan, of Gaza City, was lucky. The Knight-Ridder wire service reported her story:

In an apartment building across the street from Kannan and her family live four brothers who are Hamas militants. Israeli intelligence called the Hamas members to warn them that they were targets, Kannan said. Leaders at the local mosque urged

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ Goldstone Report ¶ 476.

²⁰⁵ Sheera Frenkel, Human Shields Were Forced Into the Front Line – By Both Sides, *THE TIMES* (London), Feb. 2, 2009, available via Lexis.

*neighbors to converge on the apartment building and act as human shields, she added. No one heeded the call, however, so the Hamas militants fled.*²⁰⁶

The IDF has posted video evidence of civilians being forced or directed to serve as human shields during Operation Cast Lead. One video shows a militant launching a rocket from the roof of a home and then being escorted out by civilians.²⁰⁷ Another video shows a fleeing militant attempting to maneuver himself next to civilians so as to shield himself from attack.²⁰⁸ Yet this evidence, and much more, was ignored by the report.

F. Intent

The central issue that distinguishes the conclusions of the Goldstone Report regarding Israel and Hamas is intentionality. The report finds that the most serious accusation against Israel, namely the killing of civilians, was intentional (and deliberately planned at the highest levels). The report also finds that one of the most serious accusations made against Hamas, namely that their combatants wore civilian clothing to shield themselves from attack, mingled among the civilian populations, and used civilians as human shields, was unintentional.

It must be pointed out, to begin with, that the issue of Hamas' intentions and actions with regard to the civilian shield issue is not unrelated to the issue of the IDF's intentions and actions with regard to the deaths of Palestinian civilians. If it were to turn out that there was no evidence that Hamas ever operated from civilians areas, and that the IDF knew this, then the allegation that the IDF, by firing into civilian areas, deliberately intended to kill Palestinian civilians, would be strengthened. But if it were to turn out that the IDF reasonably believed that Hamas fighters were deliberately using civilians as shields, then this fact would weaken the claim that the IDF had no military purpose in firing into civilian areas. It would also undercut the conclusion that Israel's real intention could be nothing other than its desire to kill Palestinian civilians. Moreover, if Hamas did use human shields then the deaths of Palestinian civilians would be more justly attributable to Hamas than to Israel.

Since intentionality, or lack thereof, was so important to the report's conclusions, it would seem essential that the report would apply the same evidentiary standards, rules, and criteria in determining the intent of Israel and in determining the intent of

²⁰⁶ Dion Nissenbaum & Ahmed Abu Hamda, Death Toll Rises as Israel Continues Gaza Assault, Knight Ridder wire, Dec. 29, 2008, accessed via Lexis.

²⁰⁷ IDF Spokesperson's Unit, Cast Lead Video: Hamas Terrorist uses Children as Human Shield, posted Sept. 17, 2009, available at <http://www.youtube.com/watch?v=2vHDyuSTneA>.

²⁰⁸ IDF Spokesperson's Unit, Cast Lead Video: Civilians Flee Hamas Terrorist as He Attempts to Use Them as Human Shield, posted Sept. 17, 2009, available at <http://www.youtube.com/watch?v=9MPwR0Eu32M>.

Hamas. Yet a careful review of the report makes it crystal clear that its writers applied totally different standards, rules, and criteria in evaluating the intent of the parties to the conflict. The report resolved doubts against Israel in concluding that its leaders intended to kill civilians, while resolving doubts in favor of Hamas in concluding that it did not intend to use Palestinian civilians as human shields. Moreover, when it had precisely the same sort of evidence in relation to both sides – for example, statements by leaders prior to the commencement of the operation – it attributed significant weight to the Israeli statements, while entirely discounting comparable Hamas statements. This sort of evidentiary bias, though subtle, and perhaps not readily apparent to the non-legal reader, permeates the entire report.

In addition to the statements of leaders, which are treated so differently, the report takes a completely different view regarding the inferring of intent from actions. When it comes to Israel, the report repeatedly looks to results and infers from the results that they must have been intended. But when it comes to Hamas, it refuses to draw inferences regarding intent from results. For example, it acknowledges that some combatants wore civilian clothes, and it offers no reasonable explanation for why this would be so other than to mingle indistinguishably from civilians. Yet it refuses to infer intent from these actions. This is crucial because the violation of international humanitarian law known as human shield use requires specific intent.²⁰⁹ For Hamas to be guilty of using human shields, militants not only needed to know that when they fired rockets from civilian areas, Israel was deterred from responding, but it must have been their purpose in shooting the rockets from civilian areas to deter Israel from responding or to cause Israel to kill civilians. Although the Mission, as discussed above, half-heartedly concludes that militants fired rockets from civilian areas, they refuse to believe that this was done with the purpose of rendering such areas immune from attack. Here are the report's words: "On the basis of the information it gathered, the Mission finds that there are indications that Palestinian armed groups launched rockets from urban areas. The Mission has not been able to obtain any direct evidence that this was done with the specific intent of shielding the rocket launchers from counterattacks by the Israeli armed forces."²¹⁰ Notice the use of the words direct evidence. As discussed in section I above, the report used five

²⁰⁹ See Goldstone Report ¶ 493. Article 51(7) of the First Protocol, the prohibition on use of human shields, is part of the basis for Art. 8(2)(b)(xxii) of the Rome Statute of the International Criminal Court. The second element of Art. 8(2)(b)(xxii) requires that "The perpetrator intended to shield a military objective from attack or shield, favour, or impede military operations." An ICRC commentary reads, "Bearing in mind that the aim of the prohibition is to protect civilians and other protected persons from the effects of attacks, the decisive element of the crime would be the intention to shield. Therefore, Element 2 was adopted....The way it is drafted, it may be qualified as a specific intent requirement." KNUT DÖRMANN, ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRINAL COURT 344-348.

²¹⁰ Goldstone Report ¶ 482.

categories of evidence to conclude Israel had a policy of intentionally killing civilians: military leader statements, political leader statements, circumstance (Israel's use of advanced weaponry), result (the sheer number of civilian deaths), and alleged related actions (destruction of infrastructure). None of these categories constitute direct evidence of intent. The report does not explain why it requires direct evidence to infer Hamas intent but is content to rely on extremely weak circumstantial evidence to infer Israeli intent.

The Mission was in possession of Hamas statements that strongly suggested intent, but refused to credit them. As described in section I of this paper, the report quoted a Hamas political leader who said, "For the Palestinian people, death has become an industry, at which women excel, and so do all the people living on this land.... This is why they have formed human shields of the women, the children, the elderly, and the mujahideen, in order to challenge the Zionist bombing machine."²¹¹ The Mission responded that "it does not consider it [the quote] to constitute evidence that Hamas forced Palestinian civilians to shield military objectives against attack."²¹² This statement is used in the section of the report investigating whether militants forced civilians to go to certain areas for the purpose of providing cover. This is a distinct inquiry from whether militants had the specific intent of shielding themselves when operating in areas that happened to be occupied by civilians. The quote is certainly relevant to this later inquiry, as it tends to show the Hamas ideology that using human shields is not only permitted, but admirable. Nonetheless, the report refuses to infer intent on the basis of this statement.

The Mission is also in possession of another statement from a Palestinian militant that suggests intent. The fighter's paraphrased words were that he launched attacks from civilian areas "in the hope that nearby civilians would deter Israel from responding."²¹³ Unlike any of the statements made by Israeli officials discussed in section I, this statement actually is direct evidence of intent. Astonishingly, the report does not credit the statement because another fighter said, "[T]he most important thing is achieving our military goals. We stay away from the houses if we can, but that's often impossible."²¹⁴ The Mission found that this quote "suggests the absence of intent."²¹⁵ The report does not even consider that some fighters possessed the requisite intent and others did not, or that some were just toeing the party line when speaking with

²¹¹ Id. ¶ 477.

²¹² Id. ¶ 478.

²¹³ Id. ¶ 453.

²¹⁴ Id.

²¹⁵ Id.

investigators. Instead, it uses the statement of the second militant to discredit the statement of the first militant. There were of course many comparable statements by Israeli officials that could have been used to impeach the ones selected by the report. It is telling of the Mission's bias that the report goes so far to present a balanced view of Hamas militants but selects for publication only the most hyperbolic and extreme statements of Israeli political officials.

Highly relevant to the report's conclusion that militants did not intend for their actions to shield themselves from counterattack is that the Mission was "unable to make any determination on the general allegation that Palestinian armed groups used mosques for military purpose,"²¹⁶ "did not find any evidence to support the allegations that hospital facilities were used by the Gaza authorities or by Palestinian armed groups to shield military activities,"²¹⁷ did not find evidence "that ambulances were used to transport combatants or for other military purposes,"²¹⁸ and did not find "that Palestinian armed groups engaged in combat activities from United Nations facilities that were used as shelters during the military operations."²¹⁹ As discussed above, however, there is hard evidence that Hamas did operate in mosques and, at the very least, near hospitals. Evidence of circumstance (precise weaponry) was used to prove Israeli intent. Regarding Hamas, the evidence of circumstance is even stronger in inferring intent. It is beyond obvious that militants do not fire rockets in the vicinity of mosques or hospitals because it is easier to launch rockets near community institutions. Rather, they do so only because of the special protections afforded to hospitals and religious centers in war. The only purpose in firing from these facilities is to shield militants from counter-attack. There simply is no other explanation.

In refusing to conclude that Hamas operated in mosques and hospitals during Operation Cast Lead, the Mission discounted photographic and video evidence on the basis that it "refer[s] not to the December 2008-January 2009 period, but to previous alleged instances of firing rockets from Gaza."²²⁰ Dismissing evidence prior to Operation Cast Lead is the modus operandi to the Mission when it comes to Hamas. In determining that Hamas did not direct civilians to areas to shield military objectives from attack, the report also dismisses clear evidence in its possession that Hamas directed civilians to areas to shield military objectives from attack in 2007. Because the event did not occur during Operation Cast Lead, the Mission deemed

²¹⁶ *Id.* ¶ 486.

²¹⁷ *Id.* ¶ 487.

²¹⁸ *Id.*

²¹⁹ *Id.* ¶ 485

²²⁰ *Id.* ¶ 451.

it utterly irrelevant.²²¹ There are numerous problems with this misuse of evidence. In the first place, the report placed great weight on hyperbolic statements made by Israeli military officials years before Operation Cast Lead. Many of them were made in the context of the very different war fought against Hezbollah in Lebanon during 2006. Second, and even more important, is the fact that Israel's military planning, which the report focuses on, took place well in advance of the commencement of Operation Cast Lead. It is highly relevant to the intention of Israeli planners that they have hard video, photographic, and testimonial evidence of Hamas fighters firing rockets from behind human shields. Even if no rockets were fired from behind human shields during Operation Cast Lead – an absurd conclusion contradicted by massive evidence – it would still be relevant to Israel's intentions that the planners were aware of Hamas' long term modus operandi: namely, to fire their rockets from behind human shields in densely populated civilian areas. Further, past actions would be important for inferring the intentions of Hamas. It is reasonable to suppose that militant mental state does not change over time vis-à-vis launching attacks from civilian areas. If militants were willing to fire from a mosque or behind a forced civilian shield two years earlier to avoid counterattack, it is likely that when they later fire rockets from residential areas, that are doing so to shield themselves from counterattack.

This study ends with refusal to infer intent that is most absurd and therefore most telling of the report's bias. The Mission wrote, "While reports reviewed by the Mission credibly indicate that members of Palestinian armed groups were not always dressed in a way that distinguished them from civilians, the Mission found no evidence that Palestinian combatants mingled with the civilian population with the intention of shielding themselves from attack."²²² Prof. Halbertal succinctly disposes of this maddening reasoning: "The reader of such a sentence might well wonder what its author means. Did Hamas militants not wear their uniforms because they were inconveniently at the laundry? What other reasons for wearing civilian clothes could they have had, if not for deliberately sheltering themselves among the civilians?"²²³ The report does not address this question, because if it did, it would have had to reach a conclusion that would have undercut the basic thrust of the report: namely that Israel deliberately shot at civilians, rather than at terrorists who deliberately wore civilian clothing and hid among the civilian population.

²²¹ See *Id.* ¶ 476.

²²² *Id.* ¶ 483.

²²³ The Goldstone Illusion.

IV. Conclusion: A Wasted Opportunity and a Biased Report

There are six possible roles that an investigative commission could have performed. Each requires different qualifications and levels of neutrality.

1. To gather evidence of all possible allegations and accusations leveled by each side against the other. No effort is made to evaluate the credibility of these allegations. The sole function is to gather the accusations and make them public so that the other side can respond. To conduct such an evidence-gathering investigation requires that the investigators have the trust of those who they are interviewing. It also requires a degree of neutrality in making certain that a fair sampling of accusations is gathered and that the information is not skewed in one way or another.

2. To assess the credibility of those making the accusations. This requires cross examination of the accusers and subjecting the accusations to crosschecking against other evidence. It also requires that those evaluating credibility be absolutely neutral and objective and have no predisposition to believing one side over the other.

3. To gather evidence of the intentions of the various actors. This is an extremely difficult task that requires access to statements both public and private of both sides. This function does not require assessment of credibility of the evidence but rather merely its gathering to present publicly so that the other side can respond.

4. To assess the credibility of evidence regarding intent and to arrive at conclusions. This too requires absolute neutrality and objectivity.

5. To make legal findings regarding the actions and intentions of both sides. This requires sophisticated legal expertise and experience.

6. To make an overall political assessment of the nature of the conflict, its history, and its current status. This requires historical and diplomatic expertise and neutrality.

Had the Goldstone Report limited itself to the first function – gathering testimony and physical evidence of the actions of both sides without assessing credibility – it would have performed a useful function. The factual allegations in the report include serious charges against both sides that require serious investigations and responses. The Israeli military is undertaking precisely such an investigation, and I hope there will be an independent civilian investigation as well. There is no likelihood that Hamas will conduct any credible inquiry, since it has no history of, or process for, doing so.

The report goes well beyond simply gathering testimonies. It purports to assess

credibility, determine intentions, and arrive at both legal and political conclusions. The members of this commission not only lack the expertise to engage in these latter assessments, but even more important they lack the neutrality and objectivity. As Goldstone himself has acknowledged, if this were a court of law, “there would have been nothing proven,” and at least one of its members would have been disqualified as a result of pre-existing bias.

Beyond its limited function of gathering testimonies from residents of Gaza, the Goldstone Mission represents a wasted opportunity for an objective group of real experts to consider the difficult moral, military, political, and legal issues presented by the situation in Gaza. The report, commissioned by an organization with a long history of anti-Israel bigotry, and written by biased “experts,” with limited experience and a pre-ordained result, is one-sided and wrong in its fundamental conclusions. This should not be surprising since conclusions can be no better than the methodology employed, and the methodology employed in this report is fundamentally flawed.

So now it is up to Richard Goldstone to explain the evidentiary bias that is so obviously reflected in the report. The burden is on him to justify the very different methodologies used in the report to arrive at its conclusions regarding the intentions of Israel and the intentions of Hamas. Failure to assume that burden will constitute an implicit admission that the conclusions reached in the Goldstone Report are not worthy of consideration by people of good will. I await his response.

LETTER TO JUSTICE GOLDSTONE¹

Trevor Norwitz

Dear Richard:

I have finally completed my review of your report² which, by its very length, defends itself against the risk of being read quickly or widely, to paraphrase that infamous war criminal (by your definition) Winston Churchill. I am profoundly disappointed by the contents of your report, but I am also troubled by the *ad hominem* attacks that have been directed towards you. I offer this analysis and critique in the spirit of your article in the *Jerusalem Post* today,³ looking only at the substance of your report and relying neither on its authors' motives nor their reputation. I do so in an effort to advance the cause of truth and in the hope that you may yet be willing to take actions to mitigate the terrible injustice and damage that your report is causing. To that end, I am respectfully including some suggestions for you at the end of this letter (which is longer than the one I sent you on July 14 – attached again for your reference – but which I hope you will take time to read).

In a nutshell, your report is a deeply flawed document that is not only unbalanced and inflammatory, but reflects a procedurally deficient rush to judgment incapable producing any meaningful findings, least of all charges as grave, politically loaded and emotionally laden as those of “war crimes” and “crimes against humanity.”

I acknowledge at the outset that your report was difficult to read not only because of its obvious lack of balance, but also because it does raise some hard questions about the precise manner in which Israel reacted to the years of rocket attacks against

¹ Letter dated October 19, 2009.

² For the most part, I reviewed the Advance Edited Version released on September 15, 2009. I understand from your speech to the HRC that the final version submitted on September 29, 2009 redressed certain inaccuracies. Although I doubt that any corrections made will significantly affect the substance of my letter, I will be happy to review the changes if a version marked to highlight them is made available. I believe the paragraph references I use apply to both the Advance Edited Version and the final version.

³ My Mission – and Motivation, *Jerusalem Post* (jpost.com) October 19, 2009.

its towns and people and the threats it faces.⁴ I hope that, to the extent it has not already done so, Israel will investigate and explain the incidents you have highlighted which have undoubtedly been part of a chain of events that has resulted in much human suffering. Sadly though, because your report is so one-sided and unfair, these important questions may receive less attention than they deserve.

As someone who had expected⁵ a relatively fair and balanced investigation because of your involvement, I am struggling to understand why you would go out of your way and beyond even the “very lopsided unfair resolution” (to use your own words⁶) of the group⁷ that authorized your Mission to demonize Israel while legitimizing and even whitewashing Hamas. (For while you may object to that characterization, that is indeed what your report does, as I describe below.)

I do not intend to focus on factual inaccuracies in your report (which others better placed than I are already starting to address⁸), but wish to emphasize rather the *manner* in which your investigation was conducted and its “findings” reported. The imbalance and partiality that permeate your report are evident at many levels. They are manifested in the methodology you adopted to conduct your investigation and reach your conclusions, in the way in which you chose to characterize your mission and select which incidents you would investigate and which you would ignore, in the fundamental premises which underlie your investigation and conclusions, in the manner in which you have misrepresented the history of the Middle East conflict, and in your use of language both throughout your report and in your subsequent public statements. Of course this letter can not be comprehensive but can only illustrate a few of the many examples where this one-sidedness shows through your purported factual and legal findings.

⁴ I am reminded of that famous statement by Prime Minister Golda Meir from forty years ago: “When peace comes we will perhaps in time be able to forgive the Arabs for killing our sons, but it will be harder for us to forgive them for having forced us to kill their sons.” It is nothing less than tragic that forty years later this is still true, except that the word “sons” should be replaced in both places with the word “children...”

⁵ My disappointment is especially acute because I have for months been assuring doubters that the investigation would likely be fair and balanced because of your involvement.

⁶ Your interview with Christiane Amanpour of CNN on September 30. It is troubling that you decline to speak and write plainly and openly before all audiences about the lopsidedness of the authorizing resolution. You obviously recognize it and have acknowledged it (before an American audience on CNN and in the Israeli press) and yet you continue to hide the biased origin of your Mission, for example in the Introduction to the Report (1) and in your introductory remarks to the HRC rendering your final report.

⁷ I will generally refer to this body as the HRC. I can not bring myself to use the full name because the irony is too bitter and tragic given the critical importance of human rights in today’s world.

⁸ See for example: “Blocking the Truth of the Gaza War: How the Goldstone Commission Understated the Hamas Threat to Palestinian Civilians” by Jonathan D. Halevi, Jerusalem Center for Public Affairs, Vol. 9, No. 10, September 18, 2009, available at www.jcpa.org.

Your Procedurally Flawed Investigation

In my earlier letter to you, I made three points: (i) I implored you not to hold the Israeli government's refusal to cooperate with your investigation against Israel or allow that to be a source of injustice, (ii) I begged you to try to find out the relevant facts regarding the activities and actions of Hamas and other terrorist groups operating in Gaza and Israel's efforts to avoid civilian casualties, notwithstanding the refusal of the Israeli government to assist you, and (iii) I urged you to put your findings in their proper context. You said you would take these things into account but unfortunately I now see my worst fears realized.

Passing judgment based on one-sided (and tainted) evidence: Your mission took Israel's refusal to cooperate as an invitation (or perhaps as an excuse) to allow the scales of justice to weigh with only one pan being filled. Time and time again, you made findings of fact based solely on evidence provided by the Palestinian side of the conflict (even though your report expressly acknowledges that the testimony you received from witnesses in Gaza was tainted by duress,⁹ not to mention obvious, if understandable, bias). Almost every one of your "findings of fact" was arrived at using the formula: the direct evidence the mission collected said X; no evidence to the contrary has been provided; therefore "**on the information available to it**,¹⁰ the Mission finds."

And you did this in the full knowledge that you had heard only half the story. I understand that you and your fellow Commissioners were outraged by Israel's decision to snub you (as is evident in the numerous references to their refusal to cooperate throughout your report – I stopped counting at forty), but if your investigation was truly seeking to uncover the truth, you quite simply could not have reached conclusions and made such momentous and awful accusations based on one-sided evidence. In your October 19 article in the *Jerusalem Post*, you state: "Our mission obviously could only consider and report on what it saw, heard and read. If the government of Israel failed to bring facts and analyses to our attention, we cannot fairly be blamed for the consequences." I strongly disagree. As one entrusted to find the facts, you had a moral if not legal obligation to seek the truth, and if you were not able to do so, you should have said just that, rather than pretending that you have

⁹ Of course you phrased it a little more delicately: "The Mission was faced with a certain reluctance by the persons it interviewed in Gaza to discuss the activities of the armed groups" (35). "Whatever the reasons for their reluctance, the Mission does not discount that the interviewees' reluctance may have stemmed from a fear of reprisals" (Report at 438). Really? You think? See also paragraphs 453 and 1585.

¹⁰ The emphasis of this frequently used phraseology and other bolded terms within quotes is added throughout.

established the truth (“based on information provided”) when you knew that was not so and that you had only heard one side of the story.

Failure to Investigate Critical Facts

Moreover, your report shows virtually no effort to look beyond the evidence presented to you (overwhelmingly from the Palestinian side) to find out what really happened in Gaza and – most crucially – why: why Israel launched the (unfortunately named) “Operation Cast Lead” and why individual officers and soldiers took the actions they did in the heat of battle.

To cite one important example, it was widely reported that the Hamas high command was camped out in the Al-Shifa Hospital, which would of course constitute a war crime and would probably have justified Israel attacking that hospital notwithstanding the civilian presence there. Fortunately for any actual civilians in the hospital, the Israel Defense Forces (IDF) refrained (although neither that nor any other act of restraint by the IDF – and there is much evidence that the IDF pulled back from many attacks against legitimate military targets because of the presence of civilians – was deemed worthy of a mention in your Report). You note those reports about the Al-Shifa Hospital but simply state: “The Mission did not investigate the case of the Al-Shifa Hospital and is not in a position to make any finding with regard to these allegations” (at 466). You then immediately go on – astoundingly – to make a formal finding of fact that “**on the basis of the investigations it has conducted**, the Mission did not find any evidence to support the allegations made by the Israeli government [that Hamas used medical facilities for cover]”(at 467).

A second example of your mission’s inappropriate wholesale reliance on one-sided evidence relates to your findings that Israel’s attacks on the Legislative Council building (in which you note there were no casualties) and Gaza main prison (in which a prison guard was killed) were war crimes. In your standard formulation, you conclude: “There is an 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.’ **On the information available to it**, the Mission finds that the attacks on these buildings constituted deliberate attacks on civilian objects in violation of the rule of customary international humanitarian law. . .”

It is notable that this finding follows your observation (paragraph 367, footnote 235) that there was evidence that of the approximately 300 prisoners in custody in the prison at the time it was struck there were “roughly 115 alleged collaborators with

Israel [and] about 70 Fatah supporters held on various charges. . .” Even without Israel’s having to spell it out for you, you might easily have discerned several potential military advantages to be obtained from attacking this prison (which based on evidence your mission uncovered does not appear to be a facility dedicated solely to civilian activities of the Gaza authorities) and facilitating the escape of its inmates. Your rejection of Israel’s determination to attack the “command and control” infrastructure of Hamas is rooted in the distinction which you insist on drawing between Hamas and its military wing, and your insistence on the legitimacy and sanctity of the former. These highly dubious premises that underlie many of your “war crime” findings fly in the face of the broad recognition of Hamas as a terrorist organization.

Use of Hearsay and Anonymous Accusations as Evidence

Another serious procedural flaw in your report is your reliance on hearsay and accusations made anonymously to “corroborate” your allegations. One clear example of this is the anonymous report by a group called Breaking the Silence entitled “Soldiers’ Testimony from Operation Cast Lead, Gaza 2009” which is cited dozens of times in your report as providing “strong corroboration,” and the validity and veracity of which you accept without question. Indeed you criticize Israel’s efforts to lobby countries that funded this anonymous report as “contrary to the spirit of the Declaration [on Human Rights Defenders].” As a judge, you must obviously appreciate that such anonymous accusations, particularly to the extent they merely recite what the anonymous speaker heard from some other source and are thus pure hearsay, would not be admissible as evidence in a court, precisely because the prejudicial impact of those allegations is far outweighed by any probative value they may have. I expect that your response may be that your investigation was not a court of law and therefore not subject to the same evidentiary rules. But I would argue that in this situation, where the prejudicial impact on Israel and the Jewish people in general of your accusations of “war crimes” and “crimes against humanity” was obviously going to be so devastating, it behooved you and your fellow commissioners to, at a minimum, adhere to basic principles of evidence and procedural fairness.

More Prejudice than Proof

Indeed this failure to strike an appropriate balance between what is probative and what is prejudicial is a central feature of your investigation and your report. There are innumerable examples of offhand remarks and references in your report to terrible things that Israel and Israelis are alleged to have done, without any justification or

evidence offered. Sometimes these are stated as naked allegations (for example you refer to “concerns of torture and other ill-treatment” of Palestinian detainees), while on many other occasions they are simply stated as facts even though they are not facts.

To cite just one example, at 642 you state: “On 5 February 2003, for instance, Israeli snipers shot and killed two staff nurses who were on duty inside the hospital.” These unsubstantiated and often false allegations reflect a bias and a flagrant disregard for the basic principles of due process and all norms of fairness and justice.

One last – and more serious – example of this disregard for the balance between probative and prejudicial is your decision to televise the interviews with Palestinian witnesses. You state (at 166):

The purpose of the public hearings, which were broadcast live, was to enable victims, witnesses and experts from all sides to the conflict to speak directly to as many people as possible in the region as well as in the international community. The Mission is of the view that no written word can replace the voice of victims.¹¹

It hardly bears mentioning that any probative value of these interviews (particularly when they only tell one side of the story and, as you acknowledge, were tainted by duress) does not justify the inflammatory effects of televising them before the report is issued. The fact that you chose to publicize these hearings is a further indication that your report was designed to play into a trial in the “court of public opinion,” rather than to be a true finding of facts.

The Appointment and Composition of your Mission

Speaking of the “court of public opinion” provides a good segue to my next procedural point. I will not belabor the well-aired point (which I included in my last letter to you) that Christine Chinkin should have been recused at the outset due to the evidence of her predisposition to find Israel guilty of war crimes. That fact alone should be sufficient to render your report tainted and unreliable. What has received less publicity (and indeed I did not know it when I first wrote to you) was that you and the other two members of your panel were among a small group of eminent jurists who had written to the Secretary-General of the United Nations expressing that “events in Gaza had shocked [you] to the core,” effectively volunteering for the job you were later given. While I could be wrong, I do not believe that this group of jurists that had ever written to the United Nations expressing such shock or

¹¹ This is one example of the objection, which is discussed later in the letter, that your report evidences a political motivation behind what was supposed to be a “fact-finding” mission.

called for an investigation during the eight years of rocket attacks on Israeli civilian population centers. If that is the case, that would also suggest a predisposition among the signatories of that letter to seek to make an example of Israel only and would call into question their impartiality. I also wonder whether this group or these jurists independently called for similar investigations into other comparable incidents, the shelling of Grozny perhaps or the Sri Lankan government's actions against the Tamil Tigers.¹²

Double Standard in Assessment of Credibility of Evidence and Intentions

One of the most surprising elements of your report is the ease with which you made findings of fact regarding the subjective intentions of the Israeli government and individual Israeli soldiers to strike at civilian targets and to murder civilians. In fact, you assert that you were able to determine the presence of the subjective fault element (*mens rea*) required for criminal liability “[i]n almost all of the cases [you examined]” (25). Your accusations that Israel willfully and intentionally attacked civilians could not be more stark. To quote just one of very many examples: “In reviewing the above incidents the Mission found in every case that the Israeli armed forces had carried out direct intentional strikes against civilians” (808). And you purported to be able to make these determinations without once speaking to the Israelis whom you accuse of such horrific actions and intentions.

In contrast, you were virtually never able to ascertain any improper intention on the part of the Palestinian parties to this dispute even where the intention behind their actions would seem to be fairly obvious and even though you “enjoyed” their full support and cooperation.

Example: Firing rockets from civilian areas: “On the basis of the information it gathered, the Mission finds that there are indications that Palestinian armed groups launched rockets from urban areas. The Mission **has not been able to obtain any direct evidence that this was done with the specific intent of shielding the rocket launchers from counterstrikes** by the Israeli armed forces” (480).

Another example: Hamas fighters mingling with civilians: “The Mission finds that the presence of Palestinian armed fighters in urban residential areas during the military operations is established. While reports reviewed by the Mission credibly indicate

¹² It is not too late for that group of eminent jurists to call for an investigation into events in eastern Congo where there have been recent reports of over a thousand civilians murdered and nearly 900,000 displaced by Rwandan Hutu militiamen and Congolese forces, with allegations of widespread rape, looting, and forced labor.

that members of Palestinian armed groups were not always dressed in a way that distinguished them from civilians, the Mission found no evidence that Palestinian combatants mingled with the civilian population with the intention of shielding themselves from attack”(481).¹³

The evidence on which you base your conclusions that Israel consistently and as a matter of policy attacked civilians and civilian objects consisted of the fact of Israel’s technological superiority and on statements by a handful of Israeli leaders.¹⁴ The section on Israel’s strategy in your report concludes (at 1211): “Statements by political and military leaders prior to and during the military operations in Gaza leave little doubt that disproportionate destruction and violence against civilians were part of a deliberate policy.”

Aside from the inadequacy of using this sort of circumstantial evidence to determine subjective intentions, and the fact that you have a tendency to take these quotes out of context,¹⁵ it is striking how unhesitatingly and how fully you attribute probative value to public statements by Israeli leaders (even if they appear to have been made in a political context and could easily be understood to be mere “puffery”).

On the other hand, your report does not include any quotes from Hamas leaders regarding their intentions to attack Israeli civilians – or the Hamas charter which calls for the destruction of Israel and killing of Jews – and even when Hamas does admit that it uses human shields or that policemen killed by Israeli strikes were its

¹³ One wonders what reason you might ascribe to the decision of Palestinian combatants to fight out of uniform. Perhaps they thought their uniform so unfashionable, they would not want to be caught dead in it.

¹⁴ So for example you state (at 61): “The Israeli armed forces . . . have a very significant capacity for precision strikes by a variety of methods, including aerial and ground launches. Taking into account the ability to plan, the means to execute plans with the most developed technology available, and statements by the Israeli military that almost no errors occurred, the Mission finds that the incidents and patterns of events considered in the report are the result of deliberate planning and policy decisions.”

¹⁵ Two examples of Israeli comments taken out of context: (1) when the Israeli leaders in question threatened a “disproportionate” response to rocket attacks it is likely they were not using that word in the legal sense (in relation to the military object to be achieved) but in the more colloquial sense of making Hamas pay a disproportionately high price for attacking Israel, which is entirely appropriate and does not translate into your “disproportionate destruction and violence against civilians were part of a deliberate policy”; and (2) several times you cite a comment from after the Gaza operation by Deputy Prime Minister Eli Yishai that, if attacked, Israel would “destroy 100 homes for every rocket fired” (64. 1201 and 1212) as evidence that Israeli leaders intended the “destruction of civilian objects . . . as a response to rocket attacks.” But you fail to consider that in his earlier comments it was clear he was talking about homes of terrorists (see 1200). See also 389.

operatives, you cast doubt on that admission and suggest that *it* is mere puffery.¹⁶ Even in case of “Palestinian armed groups” firing rockets at Sderot in Israel where their intentions are quite obvious, you are unwilling to attribute any subjective intent but merely find that “there is significant evidence to suggest that one of the primary purposes of the rocket and mortar attacks is to spread terror amongst the Israeli civilian population. . .”

This double standard in your treatment of witnesses is also evident throughout your report where you accord full credibility to virtually all Palestinian witnesses and praise their objectivity (even though you acknowledge the presence of duress) but almost invariably cast doubt upon Israeli accounts you received. The Israeli government cannot even acknowledge an error without your report casting doubt on it,¹⁷ while the only times you seem to doubt the credibility of Palestinian witnesses is when so doing would be exculpatory.¹⁸

I could go on and on with examples but the point is clear: your mission simply took the accusations made by obviously interested parties¹⁹ and (by your own admission) coerced witnesses, in some cases “corroborated” by anonymous reports, and repackaged them into “findings of fact” and the most horrific of allegations. Virtually no effort was made to uncover the truth or to get behind the accusations and ask why particular actions were taken, beyond asking Israel to explain and drawing a negative inference from their refusal, on principle, to respond. You may disagree with Israel’s decision to ignore your mission, but when that becomes the fundamental linchpin on which you reach your conclusions, that is not fact-finding.

It is politics. I myself was unsure of the Israeli government’s decision not to cooperate with your investigation, but it becomes hard to argue with those who say that your

¹⁶ For example, Hamas leader Fathi Hammad stated: “The Palestinian people has developed its [methods] of death seeking. For the Palestinian people, death became an industry, at which women excel and so do all people on this land: the elderly excel, the mujahideen excel and the children excel. Accordingly, [Hamas] created a human shield of women, children, the elderly and the mujahideen, against the Zionist bombing machine.” You responded: “Although the Mission finds this statement morally repugnant, it does not consider it to constitute evidence that Hamas forced Palestinian civilians to shield military objectives against attack. The Government of Israel has not identified any such cases” (476). See also 421: “Often, when persons . . . are killed by actions of the Israeli armed forces, political and/or armed groups ‘adopt’ them as ‘martyrs’ placing their photographs on their websites and commending their contribution to resisting occupation. This does not mean that those persons killed were involved in resistance activities in any way.”

¹⁷ See 47 in which, reacting to Israel’s acknowledgment of a tragic “operational error” you expressed “significant doubt about the Israeli authorities’ account of the incident.”

¹⁸ See for example 456.

¹⁹ Much of the data and evidence you received and cited in your report came from a division of the Gaza authorities (that is, Hamas) called the “Central Commission for Documentation and Pursuit of Israeli War Criminals.” Maybe the name of this group suggests it may not be entirely objective.

report validates the view that the deck was so stacked against Israel that it was not worth playing the game.

Your Selection of Incidents to Investigate

A closely related point is your mission's selection of which matters to investigate and which to ignore. Your mission investigated 36 incidents in Gaza and stated that it "considers that the report is illustrative of the main patterns of violations" (17). Since virtually all of these incidents were cases involving Israeli actions and Palestinian casualties or damage, it is clear that the "pattern of violations" that interested you most were those where Israel could be condemned.

As discussed above, the efforts you made to find the relevant facts underlying the operation left much to be desired. Very little effort was made to investigate the behavior of Hamas and the other "Palestinian armed groups": Did they direct attacks at civilian targets? Did they use civilians as human shields? Did they hide weapons in civilian buildings like mosques, schools, and hospitals? You do not even raise as a possibility the question of whether Hamas and the other "Palestinian armed groups" intentionally drew fire towards civilian objects to score public relations victories (I do not believe in their wildest dreams they ever expected the PR and strategic windfall that you have awarded them), although this appears to be a central element of their *moqawamma* ("resistance") strategy. I understand that seeking those facts was difficult – the people you were talking to would not talk about that (because of both bias and intimidation) and the people who would talk about it (the Israelis) refused to talk to you – but that should not relieve honest fact-finders of their obligation to try find the facts. Reviews by others of the video clips of interviews with Palestinian witnesses posted on your website suggest that you did not even press witnesses for answers to these questions.²⁰ Instead you simply relied on the absence of countervailing evidence to validate the "facts" reported to you by those biased and intimidated witnesses.

On a few occasions, you accepted the "possibility" that there might be another side to the story that you "could not entirely discount," that is, that there may have been inappropriate actions on the Palestinian side. For example:

The Mission finally notes that it cannot entirely discount the possibility that Palestinian civilians may have been killed as a result of fire by Palestinian armed groups in encounters with the Israeli armed forces, as argued in a submission to the Mission, although it has not encountered any information suggesting that this was the case. (361)

²⁰ See the Halevi piece referred to above.

[W]hile the Mission would not rule out the possibility that there might be individuals in the police force who retain their links to the armed groups, it believes ... (417)

[T]he Mission accepted, on the basis of information in the reports it had seen, the possibility of mortar attacks from Palestinian combatants in the vicinity of the school. (444)

The Mission cannot discount the possibility that Palestinian armed groups were active in the vicinity of such [United Nations] facilities. (483)

However, these matters were never investigated to the point of ascertaining whether they amounted to war crimes or whether they justified the Israeli actions under investigation.

For the most part, you were satisfied simply to state that you were unable to make any determination regarding these matters: “The Mission is unable to make any determination on the general allegation that Palestinian armed groups used mosques for military purposes” (484). “**On the basis of the investigations it has conducted**, the Mission did not find any evidence to support the allegations that hospital facilities were used by the Gaza authorities or by Palestinian armed groups to shield military activities . . .” (485). “**On the basis of the information it gathered**, the Mission found no indication that the civilian population was forced by Hamas or Palestinian armed groups to remain in areas under attack from the Israeli armed forces” (486).

On other occasions, where the evidence of bad behavior on the Palestinian side was so clear you could not deny it or profess ignorance, you proceed – astonishingly – to justify it or explain it away.

Example: Firing rockets from civilian areas: “The Mission finds that there are indications that Palestinian armed groups launched rockets from urban areas... Palestinian armed groups do not appear to have given Gaza residents sufficient warning of their intention to launch rockets from their neighbourhoods to allow them to leave and protect themselves against Israeli strikes at the rocket launching sites... Given the densely populated character of the northern half of the Gaza Strip, **once Israeli forces gained control of the more open or outlying areas** during the first days of the ground invasion, **most – if not all – locations still accessible to Palestinian armed groups were in urban areas**” (480).

In other words, you explain and even seek to justify Hamas’ actions endangering civilians because it would have been dangerous for it to fight Israel otherwise.

Another Example: Booby trapping houses: “From the information it gathered, the Mission does not discount the use of booby traps by the Palestinian armed groups.

The Mission has **no basis to conclude that civilian lives were put at risk**, since none of the reports records the presence of civilians in or near the houses that were allegedly booby-trapped” (482).

Your willingness to accept a “no-harm-no-foul” defense for booby trapping civilian houses is as telling as your reluctance to find improper intentions on the Palestinian side.

These few examples (of the many more that could be cited) should suffice to demonstrate that your mission chose only to investigate one side of the conflict (Israel), and made its findings based on evidence presented by only one side of the conflict (the Palestinians).

Your Characterization (and Extension) of Your Mission

HRC Resolution S-9/1, that “very lopsided unfair resolution” (again, those are your words) which was introduced by Cuba, Egypt, and Pakistan and passed by many of the world’s most repressive regimes, established your “fact-finding mission” to gather evidence to support their determination that Israel had violated the human rights of the Palestinian people. When you agreed to head the Mission, to your credit you insisted to the President of the HRC that your mission be authorized to look at violations on all sides.²¹ It is therefore very surprising that you made so little effort to find the facts relating to violations on the Palestinian side, as described above. Equally surprising is how you chose to characterize your mission and even broaden its scope in certain respects, all of which appear to have the purpose and most certainly had the effect of heightening criticism of Israel. It is interesting that even the terminology in which you chose to cast your allegations against Israel is more extreme than that used in the “very lopsided unfair resolution,” which spoke in terms of human rights violations but did not talk about “war crimes” or “crimes against humanity.” That phraseology with all of its evocative connotations for the Jewish people is all yours.²²

Seeking Political Impact Rather than Truth

Instead of viewing yourselves as a fact-finding mission, with the specific purpose

²¹ The legal implications of the President’s consent are unclear since the “very lopsided unfair resolution” was never actually amended or expanded.

²² I suppose the Jewish people should be grateful that for the most part your report leaves implicit its equation of Israel and the Nazis. The only time you draw an express parallel between Israel and Hitler’s Germany is when you compare Israel’s withdrawal from Gaza to allow the Palestinians to govern themselves with the German invasion of Denmark (279).

of uncovering the truth, you chose to characterize yourselves as a victim-oriented mission: “The Mission gave priority to the participation of victims and people from the affected communities.”²³ “The Mission has made victims its first priority and it will draw attention to their plight . . .” (136).

As I noted to you in my earlier letter, such a victim-focused investigation is not an appropriate method for establishing the facts in a conflict such as this. There are undeniably more victims on the Palestinian side of the conflict but “draw[ing] attention to their plight” is not a fact-finding objective. It is a political objective. In some cases, such as the South African Truth and Reconciliation Commission, which appears to have been, at least in part, the model for your proceedings, that may be appropriate and very laudable.

However that is not the job of a fact-finding mission in the midst of an ongoing political conflict. The question that the honest fact finder should be trying to answer is not how can I “draw attention to their plight,” but *whose victims are they?* It is clear from your report, and apparently from the videotaped interviews which your mission has published, that you were far more concerned about effects than causes, and not asking enough of the right questions.

Law-Making Rather than Fact-Finding

A second manner in which you extended the scope of your fact-finding mission was in your decision to go beyond fact-finding and to express legal opinions on which you then based your accusations of war crimes. For example, the question of whether Gaza should still be considered “occupied” following Israel’s unilateral and complete withdrawal is a legal question and a highly contentious one. Certainly Israel maintains that Gaza is no longer occupied and there are strong arguments in that regard. That substantive question is beyond the scope of this letter,²⁴ but the point is that you chose to reach a legal conclusion in the context of a fact-finding mission, based very grave accusations on that legal position, and did so with no due process and no opportunity for debate on the merits of the legal issue.

²³ As an example, see again the Halevi piece referred to above.

²⁴ It is curious though that you do not accuse Egypt, which shares a border with Gaza and which, if there is indeed a “blockade,” must by definition be a participant in it. It is also notable that you again do not allow yourself to be distracted by the underlying reasons for the “blockade” you decry. Although you frequently mention the closing of the border crossings as part of the “blockade” you chose not to investigate the reasons for these closings, the fact that there were routinely attacked by Hamas and other terrorist groups, and the weapons smuggling that the border controls were designed to prevent (although you do note without any further commentary that weapons, including Iranian and Chinese rockets, are “thought to be smuggled into Gaza”).

A second instance of law making is your holding “that the Israeli system of investigation does not comply” with the “standards of impartiality, independence, promptness and effectiveness” required by international law. I will leave it to others better placed than I am to address the substance of your holding and note only that it is my understanding that the Israeli standards for investigating the actions of its own military are not very different from those followed by the United States, Britain, and other modern countries with active and honorable militaries. Similarly (although probably a matter of mixed fact and law) is your finding that the Gaza police force was a civilian police force entitled to protection under international humanitarian law.

To be sure you did some fact-finding. You unearthed the details regarding the IDF’s attack on the Gaza police stations at the outbreak of the operation. You also established that, after Hamas seized control of Gaza in July 2007, it “merged the Gaza police with the ‘Executive Force’ it had created after its election victory,” and that “a great number of the Gaza policemen were recruited among Hamas supporters or members of Palestinian armed groups.” You noted that you had been provided with information on Gaza police members’ alleged affiliation with armed groups that purported to be “based to a large extent on the websites of the armed groups” themselves,²⁵ and you accepted (in your usual noncommittal way regarding allegations against Palestinians that you preferred not to investigate) “that there may be individual members of the Gaza police that were at the same time members of Palestinian armed groups and thus combatants.” You nevertheless concluded: “[F]rom the facts gathered by it, the Mission finds that there is **insufficient information to conclude** that the Gaza police as a whole had been ‘incorporated’ into the armed forces of the Gaza authorities” and that the Gaza police were a “civilian law-enforcement agency.” Clearly Israel had a different view on this issue but again you were happy to reach this conclusion – and the resulting verdict of guilty of “war crimes” – without their input.

Piling On Gratuitous Anti-Israel Criticisms

You also expanded the scope of your mission beyond what was required by the HRC’s “very lopsided unfair resolution” in other notable respects. You expend over 20 pages criticizing Israel for “repressing dissent” and limiting freedom of association, as well as for excluding the press and human rights monitors from Gaza during the operation. This is not only gratuitous given the primary scope of your mission and the many

²⁵ However you dismiss these reports as unreliable because, you say, of the tendency of Palestinian groups to “adopt” dead Palestinians as “martyrs” after their death and “[t]his does not mean that those persons killed were involved in resistance activities in any way” (421). Indeed this reflects another troubling tendency in your report, namely that you are quick to dismiss Palestinian statements against interest as unreliable “puffery,” but you frequently cite Israeli “puffery” as evidence of bad intent.

important areas you decided not to investigate at all, but ironic in the extreme given the critical mass of highly repressive countries that commissioned your report. Israel is a robust democracy – the only one in the Middle East – and has a vigorous free and highly critical press and a strong commitment to human rights. Very few of its accusers can claim that. The limited actions taken in the middle of a war to prevent the opening of a second front (even your report acknowledges that “in the main, the protests were permitted to take place”) have to be seen against this backdrop. I know I am not alone in wishing that eminent jurists like yourselves would devote as much time and effort to criticizing repression of dissent in Iran, China, Zimbabwe, Cuba, or a host of other countries as you have investigating and formulating such allegations against Israel.

It is also telling that you and your fellow commissioners even felt compelled – in the context of a fact-finding mission regarding the war in Gaza – to call into question Israeli laws that are central to its identity as the Jewish homeland, including the so-called Law of Return that guarantees Israeli citizenship for all of Jewish ancestry.²⁶ The above examples show that the way you chose to characterize your mission and the scope you established for your investigation and report reflect a biased and political effort. What did you do when the “very lopsided unfair resolution” of the HRC commissioned your group to find facts to support their determination of human rights violations by Israel? You did that and more: you decided to use your mission as a political vehicle to “draw attention to [the victims’] plight”; you established new legal standards that you then found Israel did not live up to; you gratuitously (and ironically) lambasted Israel for repressing dissent and freedom of the press and association; and you even gratuitously raised questions concerning Israel’s right to exist as a Jewish state.

Fundamental but Dubious Assumptions

Without denying that there are matters raised in your report that deserve further investigation and explanation by Israel, it appears that your wholesale condemnations of Israel and accusations of war crimes rest in large part on certain fundamental premises or a “worldview” shared by you and your fellow Commissioners. These premises reflect assumptions that underlie much of your report, but their validity is not incontrovertible. Indeed they are highly contentious and to the degree these assumptions are wrong, your report’s conclusions are invalid.

²⁶ See 206 to 208. For example you say: “The Committee on Economic, Social and Cultural Rights also has recognized that Israel’s application of a ‘Jewish nationality’ distinct from Israeli citizenship institutionalizes discrimination that disadvantages all Palestinians...” An interesting debate perhaps, but it is most interesting that you feel the need to question Israel’s right to exist as a Jewish state in the context of your fact-finding mission.

Legitimizing Hamas

One of these fundamental assumptions that permeates your entire analysis is that Hamas is a nonviolent political organization distinct from its military wing. This characterization of Hamas is entirely implausible. It requires more than naiveté to reach that conclusion, in light of all the readily available evidence, including that organization's refusal to renounce the use of violence or even to recognize the existence of the State of Israel (which together torpedoed the peace process and damned Gaza to its present state of destitution), the express statements of Hamas' own leadership regarding the use of violence and terrorist tactics, and the fact that the Hamas charter calls for the destruction of Israel and genocide against the Jewish people (which remarkably does not merit a mention in your report). Because it openly embraces terrorist tactics, Hamas is widely condemned as a terrorist organization. In light of all the readily available evidence, the suggestion that Hamas can be neatly separated from its military wing is spurious.

Earlier I stated that your report not only legitimizes but whitewashes Hamas. Although the press has chosen not to highlight this, a close review of every reference to Hamas throughout your report will reveal that, while there are some perfunctory condemnations of "armed Palestinian groups" (which include Hamas' Al-Qassam Brigades) and some measured criticism of the "Gaza Authorities" regarding things they could have done better (sins of omission rather than commission), Hamas itself gets off virtually scot-free in your report and even emerges looking like an innocent victim. My point here is not to refute as a substantive matter that highly troubling aspect of your report – I shall leave that to others – but simply to observe that a critical assumption underlying many of your claims of "war crimes" is that Hamas should be considered independent of its infamous military wing. To the extent that this assumption is flawed, the conclusions on which it is based are invalid. But the very fact that you approached your fact-finding mission with this as a basic assumption indicates a perspective that calls the conclusions drawn by your mission into question.

Gaza Still Occupied?

A second fundamental assumption, discussed above, is the notion that Gaza remains occupied by Israel notwithstanding its complete unilateral withdrawal four years ago which, in your view,²⁷ has "done nothing" to alter the character of Israel as an

²⁷ Quoting with approval (at 279) the nonbinding (and extremely one-sided and dubious) decision of the International Court of Justice, in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.

occupying Power.”²⁸ Again, I will leave it to others to debunk this dubious legal conclusion, noting simply that it is one of the foundations on which you build your case for the prosecution. The implications of your position are dramatic. For example, although Israel facilitated the supply of significant humanitarian aid to Gaza and even your report acknowledges “that the supply of humanitarian goods, particularly foodstuffs, allowed into Gaza by Israel temporarily increased during the military operations” (72), you nevertheless condemn Israel as violating the Fourth Geneva Convention for not doing enough “as Occupying Power” to provide such supplies. In other words, your report twists Israel’s humanitarian efforts (done from its perspective out of kindness rather than legal obligation) into a war crime because you reached a different legal conclusion on the status of Gaza. If you are wrong in your conclusion that Gaza remains occupied, then rather than being condemned as war criminals, Israel should be commended for its humanitarian efforts to support the Palestinian civilian population even while that it was in the midst of a bloody war to root out the terrorists who had converted their homes into rocket launching sites.

Placing Blame

Perhaps the most fundamental and flawed assumption underlying your report is the position that the tragic situation of the Palestinian people, and especially those in Gaza, is all Israel’s fault. That your mission is of this view is clear from the way you characterize (or rather mischaracterize) the history of the region; it is clear from your use of language throughout your report; it is clear from your failure to seek to understand why actions were taken – why Israel shut border crossings? Why Israel built the security barrier? Why Israel felt the need to undertake the Gaza operation at all? And it is clear from your refusal to acknowledge what Hamas and its charter say unequivocally that Hamas exists to destroy the Jewish State. Your perspective is also clear from specific statements, including the curious analysis you offer in one of your concluding paragraphs where you say: “After decades of sustained conflict, the level of threat to which both Palestinians and Israelis are subjected has not abated, but if anything increased . . . The State of Israel is therefore also failing to protect its own citizens **by refusing to acknowledge the futility of resorting to violent means and military power**” (1711). It is telling that it is Israel you criticize in this regard, and it

²⁸ A peculiar implication of this conclusion is that, if Israel is bound by the same obligations it was when it actually occupied Gaza, its proper course of action in light of its obligation to protect its own citizens from rocket attacks is presumably to recapture Gaza, impose order, and govern the Gazans in accordance with humanitarian law. I doubt very much that this is what you are proposing but it does show how divorced your report is from the political realities of the Gaza situation.

is unclear what you expect Israel to do in the context of a foe that refuses to negotiate but only wants to fight.²⁹

There are other elements of the “worldview” with which you and your fellow commissioners approached your assignment and which impacted your report – assumptions regarding Israel’s right to exist as a Jewish state at all, for example, or regarding the legitimacy of a separation barrier to protect Israeli civilians from terrorist attacks, or whether Israel is a decent country (for example at 132 you state: “The Mission is also of the view that the Israeli system presents inherently discriminatory features that have proven to make the pursuit of justice for Palestinian victims very difficult”). This is not the place to debate these interesting topics; I mention them solely to make the point that there are perspectives and prejudices that underlie your investigation that cannot but influence your findings.

Your Ahistorical Context

Consistent with the third and last entreaty of my letter, you accepted that the Gaza operation and events under investigation should not be considered in isolation, but to you and your fellow commissioners that did not mean they should be placed in the context of the thousands of rockets that were fired from Gaza at Israeli towns since Israel’s unilateral and complete withdrawal from Gaza. No, to you, Israel’s actions “are part of a broader context, and are deeply rooted in the many years of Israeli occupation of Palestinian territory.”

The “historical context” offered by your report is not a history that any objective person with any knowledge of the Middle East would recognize.³⁰ On the contrary, what you chose to include in the brief historical context you provide is a simplistic canned recitation of the revisionist “Palestinian narrative.”

Numerous affirmative statements in your report mischaracterize the history of the

²⁹ I am reminded of that insightful quote attributed to Mark Twain: “If a man invites you to take a walk with him, you can say that you are too tired. Should a man invite you to dinner, you can say that you have just eaten. If a man asks you to have a drink with him, you can say it is against your religion. However, if a man asks you to fight him, then you must oblige him.”

³⁰ There are of course many books you could read that would provide the more traditional history of the region. For a balanced (if not entirely up-to-date) summary of the recent developments in the Israeli-Palestinian conflict, I refer you to Part II, The Historical Setting, of the paper “When You Have Not Decided Where To Go, No Wind Can Take You There: A Strategy To Achieve A Comprehensive Israeli-Arab Peace” by Yair Hirschfeld PhD, an Israeli academic and one of the architects of the Oslo accords, published by The James A. Baker III Institute for Public Policy at Rice University in 2007 and available online at <http://www.bakerinstitute.org/personnel/fellows-scholars/yhirschfeld>.

region³¹ but more telling is what you chose to leave out. How, for example, can you purport to deal with the conflict between Israel and Hamas without once mentioning that the charter of Hamas calls for the destruction of the State of Israel? How can the historical context you cite make no reference at all to the persistent pan-Arabist rejection of the State of Israel, the many wars that were waged against Israel by many Arab states, the terror campaign waged against Israel by Hamas (save for a couple of lines that cites the number of suicide bomb attacks “according to Israel’s Ministry of Foreign Affairs”)? Your report fails to address the fundamental question of why the Gaza operation was launched at all, or why Israel had to build its security barrier (which you criticize), or why the border crossings were frequently closed. Indeed a reader of your report with limited knowledge of the situation would have to conclude based on the absence of any of this background and the numerous accusations you make against Israel of intentionally targeting Palestinian civilians that Israel’s intentions were genocidal (which would be ironic since it is of course Hamas that propagates a genocidal philosophy against Israel and the Jewish people³²).

They would also have to conclude that the IDF was terribly incompetent, given their low rate of success if they were deliberately targeting Palestinian civilians, with some 2,300 to 3,000 sorties flown during the operation and their overwhelming firepower from land, sea, and air. Without minimizing in any way the terrible tragedy inherent in any loss of life of innocent civilians, the number of casualties relative to the amount of firepower brought to bear surely indicates that significant efforts were made, including through careful targeting and provision of warnings, to avoid loss of life.

You purport to go through a detailed chronology of events that seems to show how every rocket attack by the “Palestinian armed groups” was in fact a response to some Israeli provocation. The clear suggestion from your recitation of events is that what happened in the years between Israel’s unilateral withdrawal from Gaza and the Gaza operation was not just a “cycle of violence” (the mantra favored by reporters

³¹ To mention just one example, you describe the second intifada unleashed by Yasser Arafat when he did not get everything he wanted at Camp David as a “second popular uprising [that] erupted after . . . Ariel Sharon conducted a controversial visit to the Temple Mount/al-Haram-al-Sharif” (180). I find it telling that you cannot even bring yourself to say that Jerusalem is the site of the Jewish Temple. In footnote 10 you state: “The Temple Mount/al-Haram-al-Sharif (the Noble Sanctuary) is the location of al-Aqsa and the Dome of the Rock mosques, the third most sacred place in Islam. It is also believed to be the location of the two ancient Jewish temples.”

³² For example see the following quotes from the Charter of Hamas: “Israel will exist and will continue to exist until Islam will obliterate it, just as it obliterated others before it” (The Martyr, Imam Hassan al-Banna, of blessed memory) . . . “The Prophet, Allah bless him and grant him salvation, has said: ‘The Day of Judgement will not come about until Muslims fight the Jews (killing the Jews), when the Jew will hide behind stones and trees. The stones and trees will say O Muslims, O Abdulla, there is a Jew behind me, come and kill him. Only the Gharkad tree, would not do that because it is one of the trees of the Jews’ (related by al-Bukhari and Muslim).”

who wish to draw a moral equivalence between Israel and its attackers) but that the problems were actually instigated by Israel. Set against the incontrovertible fact (that again – astoundingly – your report does not even mention) that Hamas’ stated goal is not the liberation of Gaza but the destruction of Israel, it can only be said the historical context in which you place the operations under investigation is derived from a Palestinian fairy tale.

I could go on but I think the point is clear that the historical context you adopted and with which you approached your assignment is a biased and ahistorical one, which reflects a pro-Palestinian, anti-Israel political worldview that dictated the tone and preordained the outcome of your investigation.

The Language of Your Report Illustrates Its Bias

As already shown by the various quotes taken from your report, the language used throughout your report defies any claim of evenhandedness. This is evident in the big themes, as when you wax eloquent about “the right of the Palestinian people to self-determination” without ever noting the denial by Hamas and others who refuse to accept Israel’s legitimacy of the Jewish people’s right to self-determination (and indeed you even call the latter into question yourself³³).

And it is evident in the hundreds of little references peppered throughout your recitation of the historical background and your “findings of fact” which are stated in ways unfavorable to Israel (and questionable in fact). To mention just a handful of arbitrary examples: there is the recitation of Israeli aircraft attacking a “car maintenance workshop” (without any explanation that it was probably also a rocket factory) (261); there is the description of the tunnels built under the Gaza-Egypt border as “a lifeline for the Gaza economy and the people” enabling them to get “fuel . . . as well as consumables” without even mentioning the smuggling of rockets, IEDs, and other weapons (253 and 320); there are the unsubstantiated incidental “drive-by” allegations of intentional attacks on civilians (for example that an Israeli plane “fired a missile at a group of Palestinian children who were sitting in a street”); there are all those references to “blockades” and “occupation” (even after the Israeli withdrawal from Gaza); and of course there is the refusal ever to use the word “terrorist” or “terrorism” except when quoting an Israeli source. Indeed an analysis of the use of the word “terror” of your report will reveal the ironic fact that Israel is the only party

³³ See 206 to 208 and the discussion above at footnote 26.

in connection with whom you use the word “terrorize”³⁴ and the party you frequently accuse of spreading terror, with just one acknowledgment of the terror caused by over 8,000 rockets fired by Hamas and its ilk (without mentioning them by name of course).³⁵

Differences in Tone and Equivocation

Your “findings” and accusations against the Israeli government and the IDF, which overwhelmingly dominate your report, are expressed unequivocally and in words of one syllable using the most serious accusation that can be made: “*war crimes*.” You repeat this charge against Israel over and over again. See, for example, paragraphs 1169 to 1173, even though you did offer your standard perfunctory acknowledgement that you did not have all the facts (without saying all the “facts” you did have came from one side): “**From the facts available to it, and in the absence of any information refuting the allegations that the incidents described above took place**, the Mission finds that there have been a number of violations of international humanitarian law and human rights law”(1165).

Your criticisms of the “Palestinian armed groups” are not only far fewer and more limited but are also much more tentative and measured, and of course Hamas itself is almost untouched. As described above, for the most part you simply avoid looking at Palestinian offenses, either just saying you are “not in a position to make any finding” or expressly exonerating them “on the basis of your investigations” or on occasion saying you “cannot exclude the possibility” of bad actions. Of course, you cannot avoid acknowledging that “Palestinian armed groups have launched about 8,000³⁶ rockets and mortars into southern Israel since 2001.” These rocket attacks, you determined (in your boldest accusation against the Palestinians),

constitute indiscriminate attacks upon the civilian population of southern Israel and that where there is no intended military target and the rockets and mortars are launched into a civilian population, they constitute a deliberate attack against a civilian population. These acts would constitute war crimes and may amount to crimes against humanity. Given the seeming inability of the Palestinian armed

³⁴ “[T]he Mission concludes that what occurred in just over three weeks at the end of 2008 and the beginning of 2009 was a deliberately disproportionate attack designed to punish, humiliate and terrorize a civilian population...” (1690; see also 5117, 1162 and 1256).

³⁵ “[T]he Mission finds that the rocket and mortars attacks, launched by Palestinian armed groups in Gaza, have caused terror in the affected communities of southern Israel and in Israel as a whole” (1724).

³⁶ I understand, including from footnotes in your report, that Israel believes the number is much higher – close to 12,000. You do not explain how you made your finding that the lower 8,000 number is more credible.

groups to direct the rockets and mortars towards specific targets and given the fact that the attacks have caused very little damage to Israeli military assets, the Mission finds that there is significant evidence to suggest that one of the primary purposes of the rocket and mortar attacks is to spread terror amongst the Israeli civilian population, a violation of international law.

The tone and equivocation with which you make this one finding against “Palestinian armed groups” is quite different to that used in your multiple accusations of war crimes against Israel. And of course the charge is virtually meaningless anyway because no party that can be held accountable is named.

Israel can do nothing right in your eyes. Another striking feature of your report is how every positive action Israel takes is twisted into a negative and an accusation, generally of war crimes. We have already noted how the very substantial amount of humanitarian aid facilitated and delivered by Israel even in the midst of an ongoing war was regarded by you as inadequate to fulfill its obligation as “Occupying Power” and thus a violation of the Geneva Convention. The same pattern is evident in your consideration of the multi-level warning system Israel instituted to try to minimize civilian casualties, which has been described as “unprecedented in the history of warfare.”³⁷

You do devote two lines to acknowledging Israel’s efforts in this regard: “The Mission acknowledges the significant efforts made by Israel to issue warnings through telephone calls, leaflets and radio broadcasts and accepts that in some cases, particularly when the warnings were sufficiently specific, they encouraged residents to leave an area and get out of harms way.”³⁸

But you then proceed to spend about ten pages detailing why these efforts were imperfect and inadequate, so that Israel’s conduct still amounted to war crimes. One particular case is quite instructive. Israel was aware that a favorite Hamas tactic when they receive a warning that a particular house is about to be targeted (because it is used for storing weapons or for some other reason) is to send people (civilians?) up onto the roof to wave off the Israeli planes. It is not clear whether these “human shields” perform this task willingly, as suggested by Hamas leader Fathi Hammad, or are coerced, but in either case the fact that they do it suggests they have a greater appreciation for the IDF’s restraint than you seem to have.

³⁷ “I don’t think there’s ever been a time in the history of warfare when any army has made more efforts to reduce civilian casualties and deaths of innocent people than the IDF is doing today in Gaza.” British Colonel (retired) Richard Kemp. In my letter I cited you to Col. Kemp’s work on the challenges faced by countries trying to fight within the provisions of international law against an enemy that deliberately and consistently flouts international law, and urged you to reach out to him but I gather you chose not to do so.

³⁸ See quote at 475.

Knowing this, Israel invested in the technology and training to effect a “warning shot” by missile, the practice referred to as “roof knocking.” There is video evidence of its efficacy. This tactic could be viewed as an innovative effort to add a layer of warning to lower the risk of civilian casualties when striking at legitimate military targets. You, however, chose to describe it as “reckless in the extreme” saying: “the idea that an attack, however limited in itself, can be understood as an effective warning in the meaning of article 57(2)(c) [of Chapter IV of Additional Protocol I to the Geneva Conventions] is rejected by the Mission” (530 to 533). One wonders if you would apply the same standard to any warning shot, which I expect would be a novel interpretation of the laws of war.

I will cite one final example of how in your report almost everything Israel does is twisted to portray it in the worst possible light. Your report notes that, because of the thousands of rockets that have been launched at Sderot and other Israeli cities and towns near the Gaza border, Israel installed at great cost a warning system that would give residents 15 seconds warning of incoming rockets. Your principle reason for mentioning this appears to be so that you can condemn “the disparity in treatment of Jewish and Palestinian citizens by the Government of Israel in the installation of early warning systems and provision of public shelters and fortified schools between its Jewish and Palestinian citizens,” even though the Palestinian towns and informal villages are not the target of the rocket attacks from Gaza (110, 1714).

Gilad Shalit

Your treatment of the Shalit matter is troubling. Contrary to press reports,³⁹ even after hearing from his father, you could not even bring yourself to demand his immediate release by Hamas. The most you can bring yourself to do is issue a “recommendation” to unidentified “Palestinian armed groups” that he be released “on humanitarian grounds” and until then be treated as a “prisoner of war” (1770). For the most part, your discussion of Shalit consists of criticizing Israel’s heavy-handed response after he was “captured during an enemy incursion into Israel,” and your indication of concern that Israel not impose “collective punishment of the civilian population of the Gaza Strip” by “maintaining the blockade of the Gaza Strip until the release of Gilad Shalit” as some Israeli politicians have suggested (78). Your approach to the Shalit matter appears to be, consistent with the rest of your report, that his capture was a legitimate act of resistance on the part of “armed Palestinian groups” against the ongoing “Israeli occupation.” Gilad Shalit was captured in an illegal cross border

³⁹ In your *Jerusalem Post* article of October 19 you state that the Mission “called for his release”. Not to be too pedantic, but this provides a good example of how things get distorted in the press: the report says “recommend”; you say “called”; the press says “demanded.”

raid by Hamas (and others) that constituted an act of war and a grave escalation in hostilities. You (and Hamas) cannot have it both ways: you cannot consider Shalit a “legitimate” prisoner of war unless you are willing to admit that Hamas-ruled Gaza is actively at war with Israel, with all that entails.

Post-Publication Comments

I have seen reference to a number of public statements you have made publicly following the release of your report that have added to my consternation. One of these arose in an interview with Christiane Amanpour when she asked you about whether the standards you were applying to Israel and possible International Criminal Court proceedings might not implicate “what NATO or the U.S. is doing let’s say in Afghanistan or in Iraq.”

You responded by saying: “Well, that’s correct. But the United States, I think to its credit, has always taken care to protect innocent civilians. When innocent civilians have been killed and injured, it hasn’t been because it was intentional. It may have been negligent, it may even have been, and I don’t know I haven’t looked in to it, it may have been more than negligent but I have no doubt that it hasn’t been deliberate.” I firmly share your conviction that the United States does not intentionally target civilians. I also firmly believe that is true of Israel. What troubles me is how you, as a judge, can make such a statement without having done any investigation whatsoever. Coupled with your unsubstantiated “findings” that Israel intentionally attacked and murdered hundreds of civilians, this statement speaks volumes.

I also wish to comment on a statement you made in your address to the HRC delivering your final report. You stated that “the teaching of hate and dehumanization by each side against the other contributes to the destabilization of the whole region.” The teaching of hate and dehumanization by Hamas and even the Palestinian Authority is well known and well documented. I am curious what research you did to conclude that Israel teaches “hate and dehumanization” of Palestinians. I think it very likely that your statement was not researched at all but was just another superficial attempt to sound even-handed, but one that leads to injustice.

The Implications of your Report

In my earlier letter to you, I expressed the hope that, even though your mission was the product of a manifestly biased institution and process (as you have acknowledged), you would make something good come out of it, including by sending an unequivocal message that humanity’s vitally important global institutions

and the force of international law can not be cynically manipulated for political purposes. Sadly, your report does just the opposite: it compounds the original sin of your mission's establishment; it manipulates law and fact for political purposes; and it is likely to encourage the worst of human behavior and set back the quest for peace in the Middle East.

Already your report has had enormous global repercussions, including some that you probably did not intend. Aside from the general anguish that your accusations of "war crimes" have caused in Israel and among the Jewish people, and the anger and hatred that it is has fueled among their enemies, specific identifiable consequences of your report already include: the last-minute cancellation of NATO joint military exercises among Israel, Turkey, the United States, and Italy (and consequent waste of millions of dollars and downgrading of Israeli-Turkish relations); the degradation of negotiations between Israel and the Palestinian Authority; the weakening of the Palestinian Authority and strengthening of Hamas; travel restrictions on Israeli leaders; and further polarization of the HRC and frustration of the Obama Administration's stated policy of constructive engagement to try to develop the HRC into a useful and meaningful human rights organization.⁴⁰

While your reports works its way through the United Nations Security Council and International Criminal Court processes, I am sure many others will examine it closely and point out all of its factual errors and legal flaws. I hope that this takes place in the context of a thorough investigation by Israel of the serious allegations that you have made. I expect that by the time the truth emerges regarding the cases you investigated (not to mention situations you chose to ignore), the credibility of your report will be thoroughly undermined. Of course that will be cold comfort for Israel and the Jewish people, as the libel you have perpetrated – unparalleled in both its heinous accusations and widespread publication – has already taken hold and the truth, when it emerges, will have no power against the venom and hate that has already been spread.

My Suggestions For You

It appears from your recent public remarks (at least in the Jewish press) that you may now realize that your report overstates (to use a euphemistic term) the case against Israel. Your statements like "[i]f this was a court of law, there would have been nothing proven" and "I wouldn't consider it in any way embarrassing if many

⁴⁰ See for example John Bolton, "Israel, the U.S. and the Goldstone Report," *Wall Street Journal*, October 19, 2009.

of the allegations turn out to be disproved”⁴¹ are welcome – because they are true – although they are somewhat perplexing because they are so inconsistent with the unqualified charges you made in your report itself.

It is also clear that you are frustrated and “saddened”⁴² that the HRC is continuing in its usual one-sided anti-Israel mode and not even condemning the “Palestinian armed groups” for the violations your report did establish. (You should not be surprised that Hamas is not named in the HRC resolution for, as I have pointed out, your report does not condemn them either, only their military wing.) It seems possible that you may even now be seeing the damage and injustice that is being and will continue to be caused by this document that bears your name and will, for better or worse, be your enduring legacy (even as I am sure you continue to believe that Israel’s leaders and soldiers should be held accountable if they overstepped legal bounds). And you may even be wondering whether there is anything you can do to mitigate the damage, injustice, and pain that your report is causing.

My suggestion to you is that, in the interests of truth and justice, you should publish an article in which you do the following (much of this should not be difficult or controversial as you have already done it in a more limited forum):

1. Acknowledge that the type of scrutiny and standards you are applying against Israel have never been applied against any country in a comparable situation.
2. Acknowledge that based on the standards by which you are judging Israel, many other countries would also have been found guilty of war crimes (including in recent and ongoing conflicts and most certainly the Allied powers that defeated Germany and Japan in World War Two).
3. Admit and explain that your determinations were made on the basis of one-sided evidence which, as you have already acknowledged, was tainted by duress.
4. Acknowledge that there are many credible allegations of actions taken by Hamas and other Palestinian armed groups that, if true, would constitute war crimes but that you did not investigate.
5. Acknowledge that your report was unbalanced in terms of the allocation of focus on Israel, the incidents it chose to investigate, the selective historical context it included, and the language it used.
6. Acknowledge that in a judicial proceeding a person who had demonstrated

⁴¹ See *The Jewish Daily Forward*, issue of October 23, 2009, available at <http://www.forward.com/articles/116771>.

⁴² See for example “U.N. Council Backs Gaza War-crimes Report,” *The Washington Times*, October 17, 2009, available at <http://www.washingtontimes.com/news/2009/oct/17/un-council-backs-gaza-war-crimes-report>.

prejudgment of the issue at hand, as Christine Chinkin had, would not have been eligible to participate as a judge.

7. Acknowledge that your taking into consideration of hearsay and anonymous reports is not consistent with standards that would apply in any judicial inquiry.

8. Explain, as you have already said orally, that much of the evidence you considered (including hearsay and anonymous reports) would not be admissible in a court and that your conclusions do not reflect anything that has been proven.

9. Acknowledge that a central pillar of your argument was that Hamas should be considered separately from its military wing and if that distinction does not hold up in fact, numerous of your allegations of war crimes and other violations would cease to apply.

10. Acknowledge that a central pillar of your argument is that Israel continues to “occupy” Gaza, and if that characterization does not hold up as a matter of law, numerous of your allegations would cease to apply.

11. Given the aspersions your report has cast on the Israeli judicial system, repeat and emphasize (and not only in Israeli and Jewish media) your statement that “Israel has a strong history of investigating allegations made against its own officials reaching to the highest levels of government... Israel has an internationally renowned and respected judiciary that should be envy of many other countries in the region.”

12. Acknowledge that Israel is not alone responsible for the casualties and damage resulting from Operation Cast Lead but that some substantial portion of the responsibility (parties may differ on the allocation) must go to Hamas and the other Palestinian armed groups that attacked Israel with missiles.

13. Acknowledge that Israel has a right to act in self-defense and an obligation to defend its citizens and is not required or expected to suffer missiles being launched at it from Gaza or across any other border.

14. Acknowledge that the refusal by Hamas and other entities and states to recognize and accept the State of Israel is inconsistent with the Charter of the United Nations and a major impediment to peace in the region.

15. Demand (not just “recommend as a humanitarian gesture”) the release of Gilad Shalit who is not just being held captive illegally but who was taken captive illegally.

In writing this letter to you, I am by no means suggesting that Israel is perfect or should be immune from criticism or even condemnation, when appropriate. It is entirely possible that individual Israeli soldiers or the IDF as a whole may have overstepped the bounds during Operation Cast Lead, including perhaps in some of the incidents

that you have looked at. As noted in your report, there are still many investigations, including some criminal cases, open in Israel regarding Operation Cast Lead, and if any credible allegations you have raise are not already being investigated, I sincerely hope they will be added. In any such cases, I hope and trust that the Israeli authorities will take all appropriate action so that the “purity of arms” on which the IDF has always rightfully prided itself will not be compromised.

But for all the reasons I have described above, your report as written is an abominable travesty of justice. The damage that you and your report have already done – to Israel, to the Jewish people, and to truth itself – can never be undone. But it can be mitigated if you are willing to admit the flaws in your report loudly and clearly.

Sincerely,

Trevor Norwitz

New York, New York USA

THE GOLDSTONE REPORT AND INTERNATIONAL LAW¹

By Peter Berkowitz

The controversy over the “Report of the United Nations Fact-Finding Mission on the Gaza Conflict”² (September 15, 2009), more commonly known as the Goldstone Report, seems to have died down. But its larger significance has yet to be appreciated. For the most part, the controversy has swirled around the reliability of the Goldstone Report’s factual findings and the validity of its legal findings concerning Operation Cast Lead, which Israel launched on December 27, 2008 and concluded on January 18, 2009. But another and more far-reaching issue, which should be of great importance to those who take seriously the claims of international law to govern the conduct of war, has scarcely been noticed. And that pertains to the disregarding of fundamental norms and principles of international law by the United Nations Human Rights Council (HRC), which authorized the Goldstone Mission; by the mission members, who produced the Goldstone Report; and by the HRC and the United Nations General Assembly (of which the HRC is a subsidiary organ), which endorsed the report’s recommendations. Their conduct combines an exaltation of, and disrespect for, international law. It is driven by an ambition to shift authority over critical judgments about the conduct of war from states to international institutions. Among the most serious political consequences of this shift is the impairment of the ability of liberal democracies to deal lawfully and effectively with the complex and multifarious threats presented by transnational terrorists.

Notwithstanding a veneer of equal interest in the unlawful conduct of both Israel and the Palestinians, the Goldstone Report – informally named after the head of the U.N. mission, Richard Goldstone, former judge of the Constitutional Court of South Africa and former prosecutor of the International Criminal Tribunals for Rwanda and the former Yugoslavia – overwhelmingly focused on allegations that in Operation Cast Lead Israel committed war crimes and crimes against humanity. The purpose of Israel’s three-week operation was to substantially reduce the rocket and mortar fire that Hamas, long recognized by the United States and the European

¹ Originally published by the Hoover Institute, August 1, 2010.

² Available at http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/docs/UNFFMGC_Report.PDF (this and all subsequent links accessed June 23, 2011).

Union as a terrorist organization, had been unlawfully raining down upon civilian targets in southern Israel for eight years, and which Hamas had intensified after its bloody takeover of Gaza from the Palestinian Authority in 2007. While the Goldstone Report indicated that here and there Palestinian armed groups may have committed war crimes, it purported to find substantial evidence – based primarily on the testimony of Palestinians either affiliated with, or subject to, Hamas – that Israel had repeatedly violated international law by using disproportionate force. At its most incendiary, the Goldstone Report purported to find solid evidence that Israel had committed crimes against humanity – the gravest breaches of international law – by implementing a deliberate policy of terrorizing Palestinian civilians, targeting civilian non-combatants, and destroying civilian infrastructure.³

Israel has provided three major responses to the Goldstone Report. The most recent came from the Intelligence and Terrorism Information Center (ITIC), an Israeli NGO that works closely with the Israel Defense Forces (IDF). In March 2010, the ITIC published and posted online a 349-page study, “Hamas and the Terrorist Threat from the Gaza Strip: The Main Findings of the Goldstone Report Versus the Factual Findings.”⁴ Like the two previously published accounts by the Israeli government of the country’s continuing investigations of allegations of unlawful conduct committed by its armed forces during the three weeks of Operation Cast Lead – “The Operation in Gaza: Factual and Legal Aspects”⁵ (July 29, 2009) and “Gaza Operation Investigations: An Update”⁶ (January 29, 2010) – it garnered next to no attention in the press, from international human rights organizations, from the HRC, or from the General Assembly. Nor have the Goldstone Report’s champions in the international human rights community or Judge Goldstone and his colleagues dealt seriously with

³ On April 2, 2011, Goldstone published an op-ed in the *Washington Post*, “Reconsidering the Goldstone Report on Israel and War Crimes,” available at http://www.washingtonpost.com/opinions/reconsidering-the-goldstone-report-on-israel-and-war-crimes/2011/04/01/AFg111JC_story.html. In it, he withdrew the gravest charge, concluding that “civilians were not intentionally targeted as a matter of policy” by Israel. For an assessment of the limits of Goldstone’s reconsideration, see my “Upon Further Review,” in *The Weekly Standard*, April 18, 2011, available at http://www.weeklystandard.com/articles/upon-further-review_557017.html.

⁴ Available at http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/pdf/g_report_e1.pdf.

⁵ Available at <http://www.mfa.gov.il/NR/rdonlyres/E89E699D-A435-491B-B2D0-017675DAFEF7/0/GazaOperation.pdf>.

⁶ Available at <http://www.mfa.gov.il/NRrdonlyres/8E841A98-1755-413D-A1D2-8B30F64022BE/0/GazaOperationInvestigationsUpdate.pdf>.

the incisive criticisms published by scholars and journalists concerning both the report's factual findings⁷ and legal findings.⁸

But the deeper issue for international law concerns the right and the responsibility of states to make lawful judgments, under the international law of armed conflict, about the conduct of war, including the crucial judgments in asymmetric warfare concerning what constitutes a proportional use of force. That issue cannot be resolved by showing that the Goldstone Report's findings of fact about the Gaza operation are severely biased, or by demonstrating that the report misunderstood or misapplied the test for determining whether Israel exercised force in a proportional manner, although such showings and demonstrations are highly relevant. Nor can it be resolved by bringing to light how the Goldstone Mission itself – as conceived and authorized by the Human Rights Council, carried out by Goldstone and his colleagues, and endorsed by the United Nations General Assembly – disregarded basic norms and principles of international law, even though this leads to the heart of the matter. In the end, whether nation-states or international authorities should have primary responsibility for enforcing the lawful conduct of war turns on conflicting opinions about armed conflict, politics, and justice. Even those many conservatives and progressives who share a commitment to the freedom and dignity of the individual may come to different conclusions grounded in divergent views about the best means for securing individual rights while maintaining international order.

Authoritative sources in international law assign primary responsibility for judgments about whether war has been conducted in accordance with the law of armed conflict to the judicial and other relevant organs of nation-states. That assignment is rooted in the larger liberal tradition's teaching that nation-states – particularly those based

⁷ See, for example, Alan Dershowitz, "The Case Against the Goldstone Report: A Study in Evidentiary Bias," available at <http://www.alandershowitz.com/goldstone.pdf> [Reprinted in this volume 99–152]; Moshe Halbertal, "The Goldstone Illusion: What the U.N. report gets wrong about Gaza – and war," *The New Republic* (November 6, 2009), available at <http://www.tnr.com/article/world/the-goldstone-illusion>; [Reprinted in this volume 277–290]; "Opportunity Missed," *Economist* (September 17, 2009), available at <http://goldstonereport.org/pro-and-con/critics/308-the-economist-opportunity-missed>; Joshua Muravchik, "Goldstone: An Exegesis," *World Affairs* (May/June 2010), available at <http://www.worldaffairsjournal.org/articles/2010-May/June/full-Muravchik-Traub-MJ-2010.html>; and Richard Landes "Goldstone's Gaza Report: Part One: A Failure of Intelligence," [Reprinted in this volume 45–67] and "Goldstone Gaza Report: Part Two: A Miscarriage of Human Rights," *Meria* (December 2009), available at <http://www.gloria-center.org/meria/2009/12/landes1.html> and <http://www.gloria-center.org/meria/2009/12/landes2.html>.

⁸ See, for example, Laurie R. Blank, "The Application of IHL in the Goldstone Report: A Critical Commentary," *Yearbook of International Humanitarian Law* 12 (2009), "Emory Public Law Research Paper No. 10-96," available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1596214 [Reprinted in this volume 203–264]; Asa Kasher, "Operation Cast Lead and the Ethics of Just War," available at <http://www.goldstonereport.org/procedural-flaws/legal-reason-ing/378-asa-kasher-operation-cast-lead-and-the-ethics-of-just-war-azure>; and Keith Pavlischek, "Proportionality in Warfare," *New Atlantis* (Spring 2010), available at <http://www.thenewatlantis.com/publications/proportionality-in-warfare>.

on the consent of the governed and devoted to securing individual rights – are the best and most legitimate means of securing peace, exercising authority over the individual, and preserving political freedom. That teaching is bound up with the view that states are likely to be more sober in assessing the actions of other states than are international organizations because states must bear the burden of any proposed reform or rule. In contrast, the Goldstone Report and its supporters appear to be animated by the conviction that judgments about the lawful conduct of war are best and primarily vindicated by international institutions, because of their supposed superior objectivity, impartiality, and expertise. Yet the authors of the Goldstone Report and the international institutions they champion have shown themselves willing to ignore international law as it is in order to remake it as they believe it should be. One reason to prefer the allocation of responsibilities in international law as it currently stands to the Goldstone Report's efforts to transform it are the report's stunning defects. They illustrate that those who are responsible for the operation of international institutions are no less subject to the passions and prejudices that thwart the impartial and objective administration of law than judges and other officials in legal systems in liberal democracies, and in some cases may be more subject to such passions and prejudices.

Israel's Critique of the Goldstone Report

In July 2009, the Ministry of Foreign Affairs published and posted online an analysis of the Gaza operation that was designed to rebut in advance the main charges advanced by the Goldstone Report, which would not be released until mid-September. Prepared while Israel was still conducting preliminary field investigations into allegations of unlawful conduct by the IDF, "The Operation in Gaza: Factual and Legal Aspects" covered numerous issues. The 159-page document emphasized Israel's right and obligation under international law to use military force to stop Hamas' bombardment of civilian targets in southern Israel with rockets and mortar shells – approximately 12,000 since the year 2000 and 3,000 in 2008 alone. It reported that by late 2008 Hamas had put one million Israeli civilians in range of its weapons and had assembled armed forces of more than 20,000. It described the considerable efforts Israel undertook, in accordance with the U.N. Charter, to bring international pressure to bear on Hamas, "including urgent appeals to the U.N. Secretary-General and successive Presidents of the Security Council to take determined action, and diplomatic overtures, directly and through intermediaries, to stop the violence." It reaffirmed Israel's adherence to the law of armed conflict and human rights law and explained that, under a proper understanding of both and taking into account Hamas' systematic use of human shields and relentless blurring of the distinction between

civilians and combatants, Israel's military operation in Gaza was a proportionate response. It provided clear evidence, including photographs and video, that, in flagrant violation of international law, Hamas deliberately engaged in "the launching of rocket attacks from within densely populated areas near schools and protected U.N. facilities, the commandeering of hospitals as bases of operations and ambulances for transport, the storage of weapons in mosques, and the booby-trapping of entire civilian neighbourhoods so that an attack on one structure would devastate many others." It reviewed the extensive and unprecedented precautions the IDF took to minimize non-combatant casualties – including making hundreds of thousands of phone calls to Gaza residents to warn of impending air strikes – against an adversary that placed civilians in the line of fire as part of a coldly calculated military strategy. It summarized the steps the IDF took during the three-week conflict to ensure the daily delivery of humanitarian supplies to the civilian population. It acknowledged that "the Gaza Operation resulted in many civilian deaths and injuries and significant damage to public and private property in Gaza." And it reported that the IDF was conducting field investigations into accusations of unlawful conduct; detailed Israel's extensive and well-established system of military justice of which those investigations were the first stage; and reaffirmed Israel's right and responsibility under international law to investigate accusations that its military had acted unlawfully and, where appropriate, prosecute and punish.

"The Operation in Gaza: Factual and Legal Aspects" fell on deaf ears, including those of the Goldstone Mission. While complaining that the Israeli government refused to cooperate with its investigation, the Goldstone Report virtually ignored Israel's 159-page official statement, packed with critical facts and pertinent legal analysis and available online to all the world.⁹

The second major official statement by the Israeli government, "Gaza Operation Investigations: An Update" (January 29, 2010), was prepared in response to a request

⁹ Judge Goldstone contended that Israel's refusal to cooperate with his mission was the cause of "any omission" of "information and evidence" concerning "actions by Hamas or other Palestinians groups in Gaza." See his letter of October 29, 2009 (http://price.house.gov/news/pdf/Goldstone_letter.pdf) to Representative Howard Berman, chairman of the House Committee on Foreign Affairs, and Representative Ileana Ros-Lehtinen, ranking member of the House Committee on Foreign Affairs, in response to a U.S. House of Representatives draft resolution condemning the Goldstone Report (the Resolution was passed by a large majority on November 3). Judge Goldstone's contention is unpersuasive. Besides ignoring Israel's publicly available account, which detailed "actions by Hamas or other Palestinian groups in Gaza," Judge Goldstone and his colleagues also neglected publicly available material published by Hamas concerning its unlawful political ambitions and unlawful methods of war. Indeed, they are not a closely guarded secret. A good place to start is Hamas' 1988 Charter, also readily available online at http://avalon.law.yale.edu/20th_century/hamas.asp. It declares, among other things, that Hamas seeks to "raise the banner of Allah over every inch of Palestine" (Article 6); "Allah is its target, the Prophet is its model, the Koran its constitution: Jihad is its path and death for the sake of Allah is the loftiest of its wishes" (Article 8); and "There is no solution for the Palestinian question except through Jihad" (Article 13).

from U.N. Secretary-General Ban Ki-Moon.¹⁰ A good part of the 46-page document sketched Israel's military justice system and the role of the Attorney General's Office and the Supreme Court in overseeing it; how complaints of unlawful conduct in war in Israel are brought; the role of the military advocate general in screening, reviewing, and referring cases; the conduct of command investigations, which evaluate the performance of forces in the field and which yield information relevant to unlawful conduct; the mechanics of criminal investigations and prosecutions; and the substantial similarity of Israel's multilayered system to those of the United Kingdom, United States, Australia, and Canada.¹¹ In passing, the update noted that "Under international law, the responsibility to investigate and prosecute alleged violations of the Law of Armed Conflict by a state's military forces falls first and foremost to that state."

In addition, the update indicated that the IDF had launched 150 investigations arising out of the Gaza operation, 36 of which had been referred for criminal investigation in which "criminal investigators have taken evidence from almost 100 Palestinian complainants and witnesses, along with approximately 500 IDF soldiers and commanders." For every one of the 34 allegations of harm to civilians or damage to civilian property discussed at length in the Goldstone Report, the IDF had initiated an investigation – 22 of which the IDF pursued before the report's publication, and 12 of which it promptly pursued after the report aired them.

While no judicial system is perfect, given the substantial similarity of Israel's system for investigating and prosecuting unlawful conduct in war to those of the United Kingdom, United States, Australia, and Canada, it is hard to see how any existing judicial system would be able to pass muster if Israel's were judged inadequate. Yet the Goldstone Report found Israel's inherently inadequate:

After reviewing Israel's system of investigation and prosecution of serious violations of human rights and humanitarian law, in particular of suspected war crimes and crimes against humanity, the Mission found major structural flaws that in its view make the system inconsistent with international standards. (Part V, Par. 1756)

The Goldstone Report reached this extraordinary conclusion without comparing the Israeli system with others, and well before Israel could possibly have made substantial progress in undertaking the investigations – involving not roped-off and locked-down crime scenes but in many cases battlefields in enemy territory – of the allegations that arose out of Operation Cast Lead.

¹⁰ The discussion of this document draws on Peter Berkowitz, "A Usurpation of National Sovereignty," *National Review Online* (February 10, 2010), available at <http://article.nationalreview.com/424501/a-usurpation-of-national-sovereignty/peter-berkowitz>.

¹¹ See "Gaza Operation Investigations: An Update," 12-26.

The report's radical judgment might make sense on the supposition that since states are interested parties, their judicial systems should not be assigned responsibility by international law to investigate and prosecute war crimes, which, in a sense, calls on states to serve as judges in their own cause. In that case, however, the Goldstone Report's critique should have been directed not at Israel but at international law itself.

Instead, the Goldstone Report cultivates the appearance of applying international law while actually rejecting its imperatives and replacing them with its own. But it does not do so in an evenhanded fashion. Compounding its disregard for law, it evinces little interest in the capability or willingness of Hamas, the governing authority in Gaza, to enforce the law of armed conflict. Suffice it to say that Hamas has made no discernible progress in investigating and punishing war crimes arising out of the Gaza conflict, which should not be a surprise since Hamas has no discernible system of military justice for discharging its obligation to do so. And, undermining their claims to be impartial and objective upholders of international law, neither the HRC nor the General Assembly nor the greater international human rights community seems particularly troubled by this additional failure on the part of Hamas to comply with its legal obligations.

Israel's January 2010 document also provided striking rebuttals of Goldstone Report factual findings:

The Goldstone Report found that, in the absence of legitimate military objectives, Israel intentionally destroyed the Namar water-wells complex – including pumping machines, pipes, and civil-administration buildings – by air strikes to deprive Gaza's civilian population of clean drinking water. Israel's update, however, furnished photographic evidence demonstrating that the Namar water wells were located inside the walls of a Hamas military compound.

The Goldstone Report found that Israel undertook a “deliberate and premeditated strike” to damage a vacated Gaza wastewater-treatment plant in the al-Sheikh Ejlin neighborhood to cause raw sewage to flow into and destroy farmland. Israel's update, however, reported that the damage to the plant did not stem from a deliberate IDF attack. The IDF may have damaged the plant inadvertently during a battle with Hamas fighters, or Hamas fighters themselves may have attacked the plant to set loose sewage to hamper the movements of Israeli tanks operating in the area. But “there was no physical evidence or eyewitness testimony to support the conclusion of the Human Rights Council Fact-Finding Report.”

The Goldstone Report found that Israel conducted an aerial strike on the al-Bader Flour Mill to deny Gaza's civilian population the means of providing for their own

sustenance and to render them more dependent on Israel. Israel's update, however, pointed out that the Goldstone Report contains no evidence that the flour mill was struck from the air, that "photographs of the mill following the incident do not show structural damage consistent with an air attack," and that the available evidence indicates the flour mill was struck by tank shells during combat operations.

The Goldstone Report found that Israel destroyed the Abu-Askar family home despite its "unmistakably civilian nature." Israel's update, however, maintained that "due to its use as a large storage facility for weapons and ammunition, including Grad missiles, the house of Muhammad Abu-Askar was a legitimate military target." It also emphasizes that because the IDF issued warnings to the family to evacuate and delayed the attack until the night, when fewer civilians were present, no civilian casualties ensued.

These are by no means the only examples of Goldstone Report factual findings whose bases in fact are doubtful. Together, however, they call into the most serious question the reliability of all Goldstone Report factual findings.

And the unreliability of the report's factual findings undercuts the validity of its legal findings. That's because the factual findings are critical to judgments about the central legal questions addressed by the Goldstone Report, which concern whether Israel honored the master concepts of the law of armed conflict: the principle of distinction and the principle of proportionality. The principle of distinction requires parties to a conflict to distinguish between civilians and civilian objects, and combatants and military objects, and prohibits targeting the former. The principle of proportionality requires that the force used in the pursuit of legitimate military objectives be reasonably expected not to cause harm to civilians or to civilian objects that would be excessive in relation to the anticipated military advantage. What constitutes a legitimate military objective, what constitutes reasonable expectations, and what constitutes excessive harm to civilians or to civilian objects in relation to anticipated military advantage – indeed, what constitutes a civilian or civilian object in an age of transnational terrorism – are intensely context-sensitive questions. They turn not only on the facts but on difficult military judgments about both sides' strategy and tactics. Whether, for example, Hamas used water-wells, sewage treatment plants, flour mills, and residential homes, along with mosques, hospitals, and police officers as part of its combat operations are factual questions bound up with questions about Hamas' strategy and tactics. Answering them accurately is crucial to determining whether Israel crafted a strategy and adopted tactics consistent with the principles of distinction and proportionality. To the extent that the Goldstone Report got the facts wrong and mischaracterized or downplayed Hamas' strategy and tactics – and the evidence is that it did this to an egregious extent – its legal findings must be rejected.

To be sure, in “Gaza Operation Investigations: An Update,” the Israeli government sought to present its judicial system and wartime conduct in the best light, and to set forth the facts and read international law in a manner most favorable to its interests. Therefore, its accounts should be subject to public and professional scrutiny. Regrettably, the update has largely been ignored.

The March 2010 Intelligence and Terrorism Information Center study, “ Hamas and the Terrorist Threat from the Gaza Strip,” focuses on the comprehensive failure of the Goldstone Report to deal with Hamas as the governing authority of the Gaza Strip and as the main agent in Gaza undertaking terrorist operations against Israel. Indeed, except as a target of Israeli or Palestinian Authority violence, the Goldstone Report renders invisible Hamas and the other terrorist organizations operating in Gaza:

The Report does not refer to them as terrorist organizations, but rather calls them “Palestinian armed groups.” By using such terminology, the Report ignores or at least obscures and minimizes the terrorist nature of the organizations which fire rockets at Israeli civilians (defined by the Report as a “war crime”). In fact, the Report does not deal with the nature of Hamas and the other terrorist organizations in the Gaza Strip at all. It does not mention Hamas’ ideology (for example, the Hamas Charter, which advocates the destruction of the State of Israel), its overall strategy (the employment of terrorism and its consistent resistance to the peace process), the military infrastructure it constructed in the Gaza Strip, its radical Islamic nature, its use of force and occasional brutality in dealing with opponents (particularly Fatah), the process of enforced Islamization of the Gaza Strip, and the direction and support it receives from its headquarters in Damascus. The Report does not refer to Hamas and other organizations in the Gaza Strip as terrorist organizations, in complete contradiction to not only the Israeli but also the American and European Union positions, all of which have designated them, both their political and military wings, as terrorist organizations.

It is no surprise then that the Goldstone Report ignores or denies a host of related facts about Hamas crucial to the evaluation of the lawfulness of Israel’s conduct in Operation Cast Lead. Among these are Hamas’ systematic integration of its political administration and its armed forces; Hamas’ massive military buildup following Israel’s total evacuation from the Gaza Strip in 2005, including Hamas’ substantial increase in the number, range, and destructive power of its rockets; and the funding and arming of Hamas by Syria and Iran.

The Goldstone Report omits these facts critical to understanding Israel’s operation while uncritically accepting Hamas’ narrative about the cause of the conflict and Hamas’ version of specific events during Operation Cast Lead. Indeed, the Goldstone

Report goes so far as to assert that “In the framing of Israeli military objectives with regard to the Gaza operations, the concept of Hamas’ ‘supporting infrastructure’ is particularly worrying as it appears to transform civilians and civilian objects into legitimate targets.” That is a perverse inversion: As the ITIC study shows at great length and with massive supporting evidence, the unlawful transformation of civilians and civilian objects into supporting infrastructure for violent jihad against Israel is an essential feature of Hamas’ strategy.

Israel’s lengthy preliminary July 2009 statement on the factual and legal aspects of Operation Cast Lead, its January 2009 update, and the extensively documented March 2010 ITIC study on Hamas terrorism discredit the Goldstone Report’s factual and legal findings. But there is a larger and more fundamental problem. Under prevailing international law, the Goldstone Mission lacked proper legal foundations.

Flawed Legal Foundations

The undertaking assigned to Goldstone and his colleagues by the United Nations Human Rights Council, the manner in which the Goldstone team carried out its mandate, and the General Assembly’s endorsement of the Goldstone Report contravened underlying norms and explicit provisions of existing international law.

According to the Goldstone Report, the Goldstone Mission was established on April 3, 2009, by the president of the Human Rights Council

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. (Part I, Par. 131)

This mandate laid the foundations for an improper arrogation of power in two respects. First, it led to the trampling not only by the Goldstone Report but also by the Human Rights Council and the General Assembly on the primary responsibility assigned by the U.N. Charter to the Security Council: to deal with international peace and security. Second, it paved the way for the infringement not only by the Goldstone Report but, again, by the Human Rights Council and the General Assembly of the primary responsibility that multiple sources of international law accord to nation-states to investigate, prosecute, and punish unlawful conduct in war. Both arrogations of power hindered the exercise by Israel of its right and impaired its ability to discharge its responsibility under international law to pursue war crimes allegations against its armed forces.

Consider first how the General Assembly, by means of the Goldstone Report and the Human Rights Council, subverted the division of powers established by the U.N. Charter between it and the Security Council. In Article 24, the U.N. Charter specifies that the Security Council has “primary responsibility for the maintenance of international peace and security.” At the same time, the U.N. Charter reserves a limited role for the General Assembly in matters pertaining to international peace and security. Article 10 gives it generally wide latitude to discuss and make recommendations while also establishing a crucial limitation: “The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matter.” Article 12 states the limitation clearly: “While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.”

On January 8, 2009, in the midst of Operation Cast Lead, the Security Council, consistent with Article 24 of the U.N. Charter, seized itself of the Gaza conflict. The Security Council, which continued to be seized of the Gaza operation, never asked the General Assembly for its recommendations. Yet the Goldstone Report, authorized by the Human Rights Council and thus by its parent body, the General Assembly, not only presented factual findings and legal findings but also offered recommendations to the Security Council and to members of the United Nations. And both the Human Rights Council and the General Assembly endorsed those recommendations. In doing so, they directly contravened Article 12 of the U.N. Charter.

Not all actions undertaken by the General Assembly in connection to the Gaza conflict contravened the U.N. Charter. For example, while the battle still raged, and after the Security Council seized itself of the conflict, the General Assembly seized itself of the matter, too. The full General Assembly urged the parties to heed Security Council Resolution 1860 (the U.S. abstained), which called for ceasing of hostilities. No interference with Security Council primacy occurred, because the General Assembly made no recommendations; it simply affirmed the Security Council’s resolution.

The same cannot be said of the Human Rights Council’s initial intervention, which also took place while the battle still raged. Despite the absence of a request from the Security Council, the Human Rights Council, which as a creature of the General Assembly is, according to well-established principles of international law, bound by the same rules as its parent, made definite recommendations in Resolution S-9/1

(January 12, 2009).¹² Among other things, it “Call[ed] for the immediate cessation of Israeli military attacks”; “Demand[ed] that the occupying Power, Israel, immediately withdraw its military forces from the occupied Gaza Strip”; “Demand[ed] that the occupying Power, Israel, stop the targeting of civilians and medical facilities and staff and the systematic destruction of the cultural heritage of the Palestinian people”; and, not least, “Decide[d] to dispatch an urgent, independent international fact-finding mission, to be appointed by the President of the Council, to investigate all violations of international human rights law and international humanitarian law by the occupying Power, Israel, against the Palestinian people throughout the Occupied Palestinian Territory, particularly in the occupied Gaza Strip, due to the current aggression, and calls upon Israel not to obstruct the process of investigation and to fully cooperate with the mission.”¹³ All of the Human Rights Council’s demands for action by, and against, Israel conflicted with Article 12 of the U.N. Charter.

Other conflicts followed. With its publication in September 2009, the Goldstone Report contravened Article 12 with ten pages of aggressive recommendations. Among other things, it called for changes in Israel policy in the West Bank, in East Jerusalem, and in the detention of Palestinians; urged the U.N. secretary-general to submit the report to the Security Council; recommended that the Human Rights Council submit the report to the International Criminal Court (ICC); and advised states around the world to invoke universal jurisdiction to initiate criminal investigations in their domestic courts. In its report of October 21, 2009, the Human Rights Council disregarded Article 12 by endorsing the Goldstone Report recommendations.¹⁴ And in its Resolution 64/10 of December 1, 2009, the General Assembly disregarded Article 12 by endorsing the HRC’s endorsement of the Goldstone Report recommendations.¹⁵

Judge Goldstone has contended that the report avoided trespassing on Security Council prerogatives by declining to address the legality of Israel’s decision to undertake the Gaza operation (*jus ad bellum*) and instead dealing only with the legality of the conduct of the operation (*jus in bello*). But concerning the central legal question that arises in asymmetric warfare, Judge Goldstone’s distinction can not be sustained. That is because, as the failings of the Goldstone Report make abundantly

¹² Available at <http://domino.un.org/unispal.nsf/0/404e93e166533f828525754e00559e30>.

¹³ Mary Robinson, former president of Ireland and noted human rights champion, declined an early invitation to head such a Human Rights Council mission on the grounds that the HRC mandate referred only to violations by Israel and not also by Palestinians. Judge Goldstone frequently points out that he successfully sought a mandate that also included instructions to investigate unlawful conduct by Palestinians. Yet the fundamental flaws in their report indicate that he and his colleagues carried out their investigation in the spirit of the original mandate.

¹⁴ Available at <http://domino.un.org/unispal.nsf/0/93c22cea660fa96e85257657004cf8e6>.

¹⁵ Available at <http://domino.un.org/unispal.nsf/0/9cc062414581d038852576c10055b066>.

clear, it is often impossible to properly assess the proportionality of any particular exercise of force in asymmetric warfare absent an understanding of the complex circumstances that justified the use of force in the first place.

Admittedly, the division of powers established by the U.N. Charter does not appear to have had much impact in recent years on General Assembly practice. The General Assembly and its subsidiaries routinely make recommendations regarding matters of which the Security Council has declared itself seized but concerning which the Security Council has not requested General Assembly recommendations. Accordingly, one might argue that the Security Council's failure to protest arrogation by the General Assembly and its subsidiaries of its prerogatives has rendered Article 12 a dead letter. Indeed, according to the International Court of Justice's (ICJ) advisory opinion *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2004), the "interpretation of Article 12 has evolved," and "the accepted practice of the General Assembly, as it has evolved, is consistent with Article 12, paragraph 1, of the Charter."¹⁶ The ICJ opinion also notes, "It is often the case that, while the Security Council has tended to focus on the aspects of such matters related to international peace and security, the General Assembly has taken a broader view, considering also their humanitarian, social and economic aspects."

Even if the ICJ opinion were sound, it could not be fairly said that the Goldstone Report restricted itself to the "humanitarian, social, and economic" aspects of Israel's Gaza Operation. Indeed, its mandate directed it not only "to investigate all violations of international human rights" but also all violations of "international humanitarian law," another term for the international law of armed conflict, which governs conduct in war. A further problem with this line of argument is that with a little ingenuity and a lot of brazenness all of the conduct of war can be subsumed under its humanitarian, social, and economic aspects. This was illustrated by the president of the General Assembly's 63rd session, on January 15, 2009. In opening the 32nd Plenary Meeting of the 10th Emergency Special Session on the "Illegal Israeli Actions in Occupied East Jerusalem and the Rest of the Occupied Palestinian Territory," he contended that because Security Council Resolution 1860 failed to address the humanitarian and economic crises brought about by the Gaza fighting and border restrictions it was incumbent upon the General Assembly to achieve a ceasefire and unimpeded humanitarian access.¹⁷ Under such a theory, since in war civilians inevitably suffer humanitarian, social, and economic harms, even where entirely unintended, the General Assembly will always have the prerogative to intervene in matters of international peace and security regardless of Security Council actions or requests.

¹⁶ Available at <http://www.icj-cij.org/docket/files/131/1677.pdf>.

¹⁷ Available at <http://www.un.org/ga/president/63/statements/onpalestine150109.shtml>.

To the extent that Security Council acquiescence to General Assembly usurpation has rendered Article 12 irrelevant, and the ICJ and the General Assembly have redefined war in terms of its humanitarian, social, and economic aspects, the Security Council's role as the international body with "primary responsibility for the maintenance of international peace and security" has been significantly diminished. Indeed, these changes threaten to render the system of collective security established by the U.N. Charter entirely dysfunctional.

The Goldstone Mission, however, would still not have been justified. Even if the Human Rights Council and the General Assembly were not barred by the division of powers established by the U.N. Charter from making recommendations about the Gaza conflict while the Security Council was seized of it and absent a Security Council request, there would still be sufficient reason to conclude that the Goldstone Report conflicted with the requirements of international law. The second set of reasons flows out of a principle of deference to national courts that is inscribed in a variety of authoritative international law sources. According to this principle of deference, in the first instance it is the responsibility of nation-states themselves to carry out investigations concerning allegations of war crimes and to prosecute and punish where warranted. Of course deference is not a blank check: National courts can be found disinclined or incompetent to carry out their responsibilities under international law. Nevertheless, the principle of deference, rooted in the United Nations Charter, the Geneva Conventions, customary international law, and the statute governing the ICC creates a substantial protected sphere for the operation of domestic legal systems. The Goldstone Mission contravened the principle of deference.

Article 2 of the U.N. Charter declares:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

One of the critical matters that international law places within the domestic jurisdiction of states is primary responsibility for the investigation and prosecution of war crimes. Article 146 of the Fourth Geneva Convention is a key legal source for this right and responsibility:

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons

alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

In all circumstances, the accused persons shall benefit by safeguards of proper trial and defense, which shall not be less favourable than those provided by Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949.¹⁸

To be sure, Article 146 articulates a general obligation binding on all High Contracting Parties, not just on parties to a conflict. But it was understood at the time of the drafting and has been recognized in foreign relations law since that priority goes to the states accused and the states aggrieved. This is in line with common sense: Those accused of grave breaches, particularly members of standing armed forces, are most likely to be in the territory of an accused or aggrieved state.

This understanding comports with International Committee of the Red Cross (ICRC) commentary on Article 146:

The obligation on the High Contracting Parties to search for persons accused to have committed grave breaches imposes an active duty on them. As soon as a Contracting Party realizes that there is on its territory a person who has committed such a breach, its duty is to ensure that the person concerned is arrested and prosecuted with all speed. The necessary police action should be taken spontaneously, therefore, not merely in pursuance of a request from another State. The court proceedings should be carried out in a uniform manner whatever the nationality of the accused. Nationals, friends, enemies, all should be subject to the same rules of procedure and judged by the same courts. There is therefore no question of setting up special tribunals to try war criminals of enemy nationality.¹⁹

States' active duty to search for war crimes perpetrators on their territory confirms the special role that accused and aggrieved states have under Article 146 to launch

¹⁸ Available at <http://www.icrc.org/ihl.nsf/9ac284404d38ed2bc1256311002afd89/6f96ee4c7d1e72cac12563cd0051c63a!OpenDocument>.

¹⁹ See the ICRC commentary "Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949," available at <http://www.icrc.org/ihl.nsf/COM/380-600168?OpenDocument>.

investigations, pursue suspects, make arrests, undertake prosecutions, and impose punishments.

Yet in the Gaza conflict, the General Assembly and its subsidiary, the Human Rights Council, showed no deference to Israel's right and responsibility to deal with war crimes. Indeed, by prematurely authorizing an investigation even before the guns fell silent in Gaza, the Human Rights Council cast dark aspersions on Israel's system of military justice and civilian oversight. And then well before Israel could reasonably have completed preliminary investigations of war crimes allegations, let alone initiated criminal trials, the Goldstone Report produced factual and legal findings that all but pronounced IDF commanders and soldiers guilty of war crimes and crimes against humanity. This struck at the independence of Israel's judicial system and interfered with its ability to discharge its Article 146 active duty. For how could the Israeli system provide a fair trial to defendants who, thanks to the Goldstone Report and its swift endorsement by the Human Rights Council and the General Assembly, were already convicted in the court of international public opinion?

Furthermore, the Goldstone Report's recommendation that the Security Council refer Israel to the International Criminal Court in the event that Israel did not comply with the report's specific demands showed a misunderstanding of the ICC's role. That misunderstanding is of special interest because it revolves around the very principle of deference to national courts over which the Goldstone Report rides roughshod.

The Rome Statute, which established the ICC, confirms the primacy that international law assigns to states to handle war crimes accusations. Article 17 lays out what has come to be called the "complementarity principle." It provides that a condition for the admissibility of a case is that "the State is unwilling or unable genuinely to carry out the investigation or prosecution."²⁰ The principle of deference is also built into the severe restrictions on the crimes that the ICC is authorized to handle. The ICC does not exist to prosecute every crime that happens in wartime. It is reserved only for the most heinous and enormous, the kind of crimes, that is, whose very commission implies that state courts are unable or unwilling to investigate or prosecute.

In a February 2006 letter explaining his decision to decline the many requests to investigate war crimes allegations against coalition troops in Iraq, ICC prosecutor Luis Moreno-Ocampo stressed that the scale of the alleged crimes was critical.²¹ Under the Rome Statute, for the ICC to initiate an investigation a case must meet

²⁰ Available at http://untreaty.un.org/cod/icc/statute/99_corr/2.htm.

²¹ Available at http://www.icc-cpi.int/NR/rdonlyres/F596D08D-D810-43A2-99BB-B899B9C5BCD2/277422/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf.

both a specific and general gravity standard. The specific standard involves crimes committed “as part of a plan or policy or as part of a large-scale commission of such crimes.” The general standard requires that the magnitude of the crime be of surpassing scale. Ocampo found no evidence that the alleged crimes committed by coalition forces in Iraq were part of any plan or policy, so they failed to meet the specific gravity standard. He further observed that the cases the ICC had accepted involved the willful killing of hundreds of thousands of people, large-scale sexual violence and abductions, and the displacement of millions. The alleged misconduct in Iraq did not belong in the same class: “The number of potential victims of crimes within the jurisdiction of the Court in this situation – 4 to 12 victims of willful killing and a limited number of victims of inhuman treatment – was of a different order than the number of victims found in other situations under investigation or analysis by the Office.” Thus the criminal allegations concerning coalition forces in Iraq didn’t meet the general gravity standard either. Therefore, Ocampo concluded, the charges were inadmissible for prosecution by the ICC.

Like the principle of complementarity, the gravity standard reflects the primacy international law attaches to the right and responsibility of states to investigate and prosecute war crimes. It does this by creating an exceedingly high hurdle for ICC intervention. The case that the Goldstone Report makes against Israel does not come close to clearing it. The report does accuse Israel of deliberately seeking to terrorize the Palestinian population – which, if true, would meet the specific gravity standard for admissibility. However, and setting aside the Goldstone Report’s many grave defects, it would still not have met the ICC’s general gravity standard. What is decisive is that while the number of civilian deaths for which the Goldstone Report found Israel responsible was considerably larger – in the hundreds – than the number involved in the complaints against coalition forces in Iraq, the number of deaths was nevertheless of a substantially lesser order than those, as Ocampo explained in his letter on military operations in Iraq, that are necessary to meet the ICC’s general gravity standard.

Because the allegations against Israel failed to meet the ICC’s general gravity standard, the Goldstone Report’s recommendation that the Security Council refer the matter to the ICC was without merit. In pressing those recommendations, the report not only displayed an ignorance of or indifference to the law under which the ICC operates. It also, and again, demonstrated its obliviousness to the right and responsibility of states, in the first instance, to deal with war crimes accusations.

Ocampo’s reasoning in his Iraq letter about the narrow limits within which the ICC was designed to operate is in line with his general views about the presumption in international law that states are the appropriate initial authority for handling most

criminal investigations and prosecutions. In his statement at his swearing in on June 16, 2003, he emphasized the principle of deference to national courts:

The Court is complementary to national systems. This means that whenever there is genuine State action, the Court cannot and will not intervene. But States not only have the right, but also the primary responsibility to prevent, control and prosecute atrocities. Complementarity protects national sovereignty and at the same time promotes state action.

The effectiveness of the International Criminal Court should not be measured by the number of cases that reach it. On the contrary, complementarity implies that the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success.

For this reason, the first task of the Office of the Prosecutor will be to establish links with prosecutors and judges from all over the world.

They continue to bear primary responsibility for investigating and prosecuting the crimes within the jurisdiction of the Court, and we are confident that they will make every effort to carry out their duties.

We wish to interact with them in order to establish a network of national and international prosecutors who will co-operate with each other and develop the ability to function together.²²

One could hardly wish for a clearer statement from a better-positioned authority affirming the primacy that international law accords to states to investigate and prosecute unlawful conduct in war committed on their territory. By failing to appreciate this primacy, the Goldstone Mission infringed on Israel's rights, interfered with its responsibilities, and violated fundamental norms and principles of international law.

The only relevant cases where international authorities were given the power to preempt local prosecutions were the ad hoc tribunals for Rwanda and the former Yugoslavia, established in the 1990s in the midst of internal conflict and civic breakdown under conditions in which the normal presumption in favor of domestic accountability may appear to have been reversed. But those tribunals, for which Judge Goldstone served as prosecutor, are better seen as clarifying the limits to the deference international law grants to national courts. The International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda dealt with situations in which civil war and massive killing either overwhelmed the ability or demonstrated the unwillingness of national governments to undertake the impartial, independent, and diligent investigations and prosecutions of war crimes required by international law. But in contrast to war-torn former Yugoslavia and genocide-ravaged Rwanda,

²² Available at <http://www.iccnw.org/documents/MorenoOcampo16June03.pdf>.

Israel possesses a judicial system, as any impartial and objective review would show, that is on a par with the most admired judicial systems in the world.

This analysis does not imply that international institutions were obliged to sit on the sidelines until Israel had completed its investigations and prosecutions arising out of Operation Cast Lead. For example, the ICRC's contribution respected Israel's rights and responsibilities as a sovereign state. In the summer of 2009, the ICRC submitted a confidential report to the government of Israel – it involved no recommendations to other international bodies and neither sought nor had any impact on international public opinion. It was not intended to accomplish anything other than to provide information to enable Israel to better carry out its active duty under international law to investigate and prosecute war crimes connected to the Gaza operation.

Had it proceeded in the spirit of the ICRC, the Human Rights Council too might have played a lawful and constructive role in the months following the conclusion of the Gaza conflict. It might have, for example, appointed a task force to review the complex and multi-layered judicial system that Israel has established for the investigation and prosecution of war crimes. A competent review would have included a comparison of Israel's system with that of other nations. And a lawful review would have involved submission of a confidential report to Israel that, in the event, identified where the country's judicial system may have fallen short in this particular or that of international standards as reflected in best practices around the world – as opposed to failing to live up to an entirely idealized system of international criminal justice. This would have respected Israel's rights, and aided Israel in complying with its responsibilities, under international law.

How little the majority of members of the Human Rights Council actually care about the impartial and objective application of international law and the protection of human rights was shown in May 2009, less than two months after the HRC had authorized the Goldstone Mission. Sri Lanka had just defeated the Tamil Tigers in their 25-year war. U.N. officials estimated that in its advance into the Tamil north the Sri Lankan army killed more than 10,000 civilians, with some estimates at the time going as high as 20,000 and current estimates reaching 30,000. Credible reports indicated that government forces herded civilians into a “no fire” zone in the north and then shelled it. Cell phone video, which the top U.N. envoy in Sri Lanka considered genuine, showed government forces executing naked and bound captives. The government was directly linked to hundreds of disappearances, and held approximately 300,000 civilians in poor conditions in detention camps. Nevertheless, the Human Rights Council rejected a draft resolution that deplored the actions of both sides, and which called for an independent investigation. Instead, on May 28, 2009, as Goldstone and his team were proceeding with their work, the Human Rights

Council passed Resolution S-11/1, which “reaffirm[ed]” the U.N. Charter’s “principle of non-interference in matters that are essentially within the domestic jurisdiction of States.”²³ The only condemnation the resolution offered was directed at the defeated Tamil Tigers. The Sri Lankan government received nothing but encouragement from the Human Rights Council for its conduct. Eight months later, in January of 2010, after being reelected as president of Sri Lanka (with votes primarily from those of his own ethnicity), President Mahinda Rajapaksa declared that his victory proved that his government had committed no war crimes, and that no investigation, internal or otherwise, was needed. The United Nations Human Rights Council could see no reason to disagree.²⁴

Who Judges?

The United Nations Human Rights Council is a travesty. A majority of its members appear to take only the most cynical view of international law, conceiving of it as a tool for punishing their enemies and rewarding their friends, and regarding Israel as the most odious of their enemies and the principal threat to international order.

But it would be a mistake to conclude from the HRC’s abuse of Israel and the flawed legal foundations of the Goldstone Report that the Western international human rights lawyers, professors of law, and intellectuals who have uncritically championed the Goldstone Report’s findings and endorsed its recommendations hold a cynical view of international law. On the contrary, many supporters of the Goldstone Report are animated by an idealized understanding of international law according to which it crystallizes humanity’s considered judgments about morality and war, and an idealized understanding of international institutions according to which the men and women who operate them embody a form of transnational or global governance that operates above the fray of nation-state power politics. To advance the cause of international peace and global justice, they therefore maintain, critical judgments about the lawful conduct of war – including the crucial question in asymmetric warfare of what constitutes a proportional use of force – should be taken out of the hands of nation-states and placed in those of international institutions.

²³ Available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/11specialsession/S-11-1-Final-E.doc>.

²⁴ On June 3, 2010, and more than a year after the HRC had formally pronounced its satisfaction with Sri Lanka’s conduct, Philip Alston, Special Rapporteur on extrajudicial, summary, or arbitrary executions for the HRC, in presenting his annual report, called for an “independent international inquiry” into “allegations that as many as 30,000 persons were killed in Sri Lanka in the closing months of the conflict and that grave violations of human rights and humanitarian law were committed.” At the same time, Alston called for an “independent international inquiry” into Israel’s “attack on the humanitarian flotilla off Gaza,” an attack that occurred only days before and in which Israeli commandos, in self-defense, killed nine militants who were part of a mission to break Israel’s lawful maritime blockade of Gaza.

These men and women are blinded to the Goldstone Report's grave flaws by the higher cause they believe it serves. Indeed, the scandal of the Goldstone Report – which includes both its grave flaws and the blindness to them of many international human rights lawyers – gives good reasons, certainly for liberal democracies with well-developed judicial systems, to wish to preserve the right and primary responsibility of states, inscribed in authoritative sources of international law, to adjudicate the difficult questions that arise under the international law of armed conflict.

The worthy ambition to hold perpetrators accountable for unlawful conduct in war must not be allowed to obscure the obstacles to designing international institutions capable of impartially and objectively crafting, adjudicating, and enforcing the law of armed conflict. These include the emergence of a transnational elite with interests and ambitions of its own; the lack among international organizations' officials and staff of the benefits of democratic accountability and national security responsibility for the rules they seek to make and implement governing the conduct of war; the domination of the General Assembly by authoritarian states; and the absence in many cases of agreed upon authority for adjudicating and enforcing international law. Until these obstacles are overcome – and we are a long way off – justice will be better served by preserving the right and primary responsibility of states to vindicate, through their judicial systems, the international law of armed conflict, especially when those states are established liberal democracies. International institutions should be reserved, as the principle of deference implies, as a judicial system of last resort.

Indeed, the revolution in international law that the Goldstone Report seeks to advance affects directly only a small number of countries, all liberal democracies. Russia, China, Iran, and the host of lesser authoritarian regimes around the globe pay little more than lip service to human rights and their obligations under the laws of armed conflict. Transnational terrorists openly scoff at such rights and obligations. Meanwhile, a substantial majority of the world's liberal democracies, whose commitments to individual freedom and human equality inculcate respect for human rights and the principles that undergird the international law of armed conflict, seldom take up arms. Among liberal democracies, Israel and the United States in particular depend daily on their armed forces to protect their way of life. And paradoxically, while no armies in the history of warfare have devoted greater attention or energy than those of Israel and the United States to distinguishing and protecting civilians in warfare and ensuring that the force they use in armed conflict is proportional to the threat faced, no armies today come under greater worldwide attack for violating the laws of war and human rights than those of Israel and the United States.

Although Israel and the U.S. confront a common enemy, their strategic situations

differ dramatically. Israel is tiny and faces adversaries – to the immediate north Iran-sponsored Hezbollah in southern Lebanon and Iran-sponsored Syria; to the immediate south in Gaza and immediate east in the West Bank Iran-sponsored Hamas; and a thousand miles to the east, but within Shahab III ballistic missile range, the Islamic Republic of Iran itself – that seek its destruction through violent jihad. It therefore maintains the region's most powerful military and a nuclear deterrent. Meanwhile, the United States remains the world's sole superpower and the only nation capable of projecting force anywhere in the world promptly and decisively. It is surrounded by friendly neighbors and vast oceans while shouldering responsibility for keeping open the world's sea lanes, ensuring safety in the skies, and generally serving as the international political and economic order's chief law enforcement officer. And notwithstanding the Obama administration's awkward equivocations, the U.S. remains engaged in a protracted transnational struggle with the same forces of Islamic extremism that menace Israel.

Despite their common enemy, Israel and the United States stand in different relationships to the project, of which the Goldstone Report is one initiative, to expand the authority of international institutions to take primary responsibility for critical judgments about the lawful conduct of war. It is obviously in Israel's interest to oppose such a transfer of power to international bodies, which are stacked against it. And while Washington has provided indispensable support over the decades for Israel's security interests, it is just as easy to understand why the United States, whose wealth, power, and Security Council veto insulate it from the machinations of the General Assembly and its subsidiary organs, might wish to downplay the matter.

But that is shortsighted. There is a danger that the spread of practices among international bodies and an accumulation of precedents concerning international law will weigh down the United States in the struggle that it shares with Israel and all civilized nations to combat, in accordance with the law of armed conflict, transnational terrorism. Of course that will only happen if the U.S. recognizes such practices and precedents as authoritative. Encouragement to do so comes from powerful trends in American universities and law schools, where professors for going on a generation have been cultivating in their students the view, which animates the Goldstone Report, that critical judgments about the lawful conduct of war are indeed properly and in the first instance the province of international institutions.

That view is suited to a world in which all nation-states incline to peace and govern themselves in accordance with liberal and democratic principles. Unfortunately, that is not the world in which we live. Nor is it a world we can expect to emerge anytime soon.

THE APPLICATION OF IHL IN THE GOLDSTONE REPORT: A CRITICAL COMMENTARY¹

*Laurie Blank*²

1. Introduction

Operation Cast Lead, the Israeli military operation in Gaza that began on December 27, 2008, demonstrated anew the challenges international humanitarian law (IHL) – otherwise known as the law of armed conflict or the law of war³ – faces in contemporary conflict.⁴

In response to the firing of rockets at southern Israel and Hamas' use of tunnels to smuggle rockets into Gaza, the Israel Defense Forces (IDF) launched major air and ground operations against Hamas and other Palestinian armed groups in Gaza. The nature of the ensuing combat highlighted complex legal issues regarding, inter alia, targeting, collateral damage, and the protection of civilians.

The Report of the United Nations Fact-Finding Mission on the Gaza Conflict (hereinafter Goldstone Report)⁵ presented an opportunity to examine critically how

¹ Originally published in the *Yearbook of International Humanitarian Law*, 2009.

² Director, International Humanitarian Law Clinic, Emory University School of Law. I am grateful to Dr. Gregory P. Noone and Professor Geoffrey S. Corn for their valuable insights and would also like to thank Silas Allard (J.D. 2010, Emory Law School), Sarit Barhen (J.D. 2010, Emory Law School), and C.C. Ragan (J.D. expected 2011, Emory Law School) for their invaluable research assistance.

³ International humanitarian law is generally viewed as a marginally broader term than the law of armed conflict or the law of war, encompassing the law on genocide, crimes against humanity, and the protection of civilians generally. Nonetheless, all three terms denote the body of law that governs the conduct of states, armed groups, and individuals during armed conflict. For the purposes of this article, I will use these terms interchangeably.

⁴ See L.R. Blank and A.N. Guiora, "Teaching an old dog new tricks: operationalizing the law of armed conflict in new warfare," 1 *Harvard NSJ* (2010) pp. 45-85, defining "new warfare" as "conflicts generally involv[ing] a state engaged in combat with non-state forces, combat characterized by fighting in highly populated areas with a blurring of the lines between military forces and civilian persons and objects."

⁵ "Human Rights in Palestine and Other Occupied Arab Territories," Report of the United Nations Fact-Finding Mission on the Gaza Conflict, A/HRC/12/48, 15 September 2009 [hereinafter Goldstone Report].

the law applies in complicated modern warfare and how the law might be used to solve difficult problems such conflict poses. Mandated to investigate possible violations of IHL and human rights law during the conflict in Gaza, the Goldstone Report engages in a sweeping review of the conflict, as well as the historical underpinnings of the Israeli-Palestinian conflict, human rights in the West Bank and in Israel proper, and Israel's strategic aims. Its determinations rely primarily on factual information gathered in the course of the investigations on the ground in Gaza. Others have highlighted limitations in the fact-finding and raised questions about whether the conclusions set forth in the Goldstone Report are even-handed given the absence of information from the Israeli government, which refused to cooperate in the investigation.⁶ This article will not address those questions, nor will it assess whether actual crimes were committed; that would be a task for a competent court or tribunal. Rather, I will analyze the Goldstone Report's application of the law to the conduct of both parties so as to examine whether it applies the correct legal standards and interprets them appropriately within the framework of the Gaza conflict. In particular, the article will focus on two main shortcomings in the Goldstone Report's application of IHL: areas in which the report could have benefitted from a greater sensitivity to the complexities of modern warfare, and areas in which its approach is questionable as a matter of law.

The second section offers a brief background on the conflict, the Goldstone Report itself, and the applicable law. In the third, I highlight the report's flawed examination of the challenges posed by contemporary conflicts in two fundamental areas of IHL: distinction and military objectives. Both require that military commanders and soldiers understand who is a civilian and who is a fighter or combatant, and which targets are military targets and which are civilian objects. Without a thorough and sophisticated understanding of how to make these determinations, military commanders, soldiers, and policy makers will face grave difficulty in planning and carrying out military operations within the bounds of the law. The challenges presented in Operation Cast Lead are emblematic of some of the most difficult dilemmas modern warfare poses.

Section four highlights several areas in which the Goldstone Report's application of IHL is questionable, either because it uses the incorrect legal standard or because it applies the wrong law when more than one body of law applies. The report errs twice

⁶ See e.g., N. Cumming-Bruce, "U.N. investigator presents report on Gaza War," *New York Times*, 30 September 2009; R.O. Freedman, "A biased war report; U.N.'s human rights council's Gaza study was destined to unfairly criticize Israel," *Christian Science Monitor*, 20 October 2009; G. Steinberg, "Fundamentally flawed, or a step toward sanctions?," *Jerusalem Post*, 16 September 2009; R. Goot, "A blind eye to Hamas atrocities," *The Australian*, 6 November 2009.

in its treatment of the principle of proportionality, first by approaching *jus in bello*⁷ proportionality retrospectively rather than prospectively, and second by conflating *jus ad bellum*⁸ proportionality with *jus in bello* proportionality. Additional problems arise in its analysis of the law governing precautions in attack and the treatment of prisoners of war, and its assessment of responsibility for specific crimes, including attacks on civilians, destruction of property, and hostage taking.

IHL seeks to balance two key goals – military necessity and humanity. In this way, the law protects civilians from the ravages of war while still enabling effective military operations. Interpretations of the law that leave militaries with no lawful means by which to engage in necessary operations are often viewed as counterproductive and pose the risk of generating disregard for legal norms. The Goldstone Report unfortunately fails to give sufficient weight to this inherent balancing – the most basic and historic premise of humanitarian law: the “desire to diminish the evils of war, as far as military requirements permit.”⁹

2. Background

Countless articles and media reports have provided detailed accountings of the Israeli-Palestinian conflict, the Israeli disengagement from Gaza, Hamas’ rise to power in Gaza, and the escalation of hostilities between Israel and Gaza in 2007 and 2008.¹⁰ Therefore, only a summary of the Gaza conflict and the establishment of the United Nations fact-finding mission that culminated in the publication of the Goldstone Report is necessary to frame the subsequent discussion.

2.1 Operation Cast Lead

For the three years between Israel’s disengagement from the Gaza Strip and the

⁷ *Jus in bello* is the body of law governing the conduct of hostilities and the conduct of persons during armed conflict. See Section 4.2 *infra*.

⁸ *Jus ad bellum* is the law governing the resort to force. See Section 4.2 *infra*.

⁹ Hague Convention No. IV Respecting the Laws and Customs of War on Land, 18 October 1907, preamble, Stat. 2277, T.S. 539 [hereinafter Hague IV].

¹⁰ Y. Shany, “Faraway, so close: the legal status of Gaza after Israel’s disengagement,” 8 *YIHL* (2005) pp. 369-383; M. Mari, “The Israeli disengagement from the Gaza Strip: an end of the occupation?,” 8 *YIHL* (2005) pp. 356-368; N. Stephanopoulos, “Israel’s legal obligations to Gaza after the pullout,” 31 *Yale JIL* (2006) pp. 524-528; M.S. Kaliser, “Modern day exodus: international human rights law and international humanitarian law implications of Israel’s withdrawal from the Gaza Strip,” 17 *Indiana I & Comp. LR* (2007) pp. 187-228; G. Robinson, “The fragmentation of Palestine,” 106 *Current History* (2007) p. 421; E. Bronner, “ Hamas fires rockets into Israel,” *New York Times*, 15 November 2008; J. Goldberg, “The forgotten war: the overlooked consequences of Hamas’ actions,” *New Yorker*, 11 September 2006; “Holiday marks 35th anniversary of Yom Kippur war,” *U.S. Fed. News*, 6 October 2008, (noting that “since Israel’s Gaza withdrawal, Iran-backed Hamas and other terrorist groups in Gaza have fired more than 5,800 rockets and mortars into Israel.”).

start of Operation Cast Lead, Hamas fired nearly 6,000 rockets at southern Israel.¹¹ Israel maintained its blockade of Gaza, originally instituted in response to the 2006 capture of IDF Corporal Gilad Shalit by Palestinian armed groups in a cross-border raid. In June 2008, Israel and Hamas agreed to an Egyptian-brokered cease-fire that was intended to last for six months. Throughout the summer and the fall, the Israeli blockade remained in place and Hamas continued sporadic rocket fire. On November 5, 2008, Israel launched a raid on a tunnel being built near the Gaza border, and Hamas retaliated with rocket fire.¹² Hostilities intensified over the next several weeks, with Hamas firing over 196 rockets and 127 mortars into Israel during that time.¹³ After Hamas declared the truce over on December 18, 2008, Palestinian rocket attacks and Israeli air strikes intensified. On December 27, 2008, Israel launched Operation Cast Lead with a weeklong air attack. Ground operations began on January 3, 2009 and ended on January 18, 2009.

2.2 *The Goldstone Report: Genesis and Mandate*

The United Nations Human Rights Council established the United Nations Fact-Finding Mission on the Gaza Conflict (hereinafter the Mission) on April 3, 2009. The Mission's mandate was to "investigate all violations of international human rights law and international humanitarian law that might have been committed at any time in the context of the military operations that were conducted in Gaza during the period from 27 December 2008 and 18 January 2009, whether before, during or after."¹⁴ The

¹¹ See A.N. Guiora and D. Luban, "An exchange on law and Israel's Gaza campaign," 31 *ABA National Security Law Report* (Jan./Feb. 2009) pp. 1-16.

¹² "Gaza truce broken as Israeli raid kills six Hamas gunmen," *The Guardian*, 5 November 2008.

¹³ Goldstone Report, paras. 257, 259.

¹⁴ At <<http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/FactFindingMission.htm>>. Many critics of the Goldstone Report charge that the report's official mandate only addresses alleged Israeli violations of IHL and human rights law rather than violations committed by both sides. For example, the Human Rights Council resolution calling for the establishment of the Mission states that the HRC: "Decides to dispatch an urgent, independent international fact-finding mission, to be appointed by the President of the Council, to investigate all violations of international human rights law and international humanitarian law by the occupying Power, Israel, against the Palestinian people throughout the Occupied Palestinian Territory, particularly in the occupied Gaza Strip, due to the current aggression, and calls upon Israel not to obstruct the process of investigation and to fully cooperate with the mission." United Nations Human Rights Council, "The grave violations of human rights in the occupied Palestinian territory, particularly due to the recent Israeli military attacks against the occupied Gaza Strip," U.N. Doc. A/HRC/S-9/L.1, para. 14 (9th special sess.), 9 and 12 January 2009. After raising concerns about the wording of the mandate, Judge Richard Goldstone received verbal confirmation of a revised mandate to address violations by Hamas and other Palestinian armed groups as well. See H. Rettig Gur, "Goldstone to Post: Mandate of my Gaza probe has changed. There's no reason for Israel not to cooperate. Israel disagrees: There's been no formal change. The goal is not to find truth but to attack us," *Jerusalem Post*, 17 July 2009. This article will not address the nature of the mandate but will focus entirely on the misapplication of IHL in the report.

Mission convened in Geneva in May, July, and August 2009, and conducted field visits to Gaza and Amman, Jordan during the summer of 2009. The government of Israel refused to cooperate with the investigations or allow the Mission to enter Gaza through Israel. Eventually, Egypt granted the Mission permission to enter Gaza through the Rafah crossing. In addition, the Mission held public hearings in Gaza in June 2009 and in Geneva in July 2009. On September 15, 2009, the Mission issued its final report, entitled “Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict.”

In its conclusions and recommendations, the Goldstone Report found numerous violations of IHL and human rights law by Israel and Hamas and other Palestinian armed groups. The report also analyzed and criticized Israel’s overall objectives and strategy, Israel’s blockade of the Gaza Strip, and the treatment of Palestinians in the West Bank, among other issues. Finally, the report analyzed the Israeli mechanisms for holding alleged perpetrators of IHL violations accountable and offered numerous critiques of the military investigation and justice systems. In the same vein, the report addressed the obligation of Hamas to hold perpetrators accountable and found no existing suitable mechanisms for accountability in the Gaza Strip.

The report issues a number of recommendations, focusing on accountability for IHL violations, reparations, violations of human rights law, the blockade, the use of weapons and military procedures, and the protection of human rights organizations.¹⁵ In particular, the report recommends that the United Nations Security Council refer the situation in Gaza to the prosecutor of the International Criminal Court (ICC) pursuant to Article 13(b) of the Rome Statute of the International Criminal Court (hereinafter Rome Statute) if, after six months, no “good faith investigations that are independent and in conformity with international standards” are underway.¹⁶ It also recommends that other States Parties to the 1949 Geneva Conventions use universal jurisdiction, where available, to begin criminal investigations of grave breaches in their national courts.¹⁷ Finally, the report issued numerous recommendations to Israel and to Palestinian authorities and armed groups regarding adherence to IHL and human rights law, the release of Corporal Shalit, and the review of rules of engagement and other instructions to military and security forces, as well as several other related matters.¹⁸

¹⁵ Goldstone Report, para. 1764.

¹⁶ *Id* at, para. 1766.

¹⁷ *Id* at, para. 1772.

¹⁸ *Id* at, paras. 1769-1771.

The Mission's work and the report itself demonstrate many of the challenges fact-finding missions face. In particular, while alleged violations of "Geneva law" – the branch of IHL focused on protection of civilians – are perhaps more easily identifiable, much of the Mission's work involved alleged violations of "Hague law" – the branch of IHL focused on the conduct of hostilities. Many of the issues raised here highlight the significantly more complex nature of fact-finding in the area of Hague law. Beyond the recommendations and the fact-finding, however, the Goldstone Report offers a window into the implementation of IHL during complex asymmetrical warfare.¹⁹ For this reason, a careful analysis of how the report applies IHL to situations, incidents and persons during the conflict is critical.

2.3 *Applicable law*

The Goldstone Report briefly assesses the law applicable to the conflict in Gaza. Israel is a party to the four Geneva Conventions of 1949²⁰ but is not a party to the 1977 Additional Protocols.²¹ The report, referencing the Israeli Supreme Court's determination that the conflict with Hamas and other Palestinian armed groups is an international armed conflict,²² identifies the applicable law as the Geneva Conventions (particularly Geneva Convention IV), the Hague Convention IV of 1907 and its accompanying Regulations ("Hague Convention"), and the provisions of

¹⁹ Asymmetrical warfare is generally used to describe "a situation where an adversary can take advantage of its strengths or an opponent's weaknesses." R.W. Barnett, *Asymmetrical warfare: today's challenge to U.S. military power* (Washington, Brassey's 2003) p. 15. In "the modern context, asymmetrical warfare emphasizes what are popularly perceived as unconventional or non-traditional methodologies." C.J. Dunlap, Jr., "A virtuous warrior in a savage world," 8 *USAEA JLS* (1997) pp. 71 at 72.

²⁰ Israel ratified the Geneva Conventions on 6 July 1951. The four Geneva Conventions are: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 6 UST 3114, 75 UNTS 31 [hereinafter GC I or First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 6 UST 3217, 75 UNTS 85 [hereinafter GC II or Second Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, 6 UST 3316, 75 UNTS 135 [hereinafter GC III or Third Geneva Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 6 UST 3516, 75 UNTS 287 [hereinafter GC IV or Fourth Geneva Convention].

²¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3 [hereinafter AP I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609 [hereinafter AP II].

²² Goldstone Report, para. 282, citing to *Public Committee Against Torture v. Government of Israel*, HCJ 769/02 (11 December 2006).

Additional Protocol I that form part of customary law.²³ Additional Protocol I did not apply to the conflict as conventional law because neither Israel nor Hamas is a party, but many of its provisions are customary law that was binding in the conflict.²⁴ The Goldstone Report also recognizes that these same principles bind Hamas and other Palestinian armed groups.²⁵ Finally, the report references the Rome Statute and the definitions of crimes therein and recommends that the alleged violations potentially be submitted to the ICC for prosecution. Any questions regarding the nature of the conflict – whether it is international or non-international – are, while both debatable and relevant, beyond the scope of this article. Similarly, although the applicability of the Rome Statute to Hamas and other Palestinian armed groups is highly disputed and uncertain, such questions are also beyond the scope of this article. Therefore, this article will employ the framework set forth above regarding the applicable law and will use the elements of crimes in the Rome Statute as a guide, without any suggestion that the conflict is indeed an international armed conflict or that Hamas is subject to the Rome Statute. Finally, I note that the primary provisions of Additional Protocol I relied on in this article and in the corresponding sections of the Goldstone Report all form part of customary international law.²⁶

²³ Goldstone Report, paras. 271, 272, 285. The Israeli report on the Gaza operation takes a similar approach; see “The operation in Gaza, 27 December 2008-18 January 2009: factual and legal aspects” (July 2009), para. 30 (Israel “applies to its military operations in Gaza the rules of armed conflict governing both international and non-international armed conflicts”); para. 31 (“In particular, Israel’s High Court of Justice has confirmed that in the ongoing armed conflict with Palestinian terrorist organisations, including Hamas, Israel must adhere to the rules and principles in (a) the Fourth Geneva Convention, (b) the Regulations annexed to the Fourth Hague Convention [which reflect customary international law], and (c) the customary international law principles reflected in certain provisions of Additional Protocol I to the Geneva Conventions on 1949. Israel is not a Party to the Additional Protocol I, but accepts that some of its provisions accurately reflect customary international law.”) [footnotes omitted].

²⁴ Goldstone Report, para. 282, see also n. 26 *infra*.

²⁵ Goldstone Report, para. 304 (“As the Special Court for Sierra Leone held, it is well settled that all parties to an armed conflict, whether States or non-State actors, are bound by international humanitarian law, even though only States may become parties to international treaties,”) citing *Prosecutor v. Sam Hinga Norman*, case No. SCSL-2004-14-AR72(E), Decision on preliminary motion based on lack of jurisdiction (child recruitment) (31 May 2004), para. 22.

²⁶ AP I, Arts. 37(1), 48, 51, 52(2), 57, and 58 all form part of customary international law. See J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, 3 Vols. (Cambridge, CUP 2005) Rules 1, 2, 7, 8, 10-15, 17-24, 65; C. Greenwood, “The customary law status of the 1977 Protocols,” in *Essays on War in International Law* (London, Cameron May 2006); M.N. Schmitt, “Human shields in international humanitarian law,” 47 *Columbia JTL* (2009) pp. 292 at 308; Y. Dinstein, *The Conduct of Hostilities in International Armed Conflict*, (Cambridge, CUP 2004) p. 83, T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (New York, Oxford University Press 1989) pp. 64-65.

3. Distinction and Military Objectives: Applying the Law of Armed Conflict Amid the Complexities of new Warfare

One of the most fundamental issues during conflict is identifying who or what can be targeted.²⁷ Traditionally, one could distinguish between soldiers – who wore uniforms – and civilians – who typically did not venture near the battlefield – in most circumstances. Similarly, identifying military and civilian objects was usually feasible. Contemporary conflicts introduce a whole set of new challenges in this area, however, and Operation Cast Lead was no exception. Fighters dressed in civilian clothing and fighting from civilian areas introduce massive uncertainties that dramatically complicate the implementation of IHL.

This article does not suggest that militaries fighting against insurgents or other non-state entities (whether called terrorists, guerrillas, rebels, etc.) should be granted greater leeway in carrying out their obligations under IHL. One principal tenet of IHL is that parties' obligations are constant, regardless of the conduct, status, or obligations of the other side. Thus, the mere fact that Hamas and other Palestinian militants did not distinguish themselves from the civilian population did not absolve Israel of its obligation to distinguish between legitimate targets and innocent civilians.

3.1 The Principle of Distinction in Contemporary Conflicts

The principle of distinction, one of the “cardinal principles of IHL,”²⁸ requires that any party to a conflict distinguish between those who are fighting and those who are not and direct attacks solely at the former.²⁹ Similarly, parties must distinguish

²⁷ See Blank and Guiora, *supra* n. 4, for an in-depth discussion of how to identify and classify legitimate targets effectively for commanders and troops on the ground.

²⁸ *Legality of the Threat and Use of Nuclear Weapons in Armed Conflict*, Advisory Opinion, 8 July 1996, 1996 ICJ Rep., para. 78 (Dissenting Opinion of Judge Higgins, dissenting on unrelated grounds) (declaring that distinction and the prohibition on unnecessary suffering are the two cardinal principles of IHL) [hereinafter *Nuclear Weapons*].

²⁹ Distinction was first set forth in Article 22 of the Lieber Code: “Nevertheless, as civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit.” Francis Lieber, *War Department, Instructions for the Government of Armies of the United States in the Field Art. 22* (1863), at <<http://www.icrc.org/ihl.nsf/FULL/110?OpenDocument>> [hereinafter Lieber Code]. A few short years later, the international community reinforced the rule in the St. Petersburg Declaration, which stated that “the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy.” *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight*, preamble, 29 November (11 December), 1868, reprinted in 1 *AJIL Supp.* 95; see also Henkaerts and Doswald-Beck, *supra* n. 26, Rule 1.

between civilian objects and military objects and target only the latter. Article 48 of Additional Protocol I sets forth the basic rule:

*In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.*³⁰

Distinction lies at the core of IHL's seminal goal of protecting innocent civilians and persons who are *hors de combat*. The obligation to distinguish forms part of the customary international law of both international and non-international armed conflicts, as the International Criminal Tribunal for the former Yugoslavia (ICTY) held in the *Tadić* case.³¹ As a result, all parties to any conflict are obligated to distinguish between combatants, or fighters, and civilians, and concomitantly, to distinguish themselves from civilians and their own military objects from civilian objects.

The purpose of distinction – to protect civilians – is emphasized in Article 51 of Additional Protocol I, which states that “[t]he civilian population as such, as well as individual civilians, shall not be the object of attack.”³² Article 51 continues, stating:

*Indiscriminate attacks are prohibited. Indiscriminate attacks are: (a) those which are not directed at a specific military objective; (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.*³³

Furthermore, Article 85 of Protocol I declares that nearly all violations of distinction

³⁰ AP I, Art. 48, 8 June 1977, 1125 UNTS 3 [hereinafter AP I]. Article 48 is considered customary international law. See Henkaerts and Doswald-Beck, *supra* n. 26, Rule 1.

³¹ *Prosecutor v. Dusko Tadić*, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, para. 110, 127, citing U.N. General Assembly Resolution 2675: “Bearing in mind the need for measures to ensure the better protection of human rights in armed conflicts of all types, [... the General Assembly] Affirms the following basic principles for the protection of civilian populations in armed conflicts, without prejudice to their future elaboration within the framework of progressive development of the international law of armed conflict: ... 2. in the conduct of military operations during armed conflicts, a distinction must be made at all times between persons actively taking part in the hostilities and civilian populations.” See also Nuclear Weapons, *supra* n. 28, para. 79 (distinction is one of the “intransgressible principles of international customary law”); Henkaerts and Doswald-Beck, *supra* n. 26, Rule 1; *Abella v. Argentina* (La Tablada), Inter-American Commission on Human Rights, Report No. 55/97, Argentina, Doc. 38, 1997, para. 178.

³² AP I, Art. 51(2).

³³ AP I, Art. 51(4).

constitute grave breaches of the Protocol, including:

*(a) making the civilian population or individual civilians the object of attack; (b) launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2(a)(iii);... (d) making non-defended localities and demilitarized zones the object of attack; [and] (e) making a person the object of attack in the knowledge that he is hors de combat ...*³⁴

The Rome Statute similarly criminalizes attacks on civilians and indiscriminate attacks.³⁵

New warfare poses particular challenges for distinction precisely because of the lack of boundaries between conflict areas and civilian areas, and thus between those actively participating in hostilities and those who are not. Moreover, modern warfare is increasingly characterized by asymmetry in the military capabilities of the parties. As such asymmetry grows, the “disadvantaged party has an incentive to blur the distinction between its forces and the civilian population in the hope that this will deter the other side from attack.”³⁶ For example, during Operation Iraqi Freedom, Iraqi insurgents commonly wore civilian clothing when approaching American and British forces in order to get closer without seeming to present a threat.³⁷ Similarly, the Taliban in Afghanistan regularly “use a tactic of engaging coalition forces from positions that expose Afghan civilians to danger.”³⁸ Perhaps most nefariously, insurgent groups that employ suicide bombing as a tactic have now turned to the use

³⁴ AP I, Art. 85.

³⁵ See Rome Statute of the International Criminal Court, Arts. 8(2)(b)(i), 8(2)(b)(ii), 8(2)(b)(iv), 8(2)(b)(v), 8(2)(b)(vi), 8(2)(e)(i), 8(2)(e)(ii), 8(2)(e)(iv), U.N. Doc A/CONF.183/9 (July 17, 1998), at <<http://untreaty.un.org/cod/icc/statute/rome fra.htm>> [hereinafter Rome Statute].

³⁶ M.N. Schmitt, “The impact of high tech and low tech warfare on distinction,” Harvard Program on Humanitarian Policy and Conflict Research, International Humanitarian Law Research Initiative Briefing Paper (November 2003) p. 7, reprinted in R. Arnold and P.-A. Hildbrand, eds., *International Humanitarian Law and the 21st Century’s Conflicts: Changes and Challenges* (Lausanne, Editions Interuniversitaires Suisses 2005).

³⁷ *Id.* Similarly, Afghan militants often pose as women to escape from fire fights unseen. See “Official: Afghan militants fled dressed as women,” [6 July 2009] at <<http://www.cnn.com/2009/WORLD/asiapcf/07/06/afghanistan.marine.standoff/index.html>>.

³⁸ J. Garamone, “Directive re-emphasizes protecting Afghan civilians,” American Forces Press Service, [6 July 2009] at <www.defenselink.mil>.

of women and children, for they have proven more likely to evade measures designed to identify suicide bombers.³⁹

In any assessment of compliance with international humanitarian law, it is essential to understand the context in which it is applied, beyond the natural inclination to focus on the innocent civilian casualties and the civilian infrastructure that endures significant damage in the course of conflict that knows no differentiation between the traditional battlefield and populated urban areas. Of course, context does not excuse overt violations of the law nor does it alter the fundamental legal framework at issue. However, the circumstances to which the law is applied may well determine the nature of compliance. In no area of international humanitarian law is this more true than that of distinction. As will become apparent, both Hamas tactics and the urban environment in which most of the relevant military operations occurred dramatically influenced the application of the principle of distinction during Operation Cast Lead.

3.2 Identifying Military Objectives

Beyond the obligation to differentiate between innocent civilians and persons who are fighting (and therefore can be targeted), the principle of distinction requires comparable determinations regarding the targeting of objects. The obligation to target only military objectives is one means of implementing the age-old principle that the means and methods of warfare are not unlimited.⁴⁰ Operation Cast Lead, even more than other asymmetrical conflicts, demonstrated the complexities of determining when buildings and other objects constitute military objectives. According to many reports, Palestinian militants hid or stored rockets, missiles, and other munitions

³⁹ See e.g., “Pakistan: Taliban buying children for suicide attacks,” [7 July 2009] at <<http://edition.cnn.com/2009/WORLD/asiapcf/07/07/pakistan.child.bombers/index.html>> (explaining that “young suicide bombers may be able to reach targets unnoticed.”); C. Clifford, “The battle for suicide bombers,” children.foreignpolicyblogs.com/category/suicide-bombers/; “Child bombers-in-training arrested in Iraq,” [21 April 2009] at <www.UPI.com>; D. Abrams, “Turning a blind eye to child suicide bombers,” [26 March 2004], at <www.msnbc.msn.com/id/4601244>.

⁴⁰ The modern version of this principle appears in AP I, Art. 35; earlier formulations appear in the writings of Vitoria, Grotius, and Vattel, as well as in early codifications of the laws of war. See Franciscus de Vitoria, *De Indis Et De Ivre Belli Reflectiones*, J. Pawley Bate, transl. (New York, Oceana Publications 1964) (1557); Hugo Grotius, *The Law of War and Peace*, F.W. Kelsey, transl. (New York, Oceana Publications 1964) (1646); Emmerich de Vattel, *The Law of Nations or the Principles of Natural Law*, C.G. Fenwick, trans. (Washington, Carnegie Institute of Washington 1916) (1785); Lieber Code, Art. 16, St. Petersburg Declaration, *supra* n. 29; *Laws of War on Land* (1880 Oxford Manual) Art. 4, at the ICRC Treaty Database, <www.icrc.org/ihl>.

in mosques, hospitals, schools, and other civilian buildings.⁴¹ In any conflict, such conduct makes targeting decisions extraordinarily difficult given the obligations to minimize civilian casualties and operate within the framework of proportionality; in Gaza, the most densely populated piece of land on earth,⁴² the demands and dangers increase exponentially.

The very nature of Hamas and the political situation in Gaza make the question of how to identify military objectives a challenging one. As the IDF report on Operation Cast Lead explains,

*While Hamas operates ministries and is in charge of a variety of administrative and traditionally governmental functions in the Gaza Strip, it still remains a terrorist organisation. Many of the ostensibly civilian elements of its regime are in reality active components of its terrorist and military efforts. Indeed, Hamas does not separate its civilian and military activities in the manner in which a legitimate government might. Instead, Hamas uses apparatuses under its control, including quasi-governmental institutions, to promote its terrorist activity.*⁴³

Unlike previous counterterrorism operations against Hamas leaders and others involved in terrorist attacks against Israel,⁴⁴ Operation Cast Lead was essentially a war.⁴⁵ Israel therefore analysed and designated military targets within that framework, targeting Hamas ministries and other objects that appeared civilian in character. Criticisms of this approach have abounded; this article will not address them, except to recognize that the Israeli approach broadens the concept of military objective in potentially problematic ways. Rather, the analysis that follows examines the narrower issue of how the Goldstone Report applies IHL to the targeting of buildings in Gaza.

Article 52 of Additional Protocol I defines military objectives as:

...those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or

⁴¹ A.H. Cordesman, Center for Strategic & International Studies, *The "Gaza War": A Strategic Analysis* (2009) p. 24 (describing how Hamas used a mosque to store Grad missiles and Qassam rockets), <http://www.csis.org/media/csis/pubs/090202_gaza_war.pdf>; J. Fleishman, "Charges fly in battle over what happened in Gaza," *Los Angeles Times*, 23 January 2009, p. A1 (detailing how Hamas used a bunker beneath a hospital as a headquarters).

⁴² BBC News, Key Maps, at <http://news.bbc.co.uk/2/shared/spl/hi/middle_east/03/v3_israel_palestinians/maps/html/population_settlements.stm>.

⁴³ "The operation in Gaza: factual and legal aspects" (July 2009) para. 235.

⁴⁴ See *Public Committee Against Torture*, *supra* n. 22.

⁴⁵ See Guiora and Luban, *supra* n. 11 (suggesting that while Israel did not declare war in the traditional sense under international law – since neither Hamas nor Gaza is a state – it did declare war on an organization, leading to an operation fundamentally different from previous operational counterterrorism.).

*neutralization, in the circumstances ruling at the time, offers a definite military advantage.*⁴⁶

This definition sets forth nature, location, and use or purpose as the primary criteria. Nature refers to “all objects directly used by the armed forces: weapons, equipment, transports, fortifications, depots, buildings occupied by armed forces, staff headquarters, communications centres etc.”⁴⁷ Location is an important factor because certain objects, such as bridges, make a direct contribution to military action regardless of whether they have a military function. Finally, use and purpose refer respectively to an object’s present or intended function. The Commentary to the Additional Protocols (the “Commentary”) explains that many civilian objects are or become useful to the armed forces. “Thus, for example, a school or a hotel is a civilian object, but if ... used to accommodate troops or headquarters staff, [it will] become [a] military objective[.]”⁴⁸ Nonetheless, the Protocol emphasizes that all doubts as to the civilian or military nature of an object should be resolved in favor of civilian status.

Two key questions of targeting in Operation Cast Lead stand out: classification and targeting of Hamas ministry buildings, and Israeli attacks on hospitals and mosques. In both situations, the nature of Hamas as a terrorist organization governing a non-state entity and engaging in terrorism and insurgent warfare makes the application of IHL extremely complex.

3.2.1 Classification of Government Buildings

The IDF targeted a broad swath of government buildings and civilian political infrastructure in Gaza, including civilian ministries, the al-Saraya prison, and the Palestinian Legislative Council building. On first glance, these buildings are not self-evident military targets like barracks, tanks, or munitions factories, but could be legitimate targets if they meet the definition set forth in Article 52(2). The Goldstone Report rejects the argument that these targets could be military objectives by finding that they are not “war ministries,” do not have a dual civilian-military use, and did not make an effective contribution to military action.⁴⁹ It does so, however, with little, if any, analysis of the actual use of those buildings at the time of the conflict,

⁴⁶ AP I, Art. 52(2).

⁴⁷ Y. Sandoz, C. Swinarki and B. Zimmerman, eds., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva, ICRC, Dordrecht, Nijhoff 1987) para. 2020 (hereinafter Protocol Commentary).

⁴⁸ *Id* at, para. 2022.

⁴⁹ Goldstone Report, paras. 385-387.

simply stating that there is “no indication” or “an absence of evidence” of any military use.⁵⁰ In contrast, the Israeli position that all Hamas buildings were part of the terror infrastructure and therefore legitimate targets is a clear broadening of the category of military objectives and legitimate targets. Although the report’s concern about the risks of this approach is valid, its response is overly narrow.

For example, the report states that the only ministries on the two lists of military objectives commonly used – one by the International Committee of the Red Cross (ICRC) and one by Major General A.P.V. Rogers – are “war ministries.”⁵¹ In the case of Hamas, which has no “war ministry” but rather multiple armed entities engaged in operations against Israel, this distinction is too elementary. The Interior Ministry, for example, oversees “Hamas-controlled government forces in Gaza.”⁵² According to Article 52(2) and the ICRC’s list of military objectives, it meets the standard of a military objective because it makes an effective contribution to military action and its neutralization or destruction would offer a direct military advantage for Israel by eliminating or curtailing the ability of those forces to engage in combat. Moreover, the ICRC list specifically mentions “other organs for the direction and administration of military objectives” as legitimate military objectives.⁵³ Given the nature of Hamas’ infrastructure, a number of its buildings qualify.⁵⁴ The Goldstone Report’s analysis inadequately assesses the significance of this infrastructure during the Gaza conflict in evaluating whether the targets were military objectives.

Based on this cursory appraisal, the report then asserts that attacks on the buildings were deliberate attacks against civilian objects. IHL uses a reasonableness standard based on the circumstances at the time to assess targeting determinations. In *Prosecutor v. Galić*, the ICTY stated that a civilian object “shall not be attacked when it is not reasonable to believe, in the circumstances of the person contemplating the attack, including the information available to the latter, that the object is being used to make an effective contribution to military action.”⁵⁵ The status of a building thus cannot be determined solely from hindsight or in the absence of relevant intelligence

⁵⁰ *Id* at, paras. 386-387.

⁵¹ *Id* at, para. 385, citing to Office of the Prosecutor, International Criminal Tribunal for the former Yugoslavia, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (13 June 2000) para. 49, reprinted in (2000) 39 ILM 1257 [hereinafter NATO Bombing Report].

⁵² Nidal al-Mughrabi, “Israel flattens Hamas ministry in Gaza Strip,” Reuters, 18 January 2008.

⁵³ NATO Bombing Report, *supra* n. 51, para. 39.

⁵⁴ M. Levitt, *Hamas: Politics, Charity, & Terrorism in the Service of Jihad* (New Haven, Yale Univ. Press 2006).

⁵⁵ *Prosecutor v. Stanislav Galić*, case No. IT-98-29-T, Judgment, § 51 (5 December 2003).

information about the actual, rather than perceived, use of the building. Instead, as with proportionality determinations, discussed *infra*, assessments of the military or civilian nature of a target must be based on the information reasonably available to the commander or military planner at the time of the attack. For example, during Operation Iraqi Freedom, the U.S. attacked, among other buildings, the Baath Party Headquarters, which appears, at first blush, to be a civilian object. Yet Iraqi forces were firing at the U.S. troops from within and near the building, and a weapons cache was subsequently found inside the facility.⁵⁶ As this example illustrates, those examining whether there has been a deliberate attack on civilians or civilian objects must:

*reconstruct the assessment carried out by the military regarding the military necessity of destroying the target. This requires knowledge of the tactical and strategic goals of the belligerents at that time as the determination of what is militarily necessary may be relative to the goals of the warring party concerned – which may change during the conflict ...*⁵⁷

The failure to address intent and military use of civilian objects in the Goldstone Report – indeed to even raise serious questions regarding the possible military use of certain buildings – risks undoing the balance IHL draws between military necessity and humanitarian concerns in the classification of military objectives.

In addition, as discussed in greater detail below, both the ICTY and the Rome Statute require a *mens rea* of wilfulness or intentionality to satisfy the elements of deliberate attack⁵⁸ – yet the Goldstone Report’s analysis of military objectives appears to disregard this requirement. The report seems to assume that Israel had concluded that all Hamas buildings were by nature military. However, even assuming, solely for the sake of analysis, that such a conclusion was incorrect, the approach would not evidence a violation of the prohibition on directly attacking civilian objects unless it was also, in the attendant circumstances, unreasonable. If the IDF reasonably believed, based on the information it had at the time, that individual buildings in question met the definition of military objective, then the intent element of the crime of deliberate attacks on civilian objects would not have been met. With no information from the

⁵⁶ M.N. Schmitt, “Conduct of hostilities during Operation Iraqi Freedom: an international humanitarian law assessment,” 6 *YIHL* (2003) pp. 73-110, citing U.S. CENTCOM News Release No. 03- 03-105, “U.S. Marines destroy Ba’ath Party Headquarters,” 31 March 2003.

⁵⁷ C. Wuerzner, “Mission impossible? Bringing charges for the crime of attacking civilians or civilian objects before international criminal tribunals,” 90 *IRRC* (December 2008) pp. 907 at 917.

⁵⁸ *Prosecutor v. Tihomir Blaškić*, case No. IT-95-14-A, Appeals Judgment, 29 July 2004, para. 180; K. Dormann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (Cambridge, CUP 2005) p. 152 (“the civilian character of the object must or should have been known to the perpetrator and, similar to the *mens rea* of the crime of attacking civilians, the attack must have been willfully directed at civilian objects.”). See also *Prosecutor v. Dario Kordić and Mario Čerkez*, case No. IT-95-14/2-A, Judgment, para. 53 (17 December 2004).

IDF about how they reached their determinations and on what evidence they based their classifications, the report pays insufficient regard to the issue of intent.

3.2.2 Attacks on Protected Objects

The second shortcoming in the Goldstone Report regarding targeting in the context of military objectives involves its analysis of Israeli attacks on hospitals and mosques. Numerous allegations arose of Hamas using hospitals, schools, mosques, residential houses, and other civilian objects for the storage of weapons, firing of rockets, and other military purposes.⁵⁹ Conflicts in Afghanistan, Iraq, and Lebanon, among others, also involved similar use of protected objects by insurgents and other fighters.⁶⁰ Normally protected under international law, these buildings lose their immunity from attack if used for military purposes. For example, Article 18 of the Fourth Geneva Convention sets forth the obligation to refrain from attacking – and to protect – civilian hospitals.⁶¹ Article 19 then states that “the protection to which civilian hospitals are entitled shall not cease unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy.”⁶² Launching rockets from or storing munitions in a hospital clearly qualify. Similarly, Hague Convention IV recognizes limits on the protection of cultural and religious buildings:

In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic

⁵⁹ See Cordesman, *supra* n. 41, pp. 43-47, 49, 51-52, 54-55 (describing how Hamas uses mosques, houses, and cemeteries for military operations and to store weapons).

⁶⁰ See D. Filkins, “The conflict in Iraq: with the eight Marines; in taking Falluja mosque, victory by the inch,” *New York Times*, 10 November 2004]; C. Gall, “Americans face rising threat from Taliban,” *Int’l. Herald Tribune*, 15 July 2008; J. Rabkin, “The fantasy world of international law: the criticism of Israel has been disproportionate,” *Weekly Standard*, 21 August 2006; Department of Defense Final Report to Congress, Conduct of the Persian Gulf War (1992), at <<http://www.nduedu/library/epubs/cpgw.pdf>> [hereinafter Gulf War Final Report]; Letter Dated 5 March 1991 From the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, S/22341, 8 March 1991, p. 3 (explaining that the Iraqis “moved significant amounts of military weapons and equipment into civilian areas with the deliberate purpose of using innocent civilians and their homes as shields against attacks on legitimate military targets”; and “Iraqi fighter and bomber aircraft were dispersed into villages near military airfields where they were parked between civilian houses and even placed immediately adjacent to important archaeological sites and historic treasures.”).

⁶¹ GC IV, Art. 18 (“Civilian hospitals organized to give care to the wounded and sick, the infirm and maternity cases, may in no circumstances be the object of attack but shall at all times be respected and protected by the Parties to the conflict.”).

⁶² *Id* at, Art. 19. See also Protocol Commentary, para. 1948 (“purely civilian objects may in combat conditions become military objectives.”).

*monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.*⁶³

During Operation Iraqi Freedom, human rights organizations condemned the Iraqi practice of using hospitals and mosques for military uses. Emphasizing that such use was illegal under IHL, Human Rights Watch's report "Off Target" explains that the "protection ceases [when] medical establishments are used to commit acts harmful to the enemy. By using hospitals as military headquarters, Iraqi forces turned them into military objectives."⁶⁴ The military manuals of many countries provide further explanation as well. "For example, if enemy soldiers use a school building as shelter from attack by direct fire, then they are clearly gaining a military advantage from the school. This means the school becomes a military objective and can be attacked."⁶⁵

In assessing the Israeli shelling of the UNRWA school, the Goldstone Report does consider that Palestinian armed groups were firing at Israeli forces from near the school in determining whether the school, or at least the area near the school, was a legitimate target. In other cases, however, the Goldstone Report fails to mention that use of otherwise civilian objects for military purposes causes such objects to lose their immunity from attack. For example, the only comments the report makes about the use of mosques to store weapons or as a location from which to launch attacks refer to the obligation of Palestinian armed groups to refrain from conducting attacks from civilian buildings. It further states that "it could not exclude that Palestinian armed groups engaged in combat activities in the vicinity of hospitals and other protected sites," nor could it exclude that they may have used "mosques for military purposes or to shield military activities."⁶⁶ Given that it claims a lack of the necessary information, it may well be understandable that the report did not reach definitive conclusions regarding violations of those obligations. However, the failure to state the law regarding the loss of protected status for civilian objects precisely when it is

⁶³ Hague IV, Art. 30. See also *Prosecutor v. Pavle Strugar*, case No. IT-01-42-T, Judgment, 31 January 2005, para. 310 (stating that "the protection accorded to cultural property is lost where such property is used for military purposes.").

⁶⁴ Human Rights Watch, "Off Target: The conduct of the war and civilian casualties in Iraq" (2003), p. 73, at <www.hrw.org/reports/2003/usa1203>.

⁶⁵ Australia, Defence Force Manual, (1994) § 530, cited in Henkaerts and Doswald-Beck, *supra* n. 26, at p. 236. See also Canada LOAC Manual, p. 4-5, § 37, cited in *Id* at, at p. 237 ("where a civilian object is used for military purposes, it loses its protection as a civilian object and may become a legitimate target"); Netherlands, Military Manual (1993), p. V-3, *Id* at, at p. 238 (civilian buildings can become military objectives if, for example, they house combatants or are used as commando posts); United States, Air Force Pamphlet (1976), § 5-3(b) (2) ("the inherent nature of the object is not controlling since even a traditionally civilian object, such as a civilian house, can be a military objective when it is occupied and used by military forces during an armed engagement").

⁶⁶ Goldstone Report, para. 495.

relevant is a regrettable oversight. The report thus presents an incomplete assessment of the zone of combat and the full panoply of relevant legal obligations.

3.3 *Perfidy*

One additional issue that arises frequently in contemporary conflicts – but is noticeably absent in the Goldstone Report – is perfidy. Given the nature of Hamas’ tactics and the combat involved in Operation Cast Lead, this omission is unfortunate.

The traditional definition of perfidy is “[t]o kill or wound treacherously individuals belonging to the hostile nation or army,”⁶⁷ as set forth in Article 23(b) of the 1907 Hague Convention. Suicide bombers disguising themselves as civilians to gain closer access to military checkpoints or other locations are a prime example of killing “treacherously.” Article 37(1) of Additional Protocol I offers a more comprehensive formulation, forbidding killing, capturing or injuring the enemy “by resort to perfidy.”⁶⁸ Examples of perfidy in Article 37(1) include feigning truce or surrender, feigning civilian status, or feigning protected status by using emblems of the United Nations or neutral states.⁶⁹ In particular, the Protocol states that “[a]cts inviting the confidence of an adversary to lead him to believe that he is entitled to, or **is obliged to accord**, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy”⁷⁰ (emphasis added). As the Commentary explains, “[t]he central element of the definition of perfidy is the deliberate claim to legal protection for hostile purposes. The enemy attacks under cover of the protection accorded by humanitarian law...”⁷¹ Unquestionably, the prohibition against perfidy, based on notions of honor, forms part of customary international law.⁷²

⁶⁷ Hague IV, Art. 23(b). The prohibition on killing treacherously goes back to the Lieber Code, which states that military necessity “admits of deception, but disclaims acts of perfidy.” Lieber Code, Art. 16.

⁶⁸ AP I, Art. 37(1).

⁶⁹ *Id.* at, Art. 37(1)(a) – (d).

⁷⁰ *Id.*

⁷¹ Protocol Commentary, para. 1500, further explaining that the “definition is based on three elements: inviting the confidence of an adversary, the intent to betray that confidence (subjective element) and to betray it on a specific point, the existence of the protection afforded by international law applicable in armed conflict (objective element).”

⁷² Dinstein, *supra* n. 26, p. 199, M.N. Schmitt, “Asymmetrical warfare and international humanitarian law,” 62 *Air Force LR* (2008) pp. 1 at 22-23, citing to NWP 1-14M, para. 12.7; U.S. Army Judge Advocate General’s School, *Law of War Handbook 192* (2005); and L. Doswald-Beck, ed., *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (Cambridge, CUP 1995), Rule 111. See also, Henkaerts and Doswald-Beck, eds., *supra* n. 26, Rule 65.

Thus, when fighters intentionally disguise themselves as civilians in order to lead soldiers on the opposing side to believe they need not take defensive action to guard against attack, they commit perfidy. The indirect consequence of such actions is that civilians are placed at greater risk, since soldiers previously attacked by fighters disguised as civilians may be more likely to view those who appear to be civilians as dangerous and respond accordingly.

During Operation Cast Lead, Palestinian armed groups generally operated in civilian clothes and from civilian areas, enabling them to take advantage of the protections IHL affords civilians. Not once in discussing the activities of these armed groups, however, does the Goldstone Report mention the word perfidy.⁷³ What the report does do is indicate that Palestinian armed groups fired rockets and mortars from urban areas and cites a January 2009 interview with three Palestinian militants in which they stated that “rockets and mortars were launched in close proximity to homes and alleyways in the hope that nearby civilians would deter Israel from responding.”⁷⁴ Similarly, the report recognizes that members of Palestinian armed groups did not wear uniforms. Instead, after the start of military operations, “members of al-Qassam Brigades abandoned military dress and patrolled streets in civilian clothes.”⁷⁵ These acts appear to constitute human shielding, itself a violation of IHL,⁷⁶ and addressed briefly in Section 4.3 *infra*. The Goldstone Report analyzes these actions and accompanying behaviours solely in that context.

What the report fails to mention, however, is that the Palestinian militants were not just shielding the mortars from attack, but were attacking – firing mortars and rockets – while in civilian dress and while feigning civilian status, the fundamental element of perfidy.⁷⁷ A reading of Article 37(1) demonstrates that, if accounts of militants wearing civilian dress in order to launch attacks while benefitting from the protection of apparent civilian status are credible, the militants involved would

⁷³ The word “perfidy” appears three times in the Goldstone Report, all in para. 1102, addressing the alleged practice of Israeli troops urging militants to exit a building because the ICRC was present.

⁷⁴ Goldstone Report, paras. 450-451.

⁷⁵ *Id* at, para. 478.

⁷⁶ AP I, Art. 51(7) (“The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.”).

⁷⁷ See e.g., “Legal Aspects of Suicide Attacks in Iraq” in *Monitoring International Humanitarian Law in Iraq*, International Humanitarian Law Research Initiative, at <<http://www.ihlresearch.org/iraq/pdfs/briefing3446.pdf>> (“However, the fact that the attackers in recent suicide operations have posed as civilians and therefore concealed their combatant status constitutes an act of perfidy prohibited under IHL.”).

likely be guilty of perfidy. “A combatant who takes part in an attack, or in a military operation preparatory to an attack, can use camouflage and make himself virtually invisible against a natural or man-made background, but he may not feign civilian status and hide amongst a crowd.”⁷⁸ Although wearing civilian clothes while firing mortars and rockets is not in and of itself a violation of IHL, doing so in order to deceive the opposing party as to one’s status would be perfidy.

Given the nature of the combat during Operation Cast Lead, it is certainly conceivable that Hamas and other Palestinian militants wore civilian clothes for the purpose of deceiving the IDF as to their status and with the aim of conducting attacks. The Goldstone Report unfortunately does not include any factual information regarding a possible intent to deceive through the use of civilian clothes. The failure to examine this question and to address the apparent practice of militants attacking while disguised as civilians is regrettable because it suggests that the Mission did not adequately explore what appears to have been the use of perfidious – and therefore unlawful – tactics.

4. Errors and Missteps in Applying the Law

Beyond any doubt, the human toll among Palestinians and Israelis from the conflict in Gaza was high and the damage to infrastructure, housing, and civilian life widespread. Although one of IHL’s fundamental goals is the protection of civilians and civilian objects, it also recognizes and accounts for civilian deaths and injuries. The mere fact of harm to civilians does not mean that an attacker has violated the law. However, the Goldstone Report seems to adopt a framework in which civilian deaths and the destruction of civilian property necessarily connote violations of the law.

4.1 Proportionality in the Conduct of Hostilities

The principle of proportionality requires that parties refrain from attacks in which the expected civilian casualties will be excessive in relation to the anticipated military advantage gained. This principle balances military necessity and humanity, and is based on the confluence of two key ideas. First, the means and methods of attacking the enemy are not unlimited. Rather, the only legitimate object of war is to weaken the military forces of the enemy. Second, the legal proscription on targeting civilians does not extend to a complete prohibition on all civilian deaths. The law has always tolerated “the incidence of some civilian casualties... as a consequence of military

⁷⁸ Protocol Commentary, *supra* n. 47, para. 1507.

action,”⁷⁹ although “even a legitimate target may not be attacked if the collateral civilian casualties would be disproportionate to the specific military gain from the attack.”⁸⁰ That is, the law requires that military commanders and decision makers assess the advantage to be gained from an attack and assess it in light of the likely civilian casualties.

This principle stems from St. Thomas Aquinas’ “doctrine of double effect,” which explains that it is morally permissible to perform an act having both a good effect and an evil effect, as long as the intended good effect outweighs the evil effect, which is simply foreseen rather than intended.⁸¹ In essence, “double effect is a way of reconciling the absolute prohibition against attacking non-combatants with the legitimate conduct of military activity.”⁸² Even before codification in the various Hague and Geneva Conventions, and the modern formulation of proportionality in Additional Protocol I, the laws of war incorporated these notions.⁸³ Additional Protocol I contains three separate statements of the principle of proportionality. The first appears in Article 51, which sets forth the basic parameters of the obligation to protect civilians and the civilian population, and prohibits any “attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”⁸⁴ This language demonstrates that Additional Protocol I contemplates incidental civilian casualties, and appears

⁷⁹ J. Gardham, “Necessity and proportionality in *jus ad bellum* and *jus in bello*,” in L. Boisson de Chazournes and P. Sands, eds., *International Law, The International Court of Justice and Nuclear Weapons* (Cambridge, CUP 1999) pp. 283-284.

⁸⁰ *Nuclear Weapons*, *supra* n. 28, p. 936 (Dissenting Opinion of Judge Higgins).

⁸¹ *Summa Theologica* (II-II, Qu. 64, Art.7).

⁸² M. Bagaric and J. Morss, “In search of coherent jurisprudence for international criminal law: correlating universal human responsibilities with universal human rights,” *29 Suffolk Transnational Law Review* (2006) pp. 157 at 174-175.

⁸³ For example, the Lieber Code includes the following concepts: “[m]ilitary necessity...consists in the necessity of those measures which are indispensable for securing the ends of the war”; “[m]ilitary necessity admits of all direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of the war”; and “the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit.” Lieber Code, Arts. 14, 15, 22. Although the Lieber Code does not include a specific statement of the principle of proportionality, we can see the early underpinnings of it in these three statements.

⁸⁴ API Art. 51(5)(b).

again in Articles 57(2)(a)(iii)⁸⁵ and 57(2)(b),⁸⁶ which refer specifically to precautions in attack.

The Rome Statute also incorporates the principle of proportionality in criminalizing war crimes. Article 8(2)(b)(iv) forbids:

*Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.*⁸⁷

Both formulations emphasize that proportionality is not a mathematical concept, but rather a guideline to help ensure that military commanders weigh the consequences of a particular attack and refrain from launching attacks that will cause excessive civilian deaths. The principle of proportionality is well-accepted as an element of customary international law applicable in all armed conflicts.⁸⁸

The Goldstone Report relies on the statement of proportionality in Additional Protocol I and acknowledges that “not all deaths constitute violations of international humanitarian law.”⁸⁹ However, it then qualifies that statement by explaining that “under certain strict conditions, actions resulting in the loss of civilian life may not be unlawful.”⁹⁰ This formulation is significantly narrower than the standard in Additional Protocol I. The report also misconstrues the appropriate test, substituting a criterion of “acceptable loss of civilian life”⁹¹ for the actual test of “excessiveness” in

⁸⁵ AP I, Art. 57(2)(a)(iii) (“With respect to attacks, the following precautions shall be taken: (a) those who plan or decide upon an attack shall: . . . (iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”).

⁸⁶ AP I, Art. 57(2)(b) (“[A]n attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”).

⁸⁷ Rome Statute, Art. 8(2)(b)(iv).

⁸⁸ *Nuclear Weapons*, *supra* n. 28, para. 587; Henkaerts and Doswald-Beck, *supra* n. 26, Rule 14; M.N. Schmitt, “Fault lines in the law of attack,” in S. Breau and A. Jachec-Neale, eds., *Testing the Boundaries of International Humanitarian Law* (London, British Institute of International and Comparative Law 2006) pp. 277 at 292; Y. Dinstein, “The laws of air, missile and nuclear warfare,” 27 *Israel YB HR* (1997) pp. 1 at 7, citing C. Greenwood, “Customary international law and the first Geneva Protocol of 1977 in the Gulf conflict,” in P. Rowe, ed., *The Gulf War 1990-91 in International and English Law* (London, Sweet & Maxwell 1993) pp. 63 at 77.

⁸⁹ Goldstone Report, para. 1683.

⁹⁰ *Id.*

⁹¹ *Id.* at para. 701.

Additional Protocol I and the Rome Statute. The law does not require commanders to determine some measure of “acceptable” civilian casualties, but rather demands only that they refrain from any attack that they expect would cause excessive civilian casualties relative to the military gain. In contrast, the Goldstone Report arguably starts from the erroneous premise that the very existence of civilian deaths creates prima facie evidence of a disproportionate attack and therefore a presumption of an IHL violation.⁹² Precisely because this presumption does not exist in IHL, “no tribunal to date has ever explicitly determined in a well articulated manner that disproportionate damage was caused when assessing an incident in which the disproportionate impact of the attack was not blatant or conspicuous.”⁹³

When weighed against common interpretations of proportionality in international and domestic jurisprudence and state practice, and given the absence of any further interpretation, the report’s approach is unduly restrictive. As the ICTY stated, an attacking party should be guided by the “basic obligation to spare civilians and civilian objects as much as possible”⁹⁴ when considering whether to launch an attack, understanding that civilian deaths are inevitable and unavoidable in conflict. In fact,

*[w]ithin both the Just War Tradition and the law of war, it has always been permissible to attack combatants even though some non-combatants may be injured or killed; so long as injury to non-combatants is ancillary (indirect and unintentional) to the attack of an otherwise lawful target, the principle of noncombatant immunity is met.*⁹⁵

⁹² Schmitt, *supra* n. 56; Schmitt, *supra* n. 88, p. 293. See also J. Holland, “Military objective and collateral damage: their relationship and dynamics,” 7 *YIHL* (2004) pp. 35 at 47 (“Clearly, one cannot always attribute every civilian death after an attack to the attacker ... One cannot assess incidental civilian losses for which the attacker is responsible by simply conducting a body count. Such an oversimplification is as superficial as assessing the quality of a hospital by only counting the bodies in its morgue.”); W.J. Fenrick, “The prosecution of unlawful attack cases before the ICTY,” 7 *YIHL* (2004) pp. 153 at 175 (“The actual results of the attack may assist in inferring the intent of the attacker as he or she launched the attack but what counts is what was in the mind of the decision maker when the attack was launched.”).

⁹³ Fenrick, *supra* n. 92, at p. 177. See also A.P.V. Rogers, *Law on the Battlefield* (Manchester, Manchester University Press 1996) p. 67 (“any tribunal dealing with the matter would have to look at the situation as the soldier making the decision saw it before assessing his guilt.”); A.P.V. Rogers, “Conduct of combat and risks run by the civilian population,” *Military Law and Law of War Review* (1982) p. 311.

⁹⁴ Galić, *supra* n. 55, para. 58.

⁹⁵ W. Hays Parks, “Air war and the law of war,” 32 *Air Force LR* (1990) pp. 1 at 4.

Numerous military manuals confirm this interpretation of IHL and the principle of proportionality.⁹⁶

Thus, “[a]lthough the legal process requires a line to be drawn in order to provide clarity for those required to make [these] difficult decisions, there must remain a broad scope for the interpretation of significantly different concepts.”⁹⁷ In contrast, the Goldstone Report’s approach to proportionality draws a line too far to one side, undoing the delicate balance IHL strikes between military necessity and protection of civilians.

4.1.1 Applying Proportionality in Practice: Military Advantage

Applying proportionality requires that we compare two dissimilar factors: civilian harm and military advantage. Although it may seem straightforward to declare that militaries should never attack when the loss of innocent life will outweigh any military benefit from the attack, in practice the application of the principle is rarely clear-cut. As one commentator glibly explained, military commanders are not issued a “proportionometer” to help them make such calculations.⁹⁸ Comparing the destruction of a munitions factory – or, in Gaza, a storage facility for rockets – to the number of civilian deaths or serious injuries is difficult, perhaps impossible.

No less, although the common terminology of proportionality is one of “balance” or “weighing,” the actual test requires that we examine “excessiveness,” as stressed in Additional Protocol I. Therefore, we cannot use that “proportionometer” to determine precisely when one additional civilian death will “tip the scale” and make an otherwise lawful attack disproportionate. The Rome Statute’s use of the term “clearly excessive” emphasizes again that proportionality is not a question of numbers or math. Instead, “focusing on excessiveness avoids the legal fiction that collateral damage, incidental injury, and military advantage can be precisely measured.”⁹⁹

⁹⁶ Australia Defence Force Manual (1994), § 535, cited in Henkaerts and Doswald-Beck, *supra* n. 26, p. 299 (“collateral damage may be the result of military attacks. This fact is recognized by [the law of armed conflict] and, accordingly, it is not unlawful to cause such injury and damage.”); U.S. Naval Handbook, § 8.1.2.1 (“it is not unlawful to cause incidental injury to civilians or collateral damage to civilian objects, during an attack upon a legitimate military objective.”); Canada, LOAC Manual, pp. 4-2 and 4-3, §§ 17 and 18, cited in Henkaerts and Doswald-Beck, *supra* n. 26 at 300 (“the fact that an attack on a legitimate target may cause civilian casualties or damage to civilian object does not necessarily make the attack unlawful under the [law of armed conflict].”).

⁹⁷ K.W. Watkin, “Assessing proportionality: moral complexity and legal rules,” 7 *YIHL* (2004) pp. 3 at 50.

⁹⁸ See Holland, *supra* n. 92, p. 48.

⁹⁹ Schmitt, *supra* n. 88, p. 293.

Rather than proceeding blindly with the assumption that numbers of civilian deaths and quantifications of damage to civilian objects or infrastructure are the dominant factor, therefore, it is important to understand the concept of military advantage. Both Article 51(5)(b) of Additional Protocol I and Article 8(2)(b)(iv) of the Rome Statute speak of a “concrete and direct” military advantage. The Commentary states that the phrase “concrete and direct” was intended to show that “advantages which are hardly perceptible and those which would only appear in the long term should be disregarded.”¹⁰⁰ Although this explanation reinforces the need for a strong connection between the military operation at issue and its advantage or goals, state practice also demonstrates that “concrete and direct” must not be interpreted too narrowly. Thus, in ratifying Additional Protocol I in 1998, the United Kingdom stated that the “military advantage anticipated from an attack is intended to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack.”¹⁰¹ The Canadian Manual on the Law of Armed Conflict offers a similar explanation of military advantage and, like numerous others, emphasizes that “military advantage may include a variety of considerations including the security of the attacking forces.”¹⁰²

Although the Goldstone Report refers to military advantage often in applying the proportionality test to various incidents during the conflict in Gaza, it offers neither a useful examination of the nature of military advantage nor a discussion of the considerations involved in assessing whether a military advantage is “concrete and direct.” The report’s brief attempt at explicating military advantage references the analysis in the Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (hereinafter NATO bombing report), but does not set forth any standard by which the Mission would then assess military advantage. The report first poses the questions

¹⁰⁰ Protocol Commentary, para. 1980.

¹⁰¹ United Kingdom, Statement Made on Ratification of Additional Protocol I (28 January 1998) reprinted in A. Roberts and R. Guelff, eds., *Documents on the Laws of War*, 3rd edn. (Oxford, OUP 2000) p. 511. Numerous other states expressed the same interpretation, including Belgium, Canada, the Federal Republic of Germany, the Netherlands, Italy, Spain, and the United States. See H.S. Levie, *Protection of War Victims: Protocol I to the 1949 Geneva Convention* (Dobbs Ferry NY, Oceana 1980). See also M. Bothe et al., *New Rules for Victims of Armed Conflicts* (The Hague, Martinus Nijhoff 1982) p. 311 (“It would obviously be impossible to apply this balancing requirement to each individual act of violence which takes place during the course of a battle.”).

¹⁰² Canada, LOAC Manual, p. 4-3, §§ 20 and 21, cited in Henkaerts and Doswald-Beck, *supra* n. 26, p. 328 (stating that “the military advantage at the time of the attack is that advantage anticipated from the military campaign or operation of which the attack is part, considered as a whole, and not only from isolated or particular parts of that campaign or operation. A concrete and direct military advantage exists if the commander has an honest and reasonable expectation that the attack will make a relevant contribution to the success of the overall operation.”). States also viewing the security of the attacking forces as a proper consideration in assessing military advantage also include the United States and Australia, for example. See Henkaerts and Doswald-Beck, *supra* n. 26, p. 329.

from the NATO bombing report, now recognized as constituting factors relevant in a proportionality analysis:

- (a) *What are the relative values to be assigned to the military advantage gained and the injury to non-combatants and or the damage to civilian objects?*
- (b) *What do you include or exclude in totaling your sums?*
- (c) *What is the standard of measurement in time or space? and*
- (d) *To what extent is a military commander obligated to expose his own forces to danger in order to limit civilian casualties or damage to civilian objects?*¹⁰³

After acknowledging that “these views are helpful to inform the present discussion,”¹⁰⁴ the Goldstone Report offers but one hint at its restrictive understanding of military advantage. It appears in the analysis of Israeli shelling of al-Fakhura Street in response to mortars fired by Hamas operatives somewhere near a UNRWA elementary school.¹⁰⁵ To determine whether the attack constituted an indiscriminate attack within the meaning of Article 51 of Additional Protocol I, the report examines “the issue of proportionality in relation to the military advantage to be gained.”¹⁰⁶ It states that “the military advantage to be gained was to stop the alleged firing of mortars that posed a risk to the lives of Israeli armed forces.”¹⁰⁷ Stopping mortar fire endangering one’s own troops offers a clear military advantage. After all, no military force can engage in any military operations if the law does not permit it to take defensive action.

The report fails to consider, however, that stopping the firing of mortars offers additional military advantages, such as the pursuit of the overall objective of eliminating the ability of Hamas and other Palestinian armed groups to launch attacks on civilians in Israel. Indeed, “the term military advantage, should be interpreted in this context – as an advantage that will help a commander reach the goal of submission of the enemy at the earliest possible moment with the least possible expenditure of men and resources.”¹⁰⁸ Israel sought to end rocket attacks on Israel both by destroying weapons caches, smuggling tunnels, and other attack infrastructure and by eliminating the

¹⁰³ NATO Bombing Report, *supra* n. 51, para. 49.

¹⁰⁴ Goldstone Report, para. 694.

¹⁰⁵ Goldstone Report, Section X, explaining that it was likely, but unconfirmed, from the information gathered that Hamas launched a mortar attack from somewhere in the vicinity of the elementary school, and that Israel responded with shelling that landed on busy al-Fakhura Street, killing at least 24 people and injuring as many as 40.

¹⁰⁶ *Id* at, para. 691.

¹⁰⁷ *Id* at, para. 694(a).

¹⁰⁸ N. Neuman, “Applying the rule of proportionality: force protection and cumulative assessment in international law and morality,” 7 *YIHL* (2004) pp. 79 at 91.

ability of Hamas to carry out such attacks. Stopping the firing of mortars near the school would thus be part of the overall strategic goal of ending the attacks, a clear military advantage. In this particular case, the military advantage of simply stopping the mortar attacks to protect Israeli forces is sufficiently concrete and direct to satisfy the standard. But the broader military advantages are equally concrete and direct, and therefore also valid. The Goldstone Report's restrictive interpretation of military advantage here suggests that its analysis will be excessively narrow in other circumstances.

The approach to military advantage suffers from a more serious shortcoming. The simple fact that stopping the mortar attacks constituted a military advantage should have been sufficient for the Mission to then consider whether any expected civilian losses from the attack were excessive. However, the Mission instead stated that "the calculation of the military advantage has to be assessed bearing in mind the chances of success in killing the targets as against the risk of firing into a street full of civilians."¹⁰⁹ The proportionality analysis considers anticipated military advantage (stopping the mortar attacks) on one side and expected civilian losses on the other side. Once military advantage is identified and determined to be appropriately concrete and direct within the ordinary meaning of the law, one then considers whether the military commander expected the attack to cause excessive civilian losses relative to that military advantage. Although it may simply be imprecise writing, the Goldstone Report appears to conflate these separate considerations into the determination of military advantage by requiring that military advantage include both the chances of success and the risk of hitting civilians. Nowhere in the Additional Protocol or in the Commentary does the law suggest that military advantage includes an assessment of the risk to civilians. Doing so would simply turn the identification of military advantage into the proportionality analysis itself, thereby undoing the careful balance that the principle of proportionality seeks between military necessity – the need to pursue effective military action – and considerations of humanity – the overarching obligation to take "constant care...to spare the civilian population, civilians and civilian objects."¹¹⁰

4.1.2 Proportionality: A Prospective Approach

Understanding the correct perspective is critical to analyzing proportionality in any given situation. The very language of Additional Protocol I, referring to "anticipated" military advantage and "expected" civilian casualties, demonstrates that

¹⁰⁹ Goldstone Report, para. 694(b).

¹¹⁰ AP I, Art. 57(1).

proportionality cannot be viewed in hindsight. Rather, we must approach the balance between military advantage and civilian casualties on the basis of the information available and the circumstances at the time of the military operation in question. “Such decisions cannot be judged on the basis of information which has subsequently come to light.”¹¹¹ Combat, even a minor fire fight, involves confusion and uncertainty – the “fog of war.” Viewing proportionality in hindsight ignores these considerations. A retrospective approach also falls prey to the challenge of comparing the impact of civilian deaths to military advantage gained or lost. The former are dramatic and emotional and “lend themselves to powerful pictures and strong reactions.”¹¹² Military advantage, in contrast, is abstract, has little or no emotional impact and is difficult to convey in pictures. It will often prove difficult to fairly assess whether collateral damage is excessive in practice because the military advantage from an attack may not be immediately apparent to an observer. The retrospective approach can therefore lead to departures from the accepted application of the principle of proportionality.

For this reason, numerous countries issued statements upon ratifying Additional Protocol I to emphasize that “the only information on which [proportionality determinations] can possibly be taken is such relevant information as is then available and that it has been feasible from him to obtain for that purpose.”¹¹³ Military manuals

¹¹¹ Canada, Reservations and Statements of Understanding made upon Ratification of Additional Protocol I, 20 November 1990, § 7, cited in Henkaerts and Doswald-Beck, *supra* n. 26, p. 332.

¹¹² Holland, *supra* n. 92, p. 47.

¹¹³ Belgium, Interpretative declarations made upon ratification of Additional Protocol I, 20 May 1986, §3, cited in, Henkaerts and Doswald-Beck, *supra* n. 26, p. 332. For additional statements, see *Id* at, pp. 332-333, citing to: Algeria, Interpretative declarations made upon accession to Additional Protocol I, 16 August 1989, § 2 (“To judge any decision, the circumstances, the means and the information available at the time the decision was made are determinant factors and elements in assessing the nature of the said decision.”); Austria, Reservations made upon ratification of Additional Protocol I, 13 August 1982, § 1 (Article 57(2) of Additional Protocol I “will be applied on the understanding that, with respect to any decision taken by a military commander, the information actually available at the time of the decision is determinative.”); Egypt, Declaration upon ratification of Additional Protocol I, 9 October 1992 (“Military commanders planning or executing attacks make their decisions on the basis of their assessment of all kinds of information available to them at the time of the military operations.”); Ireland, Declarations and reservations made upon ratification of AP I, 19 May 1999, § 9 (“military commanders and others responsible for planning, deciding upon, or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is reasonably available to them at the relevant time.”); Germany, Declarations made upon ratification of Additional Protocol I, 14 February 1991, § 4 (“the decision taken by the person responsible has to be judged on the basis of all information available to him at the relevant time, and not on the basis of hindsight.”); Italy, Declarations made upon ratification of AP I, 27 February 1986, § 5; Netherlands, Declarations made upon ratification of AP I, 26 June 1987, § 6; New Zealand, Declarations made upon ratification of AP I, 8 February 1988, §2; Spain, Interpretative declarations made upon ratification of AP I, 21 April 1989, §5 (“the decision made by military commanders, or others with the legal capacity to plan or execute attacks which may have repercussions on civilians or civilian objects or similar objects, shall not necessarily be based on anything more than the relevant information available at the relevant time and which it has been possible to obtain to that effect.”).

provide the same guidance to commanders regarding how to assess the lawfulness of a potential attack, recognizing that:

*It will not always be easy for a commander to evaluate [whether an attack will be disproportionate] with precision. On the one hand, he must take into account the elements which are available to him, related to the military necessity necessary to justify an attack, and on the other hand, he must take into account the elements which are available to him, related to the possible loss of human life and damage to civilian objects.*¹¹⁴

In addition, these decisions must also take into account “the urgent and difficult circumstances under which such decisions must usually be made”¹¹⁵ – the fog of war.

This prospective analysis depends, at its heart, on what is commonly referred to as “the reasonable commander.” With its analogy in domestic criminal law’s notion of the “reasonable person,” the reasonable commander is “the reasonable man in the law of war ... and is based upon the experience of military men in dealing with basic military problems.”¹¹⁶ Merely adding up the resulting civilian casualties and injuries and assessing the actual value gained from a military operation may be the simpler approach because “the results of an attack are often tangible and measurable, whereas expectations are not.”¹¹⁷ However, it does not do justice to the complexities inherent in combat; instead, the proportionality of any attack must be viewed from the perspective of the military commander on the ground, taking into account the information he or she had at the time. As Clausewitz wrote, “[t]he great uncertainty of all data in war is a peculiar difficulty, because all action must, to a certain extent, be planned in a mere twilight, which in addition not infrequently – like the effect of a fog or moonshine – gives to things exaggerated dimensions and unnatural

¹¹⁴ Belgium, Law of War Manual (1983), p. 29, cited in Henkaerts and Doswald-Beck, *supra* n. 26, p. 334. See also *UK Ministry of Defence Manual of the Law of Armed Conflict* (2004) 2.4.2 (“the responsibility of the officer ... would be assessed in light of the facts as he believed them to be, on the information reasonably available to him from all sources.”).

¹¹⁵ Canada, LOAC Manual (1999), pp. 4-2, 4-3. See e.g., The Canadian Law of Armed Conflict Resources/[dgd/da/Pubs/CF%20Joint%20Doctrines%20Publications/CF%20Joint%20Doctrines%20-%20B-GJ-005-104%20FP-021%20-%20LOAC%20-%20EN%20\(13%20Aug%2001\).pdf](http://dgd/da/Pubs/CF%20Joint%20Doctrines%20Publications/CF%20Joint%20Doctrines%20-%20B-GJ-005-104%20FP-021%20-%20LOAC%20-%20EN%20(13%20Aug%2001).pdf) (explaining that “consideration must be paid to the honest judgement of responsible commanders, based on the information reasonably available to them at the relevant time, taking fully into account the urgent and difficult circumstances under which such judgements are usually made” and emphasizing that any analysis of the proportionality test must be based on “what a reasonable person would do” in the circumstances) at the Operational and Tactical Level, § 5, § 27 (1992), at <<http://www.cfd-cdf.forces.gc.ca/websites/>>.

¹¹⁶ W.V. O’Brien, “The conduct of just and limited war,” in J.E. White, ed., *Contemporary Moral Problems: War, Terrorism, and Torture* (Belmont CA, Wadsworth 2009) pp. 21 at 28.

¹¹⁷ Schmitt, *supra* n. 88, p. 294.

appearance.”¹¹⁸ Furthermore, as the Committee investigating the NATO bombing of Yugoslavia concluded:

*It is unlikely that a human rights lawyer and an experienced combat commander would assign the same relative values to military advantage and to injury to non-combatants, nor would military commanders with different doctrinal backgrounds and differing degrees of combat experience or national military histories ... always agree in close cases.*¹¹⁹

Although few international tribunals and domestic courts have tackled questions of proportionality in depth, those that have done so have hewed carefully to the reasonable commander approach. In *Prosecutor v. Galić*, for example, the ICTY declared that:

*In determining whether an attack was proportionate it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack.*¹²⁰

This approach dates back to the post-World War II trials, when the Nuremberg Tribunal acquitted General Lothar Rendulic of the crime of wanton destruction of property. Notwithstanding the extraordinary destruction Norway suffered at General Rendulic’s hands as he embarked on his “scorched-earth” retreat in the face of the approaching Russian army, the tribunal found that his actions were not criminal because they were based on his judgement in the circumstances. In a clear statement of the nature of the proportionality analysis, the tribunal stated:

We are not called upon to determine whether urgent military necessity for the devastation and destruction in the province of Finnmark actually existed. We are concerned with the question whether the defendant at the time of its occurrence acted within the limits of honest judgment on the basis of the conditions prevailing at the time. The course of a military operation by the enemy is loaded with uncertainties, such as the numerical strength of the enemy, the quality of his equipment, his fighting spirit, the efficiency and daring of his commanders, and the uncertainty of his intentions ... It is our considered opinion that the conditions, as they appeared to the defendant at the time were sufficient upon which he could honestly conclude

¹¹⁸ C. von Clausewitz, *On War*, M. Howard and P. Paret, transl. (Princeton, Princeton University Press 1976) Book 2, Chapter 2, para. 24.

¹¹⁹ NATO Bombing Report, *supra* n. 51, para. 50. See also W.J. Fenrick, “Justice in cataclysm criminal trials in the wake of mass violence: attacking the enemy civilian as a punishable offense,” 7 *Duke JCIL* (1997) pp. 539 at 546.

¹²⁰ *Galić*, *supra* n. 55, at § 58.

*that urgent military necessity warranted the decision made. This being true, the defendant may have erred in the exercise of his judgment but he was guilty of no criminal act.*¹²¹

The NATO bombing report also took a prospective approach to proportionality determinations, examining each incident under consideration by looking at the facts at the time of the attack rather than the facts that were known at the time of the investigation.¹²²

Domestic courts have adopted the same approach. In October 2009, the Spanish National Court confirmed its order dismissing a complaint against two U.S. servicemen for the death of José Couso, a Spanish journalist killed in the crossfire during a firefight in Iraq in 2003. The U.S. soldiers fired on the Palestine Hotel, where many journalists resided while on assignment, believing that there was a sniper on the roof shooting at them. Finding that it could not determine whether the sniper actually existed, the Spanish court held that in the absence of any evidence that the soldiers acted unreasonably, and given the tensions and confusion inherent in a hostile environment, it could not hold them criminally accountable for Couso's death.¹²³ Similarly, in reviewing the actions of the IDF, the Israeli Supreme Court has repeatedly stated that its role is to ensure that a military commander's decision falls within the "zone of reasonableness."¹²⁴

The bombing of the Al Firdus Bunker during the 1991 Gulf War offers a useful example of how the evaluation of proportionality works, both at the time of the attack and at the time of the post-hoc consideration. Coalition forces identified the bunker as an Iraqi command shelter and therefore a legitimate military objective. Camouflaged and surrounded by barbed wire, the bunker was guarded by armed sentries. In the early morning of February 13, 1991, Coalition forces bombed the bunker, unknowingly killing hundreds of Iraqi civilians who were using the bunker as a night-time shelter. An evaluation of the attack demonstrated that U.S. military planners and decision-makers had no knowledge that civilians were using the bunker as a shelter and therefore, "no reasonable commander could have foreseen

¹²¹ XI Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, 1230, 1296-7 (1950) (hereinafter *Hostage Judgment*).

¹²² NATO Bombing Report, *supra* n. 51, paras. 63-70, 86-89.

¹²³ Seccion 3a de la Sala de lo Penal de la Audiencia Nacional, 23 October 2009; Victoria Burnett, "Spain: court drops charges on GIs in killing," *New York Times*, 15 July 2009, p. A9; "3 U.S. soldiers cleared in slaying," *Los Angeles Times*, 15 July 2009, p. A20.

¹²⁴ HCJ 7015/02 *Ajuri v. IDF Commander*, at 375. See also HCJ 1005/89 *Aga v. Commander of the IDF Forces in the Gaza Strip Area*, at 539.

the disproportionate civilian casualties that occurred.”¹²⁵ Rather than the actual number of civilian casualties, investigators focused on the expected loss of civilian life, the appropriate legal test, and concluded that “in the absence of any knowledge of the civilian use of the bunker, the military commander did not violate the rule of proportionality.”¹²⁶

The fact-finding mission in Gaza gathered significant amounts of factual information on the ground – after the fact. The lack of Israeli cooperation admittedly made the Mission’s task significantly more difficult, because investigations of potential IHL violations require “some knowledge of the intelligence available to the attacker and the operational circumstances in which the attack took place as seen by the attacker,” which can be “very difficult without the cooperation of the attacker.”¹²⁷ Such difficulties, however, are not cause for disregarding the fundamental premise that proportionality is based on the notion of the reasonable commander making a good faith, honest and competent decision.¹²⁸ After all, as the ICTY explained in *Galić*, neither the actual damage caused nor the actual military advantage gained is dispositive; the key lies in the terms “expected” and “anticipated.”¹²⁹

Notwithstanding the report’s insistence that it “is not attempting to second-guess

¹²⁵ C.B. Puckett, “In this era of smart weapons, is a state under an international legal obligation to use precision-guided technology in armed conflict?,” 18 *Emory ILR* (2004) pp. 645, 670-671 citing to *Int’l and Operational Law Dep’t*, The Judge Advocate General’s School, U.S. Army, Operational Law Cases and Materials 9-8 (45th Graduate Course 1996). See also T.L.H. McCormack and P.B. Mtharu, “Cluster munitions, proportionality and the foreseeability of civilian damage,” in O. Engdahl and P. Wrangé, eds., *Law at War: The Law as it Was and the Law as it Should Be* (Leiden, Nijhoff 2008) p. 197 (“U.S. authorities determined that there had been no violation of international humanitarian law because the information available at the time had allowed the military commander to make a reasonable assessment that the target was a legitimate military objective and that the expected loss of civilian life and/or damage to civilian property was not disproportionate to the expected military advantage.”).

¹²⁶ McCormack and Mtharu, *supra* n. 125, p. 197. Indeed, had Coalition planners known of the presence of civilians in the bunker, they likely would not have launched the attack; see T. Keane, “Collateral Damage in the Gulf War: Experience and Lessons,” at <http://www.hks.harvard.edu/cchrp/Use%20of%20Force/June%202002/Keane_Final.pdf>.

¹²⁷ *Report of an Expert Meeting Which Assessed Procedural Criticisms Made of the U.N. Fact-Finding Mission on the Gaza Conflict (The Goldstone Report)*, Chatham House (November 2009) p. 6. [Reprinted in this volume 89–98.]

¹²⁸ Dinstein, *supra* n. 88, p. 8, Protocol Commentary, *supra* n. 47, para. 1978; Middle East Watch, *Needless Deaths in the Gulf War: Civilian Casualties During the Campaign and Violations of the Laws of War* (1991).

¹²⁹ *Galić*, *supra* n. 55, fn. 109. See also Lieutenant Colonel E.T. Jensen, “Targeting of Persons and Property,” in G.S. Corn, *The War on Terror and the Laws of War: A Military Perspective* (New York, Oxford Univ. Press 2009) p. 60 (“The commander is not required to be able to predict the future. Nor is he required to search out every possible misapplication of force that could occur from his targeting strategy, only those that may be expected. The standard is the reasonableness of the commander’s decision, and the reasonableness of the commander’s decision is determined in light of the anticipated results, not the actual results.”).

with hindsight the decisions of commanders,¹³⁰ it repeatedly finds that particular Israeli attacks were disproportionate¹³¹ on the basis of “the information before it.”¹³² Such conclusions seem to shift the burden to an attacker, such that attackers must now adduce evidence that their attacks were in compliance with the law. It is unclear whether the Mission would have reached the same conclusions if it had access to the information available to the commanders on the ground. That said, the lack of such information cannot justify drawing legal conclusions in its absence.

The report’s analysis of the Israeli attacks on the Palestinian police stations in the opening hours of the conflict illustrates both the challenges of a proportionality analysis and the way in which the report misconstrues proportionality. In analyzing the attacks on the police stations, which indeed raise complex questions, the report explains that the presence of members of Palestinian armed groups among the policemen at the time of the attacks could have made them lawful.¹³³ Indeed, Israel specifically stated that it viewed the policemen as combatants because of their involvement with Hamas, the Executive Force, and other Palestinian armed groups.¹³⁴ In response, the report accepts that “there may be individual members of the Gaza police that were at the same time members of al-Qassam Brigades or other Palestinian armed groups and thus combatants.”¹³⁵ However, it then concludes that “the deliberate killing of 99 members of the police” constituted an attack that:

*failed to strike an acceptable balance between the direct military advantage anticipated (i.e., the killing of those policemen who may have been members of Palestinian armed groups) and the loss of civilian life (i.e. the other policemen killed and members of the public who would inevitably have been present or in the vicinity).*¹³⁶

The flaw in this analysis is that the report fails to address the issue of the number of civilian casualties the Israeli commanders and decision makers expected – either among the policemen or in the broader civilian population. In other words, the report reaches a legal conclusion that the attack was disproportionate without evidence of

¹³⁰ Goldstone Report, para. 588.

¹³¹ See e.g., Goldstone Report, paras. 584-593, 701.

¹³² *Id* at, paras. 624, 625, 809, 836.

¹³³ Goldstone Report, para. 433. The question of which policemen were combatants is, of course, one of distinction and reinforces the grave challenges modern conflicts pose as we try to sort out who is a combatant – or fighter – and who is a civilian.

¹³⁴ Goldstone Report, para. 406; “The operation in Gaza,” paras. 238-248.

¹³⁵ Goldstone Report, para. 434.

¹³⁶ *Id* at, para. 435.

the key component of the proportionality equation. Furthermore, from the Israeli perspective, the anticipated military advantage of eliminating a significant number of combatants (based on the information available to them at the time) would be considerable. By focusing its analysis on the simple number of policemen killed without taking full cognizance of the anticipated military advantage, the number of policemen qualified as combatants, or the expected civilian casualties, the Goldstone Report once again deviates from accepted understandings of the principle of proportionality.

4.2 Two Proportionalities: *Jus In Bello* and *Jus Ad Bellum*

A common source of confusion – and one present in the Goldstone Report – derives from the use of the term proportionality in the law governing the resort to force. International law applicable to armed conflict includes two main bodies of law: *jus in bello* and *jus ad bellum*. *Jus in bello* is the law governing the conduct of hostilities and the protection of persons in times of conflict and is synonymous with IHL or the law of armed conflict. *Jus ad bellum* is the law governing the resort to force; that is, when a state may use force within the constraints of the United Nations Charter framework and traditional legal principles.¹³⁷ Modern *jus ad bellum* has its origins in the 1919 Covenant of the League of Nations, the 1928 Kellogg-Briand Pact, and the United Nations Charter.¹³⁸

Proportionality plays an important role in both legal regimes. As discussed in the previous section, the principle of proportionality in *jus in bello* balances military necessity and humanity by prohibiting attacks in which the expected civilian casualties would be excessive in relation to the anticipated military advantage gained. In *jus ad bellum*, proportionality limits the power to use force in response to an armed attack, assessing whether a state's military operation exceeded what was necessary to defend the state. Unlike *jus in bello* proportionality, *jus ad bellum* proportionality is unconcerned with the extent of civilian casualties. The two forms of proportionality are therefore separate and distinct, and serve different purposes in international law. The Goldstone Report conflates the two and weaves them together, allowing one to inappropriately impact its conclusions regarding the other. This section will first detail international law's continued separation between *jus in bello* and *jus ad bellum*. It will then explain the concept of *jus ad bellum* proportionality and how it differs from *jus in bello* proportionality before analyzing how the Goldstone Report confuses the two.

¹³⁷ The United Nations Charter prohibits the use of force, Art. 2(4), with two exceptions: the right to self-defense, Art. 51, and the multilateral use of force authorized by the Security Council under Art. 43.

¹³⁸ M. Shaw, *International Law*, 4th edn. (Cambridge, CUP 1997) pp. 807-808.

4.2.1 *The Importance of Distinguishing Jus In Bello from Jus Ad Bellum*

International law has long recognized a firm distinction between *jus in bello* and *jus ad bellum*. The modern incarnation of this distinction appears in common Article 2 to the Geneva Conventions and in the preamble to Additional Protocol I, which reaffirms that the “provisions of the Geneva Conventions [and] this Protocol must be fully applied in all circumstances... without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict.”¹³⁹

Dating back several centuries, the distinction appears in the writings of Hugo Grotius, Francisco de Vitoria, and Emmerick de Vattel. All three emphasized that certain restraints in war must apply equally to all combatants, that “whatever is permitted to the one in virtue of the state of war, is also permitted to the other.”¹⁴⁰ With the rise of the nation-state in the eighteenth and nineteenth centuries, the cause of war diminished in importance, with war characterized as a neutral situation. “This view of violence as a process to be regulated in and of itself is what set the stage for the development of the modern laws of war, by severing their “historical dependence on the *jus ad bellum*.”¹⁴¹ As Meron writes, “[i]n contrast to medieval law, most modern rules of warfare (e.g., on requisitioning property and the treatment of prisoners of war and civilians, that is *jus in bello*) apply equally to a state fighting a war of aggression and to one involved in lawful self-defense.”¹⁴²

IHL’s effectiveness depends in many ways on the separation of *jus in bello* and *jus ad bellum*. If the cause at arms influenced a state’s obligation to abide by the laws regulating the means and methods of warfare and requiring protection of civilians and persons *hors de combat*, states would justify all departures from *jus in bello* with reference to the purported justness of their cause. The result: an invitation to

¹³⁹ API, preamble. Common Article 2 to the Geneva Conventions states that the conventions apply in “all cases of war.” Similarly, in a 1963 resolution, the Institut de Droit International declared that the rules restraining conduct in war must be equally applied to all belligerents. Institut de Droit International, Resolution, “Equality of Application of the Rules of the Law of War to Parties to an Armed Conflict,” 50 (II) AIDI 376 (Bruxelles, 1963).

¹⁴⁰ E. de Vattel, *Le droit des gens* (posthumous edition, 1773 [1758]), cited in Roberts, *supra* n. 101, p. 938. See also 3 Hugo Grotius, *The Rights of War and Peace*, Richard Tuck, ed., (Indianapolis IN, Liberty Fund 2005) pp. 1420-1421.

¹⁴¹ J. Moussa, “Can *jus ad bellum* override *jus in bello*? Reaffirming the separation of the two bodies of law,” 90 *IRRC* (December 2008) pp. 963 at 966, citing J. Gardam, “Proportionality and force in international law,” 87 *AJIL* (1993) pp. 391 at 396.

¹⁴² T. Meron, “Shakespeare’s Henry the Fifth and the law of war,” 86 *AJIL* (1992) pp. 1 at 12.

unrestricted warfare. International law instead applies both *jus ad bellum* and *jus in bello* to all situations of armed conflict. *Jus ad bellum* governs the resort to force and examines the necessity and proportionality of the force used in response to an “armed attack” as that term is understood in the customary law of self-defense and Article 51 of the United Nations Charter. *Jus in bello* applies to the conduct of hostilities and the protection of persons. Violation of the former constitutes the crime of aggression; a violation of the latter, depending on the seriousness of the violation, is a war crime.

International jurisprudence consistently reinforces this separation. Most recently, the Appeals Chamber of the Special Court for Sierra Leone held that the separation between *jus in bello* and *jus ad bellum* is fundamental to the implementation of humanitarian law. In *Prosecutor v. Fofana and Kondewa*, the Trial Chamber convicted two leaders of the Civil Defence Forces, a militia fighting to restore the legitimate government, of mutilation, amputation, hacking civilians to death, and other brutal crimes.¹⁴³ At sentencing, the Trial Chamber reduced their sentences on the grounds that, although they committed grievous atrocities, they fought for “a cause that is palpably just and defensible.”¹⁴⁴ In essence, the Trial Chamber conflated *jus in bello* and *jus ad bellum*, explicitly accepting that those who fight in a just war bear lesser obligations under the law of armed conflict. On appeal, the Appeals Chamber rejected this approach, finding that it violated the “basic distinction and historical separation between *jus ad bellum* and *jus in bello*,... a bedrock principle” of IHL.¹⁴⁵ In particular, the court emphasized that “[a]llowing mitigation for a convicted person’s political motives, even where they are considered... meritorious... provides implicit legitimacy to conduct that unequivocally violates the law – the precise conduct this Special Court was established to punish.”¹⁴⁶

The ICTY has placed equal weight on the distinction between the two bodies of law, lamenting that “[t]he unfortunate legacy of wars shows that until today many perpetrators believe that violations of binding international norms can be lawfully committed, because they are fighting for a ‘just cause.’”¹⁴⁷ In response, the Tribunal declared emphatically that “[t]hose people have to understand that international law is applicable to everybody, in particular during times of war.”¹⁴⁸ Similarly, the

¹⁴³ *Prosecutor v. Fofana & Kondewa*, case No. SCSL-04-14-T, Sentencing Judgement (9 October 2007), §46.

¹⁴⁴ *Id* at, §§ 86-88.

¹⁴⁵ *Prosecutor v. Fofana & Kondewa*, case No. SCSL-04-14-A, Judgement, §§ 529-30 (28 May 2008).

¹⁴⁶ *Id* at, § 534.

¹⁴⁷ *Kordić and Čerkez*, *supra* n. 58, para. 1082.

¹⁴⁸ *Id* at See also *Abella v. Argentina*, *supra* n. 29, paras. 173-174 (“application of the law is not conditioned by the causes of the conflict.”).

committee investigating the NATO bombing in Yugoslavia rejected attempts to argue that because NATO did not act in self-defense or under Security Council authority, all actions taken during the bombing campaign were illegal. After examining past precedent, the committee concluded that its task was to “deliberately refrain[] from assessing *jus ad bellum* issues ... and focus exclusively on whether or not individuals have committed serious violations of international humanitarian law as assessed within the confines of the *jus in bello*.”¹⁴⁹

The trials of Nazi leaders in the aftermath of World War II offered a prime opportunity to address the relationship between *jus in bello* and *jus ad bellum*. Although the Nuremberg Tribunal convicted several Nazi leaders for the crime of waging aggressive war, the Tribunal was careful to separate crimes under *jus ad bellum* from crimes under *jus in bello*. In doing so, it refused to accept the Prosecution’s argument that Germany, as the aggressor, was not entitled to invoke rights and protections under IHL.¹⁵⁰ For example, in the Justice Trial, the Tribunal declared:

*If we should adopt the view that by reason of the fact that the war was a criminal war of aggression every act which would have been legal in a defensive war was illegal in this one, we would be forced to the conclusion that every soldier who marched under orders into occupied territory or who fought in the homeland was a criminal and a murderer.*¹⁵¹

In the Hostages Trial, German leaders faced prosecution for crimes committed during the occupation of and campaigns in Greece and Yugoslavia. Rejecting the argument that the illegal use of force prevented Germany from invoking the law of belligerent occupation, the Tribunal emphasized that “whatever may be the cause of a war that has broken out, and whether or not the cause be a so-called just cause, the same rules of international law are valid as to what must not be done, may be done, and must be done by the belligerents themselves in making war against each other.”¹⁵²

4.2.2 Proportionalities Conflated: Undermining IHL’s Protections

Notwithstanding international law’s firm prescription against combining *jus in bello*

¹⁴⁹ NATO Bombing Report, *supra* n. 51, para. 34.

¹⁵⁰ Moussa, *supra* n. 141, p. 985.

¹⁵¹ *USA v. Alstotter et al.*, Law Reports of Trials of War Criminals, Vol. VI, United Nations War Crimes Commission, London, 1947-9, p. 52.

¹⁵² *USA v. William List et al.*, (case No. 7), Trials of War Criminals before the Nuremberg Military Tribunals, Vol. XI, 1950, pp. 1247-1248, citing Oppenheim’s *International Law*, II Lauterpacht, p. 174.

and *jus ad bellum*, the Goldstone Report does just that. Specifically, it confuses *jus in bello* proportionality with the *jus ad bellum* requirement of a proportionate response. Most past attempts to conflate the two bodies of law involved imposing *jus ad bellum* on the *jus in bello* in one of two ways: 1) arguing that an unjust war, or war of aggression, makes all acts illegal; or 2) arguing that a just war excuses acts that would otherwise be violations of IHL. The Goldstone Report takes a different, but equally troubling tack. The report uses conclusions about attacks purportedly violating the *jus in bello* principle of proportionality to conclude that Israel's overall use of force was a disproportionate response under *jus ad bellum*.¹⁵³

Under *jus ad bellum*, a state can use force in self-defense in response to an armed attack as long as the force used is necessary and proportionate to the goal of repelling the attack or ending the grievance.¹⁵⁴ Thus, the law focuses on whether the defensive act is appropriate in relation to the ends sought. The requirement of proportionality in *jus ad bellum* measures the extent of the use of force against the overall military goals, such as fending off an attack or subordinating the enemy. To this end, "acts done in self-defense must not exceed in manner or aim the necessity provoking them."¹⁵⁵ The classic formulation of the parameters of self-defense stems from the Caroline Incident. British troops crossed the Niagara River to the American side and attacked the steamer *Caroline*, which had been running arms and materiel to insurgents on the Canadian side. The British justified the attack, which killed one American and set fire to the *Caroline*, on the grounds that their troops had acted in self-defense. In a letter to his British counterpart Lord Ashburton, U.S. Secretary of State Daniel Webster declared that the use of force in self-defense should be limited to "cases in which the necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation."¹⁵⁶ Furthermore, the force used must not be "unreasonable or excessive; since the act, justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it."¹⁵⁷ Over the past sixty years, the International Court of Justice has embraced this same formulation.¹⁵⁸

¹⁵³ Goldstone Report, paras. 1023, 1683, 1690.

¹⁵⁴ *Nuclear Weapons*, *supra* n. 28, para. 41; Case Concerning Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*), Merits, ICJ Rep. 1986; Arbitral Award of 19 December 2005, "*Ethiopia v. Eritrea, jus ad bellum*, Ethiopia's claim 1-8," at <www.pca-cpa.org>.

¹⁵⁵ O. Schachter, "In defense of international rules on the use of force," 53 *Univ. Chicago LR* (1986) pp. 113 at 132.

¹⁵⁶ Letter from Daniel Webster, U.S. Secretary of State, to Lord Ashburton, Special British Minister (6 August 1842) reprinted in 2 J. Moore, *Digest of Int'l Law* § 217 at 409 (1906).

¹⁵⁷ *Id.*

¹⁵⁸ See e.g., *Nicaragua v. U.S.*, *supra* n. 154; *Oil Platforms (Iran v. U.S.)*, 2003 ICJ 161 (6 November); *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 ICJ 116 (19 December).

Israel responded in self-defense to an eight-year campaign of rocket attacks from Gaza that terrorized the civilian population of southern Israel. As the Goldstone Report documents, between April 2001 and December 2008, Palestinian armed groups launched more than 8,000 rockets and mortars into southern Israel from Gaza, including over 500 in November and December 2008.¹⁵⁹ Operation Cast Lead's primary purpose was to destroy the rocket launchers and the tunnels used to smuggle the rockets and launchers into Gaza from Egypt. *Jus ad bellum* provides the appropriate framework for analyzing the lawfulness of Israel's response, based on the requirements of necessity and proportionality. Whether Israel's use of force met those requirements may be debatable, but the Goldstone Report departs from the accepted *jus ad bellum* proportionality analysis.

Instead of examining the scale and nature of the Israeli military response in relation to that which would be reasonably necessary to defend itself against the rocket attacks, the report focuses on the civilian casualties as the benchmark, even though civilian casualties play no role in *jus ad bellum* proportionality determinations. After concluding – using an unduly narrow standard and a retrospective approach, as explained above – that many of Israel's attacks on particular targets violated the *jus in bello* principle of proportionality, the Goldstone Report uses this assessment to reach conclusions regarding the lawfulness of Israel's overall response under *jus ad bellum*. In particular, the report concludes that Operation Cast Lead therefore was a deliberately disproportionate attack designed to punish, humiliate and terrorize a civilian population, radically diminish its local economic capacity both to work and to provide for itself, and to force upon it an ever increasing sense of dependency and vulnerability.¹⁶⁰ This sweeping conclusion, based on only several incidents in which the Goldstone Report found civilian casualties excessive in relation to the military advantage gained, harkens back to the arguments made – and rejected soundly – at Nuremberg about the criminality of specific German acts based on the German war of aggression. Although, as explained above, past conflation has generally involved using *jus ad bellum* violations to excuse *jus in bello* violations, the report's use of purported *jus in bello* violations to find an overall *jus ad bellum* violation is equally problematic.

Past precedent and the work of numerous scholars condemn this approach. Indeed, “a finding that an attack or series of attacks did not meet the proportionality test under *jus in bello* should have no bearing on whether the conflict is a legitimate

¹⁵⁹ Goldstone Report, para. 1630, citing statistics from Report of the Intelligence and Terrorism Information Center at the Israel Intelligence Heritage & Commemoration Center (IICC), “Summary of rocket fire and mortar shelling in 2008,” at <http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/pdf/ipc_e007.pdf>; Goldstone Report, para. 1634.

¹⁶⁰ Goldstone Report, para. 1690.

exercise of self-defense.”¹⁶¹ An attack that fails to meet the standard set forth in Articles 51 and 57 of Additional Protocol I – that is, one where the expected civilian casualties are excessive in relation to the anticipated military advantage gained – can be committed within the context of a lawful resort to force under *jus ad bellum*. Just the same, the military forces of an aggressor state may well comport themselves entirely in accordance with their obligations under humanitarian law, the *jus in bello*. Distinguishing between victim and aggressor or between just and unjust causes in applying the law of armed conflict will “[lead] to a complete disintegration of the *jus in bello*,”¹⁶² regardless of whether one uses *jus ad bellum* to justify or condemn *jus in bello* actions or the reverse. By conflating and confusing *jus in bello* proportionality with *jus ad bellum* proportionality, the Goldstone Report opens the door for future victims to indict their aggressors solely on the basis of *jus ad bellum* violations, for those assured of their “just cause” to excuse unlawful behaviour as justified, and for parties to claim that *jus in bello* violations render unlawful an otherwise legitimate operation in self-defense.

4.3 Precautions and Measures to Protect Civilians

In pursuit of the goal of protecting civilians and those *hors de combat* from unnecessary suffering in war, IHL imposes obligations to take “constant care”¹⁶³ during military operations to protect the civilian population. Thus, in addition to the rules governing legitimate targets of attack and methods of warfare, the law mandates that parties take certain precautionary measures to protect civilians.

The Goldstone Report addresses precautions taken by both Israel and Palestinian armed groups, with a significantly greater factual and legal emphasis on the former. In so doing, the Mission interprets the law in ways that pose grave consequences for future conflicts. First, the report applies an unduly strict standard for the obligation to issue advance warning of attacks. Second, the report’s minimalist standards for the obligations of defending parties to offer protections for their own civilians would, if followed, leave civilian populations even more vulnerable to the dangers of modern warfare.

¹⁶¹ Moussa, *supra* n. 141, p. 977.

¹⁶² Y. Dinstein, *War Aggression and Self-Defense* (Cambridge, CUP 2005) p. 156.

¹⁶³ AP I, Art. 57(1).

4.3.1 *Precautions in Attack: Effective Advance Warning*

Article 57 of Additional Protocol I sets forth precautions that attacking parties must take. First, parties must refrain from launching attacks that violate the principle of proportionality, as detailed above. Parties also must do everything feasible to ensure that targets are military objectives, and must choose the means and methods of attack with the aim of minimizing incidental civilian losses and damage. When choosing between two possible attacks offering similar military advantage, parties must choose the objective that offers the least likely harm to civilians and civilian objects. Finally, Article 57(2)(c) mandates that “effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.”¹⁶⁴ With particular relevance to the conflict in Gaza, the Commentary emphasizes that these precautions “will be of greatest importance in urban areas because such areas are most densely populated.”¹⁶⁵

Precautions are, understandably, a critical component of the law’s efforts to protect civilians. For this reason, even if a target is legitimate under the laws of war, failure to take precautions can make an attack on that target unlawful.¹⁶⁶ By the same token, this obligation by no means requires defined protections for civilians, because the very nature of combat precludes such an absolute measure of certainty.¹⁶⁷

Recent international jurisprudence emphasizes that the obligation extends to those precautions that are feasible in the circumstances, given the information available to the commanders and military planners. Among other incidents during the 1999 NATO bombing campaign in Yugoslavia, the committee investigating the bombing examined NATO’s attack on Korisa, a village near Pristina. Eighty-seven civilians, mostly refugees, died when NATO attacked a Serbian military camp and command post near the village. NATO asserted that it bombed a legitimate military target – the

¹⁶⁴ AP I, Art. 57(2)(c).

¹⁶⁵ Protocol Commentary, para. 2190.

¹⁶⁶ See e.g., *Isayeva v. Russia*, 41 ECtHR 847 (2005), in which the European Court of Human Rights held that a Russian aerial assault on the village of Katyr-Yurt violated the right to life in Article 2 of the European Convention on Human Rights because the military continued its aerial bombardment of the village and its outskirts even as the civilians tried to leave via a safe passage corridor. The Court found no evidence that, although the attack may have been against a legitimate target – insurgents entrenched in the village – “it was planned and executed with the requisite care for the lives of the civilian population.” *Id* at, para. 200. Although the ECHR applied the human rights framework and analysis of Article 2(2) of the European Convention rather than Article 57 of Additional Protocol I, the court’s analysis is comparable and offers useful information for understanding when the failure to take precautions will make an attack unlawful.

¹⁶⁷ Dinstein, *supra* n. 26, p. 126 (“[p]robably, no absolute certainty can be guaranteed in the process of ascertaining the military character of an objective selected for attack, but there is an obligation of due diligence and acting in good faith.”).

command post – and that it did not observe any civilians in the area immediately before the attack.¹⁶⁸ The committee examined the pilot’s efforts to identify the target and the surrounding area, including the identified military characteristics of the vehicles and buildings. Accepting NATO’s position that “all practicable precautions were taken” and recognizing that the pilot and air controllers took appropriate steps to identify the target, the committee determined that no violation of the law occurred.¹⁶⁹ The Ethiopia-Eritrea Claims Commission took a similar approach, finding that, “[b]y feasible, Article 57 means those measures that are practicable or practically possible, taking into account all circumstances ruling at the time.”¹⁷⁰

The obligation to warn civilians of impending attacks appears in the law of war dating back to the Lieber Code, which required military commanders to inform the enemy “of their intention to bombard a place, so that non-combatants, and especially the women and children, may be removed before the bombardment commences.”¹⁷¹ The main purpose of warnings is to give civilians an opportunity to leave and find a place of greater safety. Article 26 of the Regulations annexed to the 1907 Hague Convention is the most oft-cited statement of the obligation to warn: “The officer in command of an attacking force must, before commencing a bombardment, except in cases of assault, do all in his power to warn the authorities.”¹⁷² Like Article 57(2)(c) of Additional Protocol I, this requirement provides a practical limitation taking into account the circumstances and the feasibility of issuing such a warning. In essence, the obligation to warn is not absolute and can be avoided if issuing a warning would seriously compromise the chances of success, such as in the case of a surprise attack.

IHL contains no further guidance to help understand what actions make a warning “effective,” but state practice supports the Commentary’s view that “[w]arnings may also have a general character.”¹⁷³ Examples in the Commentary include giving notice

¹⁶⁸ NATO Bombing Report, *supra* n. 51, para. 88.

¹⁶⁹ *Id.* at, para. 89. At a press conference after the attack, a NATO General explained that the command post “was a military target which had been used since the beginning of [the] conflict over there and we have all sources used (sic) to identify this target in order to make sure that this target was still a valid target when it was attacked,” *Id.* at, para. 88.

¹⁷⁰ Arbitral Award of 19 December 2005, “Ethiopia v. Eritrea, Western and Eastern Fronts, Ethiopia’s claims 1 & 3,” para. 33, at <www.pca-cpa.org>.

¹⁷¹ Lieber Code, Art. 19. See also J.-F. Quéguiner, “Precautions under the law governing the conduct of hostilities,” 88 *IRRC* (December 2006) pp. 793 at 806 fn. 42, describing the content of this warning in successive law of war instruments, including the Brussels Declaration (Art. 16), the Oxford Manual (Art. 33), and the Regulations annexed to the 1899 Hague Convention II (Art. 26).

¹⁷² Hague IV, Art. 26.

¹⁷³ Protocol Commentary, para. 2225. The Commentary gives examples from WWII of warnings by radio, by pamphlets, and by flying low over the objectives to give civilians time to leave. *Id.* at, para. 2224.

by radio of attacks on certain types of facilities or providing a list of objectives to be attacked. In the 1991 Gulf War, for example, the United States military dropped leaflets to warn before attacks in Basra, Faw, Zubair, Tannuwa, and Abdul Khasib, among other cities.¹⁷⁴ Responding to ICRC queries, the United States wrote: “a warning need not be specific; it may be a blanket warning, delivered by leaflets and/or radio, advising the civilian population of an enemy nation to avoid remaining in proximity to military objectives.”¹⁷⁵ In a more controversial situation, the committee investigating the NATO bombing in Yugoslavia examined the warnings NATO issued before bombing the radio and television stations in Belgrade. Amid uncertainties about the actual nature and content of NATO’s warnings, the committee raised doubts about their effectiveness, but did not conclude that NATO had violated the obligation to warn.¹⁷⁶

The Goldstone Report sets forth several criteria in determining whether a warning is effective:

*It must reach those who are likely to be in danger from the planned attack, it must give them sufficient time to react to the warning, it must clearly explain what they should do to avoid harm and it must be a credible warning. The warning also has to be clear so that the civilians are not in doubt that it is indeed addressed to them. As far as possible, warnings should state the location to be affected and where the civilians should seek safety. A credible warning means that civilians should be in no doubt that it is intended to be acted upon ...*¹⁷⁷

Although these criteria seem reasonable, in actually applying them, the report diverges from the general understanding of and state practice regarding warnings in three primary ways. First, the report seems to set an unduly high standard for measuring the “effectiveness” of warnings. According to the Israeli government, and as stated in the report, Israel’s warnings consisted of: 165,000 telephone calls, 300,000 warning notes on December 28, 2008 alone, 2,500,000 leaflets overall, radio broadcasts,

¹⁷⁴ C.B. Shotwell, “Economy and humanity in the use of force: a look at the aerial rules of engagement in the 1991 Gulf War,” 4 *USAF JLS* (1993) pp. 15 at 36. Similarly, Israel has used leaflets, telephone calls, and radio broadcasts in the past. Parks, *supra* n. 95; E. Gross, “Use of civilians as human shields: what legal and moral restrictions pertain to a war waged by a democratic state against terrorism?,” 16 *Emory ILR* (2002) pp. 445 at 497; S. Goldberg, “Israel launches rocket attacks after frantic mob murders soldiers,” *The Guardian*, 13 October 2000.

¹⁷⁵ United States, Message from the Department of the Army to the legal advisor of the U.S. Army Forces deployed in the Gulf, 11 January 1991, § 8(I).

¹⁷⁶ NATO Bombing Report, *supra* n. 51, para. 77. Some reports said that NATO did not give a warning so as to protect its pilots; others said that foreign media representatives apparently were warned of the attack.

¹⁷⁷ Goldstone Report, para. 528.

and roof-knocking.¹⁷⁸ After detailing the content of the leaflet and radio broadcast warnings, the Mission concludes that the warnings were not sufficient because Israel had the capability to issue more effective warnings, civilians in Gaza were uncertain about whether and where to go for safety, and some places of shelter were struck after the warnings were issued. As a simple factual matter, these conclusions suggest that warnings far exceeding those given in any other conflict are insufficient, a claim that seems unreasonable on its face.

In addition, while Israel certainly has capabilities far superior to those of Hamas and other Palestinian armed groups, IHL applies equally to belligerents regardless of capability.¹⁷⁹ By qualifying Israel's obligations based on its capabilities, the Goldstone Report exacerbates the already-present tendency towards "a capabilities-based IHL regime."¹⁸⁰ In fact, IHL is not about a fair fight. The wording of Article 57(2)(c) speaks to feasibility, not capability, and does not require the attacking party to exhaust all possible means to warn. By the Goldstone Report's standards – which do not reflect existing law – states simply will not issue warnings because no warnings will meet these standards and still enable effective military operations.

Second, the Goldstone Report takes a retrospective look at warnings. Nothing in Article 57(2)(c) of Additional Protocol I or Article 26 of the Hague Convention suggests that the effectiveness of warnings should be judged on the basis of whether civilians actually heeded the warnings or found safety. Rather, the very language of both provisions, speaking of attacks that "may affect"¹⁸¹ the civilian population, accounting for "circumstances" or events within the commander's "power,"¹⁸² leads to the conclusion that the law focuses on the content and nature of the warnings at the time and whether they were reasonable and effective under the circumstances. But the Goldstone Report judges the warnings by looking at whether civilians followed them, which, while a fair consideration, is not dispositive and introduces a host of additional factors not contemplated by the conventional law. Indeed, the law contains

¹⁷⁸ *Id.* at paras. 498-489. Roof-knocking is a new technology the Israelis developed in which they fire light explosives at rooftops to warn the residents inside of an impending attack. The explosives merely make a noise and do not explode.

¹⁷⁹ M.N. Schmitt, "Asymmetrical Warfare and International Humanitarian Law," in W. Heintschel von Heinegg and V. Epping, eds., *International Humanitarian Law Facing New Challenges, Symposium in Honour of Knut Ipsen* (Berlin, Springer 2007) pp. 11 at 36.

¹⁸⁰ *Id.* (recognizing the danger that the "more a military is capable of conducting clean warfare, the greater its legal obligations, and the more critical the international community will be of any instance of collateral damage and incidental injury (even when unavoidable).").

¹⁸¹ AP I, Art. 57(2)(c).

¹⁸² Hague IV, Art. 26(b).

no requirement that the civilian population be able to act on the warnings in order to find them effective. Had alternative warning options been available that could have enabled the civilian population to act on them, it might fairly have been concluded that the Israeli warnings were ineffective. No such argument exists here. Instead, the legally correct approach is to examine whether the warnings generally informed civilians that they were at risk and should seek shelter. In other words, the legal issue is whether they were effective in transmitting a warning, not whether the civilians actually heeded them. The sheer numbers involved – 165,000 phone calls and 2.5 million leaflets – seem to suggest an affirmative answer.

Finally, the Goldstone Report injects the proportionality analysis into the determination of whether warnings are effective, a factor not present in the Additional Protocol or the Hague Convention. The report questions whether “the injury or damage done to civilians or civilian objects by not giving a warning is excessive in relation to the advantage to be gained by the element of surprise for the particular operation.”¹⁸³ And yet IHL does not link the effectiveness of a warning to the principle of proportionality; it simply requires a warning “unless circumstances do not permit.” In light of the report’s retrospective approach to proportionality, this linkage is doubly problematic.

4.3.2 Defender’s Obligation to Take Precautions

Recognizing that the party in control of the territory where the conflict is taking place is often best situated to protect civilians from the unfortunate consequences of war, Additional Protocol I places obligations on the defending party as well. Article 58, entitled “Precautions against the effects of attacks,” requires that parties shall, to the extent feasible,

*endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives;(b) avoid locating military objectives within or near densely populated areas;[and] (c) take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.*¹⁸⁴

Although Additional Protocol I emphasizes the attacking party’s affirmative obligation to take precautions in planning and launching attacks, this obligation in

¹⁸³ Goldstone Report, para. 527.

¹⁸⁴ AP I, Art. 58.

no way diminishes the defending party's obligations.¹⁸⁵ As the Commentary explains, "[b]elligerents may expect their adversaries to conduct themselves [lawfully] and to respect the civilian population, but they themselves must also cooperate by taking all possible precautions for the benefit of their own population as is in any case in their own interest."¹⁸⁶

Indeed, the Goldstone Report specifically "emphasize[s] that the launching of attacks from or in the vicinity of civilian buildings and protected areas are serious violations of the obligation on the armed groups to take constant care to protect civilians from the inherent dangers created by military operations."¹⁸⁷ This statement recognizes what seems apparent from the wording of Article 57(1) of Additional Protocol I – and is critically important in a conflict like that in Gaza – that the obligation to take "constant care" applies to the entirety of the civilian populations affected by the conflict and is not limited only to the civilian population of the attacked party. Parties have an obligation to protect their own civilians from the consequences of their own offensive actions as well as those of the enemy.

In practice, however, the report gives the defending party's obligations short shrift. Similar focus on the attacking party's obligations in recent years has led some to argue that the recent shift in emphasis overall from defender to attacker creates perverse incentives for the defender to use the civilian population as a shield. They further insist that "the international community must re-direct its attention and disapproval to those who intentionally place non-combatants in danger to achieve military and political objectives; if it fails to do so, it serves as an enabler for those who deliberately place civilians at risk."¹⁸⁸ The Goldstone Report's approach does indeed pose this risk.

Paragraph (b) of Article 58 – regarding precautions against locating military objectives in densely populated areas – is particularly relevant to the conflict in Gaza. Curiously, the Goldstone Report fails to mention Article 58 at all. Rather, the report limits its legal analysis of precautions by Palestinian armed groups to the prohibition against using human shields set forth in Article 28 of the Fourth Geneva Convention and in

¹⁸⁵ Although the obligation to take "constant care" appears in Article 57, which addresses the attacking party, the Commentary suggests that both parties have such an obligation: "The term 'military operations' should be understood to mean any movement, manoeuvres, and other activities whatsoever carried out by the armed forces with a view to combat." Protocol Commentary, para. 2191.

¹⁸⁶ Protocol Commentary, para. 2240.

¹⁸⁷ Goldstone Report, para. 495.

¹⁸⁸ R.D. Rosen, "Targeting enemy forces in the war on terror: preserving civilian immunity," 42 *Vanderbilt JTL* (2009) pp. 683 at 691-692.

Article 51(7) of Additional Protocol I.¹⁸⁹ Much has been written on human shields elsewhere; rather than reprise the debate over human shields, this section will focus on the Goldstone Report's improper application of the law relevant to the placing of military objectives in civilian areas.

The Goldstone Report's approach raises two significant legal problems: first, the obvious failure to address the location of military objectives in densely populated areas; and second, the transmutation of the intent element of Article 51(7) to potential violations of Article 58(b). The report concludes that "there are indications that Palestinian armed groups launched rockets from urban areas."¹⁹⁰ It neglects to recognize, however, that in this particular conflict, the rocket launchers themselves were military objectives for Israel – one of the main goals of Operation Cast Lead was to eliminate the ability of Palestinian armed groups to fire rockets at civilian areas in southern Israel. Therefore, when Palestinian armed groups launched rockets from civilian areas in Gaza, they were locating military objectives in densely populated areas, in violation of Article 58(b) of Additional Protocol I.¹⁹¹ Failure to address this point is a serious shortcoming that could evince a failure to recognize fully the obligations of the defending party, especially in the complicated scenarios of contemporary conflicts. Just as the densely populated nature of Gaza does not relieve Israel of its obligations to distinguish between civilian and military objectives and take precautions, so it correspondingly does not relieve Palestinian armed groups of their obligations under Article 58. For civilians caught in the zone of combat and for military planners and commanders making targeting determinations, the continued force of this obligation is critical.

As a result of this failure to address Article 58, the Goldstone Report analyzes precautions taken, or not taken, by Hamas and other Palestinian armed groups solely within the framework of the prohibition on shielding. The language of the provisions on shielding does suggest that a measure of intent is required – civilians "shall not be

¹⁸⁹ Article 28 of the Fourth Geneva Convention states: "The presence of a protected person may not be used to render certain points or areas immune from military operations." Article 51(7) of Additional Protocol I states: "The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations."

¹⁹⁰ Goldstone Report, para. 450.

¹⁹¹ In addition, "the law of armed conflict requires that the defence should be conducted from the position which would cause the least danger to civilians and civilian objects." Australia Defence Force Manual, § 553, cited in Henkaerts and Doswald-Beck, *supra* n. 26, p. 430. One could also argue that such attacks violated Article 57(2)(a)(ii) as well, which obligates parties to "take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects."

used to render certain points or areas immune from military operations,” and parties shall not direct the movement of civilians “in order to attempt to shield military objectives.”¹⁹² That intent, however, is only necessary for the purpose of “finding that a party is using the civilian population living in the area of the fighting as a human shield,”¹⁹³ *not* for the purpose of finding a violation of Article 58(b)’s prescription against locating military objectives in densely populated areas. By applying the incorrect standard and requiring intent where IHL requires none, the Goldstone Report identifies no violation of Article 58; rather, it merely states that it could not “obtain any direct evidence that [rockets were launched from urban areas] with the specific intent of shielding the rocket launchers from counterstrikes by the Israeli armed forces.”¹⁹⁴ Aside from the fact that it is hard to envision what purpose Hamas could have had other than shielding the rocket launchers from attack, the report’s analysis encourages those who wish to take advantage of the civilian population’s presence. Article 58’s clear prohibition on locating military objectives in densely populated areas, regardless of intent, offers much greater protection for civilians than does the Goldstone Report’s approach.

4.4 Attacks on Civilians and Civilian Property

Unlawful attacks on civilians include both deliberate and indiscriminate attacks. This section will focus on two specific issues regarding attacks on civilians: the requisite intent for a finding of deliberate attacks and the relationship between human rights law and IHL in analyzing responsibility for attacks on civilians.

4.4.1 Mens Rea for the Crime of Deliberate Attacks

The Rome Statute criminalizes two types of deliberate attacks: intentional attacks directed against civilians and attacks made in the knowledge that civilian casualties would be clearly excessive in relation to the military advantage gained, that is, attacks

¹⁹² AP I, Art. 51(7).

¹⁹³ Goldstone Report, para. 491.

¹⁹⁴ *Id* at, para. 480.

that violate the principle of proportionality.¹⁹⁵ The ICTY has also prosecuted both types of attacks committed in the course of the war in the former Yugoslavia.¹⁹⁶ The crime of unlawful attacks on the basis of a violation of the principle of proportionality involves the *actus reus* of causing disproportionate civilian deaths or civilian property damage and the *mens rea* of knowledge or intent.¹⁹⁷ The discussion of proportionality in section 4.1 above highlights the shortcomings in the Goldstone Report's approach to finding disproportionate attacks and therefore *actus reus* will not be addressed here. On the issue of intent, both the ICTY and the ICC recognize the importance of *mens rea* because, as the Prosecutor of the ICC explained,

*under international humanitarian law and the Rome Statute, the death of civilians during an armed conflict, no matter how grave and regrettable, does not in itself constitute a war crime. International humanitarian law and the Rome Statute permit belligerents to carry out proportionate attacks against military objectives, even when it is known that some civilian deaths and injuries will occur.*¹⁹⁸

The Goldstone Report's primary conclusion is that the Israeli armed forces committed deliberate attacks against civilians and the civilian population in Gaza because it could not ascertain "any grounds which could have reasonably induced [them] to assume that the civilians attacked were in fact taking a direct part in the hostilities and had thus lost their immunity against direct attacks."¹⁹⁹ As in the proportionality analysis above, however, the report makes this conclusion without any information

¹⁹⁵ Rome Statute, Art. 8, defining war crimes as: "(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;... (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated."

¹⁹⁶ See *Prosecutor v. Tihomir Blaškić* case No. IT-95-14-T, Judgment, 3 March 2000 and *Blaškić*, *supra* n. 58; *Kordić*, *supra* n. 58; *Strugar*, *supra* n. 63; *Galić*, *supra* n. 55.

¹⁹⁷ United Nations Preparatory Commission for the International Criminal Court, Report of the Preparatory Commission for the International Criminal Court, Addendum, Part II, Finalized Draft Text of the Elements of Crimes Art. 8(2)(b)(iv) War Crime of Excessive Incidental Death, Injury, or Damage (2 November 2000) (hereinafter *Elements of Crimes*).

¹⁹⁸ International Criminal Court, Organs of the Court, "Letter to Senders regarding Iraq," 9 February 2006 at <http://www.icc-cpi.int/library/organs/otp/OTP_letter_to_senders_re_iraq_9_February_2006.pdf>. See also R.J. Galvin, "The ICC Prosecutor, collateral damage, and NGOs: evaluating the risk of politicized prosecution," *Univ. Miami I & Comp. LR* (Fall 2005) p. 58-59 (reiterating that the fact that civilian deaths occurred does not unequivocally lead to an assumption that war crimes took place); NATO Bombing Report, *supra* n. 51, para. 62 ("Collateral casualties to civilians and collateral damage to civilian objects can occur for a variety of reasons.").

¹⁹⁹ Goldstone Report, para. 809. This statement references the loss of immunity from attack for civilians who are directly participating in hostilities. AP I, Art. 51(3).

from the Israeli commanders launching the attacks and – as a result – on the basis of retrospective information, rather than that available at the time of the attack. Both features of the analysis lead to an unnecessary broadening of the *mens rea* for the crime of unlawful attack – indeed, to an effective elimination of the *mens rea* element.

On first glance, the Goldstone Report's formulation appears similar to that used by the ICTY in *Prosecutor v. Galić*, where the tribunal held that

*The Prosecution must show that the perpetrator was aware or should have been aware of the civilian status of the persons attacked. In case of doubt as to the status of a person ... the Prosecution must show that in the given circumstances a reasonable person could not have believed that the individual he or she attacked was a combatant.*²⁰⁰

However, the report ignores the need to understand what the commander knew at the time of the attack. First, Article 85 of Additional Protocol I states that excessive civilian losses are a grave breach only if the attack leading to such losses is committed willfully and in the knowledge that it will cause excessive loss.²⁰¹ The drafters of the Rome Statute and the Elements of Crimes similarly reinforced the importance of the knowledge element, explaining that one element of the crime of excessive incidental death is that the “perpetrator knew that the attack would cause”²⁰² clearly excessive collateral damage. Similarly, in *Prosecutor v. Galić*, the ICTY held that “to establish the *mens rea* of a disproportionate attack, the Prosecution must prove ... that the attack was launched willfully and in knowledge of circumstances giving rise to the expectation of excessive civilian casualties.”²⁰³

The Goldstone Report's standard is a lower requirement of acting on grounds that “reasonably induced them to assume” the persons killed were legitimate targets, which does not appear to be drawn from any international criminal jurisprudence. More importantly, it enables a determination of criminality without any grasp of what the

²⁰⁰ *Galić supra* n. 55, para. 55. The Tribunal also held, para. 50, that “a person shall not be made the object of attack when it is not reasonable to believe, in the circumstances of the person contemplating the attack, including the information available to the latter, that the potential target is a combatant.”

²⁰¹ AP I, Art. 85(3)(b). The Commentary to Additional Protocol I is clear that, by adding “the words in the knowledge to the common constitutive elements set out in the opening sentence[, it is therefore] only a grave breach if the person committing the act knew with certainty that the described results would ensue, and this would not cover recklessness.” Protocol Commentary, para. 3479. Similarly, the Commentary to Article 51 of Additional Protocol I emphasizes that “in relation to criminal law the Protocol requires intent and, moreover, with regard to indiscriminate attacks, the element of prior knowledge of the predictable result.” Protocol Commentary, para. 1934.

²⁰² Elements of Crimes, *supra* n. 197, Finalized Draft Text of the Elements of Crimes Art. 8(2)(b)(iv) War Crime of Excessive Incidental Death, Injury, or Damage (2 November 2000).

²⁰³ *Galić, supra* n. 55, para. 59.

alleged perpetrator knew or intended at the time of the attack. Since the time of the Nuremberg Tribunals, the law has required that “an individual should not be charged or convicted on the basis of hindsight but on the basis of information available to him or information he recklessly failed to obtain at the time in question.”²⁰⁴

The Mission had no access to information from the Israeli armed forces about what particular commanders or soldiers knew at the time of the attacks in question – perhaps understandably because of the Israeli decision not to cooperate. Testimony from witnesses and analysis by experts after the fact are a useful source of information for any investigation, but cannot provide the whole picture.²⁰⁵ The military has information regarding the nature of the threat anticipated, the intelligence information available to the commanders and soldiers at the time of the attack, previous operations that directly influenced decision-making in the particular incident in question, and other data relevant to analyzing what the commander knew at the time of the alleged unlawful attack. The report fails to recognize that lack of such information limits its ability to make determinations about violations of the law. Accountability for violations of IHL is critically important, but justifies neither a relaxed standard of analysis nor elimination of the element of *mens rea*. Huge swaths of Gaza still lie in ruins. The Goldstone Report raises important questions about just how much property destruction was lawful. Fact-Finding missions can indeed play a critical role in reinforcing protections for civilians and civilian property by highlighting the extent of destruction resulting from military operations, whether lawful or unlawful. Nonetheless, the Goldstone Report’s analysis of the destruction in Gaza is – like many other areas of the report – regrettably simplistic and imprecise.

The central element of the crime of wanton destruction is the absence of military necessity justifying the measure of destruction.²⁰⁶ In this context, we assess military necessity using the definition of military objective in Article 52(2) of Additional Protocol I: “objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military

²⁰⁴ *USA v. Wilhelm List and Others*, The Hostages Trial: Trial of Wilhelm List and Others (case No. 47), 8 Law Reports of Trials of War Criminals, 34, 57 (U.N. War Crimes Comm. 1948), para. 69 (hereinafter Hostages Trial).

²⁰⁵ See Wuerzner, *supra* n. 57, p. 923 (“With respect to the mental element of the crime, this overview should include knowledge of the information available to the military at the time of the attack and at the time of the decision-making process. The Prosecutor must rely not only on military and weapons experts, but also on witnesses who have survived the attack and, most importantly, on the armed forces themselves.” [emphasis added]).

²⁰⁶ *Kordić and Čerkez*, *supra* n. 58, para. 346.

advantage.”²⁰⁷ To do so, as the ICTY explained in the *Strugar* case, “each case must be determined on its facts.”²⁰⁸ The Mission, however, did not incorporate analysis of the relevant facts or information available at the time of the attacks in question into its analysis of their military necessity or military advantage.²⁰⁹ In the absence of sufficient evidence to determine whether particular targets were military objectives – and therefore to consider the military necessity of attacking those targets – the Goldstone Report lacked the information necessary to conclude that the destruction was wanton.

In addition, the report again applies a *mens rea* standard not ordinarily accepted in IHL. As in the case of attacks on civilians, the report’s analysis of property destruction relies on testimony of witnesses and includes little, if any, assessment of the information available to the Israeli forces at the time of the attacks. In contrast, the ICTY has consistently held that “military advantage must be assessed from the perspective of the commander”²¹⁰ and that knowledge or intent is required to reach a finding of wanton destruction not justified by military necessity.²¹¹

The Nuremberg Tribunal demonstrated that courts will afford commanders a wide degree of discretion when assessing the *mens rea* of the crime of wanton destruction. As described earlier, General Rendulic was indicted in the *Hostages Trial* for the scorched earth policy he carried out in Norway during his retreat in the face of the Soviet invasion. Accepting his plea of military necessity – that he believed the scorched earth policy was necessary to slow the Soviet advance – the court found that “the conditions, as they appeared to the defendant at the time were sufficient upon which he could honestly conclude that urgent military necessity warranted the decision he made.”²¹² Similarly, in the High Command case, the Tribunal emphasized that military necessity requires difficult factual determinations and recognized that in many combat situations, “a commander must necessarily make quick decisions to meet the particular situation of his command. A great deal of latitude must be accorded to

²⁰⁷ AP I, Art. 52(2).

²⁰⁸ *Strugar*, *supra* n. 63, para. 295.

²⁰⁹ Goldstone Report, paras. 926-928, 955-956.

²¹⁰ *Galić*, *supra* n. 55, paras. 50-51.

²¹¹ *Strugar*, *supra* n. 63, para. 296; *Kordić and Čerkez*, *supra* n. 58, para. 346 (holding that the crime of wanton destruction requires that “(i) the destruction of property occurs on a large scale; (ii) the destruction is not justified by military necessity; and (iii) the perpetrator acted with the intent to destroy the property in question or in reckless disregard of the likelihood of its destruction.”).

²¹² *Hostages Trial*, *supra* n. 204, p. 1297.

him under such circumstances.”²¹³ Whether the Israeli commanders made reasonable decisions in targeting residential property, flour mills, and other contested targets during the conflict remains unclear. In fact, the most recent Israeli investigation into the attacks on the flour mill concluded that “photographic proof [demonstrates] that the mill was accidentally hit by artillery in the course of a firefight with Hamas militiamen,”²¹⁴ a claim subsequently contested,²¹⁵ thereby illustrating the uncertainty surrounding the actual events. Unfortunately, the Goldstone Report disregards *mens rea* and assesses the targeting decisions without regard to the information available to the commanders at the time or to the attendant circumstances.

4.4.3 IHL or International Human Rights: Where Do We Draw the Line?

On several occasions, the Goldstone Report applies human rights law concurrently with IHL, stating that Israel is in violation of Article 6 of the International Covenant on Civil and Political Rights (ICCPR) in addition to particular provisions of Additional Protocol I. This juxtaposition of the two bodies of law raises important questions about how they interrelate during armed conflict.

Article 6 of the ICCPR prohibits the arbitrary deprivation of the right to life.²¹⁶ The Goldstone Report therefore concludes that in most of the cases in which Israeli attacks killed civilians, Israel also violated Article 6 of the ICCPR. These conclusions raise two separate issues: the application of the ICCPR to Israeli military operations outside Israeli territory, and the interplay between international human rights law and IHL during the conduct of hostilities. The former involves the extraterritorial

²¹³ *USA v. Wilhelm von Leeb et al.*, Trials of War Criminals before the Nuernberg Military Tribunals, Vol. XI, p. 541.

²¹⁴ E. Bronner, “Israel Poised to Challenge a U.N. Report on Gaza,” *New York Times*, 23 January 2010, p. A6.

²¹⁵ R. McCarthy, “U.N. find challenges Israeli version of attack on civilian building in Gaza War,” *The Guardian*, 1 February 2010.

²¹⁶ International Covenant on Civil and Political Rights, GA Res. 2200A (XXI), U.N. Doc. A/6316 (16 December 1966) (hereinafter ICCPR), Art. 6 (“Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”).

application of the ICCPR,²¹⁷ a topic beyond the scope of this article. Therefore, this section will focus on the latter.

Although human rights law applies in times of war as well as in times of peace, IHL, as *lex specialis*, is the dominant legal framework in armed conflict. The ICJ has reaffirmed the primary role for IHL on more than one occasion, expressly stating that:

*The test of what is an arbitrary deprivation of life ... falls to be determined by the applicable lex specialis, namely, the law applicable in armed conflict, which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.*²¹⁸

The Court recognizes that IHL does not categorically forbid all killing in armed conflict and that the taking of life in armed conflict can only be an arbitrary deprivation of life if it violates IHL. The *travaux préparatoires* of the ICCPR confirm this interpretation, suggesting “that this was the meaning which the term arbitrary was intended to bear, since killing in the course of a lawful act of war was given as an example of a taking of life which would not be arbitrary.”²¹⁹ Regional courts have adopted the

²¹⁷ *Banković & Others v. Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey and the United Kingdom*, ECt. HR, App. No. 52207/99 (holding that extraterritorial acts by NATO forces were not within the jurisdiction of member states for the purposes of Art. 1 of the ECHR); see also *Al Skeini and Others v. Secretary of State for Defense* [2004] EWHC 2911, paras. 263, 265 (holding that the House of Lords did not have “broad, world-wide extraterritorial personal jurisdiction” over the action on behalf of Iraqis killed by British forces in shooting incidents in Basra); cf. *Issa v. Turkey*, App. No. 31821/96, para. 71 (2004) (finding a broad jurisdictional exception to avoid allowing a state to perpetrate violations on the territory of another state that it could not perpetrate on their own territory); *Cyprus v. Turkey*, 2001-IV ECt.HR 1 (Grand Chamber) (a state’s responsibility may be engaged when it exercises effective control outside its jurisdiction as a consequence of lawful or unlawful military action); *Lopez Burgos v. Uruguay*, Communication [Comm.] No. 52/1979, U.N. Doc. CCPR/ C/13/D/52/1979 (1981) (“never was it envisaged ... to grant States parties unfettered discretionary power to carry out willful and deliberate attacks against the freedom and personal integrity of their citizens living abroad.”); see also M.J. Dennis, “ICJ Advisory opinion on construction of a wall in the occupied Palestinian territory: application of human rights treaties extraterritorially in times of armed conflict and military occupation,” 99 *AJIL* (2005) pp. 119, at 126.

²¹⁸ *Nuclear Weapons*, *supra* n. 28, para. 25. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion (ICJ 9 July 2004), 43 *ILM* 1009 (2004).

²¹⁹ C. Greenwood, “*Jus ad bellum* and *jus in bello* in the Nuclear Weapons Advisory Opinion,” in Boisson de Chazournes et al., *supra* n. 79, pp. 247 at 253.

same approach.²²⁰ In addition, the Human Rights Committee stated that “in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights.”²²¹ To reach an alternative conclusion arguably suggests that Article 6 outlaws all killing in armed conflict and therefore all military action.

Similarly, although human rights law plays an important role in times of armed conflict, the practical ramifications of applying a human rights framework to individual attacks in hostilities are challenging. As a former Canadian Judge Advocate General explains:

*Due to its extensive procedural, time and resources requirements, [the human rights framework] lends itself more readily to the assessment of isolated acts of violence rather than the traditional scope of hostilities in either internal or international armed conflict. The danger lies in suggesting that such an accountability process has to be put in place for each attack during which an uninvolved civilian is killed, when there are potentially hundreds of such attacks in the course of a major conflict.*²²²

The concomitant obligations of this “law-enforcement” approach would overwhelm the system and result, perhaps, in diminished protection for civilians and other protected persons in the zone of combat. Any human rights analysis of hostilities and attacks on civilians must therefore account for the “shoot to kill” paradigm of IHL within the parameters of lawful killing during armed conflict.

In most of the incidents for which the Goldstone Report finds Israel in violation of Article 6 of the ICCPR, it has also found a violation of IHL. If the IHL analysis in those situations was correct, then one might equally find an arbitrary killing under Article 6 of the ICCPR. This article has already addressed the misapplication of IHL to proportionality calculations and to incidents purportedly involving intentional attacks against civilians and will therefore not consider whether it is appropriate for the Goldstone Report to find violations of Article 6 of the ICCPR in such cases.

However, in one particular incident, the attack on the al-Daya family house, the report’s finding of an Article 6 violation constitutes a “second bite at the apple.” In that

²²⁰ See *Cyprus v. Turkey*, Apps. Nos. 6780/74, 6950/75, 4 EHRR 482 (1982) (finding that the Third Geneva Convention takes precedence over the ECHR with regard to treatment of prisoners of war); Inter-American Court of Human Rights, Decision on Request for Precautionary Measures (Detainees at Guantanamo Bay, Cuba) (12 March 2002) 41 ILM 532, 533 (2002) (finding that IHL is *lex specialis* with regard to the American Declaration on Human Rights).

²²¹ Human Rights Commission, General Comment No. 31, U.N. Doc. CCPR/C/21/Rev.1/Add.13, para. 11 (2004).

²²² Watkin, *supra* n. 97, p. 40.

incident, the IDF destroyed the al-Daya house in an operation against a neighboring house used to store weapons. The report questions the Israeli explanation, but after analyzing the facts available to it, concludes that “[i]n the absence of information necessary to determine the precise circumstances of the incident, the Mission can make no findings on possible violations of international humanitarian law or international criminal law.”²²³ And yet, the report then finds that Israel is liable for a violation of Article 6 of the ICCPR because, even though it did not plan to strike the al-Daya house, it did plan to fire the projectile. Finding that “the consequences may have been unintended [but] the act was deliberate,”²²⁴ the report states that the civilian deaths were arbitrary killings. This conclusion flies in the face of international jurisprudence and state practice recognizing that an arbitrary killing can only be one that violates IHL. In this case, the Goldstone Report itself acknowledges that the attack did not violate IHL. In its search for an alternative basis for liability in human rights law, the report ignores both the *lex specialis* of IHL and IHL’s basic understanding that not all taking of life in armed conflict is arbitrary.

Beyond the legal error there lies a broader danger. As discussed above, IHL is premised on a delicate balance between minimizing suffering in war and enabling effective military operations. The notion that an attack lawful under IHL can nevertheless violate human rights law undermines that delicate balance.

4.5 Treatment of Prisoners of War and Hostage Taking

Since 2006, Palestinian armed groups have held Israeli Corporal Gilad Shalit captive in Gaza. The Goldstone Report declares that “Gilad Shalit meets the requirements for prisoner-of-war status under the Third Geneva Convention.”²²⁵ The report then briefly enumerates the basic protections to which Shalit is entitled as a prisoner of war: humane treatment, external communication, visits from the ICRC, and the provision of information about his condition to his family. By all accounts, Hamas and other Palestinian groups have routinely failed to meet these standards.²²⁶

The Third Geneva Convention governs the treatment of prisoners of war during

²²³ Goldstone Report, para. 858.

²²⁴ *Id.* at, para. 861. On its face, the statement is absurd and would mean that anytime a combatant intentionally fired a weapon and unintentionally killed a civilian, he would be liable for an arbitrary killing under ICCPR Art. 6.

²²⁵ Goldstone Report para. 1337.

²²⁶ <<http://www.icrc.org/Web/eng/siteeng0.nsf/html/israel-interview-111208>> (explaining that Hamas has refused ICRC requests to visit Shalit and has refused to forward letters and other communications to him).

international armed conflict, which is how both the Goldstone Report and the Israeli Supreme Court characterize the conflict, as noted in Section 2.3 *infra*. In particular, prisoners of war are entitled to humane treatment, medical treatment, and to be “quartered under conditions as favorable as those for the forces of the Detaining Power who are billeted in the same area.”²²⁷ Furthermore, Article 23 of the Third Geneva Convention forbids detaining prisoners of war where they “may be exposed to the fire of the combat zone.”²²⁸ Finally, and with particular relevance to the situation of Corporal Shalit, who has not been allowed any contact with his family or the ICRC, Section V of the Third Geneva Convention sets forth the detaining power’s obligations regarding contact between prisoners of war and “the exterior”:

*Art. 70. Immediately upon capture, or not more than one week after arrival at a camp, ... every prisoner of war shall be enabled to write direct to his family, on the one hand, and to the Central Prisoners of War Agency provided for in Article 123, on the other hand, a card ... informing his relatives of his capture, address and state of health. ... Art. 71. Prisoners of war shall be allowed to send and receive letters and cards. ... Such letters and cards must be conveyed by the most rapid method at the disposal of the Detaining Power; they may not be delayed or retained for disciplinary reasons.*²²⁹

Humane treatment of prisoners of war is also required by customary international law. The Eritrea-Ethiopia Claims Commission analyzed the customary law obligations of parties regarding treatment of prisoners of war because for much of the Eritrea-Ethiopia conflict, Eritrea was not a party to the Geneva Conventions.²³⁰ The Commission held that, under customary international law, “the requirement of treatment of POWs as human beings is the bedrock upon which all other obligations of the Detaining Power rest.”²³¹ More specifically, the Commission clearly stated that the obligation to grant the ICRC access to prisoners of war is an obligation under customary international law, and that “Eritrea violated customary international law ... by refusing to permit the ICRC to send its delegates to visit all places where Ethiopian POWs were detained, to register those POWs, to interview them without

²²⁷ GC III, Art. 25.

²²⁸ GC III, Art. 23.

²²⁹ GC III, Arts. 70-71.

²³⁰ Eritrea ratified the four Geneva Conventions on 14 August 2000. See at <<http://www.icrc.org/IHL.NSF/WebSign?ReadForm&id=375&ps=P>>.

²³¹ Arbitral Award of 1 July 2003, “*Ethiopia v. Eritrea*, Prisoners of War, Eritrea’s claim 17,” para. 55, at <www.pca-cpa.org>; see also paras. 29, 57; Arbitral Award of 1 July 2003, “*Ethiopia v. Eritrea*, Prisoners of War, Ethiopia’s claim 4,” para. 53, at <www.pca-cpa.org>.

witnesses, and to provide them with the customary relief and services.”²³²

Although the Goldstone Report states that Shalit is a prisoner of war according to the Third Geneva Convention, it does not make any findings or reach any conclusions about violations of the standards therein or of customary law. As international tribunals have repeatedly held, non-state parties, like Hamas, are bound by IHL, even though they are not parties to international treaties.²³³ The ICRC has specifically emphasized this obligation with regard to the taking of prisoners, stating that “[t]here is an obligation for both State and non-State actors of conflicts to comply with the rules of international humanitarian law. One of these rules provides that all persons deprived of their liberty must be allowed to correspond with their families.”²³⁴ The conditions of Corporal Shalit’s captivity clearly violate these prescriptions.

Given that Hamas and other Palestinian armed groups holding Shalit have repeatedly violated their obligations under the Third Convention and customary international law with regard to his capture, treatment, and visits from the ICRC, the Mission’s failure to comment on their obligations and violations is a glaring omission. A second omission is still more troubling. The circumstances of Shalit’s detention demonstrate that his captors have in fact made him a hostage, conduct that violates IHL and would constitute a war crime under the Rome Statute. As the ICRC explains, hostage-taking occurs when “[a] person has been captured and detained illegally [and a] third party is being pressured, explicitly or implicitly, to do or refrain from doing something as a condition for releasing the hostage or for not taking his life or otherwise harming him physically.”²³⁵

IHL prohibits hostage taking in all situations, as manifested in multiple IHL treaty provisions. In some circumstances, these treaties define hostage-taking as a grave breach. Common Article 3 to the four Geneva Conventions, Article 34 of the Fourth Geneva Convention and Article 75(2)(c) of Additional Protocol I, all of which apply to or evince customary norms applicable to the conflict in Gaza, all forbid taking of hostages. Although some iterations of the crime of hostage-taking specifically refer to

²³² *Id* at, para. 62.

²³³ See e.g., *Prosecutor v. Sam Hinga Norman*, *supra* n. 25, at § 22.

²³⁴ Interview, “ICRC President: access to captured Israeli soldiers remains a priority,” 8 June 2007, at <<http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/israel-interview-070607>>. See also Interview, “ICRC continues efforts to gain access to captured Israeli soldiers,” 30 May 2008, at <<https://www.icrc.org/web/eng/siteeng0.nsf/htmlall/israel-interview-300508>>, (“Both States and armed groups are bound by these essential rules.”).

²³⁵ “ICRC position on hostage-taking,” in 846 IRR (2002) p. 467, at <<http://www.icrc.org/Web/Eng/siteeng0.nsf/html/5C6CLN>>. See also Elements of Crimes, *supra* n. 197, p. 18; Dormann, *supra* n. 58, pp. 124-127. The elements of the crime of hostage taking draw heavily from the International Convention Against the Taking of Hostages (1979), 1316 UNTS 205 (1983); see *Prosecutor v. Sesay, Kallon and Gbao* (RUF case), SCSL-04-15-A, Appeals Judgement, para. 579, 26 October 2009.

civilians, such as Article 2(h) of the Statute of the ICTY, and civilians are traditionally the most common victims of hostage-taking in wartime, the law is quite clear that “[n]o hostages can be taken, whether civilians, combatants (**especially, prisoners of war**), or even neutrals”²³⁶ [emphasis added]. In particular, common Article 3 specifically mentions “members of armed forces ... placed ‘*hors de combat*’ by ... detention” as persons protected from hostage taking and applies in both international and non-international armed conflicts.²³⁷ Similarly, the Rome Statute makes hostage-taking a war crime in all circumstances in both international and internal armed conflict.²³⁸

In a recent decision in the *Karadžić* case, the ICTY confirmed that the crime of hostage taking is not limited to the holding of civilians as hostages. The Tribunal held that “the minimum protections outlined in common Article 3, which include the prohibition of hostage-taking, also apply to persons who are *hors de combat* by virtue of detention.”²³⁹ More specifically, in relation to the Mission’s failure to address Corporal Shalit’s captivity, the Appeals Chamber held that the prohibition on hostage-taking is integral to the Third Geneva Convention, stating that “the protection of POWs is covered by an extensive net of provisions within the Third Geneva Convention which, read together, lead to the conclusion that any conduct of hostage-taking involving POWs could not but be in violation of the Third Geneva Convention.”²⁴⁰

Corporal Shalit has obviously been rendered *hors de combat* by detention. Because his continued detention is motivated not by a purpose of preventing his return to hostilities, but instead as a tool to leverage the policies of his government, he fits the definition of a hostage. By acknowledging that even POWs can be made hostages, the *Karadžić* decision confirmed that detention for the purpose of preventing a return

²³⁶ Dinstein, *supra* n. 26, p. 227. See also M.N. Schmitt, “Humanitarian law and direct participation in hostilities by private contractors or civilian employees,” 5 *Chicago JIL* (2005) pp. 511 at 540.

²³⁷ *Prosecutor v. Radovan Karadžić* Decision on Appeal of Trial Chamber’s Decision on Preliminary Motion to Dismiss Count 11 of the Indictment, IT-95-5/18-AR72.5, para. 25, 9 July 2009; Tadić *supra* n. 31, para. 102, *Nicaragua v. U.S.*, *supra* n. 154, para. 219; *Prosecutor v. Mrkšić, Radić and Šljivančanin*, case No. IT-95-13/1-A, Judgment, para. 70 (5 May 2009); *Prosecutor v. Dragoljub Kunarac et. al*, case No. IT-96-23 and IT-96-23/1-A, Judgment, para. 68 (12 June 2002); *Prosecutor v. Zegnil Delalić et Al.*, (čelebići case), case No. IT-96-21-A, paras. 143, 147, 150 (20 February 2001).

²³⁸ Rome Statute, Arts. 8(2)(a)(viii) and 8(2)(c)(iii).

²³⁹ *Prosecutor v. Radovan Karadžić*, Decision on Six Preliminary Motions Challenging Jurisdiction, IT-95-5/18-PT, para. 60, 28 April 2009. See also *Blaškić*, *supra* n. 58, para. 708 (entering convictions for hostage-taking when even though “not all were necessarily civilians, all were persons placed *hors de combat*.”); *Kordić and Čerkez*, *supra* n. 58, para. 319.

²⁴⁰ *Prosecutor v. Radovan Karadžić*, Decision on Appeal of Trial Chamber’s Decision on Preliminary Motion to Dismiss Count 11 of the Indictment, IT-95-5/18-AR72.5, para. 21, 9 July 2009.

to hostilities is the underlying purpose of the Third Geneva Convention prisoner of war regime, a purpose derived from earlier conventional law and customary law. “The object of capture is to prevent the captured individual from serving the enemy. He is disarmed and from then on he must be removed as completely as practicable from the front, treated humanely and in time exchanged, repatriated or otherwise released.”²⁴¹ In particular, “captivity in war is neither revenge, nor punishment, but solely protective custody.”²⁴² Moreover, the Third Geneva Convention specifically prohibits reprisals against POWs²⁴³ – and using POWs to gain leverage in negotiations rather than holding them in preventive custody fits within the spirit of that provision. Hamas has stated that Corporal Shalit’s release depends on a number of conditions, including the end of the Israeli blockade of Gaza, an end to the Israeli policy of targeted killings, and the release of prisoners in Israeli jails.²⁴⁴ As the ICTY Appeals Chamber recently stated regarding the crime of hostage-taking:

*The lawfulness of detention does not depend on the circumstances in which any individual comes into the hands of the enemy but rather depends upon the whole circumstances relating to the manner in which, and reasons why, they are held. Thus, the unlawfulness of detention relates to the idea that civilians or those taking no active part in hostilities are taken or held hostage not to ensure their safety or to protect them, but rather to gain an advantage or obtain a confession.*²⁴⁵

Since Hamas’ reason for continued detention is inconsistent with conventional and customary law, Corporal Shalit is being detained unlawfully, a fact that the Goldstone Report fails to consider or condemn.

5. Conclusion

By all accounts, over a thousand Palestinians died during Operation Cast Lead. Property damage and destruction left most of Gaza in ruins. Although undeniably tragic, these facts do not alone evidence violations of IHL by Israel. By the same token, the much smaller number of Israeli civilian deaths and lesser extent of property

²⁴¹ In re Territo, 156 F.2d 142, 145 (9th Cir. 1946).

²⁴² Y. Naqvi, “Doubtful prisoner-of-war status,” 84 *IRRC* (2002) pp. 571 at 572 (quoting Nuremberg Military Tribunal, Judgment and Sentences, 1 October 1946, reprinted in 41 *AJIL* (1947) pp. 172, 229).

²⁴³ GC III, Art. 13.

²⁴⁴ “Palestinians could hand over Israeli soldier to Egypt or France,” BBC Monitoring Middle East, 4 July 2006.

²⁴⁵ *Prosecutor v. Radovan Karadžić*, Decision on Appeal of Trial Chamber’s Decision on Preliminary Motion to Dismiss Count 11 of the Indictment, IT-95-5/18-AR72.5, para. 65, 9 July 2009.

damage in southern Israel do not absolve Hamas of responsibility for violating IHL by firing rockets intentionally and indiscriminately into civilian areas.

IHL maintains a delicate balance between two goals: effective lawful military operations and minimizing suffering during conflict. To do so, the law must be agile enough to accommodate new challenges. Even when the complexities of asymmetrical warfare, counterinsurgency, and other complicated contemporary conflicts make implementation of IHL difficult, core principles such as distinction, proportionality, military necessity, and humanity must nevertheless bound military action and guide our analysis of such action. The challenges Israeli forces faced in the densely populated Gaza Strip, where militants fought in civilian clothing, stored rockets in mosques, and fired rockets from the shadow of schools, do not diminish IHL's core obligations. Nor do these key principles change merely because Hamas, a non-state entity armed solely with missiles and rockets, faces Israel, which has one of the most technologically advanced militaries in the world. Doing so would fundamentally disrupt IHL's delicate balance.

Yet the Goldstone Report appears to do just that by devoting little attention to Hamas' violations of the IHL principle of distinction, such as the intentional failure of its forces to distinguish themselves from the civilian population and its use of civilian areas as a shield against Israeli operations. Such an approach risks fundamentally changing the calculus of combat because it drastically reduces the ability of militaries to conduct effective operations while still maximizing protection of the civilian population.

Beyond distinction, the Goldstone Report turns proportionality on its head, using a retrospective analysis to judge a commander's actions during combat. Relying substantively on information gathered after the fact, it discounts or simply fails to incorporate contemporaneous Israeli intentions or actions and the surrounding circumstances. The Goldstone Report instead measures proportionality by a "mathematical formula" in which the number of casualties directly correlates to a finding that crimes were committed. If the law functioned in this manner, no military could ever engage in any operations. In a separate misapplication of proportionality, the report conflates *jus in bello* proportionality and *jus ad bellum* proportionality. By doing so, it uses the incorrect assessment that particular Israeli attacks violated *jus in bello* proportionality to unfairly package Operation Cast Lead as disproportionate overall.

Apart from this fundamental misinterpretation of the key principles of distinction and proportionality, the Goldstone Report drastically alters the nature of certain crimes under IHL by all but eliminating the *mens rea* requirement for attacks on

civilians and destruction of property. Absent the mental element of intent, the mere fact of civilian deaths or property destroyed becomes the sole determining factor in finding violations of the law. Curiously, the report introduces an intent element not normally present in IHL when analyzing whether Hamas and other Palestinian armed groups took sufficient precautions to locate military objectives away from the civilian population.

The misapplication of IHL in the Goldstone Report has great significance. Perhaps the Mission sought greater protection for civilians by introducing new interpretations of IHL. In reality, the Goldstone Report will have the opposite effect. The report will embolden insurgent and terrorists who will now see the benefit of, and lack of accountability for, intermingling with the civilian population and endangering civilians with every launch of a rocket and every missile stored under a hospital. Moreover, militaries may conclude that even operations conducted lawfully under existing IHL cannot meet the (flawed) standards propounded in the Goldstone Report. As a result, some may choose to simply disregard the law; others may refrain from mounting effective operations out of fear that they will be condemned as acting unlawfully. Both choices place civilians at grave risk of injury and death, and undermine the very purpose of IHL.

A CRITIQUE OF THE GOLDSTONE REPORT AND ITS TREATMENT OF INTERNATIONAL HUMANITARIAN LAW¹

*Abraham Bell*²

I. Introduction

The Human Rights Council-appointed United Nations Fact-Finding Mission on the Gaza Conflict, popularly known as the Goldstone Mission, has been embroiled in controversy since it published its report in September 2009. Sadly, I believe that criticisms raised against the report are well founded and the nearly 500-page Goldstone Report failed in almost every respect.

Because I must focus on doctrinal International Humanitarian Law issues, I must ignore many of the Goldstone Report's non-doctrinal deficiencies. For further investigation of such issues, I commend beginning with the summary of a 2009 meeting at Chatham House on the report's procedural failings. The meeting addressed the most serious charges: The "style and presentation in the Goldstone Report could raise criticisms about bias and prejudice." "Criticisms of Hamas in the Report are tentative ... while the language employed regarding alleged Israeli violations is stronger and more condemnatory." The "incidents ... are presented as factual narratives with little analysis[,] ... hardly any documentary references" with "titles [that] appeared to disclose bias." The Mandate adopted by the Human Rights Council was "aggressively biased against Israel" and "did not conform with the terms of the 1991 General Assembly declaration on fact-finding missions." Christine Chinkin's participation as one of the four members despite public comments regarding the conflict created a "perception of bias." The Goldstone Mission gave "insufficient acknowledgement of the difficulty in obtaining information in a political environment dominated by

¹ Originally published in the *American Society of International Law Proceedings*, March 2010.

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Hamas” where witnesses were “prescreened and pre-selected” and “intimidated” by Hamas.

Incidents selected by the mission for investigation “appeared to have been selected for political effect” and it was unsatisfactory for the mission to have declined to reveal the criteria for selection. The mission used the incidents it selected to “to extrapolate an unbalanced account of what happened in Gaza.” The mission “dismissively rejected Israel’s extensive system of investigations of allegations of wrong-doing” despite its similarity to “review systems” employed throughout the world, including the U.S. and UK.³ While the meeting report failed to endorse many of these criticisms, I believe they are all well founded. Additionally, the meeting report was deliberately underinclusive. It consciously omitted all substantive criticism, and it left aside yet more procedural criticisms discussed by others.⁴

I now turn, as I must, to doctrine. The Goldstone Report’s interpretation and application of the law is no less defective; indeed, its doctrinal flaws alone are so extensive that I cannot possibly address them all in my brief remarks. I will therefore restrict myself to four subjects: (1) collective punishment (2) terrorism (3) distinction and proportionality and (4) human shielding.

II. Collective Punishment

Begin with collective punishment. As the ICRC observes, the prohibition on collective punishment is an “application, in part, of [the] Rule [] that no one may be convicted of an offence except on the basis of individual criminal responsibility.”⁵ In other words, collective punishment is the imposition of penal and quasi-penal punishment on the basis of association rather than criminal guilt.

But according to the Goldstone Report, collective punishment consists of imposing economic and political sanctions, or engaging in lawful actions of war when motivated by lawful goals such as convincing the enemy to release hostages – though apparently only when carried out by Israel. Thus, for instance, the report found Israel guilty of collective punishment for implementing a partial closure of its own border with

³ See *Report of an Expert Meeting which Assessed Procedural Criticisms made of the U.N. Fact-Finding Mission on the Gaza Conflict (The Goldstone Report)* at Chatham House on 27 November 2009, available at http://www.chathamhouse.org.uk/files/15572_il271109summary.pdf. [Reprinted in this volume 89–98.]

⁴ See criticisms collected at <http://www.goldstonereport.org>.

⁵ Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* 374 (2005), rule 103.

Gaza,⁶ and in warning it might continue “economic and political isolation” of Gaza until Hamas releases the hostage Gilad Shalit.⁷ The report provided no precedent for this radical reinterpretation of “collective punishment.” It could not, since there is no such precedent. Economic and political sanctions and other forms of retorsion, are among the most basic tools of international relations. For example, the states of the Arab League and the Organization of the Islamic Conference have imposed economic and political sanctions on Israel for more than six decades without ever having been found in violation of the IHL rule of collective punishment. The report justified neither its odd understanding of the law nor its application to only one party.⁸ Instead, the report sufficed with the claim that the accusation is popular among Palestinians. In the words of the report, “Israel... has chosen to punish the whole Gaza Strip and the population in it with economic, political and military sanctions. This has been seen and felt by many people with whom the Mission spoke as a form of collective punishment inflicted on the Palestinians because of their political choices.”⁹

III. Terrorism

This misclassification of economic sanctions as collective punishment is particularly striking in light of the report’s apparent denial of the legal duties imposed on states to deny even passive support to terrorist organizations like Hamas. That Hamas is a terrorist organization cannot be seriously doubted. Hamas repeatedly commits acts defined as criminal by the International Convention for the Suppression of Terrorist Bombings, the International Convention for the Suppression of the Financing of Terrorism, and the International Convention Against the Taking of Hostages. The

⁶ *Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, U.N. Doc. A/HRC/12/48 (25 September 2009) (final, late submitted version) ¶¶ 1305-1309 and 1328-1331 (hereinafter, “Goldstone Report”).

⁷ Goldstone Report ¶ 78. The paragraph refers to an Israeli “blockade,” later defined in ¶ 311 as “the long process of economic and political isolation imposed on the Gaza Strip by Israel, which is generally described as a blockade.”

⁸ On the Goldstone Report’s attempt to expand the law of belligerent occupation to make Gaza territory “occupied” by Israel, see Bell & Shefi, *The Mythical Post-2005 Israeli Occupation of the Gaza Strip*, 16 ISRAEL AFFAIRS 268 (2010).

⁹ Goldstone Report ¶ 1330.

United States,¹⁰ the European Union,¹¹ Canada,¹² Israel,¹³ and Japan¹⁴ all classify Hamas as a terrorist organization. Hamas' terrorist acts are not accidental; Hamas was chartered in 1988 with the expressed aims of "obliterat[ing] Israel," rejecting "so-called peaceful solutions," and "struggl[ing] against the Jews" until the Day of Judgment when the stones and the trees will help Muslims kill Jews.¹⁵ Security Council Resolution 1373, adopted under Chapter VII, requires states to forbid support, whether passive or active, to entities controlled by persons who commit terrorist acts. With Hamas in control of the government of the Gaza Strip, and numerous reports of Hamas diverting civilian aid in order to fill its own coffers,¹⁶ Resolution 1373 not only permits but requires Israel strictly to limit aid to the Gaza Strip. Of course, one can plausibly argue that Resolution 1373 is quasi-legislative and therefore *ultra vires*. One can quibble about the scope of "passive support" and the other acts forbidden by 1373. One can ponder the interplay between 1373 and the limited IHL duties to permit passage of some kinds of aid. One can argue about the degree to which Hamas' past theft of aid implies a future threat. But the Goldstone Report did not engage the arguments or even acknowledge the existence of international law concerning terrorist organizations. Nor did the report acknowledge that Hamas is a terrorist organization. Rather, in a startling repudiation of the law, the report concluded that the only relevant crime of terror is to be found in the Geneva Conventions, and, in an even more shocking renunciation of reality, that Israel and only Israel is guilty

¹⁰ United States Department of State, Office of the Coordinator for Counterterrorism, List of Foreign Terrorist Organizations, available at <http://www.state.gov/s/ct/rls/other/des/123085.htm>.

¹¹ European Union list of terrorist groups, 2009, available at <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:023:0037:0042:EN:PDF>.

¹² Canada Currently Listed Terrorist Entities, available at <http://www.publicsafety.gc.ca/prg/ns/le/cle-eng.aspx>.

¹³ Israel List of Terrorist Organizations (Hebrew), available at <http://www.mod.gov.il/pages/general/pdfs/teror.pdf>.

¹⁴ See Japan Diplomatic Bluebook 2005, available at <http://www.mofa.go.jp/policy/other/bluebook/2005/ch3-a.pdf>.

¹⁵ The Covenant of the Islamic Resistance Movement (18 August 1988) (English translation), available at http://avalon.law.yale.edu/20th_century/hamas.asp.

¹⁶ E.g., Isabel Kershner and Taghreed El-Khodary, U.N. Says Hamas Stole Aid Intended for Gazans, NEW YORK TIMES, February 4, 2009, <http://www.nytimes.com/2009/02/04/world/africa/04iht-mideast.4.19933553.html>; Jordan Says Hamas Seizes Aid Convoy Sent to Gaza, REUTERS, February 9, 2009, <http://www.reuters.com/article/idUSL0983878>; Yaakov Katz, Hamas Raids Aid Trucks, Sells Supplies, JERUSALEM POST, January 12, 2009.

of terror.¹⁷ Indeed the report claimed legal protection for terrorist organizations: it posited that arresting Hamas members, refusing public appointment to Hamas and affiliates, and denying Hamas-affiliated organizations public support constitute illegal discrimination on the basis of political belief, a violation of freedom of association, and even collective punishment.¹⁸

IV. Distinction and Proportionality

The whitewashing of Hamas carries over to the report's problematic treatment of issues of distinction and proportionality. Examine, for instance, the report's lengthy claim that Israel violated the rule of distinction by targeting Hamas police. As you will recall, the rule of distinction requires combatants to aim their fire only at legitimate targets. This rule has two elements: legitimate targets and intent. Legitimate targets are objects that contribute to the war effort, or persons who are combatants. Set aside for the moment the problem that in non-international conflicts (a category which arguably fits the Gaza conflict) there is no definition of combatant, and let us agree that one may legitimately target only members of armed forces and those active in hostilities. The element of intent specifies that the rule of distinction is violated only where one deliberately aims at illegitimate targets as such.

Were the police legitimate targets? According to Israel, the Gaza police were armed forces tasked with engaging in military and quasi-military operations. In addition, nearly all policemen were also active members of Hamas or other terrorist organizations, and as the report noted, Israel defined "anyone who is involved with terrorism within Hamas [a]s a valid target."¹⁹ The Goldstone Report denied that the police were armed forces, notwithstanding that Hamas police spokesman Islam Shahwan himself had been quoted during the conflict confirming the police role in "facing the enemy," relying instead on Shahwan's later self-serving claim that the police had a purely civilian role.²⁰ The report acknowledged the truth of Israel's

¹⁷ Goldstone Report ¶ 108, 884, 1164, 1171, 1328, 1494, 1893, 1921, 1927. The Report conceded that "continued [rocket] attacks" by "Palestinian armed groups" "caused terror" in Israel and it is "plausible" that "one of the primary purposes of" the attacks was "to spread terror." Goldstone Report ¶¶ 1689, 1691, 1900, 1951.

¹⁸ Goldstone Report ¶¶ 91, 100-102, 1501, 1550-1561.

¹⁹ Goldstone Report ¶ 376.

²⁰ Goldstone Report ¶ 416. On Shahwan's general credibility as a witness, see Ali Waked, Hamas: Israel Distributes Libido-increasing Gum in Gaza, YNET NEWS, July 13, 2009, <http://www.ynetnews.com/articles/0,7340,L-3746017,00.html>, where Shawan claimed to have intercepted libido-increasing chewing gum secretly distributed by Israeli intelligence operatives in the Gaza Strip in order to destroy the morals of Palestinian youth.

second claim – that most or nearly all of the police were active Hamas members²¹ – but denied that an armed member of a terrorist organization should automatically be viewed as a member of an armed force. To understand just how revolutionary this is, consider a British soldier in Afghanistan stationed on traffic control duty. Would we really accept that the soldier was no longer a legitimate combat target solely because he had civilian governing functions during that particular period? Yet, according to the Goldstone Report, once terrorist groups seize control of an area, their armed members and leaders become presumptive civilians.

In any event, the Goldstone Mission stated that it did not know what percentage of targeted police fit the report's restrictive definition of combatant, and it did not matter since Israeli strikes killed several civilian passersby (according to the report, in the incidents it investigated, 99 policemen and 9 civilians were killed²²). According to the Goldstone Report, this demonstrated that Israeli strikes violated the rule of proportionality.²³ This is an exceedingly odd understanding of the rule of proportionality.

Every civilian casualty is a tragedy. But proportionality permits such collateral casualties unless military commanders anticipate excessive collateral losses in relation to the anticipated military advantage. Here too there are two elements: excessive damage to civilians (requiring a comparison of damage to civilians, military necessity, and the proportion between the two) and anticipation of the excessiveness. The numbers of casualties – 11 police to every civilian, with even the Goldstone Report acknowledging that most police were armed members of Hamas – seem of a scope that traditionally would not be viewed as excessive under the proportionality standard. Consider, for example, the opinion of the ICTY prosecutor on NATO bombings in Kosovo, where he ruled out a prosecution for disproportionate attacks where NATO forces killed 10-17 civilians in bombing a broadcast station and putting it out of commission for only a few hours.²⁴ The smallest percentage of civilian casualties I can find in a successful proportionality prosecution is the ICTY ruling in the *Galić* case,²⁵ where the court ruled that an attack on a soccer pitch was disproportionate despite 50% of the dead being soldiers. Note that the Goldstone Report fails this standard by more than a factor of five, and in the *Galić* case, the court

²¹ Goldstone Report ¶ 420.

²² Goldstone Report ¶ 424.

²³ Goldstone Report ¶ 437.

²⁴ Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, ¶¶ 71-79.

²⁵ *Prosecutor v. Stanislav Galic* – Case No. IT-98-29-T (trial judgment, 5 December 2003), ¶¶ 372-387.

suggested that the 50% figure sufficed in *Galić* only due to special circumstances and would never suffice for a finding of disproportionality in ordinary circumstances. In any event, the report never even attempted to demonstrate how it calculated proportionality. Additionally, the Goldstone Report presented no evidence of what Israeli mission planners anticipated. The clear implication is that the anticipation, numbers, proportion, and military necessity are irrelevant. Israel, and only Israel, is subject to a different rule: it is guilty of a disproportionate attack whenever there is any collateral damage.

Just as it rewrote the meaning of legitimate targets and the rule of proportionality, the Goldstone Report rewrote the meaning of intent for the rule of distinction. Repeatedly, the Goldstone Report stated that Israeli criminal intent could be presumed since (a) civilians died and (b) Israel has precision weaponry at its disposal.²⁶ *QED*. Therefore, *pace* Goldstone Report, it was unnecessary to investigate Hamas' fighting practices, the rules of engagement actually given to Israeli forces, or any other facts that would shed light on Israeli intent. Instead, claimed the report, "[t]he Israeli armed forces possess very advanced hardware ... Taking into account the ability to plan, the means to execute plans with the most developed technology available, and statements by the Israeli military that almost no errors occurred, the Mission finds that the incidents and patterns of events considered in the report are the result of deliberate planning and policy decisions."²⁷ Elsewhere, the Goldstone Report went further and found that even where Israel did err, it nevertheless acted intentionally. Thus, said the report, Israel violated the intent requirement of the rule of distinction by mistakenly striking a civilian home rather than the intended target of a neighboring house storing weapons since even though the "consequence may have been unintended," the "firing of the projectile was a deliberate act."²⁸ In other words, the Report irrebuttably presumed Israel to be guilty and to have the requisite criminal intent. The Goldstone Report even made this presumption of guilt explicit, stating that it did not find it necessary to grant a presumption of innocence since it was leveling charges against the entire state rather than accusing named individuals, and anyway, where the Goldstone Mission had evidence, it was insufficient to meet criminal standards of proof.²⁹ Of course, the mission presumed only Israel's guilt; one cannot find a single instance where the

²⁶ E.g., Goldstone Report ¶¶ 61, 1191.

²⁷ Goldstone Report ¶ 61.

²⁸ Goldstone Report ¶ 864.

²⁹ Goldstone Report ¶¶ 25 and 172.

report concluded definitively that Hamas acted from criminal motives, nor where it presumed Hamas' criminal intent.³⁰

No legal source or state practice supports denying armies with precision weaponry any collateral damage or errors. Nor do any recognized versions of distinction dispense with the element of proving specific intent to harm civilians as such or anticipation of excessive collateral damage, and instead find the rules violated by all attacks that after the fact are alleged to have harmed protected targets. And yet, this is precisely how the Goldstone Report applied the rules against Israel.

V. Human Shielding and Perfidy

Like the Goldstone Report, I have largely omitted discussion of Hamas' many IHL violations. Numerous contemporary news reports described Hamas combatants operating out of hospitals,³¹ ambulances,³² and schools,³³ fighting in civilian dress,³⁴ hiding behind civilians while fighting,³⁵ and using mosques³⁶ and other protected sites to store weapons. By sacrificing Palestinian civilians in this way, Hamas transformed

³⁰ Compare Goldstone Report ¶¶ 1687-1691 (where the Report acknowledged "Palestinian armed groups, among them Hamas, have publicly expressed their intention to target Israel civilians" but ultimately refused to conclude that Hamas intentionally targeted civilians since it and other Palestinian groups "recently claimed that they do not intend to harm civilians.")

³¹ E.g., Ethan Bronner & Taghreed El-Khodary, No Early End Seen to "All-Out War" on Hamas in Gaza, *NEW YORK TIMES*, December 30, 2008, available at <http://www.nytimes.com/2008/12/30/world/africa/30iht-30mideast.18990855.html>.

³² E.g., Jason Koutsoukis, Hamas Tried to Hijack Ambulances During Gaza War, *SYDNEY MORNING HERALD*, Jan. 26, 2009, available at <http://www.smh.com.au/news/world/hamas-tried-to-hijack-ambulances-during-gazawar/2009/01/25/1232818246374.html>.

³³ E.g., Israel Hits Second U.N. School, Blasts Way Into Southern Gaza, *FOXNEWS.COM*, Jan. 6, 2009, available at <http://www.foxnews.com/story/0,2933,476664,00.html>.

³⁴ E.g., Steven Erlanger, A Gaza War Full of Traps and Trickery, *NEW YORK TIMES*, January 11, 2009, available at <http://www.nytimes.com/2009/01/11/world/middleeast/11hamas.html>; Taghreed El Khodary & Isabel Kushner, For Civilians in Gaza, Warnings But Nowhere to Run, *INTERNATIONAL HERALD TRIBUNE*, January 7, 2009; Martin Fletcher, Sheera Frenkel & Azmi Keshawi, Gaza's Tunnels, Traps and Martyrs, *THE TIMES* (London), Jan. 12, 2009, available at http://www.timesonline.co.uk/tol/news/world/middle_east/article5497340.ece.

³⁵ E.g., Ulrike Putz, 'Who Has Won Here?', *SPIEGEL*, Jan. 23, 2009, available at <http://www.spiegel.de/international/world/0,1518,603203,00.html>; Rod Nordland, Hamas and Its Discontents, *NEWSWEEK.COM*, Jan. 20, 2009, available at <http://www.newsweek.com/id/180691/page/1v>; Ethan Bronner, Parsing Gains of Gaza War, *NEW YORK TIMES*, Jan. 18, 2009, available at <http://www.nytimes.com/2009/01/19/world/middleeast/19assess.html>.

³⁶ E.g., Steven Erlanger, Weighing Crimes and Ethics in the Fog of Urban Warfare, *NEW YORK TIMES*, Jan. 16, 2009, available at <http://www.nytimes.com/2009/01/17/world/middleeast/17israel.html>; Sheera Frenkel, Human Shields Were Forced Into the Front Line – By Both Sides, *THE TIMES* (London), Feb. 2, 2009.

many otherwise protected places into lawful targets, made many civilians legitimate collateral damage and caused enormous destruction of civilian property. In other words, Hamas' actions were the primary cause of material destruction in Gaza and of many innocent Palestinian deaths. As well, Hamas' actions violated IHL: its misuse of ambulances and civilian dress constituted perfidy, and its exploitation of civilians and civilian areas as cover constituted human shielding. The report refused to acknowledge Hamas' wrongdoing. It dismissed photographic evidence of Hamas' guilt on the grounds that it "is not reasonably possible to determine whether those photographs show what is alleged."³⁷ The report failed to acknowledge many contemporary news reports and dismissed others as unreliable,³⁸ brushed aside Israeli complaints, and declined to include even one incident of Hamas wrongdoing among the 36 investigated by the Mission. Of 1,025 paragraphs in the report dealing with combat operations in Gaza,³⁹ all but 60 dealt with Israel,⁴⁰ and those 60 dealing with Hamas consisted primarily of the mission dismissing Israeli grievances about Hamas. The report offered no information about Hamas' war aims, units deployed, combat tactics, or combat missions. Indeed, the mission was so uninterested in Hamas' wrongdoing that it stated that "only one of the incidents it investigated clearly involved the presence of Palestinian combatants."⁴¹

While refusing to investigate Hamas, the mission denied the credibility of evidence that reflected badly on Hamas or well on Israel. I searched for variations of the word "credible" in the report and found 24 paragraphs⁴² in which the report stated that it found Palestinian witnesses credible, as well as 2 more where it found credible Palestinian claims jointly made with private Israelis that were critical of the State of Israel.⁴³ I found no cases where the report stated that Palestinian witnesses were not credible. By contrast, I found 4 paragraphs in which the report found Israeli claims not credible,⁴⁴ and not a single instance of an Israeli claim being deemed credible.

³⁷ Goldstone Report ¶ 451.

³⁸ E.g., Goldstone Report ¶ 614.

³⁹ Goldstone Report ¶¶ 311-1335.

⁴⁰ Goldstone Report ¶¶ 439-498.

⁴¹ Goldstone Report ¶ 479.

⁴² Goldstone Report ¶¶ 467, 483, 503, 551, 622, 645, 683, 723, 741, 752, 762, 768, 777, 798, 838, 922, 925, 1011, 1032, 1090, 1091, 1164, 1354 & 1366.

⁴³ Goldstone Report ¶¶ 1378 & 1591.

⁴⁴ Goldstone Report ¶¶ 41, 675, 690, 866.

Similarly, I searched for “reliable” and found 2 Israeli claims not “reliable”⁴⁵ and none “reliable,” while 15 Palestinian claims⁴⁶ (as well as 2 joint claims⁴⁷) were “reliable” and none not “reliable.” While this methodology is crude, I think it accurately reflects the double standard on evidence. Having refused both to collect evidence adverse to Hamas and to believe it once received, the report stated repeatedly that it “did not find any evidence to support the allegations made” that Hamas committed crimes of perfidy and human shielding.⁴⁸ The report added that the crime of human shielding is not established merely by moving civilians or taking up position near them; it requires the “specific intent of shielding the combatants from counter-attack.”⁴⁹ Despite evidence of Hamas having called in the past for civilians to act as shields,⁵⁰ the report stated that it could not find the required criminal intent without “direct evidence on this question.”⁵¹ Thus the report anchored Hamas’ impunity for its crimes.

By contrast, the report devoted 75 paragraphs to finding Israel guilty of 4 instances of alleged human shielding.⁵² Interestingly, while the 75 paragraphs contained lengthy narratives of alleged acts in which Israeli troops forced Palestinians to accompany them, the report cited no source other than testimony of the accusers, which the report found credible despite admitted “inconsistencies.”⁵³ Further, the report offered no evidence showing any Israeli intent to exploit the movement of the Palestinian civilians as human shields. Rather, as in the case of distinction, the report presumed criminal intent. Thus while the report found past encouragement by Hamas of human shielding not incriminatory, it found Israeli rules of engagement forbidding such practices suspicious⁵⁴ and allegations of Israeli human shielding not accepted by an Israeli court in 2002 were found incriminatory.⁵⁵ To be sure, Israel recently charged two soldiers for forcing a Palestinian to open a suspicious bag during the

⁴⁵ Goldstone Report ¶¶ 675 & 702.

⁴⁶ Goldstone Report ¶¶ 551, 645, 723, 741, 752, 762, 768, 777, 798, 838, 922, 1011, 1012, 1090 & 1164.

⁴⁷ Goldstone Report ¶¶ 1378 & 1593.

⁴⁸ E.g., Goldstone Report ¶ 469.

⁴⁹ Goldstone Report ¶ 452.

⁵⁰ Goldstone Report ¶ 452. See also <http://www.youtube.com/watch?v=ArJbn-IUCh4>.

⁵¹ Goldstone Report ¶ 452.

⁵² Goldstone Report ¶¶ 1032-1106.

⁵³ Goldstone Report ¶ 1091.

⁵⁴ Goldstone Report ¶ 1101.

⁵⁵ Goldstone Report ¶ 1098. See also *Adalah v. Commander of the Central Region*, HCJ 3799/02 (2005).

Gaza conflict.⁵⁶ Perhaps more such cases will come to light. But the disparity in the report's evidentiary and legal standards is striking.

VI. Conclusion

Some have wondered despairingly after the Goldstone Report whether states can defend themselves anymore against aggression by terrorist groups.⁵⁷ If Israel really massively violated the laws of war even as British colonel Richard Kemp testified that “the Israeli Defence Forces did more to safeguard the rights of civilians in a combat zone than any other army in the history of warfare,”⁵⁸ if terrorists can shield themselves with impunity behind hospitals and civilian neighborhoods, and if states must support terrorist groups financially and logistically, then there is no legal way to fight terrorists. But the law does not dictate these absurd conclusions. The Goldstone Report failed, not the law.

⁵⁶ See Military Prosecution Indicts Two IDF Staff Sergeants for Unauthorized Conduct During Operation Cast Lead, http://www.mfa.gov.il/MFA/Government/Communiques/2010/Military_Prosecution_indicts_sergeants_Operation_Cast_Lead_11-Mar-2010.htm.

⁵⁷ E.g., Max Boot, The Goldstone Report, COMMENTARY CONTENTIONS, September 16, 2009, available at <http://www.commentarymagazine.com/blogs/index.php/boot/96122>; Israel Ministry of Foreign Affairs, Goldstone Fact-Finding Report: A Challenge to Democracies Fighting Terror, http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Hamas+war+against+Israel/Goldstone+Fact-Finding_Report_Challenge_democracies_fighting+_error.htm.

⁵⁸ Richard Kemp, Testimony before U.N. Human Rights Council, October 16, 2009, available at <http://www.unwatch.org/site/apps/nlnet/content2.aspx?c=bdKKISNqEmG&b=1313923&ct=7536409>.

THE GOLDSTONE ILLUSION¹

Moshe Halbertal

I.

In 2000, I was asked by the Israel Defense Forces to join a group of philosophers, lawyers, and generals for the purpose of drafting the army's ethics code. Since then, I have been deeply involved in the analysis of the moral issues that Israel faces in its war on terrorism. I have spent many hours in discussions with soldiers and officers in order to better grasp the dilemmas that they tackle in the field, and in an attempt to help facilitate the internalization of the code of ethics in war. It was no wonder that, when the Goldstone Report on the Gaza War was published, I was keen to read it, with some hope of getting a perspective on Israeli successes or failures in this effort to comprehend war, and to fight it, morally. Unlike many who responded to the report, in praise or in blame, I gave this immensely long document a careful reading.

Let us begin with a sense of the moral stakes. Since the early 1990s, the nature of the military conflict facing Israel has been dramatically shifting. What was mainly a clash between states and armies has turned into a clash between a state and paramilitary terror organizations, Hamas in the south and Hezbollah in the north. This new form of struggle is now called "asymmetrical war." It is defined by an attempt on the part of those groups to erase two basic features of war: the front and the uniform. Hamas militants fight without military uniforms, in ordinary and undistinguishing civilian garb, taking shelter among their own civilian population; and they attack Israeli civilians wherever they are, intentionally and indiscriminately. During the Gaza operation, for example, some Hamas militants embedded in the civilian population did not carry weapons while moving from one position to another. Arms and ammunition had been pre-positioned for them and stored in different houses.

In addressing this vexing issue, the Goldstone Report uses a rather strange formulation: "While reports reviewed by the Mission credibly indicate that members of the Palestinian armed groups were not always dressed in a way that distinguished them from the civilians, the Mission found no evidence that Palestinian combatants mingled with the civilian population with the intention of shielding themselves from

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the attack.” The reader of such a sentence might well wonder what its author means. Did Hamas militants not wear their uniforms because they were inconveniently at the laundry? What other reasons for wearing civilian clothes could they have had, if not for deliberately sheltering themselves among the civilians?

As for the new “front” in asymmetrical warfare, we read in another passage, which is typical of the report’s overall biased tone, that, “On the basis of the information it gathered, the Mission finds that there are indications that Palestinian armed groups launched rockets from urban areas. The Mission has not been able to obtain any direct evidence that this was done with the specific intent of shielding the rocket launchers from counterstrikes by the Israeli armed forces.” What reason could there possibly be for launching rockets from urban centers, if not shielding those rockets from counterattack? And what is the moral distinction that is purportedly being established here?

By disguising themselves as civilians and by attacking civilians with no uniforms and with no front, these paramilitary terrorist organizations attempt nothing less than to erase the distinction between combatants and non-combatants on both sides of the struggle. Suicide bombers exploded themselves on buses and in restaurants in Tel Aviv, Jerusalem, Haifa, Dimona, Eilat, and many other places. Qassam rockets and Katyushas were fired randomly at various Israeli civilian centers, as far as their range allowed. So the war had no defined place and was waged by unidentified murderers. It justifiably felt like a change in the very nature of warfare. The goal of this momentous transformation was to create a war of all against all and everywhere. It aimed at shifting the Israeli population from a healthy sense of cautious fear attached to a particular place – a border, a security zone – to a generalized panic that has no location. Everywhere and everyone is now regarded as dangerous. This is not paranoia. It has a basis in a new reality, and is the outcome of a new strategic paradigm.

Faced with this unprecedented and deeply perplexing situation, two extreme positions have emerged in Israel. The radical left claims that, since such a struggle necessarily involves the killing of innocent civilians, there is no justifiable way of fighting it. Soldiers ought to refuse to engage in such a war, and the government has only one option, which is to end the occupation. This view is wrong, since Israel has the right and the obligation to protect its citizens, and without providing real security, it will fail also to achieve peace and to put an end to the occupation. The radical right claims that, since Hamas and Hezbollah initiated the targeting of Israeli civilians, and since they take refuge among their own civilians, the responsibility for harming Palestinian civilians during Israel’s attempt to defend itself falls upon the Palestinians exclusively. This approach is also wrong. The killing of our civilians does not justify the killing of

their civilians. Civilians do not lose their right to life when they are used as shields by Hamas and Hezbollah. In fighting the militants, Israel must do as much as it possibly can do to avoid and minimize harm to civilian life and property.

The aim of the IDF ethics code is to strike a coherent and morally plausible position that provides Israel with the effective tools to protect its citizens and win the war while also setting the proper moral limits that have to be met while legitimately securing its citizens. In debating the code, I heard many times that it imposes constraints upon Israeli action that would limit the capacity of the army to win the battle and to provide security. In fact, the moral constraints and the strategic goals are mutually reinforcing. Radical groups such as Hamas start their struggle with little support from their population, which tends to be more moderate. They increase their base of support cynically, by murdering Israeli civilians and thereby goading Israel into an overreaction (this is not to deny, of course, that Israel can choose not to overreact) in a way that ends up causing suffering to the Palestinian civilians among whom the militants take shelter. The death and the suffering of the civilian Palestinian population, in the short run, is a part of the Hamas strategy, since it increases the sympathy of the population with the movement's aims. An Israeli overreaction also leads to the shattering of Israel's moral legitimacy in its own struggle. In a democratic society with a citizen's army, any erosion of the ethical foundation of its soldiers and its citizens is of immense political and strategic consequence.

And so, Israel's goal in its struggle with Hamas and Hezbollah is to reverse their attempt to strengthen themselves politically by means of their morally bankrupt strategy. Rather than being drawn into a war of all against all and everywhere, Israel has sought to isolate the militants from their environment: to mark them and "clothe" them with a uniform, and to force them to a definite front. The moral restraints in this case are of great strategic value. I am convinced, for this reason, that targeted killing, especially of the militants' leadership, is an effective and legitimate endeavor. It is for this same reason that I believe that Israel's siege of Gaza, and its harsh effect upon general civilian life, is morally problematic and strategically counterproductive.

II.

In accordance with the just war tradition in Western history and philosophy, three principles are articulated in the IDF code concerning moral behavior in war. The first is the principle of necessity. It requires that force be used solely for the purposes of accomplishing the mission. If, for example, a soldier has to break down the door of a home in order to search for a suspected terrorist, he has no right to smash the TV set on his way in: Such gratuitous use of force has no relation to the mission. This is a straightforward principle, professionally and morally, though its implementation

might be complicated if the mission is not well-articulated or if there are serious arguments about what kind of force is necessary to accomplish a given mission. In ordinary war, the collapse of the enemy's army is a more or less clear event; but in an asymmetrical war, victory is never final – the mission seems not so much to end as to shift; and so it may be difficult to apply the necessity principle.

The second principle articulated in the code is the principle of distinction. It is an absolute prohibition on the intentional targeting of non-combatants. The intentional killing of innocent civilians is prohibited even in cases where such a policy might be effective in stopping terrorism. At the height of the violence in 2002, some suggested that the only deterrence against suicide bombers who wish to die anyway is the killing of their families. But such a policy is blatantly murderous, and it is prohibited. An Israeli soldier is prohibited from intentionally targeting non-combatants, and, in the event that he is given such an order, he must refuse it. He is obligated to engage in fighting only those who threaten his fellow soldiers and civilians.

The implementation of the principle of distinction is also very difficult in an asymmetrical war. Since the enemy does not appear in uniform and there is no specified zone that can be described as the battlefield, the question of who is a combatant becomes crucial. In the process of identifying combatants, a whole causal chain must be established and marked as a legitimate target. This “food chain” of terrorism is made up of people whose intentional actions, one after the other, will end up threatening Israeli civilians or soldiers. This chain includes the one who plans the attack, the one who recruits the bomber, the one who prepares the bomb, the driver of the car that transports the bomber to his or her target, and so on. It is clear that such an attempt gives rise to difficult cases, and even the most scrupulous effort will leave some room for doubt. What about the financier of the bombing, for example?

It is also clear that applying the international law of war to this new battlefield is fraught with problems. Consider a painful issue that comes up in the Goldstone Report – the matter of the Gaza police force. In the first minutes of the war, Israel targeted Hamas police, killing dozens. There is no question that, in an ordinary war, a police force that is dedicated to keeping the civilian peace is not a military target. The report therefore blames Israel for an intentional targeting of non-combatants. But such a charge is only valid concerning a war against a state with a clear and defined military institution, one that therefore practices a clear division of labor between the police and the army. What happens in semi-states that do not have an institutionalized army, whose armed forces are a militia loyal to the movement or party that seized power? In such situations, the police force might be just a way of putting combatants on the payroll of the state, while basically assigning them clear military roles. Israeli intelligence claims that it has clear proof that this was the case

in Gaza. This is certainly something that Israel will have to clarify. But it is clear to me that Goldstone's accusation that targeting of the police forces automatically constitutes an attack on non-combatants represents a gross misunderstanding of the nature of such a conflict.

The third principle, the most difficult of all, is the principle of proportionality, or the principle of avoidance. Its subject is the situation in which, while targeting combatants, it is foreseeable that non-combatants will be killed collaterally. In such a case, a proportionality test has to be enacted, according to which the foreseeable collateral death of civilians will be proportionate to the military advantage that will be achieved by eliminating the target. If an enemy sniper is situated on a roof, and 60 civilians live under the roof, and the only way to kill the sniper is to bomb the roof, which is to say, bomb the house, such bombing is prohibited. The military advantage in eliminating the sniper is disproportionate to the probable cost of civilian life.

In discussing the proportionality constraint, there emerges a natural pressure to provide an exact criterion for measuring the proper ratio between collateral deaths and military advantage. I must admit that I do not know the formula for such a precise calculation, and I do not believe that a clear-cut numerical rule can be established. Different people have different intuitions about strategic value and moral cost. And yet, the Israeli army has traditions and precedents that can be relied upon. In 2002, for example, Israel bombed the Gazan home of Salah Shehadeh, who was one of the main Hamas operatives responsible for the deaths of many Israeli civilians. Fourteen innocent people were killed along with Shehadeh. The Israeli chief of staff, Moshe Yaalon, claimed that the collateral deaths were not only unintentional, they were not even foreseeable. The innocent people who were killed lived in shacks in the backyard of the building, which, in aerial photographs, looked like storage units. Yaalon claimed that, had Israel known about this collateral harm, it would not have bombed Shehadeh's hiding place. It had already aborted such an operation a few times because of concern with foreseeable civilian death. I believe that such care is right. It is better to err on the side of over-cautiousness concerning collateral damage.

Besides the difficulties that are raised by the proportionality test, there is a far greater and more momentous issue at stake in the principle of avoidance. The IDF code states that soldiers have to do their utmost to avoid the harming of civilians. This principle states that it is not enough not to intend to kill civilians while attacking legitimate targets. A deliberate effort has to be made not to harm them. If such an active, positive effort to avoid civilian harm is not taken, in what serious way can the claim be made that the foreseeable death was unintended? After all, the death occurred, and could have been expected to occur. So the proper ammunition has to be chosen to minimize innocent deaths; and, if another opportunity is expected to arise for

eliminating the target, the operation must be aborted or delayed. Civilians have to be warned ahead of time to move from the area of operation if this is possible, and units have to be well aware that they must operate with caution, even after warning has been given, since not all civilians are quick to move. A leaflet dropped from the sky warning of an attack does not matter to the people – the sick, the old, the poor – who are not immediately mobile.

In line with such principles, the Israeli Air Force developed the following tactic. Since Hamas hides its headquarters and ammunition storage facilities inside civilian residential areas, the Israeli army calls the residents' telephones or cell phones, asking them to move immediately out of the house because an attack is imminent. But Hamas, in reaction to such calls, brings the innocent residents up to the roof, so as to protect the target from an attack, knowing that, as a rule, the Israeli army films the target with an unmanned drone and will avoid attacking the civilians on the roof. In response to this tactic, Israel developed a missile that hits the roof without causing any actual harm in order to show the seriousness of its intention. The procedure, called "roof-knocking," causes the civilians to move away before the deadly attack.

It is rather a strange point in the Goldstone Report that this practice, which goes a long way to protect civilians, is actually criticized. Concerning such a practice, the report states that, "if this was meant as a warning shot, it has to be deemed reckless in the extreme." The truth is that this is an admirable and costly effort to avoid civilian collateral harm. As is true with many of its criticisms, the report does not state what the alternative should be. What should Israel do in such a case? Attack the house without calling on its residents to move, or attack it while they are gathered on the roof? Or maybe avoid attacks altogether, allowing the enemy to take effective shelter among civilians?

In the deliberations about the Israeli army's code of military conduct, a crucial question emerged in connection with the requirement that efforts be made to avoid harming civilians. For such efforts surely must include the expectation that soldiers assume some risk to their own lives in order to avoid causing the deaths of civilians. As far as I know, such an expectation is not demanded in international law – but it is demanded in Israel's military code, and this has always been its tradition. In Operation Defensive Shield in 2002, for example, Israeli army units faced a tough battle in the Jenin refugee camp. The army refused to opt for the easy military solution – aerial bombardment of the camp – because it would have resulted in many civilian deaths, and it elected instead to engage in house-to-house combat, losing 23 soldiers in the battle. This norm of taking risks with soldiers' lives in order to avoid civilian deaths came under criticism in Israel, but I believe that it is right. Innocent civilian lives are important enough to obligate such risks. And, if commanders are told that they do

not have to assume such risk, then they will shoot at any suspicious person, which will result in widespread killing.

Yet the application of such norms in battle raises difficult moral quandaries. One of them comes up in the Goldstone Report. When the operation started, Hamas militants mostly avoided face-to-face battles with Israeli soldiers. They withdrew into the civilian heartland and fired mortar rockets from within their own population, targeting Israeli units. Mortar locations can be detected by radar, but the crew can move the mortar to a new location in a few minutes, and then fire from there. It is therefore impossible to target these mortars and their crews with a helicopter or in any other way that would provide a direct visual of the target and use accurate ammunition: Such means simply take too much time to deploy. The only option is to fire back with mortars that can be quickly and accurately directed at the coordinates of the mortars on the other side.

The problem with such a tactic is that such mortars are of 120 millimeter caliber and the radius of their hit is 50 meters. This means that collateral damage to civilians might occur while hitting the legitimate target. Of course, the commanding officer can choose not to fire back and put his soldiers at risk from the next rounds of mortar shots. It is important also to note that, when returning fire, the commanding officer cannot know whether there are civilians in that radius and how many of them are there. In “fog of war” conditions, and under pressure to react, such information is not available.

The Goldstone Report claims that the shooting of mortars caused disproportionate collateral harm, which is, of course, an empirical matter; but it is important to understand that this can be known only after the fact. So what to do? My own view is that, if the fire that the unit is taking is not accurate, and if the commander can move his own unit to another location, he should do so rather than fire back and endanger civilians. But this is a very difficult choice, and sometimes this choice might not be available. It is wrong to give the commanding officer a blank check to shoot anytime his soldiers are at probable risk – but he must be given the means of protecting them as well. The Goldstone Report is very critical about the firing of the Israeli mortars, but it does not take seriously into account the problems that such a situation imposes.

It is my impression that the Israeli army in Gaza did not provide clear guidance on the matter of whether soldiers have to assume risk. Some units took risks in the Gaza in order to avoid the collateral killing of civilians, while some units accepted the policy of no risk to soldiers. This does not amount to a war crime, but it is a wrong policy. It also might be a cause of unnecessary civilian deaths: It could inspire a reason for a misguided order to shoot whoever crosses a certain line on the map in proximity to

an Israeli unit. Given the fact that anyone in the battle zone could be a militant, and that warnings were given, such an order might make sense – and yet, the order should refer to someone who seems to pose a threat rather than to anyone who crosses the line, since fear and confusion might cause innocent civilians to move too close to the line and even to cross it.

These are not simple issues. They are also not political issues. They are the occasions of deep moral struggle, because they are matters of life and death. If you are looking for an understanding of these issues, or for guidance about them, in the Goldstone Report, you will not find it.

III.

In discussing the code of ethical conduct with Israeli officers, many times I encounter the following complaint: “Do you want to say that, before I open fire, I have to go through all these moral dilemmas and calculations? It will be completely paralyzing. Nobody can fight a war in such a straitjacket!” My answer to them is that the whole point of training is about performing well under pressure without succumbing to paralysis. This is the case with battlefields that have nothing to do with moral concerns. Do I attack from the right or from the left? How do I respond to this new tactic, or to that? And so on. This is why moral considerations have to be an essential part of military training. If there is no time for moral reflection in battle, then moral reflection must be accomplished before battle, and drilled into the soldiers who will have to answer for their actions after battle.

Besides the great difficulty of adjusting the norms of warfare – the principles of necessity, distinction, proportionality, and avoidance – to a non-traditional battlefield without uniforms and without a front, there is still another pedagogical challenge. In a traditional war, the difficult moral choices are made by the political elites and the high command, such as whether to bomb Dresden or to destroy Hiroshima. But in this new kind of micro-war, every soldier is a kind of commanding officer, a full moral and strategic agent. Every soldier must decide whether the individual standing before him in jeans and sneakers is a combatant or not. What sorts of risks must a soldier assume in order to avoid killing civilians while targeting a seeming combatant? The challenge is to make these rules part of the inner world of each soldier, and this takes more than just formulating the norms and the rules properly. It is for this reason that I looked to the Goldstone Report to learn whether these norms were in fact applied, and in what way Israeli soldiers did or did not succeed in internalizing and acting upon them.

The commission that wrote the report could have performed a great service if it had concentrated on gathering the testimonies from Gaza and assessing them critically, while acknowledging (as it failed to do) that they are partial and incomplete. This would have forced Israel to investigate various matters, provide answers, and take appropriate measures. (I do not imagine Hamas engaging in such an investigation of its own crimes. This is yet another asymmetry.) But instead the commission opted to add to its findings three unnecessary elements: the context of the history that led to the war, its assessment of Israel's strategic goals, and long sections on Israel's occupation of the West Bank. Why should a committee with a mandate to inquire into the operation in Gaza deal with the Israeli-Palestinian conflict at large?

The honest reader of these sections cannot avoid the impression that their objective is to prepare a general indictment of Israel as a predatory state that is geared toward violating human rights all the time. It will naturally follow from such a premise that the Gaza operation was yet another instance of Israel's general wicked behavior. These long sections are the weakest, the most biased, and the most outrageous in this long document. They are nothing if not political. In Goldstone's account of the history that led to the war, for example, Hamas is basically described as a legitimate party that had the bad luck to clash with Israel. The bloody history of the movement – which, since the beginning of the Oslo accords, was determined to do everything in its power, including the massacre of civilians, to defeat the peace process – is not mentioned.

The Israeli reader who actually experienced the events at the time remembers vividly that Hamas terrorists murdered Israeli men, women, and children all over Israel while a peace process was underway. Hamas was doing all this in accordance with its religious ideology, which is committed to the destruction of Israel and is fueled by Iranian military and financial support. In the supposed context that the report analyzes, there is no mention of Hamas' role and its ideology as reflected in its extraordinary charter, which calls for the destruction of Israel and the genocidal killing of Jews. In its attempt to stop Hamas' vicious attacks on Israel's citizens, Israel built a long fence – an obstacle to prevent a suicide bomber in Kalkilya from rolling out of bed and driving to the heart of Kfar Saba and Netanya in five or ten minutes. (The distances between life and death are really that short.) The Goldstone Report mentions the fence, of course – but as a great violation of human rights, as motivated sheerly by predatory desires.

Hamas was responsible in many ways for torpedoing the next opportunity for ending Israel's occupation. After the collapse of the Oslo agreement, Ariel Sharon, then the prime minister, decided to withdraw unilaterally from Gaza, in the belief that there was no reliable partner on the Palestinian side and that Israel had to start putting an end to its control of the Palestinian population. Ehud Olmert, Sharon's successor, was

elected on a platform that committed him to unilateral withdrawals from the West Bank. But the implementation of this policy of continued Israeli withdrawal was cut short by the unrelenting shelling of Israeli cities and villages from recently vacated Gaza. Such ongoing attacks made Israelis rightly concerned that an evacuation of the West Bank would expose Israel's population centers to such attacks, and the possibility of unilateral evacuation from the West Bank collapsed.

In the last ten years, Israel has withdrawn unilaterally from south Lebanon and Gaza. In both cases, the vacuum was filled by militant Islamic movements religiously committed to the destruction of Israel. Anyone who supports a peaceful two-state solution must ponder the role of Hamas in destroying such a prospect – and yet, quite astonishingly, nothing of this is mentioned in the Goldstone Report. It also avoids mentioning the legitimate concern of Israel about the ongoing rearmament of Hamas in Gaza, which supplies them with more lethal long-range missiles to wreak destruction on Israeli population centers. The commission should not have dealt with the context leading to the war; it should have concentrated on its mandate, which concerned only the Gaza operation. By setting its findings about the Gaza War in a greatly distorted description of the larger historical context, it makes it difficult for Israelis – even of the left, where I include myself – to take its findings seriously.

Then there is the report's conclusion concerning Israel's larger aims in the Gaza War. It claims that Israel's objective in Gaza was a direct and intentional attack on civilian infrastructure and lives: "In reviewing the above incidents the mission found in every case that the Israeli armed forces had carried out direct intentional strikes against civilians." In another statement, intentional destruction of property and attacks against civilians are lumped together: "Statements by political and military leaders prior to and during the military operations in Gaza leave little doubt that disproportionate destruction and violence against civilians were part of a deliberate policy." Now, there is a huge moral difference between the accusation that Israel did not do enough to minimize collateral civilian death and the claim that Israel targeted civilians intentionally. It might well be that Israel should have done more than it did to minimize collateral deaths – it is a harsh enough claim, and it deserves a thorough examination. But the claim that Israel intentionally targeted civilians as a policy of war is false and slanderous.

There are different accounts of the numbers of civilian deaths in Gaza, and of the ratio between civilian and militant deaths. B'Tselem, the reliable Israeli human rights organization, carefully examined names and lists of people who were killed and came up with the following ratio: Out of the 1,387 people killed in Gaza, for every militant that was killed, three civilians were killed. This ratio – 1:3 – holds if you include the police force among the civilians; but if you consider the police force as combatants,

the ratio comes out to 2:3. There are 1.5 million people in Gaza and around 10,000 Hamas militants, so the ratio of militants to civilians is 1:150. If Israel targeted civilians intentionally, how on earth did it reduce such a ratio to 1:3 or 2:3?

The commission never asks that question, or an even more obvious one. In operating under such conditions – Gaza is an extremely densely populated area – is such a ratio a sign of reckless shooting and targeting? One way to think about this is to compare it with what other civilized armies achieve in the same sort of warfare. I do not have the exact numbers of the ratio of civilian to militant deaths in NATO's war in Afghanistan, but I doubt that it has achieved such a ratio. Is it ten civilians to one combatant, or maybe 20 civilians to one combatant? From various accounts in the press, it certainly seems worse. The number of collateral deaths that are reported concerning the campaign to kill Baitullah Mehsud, one of the main Pakistani militant operatives, is also alarming: In 16 missile strikes in the various failed attempts at killing him, and in the one that eventually killed him (at his father-in-law's house, in the company of his family), between 207 and 321 people were killed. If such were the numbers in Israel in a case of targeted killing, its press and even its public opinion would have been in an uproar.

Besides the 500 civilians who were killed in the bombing of Serbia, how many militants were killed? The inaccurate high-altitude bombings in Serbia, carried out in a manner so as to protect NATO pilots, caused mainly civilian deaths. What would have been the ratio of deaths if NATO forces were fighting not in faraway Afghanistan, but while protecting European citizens from ongoing shelling next to its borders? And there are still more chilling comparisons. If accurate numbers were available from the wars by Russia in Chechnya, the ratio would have been far more devastating to the civilian population. Needless to say, the behavior of the Russian army in Chechnya should hardly serve as a standard for moral scrupulousness – but I cannot avoid adducing this example after reading that Russia voted in the United Nations for the adoption of the U.N. report on Gaza. (The other human rights luminaries who voted for the Goldstone Report include China and Pakistan.) So what would be a justified proportionality? The Goldstone Report never says. But we may safely conclude that, if the legal and moral standard is current European and American behavior in war, then Israel has done pretty well.

IV.

So a good deal of the outrage that has greeted the Goldstone Report is perfectly justified. And yet its sections devoted to the Gaza War do make claims and cite testimonies that no honest Israeli can ignore. They demand a thorough investigation,

and I will enumerate them in their order of severity.

The worst testimonies are of civilian deaths, some of which sound like cold-blooded murders. In the report, such cases amount to a few individual incidents, and they call for criminal investigation of particular soldiers. Was there indeed a killing at close range of a mother and her three daughters carrying white flags? Then there are a few cases of alleged civilian deaths that are the result of the reckless use of firepower. The most disturbing of them is the testimony about the Al Samouni neighborhood in Gaza City, in which 21 members of a family were killed in an attack on a house. The place and the names are given in the report, and Israel will have to provide answers. Was it a mistake? Were some of the family members Hamas fighters? Did someone shoot at the soldiers from the house? Or was this an act of unjustified homicide?

The testimonies in the Goldstone Report are Palestinian testimonies. They were collected in Gaza, where the watchful eye of Hamas authorities always looms, rendering them vulnerable and partial. Israel chose not to cooperate with the commission, and so the Israeli version of events is not here. It was a mistake on Israel's part not to participate in the inquiry – though, after reading the report, I am more sympathetic to Israel's reluctance. This commission that describes its mission as fact-finding treats the missing Israeli testimonies as if they are Israel's problem, rather than a methodological and empirical shortcoming in the report itself. Whatever one thinks about Israel's refusal to cooperate, the Goldstone Report is still only 452 pages of mostly Palestinian testimony, and this grave limitation must be acknowledged.

Yet the allegations have now been made, and Israeli answers must be given. The next issue that Israel will have to deal with is the use of what the report calls “human shields,” which seems to have been an Israeli practice on some occasions. In justifying such a practice, Israeli commanders claim that they forced Palestinian civilians to go to certain homes to warn other civilians before attacking the houses. This might be justified, but the testimonies sound different. They sound as if Israeli soldiers were using civilians to gather information. After attacking a certain building, a civilian was allegedly forced to go and check whether the Hamas militants were dead or not. This is a troubling testimony. Was this done, or not? If it was done, then it is in violation of Israel's own Supreme Court ruling on the matter of human shields.

Other testimonies pertain to the destruction of civilian property. One of the most disturbing is the report of the flattening with bulldozers of the chicken farm at Zeytoun, in which 31,000 chickens were killed. Such destruction, like other reported destructions of agricultural and industrial facilities, does not seem to serve any purpose. The accusation concerning the destruction of civilian property pertains as well to the large-scale destruction of homes. According to the commission, aerial

photographs show that, of the total number of homes that were destroyed in two of the hardest-hit neighborhoods, about half were destroyed in the last three days of the operation. If so, then such destruction cannot be justified as in the heat of the battle. It was done to leave a brutal scar as proof of the Israeli presence, as immoral and illegal instruments of deterrence. If this were the case, then reparations should be made to the families whose homes were destroyed.

Next in order of severity comes the bombing of civilian infrastructure. According to the report, the Israeli Air Force bombed the flour mill, the water wells, and the sewage pipes in Gaza. It is possible that the flour mill was strategically located and was used as a perch for snipers or as a launching facility for Qassam rockets fired in the war. This would be the only justification for such a bombing. Israel should now provide its version of these events. If indeed these facilities were attacked as part of a premeditated policy, then this was wrong, and Israel should say so.

I do not see much substance in the complaint against Israel's bombing of the Hamas parliament and other offices while they were empty. A persuasive case can be made that an organization such as Hamas does not have a division of labor between its military and civilian functions. The report's long section on the attack on the prison in Gaza also seems to me a mistaken accusation. The commission notes that only one guard was killed in the bombing, but it blames Israel for endangering the prisoners in attacking a target that has no military use. It did not occur to the commission that Israel attacked the prison to allow Fatah prisoners to escape harsh treatment at the hands of Hamas. (The commission is well-aware that this was the population of the prison.) Some of them did escape, and some were subsequently shot by Hamas militants.

The Goldstone Report as a whole is a terrible document. It is biased and unfair. It offers no help in sorting out the real issues. What methods can Israel – and other countries in similar situations – legitimately apply in the defense of their citizens? To create standards of morality in war that leave a state without the means of legitimate self-protection is politically foolish and morally problematic; but real answers to these real problems cannot be found in the Goldstone Report. What should Israel do when Hezbollah's more lethal and accurate missiles strike the center of Tel Aviv, causing hundreds of civilian deaths? It is a well-known fact that these missiles are in Hezbollah's possession, and, when they are fired, it will be from populated villages in Lebanon.

It is important, for this reason, that Israel respond to the U.N. report by clarifying the principles that it operated upon in Gaza, thus exposing the limits and the prejudices of the report. A mere denunciation of the report will not suffice. Israel must establish

an independent investigation into the concrete allegations that the report makes. By clearing up these issues, by refuting what can be refuted, and by admitting wrongs when wrongs were done, Israel can establish the legitimacy of its self-defense in the next round, as well as honestly deal with its own failures.

CONTRIBUTORS

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The mission of Chatham House is to be a world-leading source of independent analysis, informed debate, and influential ideas on how to build a prosperous and secure world for all. Chatham House was founded in 1920 and is based in St James's Square, London. The Chatham House Rule, famous throughout the world for facilitating free speech and confidentiality at meetings, originated here.

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