LEGAL MEMORANDUM IN OPPOSITION TO ERRONEOUS ALLEGATIONS AND FLAWED LEGAL CONCLUSIONS CONTAINED IN THE UN HUMAN RIGHTS COUNCIL'S GOLDSTONE REPORT

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INTRODUCTION

On 27 December 2008, Israeli armed forces, in response to Hamas's renewed rocket and mortar attacks deliberately targeting civilians and civilian property in Israel, launched a three-week military operation in the Gaza Strip, designated as Operation Cast Lead[1]. The Operation's purposes were to defend Israeli civilians and territory, dismember Hamas's military infrastructure, and prevent or disrupt Hamas's ability to execute further unlawful attacks against Israel[2].

Both during Operation Cast Lead, and subsequently, a number of international organisations have alleged that specific actions taken by the Israeli military and some of its soldiers constituted violations of the laws of war. The overwhelming majority (at the very least) of these claims are without merit, as even non-Israeli military experts have attested. Retired British Colonel Richard Kemp, for example, said on the BBC, "I don't think there has ever been a time in the history of warfare when any army has made more effort to reduce civilian casualties and deaths of innocent people

[1] Global Policy Forum, Timeline: Gaza Crisis, http://www.globalpolicy.org/component/content/article/189/38272.html (last visited 2 Oct. 2009); *see also Rockets 'Violated Gaza Cease Fire'*, BBC NEWS, 24 June 2008, http://news.bbc.co.uk/2/hi/middle_east/7470530.stm; *Israeli Official: IDF to Leave Gaza Before Obama Inauguration*, HAARETZ.COM, 19 Jan. 2009, http://www.haaretz.com/hasen/spages/1056757.html [hereinafter "*Israeli Official*"] ("Israel launched its air, ground and sea assault on December 27 vowing to 'change the reality' for southern border towns that, since 2001, had taken fire from Hamas and other Palestinian factions armed with rockets.").

[2] *Israeli Official*, *supra* note 1.

than the IDF is doing today in Gaza"[3]. Not only do the allegations against Israel lack merit, but the accusers lack credibility as well, as demonstrated below[4].

Numerous organisations such as Human Rights Watch and Amnesty International have published reports making serious accusations against Israel for its conduct during Operation Cast Lead. They repeatedly accuse Israel of waging indiscriminate and disproportionate attacks, utilizing human shields, and even deliberately killing civilians in certain cases. None of these reports, however, has garnered the same attention or controversy as the United Nations Human Rights Council ("UNHRC") sponsored Goldstone Report (the "Report")[5].

The purpose of this legal memorandum is to address the general methodology of the Goldstone Fact-Finding Mission (the "Mission"), the pre-conceived notions of its authors, and the specific allegations made therein. The Mission's Report is fatally flawed due to inherent biases, unreliable methodology, and speculative legal and factual conclusions that both exceed the scope of the Mission's mandate and are factually and legally incorrect. *As such, the Goldstone Report lacks credibility; it cannot be relied upon by any international body, including the Security Council, or*

[3] BBC: Former British Army Colonel Richard Kemp Discusses IDF Gaza Ops, Youtube, http://www.youtube.com/watch?v=WssrKJ3Iqcw (last visited 19 Dec. 2009).

[4] Incidentally, the Goldstone Fact-Finding Mission refused to invite Colonel Kemp to testify, allegedly 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.'" ISR. 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 7 (2009) [hereinafter "Initial Israeli Response"], http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Hamas+war+against+Israel/Initial-response-goldstone-report-24-Sep-2009.htm. The issues regarding conducting military operations in civilian areas are highly relevant to the Report's contents because they provide context to the question of criminal intent and the difficulty in distinguishing between military and civilian targets. As we will detail in greater depth throughout this memorandum, this decision was also one of many that reflected the Mission's predisposition towards unduly criticizing Israel.

[5] Report of the United Nations Fact Finding Mission on the Gaza Conflict [hereinafter "Goldstone Report" or "Report"], Human Rights Council, U.N. Doc. A/HRC/12/48, 15 Sept. 2009, http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/FactFindingMission.htm. The initial version of the Report released was 575 pages long. A subsequent version is approximately 125 pages shorter. For the purposes of this brief, we analyse and cite to the longer version.

any court seeking to serve the cause of justice; and it should be more widely discredited in the public dialogue.

INTERESTS OF CONCERNED PARTY

The European Centre for Law and Justice ("ECLJ") is a public interest law firm and UN-accredited Non-Governmental Organisation ("NGO") located in Strasbourg, France. The ECLJ shares a commitment to eradicating crimes and atrocities that shock the human conscience, but it is equally committed to the principle that judicial legitimacy demands that international bodies rely only on information fairly gathered by competent fact finders operating in an open, transparent, and unbiased manner. Further, conclusions derived from such facts must be based on a proper interpretation and application of controlling legal principles.

SUMMARY OF ARGUMENT

Under international human rights law, the entire international community has "an obligation to promote and encourage respect for human rights . . ."[6]. To that end, fact-finding missions can be useful tools in holding *human rights violators* accountable for their actions. However, as a legal matter, Operation Cast Lead was governed by the law of armed conflict, *not international human rights law*, and the Goldstone Mission's ability to speak with authority regarding what transpired in Gaza was limited by incomplete knowledge of the facts and an often incorrect application of legal principles. Further, when so-called fact-finding missions yield reports that are fundamentally biased and contain significant procedural and substantive flaws, they cease to be useful tools. Flawed reports seriously weaken the cases against

[6] RAOUL WALLENBERG INST. OF HUMAN RIGHTS & HUMANITARIAN LAW & INT'L BAR ASSOC., GUIDELINES ON INTERNATIONAL HUMAN RIGHTS FACT-FINDING VISITS AND REPORTS (THE LUND-LONDON GUIDELINES) 1 (2009) [hereinafter "LUND-LONDON GUIDELINES"], http://www.factfindingguidelines.org/ (select hyperlink "Download the guidelines").

human rights violators and strain the credibility of the submitting body, thus rendering the reports inherently suspect.

The Goldstone Mission's Report exhibits inherent biases against the State of Israel and disregards United Nations standards for fact-finding, the explicit mandate of the UNHRC, and basic international fact-finding standards. The UNHRC has also exhibited a consistent institutional bias against the State of Israel.

The UNHRC was established in June 2006. It was meant to remedy the political biases of its predecessor, the UN Commission on Human Rights, which sponsored the notoriously anti-Israel Durban World Conference Against Racism in 2001. However, thus far, the UNHRC has carried on the biased traditions of its predecessor. Nearly half of its resolutions condemning specific states (23 out of 48) have been directed at Israel[7]. On 30 January 2006, the UNHRC even voted to review potential Israeli human rights abuses at every session[8]. Former UN Secretary General Kofi Annan, among others, has criticised the body for its partial and excessive focus on Israel at the expense of other regions like the Sudan[9].

This inherent bias was once again confirmed when the UNHRC resolved to establish a fact finding mission "to investigate all violations of international human rights law and international humanitarian law by the occupying Power, Israel, against the Palestinian people throughout the Occupied Palestinian Territory, particularly in the occupied Gaza Strip, due to the current aggression . . .".[10] There was no mention

[7] Eye on the UN, Human Rights Actions, http://www.eyeontheun.org/browse-un.asp?ya=1&sa=1&u=344&un_s=0&ul=1&tp=1&tpn=Resolution (last visited 15 Dec. 2009).
[8] Anne Bayefsky, Op-Ed., *Discrimination and Double Standards*, NAT'L REV. ONLINE, 5 Jul. 2006, http://article.nationalreview.com/?q=ODI0MWMzYzQyMmE3MTBkZTUwYjk5YjgzNGRiZDNkYWM=.
[9] *Darfur Crisis 'Graver than Middle East'—Annan*, IRISH EXAMINER, 29 Nov. 2006, http://www.irishexaminer.com/breakingnews/ireland/cwidqlauojsn/.
[10] G.A. Res. S-9/1, ¶ 14, U.N. Doc. A/HRC/S-9/L.1 (12 Jan. 2009).

of indiscriminate attacks by Hamas on Israeli civilians or territory, or, among other things, illegal tactics employed by Hamas during battle.

As we discuss in greater detail below, the Mission's members also exhibited biases against the State of Israel, evidenced by past statements, which compromised the Mission's ultimate integrity. Additionally, the Report consistently draws factual and legal conclusions that are unwarranted by the evidence and beyond the scope of the Mission's mandate and espouses opinions on issues that are completely irrelevant to the mandate. The Report also fails to provide anything resembling the full and appropriate context that prompted Operation Cast Lead.

It is true, as the Mission appreciated, that Operation Cast Lead cannot be viewed in isolation. Operation Cast Lead is part of a long history of conflict. Yet, most of that context is conspicuously absent from the Report, which instead provides a one-sided perspective that depicts Palestinians as victims and Israelis as aggressors. It also gives short shrift to the Israeli military's efforts to avoid civilian casualties and respect for the rule of law. Israeli forces dropped millions of leaflet warnings and utilised airwaves to warn Palestinian citizens of danger and to minimise innocent casualties[11]. There is abundant evidence that Israel used a variety of other methods to avoid civilian casualties; Israeli forces used precision munitions, cross-checked targets, and sometimes canceled or diverted military strikes due to the risk of collateral damage[12]. It also continues to investigate any allegations of wrongdoing[13].

That mistakes occur is unsurprising in any conflict, but especially in Gaza, where the terrorist group Hamas uses human shields and initiates military operations

[11] ISR. MINISTRY OF FOREIGN AFFAIRS, THE OPERATION IN GAZA, 27 DECEMBER 2008–18 JANUARY 2009: FACTUAL AND LEGAL ASPECTS 3 (2009) [hereinafter "MFA, OPERATION IN GAZA"], http://www.mfa.gov.il/NR/rdonlyres/E89E699D-A435-491B-B2D0-017675DAFEF7/0/Gaza OperationwLinks.pdf.MFA.
[12] *Id.* at ¶¶ 1301-131.
[13] *Id.* at ¶ 333.

from, and hides in, densely populated residential neighbourhoods. Yet, although innocent lives were tragically lost during Operation Cast Lead, it in no way warrants the knee-jerk conclusion that Israel or its personnel committed war crimes or crimes against humanity. Tragic loss of human life does not automatically indicate that criminal acts occurred, but the Mission consistently draws that conclusion, based upon unreliable, unverifiable, second-hand evidence.

The Report's failure to adhere to key principles outlined in UN Guidelines and the Lund-London Guidelines—basic guidelines by which all fact-finding reports should be written—renders it contents doubtful, at best. Based on the speculative, conclusory, and inaccurate nature of the Report's factual and legal assessments, the UN—and the International Criminal Court ("ICC")—should not extend the Report any further credibility or weight. As the former scholar and president of the American Society of International Law Professor Thomas M. Franck once said, "[a] fact-finding group created by terms of reference that seek to direct its conclusion is essentially a waste of time. Its findings, at most, will reassure those minds that are already made up"[14]. Indeed, even the report's author, Richard Goldstone, aptly noted regarding his own findings that "if this was a court of law, *there would have been nothing proven*" and that "I wouldn't consider it in any way embarrassing if many of the allegations turn out to be disproved"[15]. *Such comments repudiate many of the Report's conclusions.*

ARGUMENT

On 9 December 1991, the UN General Assembly approved the *Declaration on Fact-Finding by the United Nations in the Field of the Maintenance of International*

[14] T.M. Frank & H.S. Farley, *Procedural Due Process in Human Rights Fact-Finding by International Agencies*, 74 AM. J. INT'L L. 308, 316 (1980).
[15] Gal Beckerman, *Goldstone: 'If This Was a Court of Law, There Would Have Been Nothing Proven,'* THE JEWISH DAILY FORWARD, 7 Oct. 2009, http://www.forward.com/articles/116269/ (emphasis added).

Peace and Security (the "UN Guidelines")[16]. The UN Guidelines declare "that the ability of the United Nations to maintain international peace and security depends to a large extent on its acquiring detailed knowledge about the factual circumstances of any dispute or situation"[17]. The UN Guidelines are also intended "to encourage States to bear in mind the role that competent organs of the United Nations can play in ascertaining the facts in relation to disputes or situations"[18].

The International Bar Association and the Raoul Wallenberg Institute have also developed the *Guidelines on International Human Rights Fact-Finding Visits and Reports* (the "Lund-London Guidelines")—a comprehensive set of guidelines that "provide direction to all those engaged in [a fact-finding] exercise with a view to improving accuracy, objectivity, transparency and credibility in human rights fact finding"[19]. They were "developed . . . to contribute to good practice in the conduct of fact-finding visits and in the compilation of reports"[20]. The primary goal of the Guidelines is to ensure that reports are "clearly objective and properly sourced, and the conclusions in them reached in a transparent manner"[21]. A report that adheres to the Guidelines "indicates that the allegations, observations and conclusions in it can be reasonably relied upon, thus enhancing the efficacy and credibility of the report"[22]. *In essence, the Guidelines act as a procedural safeguard to protect against biased reporting*.

While the Lund-London Guidelines generally refer to NGOs in setting forth these standards and the Mission was not technically an NGO, the same principles of

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[16] Declaration on Fact-Finding by the United Nations in the Field of the Maintenance of International Peace and Security, G.A. Res. 46/59, U.N. Doc. A/RES/46/59/Annex (9 Dec. 1991) [hereinafter "Declaration on Fact-Finding by the UN"], http://www.un.org/documents/ga/res/46/ a46r059.htm.
[17] *Id.* pmbl.
[18] *Id.*
[19] LUND-LONDON GUIDELINES, *supra* note 6, at 1.
[20] *Id.*
[21] *Id*.
[22] *Id*.

objective fact-finding apply to the Mission's work. The quintessential requirements for credible fact-finding are unbiased, independent, and objective reporting. The Mission's Report does not meet those fundamental standards, and, therefore, it should not be further regarded by UN bodies or the ICC. As this memorandum will illustrate, the Goldstone Mission was flawed from its inception, and the final Report is fraught with biases that undermine its specific allegations. This is evident in the language used, the facts reported, and the speculative nature of many of the Report's conclusions.

I. THE GOLDSTONE REPORT FAILS TO ADHERE TO PRINCIPLES IN THE UNITED NATIONS GUIDELINES AND LUND-LONDON GUIDELINES AND, THUS, IS INHERENTLY UNRELIABLE.

The Report focuses disproportionately on Palestinian tragedies, while downplaying Israeli victims and omitting the context of ongoing terrorism that necessitated Operation Cast Lead. It systematically fails to describe terror tactics employed by Hamas, which attacked Israel after unilaterally ending a brief ceasefire in 2008, and Israel's legal right to act in self-defence. Instead, the Report alleges that Israel launched an "offensive" that was "wanton", "indiscriminate", "disproportional", and "unlawful"[23], descriptions that all appear to contradict the evidence.

The Report repeatedly draws legal conclusions about the mental state of Israeli officials and soldiers without any evidence for such assessments[24]. Despite abundant evidence that Israel exercised extreme caution in executing military operations and went to great lengths in order to protect civilians[25], the Report also accuses Israeli officials of launching "direct attacks against civilians"[26], of using "human shields"[27],

[23] *See, e.g.*, Goldstone Report, *supra* note 5, ¶¶ 29, 42, 50, 62.
[24] *Id.* ¶¶ 39, 43, 45, 51, 52, 54, 61, 387, 423, 435, 740, 741, 761, 767, 784, 808, 810, 879, 924, 982, 1101, 1208, 1675, 1716, 1718.
[25] MFA, OPERATION IN GAZA, *supra* note 11, ¶ 8.
[26] Goldstone Report, *supra* note 5, ¶ 43.
[27] *Id.* ¶¶ 55, 619, n.378, 1028–1084.

and of engaging in "terrorism"[28]. At the same time—ironically—the Report exonerates Palestinian terrorist groups of identical conduct, despite abundant publicly available evidence to the contrary[29].

A. The Mission Employs a Biased Methodology in Conducting Its Investigation and Issuing Its Report and Exceeded Its Mandate.

The UN Guidelines require the following:

- Fact-finding should be comprehensive, objective, impartial and timely[30].
- Fact-finding missions have an obligation to act in strict conformity with their mandate and perform their task in an impartial way. Their members have an obligation not to seek or receive instructions from any Government or from any authority other than the competent United Nations organ. They should keep the information acquired in discharging their mandate confidential even after the mission has fulfilled its task[31].

The Lund-London Guidelines similarly require the following:

- The terms of reference must not reflect any predetermined conclusions about the situation under investigation[32].
- In order to enhance the overall quality and credibility of the report, it must be accurate, clear and drafted objectively so that the processes of the mission are transparent. It should fairly reflect all the information gathered and must refrain from bias[33].

Despite such Guidelines, the Report is riddled with language that reflects biases and predetermined conclusions. For instance, it repeatedly refers to the Israeli "offensive"[34] and to the Gaza Strip and the West Bank as the "Occupied Palestinian Territories"[35], despite the fact that Israel was acting in self-defence and unilaterally

[28] *Id.* ¶ 1169.
[29] *Id.* ¶¶ 55–60.
[30] Declaration on Fact-Finding by the UN, *supra* note 16, ¶ 3.
[31] *Id.* ¶ 25.
[32] *See* LUND-LONDON GUIDELINES, *supra* note 6, at 2.
[33] *Id*. at 7.
[34] Goldstone Report *supra note 5*, ¶¶ 29, 65, 93, 1248, 1550, 1617.
[35] *Id.* ¶¶ 95, 131, 137, 140, 149, 152-153, 159, 176, 198, 200, 206, 208, 279, 282, 297-298, 302-303, 314, 1189, 1213-1214, 1296, 1378, 1393, 1434, 1571, 1579, 1581, 1642, 1651, 1654, 1656, 1666-1667, 1673-1674, 1709.

withdrew from the Gaza Strip several years ago[36]. The Mission seems to believe that the terms "occupier" and "occupied territories" are appropriate because "the Israeli armed forces continued to maintain control over Gaza's borders . . . and Israel reserved 'its inherent right of self-defence, both preventive and reactive, including where necessary the use of force, in respect of threats emanating from the Gaza Strip'"[37]. Of course, Egypt also exercises control over part of Gaza's borders and has refused to allow a Palestinian exodus into Egyptian territory, but the Report does not accuse Egypt of being an "occupier",[38] despite its exercising control over part of Gaza's borders. Moreover, Israel's reservation of its right to act in self-defence merely re-states an inherent legal right, although one that the Report manages to question. In fact, the questionable assumption that Israel occupies Gaza underlies much of the Report's legal analysis on Israel's right to self-defence and its obligations to deliver humanitarian aid.

This bias is also reflected by the fact that, throughout the Report, the Mission judges Israelis and Palestinians by two very different standards, spending much time on Israel's supposed violations of certain laws, while completely ignoring the fact that Hamas's efforts at compliance are nowhere near Israel's. Moreover, in the absence of information about an issue, the Mission automatically assumes the worst about Israel and the best about Palestinians. For instance, the Mission emphasises over and over how Israel has not responded to its overtures and, on that basis, assumes Israel has impure motives[39]. Yet, Israel has no legal obligation to participate in a "fact-finding"

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[36] *See, e.g.*, *id.* ¶¶ 2, 62, 65, 93, 457, 597, 706, 962, 1248, 1449, 145, 1550, 1617, 1573 (at page 495), 1675 (at page 522), 1676 (at page 522), 1700 (at page 528), 1769 (at page 550). On page 494 of the Report, the paragraph numbers jump from 1805 to 1570. Thus, parentheses with page numbers are used to indicate when duplicated paragraphs are cited.

[37] *Id.* ¶ 187.

[38] Referring to Palestinians who attempted to leave Gaza and enter Egypt during the conflict, the Report acknowledges that "Egyptian security forces responded with water cannons and tear gas to force them back into Gaza." Goldstone Report, *supra* note 5, ¶ 240.

[39] Goldstone Report, *supra* note 5, ¶ 324.

mission whose very mandate assumes Israel is the party at fault. Another example is the Mission's focus on Israel's alleged "unprofessional" criminal investigatory methods[40], while failing to note that Gaza authorities' "investigations" are neither as sophisticated nor thorough as Israel's—when any are, in fact, held.

The Mission's original mandate and its methodology in preparing the Report also defy the Guidelines' standards, thereby casting doubt on the veracity, authenticity, and credibility of the Mission and its work product.

1. The UNHRC's Original Mandate, Which Was Never Legally Amended, Betrayed a Predetermined Agenda.

On 12 January 2009—well before the full set of facts surrounding Operation Cast Lead could have been investigated and before the fighting had even ceased—the UNHRC adopted Resolution S-9/1, which established the Goldstone Fact-Finding Mission. The inherent biases of the Mission and its eventual Report were clearly evident from that resolution, which stated, among other things, the following:

> *Expressing serious concern* at the lack of implementation by the occupying Power, Israel, of previously adopted resolutions and recommendations of the Council relating to the human rights situation in the Occupied Palestinian Territory, including East Jerusalem;
>
> *Recognizing* that the massive ongoing Israeli military operation in the Occupied Palestinian Territory, particularly in the occupied Gaza Strip, has caused grave violations of the human rights of the Palestinian civilians therein, exacerbated the severe humanitarian crisis in the Occupied Palestinian Territory and undermined international efforts towards achieving a just and lasting peace in the region;
>
> . . . .
>
> *Recognizing* that the Israeli siege imposed on the occupied Gaza Strip, including the closure of border crossings and the cutting of the supply of fuel, food and medicine, constitutes collective punishment of Palestinian civilians and leads to disastrous humanitarian and environmental consequences;

[40] *Id*. ¶ 1626 (page 508).

1. *Strongly condemns* the ongoing Israeli military operation carried out in the Occupied Palestinian Territory, particularly in the occupied Gaza Strip, which has resulted in massive violations of the human rights of the Palestinian people and systematic destruction of Palestinian infrastructure;

2. *Calls for* the immediate cessation of Israeli military attacks throughout the Palestinian Occupied Territory, particularly in the occupied Gaza Strip, which to date have resulted in the killing of more than nine hundred and injury to more than four thousand Palestinians, including a large number of women and children, and the end to the launching of crude rockets against Israeli civilians, which have resulted in the loss of four civilian lives and some injuries;

3. *Demands* that the occupying Power, Israel, immediately withdraw its military forces from the occupied Gaza Strip;

4. *Calls upon* the occupying Power, Israel, to end its occupation of all Palestinian lands occupied since 1967 and to respect its commitment within the peace process towards the establishment of the independent sovereign Palestinian State, with East Jerusalem as its capital, living in peace and security with all its neighbours;

5. *Demands* 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, in addition to the destruction of public and private properties, as laid down in the Fourth Geneva Convention;

6. *Also demands* that the occupying Power, Israel, lift its siege, open all borders to allow access and free movement of humanitarian aid to the occupied Gaza Strip, including the immediate establishment of humanitarian corridors, in compliance with its obligations under international humanitarian law, and ensure free access of the media to areas of conflict through media corridors;

. . . .

14. *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[41].

[41] G.A. Res. S-9/1, *supra* note 10, *passim*.

Note the many conclusions asserted as facts in the resolution—calling Israel "the occupying Power", accusing Israel of having "caused grave violations of the human rights", claiming Israel had imposed a "siege" of Gaza, etc.—even before the matter was investigated. Hence, the "facts" to be ascertained by the fact-finding Mission were asserted as already established from the outset. The UNHRC did not call for an objective investigation—and never intended to.

Among the nations voting in favour of the resolution were China, Cuba, Egypt, Indonesia, Jordan, Pakistan, Qatar, and Saudi Arabia. Canada voted against the resolution and 13 nations abstained[42]. Naturally, the biased, one-sided language of Resolution S-9/1 sparked outrage in some corners. Even former UN High Commissioner for Human Rights, Mary Robinson—herself a controversial figure and believed by many to harbor an anti-Israel bias after presiding over the Durbin Conference—made statements opposing the biased mandate. Robinson stated:

> 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[43].

In an attempt to present the appearance of greater objectivity, on 3 April 2009, the UNHRC President, Martin Uhomoibhi, named the members of the Mission and tried to reframe the mandate "to investigate all violations of international human rights law and international humanitarian law that might have been committed at any time in the context of the military operations that were conducted in Gaza during the period from 27 December 2008 and 18 January 2009, whether before, during or

[42] Recorded Vote of 33 in Favour, 1 Against, and 13 Abstentions, UN Human Rights Council, http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/resvote.htm (last visited 15 Dec. 2009).
[43] Irwin Cotler, Op-Ed., *The Goldstone Mission—Tainted to the Core (Part I)*, JERUSALEM POST, 16 Aug. 2009, http://www.jpost.com/servlet/Satellite?cid=1249418620191&pagename=JPArticle/ShowFull.

after"[44]. Despite the UNHRC President's efforts to present greater objectivity, there was never a formal UNHRC amendment of the mandate. As such, the language of the original S-9/1 Resolution remains the official legal language.

This reflects the inherent institutional bias responsible for authorizing the Report. Even if the mandate had been legally amended, one cannot easily unravel that kind of predetermined perspective from the fact-finding process. The fact that the UNHRC never amended the mandate, however, only further exacerbates the problem.

2. The Mission Exceeded Its Factual Mandate By Investigating "Facts" Far Outside of the Scope Relevant to Operation Cast Lead and By Delving Into Legal Findings.

The Mission exceeded the scope of its UNHRC mandate and leveraged the opportunity to issue a report that castigates Israel on the entire Mideast conflict. Even the revised, unofficial Goldstone mandate only authorized an investigation in the "context of the military operations that were conducted in Gaza during the period from 27 December 2008 and 18 January 2009"[45]. The Mission interpreted that "context" to include virtually anything that might reflect poorly on Israel and portray it as an aggressor and occupier of the Palestinian people. Furthermore, by not examining events prior 19 June 2008[46], the Mission produces an incomplete, revisionist history of the Israel-Gaza conflict.

The Report devotes significant attention to items that are peripheral at best to Operation Cast Lead. It talks at length about Israel's "blockade" of Gaza. As we explain in greater detail later, the Report misstates the legal standards for analysing the alleged blockade of Gaza, which the Report calls illegal[47]. It discusses the

[44] Goldstone Report, *supra* note 5, ¶ 131.
[45] UN Human Rights Council, United Nation Fact Finding Mission on the Gaza Conflict, http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/FactFindingMission.htm (last visited 15 Dec. 2009).
[46] Goldstone Report, *supra* note 5, ¶ 153.
[47] *Id*. ¶¶ 27–28.

condition of Israeli prisons[48], as well as how Israel handles internal dissenters (or what the Report calls "restrictions on human rights and fundamental freedoms relating to Israel's strategies and actions in the context of its military operations")[49]. It delves into the unemployment rate in Gaza and the West Bank[50], hospital "attacks" in 2003[51], the alleged illegality of Israeli settlements in the West Bank[52], and Israel's internal detention laws[53]. It even criticises Israel for denying Hamas detainees newspapers and books and for reducing "recreation time" to three hours per day[54].

Although most of those issues are well beyond the appropriate scope of the Report, the Mission nonetheless had an obligation to report honestly and accurately on any and all items it addressed. It did not do so. For instance, it accuses Israel of discriminating against non-Jewish citizens—part of the popular "apartheid" allegation that Israeli critics frequently lodge—by not providing shelters to Arab towns and villages within Israel also susceptible to Hamas rocket attacks[55]. In fact, Israel's policy provides all municipalities up to seven kilometres from the security barrier with a budget for building shelters[56]. There is no discrimination based on religion or ethnicity whatsoever. The Report's clearly false assertion damages its credibility.

The Mission not only exceeded its mandate by examining "facts" far outside the scope of Gaza conflict, but it also interpreted its mandate to permit conclusory and speculative legal findings. The Mission concedes that "*[t]he findings do not attempt to identify the individuals responsible for the commission of offences nor do they*

[48] *Id.* ¶¶ 86–91.
[49] *Id.* ¶¶ 111–116, 154.
[50] *Id.* ¶ 204.
[51] *Id.* ¶ 645.
[52] *Id.* ¶ 1378.
[53] *Id.* ¶¶ 1442–1444.
[54] *Id.* ¶1517.
[55] *Id.* ¶¶ 1709–1711. Given the Report's criticism of Israel's lack of cooperation with the Goldstone Mission, one wonders where it obtained such information—and how the information was corroborated.
[56] Initial Israeli Response, *supra* note 4, at 11–12.

pretend to reach the standard of proof applicable in criminal trials"[57]. And Richard Goldstone stated—to much publicity after his Report's release—that "if this was a court of law, there would have been nothing proven"[58]. Despite such admissions, the Mission nonetheless makes accusations designed to produce criminal indictments and states without qualification that Israelis committed criminal acts[59]. These are legal conclusions at their core and explicitly defy the Mission's stated purpose. They also contradict Goldstone's admission that evidence gathered does not remotely meet the required standard of proof for criminal convictions.

The examples are numerous, as the Report provides a "legal analysis" segment within each section. The most egregious of these "analyses" involve speculative conclusions about the mental states of Israelis involved in combat, *none of whom the Mission ever interviewed*. In most cases, the Mission draws conclusions about mental states *without even knowing the identities of the persons involved*. These conclusions are based exclusively on one-sided testimony months after the relevant incidents, and in no way do they account for the complexities of war or real-time operational decisions that Israelis made on the battlefield.

The Report also analyses a swath of internal Israeli laws—clearly beyond the scope of the Mission's mandate—as well as international laws that are also inappropriate for a "fact-finding mission." For example, the Report analyses Israel's unlawful combatant law[60], which is a valuable tool in fighting terrorism. Like other states fighting terrorism, Israel designates as an "unlawful combatant"

> a person who has participated either directly or indirectly in hostile acts against Israel or is a member of a force perpetrating hostile acts against the State of Israel, where the conditions prescribed in Article 4

[57] Goldstone Report, *supra* note 5, ¶ 25. (emphasis added).
[58] Beckerman, *supra* note 15.
[59] Goldstone Report, *supra* note 5, ¶¶ 32, 347, 388, 928, 929, 986, 1002, 1579, 1694 (at page 526), 1726 (at page 536), 1732 (at page 537), 1735 (at page 538), 1743 (at page 540).
[60] *Id.* ¶¶ 1445-1446.

> of the Third Geneva Convention of 12th August 1949 with respect to prisoners-of-war and granting prisoner-of-war status in international humanitarian law, do not apply to him[61].

The Report criticises the law because "[d]etention under this law does not require admission of guilt or the evidence acceptable as part of fair trial standards"[62]. This is especially ironic, given the Report's failure to apply the same standard to the IDF members it condemns.

The Report discusses the detention of Palestinian Legislative Council members and their conviction for associating with a "political party," which the Report naively says violates "the prohibition on discrimination based on political belief that is contrary to Article 26 of the ICCPR"[63]. This issue is not even germane to events that occurred during Operation Cast Lead. Moreover, the right to form associations is not an absolute right—at least not without apprehension, as individuals cannot just join and associate freely with terrorist organisations. Would anyone seriously argue that the U.S. government could not arrest a member of al-Qaeda because al-Qaeda is a political organisation? Such a notion, which the Mission seems to endorse, is patently absurd.

Similarly, the Report criticises the Palestinian Authority for its "treatment of (suspected) Hamas affiliates" and "the arbitrary closure of charities and associates affiliated with Hamas and other Islamic groups"[64]. The fact that the Report would deign to criticize anyone for choking off funding for terrorist groups is remarkable but telling. International law (e.g., UN Security Council Resolution 1373 and the International Convention for the Suppression of the Financing of Terrorism[65])

[61] *Id.* ¶ 1446.
[62] *Id.* ¶ 1448.
[63] *Id.* ¶ 1524.
[64] *Id.* ¶ 1583.
[65] International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 54/109, 9 Dec. 1999, art. 8, http://www.un.org/law/cod/finterr.htm.

specifically requires efforts to prevent financing of terrorist organisations. The Report questions the Palestinian Authority for apparently trying to fulfill that obligation. In that sense, the Report not only singles out Israel for unfair treatment but the Palestinian Authority as well. Meanwhile, it applies its most permissive standards to Hamas, which is an Iranian-backed terrorist organisation[66] that—as we explain more fully later—seeks to undermine the peace process and the Palestinian Authority by waging violent jihad.

The Report also discusses—again beyond its scope—Israel's limitations on movement between the hostile Gaza Strip and the West Bank through Israel's sovereign territory[67], limitations which are necessary for Israel's security. It talks about Israel undermining the two-state solution and violating its Oslo Accord obligations to keep the West Bank and Gaza a single territorial unit[68]. Of course, it makes no mention of Palestinian violations of Oslo by continuing terror attacks. Further, it simply ignores the ongoing political feud between the Palestinian Authority and Hamas, which has divided control of the so-called Palestinian territories between the two.

The Report frequently refers to violations of dignity, specifically violations of article 75(2)(b) of Additional Protocol I, which prevents "outrages upon personal dignity, in particular humiliating and degrading treatment"[69]. As a preliminary matter, it is necessary to point out that Israel has not ratified Additional Protocol I. The Israeli government's position is that portions of Additional Protocol I represent

[66] Mike Shuster, *Iranian Support for Hamas Running High Post-Gaza*, NPR, 4 Feb. 2009, http://www.npr.org/templates/story/story.php?storyId=100211788.
[67] *Id.* ¶¶ 1540–1567.
[68] *Id.* ¶ 1560.
[69] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts ("Additional Protocol I") art. 75(2)(b), 8 June 1977, 1125 U.N.T.S. 3, http://www.icrc.org/IHL.NSF/FULL/470?OpenDocument.Additional Protocol I.

customary international humanitarian law that Israel abides by[70]. Where provisions of Additional Protocol I do not reflect customary international law, Israel is not bound to abide by such provisions. Article 35 of the 1969 Vienna Convention on the Law of Treaties states that *treaty* obligations arise only if a State accepts those obligations in writing[71].

The Report cites Additional Protocol I to indict Israel's security checkpoint policies, saying they may violate 75(b)(2) because they can "become a site of humiliation"[72]. Yet, Article 75(b)(2) of Additional Protocol I addresses egregious offenses ("outrages," such as "enforced prostitution"[73]), not normal procedures at security checkpoints. As the International Committee for the Red Cross ("ICRC") Commentary explains, "[t]his refers to acts which . . . are aimed at humiliating and ridiculing them, or even forcing them to perform degrading acts"[74]. The language does not cover incidental inconveniences or perceived indignities, such as standing in line for long periods or thorough searches, which are necessary for security purposes.

The Report also overstates the Mission's ability to assess witness credibility generally, as it says that "[t]aking into account the demeanour of witnesses, the plausibility of their accounts and the consistency of these accounts with the circumstances observed by it and with other testimonies, the Mission was able to determine the credibility and reliability of those people it heard"[75]. Yet, one-sided interviews are inherently suspect. This is precisely why witnesses are subject to cross-examination in true legal proceedings. Often witnesses who seem credible on

[70] OPERATION IN GAZA, *supra* note 11, ¶¶ 31, 94n67, 120.
[71] Vienna Convention on the Law of Treaties, art. 35 (1969), http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.
[72] Goldstone Report, *supra* note 5, ¶ 1578.
[73] Additional Protocol I, *supra* note 69, art. 75(b)(2).
[74] Int'l Comm. of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, art. 75(b)(2), ¶ 3047 (1987) [hereinafter "ICRC Commentary on Additional Protocol I"], http://www.icrc.org/ihl.nsf/COM/470-750096?OpenDocument.
[75] Goldstone Report, *supra* note 5, ¶ 170.

the face appear less so after they are subject to more rigorous questioning and probing. And it is precisely why the following statement in the Report should be regarded with the highest skepticism:

> On the basis set out above, the Mission has, to the best of its ability, determined what facts have been established. In many cases it has found that acts entailing individual criminal responsibility have been committed. *In all of these cases the Mission has found that there is sufficient information to establish the objective elements of the crimes in question.* In almost all of the cases the Mission has also been able to determine whether or not it appears that the acts in question were done deliberately or recklessly or in the knowledge that the consequence would result in the ordinary course of events. The Mission has thus referred in many cases to the relevant fault element (mens rea)[76].

The Mission's professed confidence that in *all cases* the objective criminal elements can be determined is a truly remarkable statement. In every single one the Mission knows whether or not a crime has been committed? Yet, the following sentence acknowledges that only in *almost* all cases can the Mission surmise the relevant mental state. Because the mental state is critical to establishing criminal intent *in all cases*, the Mission was incapable of establishing the elements of the relevant crime *even by its own definition* in certain instances.

Furthermore, the Mission is implicitly acknowledging that it is capable of discerning intent and reaching conclusions about criminal culpability without ever even interviewing the relevant persons within the Israeli military or government to determine why they acted as they did and without ever subjecting any of the Mission's witnesses to cross-examination. Subjecting these statements to critical analysis of this sort is not merely an exercise in semantics. To accept the Mission's statements and their implications requires a staggering suspension of disbelief and over-confidence in the ability of the Mission's members to read minds. If advanced societies meted out justice on this basis, modern-day legal systems as we know them would look very

[76] *Id.* ¶ 172 (emphasis added).

different. *And, in fact, the rule of law is undermined by legitimising this sort of practice, particularly in the context of supposedly objective fact-finding.*

3. The Mission Facilitated the Perception of Bias By Broadcasting Its Hearings and By Employing a Victim-Centric Mentality.

The Mission demonstrated significant bias when, from the outset, it interpreted its mandate as "requir[ing] it to include restrictions on human rights and fundamental freedoms relating to *Israel's* strategies and actions in the context of its military operations"[77], especially since the Gaza operation was governed by the laws of armed conflict, not by international human rights law. Additionally, the Mission regarded the mandate as a license to place "victims" as their "first priority" in investigating the events surrounding the conflict[78]. Such interpretations are simply untenable given the plain language of the Mission's supposedly revised mandate and the standards of objective international fact-finding. A truly objective report with a broad, neutral mandate should not have focused on one side of a conflict more than the other, nor should it have assumed a focus on "victims" before its authors ever set foot on the territory in question. Indeed, the Report's disproportionate scrutiny on and overt bias against Israel in this regard reflects this perverse interpretation and casts doubt on all of the Report's contents.

Given the gravity of the Mission's role and the volatilities and sensitivities surrounding the conflict in Gaza, the perception of objectivity was as important as actual objectivity. Yet, the Mission failed miserably in cultivating such a perception. The Mission's decision to broadcast its hearings publicly did nothing to cool the flames of passion raging in the Middle East either[79]. According to the Mission, "[t]he

[77] *Id.* ¶ 14 (emphasis added).
[78] *Id.* ¶ 136. This also begs the question regarding how to determine which persons constitute "victims".
[79] Goldstone Report, *supra* note 5, ¶ 141.

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"[80].

Again, the victim-centric approach only served to bias public perception against Israel further, as most of the victims from the recent conflict, unsurprisingly, were Palestinians from Gaza, given that is where most of the combat occurred. Most of the combat occurred in Gaza because terrorist attacks directed at Israel originated in Gaza and because Hamas and other armed groups conduct their operations and house their bases and weapons in Gaza. By only focusing on the victims from the Gaza conflict, and by emphasising their plight above all other facts, the Mission merely poisons international opinion and the chance for truly objective reflection and fact-finding.

In addition to victim statements, many of the Report's sources are hopelessly biased Palestinian sources. The Report notes that Israel refused the Mission access, something the Mission seems to hold against Israel. This "cooperate or else" mentality produced a Report that contains virtually no pro-Israeli sources, but many that could be considered pro-Palestinian. For instance, in a lengthy account of allegedly illegal Israeli strikes on a flour mill, chicken farm, waste-water treatment plant, well-water complex, cement plant, and various civilian homes and other public utilities, the Report cites interviews with Palestinians and groups with Palestinian interests, but not one group with Israeli interests[81]. This type of reporting was sure to produce a lopsided account of the truth.

[80] *Id.* ¶ 166.
[81] *Id.* ¶¶ 909–1027

Furthermore, several allegations that Israeli forces used Palestinians as human shields are based solely on interviews with Palestinians[82]. Notably, one non-interview source in this section of the Report—a Haaretz article—is nonetheless based on Palestinian allegations that the IDF used Gazans as human shields[83]. After reporting these sensational accounts, the Report summarily concludes it "has no reason to doubt the veracity of [the witnesses'] accounts"[84], as if this is the normal method of reaching legal conclusions. Notably, the Report fails to take note of easily accessible *contrary evidence* readily available in the public domain[85].

The Mission's methods—especially in broadcasting testimonies—were tantamount to taking a victim's impact statement prior to trying a defendant in a court of law. It would clearly be prohibited because of the risk of creating a pre-trial bias in the fact-finder. Not all evidence is permitted, because often times the potential bias outweighs the probative value. It is only human nature that where there are victims, people will *look for* perpetrators.

Israel's refusal to participate in the Goldstone hearings was due to the inherent biases in the Mission's creation and execution, and Israel's reluctance to legitimise its predetermined conclusions—part of its legitimate sovereign prerogative. The Report repeatedly emphasises that Israel did not participate[86], and one cannot help but wonder if Israel's decision not to do so provoked retaliatory measures like the public broadcasts.

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[82] *Id.* ¶¶ 1029–1084
[83] *Id.* ¶ 1059 n.528.
[84] *Id.* ¶ 1086.
[85] *See, e.g.*, Hamas Admits It Uses Human Shields, Youtube, http://www.youtube.com/watch?v=RTu-AUE9ycs (last visited 19 Dec. 2009) (demonstrating illegal tactics and use of civilian shields by Palestinian armed groups); Hamas Using UN Ambulance, Youtube, http://www.youtube.com/watch?v=5oesBeCFAlg&NR= (last visited 19 Dec. 2009) (same); Video of Palestinian Jihadists Using Children as Human Shields, Jihad Watch, http://www.jihadwatch.org/2009/01/video-of-palestinian-jihadists-using-children-as-human-shields.html (last visited 19 Dec. 2009) (same).
[86] *Id.* ¶¶ 8, 20, 26.

Because the government did not participate, the Report also takes prior Israeli statements out of context and attempts to construct an "official" Israeli position. For instance, the Report cites retired General Giora Eiland and retired Colonel Gabriel Siboni to argue that the destruction of civilian targets was part of military policy[87]. However, the comments were made prior to Operation Cast Lead and dealt with Hizbullah and Lebanon[88]. As retired officers speaking as civilians, their comments have no bearing on intent in the Gaza conflict and cannot be relied upon as evidence of official policy. Further, in an open society such as Israel's, politicians and current and former officials are free to speak their minds, meaning even statements from those within government do not always reflect official state policy.

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[87] *Id.* ¶¶ 1192–1193.

[88] In late 2008, following Israel's war in southern Lebanon in 2006, Major General (Ret.) Eiland, apparently discussing the possibility of another war with Hizbullah (which operates out of southern Lebanon), spoke about how,

> [s]erious 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 Hizbollah's behaviour more than anything else. *Id.* ¶1192.

Around the same time, Col. (Ret.) Siboni, also discussing Hizbullah and the situation in Lebanon, said the following:

> With an outbreak of hostilities, the IDF will need to act immediately, decisively, and with force that is disproportionate 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 Hizbollah's military capabilities and should target economic interests and the centres of civilian power that support the organization. *Id.* ¶1192.

The Report cites these quotes as evidence that Israeli policy officially sought to target civilians in violation of the Laws of Armed Conflict and to inflict disproportionate damage not justified by military necessity. In fact, such an interpretation based on the quotes above requires significant speculation. In fact, neither comments seem to endorse such policies. Siboni's comments explicitly endorse targeting the elements that support Hizbullah, a terrorist organisation. Saying "intense suffering" might merely reflect an inevitable by-product of any war. Moreover, as we explain in greater detail later in this memorandum, a defensive military operation does not necessarily limit a party to the same degree of force to which it is responding. In any case, the two quotes above came from retired military personnel. In no way do they represent an official statement of the Israeli government or military, and quoting them to further such an implication is improper—and suspect.

The Mission also cites soldiers from Breaking the Silence to create the impression of an official position. It quotes one soldier who talked about destroying houses with a view towards "the day after," meaning Israel wanted to leave the area as "sterile" as possible to prevent future attacks[89]. But again, those soldiers are not authorized to speak officially on behalf of Israel, and they very well may not have been privy to the intelligence or motivation behind the military orders.

In summation, the Mission approached its fact-finding opportunity with a post-colonial mentality, which it used to emphasise the difference in power dynamics in the Middle East and to castigate Israel as the more powerful party. This bias infects the entire Report, although one quote from the Report, in particular, illustrates the deficiency well.

> In carrying out its mandate, the Mission had regard, as its only guides, for general international law, international human rights law, and the obligations they place on States, the obligations they place on non-state actors, and, above all, the rights and entitlements they bestow on individuals. This in no way implies equating the position of Israel as the Occupying Power with that of the occupied Palestinian population or entities representing it. The differences with regard to the power and capacity to inflict harm or to protect, including by securing justice when violations occur, are obvious and a comparison is neither possible nor necessary[90].

It is noteworthy that the Mission did not refer to International Humanitarian Law (i.e., the Law of Armed Conflict) *in setting forth its legal guides, which, of course, is the relevant legal authority in times of war*. This raises further questions about the Mission's purported legal analysis. The above statement is also important because it could not make clearer that the Mission holds the two sides to very different standards. One standard is applied to the so-called "aggressor" and "occupier." The other is for

[89] *Id.* ¶ 997.
[90] *Id.* ¶ 1673 (at page 520).

the so-called victims, thereby justifying virtually anything that the victim does in the name of liberation.

B. The Mission Employs Biased Individuals to Conduct the Investigation and Compile the Report.

The UN Guidelines state:

- Fact-finding missions have an obligation to act in *strict conformity with their mandate* and perform their task in an impartial way[91].

The Lund-London Guidelines also state the following about individuals engaged in fact finding:

- The mission's delegation must comprise individuals *who are and are seen to be unbiased*[92].
- The NGO should ensure that all persons associated with a mission and/or a report are aware that they must, at all times, act in an independent, unbiased, objective, lawful and ethical manner[93].
- As a good practice, reports should include . . . the names of the delegation members, including brief particulars as to their relevant expertise and experience to assure transparency[94].

The Mission's objectivity was compromised by the clear biases of the individuals who authored and worked on the Report. In addition, the Mission, like other supposedly objective fact finders, refers to evidence that is highly technical in nature and requires expertise that none of the Mission members claim to possess. For instance, the Mission's information gathering included "analysis of video and photographic images, including satellite imagery provided by UNOSAT, and expert analysis of such images . . . [,] review of medical reports about injuries to victims . . .

[91] Declaration on Fact-Finding by the UN, *supra* note 16, ¶ 25 (emphasis added). Given the biased language in the UNHRC mandate, it appears as if the Mission fully complied.
[92] THE LUND-LONDON GUIDELINES, *supra* note 6, at 2 (emphasis added).
[93] *Id.* at 3.
[94] *Id*. at 8.

[, and] forensic analysis of weapons and ammunition remnants collected at incident sites . . ."[95].

In one instance, the Report says that,

> shells used in the strikes that hit the UNRWA compound indicates clearly that at least seven shells were white phosphorous shells, three of which were complete and four of which were very substantial components of the shells. Military experts indicate that in all probability these shells were fired from a 155 mm Howitzer[96].

If members of the Mission are qualified to analyse satellite imagery or weapons forensics, then mention of such qualifications is conspicuously absent. If members are not qualified, then such an analysis has no business in the Report without more detailed information about the persons rendering the analysis and their qualifications.

In another incident, the Report states that "the manner in which the house collapsed strongly indicated that this was the result of a deliberate demolition and not of combat" and that "Khalid Abd Rabbo drew the Mission's attention to what appeared to be an anti-tank mine visible under the rubble of his neighbour's house, which had reportedly been used by the Israeli armed forces to cause the controlled explosion which brought down the building"[97]. In addition to the fact that this information is coming from an interested party (a Palestinian), and that the Mission itself is unsure about its assertion ("what appeared to be"), what qualifies the Mission's members to determine the cause of property damage and speculate on what weaponry might have been used to cause a collapse? And how can the Mission be sure that the anti-tank mine was Israel's instead of Hamas'? Lastly, even if Israel did demolish the building, it certainly does not mean that the act was illegal. There are many circumstances where demolition of a building is necessary, and controlled

[95] Goldstone Report, *supra* note 5, ¶ 159.
[96] *Id.* ¶ 568.
[97] *Id.* ¶ 993.

demolition from the ground is often preferable to a bombing from the air where the likelihood of collateral damage is higher.

Furthermore, scrutinizing each of the Mission members' prior statements and writings reveals preconceived biases against the State of Israel that further taint the Report and reveal how unbalanced its composition was.

1. Justice Richard Goldstone's Prior Statements and Writings Should Have Disqualified Him to Lead a Supposedly Independent Fact-Finding Mission.

Richard Goldstone is an international jurist who formerly served as the Chief Prosecutor for the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda. He expressed clear animus towards the State of Israel and predetermined conclusions that should have disqualified him to lead the Mission. On 16 March 2009, he co-signed a letter, which was initiated by Amnesty International, to UN Secretary General Ban Ki-Moon expressing his belief that "there is an important case to be made for an international investigation of gross violations of the laws of war" and that "[t]he events in Gaza have shocked us to the core"[98]. He also served on the Board of Human Rights Watch at the time of his Mission appointment, which presented a conflict of interest in itself, given Human Rights Watch's role in the formation of the Mission and its institutional bias against Israel[99].

In fact, Human Rights Watch is now so widely regarded as possessing anti-Israel biases that its founder, Robert Bernstein, wrote an op-ed in the *New York Times* in October of 2009 in which he said the following:

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[98] Amnesty Int'l, *Gaza Investigators Call for War Crimes Inquiry*, 16 Mar. 2009, http://www.amnesty.org.au/news/comments/20572/.

[99] NGO Monitor, *The Goldstone 'Fact-Finding' Mission and the Role of Political NGOs*, 7 Sept. 2009, http://www.ngo-monitor.org/article/the_goldstone_gaza_fact_finding_committee_and_the_lund_london_guidelines_.

> As the founder of Human Rights Watch, its active chairman for 20 years and now founding chairman emeritus, I must do something that I never anticipated: I must publicly join the group's critics. Human Rights Watch had as its original mission to pry open closed societies, advocate basic freedoms and support dissenters. But recently it has been issuing reports on the Israeli-Arab conflict that are helping those who wish to turn Israel into a pariah state . . . . Nowhere is this more evident than in its work in the Middle East. The region is populated by authoritarian regimes with appalling human rights records. Yet in recent years Human Rights Watch has written far more condemnations of Israel for violations of international law than of any other country in the region . . . . *Human Rights Watch has lost critical perspective on a conflict in which Israel has been repeatedly attacked by Hamas and Hezbollah, organizations that go after Israeli citizens and use their own people as human shields*[100].

Goldstone has faced controversy prior to his latest Report as well. While serving as Prosecutor for the ICTY, he reportedly said,

> [t]hey told me at the UN in New York: if we did not have an indictment out by November 1994 we wouldn't get money that year for 1995 . . . . There was only one person against whom we had evidence. He wasn't an appropriate first person to indict . . . but if we didn't do it we would not have got the budget[101].

In another instance, Goldstone, while sitting on South Africa's Supreme Court during the apartheid regime, upheld the jailing of a 13 year-old boy for disrupting school by protesting apartheid[102]. He is someone who has admitted placing politics above honest justice before, having pursued indictments in order to procure monetary benefits. Nowhere is his pursuit of politics at the expense of justice more evident, sadly, than in the Report on Operation Cast Lead.

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[100] Robert L. Bernstein, Op.Ed., *Rights Watchdog, Lost in the Middle East*, N.Y. TIMES, 19 Oct. 2009, http://www.nytimes.com/2009/10/20/opinion/20bernstein.html?_r=2&sq=rights watchdog&st=cse&adxnnl=1&scp=1&adxnnlx=1256140872-g8YqZC/HdML8k76MA7BMjQ (emphasis added).

[101] RW Johnson, *Think Tank: New Ideas from the 21st Century: Your Honour Is Taking an Injudicious Kick at Israel: A Judge's Report on the Gaza War Is Self-Serving*, TIMES ONLINE, 18 Oct. 2009, http://www.timesonline.co.uk/tol/news/world/middle_east/article6879387.ece.

[102] Bill Keller, *Cape Town Journal; In a Wary Land, the Judge Is Trusted (to a Point)*, N.Y. TIMES, 8 Mar. 1993, http://www.nytimes.com/1993/03/08/world/cape-town-journal-in-a-wary-land-the-judge-is-trusted-to-a-point.html; *see also* Ashley Rindsberg, *UN's Goldstone Sent 13-Year Old Boy to Prison for Protesting Apartheid*, THE HUFFINGTON POST, 19 Nov. 2009, http://www.huffingtonpost.com/ashley-rindsberg/uns-goldstone-sent-13-yea_b_359696.html.

Goldstone's personal bias is also seen in a PBS interview in which he makes one-sided statements about events in the Report[103]. In the interview, Goldstone's comments lay bare why it is so important to have objective and qualified Mission members. At 8:25 into Part I of the interview, Goldstone claims an "attack on the infrastructure of Gaza . . . *seems* to be absolutely unjustifiable"[104], and at 5:43 into Part II of the interview, he says he "just [doesn't] accept that" Israel has to do what it did in fighting Hamas[105]. But it is irrelevant if something "seems" to be inappropriate in Goldstone's eyes, or that he doesn't "accept" something. What matters is that Mission members are objective and willing to approach the investigation without pre-determined conclusions. Unfortunately, his inclination to inject personal feelings and inclinations only soils the credibility of a Report that should have placed dispassionate objectivity as a higher priority.

Despite the strong anti-Israel biases evident throughout the Report, there is an additional reason why Goldstone should have been ineligible to serve as the Report's main author: his supposed Zionist views and affection for Israel. Goldstone's daughter, Nicole, told the Jerusalem Post that her dad "is a Zionist and loves Israel"[106]. Goldstone explained why he considers himself a Zionist during the same interview with Mill Moyers[107], which he has invoked as evidence for why the Report should not be seen as flawed and biased. Again, however, such prior inclinations are inappropriate for a supposedly objective fact-finding mission, which requires *no*

[103] Bill Moyers Journal, Interview of Richard Goldstone [hereinafter "Moyers Interview"], 23 Oct. 2009, http://www.pbs. org/moyers/journal/10232009/watch.html (click on Part I and Part II in the "choose video" link).
[104] *Id.* (emphasis added) ("8:25" means eight minutes, twenty-five seconds).
[105] *Id.* ("5:43" means five minutes, forty-three seconds).
[106] JPOST.COM Staff, *'My father is a Zionist, love Israel'*, 16 Sep. 2009, http://www.jpost.com/servlet/Satellite?cid=1251804583376&pagename=JPArticle/ShowFull.
[107] Moyers Interview, *supra* note 103.

preconceived views, similar to how individuals are prohibited from serving on juries when they have prior views about a defendant or plaintiff.

It is cold comfort for Goldstone to invoke his alleged affection for Israel as justification for his objectivity, as there are good reasons why a "friend" should not sit in judgement of another friend. The first possible problem is that a friend might be inclined to treat another friend too leniently. The other danger is that friends might be inclined to judge too harshly precisely out of fear of being accused of favoritism. Whether Goldstone is biased against the State of Israel or a Zionist lover of her, one thing is certain: Goldstone possessed preconceived views on the subject that made him a poor fit to lead this sort of Mission.

2. Professor Christine Chinkin's Prior Statements Should Have Disqualified Her From Serving on a Supposedly Independent Fact-Finding Mission.

Professor Christine Chinkin is a Professor of International Law at the London School of Economics and Political Science. She was formerly a consultant to Amnesty International[108], and she was also a member of a fact-finding mission to Beit Hanoun in 2008[109]. Her biased statements prior to her appointment on the Goldstone Mission were well-publicised. On 11 January 2009, she signed a statement in the Letters section of London's *Sunday Times* titled "Israel's Bombardment of Gaza is Not Self-Defence—It's a War Crime"[110]. The letter called Israel's acts "contrary to international humanitarian and human rights law"[111], "prime facie war crimes", and

[108] NGO Monitor, *House of Cards: NGOs and the Goldstone Report*, 1 Oct. 2009, http://www.ngo-monitor.org/article/_house_of_cards_ngos_and_the_goldstone_report.
[109] UN News, *Head of UN-backed probe: Israeli attack on Beit Hanoun a possible war crime*, YUBANET.COM, 19 Sept. 2008, http://yubanet.com/world/Head-of-UN-backed-probe-Israeli-attack-on-Beit-Hanoun-a-possible-war-crime.php.
[110] Ian Brownlie et al., *Israel's Bombardment of Gaza Is Not Self Defence—It's a War Crime*, TIMES ONLINE, 11 Jan. 2009, http://www.timesonline.co.uk/tol/comment/letters/article5488380.ece.
[111] *Id.* This description is very confusing and seems to conflate principles of international humanitarian law (the law of armed conflict) with principles of international human rights law.

"aggression . . . contrary to international law"[112]. The letter also took numerous legal positions, including that Israel was not entitled to rely upon the self-defence provision of the UN charter and that Israel constitutes an occupier of Gaza. She has previously stated that Israel is guilty of "collective punishment", "war crimes", and "possibly a crime against humanity"[113].

When Judge Goldstone was asked about Professor Chinkin's preconceived biases, he said the following:

> Well, you know, firstly, it's not a judicial inquiry. It's a fact-finding mission. I've known Professor Chinkin for many years. I've found her to be an intelligent, sensible, even handed person. And it wasn't an article—she signed a letter together with a number of other, I think, British academics, at the time, soon after the Operation Cast Lead began. But working with her now, I'm absolutely satisfied that she's got a completely open mind and will not exhibit any bias one way or the other. But in any event, she is one of four people on the committee, and I don't believe that any *prima facie* views she might have held at an earlier stage is going to in any way affect the findings or the recommendations in the report[114].

With all due respect to Judge Goldstone, it appears that his perception of what constitutes objectivity is slightly misguided. It is irrelevant that Professor Chinkin was one of four members of the Mission. Her bias taints the entire team—not to mention the fact that all members of the Mission possessed their own biases that undermined the Report. It is also irrelevant if Judge Goldstone felt confident in Chinkin's ability to be open-minded. *It is the objective perception to the outsider that is important*. In summary, Chinkin should have recused herself or been removed as a member of the Mission. The fact that she remained is irrefutable evidence of the Mission's bias and clearly contradicts the Guidelines on objective fact-finding.

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[112] *Id.*
[113] *See, e.g.*, M. Jansen, *Gaza Suffers from Rolling Israeli-Engineered Crises*, JORDAN TIMES, 5 June 2008.
[114] Hillel Neuer, *Goldstone Defends Christine Chinkin from Bias Charge*, UN Watch, 13 July 2009, http://blog.unwatch.org/?p=416 (containing transcript and links to original video).

3. Hina Jilani's Prior Statements Should Have Disqualified Her From Serving on a Supposedly Independent Fact-Finding Mission.

Like Judge Goldstone, Hina Jilani signed the letter, dated 16 March 2009, to UN Secretary General Ban Ki-moon expressing a belief that "there is an important case to be made for an international investigation of gross violations of the laws of war" and that "[t]he events in Gaza have shocked us to the core"[115]. This predetermined conclusion taints her credibility as an objective member of the Mission.

Jilani was also formerly the UN Special Rapporteur for Extrajudicial, Summary or Arbitrary Executions. She was a member of a UN panel in 2004 that condemned Israel for its treatment of demonstrators in the Rafah refugee camp[116]. Moreover, she attended a court hearing in March 2009 to determine whether Shawan Jabarin, a suspected senior activist of the Popular Front for the Liberation of Palestine—a terrorist organisation[117]—was eligible for a travel visa[118]. She appeared as a board member of the organisation Front Line, which supported lifting Jabarin's travel ban[119]. Given her prior statements, she too was not qualified to serve as a Member of the Mission. The fact that she remained is additional evidence of the Mission's bias and clearly contradicts the Guidelines on objective fact-finding.

4. Desmond Travers's Prior Statements Should Have Disqualified Him From Serving on a Supposedly Independent Fact-Finding Mission.

Desmond Travers also signed the letter, dated 16 March 2009, to UN Secretary General Ban Ki-moon expressing a belief that "there is an important case to

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[115] Amnesty Int'l, *supra* note 98.
[116] Press Release, UN Human Rights Experts Echo Concerns About Events in Rafah and Gaza Strip, U.N. Doc. HR/4765 PAL/1988 (24 May 2004), http://www.un.org/News/Press/docs/2004/hr4765.doc.htm.
[117] Council Decision 2005/930 of 21 Dec. 2005, art. 1, 2005 O.J. (L 340) 64, 65 (EU) [hereinafter "Council Decision"], http://eur-lex.europa.eu/LexUriServ/site/en/oj/2005/l_340/l_340200512 23en00640066.pdf.
[118] Front Line, *Israel OPT: Israeli Supreme Court Upholds Travel Ban Against Palestinian Human Rights Defender, Mr Shawan Jabarin*, 19 Mar. 2009, http://www.frontlinedefenders.org/node/1855.
[119] *Id.*

be made for an international investigation of gross violations of the laws of war" and that "[t]he events in Gaza have shocked us to the core"[120]. This predetermined conclusion taints his credibility as an objective member of the Mission as well.

Not one of the four members of the Mission was truly objective. Each made statements prior to the Mission's investigation that reflected predetermined conclusions and biases, which violate the Guidelines on fact-finding.

Finally, Members of the Mission's staff, including Sareta Ashraph, exhibited biases against Israel that impact the Report's credibility[121]. And the Mission has refused to publicise or provide the names of UN staffers who worked for the Mission and assisted in writing the Report, a clear violation of the Guidelines, which seek to ensure transparency. At least one organisation, NGO Monitor, has requested this information on numerous occasions, but the Mission has not cooperated[122].

C. The Report Fails to Provide Sufficient Background Information to Enable Readers to Place Events in Context.

To promote objectivity and transparency in reporting, the Lund-London Guidelines require the following:

- The NGO should provide a pre-visit briefing for members of the delegation, which includes balanced material relating to the reason for the visit and any relevant cultural, economic, political, historical and legal information[123].
- As good practice, reports should include . . . sufficient background information to enable readers to contextualize the evidence[124].

[120] Amnesty Int'l, *supra* note 98.
[121] NGO Monitor, *House of Cards: NGOs and the Goldstone Report*, 1 Oct. 2009, http://www.ngo-monitor.org/article/_house_of_cards_ngos_and_the_goldstone_report.
[122] Email from Anne Herzberg, Attorney for NGO Monitor, Columbia L. Sch., to Brett Joshpe, Attorney and Author, Harv. L. Sch. (12 Dec. 2009) (on file with Joshpe).
[123] LUND-LONDON GUIDELINES, *supra* note 6, at 4.
[124] *Id.* at 8.

1. The Report Fails to Recount Accurately the Ongoing History of Conflict Between Hamas and Israel and Blatantly Ignores Hamas Transgressions.

The Mission fails to provide the proper cultural and legal context to the Israeli/Palestinian conflict and Operation Cast Lead, most notably failing to provide information about terrorist attacks that Hamas has carried out against Israel for years or about Hamas' stated desire to rid the world of Israel. This lack of context obviously dilutes the conclusion that Israel has a right to defend itself against this blatant threat and sets the tone for conclusions critical of Israel.

Hamas has launched deadly terrorist attacks, as well as bombing campaigns, against Israel for years[125]. *But for Hamas's indiscriminate attacks, there would have been no Operation Cast Lead*. Israel has a legal right to defend itself against such attacks, and it acted consistent with its inherent right to act in self-defence and its obligation to combat terrorism under international law. The Report, however, barely mentions the attacks that made the Israeli response necessary.

Hamas' founding charter declares that "Israel will exist and will continue to exist until Islam will obliterate it"[126]. It states that "there is no solution for the Palestinian question except through Jihad"[127]. It memorialises the belief that "[peace] initiatives, and so-called peaceful solutions and international conferences" that "look for ways of solving the (Palestinian) question" do not serve the cause of the "Islamic Resistance Movement"[128]. *Reading the Report, one would never know that Hamas holds such views, has made such declarations, or the extent to which it has terrorised Israeli society*. Such an omission is striking, especially when one considers its legal significance. In fact, Hamas' persistent terrorist attacks and public statements that it

[125] MFA, OPERATION IN GAZA, *supra* note 11, ¶¶ 36-38.
[126] *See* Hamas Covenant 1988 pmbl. (emphasis added), http://avalon.law.yale.edu/20th_century/hamas.asp.
[127] *Id.* art. 13.
[128] *Id.*

seeks to wipe Israel off the map and kill Jews in its Charter are evidence of genocide[129].

Instead, the Mission consistently depicts Hamas as a legitimate political organisation that represents Palestinians in Gaza, refusing to label Hamas a terrorist group[130]. It describes Hamas as "an organization with distinct political, military and social welfare components"[131]. Again, the Report not only depicts Hamas in an inappropriately benign way *vis-à-vis* its relations with Israel, but with the Palestinian Authority as well, which Hamas seeks to undermine in order to scuttle any efforts at peace talks. Meanwhile, much of the international community, including the European Union and the U.S., recognize Hamas as a terrorist organisation[132]. By refusing to condemn Hamas, the Mission legitimises its terrorist attacks, excuses its indiscriminate attacks on Israeli civilians and territory, and ignores its exploitation of Palestinians, thereby serving as enablers of Hamas's unlawful acts.

It also undermines the legitimate Palestinian Authority with whom Israel was conducting peace talks prior to Operation Cast Lead[133]. As detailed above, Hamas's

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[129] Under Article 6 of the Rome Statute, genocide is defined as "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group . . .". Rome Statute of the International Criminal Court, art. 6 [hereinafter "Rome Statute"], http://untreaty.un.org/cod/icc/statute/romefra.htm. The acts include "(a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part . . .". *Id.* Given that Hamas has stated in its Charter, of all places, that it seeks to destroy Israel, which at the very least constitutes a national, if not ethnic, racial and religious group, and that it has engaged in systematic killing, caused serious bodily and mental harm and has deliberately sought the physical destruction of the group, there is strong evidence that Hamas is guilty of the most egregious of crimes, further bolstering Israel's need to act in self-defence. The Report provides no discussion of these facts but repeatedly digresses into criticisms of Israeli policy that are beyond the proper scope of the Report while accusing Israelis of committing war crimes.

[130] The Report says, "[t]he Israeli Supreme Court has seen the confrontation between Israeli armed forces and what it calls 'terrorist organizations.'" Goldstone Report, *supra* note 5, ¶ 282.

[131] *Id.* ¶ 380.

[132] Council Decision, *supra* note 117.

[133] *E.g.*, Barak Ravid, *Israeli, Palestinian Negotiating Teams Likely to Meet Thursday*, HAARETZ.COM, 6 Mar. 2008, http://www.haaretz.com/hasen/spages/961290.html (detailing the willingness of Israel and the Palestinian Authority to negotiate a peace settlement, the progress of which was interrupted by Hamas-induced instability in Gaza).

stated organisational goals are incompatible with any peace treaty with Israel[134]. If the Report truly sought to further the cause of justice and peace between Israel and the Palestinians, it would have decried Hamas's behaviour in Gaza. Unfortunately, it did not do so; thus, it has contributed significantly to a frustration of the peace process between the two sides.

To the extent that the Mission acknowledges radical behaviour among the Palestinian population, it is remarkably apologetic for such acts, implying that Israel is the root cause of radical terrorism. The Report concedes that Gaza authorities have introduced indoctrination programmes that "*[impose] models of education at odds with human rights values and with a culture of peace and tolerance*,"[135] but implies that Israel is responsible for Islamic extremism and refuses to condemn the actors themselves. It also cites the Gaza Community Mental Health Programme to argue that military operations cause "numbness" among the Palestinian population and a feeling of abandonment, which tends to radicalise the population and cause people to "look at 'martyrs' and members of armed groups as adult role models instead"[136]. These statements serve to excuse Hamas's illegal acts and undermine the cause of justice.

And not only does the Report legitimise Hamas and refuse to label its acts "terrorism," but, in one of the Report's most outrageous conclusions, it actually accuses Israelis of "intimidation and terrorism" for legitimately detaining certain Palestinians during the conflict[137].

Additionally, the Report repeatedly refers to the Israeli "offensive". In fact, the entire engagement was a strategic *defensive* response to Hamas's resumption of

[134] *Supra notes* 126-128 and accompanying text.
[135] Goldstone Report, *supra* note 5, ¶ 1270 (emphasis added).
[136] *Id.* ¶ 1261.
[137] *Id.* ¶ 1169.

rocket attacks. Despite a six-month ceasefire, Hamas unilaterally declared the end of the truce on 18 December 2008[138], resuming indiscriminate rocket attacks against Israeli population centres that prompted condemnation from the UN Secretary-General[139]. The Report, however, implies that Israel is responsible for the resumption of hostilities, stating that "[a]fter two months in which few incidents were reported, the ceasefire began to founder on 4 November 2008 following an incursion by Israeli soldiers into the Gaza Strip, which Israel stated was to close a cross-border tunnel that in Israel's view was intended to be used by Palestinian fighters to kidnap Israeli soldiers"[140].

An Israeli army spokeswoman explained that "[s]ecurity forces uncovered a 250-metre-long tunnel intended for immediate use to abduct Israeli soldiers into the Gaza Strip and a special force is currently acting to thwart this action"[141]. She also explained that "this is a pinpoint operation to thwart an immediate threat and there is no intention to bring about the end of the ceasefire"[142]. Any implication that Israel was responsible for violating the ceasefire is pure revisionism, as it had no choice but to prevent Hamas from abducting Israeli soldiers.

Further, Israel's eventual decision to launch the more comprehensive Operation Cast Lead was made after great deliberation and much effort to resolve the crisis diplomatically. In recent years, Israel has sent dozens of letters to the UN Secretary General, the President of the Security Council, and the High Commissioner

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[138] Toni O'Loughlin, *Hamas Answers Israeli Air Raid with Rockets as Truce Ends Early*, GUARDIAN.CO.UK, 19 Dec. 2008, http://www.guardian.co.uk/world/2008/dec/19/israel-hamas-gaza-violence.

[139] On 24 December 2008, the Secretary-General "condemn[ed] [the day's] rocket attacks on southern Israel and call[ed] on Hamas to ensure that rocket attacks from Gaza cease immediately." Office of the Spokesperson of the Sec'y-General, Statement on the Situation in Gaza and Southern Israel (24 Dec. 2008), http://www.un.org/apps/sg/sgstats.asp?nid=3631.

[140] Goldstone Report, *supra* note 5, ¶ 254.

[141] *Israeli Troops Kill Gunman in Gaza Raid – Hamas: The Israeli Army Spokeswoman Said There Was no Intention to End the Ceasefire*, JAVNO, 4 Nov. 2008, http://www.javno.com/en-world/israeli-troops-kill-gunman-in-gaza-raid---hamas_200059.

[142] *Id.*

on Human Rights[143]. Judge Goldstone, nonetheless, claimed that Israel never complained to the UN Security Council, indicating he was woefully misinformed, failed to conduct adequate research, or just boldly misstated the truth[144].

It was not until Israel exhausted alternatives—including issuing numerous warnings to Hamas and imposing economic sanctions—that Israel launched the Gaza Operation[145]. While the Operation began with geographically less intrusive aerial strikes, Hamas refused to discontinue its attacks. As a result, Israel initiated a coordinated air/ground operation, both to rout Hamas forces and to reduce the risk of civilian casualties[146]. The Operation ultimately succeeded in significantly reducing the number of Hamas attacks on Israeli towns[147].

Knowledge of these facts is indispensable to framing the Israeli operation in its proper context and would certainly have been included in an objective report. *Their omission is another indication of the Mission's lack of competence to critique military operations.*

It is also clear that the Mission fails to appreciate the distinction between the strategic and operational levels of war. The Mission's characterisation of an "offensive" focused on the *operational* execution of a *strategic* defence. This is a common method of exercising the national right of self-defence. *The fact that military operations take on an offensive character at the operational and tactical level does not indicate that the operation is offensive at the strategic level, a distinction that the Mission fails to comprehend or acknowledge*[148].

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[143] MFA, OPERATION IN GAZA, *supra* note 11, at ¶¶ 52-54.
[144] Neuer, *supra* note 114.
[145] MFA, OPERATION IN GAZA, *supra* note 11, ¶¶ 53-58.
[146] *Id.* at 32.
[147] *Id.* at 33.
[148] That is why it is essential to include fact-finders with an in-depth knowledge of military operations and the Law of Armed Conflict, something the Goldstone team totally lacked.

Further, Operation Cast Lead may be considered merely another episode in an ongoing armed conflict between Israel and Palestinian armed groups. Such a characterisation renders the entire self-defence question moot in this particular instance, because there is no need to justify each individual operation as an act of self-defence once a nation is already engaged in armed conflict. Compare the distinction between *jus ad bellum* (a set of principles delineating a nation's justification for *entering* a war) and *jus in bello* (a set of principles governing the conduct of a nation *during* a war)[149].

In the relatively few instances where the Report actually mentions Hamas' offensive attacks against Israel, it trivializes them, saying they "have caused relatively few fatalities and physical injuries"[150]. But in 2008 alone, Hamas launched approximately 3,000 rockets and mortar shells at Israel, and it has launched approximately 12,000 since 2000[151]. By the time Israel launched Operation Cast Lead, Hamas had increased its rocket range to the extent that it was capable of striking some of Israel's largest cities and more important infrastructure, which also included approximately 1 million civilians (almost 15 percent of Israel's population) of whom 250,000 were school-age children[152]. The infrastructure targets included electricity and gas storage facilities, which also provided for the Palestinian people[153]. One of the main reasons for Operation Cast Lead was to halt the deployment of increasingly long-range rockets that could terrorise more of Israel[154]. Had Israel not acted when it

[149] Enzo Cannizzaro, *Contextualizing Proportionality:* Jus ad Bellum *and* Jus in Bello *in the Lebanese War*, 88 Int'l Rev. Red Cross 779, No. 864 (2006), http://www.icrc.org/Web/eng/site eng0.nsf/htmlall/review-864-p779/$File/irrc_864_Cannizzaro.pdf.
[150] Goldstone Report, *supra* note 5, ¶ 1631.
[151] INTELLIGENCE & INFO. CTR., ISR. INTELLIGENCE HERITAGE & COMMEMORATION CTR. ("IICC"), SUMMARY OF ROCKET FIRE AND MORTAR SHELLING IN 2008 5–6 (2009) [hereinafter "IICC SUMMARY"], http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/pdf/ipc_ e007.pdf.
[152] MFA, OPERATION IN GAZA, *supra* note 11, ¶¶ 4, 446.
[153] *Id*. at ¶ 49.
[154] *Id*. at ¶¶ 3, 446; *see also* YORAM COHEN & MICHAEL LEVITT, WASH. INST. FOR NEAR E. POLICY, POLICY WATCH NO. 1484, HAMAS ARMS SMUGGLING: EGYPT'S CHALLENGE (2009),

did, it was only a matter of time before Hamas succeeded in launching more devastating strikes and hit a hospital or school that resulted in significantly higher casualties[155].

Moreover, the focus on the fact that Hamas' rockets have caused few fatalities and injuries misses a crucial point: the principle of distinction and the law of armed conflict do not concern actual harm and casualties, but the *acts taken* that may or may not result in those casualties[156]. The Mission, and many groups critical of Israel, constantly overlook the fact that the only reason Israel has not had more casualties is that its defence apparatus and military are more capable and effective.

Just as troubling as this trivialisation, the Report blatantly fails to analyse the responsibility of states to assess the nature of threats in relation to the exercise of the inherent right of self-defence. The self-defence paradigm enshrined in the Charter of the United Nations implicitly (if not explicitly) recognises that it is the individual state that is primarily responsible for assessing the gravity of an armed threat[157]. If such national or collective assessments are invalid, it is the Security Council that is then responsible for condemning them, not bodies like the Mission or the UNHRC[158]. This recognition was and remains imperative, for no function is more central to the notion of sovereignty than the responsibility of a state to defend itself from hostile threats. Accordingly, the Report's trivialisation of the Hamas threat is not only factually invalid, it is also a minimalisation of the function of the State of Israel in exercising

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http://www.washington institute.org/templateC05.php?CID=3020; IICC SUMMARY, *supra* note 151, at 3–4.

[155] MFA, OPERATION IN GAZA, *supra* note 11, ¶ 51.

[156] *See infra* note 198 and accompanying text.

[157] *See* U.N. Charter art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."), http://www.un.org/en/documents/charter/chapter7.shtml.

[158] *See id*. ("Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.").

its sovereign authority to determine at what point that threat necessitated an armed response. It reflects a basic misunderstanding of international law by the Mission.

While the Report fails to account comprehensively for Hamas's transgressions against Israel, it also largely omits recognition of criminal acts by Hamas towards Palestinians as well, especially Hamas's use of fellow Palestinians as human shields[159]. Nonetheless, even the Mission is forced to acknowledge that Hamas conducted military operations from within civilian areas. For instance, the Report concedes that Palestinian fighters engaged in armed confrontation around civilian homes and *intimidated the civilian population*[160]. What makes it all the more remarkable is that, despite such an admission, the Report refuses to condemn such practices or to conclude that Hamas illegally used human shields, a shocking omission and one that is detrimental to the cause of justice.

The Report also confesses that "those interviewed in Gaza appeared reluctant to speak about the presence of or conduct of hostilities by the Palestinian armed groups. Whatever the reasons for their reluctance, the Mission does not discount that the interviewees' reluctance may have stemmed from a fear of reprisals"[161]. It would seem quite obvious that fear of reprisal most likely accounted for the hesitations, given the widely known practices of terrorist groups like Hamas. Yet, the Mission continues to extend undue evidentiary veracity to witnesses who may very well have been intimidated into saying certain things and refuses to investigate further the sources of such intimidation.

Despite the Mission's failure to delve deeper into militant groups' manipulation of the Palestinian population, others have reported more extensively on it. One Palestinian, who spoke on the condition of anonymity, recounted how he

[159] Goldstone Report, *supra* note 5, ¶¶ 36, 450, 478, 480–481, 485.
[160] *Id.* ¶¶ 450, 478, 480, 491, 1348.
[161] *Id.* ¶ 438.

"found out after the cease-fire that the militants had used his house as a base for their operations"[162]. A Hamas activist, known as N.A., who was arrested by the IDF during Operation Cast Lead, admitted that Hamas carried out rocket attacks from schools and stored weapons in homes, tunnels, orchards, and mosques, including the Salah al-Din Mosque[163]. Another Palestinian, Muhammad Shriteh, an ambulance driver, explained how he would "coordinate with the Israelis . . . so they would not shoot us," and that the more immediate threat was from Hamas because "they would lure the ambulances into the heart of a battle to transport fighters to safety"[164]. The same driver said that to prevent Hamas from hijacking ambulances, workers "had to get in all the ambulances and make the illusion of an emergency and only come back when [Hamas] had gone"[165]. *The Report does not disclose these extremely damning allegations from Palestinians themselves, further revealing the Mission's distorted portrayal of the conflict.*

Hamas also established its main headquarters in al-Shifa Hospital in Gaza City. Israel refrained from attacking the headquarters out of concern for the potential civilian collateral damage[166]. The Report states that "[t]he Mission did not investigate the case of al-Shifa hospital and is not in a position to make any finding with regard to these allegations"[167]. It is no wonder that the Mission did not find evidence that Hamas used human shields. Why the Mission would regard the allegation that Hamas conducted operations out of a civilian hospital unworthy of investigation—when the Mission apparently felt investigations into the atmosphere at anti-war rallies within Israel was worthy—is truly astounding *and* revealing.

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[162] MFA, OPERATION IN GAZA, *supra* note 11, ¶ 169.
[163] *Id.* at ¶¶ 158-165.
[164] *Id.* at ¶ 177.
[165] *Id.*
[166] *Id.* at ¶ 163.
[167] Goldstone Report, *supra* note 5, ¶ 466.

There is abundant readily available evidence that Hamas booby-trapped civilian areas and homes, stored weapons in schools and mosques, and regularly used women and children as human shields[168], despite the Report's conclusion to the contrary[169]. The Report actually acknowledges that booby traps may have been used, but it discounts them, saying, "it has no basis to conclude that civilian lives were put at risk, as none of the reports record the presence of civilians in or near the houses in which booby traps are alleged to have been set"[170]. The absurdity of such a statement should speak for itself. In other cases, the Mission simply ignores the evidence. Below are some specific examples, which the Mission apparently felt unworthy of investigation or disclosure, although the list is hardly exhaustive:

- A child told the Israeli-Arab newspaper *Kul-Al-Arab* on 9 January 2009 that he helped Hamas with military operations[171].
- On 12 January 2009, IDF soldiers discovered a booby-trapped zoo and school in Gaza. The detonator, along with weaponry, was located in the zoo and wired to the school[172].
- On 6 January 2009, a Hamas terrorist shot from a rooftop, then identified an Israel Air Force ("IAF") aircraft preparing to fire on him and called a group of children to prevent the IAF strike. He then fled the house using the children as human shields cover[173].
- On 12 January 2009, a group of three terrorists with a senior operative used children and a woman with a baby as human shields. Footage shows the IAF radio communications instructing the aircraft operator not to fire on the terrorists because of the woman and children[174].
- On 18 January 2009, Israeli personnel identified a Hamas rocket launcher between two schools. The rocket was fired

[168] MFA, OPERATION IN GAZA, *supra* note 11, at ¶¶ 119, 154, 155, 171; PA Workers' Union Official Bassam Zakarneh: Hamas Leaders Hid in Tunnels and Launched Rockets from Among Children and the Elderly, MEMRI TV, http://www.memritv.org/clip/en/2288.htm (last visited 15 Dec. 2009).
[169] Goldstone Report, *supra* note 5, ¶¶ 35, 447, 463, 478, 481, 492, 1750 (at page 541).
[170] *Id.* at ¶ 461.
[171] Itamar Marcus & Barbara Crook, *Hamas Using Children in Combat Support Roles*, PALESTINIAN MEDIA WATCH, 13 Jan. 2009, http://www.pmw.org.il/Bulletins_Jan2009.htm.
[172] Youtube, Hamas Booby Trapped School and Zoo 11 Jan. 2009, http://www.youtube.com/watch?v=uHhs9ihSmbU&feature=channel_page (last visited 15 Dec. 2009).
[173] Intelligence & Terrorism Info. Ctr., Video, http://www.terrorism-info.org.il/malam_multimedia/Hebrew/heb_n/video/v9.wmv (last visited 15 Dec. 2009).
[174] Intelligence & Terrorism Info. Ctr., Video, http://www.terrorism-info.org.il/malam_multimedia/Hebrew/heb_n/video/v11.wmv (last visited 15 Dec. 2009).

> during Israel's self-imposed humanitarian ceasefire hours, which was common practice for Hamas[175].

Fathi Hamad, a Hamas legislator, even boasted publicly about Hamas's practise[176]. However, as is typical throughout the Report, the Mission picks and chooses what evidence it regards as worthwhile. When Israeli soldiers speak out as part of "Breaking the Silence," the Mission tends to conclude that wrongdoing occurred—despite the fact that many of those soldiers did not personally observe what they alleged took place[177]. When Hamas members speak of their using human shields, the Mission "does not consider it to constitute evidence that Hamas forced Palestinian civilians to shield military objectives against attack"[178]. Even the Secretary-General of the UN acknowledged "concerns that Hamas reportedly used children as shields and may have used schools or hospitals or areas in their proximity to launch rockets into Israel"[179].

Finally, the Report ignores Hamas' blatant violation of international laws prohibiting perfidy and misstates the legal standards for what constitutes perfidy. The Report states that, "[w]hile reports reviewed by the Mission credibly indicate that members of Palestinian groups were not always dressed in a way that distinguished them from civilians, the Mission found no evidence that Palestinian combatants

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[175] Isr. Defense Forces, Video, http://switch3.castup.net/cunet/gm.asp?ClipMediaID=3313707&ak=null (last visited 15 Dec. 2009).
[176] Hamas Admits It Uses Human Shields, *supra* note 85.
[177] Dan Kosky, *Empty Noises from Breaking the Silence*, GUARDIAN.CO.U.K., 15 July 2009, http://www.guardian.co.uk/commentisfree/2009/jul/15/israel-army-breaking-silence; *see also* Yaakov Katz & Jerusalem Post Staff, *Golani Commander: Soldier 'Wasn't in Field at Time'*, JERUSALEM POST, 15 July 2009, http://www.jpost.com/servlet/Satellite?cid=1246443821039&pagename=JPost/JPArticle/ShowFull.
[178] Goldstone Report, *supra* note 5, ¶ 476.
[179] The Secretary General, *Report of the Secretary-General on Children and Armed Conflict*, ¶ 87, *delivered to the Security Council and the General* Assembly, U.N. Doc. S/2009/158, A/63/785 (26 Mar. 2009), http://unispal.un.org/unispal.nsf/f45643a78fcba719852560f6005987ad/a85c9bb45a921c6e852575a10050d6fc?OpenDocument.

mingled with the civilian population with the intention of shielding themselves from attack"[180]. It continues:

> The reports received by the Mission suggest that it is likely that the Palestinian armed groups did not at all times adequately distinguish themselves from the civilian population among whom the hostilities were being conducted. Their failure to distinguish themselves from the civilian population by distinctive signs is not a violation of international law in itself, but would have denied them some of the legal privileges afforded to combatants . . . . The Mission found no evidence that members of Palestinian armed groups engaged in combat in civilian dress. It can, therefore, not find a violation of the obligation not to endanger the civilian population in this respect[181].

This constitutes willful ignorance on the Mission's part.

Notwithstanding the blatant contradiction in that paragraph (Palestinian armed groups dressed as civilians but did not engage in combat in civilian dress?), the Report's description of the law is inaccurate. In describing the illegal act of perfidy, Article 37 of Additional Protocol I 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"[182]. The ICRC Commentary explicitly states that 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 a civilian status and hide amongst a crowd*. This is the crux of the rule"[183]. Dressing as a civilian in order to disguise one's combatant nature is precisely what constitutes perfidy and is prohibited by international law.

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[180] Goldstone Report, *supra* note 5, ¶ 481.
[181] *Id.* ¶ 493.
[182] Additional Protocol I, *supra* note 69, art. 37.
[183] ICRC Commentary on Additional Protocol I, *supra* note 74, art. 37, ¶ 1507, http://www.icrc.org/ihl.nsf/1a13044f3bbb5b8ec12563fb0066f226/762aa9ab1fb871f4c12563cd00432bfa!OpenDocument (emphasis added).

Hamas's resort to this practise only made it more difficult for Israel to distinguish accurately between combatants and civilians, and it doubtless cost innocent Palestinians their lives as result. The ICRC Commentary also clearly states that "[i]f an act of perfidy results in the death, or serious injury to body or health, it constitutes a war crime in the sense of Article 85"[184]. *It is staggering that the Report does not acknowledge this and refuses to indict Hamas for the illegal tactic*. However, it merely constitutes part of a larger pattern in which the Report omits the full context of terrorism, accords legitimacy to terrorist organisations, ignores Hamas's transgressions, and condemns Israel.

2. The Larger Historical Context that the Report Recounts is Misleading and Incomplete.

While the Report features an entire section dedicated to the historical context of the Gaza conflict, the picture that the Mission paints is highly misleading and incomplete. It handpicks and emphasises certain events, while downplaying or omitting others. The Mission notes in a footnote that "[d]ue to obvious space limitations, the historical context does not make reference to the numerous important events that took place during this period (such as the 1973 War, the Camp David Accords, the peace treaty with Jordan, the 2006 Lebanon War and many others)"[185]. The statement would be comical if the full implications were not so serious. The Report is 575 pages long. It reports on matters far beyond the scope of fact-finding in the context of the Gaza conflict. Yet, it omits crucial historical guideposts that put the Israeli/Palestinian situation in its appropriate light. And, most importantly, it completely neglects to present a full and accurate picture of Palestinian sponsored terrorism committed against Israelis (and Palestinians), including details of the two

[184] *Id.* ¶ 1524.
[185] Goldstone Report, *supra* note 5, ¶ 176 n.6.

Palestinian intifadas against Israel's civilian population[186]. When the Report does mention the second intifada, rather than detailing the wave of terror that Palestinian groups initiated, the Report says it "set off an unprecedented cycle of violence"[187], implying that Israel is equally culpable morally.

The Report states:

> The military operations of 28 December to 19 January and their impact cannot be fully evaluated without taking account of the context and the prevailing living conditions at the time they began. In material respects, the military hostilities were a culmination of the long process of economic and political isolation imposed on the Gaza Strip by Israel, which is generally described as a blockade[188].

Again, there is no mention of terrorism and no discussion of how the rockets launched into southern Israel were the "culmination of a long process" of destruction that Israelis have endured. Instead, the Report implies that socio-economic inequality is to blame for the murder of innocent civilians.

The Report also devotes significant space and attention to Israel's security barrier, which the Report calls a "separation Wall, which encroached on Palestinian land to encompass most Israeli settlement areas in the West Bank as well as East Jerusalem . . ."[189]. Such a statement not only reflects the biases of the Mission, but it

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[186] The bias of the historical context should be evident from the following introductory paragraph:

> The Mission is of the view that the events that it was mandated to investigate should not be considered in isolation. They are part of a broader context, and are deeply rooted in the many years of Israeli occupation of the Palestinian Territory and in the political and violent confrontations that have characterized the history of the region. A review of the historical, political and military developments between the Six-Day War in 1967 and the announcement of the "period of calm" *(Tahdiyah)* in June 2008, and of Israeli policies towards the Occupied Palestinian Territory is necessary to consider and understand the events that fall more directly within the scope of the Mission's mandate.

Goldstone Report, *supra* note 5, ¶ 176. Referring to "many years of Israeli occupation" without making any mention of "terrorism" evidences the Mission's bias. *Id.*

[187] *Id.* ¶ 180. The Mission might respond to criticisms that it failed to present the full context by pointing out that its mandate limited fact-finding to a limited time period. That argument might hold water if the Report did not discuss other facts when convenient that also failed to meet those criteria.

[188] *Id.* ¶ 311.

[189] *Id.* ¶ 185.

renders what amounts to a legal opinion on what constitutes Palestinian land[190]. Obviously, the status of those lands is highly controversial and uncertain, and it exceeded the Mission's scope to pronounce judgements on such matters.

3. The Report Disregards the Vagaries and Stress of Combat.

The Report fails to account for the inherent vagaries and stresses of war as well, assuming that the control of forces in combat is like an arcade game that can be tidy and always under tight control, where potential mistakes can always be precluded before they occur by an alert commander. As part of that misguided mentality, the Report consistently questions the battlefield tactics employed by the Israeli military, assuming that a better approach is always within grasp or that imperfect conditions demand absolute restraint. Neither is true.

For example, in one instance the Report questions an Israeli attack, saying

> [t]he timing of the first Israeli attack, at 11:30 am on a week day, when children were returning from school and the streets of Gaza were crowded with people going about their daily business, appears to have been calculated to create the greatest disruption and widespread panic among the civilian population[191].

The statement reveals the naivety of the Mission's members and reveals why persons with an in-depth understanding of military operations are essential for such fact-finding missions. First, how do they know it was "calculated" to cause panic and disruption? What, specifically, justifies that statement? Perhaps battlefield conditions or actionable intelligence reports *necessitated* that timing. Second, when would have been a preferable time for the strike? And who should decide? Certainly not jurists after the fact when the fighting is over. Should Israel have limited itself to weekend strikes? What about at night when people were home sleeping and nobody was on the

[190] Note that, *at Arab insistence in 1949*, the Armistice agreements between Israel and Arab belligerents refused to recognise the armistice lines as legal boundaries. Hence, determining where Israeli territory ends in the West Bank and Gaza Strip is yet to be determined by final peace talks.
[191] *Id.* ¶ 1684

street? But had that been the case, the Mission would have likely condemned launching attacks when people were in bed and most vulnerable. Ultimately, the Mission does not know what sort of information was evaluated and is thus judging Israel based on its own predilections of what should and should not occurred, not on the law and the facts known at the time by the combatants.

In another example, the Mission precedes its second-guessing of Israel's military tactics by first paying lip service to the notion that military action should be judged according to reasonable military personnel standards[192]. Then, the Mission—comprised merely of fact-finders—proceeds to analyse the military advantage that Israel sought in a particular instance, which was, according to the Report, "to stop the alleged firing of mortars that posed a risk to the lives of Israeli armed forces"[193]. It concludes that "for all armies proportionality decisions will present very genuine dilemmas in certain cases. The Mission does not consider this to be such a case"[194]. It continues:

> The Mission does not say that the Israeli armed forces had to accept the risk to themselves at all cost, but in addressing that risk it appears to the Mission that they had ample opportunity to make a choice of weapons that would have significantly limited the risk to civilians in the area. According to the position the Government has itself taken, Israeli forces had a full 50 minutes to respond to this threat – or at least they took a full 50 minutes to respond to it. Given the mobilization speeds of helicopters and fighter jets in the context of the military operations in Gaza, the Mission finds it difficult to believe that mortars were the most accurate weapons available at the time. The time in question is almost 1 hour. The decision is difficult to justify[195].

Again, the Mission's analysis is revealing in that it betrays a Report authored by individuals with very limited knowledge or understanding of armed conflict's realities. First, it is too narrow to frame the military advantage that Israel sought as

[192] *Id.* ¶ 693.
[193] *Id.* ¶ 694.
[194] *Id.*¶ 695.
[195] *Id.* ¶ 696.

simply protecting the lives of Israeli military personnel. In fact, the military advantage sought should be framed more broadly as dismantling Hamas's and other armed group's terrorist and military capabilities. Second, how can the Mission possibly assert that there was no "genuine dilemma" in this case? That would clearly seem to be an assessment one could only make if on the battlefield with knowledge of the facts in real time, something the Mission clearly lacked.

Finally, the Report's suggestion for what the Israeli military should have done instead is most revealing of all. The Report implies that the military should have used available helicopters or fighter jets rather than mortars. Its authors simply assume that such resources are available at the snap of a finger, revealing an utter naïveté about war and the limitations of resources in any military. The Mission is in no position to make such assertions. For one, it does not know that helicopters or fighter jets would have been as effective or even more precise. Moreover, it does not know whether these resources were available, whether they were being used in other operations, or whether other limitations existed that made such alternatives impossible or impractical. The Mission's speculation on the point betrays a bias and ignorance that undermines the seriousness of the Report, and it is a pattern that is repeated throughout.

The reality is that combat is confusing, chaotic and intense, and conditions are usually very imperfect[196]. Intensity and imperfection are exacerbated when forces engage in close combat in built-up areas. All modern militaries recognise that the confusion and complexity associated with military operations in this type of environment provide compelling reasons to avoid such engagements *whenever*

[196] *See, e.g.*, DEP'T OF THE ARMY, FIELD MANUAL NO. 3-21.75, THE WARRIOR ETHOS AND SOLDIER COMBAT SKILLS, at xiv (2008) (noting that "[m]odern combat is chaotic, intense, and shockingly destructive").

possible[197]. Life and death decisions in combat must often be made instantaneously by junior soldiers on the scene of action. Often such decisions must be made based on the limited information available at the moment of decision, which leads to judgements in the heat of battle that must, by necessity, be decisive even if the information available is not as comprehensive as a soldier might ideally desire. Often times, the "perfect" weapon for the situation is unavailable, and the reality of battle always creates a genuine risk that soldiers may mistakenly believe a civilian is, in fact, an enemy belligerent and, as a result, inflict harm on the civilian. This risk is especially pronounced when the enemy engages in the illegal act of perfidy, as Hamas does.

This risk is mitigated when opposing forces follow the imperative of the laws and customs of war that requires that they distinguish themselves from the civilian population[198]. In obvious contrast, this risk is exacerbated when belligerents operate in a manner that disables the ability of their opponents to make this distinction, particularly in a battle space with an extensive civilian presence like the Gaza Strip. The Report fails to mention, much less emphasise, these realities of military operations. Likewise, it fails to point out that operating in densely populated areas while simultaneously refusing to effectively distinguish its forces from the civilian population is the preferred tactic of Hamas and is exactly the situation Israeli forces confronted in Gaza[199]. These failures invalidate the conclusions reached related to the

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[197] *See, e.g.,* DEP'T OF THE ARMY, FIELD MANUAL NO. 3-0, OPERATIONS, at 1–17 (2008) (stating that "[c]lose combat is warfare carried out on land in a direct-fire fight, supported by direct, indirect, and air-delivered fires. Distances between combatants may vary from several thousand meters to hand-to-hand fighting. Close combat is required when other means fail to drive enemy forces from their positions. . . . The outcome of battles and engagements depends on [ground] forces' ability to prevail in close combat. No other form of combat requires as much of Soldiers as it does.").

[198] *See* Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, art. 4, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter "Third Geneva Convention"], http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e63bb/6fef854a3517b75ac125641e004a9e68.

[199] *See, e.g.,* DEP'T OF THE ARMY, FIELD MANUAL NO. 3-0, OPERATIONS, *supra* note 197, at 1–17 (stating that "[c]lose combat is frequent in urban operations. An urban operation is a military operation

death of civilians as the result of Israeli operations and reveal that the drafters of the Report were predisposed to condemn these deaths irrespective of the actual tactical context in which they occurred.

A much more common cause of unavoidable harm to civilians and civilian property in armed conflict is when such harm is collateral or incidental in relation to the deliberate attack on a lawful military objective. Although such harm is often knowingly inflicted, so long as it is not done with purpose (i.e., it is truly collateral), it is not *per se* unlawful. Instead, the law of armed conflict imposes a complex equation for assessing the legality of any attack anticipated to cause such harm[200]. According to this equation, it is axiomatic that military objectives are lawful targets and that civilians are unlawful targets[201]. The principle of distinction establishes this axiom[202]. That principle, which is at the core of the regulation of methods and means of warfare, requires that belligerents at all times distinguish between the lawful objects of attack and all other persons, places, and things that do not qualify as such[203]. As discussed above, the principle is implemented by the rule of military objective.

Compliance with the principle of distinction becomes most difficult when lawful military objectives are commingled with civilians and/or civilian property. While the law of armed conflict imposes an obligation on belligerents to take

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conducted where man-made construction and high population density are the dominant features. The complexity of urban terrain and density of noncombatants reduce the effectiveness of advanced sensors and long-range and air-delivered systems. Thus, a weaker enemy often attempts to negate [a more advanced enemy's] advantages by engaging [such] forces in urban environments"). Historically, Israel has been incredibly conscious of its responsibility to limit civilian casualties and has often gone to great lengths to do so—Operation Cast Lead was no exception. *See* MFA, OPERATION IN GAZA, *supra* note 11, 99–100; BBC: Former British Army Colonel Richard Kemp Discusses IDF Gaza Ops, *supra* note 3.

[200] *See* Additional Protocol I, *supra* note 69, art. 57(2).

[201] *See id*. art. 57(1).

[202] *See id*.; *see also* U.N. Office for the Coordination of Humanitarian Affairs (OCHA), Integrated Reg'l Info. Network (IRIN), *Special Report: Civilian Protection in Armed Conflict*, at 1–2 (1 Apr. 2003), http://www.irinnews.org/pdf/in-depth/Civilian-Protection-in-Armed-Conflict.pdf (outlining the major principles of international law, and describing the principle of distinction as "the most important [principle] . . . in relation to civilian protection").

[203] *See* Additional Protocol I, *supra* note 69, art. 48.

"constant care . . . to spare the civilian population, civilians and civilian objects"[204], it is clear from both historical practise and from the structure of Additional Protocol I that such commingling is virtually inevitable[205]. Extending the obligation to mitigate risk to civilians by prohibiting attacks against military objectives whenever civilians or civilian objects are in close proximity to these objectives would be unworkable for a number of reasons. First, the rule would invite violation due to the reality that belligerents have historically refused to consider military objectives immune from attack due to the proximity of civilians or civilian property. Second, unprincipled belligerents would be provided an incentive to exacerbate the risk to civilians or civilian objects by deliberately commingling them with military objectives in an effort to immunise those objectives from otherwise legitimate attack.

In response to the reality of a commingled battlespace, the drafters of Additional Protocol I adopted a compromise approach. Belligerents bear a constant obligation to endeavor to mitigate risk of harm to civilians and civilian property[206]. However, Article 51 explicitly provides that *the presence of civilians or civilian objects in the proximity of legitimate military objectives does not immunise those objectives from attack*[207]. Of course, this does not permit the deliberate targeting of civilians or civilian objects. It does, however, permit attacks on lawful military objectives with knowledge that the attacks will likely cause harm to civilians and/or civilian property[208]. *Thus, the commander does not violate the law of armed conflict when he orders an attack with knowledge that civilians will likely become casualties*

[204] *Id*. art. 57(1).
[205] *See id*. arts. 51, 57; Francis Lieber, General Orders No. 100: Instructions for the Government of the Armies of the United States in the Field arts. 15, 18–19, 21 (24 Apr. 1863), *in* 2 GENERAL ORDERS OF THE WAR DEPARTMENT, EMBRACING THE YEARS 1861, 1862 & 1863, at 106 (Thomas M. O'Brien & Oliver Diefendorf, N.Y., Derby & Miller 1864).
[206] Additional Protocol I, *supra* note 69, art. 57(1).
[207] *Id*. art. 51(7).
[208] *See id*. arts. 51, 52, 57.

of the attack, so long as he does not act with the purpose (conscious objective) to cause such casualties. Nowhere does the Report take this into consideration.

An equally critical aspect of this balance is that the obligation to "take constant care" to spare civilians and civilian objects from the harmful effects of hostilities requires belligerents to make *prima facie* good faith efforts *not* to commingle military objectives with civilians or civilian property[209]. This obligation is obviously an "endeavour" obligation and is, therefore, not absolute[210]. However, a belligerent who deliberately locates military objectives in proximity to civilians or civilian objects bears responsibility for harm to those civilians resulting from a legitimate enemy attack on those military objectives. There is more than ample, publicly available, evidence that Hamas (and other terrorist groups) do just that[211].

The final aspect of this equation is the relationship between commingled civilians and the proportionality rule. Just as a belligerent is not permitted to immunise a military objective by deliberately commingling that objective with civilians or civilian property, *even when such deliberate commingling occurs*, it does not release the attacking commander from the obligation to consider whether the harm to the civilians or civilian property would violate the proportionality prong of the prohibition against indiscriminate attacks[212]. Because of this, the deliberate commingling of civilians with military objectives does provide a potential residual immunisation effect, for if the harm to civilians was anticipated to be excessive in relation to the concrete and direct military advantage anticipated, the attack would be unlawful[213]. However, excluding such situations from the scope of the proportionality rule would be both unworkable (due to an attacking commander's inability to

[209] *Id*. arts. 51(7)–51(8), 58.
[210] *See id*.
[211] *See infra* Section II(A).
[212] Additional Protocol I, *supra* note 69, arts. 51(5)(b), 57(2)(b), 57(3).
[213] *See id*.

determine whether the commingling was deliberate, reckless, negligent, or innocent) and would subject civilians to the manipulation of commanders acting in bad faith.

In summary, when a commander identifies a lawful military objective commingled with civilians or civilian property, the commander is permitted to attack that objective even with knowledge that the attack will cause collateral damage or incidental injury to civilians or civilian property. The only limitation on this permission is that the commander must refrain from the attack if he assesses that the collateral damage or incidental injury will be excessive in relation to the concrete and direct advantage anticipated from the attack[214].

The Report contains none of this analysis, but instead lists unsubstantiated reports of damage, and concludes that Israel committed war crimes. Below are some examples, although the list is hardly exhaustive.

- The Report accuses Israel of violating the grave breaches provision of the Geneva Convention and committing a war crime based on "the nature of the strikes" on a flour mill. At the same time, the Report acknowledges that taking control of the mill might have been a proper military objective given its location and that Israel twice issued warnings to people who could have been at risk by a strike on the mill[215].
- The Report concludes that strikes on chicken farms were unlawful and not justified by military necessity. The Report simply draws such conclusions and further speculates that "the large numbers of civilians suggest[s] premeditation and a high level of planning"[216].
- The Report concludes that strikes on the Namar wells groups were not justified by military necessity and were intentional, despite also acknowledging that it was unclear whether the strikes were deliberate or in error[217].
- The Report speculates that "information in its possession strongly suggests" that Israel intentionally destroyed houses, and it was not justified by military necessity[218]. It also acknowledges that it "does not

[214] DEP'T OF THE ARMY, FIELD MANUAL NO. 3-0, OPERATIONS, *supra* note 197, at 1–17 (quoting CARL VON CLAUSEWITZ, ON WAR 65–66 (Michael Howard & Peter Paret trans., Oxford Univ. Press 2007) (1976)).
[215] Goldstone Report, *supra* note 5, ¶¶ 919, 926–928.
[216] *Id.* ¶¶ 953, 958.
[217] *Id.* ¶¶ 982–983.
[218] *Id.* ¶ 994.

have complete information on the circumstances prevailing" in the neighbourhoods[219].

- The Report concludes that Israeli strikes on a cement plant were not justified by military necessity and were designed to impair the ability of Gazans to rebuild their infrastructure[220]. It draws this conclusion simply on the basis that the plant's owner was one of less than 100 businessmen in possession of Businessman Cards issued by Israel[221].
- The Report, as part of its wanton, indiscriminate destruction theme[222], cites numerous individuals who allege that Israelis vandalized private property[223]. In one case, the Report cites a Palestinian who speculated about why Israelis broke tiles on the floor, which she said was to gather sand for sandbags[224]. In certain cases, this could be legitimate, and the Report neglects to account for the possibility that the military was searching for tunnels through which terrorist attacks and arms smuggling were carried out.
- The Report concludes that Israel's use of mortars to respond to attacking Hamas militants were not justified by military advantage due to the presence of civilians, several of whom were allegedly killed during the fighting[225].

It is a given that any civilian casualty is regrettable, no matter who the victim is; as noted above, however, it is clear that the death or injury to civilians or damage to civilian property in armed conflict is an *unfortunate but legally accepted reality*. As a result, such injury does not automatically result in war crimes (though a reader of the Report would be hard-pressed to understand that, given the unending flow of accusations of war crimes attributed to the IDF). Moreover, despite what the Report may suggest (or what others may believe) to the contrary, a soldier's life is no less valuable than a civilian's. Hence, to reiterate, *merely because a civilian is a victim of a military action does not establish that any crime has been committed*.

Carl von Clausewitz noted the following truism about war:

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[219] *Id.* ¶ 995.
[220] *Id.* ¶ 1008.
[221] *Id.* ¶¶ 1012–1013.
[222] The Report alleges that Israelis committed "grave breach[es]" of the Fourth Geneva Convention (article 147) through "extensive destruction… of property, not justified by military necessity and carried out unlawfully and wantonly". *Id.* ¶ 1002.
[223] *Id.* ¶¶ 1145, 1275, n.558.
[224] *Id.* ¶ 745.
[225] *Id.* ¶¶ 653–701.

> Everything in war is very simple, but the simplest thing is difficult. The difficulties accumulate and end by producing a kind of friction that is inconceivable unless one has experienced war. . . . This tremendous friction, which cannot, as in mechanics, be reduced to a few points, is everywhere in contact with chance, and brings about effects that cannot be measured, just because they are largely due to chance[226].

Among the factors to which von Clausewitz was referring—and which the Report ignores—is the critical intersection between the legal principles that apply to the application of combat power against a belligerent opponent and the operational and tactical situations that provide the context for the application of these principles. It is extremely revealing that the Report does not pay one bit of attention to the following critical analytical factors: the chaos and confusion of the battle space in which these decisions were made; the operational complexity caused by confronting an enemy making no effort to distinguish himself from the civilian population; lack of accurate intelligence; errors in understanding and planning; fatigue; an adaptive and lethal enemy; and presence of the civilian population[227]. One must always keep in mind that there is a thinking, scheming enemy on the other side and that "enemy commanders have their own objectives and time schedules [which] often lead to unforeseen encounters [and] produce unintended consequences . . . "[228]. It must be further recognised that "[a]ll warfare, but especially irregular warfare, challenges the morals and ethics of soldiers. An enemy may feel no compulsion to respect international conventions and indeed may commit atrocities with the aim of provoking retaliation in kind"[229].

[226] DEP'T OF THE ARMY, FIELD MANUAL NO. 3-0, OPERATIONS, *supra* note 197, at 1–17 (quoting CARL VON CLAUSEWITZ, ON WAR 65–66 (Michael Howard & Peter Paret trans., Oxford Univ. Press 2007) (1976)).
[227] *Id.* at 1–18.
[228] *Id.*
[229] *Id.* at 1–19.

The Report deliberately omits any analysis of the fact that Hamas is considered a terrorist group—and rightly so—by most of the civilised world[230]. It also omits consideration of why that characterisation is significant to any critique of Israeli conduct during the operation. Because the law of armed conflict requires that any such critique be based on the situation the commander perceived at the time of decision [231] —*not on a retrospective perspective*—this characterisation was an important factor in the preparation for mission execution by the Israeli forces. This is because *it undoubtedly led the IDF to expect that Hamas forces would disregard fundamental humanitarian law obligations during close combat just as they had historically disregarded legal obligations to an extent that led to their widespread condemnation as a terrorist organisation.*

Thus, there was a legitimate basis for Israeli forces to expect that their enemy would be commingled with the civilian population and, even more problematically, that their enemy would seek to exploit the presence of civilians to cloak their operations and gain a tactical advantage over Israeli forces—forces that, by virtue of wearing uniforms, unquestionably complied with the obligation to distinguish themselves from the civilian population. This is a critical consideration, for it places in proper context the judgements of individual commanders and soldiers when making the "shoot/don't shoot" decision. Without considering such aspects of the operation, it is impossible to properly apply the principles discussed above to determine whether harm to civilians was inflicted deliberately and not based on an

[230] Start, National Consortium for the Study of Terrorism and Responses to Terrorism, Terrorist Organization Profile: Hamas, http://www.start.umd.edu/start/data/tops/terrorist_organization_profile.asp?id=49 (last visited 19 Dec. 2009).

[231] *See* William J. Fenrick, *Attacking the Enemy Civilian as a Punishable Offense*, 7 DUKE J. COMP. & INT'L L. 539, 564 (1997) ("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." (citing United States v. Wilhelm List (The Hostages Trial), 8 L. Rep. Trials War Crim. 34, 69 (U.S. Military Trib. 1948))).

erroneous, but reasonable, judgement that the object of attack was a combatant, or whether incidental injuries to civilians were permissible collateral consequences of a lawful attack or a deliberate and invalid attack on the civilians.

The Report's failure to properly emphasise either controlling legal principles or the ground tactical situation produces a gross distortion of what occurred and is inconsistent with the proper analytical methodology required to make a genuine assessment of whether a military force violated the laws and customs of war. It is also a stark revelation that the Mission was never interested in such an outcome, but was instead predisposed to concluding Israeli forces committed such violations.

II. THE REPORT IS FILLED WITH EXAMPLES OF FLAWED FACTUAL DATA AND UNSUPPORTED LEGAL CONCLUSIONS.

A. The Mission Relies on Flawed Data, Ignores Easily Adducible Exculpatory Evidence, and Misconstrues Facts When Reaching Conclusions in its Report.

Given the Mission's procedural shortfalls listed above, it is no surprise that much of the Report's specific data is simply unreliable. The following examples present grounds for questioning factual assertions made in the Report. That a UNHRC-sponsored Mission would rely on such an unreliable factual foundation derived from investigatory methods inconsistent with legitimate fact finding procedures suggests that either the fact-finders intentionally pursued a biased, objective-oriented agenda or they were grossly incompetent.

First, the Mission convened for the first time from 4 May 2009 to 8 May 2009. It conducted two field visits to the Gaza Strip from 30 May 2009 to 6 June 2009 and from 25 June 2009 to 1 July 2009[232], meaning nearly six months passed before the

[232] Goldstone Report, *supra* note 5, ¶ 5.

Mission collected evidence in Gaza[233]. Given that none of the evidence that the Mission collected was based upon first-hand observation, experience or accounts, the extended period of time that passed between the fighting in Gaza and the Mission's visits makes any factual evidence of suspicious evidentiary value. Additionally, the sheer volume of information makes a review in days, weeks, or even a few months highly dubious.

Additionally, the Mission only investigated 36 incidents in Gaza, which it acknowledges is not exhaustive but nonetheless "considers . . . illustrative of the main patterns of violations"[234]. During the three-week operation, literally hundreds (perhaps thousands) of incidents took place. The number of incidents investigated represents a minute percentage of the overall operations, meaning they could hardly establish any state-endorsed policy of recklessness or deliberate wrongdoing. Further, questions remain about how the Mission identified and chose the particular 36 incidents that it investigated and whether they fit the Mission's predetermined conclusions.

In fact, Goldstone admitted that is exactly how they chose the specific incidents. In an interview with Bill Moyers, he admitted the following:

> 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[235].

In other words, the Mission purposely selected incidents that it thought would reflect most poorly on Israel. Clearly, that sort of biased, agenda-driven methodology could not possibly produce an accurate account of the overall facts. Moreover, the Report

[233] The Report also acknowledges an "11-week delay in its establishment" and "a short time frame (about three months) to complete its work and report to the Council at the earliest opportunity." *Id.*
[234] *Id.* ¶ 16.
[235] Moyers Interview *supra* note 103.

does not make clear exactly which 36 incidents it analyses, and the Mission has rebuffed requests for clarification[236].

The Report says, "the Mission sought to rely primarily and whenever possible on information it gathered first-hand. Information produced by others, including reports, affidavits and media reports, was used primarily as corroboration"[237]. In fact, virtually all of the information the Mission collected was second-hand. It did not witness any of the events. Its members were not involved in the events. As such, it is misleading for the Mission to imply that some of the information was based upon first-hand knowledge.

Similarly, the Mission fails to provide a chain of custody for the evidence to which it refers. All of the evidence analysed was examined long after-the-fact. There is no way to know if the physical evidence it examined was tampered with, moved, manipulated, or properly preserved. Alleged witnesses also gave their testimonies long after the events occurred, and they were often based on second-hand information [238], which has limited evidentiary value in any legal proceeding. Additionally, much of the testimony provided was most likely given under duress[239], a crucial fact that it not given nearly sufficient attention by the Report.

For example, the Report notes instances in which Fatah members in Gaza, including children, were tortured, abused, and beaten[240]. Yet, the Mission seems to accord a remarkable degree of confidence to Palestinian testimony despite abundant

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[236] NGO Monitor, Anne Herzberg, *List of 36 Incidents in the Goldstone Report*, 11 Dec. 2009, http://www.ngo-monitor.org/article/list_of_incidents_in_the_goldstone_report0.
[237] *Id.* ¶ 23.
[238] *See, e.g., id.* ¶¶ 992 n.507, 1008 n.519, 1014 n.520, 1015 n.521, 1029 n.525. The Report quotes a soldier to corroborate the story of what happened to Majdi Abd Rabbo and then concedes in a footnote that the "witness" "does not appear to have been a direct witness but heard it from others . . .". *Id.* ¶ 1088 n.532. It quotes Khaled Abd Rabbo who speculates that "*to his knowledge* his house had been demolished by the Israeli armed forces shortly before they withdrew from Gaza". *Id.* ¶ 993 (emphasis added).
[239] *Id.* ¶¶ 148, 167, 438, 453, 1348; *see, e.g., id.* ¶ 1274 n.645 (the Report admits that the woman interviewed was "distressed").
[240] *Id.* ¶¶ 1354–1355.

evidence of intimidation and fear of reprisal. It relies upon testimony from Palestinians throughout the Report to exonerate Hamas for a whole host of war crimes, including using civilian shields, using residences for military purposes, and launching attacks from residential neighbourhoods, *despite readily available, uncontroverted, contrary evidence in the public domain*[241]. The Report also relies upon Hamas testimony, to which it accords undue credibility for a terrorist organisation that deliberately kills and intimidates innocent civilians.

Much of the evidence that the Report cites is also based on reports by NGO's like Amnesty International, Human Rights Watch, and the Palestinian Center for Human Rights ("PCHR")[242]. These organizations are plagued by institutional biases against Israel and flawed methodology, rendering their authoritative value highly questionable[243]. The Report directly references NGOs with anti-Israel bias several hundred times. It cites B'Tselem 56 times, PCHR 50 times, Al Haq 40 times, Adalah 38 times, Human Right Watch 36 times, Defence of Children International – Palestinian Section 28 times, Breaking the Silence 27 times and Amnesty International 27 times[244]. It also cites on multiple occasions Jonathan Pollak for

[241] *See, e.g.*, *id.* ¶¶ 992 n.507, 1008 n.519, 1014 n.520, 1015 n.521, 1029 n.525.
[242] NGO Monitor, *Goldstone Report: 575 Pages of NGO 'Cut and Paste,'* 16 Sept. 2009, http:// www.ngo-monitor.org/article/goldstone_report_pages_of_ngo_cut_and_paste_.
[243] NGO MONITOR, WATCHING THE WATCHERS: THE POLITICS AND CREDIBILITY OF NON-GOVERNMENTAL ORGANISATIONS IN THE ARAB-ISRAELI CONFLICT 32 (2008), http:// www.ngo-monitor.org/data/images/File/watchingthewatchers-small.pdf (noting that, during the period 2000 to 2004, while grave atrocities were occurring in Darfur, Amnesty, along with the International Commission of Jurists, "published fewer than half the number of reports on the extreme violence in the Darfur region of Sudan (often termed genocide) than they did on Israeli/Palestinian issues"); NGO Monitor, *Goldstone Report: 575 Pages of NGO 'Cut and Paste,' supra* note 242; NGO Monitor, *Who Wrote the Goldstone Report?*, 19 Nov. 2009, http://www.ngo-monitor.org/article/who_wrote_the_gold stone_report_.
[244] NGO Monitor, *House of Cards: NGOs and the Goldstone Report*, *supra* note 121.

evidentiary purposes[245]. Pollak is the radical leftist leader of Anarchists Against the Wall and is a convicted criminal[246] with a clearly biased agenda.

1. The Report Relies Upon Exceedingly High Casualty Numbers and Other Questionable Data.

The International Institute for Counter-Terrorism ("IICT") conducted a study that examined the conclusions published by the Palestinian Center for Human Rights ("PCHR")—*conclusions that the Goldstone Report relies upon in analysing events in Gaza*[247]. The IICT study concluded that many of the alleged civilian casualties identified by the PCHR report were, in fact, Hamas casualties. In addition, it has exposed that, in some cases, civilian deaths attributed to Israel by the PCHR may have been members of Fatah whom Hamas murdered[248].

The Report even concedes that "unidentified gunmen killed between 29 and 32 Gaza residents between the beginning of the Israeli military operations and 27 February"[249], and that "the Mission heard first-hand accounts of violations against Fatah critics committed during the period of the Israeli military operations. *Some of the witnesses who were interviewed by the Mission were severely distressed and asked that their identity not be disclosed for fear of retaliation*"[250]. This is clear evidence of the intimidation rampant within the Palestinian population and casts doubt upon Palestinian testimonies.

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[245] *See* Goldstone Report, *supra* note 5, ¶¶ 1377 n.707, 1382, 1389 n.729, 1390 n.730, 1392 n.738.
[246] Nir Hasson, *Jonathan Pollak's day in court: Activist sentenced for anti-wall protest tells judge: Please jail me*, HAARETZ, 18 Feb. 2007, http://zope.gush-shalom.org/home/en/channels/archive/1171890175.
[247] *Id. E.g.*, Goldstone Report, *supra* note 5 ¶¶ 242 n.114, 260 n.141, 261 nn.142 & 144, 334 n.204, 350 n.215. Other examples are too numerous to cite.
[248] AVI MOR ET AL, INT'L INST. FOR COUNTER-TERRORISM, CASUALTIES IN OPERATION CAST LEAD: A CLOSER LOOK, 1, 7 (2009), http://www.ict.org.il/Portals/0/Articles/ICT_Cast_Lead_ Casualties-A_Closer_Look.pdf.
[249] Goldstone Report, *supra* note 5, ¶ 1346. The Report acknowledges that violence increased between Hamas and Fatah after Hamas won elections. *Id.* ¶ 1340.
[250] *Id.* ¶ 1348 (emphasis added).

In reporting the number of civilians killed, one of the sources that the Report cites is the clearly biased Hamas NGO, Central Commission for Documentation and Pursuit of Israeli War Criminals (TAWTHEQ), along with PCHR, Al Mezan, and B'Tselem[251]. To discredit Israel's casualty reports, the Report states that,

> the statistics from non-governmental sources are generally consistent . . . such as those provided by PCHR and Al-Mezan as a result of months of field research, [raising] very serious concerns about the way Israel conducted the military operations in Gaza. The counterclaims published by the Government of Israel fall far short of international law standards[252].

First, the strong anti-Israel position of these non-governmental sources and the fact that they collected much of their data long after the conflict ended through second-hand sources renders their statistics questionable at best. The methodological flaws that are described herein apply to many of those sources equally. Second, the Report provides no further description of the so-called "international standards" to which it refers. It is typical of the Report's methodology where allegations are made in conclusory fashion without any genuine authority to validate them.

The Report also devotes significant space to discussing supposed civilian police officers that the Israeli military targeted and killed[253]. In fact, many of these "policemen" who were killed and classified as civilians also held ranks in Hamas and were engaged in active combat[254]. One study found that over 90 percent of alleged "civilian police" were directly engaged in hostilities alongside terrorists against

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[251] *Id.* ¶ 350. The bias of these organisations is evident by their references to Palestinian land as "Occupied Palestinian Territories" and "Occupied Territories." The Al Mezan Center for Human Rights is a Palestinian non-governmental organisation that describes its mission statement as "provid[ing] a secure and long-lasting foundation for the enjoyment of human rights in the Occupied Palestinian Territories." Al Mezan Center for Human Rights, Mission Statement, http://www.mezan.org/en/messege.php?view=messageen (last visited 19 Dec. 2009). B'Tselem is an Israeli human rights organisation that "endeavors to document and educate the Israeli public and policymakers about human rights violations in the Occupied Territories." B'Tselem, About B'Tselem, http://www.btselem.org/English/About_BTselem/Index.asp (last visited 19 Dec. 2009).
[252] *Id.* ¶ 359.
[253] *See* Goldstone Report, *supra* note 5, ¶¶ 335–436
[254] *Id.*; MFA, OPERATION IN GAZA, *supra* note 11, ¶¶ 237-248.

Israel[255]. Hamas police spokesman Islam Shahwan acknowledged that Hamas had instructed police to fight against IDF forces[256], and they "received clear orders from the leadership to face the enemy, if the Gaza Strip were to be invaded"[257]. He confirmed to the Mission that he had been quoted accurately.[258]

Director of Police in Gaza, Gen. Jamal al-Jarrah, known as Abu Obeidah, also described how the Executive Force members were merged with the civil police.[259] The Report states that "the Director of Police was very open in acknowledging that many of his men were Hamas supporters" and "the Mission understands that most, if not all, of the post-2007 recruits into the civil police, will have been recruited from the Executive Force, which was strongly loyal to Hamas"[260].

The Committee for Accuracy in Middle East Reporting in America ("CAMERA") found supporting evidence, "[identifying] a number of Hamas fighters and members of other Palestinian terrorist groups who were either misclassified by PCHR as civilians, not identified as combatants, or omitted entirely from their tabulations"[261].

For example, according to CAMERA,

> PCHR described Mohammed 'Abed Hassan Brbakh as a 16 year old civilian who was killed in his home with his family on 4 January, but West Bank-based Maan News Agency identified him as a commander of the [Democratic Front for the Liberation of Palestine] in Gaza and reported his age as 22[262].

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[255] Jonathan Dahoah-Halevi, *Fatal Casualties of the Palestinian Security Forces—Myth vs. Reality*, JERUSALEM CTR. FOR PUBLIC AFFAIRS, 24 May 2009, http://www.jcpa.org.il/JCPAHeb/Templates/showpage.asp?FID=594&DBID=1&LNGID=2&TMID=99&IID=22712 (Hebrew).
[256] MFA, OPERATION IN GAZA, *supra* note 11, ¶ 244.
[257] Goldstone Report, *supra* note 5, ¶ 414.
[258] *Id.* ¶ 414.
[259] *Id.* ¶ 411.
[260] *Id.* ¶ 418.
[261] Steven Stotsky, *Gaza Casualties: Civilian or Combatant?*, Comm. for Accuracy in Middle E. Reporting in America, 29 Jan. 2009, http://www.camera.org/index.asp?x_context=2&x_outlet=118&x_article=1603.
[262] *Id.*

A New York Times article also reported that "*Hamas militants are fighting in civilian clothes; even the police have been ordered to take off their uniforms*. The militants emerge from tunnels to shoot automatic weapons or antitank missiles, then disappear back inside, hoping to lure the Israeli soldiers with their fire"[263].

Even the Report acknowledges that, "[i]n 2006, the then Hamas Interior Minister established the Executive Force, mainly composed of members of al-Qassam Brigades and Hamas supporters"[264] and that "[m]ost Palestinian political parties have an armed wing or armed groups affiliated to them . . . al-Asqa Brigades, the armed wing of Fatah, and al-Qassam Brigades, the armed wing of Hamas"[265]. Yet, the Report still maintains that Israel illegally targeted civilians, rather than combatants. In a section titled "Conflicting characterizations of the Gaza security forces," the Report describes the differing views about the status of armed groups[266]. The Report cites the Israeli position as being that these "security forces" are not immune from attack due to their dual function, because "[w]hile 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"[267].

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[263] Steve Erlanger, *A Gaza War Full of Traps and Trickery*, N.Y. TIMES, 11 Jan. 2009, at A1, http://www.nytimes.com/2009/01/11/world/middleeast/11hamas.html?pagewanted=1&_r=1&sq=Gaza%20war%20full%20of%20traps&st=cse&scp=1. In addition to explaining the difficulty in deciphering civilian versus combatant deaths, these facts provide evidence of Geneva Convention violations that would render Hamas members unlawful combatants. Article 4 of the Third Geneva Convention requires that, to be eligible for protection, soldiers must be commanded by a person responsible for them, have a fixed distinctive sign recognizable at a distance, carry arms openly, and conduct their operations in accordance with the laws and customs of war. Third Geneva Convention, *supra* note 198, art. 4.

[264] Goldstone Report, *supra* note 5, ¶ 214.

[265] *Id.* ¶ 215.

[266] *Id.* ¶ 406.

[267] *Id.* ¶ 1205.

The Report then dismisses—inexplicably—that position, saying, "[t]he Mission notes that there are no allegations that the police as an organized force took part in combat during the armed operations" and that "[t]he Mission also notes that while the then commander of the Executive Forces and now Director of Police did reportedly say in August 2007 that members of the Executive Forces were 'resistance fighters', he stressed in the same interview the authorities' intention to develop it into a law enforcement force'"[268].

First, there most certainly are allegations that the police, as an organized force, took part in combat. That is precisely what Israel alleges, and the Mission provides no evidence to contradict that assertion other than blanket statements. Second, even if there existed an intent to develop the police into an exclusive law enforcement force at a later date, it does not change its militant nature in the time being.

The Report also says that "[t]he Mission notes that a situation in which a recently constituted civilian police force integrates former members of armed groups would not be unique to Gaza. That prior membership in itself would not be sufficient to establish that the police in Gaza is a part of al-Qassam Brigades or other armed groups"[269]. It ignores the evidence further by stating the following:

> Except for the statements of the police spokesperson, the Israel Government has presented no other basis on which a presumption can be made against the overall civilian nature of the police in Gaza. It is true that the police and the security forces created by Hamas in Gaza may have their origins in the Executive Force. However . . . [the Mission] believes that the assertion on the part of the Government of Israel that 'an overwhelming majority of the police forces were also members of the Hamas military wing or activists of Hamas or other terrorist organizations' appears to be an overstatement that has led to prejudicial presumptions against the nature of the police force that *may not be justified*[270].

[268] *Id.* ¶¶ 415–416.
[269] *Id.* ¶ 416.
[270] *Id.* ¶ 417 (emphasis added). Saying that Israel's presumption "may not be justified" does not eliminate the possibility that the presumption may, in fact, be justified.

In stark contrast, the Mission takes unofficial statements made by Israelis and uses them to conclude that civilians were deliberately targeted.

CAMERA and the Intelligence and Terrorism Information Center at the Israel Intelligence Heritage and Commemoration Center also report that Hamas adopted a policy midway through Operation Cast Lead forbidding the publishing of names of Hamas fighters[271]. According to Hamas's main Internet message board, the PALDF Forum—which had published the names and photographs of numerous Hamas fighters who had been killed in the first week of the conflict—no "photographs, names, or details of those members of the resistance . . . killed or injured in the fighting" would be publicised[272]. The purpose behind this policy is utterly obvious—to ensure that Hamas militants were counted as civilian deaths. In any event, the fact that members of Hamas were also members of the police or were not engaged in hostilities at the precise moment they were killed is not dispositive from a legal standpoint, and certainly not from a moral standpoint. Israel has the right—in fact, the legal duty[273]—to target members of the terrorist group Hamas[274].

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[271] IICC, Hamas Hides the Casualties Suffered by its Operatives: Hamas's Main Online Forum Censors the Publication of Names and Photographs of Operatives Killed in Operation Cast Lead, ¶¶ 2–3, 12 Jan. 2009, http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/ html/hamas_e037.htm [hereinafter "HAMAS HIDES THE CASUALTIES"].

[272] Hamas Hides the Casualties, *supra* note 271, ¶¶ 1–2; Stotsky, *supra* note 261.

[273] The U.N. Security Council has passed several resolutions (1368, 1373, 1377 and 1624) affirming the obligation of states to combat terrorism. *See* S.C. Res. 1624, U.N. Doc. S/RES/1624 (14 Sept. 2005); S.C. Res. 1377, U.N. Doc. S/RES/1377 (12 Nov. 2001); S.C. Res. 1373, U.N. Doc. S/RES/1373 (28 Sept. 2001); S.C. Res. 1368, U.N. Doc. S/RES/1368 (12 Sept. 2001).

[274] It is axiomatic that members of the enemy armed forces qualify as lawful military objectives and are, therefore, lawfully made the object of attack at any time irrespective of whether their conduct poses a threat to the attacking force at the moment of attack. *See* ICRC Commentary on Additional Protocol I, *supra* note 74, art. 48, ¶ 1874, http://www.icrc.org/ihl.nsf/1a13044f3bbb 5b8ec12563fb0066f226/83c5b3fc27bb6f00c12563cd00434537!OpenDocument ("As regards military objectives, these include the armed forces and their installations and transports."). This is a fundamental principle of the law of armed conflict applicable in both international and non-international armed conflicts. Although there is no legal definition of "combatant" in a non-international armed conflict, the basic notion of a belligerent opponent triggers the same status-based targeting authority that applies to combatants in an international armed conflict. *See generally* MICHAEL N. SCHMITT ET AL., THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT WITH COMMENTARY (San Remo Inst. of Int'l Law ed., 2006).

Accordingly, members of an enemy opposition group, even in the context of a non-international armed conflict, are lawful military objectives by virtue of that status. *See supra* notes

Finally, the Report says that,

> it appears from the response to the Mission from the Orient Research Group . . . that its information on police members' alleged affiliation with armed groups was based to a large extent on the websites of the armed groups . . . . This does not mean that those persons killed were involved in armed resistance in any way[275].

Nor, by the way, does it mean that such persons were not involved. The Report simply adopts the less credible position, i.e., that the armed groups are misidentifying their own members. The Mission's justification seems to be that that armed groups might adopt people killed as "martyrs."

The Report concludes 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. The statement by the police spokesperson on 1 January 2009 (after the attacks of 27 December 2008 had been carried out) cannot, on its own, justify the assertion that the police were part and parcel of the armed forces[276].

The Report does nothing to refute that assertion, for one. But it is also worth asking what sort of evidence would justify that assertion for the Mission, if not admissions by the groups themselves and their devotees.

When analysing police casualties, the Mission seems reluctant to indict potential Hamas members without incontrovertible and absolutely verifiable evidence. The Mission is less concerned with the presumption of innocence when considering Israelis. *The Mission repeatedly accuses Israel of misstating its <u>good</u> intentions,*

409–412 and accompanying text. This means they may be made the object of attack based solely on a determination that they fall within this status. At that point, operational considerations dictate the methods and means employed to kill or disable the enemy. Targets are simply those persons, places, or things made the object of attack by a military force. The target selection and engagement process begins with the military mission. Operational planners then determine how to best leverage the capabilities of the military unit to achieve the effects deemed necessary to accomplish the mission. These effects generally include destruction, neutralisation, denial, harassment, and disruption. *See* U.S. JOINT CHIEFS OF STAFF, JOINT PUBL'N NO. 3-60, JOINT TARGETING, at I-1 to -11 (2007). The targeting cycle involves the selection of targets, the selection of means to engage those targets, target engagement, assessment of effects, and reconsideration of targets. *See id*. at II-1 to -19.

[275] Goldstone Report, *supra* note 5, ¶ 421.

[276] *Id*. ¶ 425.

while exonerating armed groups in Gaza that explicitly acknowledge bad intentions. The Mission takes every piece of evidence that could imply Israeli wrongdoing and highlights it, while taking every piece of evidence that indicts Palestinians and dismisses it. This is certainly not to imply that Israel is perfect or that wrongdoing could not possibly have occurred in any instances. It does, however, confirm that the Mission's methodology consistently indicts one side based on incomplete evidence while excusing the other, thereby casting doubt on the entire Report.

The IICT study found other areas that indicate bias and unreliability in PCHR casualty data. For example, its data exhibits a significant "five-year rounding bias" in reporting the ages of victims (peaks of 10, 15, 20, 25 years old), an indication of anecdotal and unreliable age reporting[277]. *Casualty demographics also reveal that a significant majority of the Palestinian casualties were combat age young males, indicating that Israel did not indiscriminately attack broad swaths of civilians, as alleged, but instead targeted combatants*[278]. While this factor alone is not dispositive of whether these casualties were lawful objects of attack, it does indicate that, absent additional information, there is simply insufficient evidence to support a conclusion that they were killed in violation of the law of armed conflict. Too many variables are raised by the combination of the age and gender of the casualties and the consistent pattern of Hamas conduct.

It is well known that few Hamas operatives wore distinctive uniforms or markings, making it virtually impossible to determine whether a fighting age male casualty was at the time of being targeted engaged in hostilities against Israeli

[277] AVI MOR ET AL, *supra* note 248, at 1, 7.
[278] *Id.*

forces[279]. Nor is it possible to determine *in the abstract* whether these casualties were killed as the result of deliberate attack, or as a collateral consequence to an otherwise lawful attack. *In short, the identification of fighting aged males who were killed during operations and were at the time of recovery dressed as civilians has, in the context of this operation, virtually no probative value in assessing potential war crimes*[280]. Moreover, had the attacks been truly indiscriminate, as the Report repeatedly claims, one would expect to see casualty patterns more reflective of the overall population demographics (i.e., the pattern would include significantly more female casualties than it actually does).

While the Report seeks to convey that its conclusions are based upon its own independent investigations, in fact, it is heavily dependent on the investigations, reporting, and data of organisations that are openly anti-Israel. As such, it clearly affords less weight to evidence that does not comport with the Mission's predetermined conclusions. Notwithstanding these serious deficiencies, the Report's legal conclusions rest heavily upon the assumption that the inflated, unreliable numbers of civilians killed were not Hamas members. Israel clearly concluded differently and believed that its information justified the conclusion that many of the "police" were aiding Hamas and, therefore, comprised part of the militant force directly participating in combat. Certainly the available evidence renders Israel's conclusions highly plausible, at the very least.

2. The Report Accuses Israel of Giving Inadequate Warnings to Palestinian Civilians Prior to Attacking.

Prior to striking targets, the IDF took various deliberate steps that were designed to warn civilians of an impending attack, often to Israel's own detriment by

[279] *See, e.g.*, *infra* note 491 and accompanying text; *see also infra* Section II(B)(3) (describing various instances where Hamas violated its obligations to distinguish itself from the civilian population); Erlanger, *supra* note 263.
[280] AVI MOR ET AL, *supra* note 248, at 12–14.

giving away the benefit of surprise. This also created a significant operational risk for Israel forces because it contributed to the ability of Hamas to cloak its forces among the civilian population in an effort to gain an illegal tactical advantage from what it knew would be the efforts of Israeli forces to distinguish between enemy military objectives and the civilian population.

For instance, the Israelis used "knock-on-the-roof" missiles—teaser missiles with little or no explosives—that are fired onto the roof of a building to warn civilians to evacuate[281]. Israel implemented this procedure because Hamas, in the past, would send civilians to the top of buildings about to be attacked, forcing Israel to either abort the attack or kill civilians[282]. Israel's efforts were designed to counter Hamas's illegal tactics that put Palestinian civilians at risk. The Report even acknowledges that Palestinians have used this tactic in the past. However, it limits documented incidents to 2007, discounting Israel's knock-on-the-roof practice in Operation Cast Lead.[283] Clearly, however, if incidents occurred as recently as 2007, Israel would be justified in implementing such a policy less than two years later. But the Report simply dismisses such efforts as inadequate and *fails to recognise that they represent powerful evidence that Israel sought to mitigate the risk to the civilian population consistent with its obligations under the law of armed conflict*[284].

These criticisms are all the more ironic considering the law of armed conflict does not impose a warning obligation on belligerents. Instead, it requires them to *consider* use of warnings to mitigate risk to civilians when such use is determined to

[281] Erlanger, *supra* note 263.
[282] Goldstone Report, *supra* note 5, ¶ 474.
[283] *Id.*
[284] *See* Additional Protocol I, *supra* note 69, art. 57(2)(c).

be feasible, a consideration that includes assessment of the additional risk created to friendly forces as the result of warnings[285].

Israel dropped more than 2.5 million leaflet warnings and made over 165,000 phone calls to warn civilians.[286] Many of these warnings were highly specific. For example, the IDF issued a warning "To the Resident of the Sajaiya Neighbourhood," which stated, among other things, that "All residents of the Sajaiya Neighbourhood must leave their homes and move towards the Old City to the other side of Salah A'Din Road, with effect as of the distribution of this leaflet and by no later than 6 hours after the distribution of this leaflet"[287]. Clearly, the warnings were specific when the circumstances permitted.

On other occasions, Israel even warned Hamas members that their houses would be struck, giving legitimate military targets time to evacuate their families. Abu Askar, who the Mission concedes was a Hamas member[288], received a call from the Israeli armed forces warning him to evacuate his home[289]. Israel also warned senior Hamas military leader Nizar Rayyan on 1 January 2009 that it would bomb his home[290]. Rayyan refused to allow his family to evacuate, and the strike killed him, as well as many of his family and neighbours[291].

The Report, parroting others similar to it, criticises Israel for issuing too many warnings to Gaza's civilians, saying that the telephone calls "caused fear and

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[285] *Id.* ("[E]ffective advance warning shall be given of attacks which may affect the civilian population, *unless circumstances do not permit*." (emphasis added)). Similarly, the U.S. Naval Handbook specifies that advance warnings should be given "[w]hen circumstances permit" and not if the "mission accomplishment requires the element of surprise or the security of the attacking forces would otherwise be compromised." DEP'T OF THE NAVY ET AL., NWP 1-14M/MCWP 5-2.1/COMDTPUB P5800.7, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS ¶ 11.2 (1995), http://www.prio.no/upload/1117/doc/US%20Navy%20 Commander's%20Handbook%201995.pdf.
[286] MFA, OPERATION IN GAZA, *supra* note 11, ¶ 8.
[287] *Id.* at ¶ 264n.225.
[288] Goldstone Report, *supra* note 5, ¶ 652 n.381.
[289] *Id.* ¶ 656.
[290] Diaa Hadid, *Hamas marks 1 year after war, but many stay home*, ASSOCIATED PRESS, 27 Dec. 2009, http://www.etaiwannews.com/etn/news_content.php?id=1142458⟨=eng_news.
[291] *Id.*

confusion"[292], that the leaflet warnings were not specific enough and that the "knock on the roof" strategy actually constituted an attack against civilians[293].

Again, the Mission injects its own interpretation of international law into a Report that is supposed to be strictly limited to fact-finding. It states that "[t]he question is 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"[294]. It also states that to be effective, a warning

> 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[295].

The Mission's criticism of Israel's efforts to warn civilians is evidence of vindictive nitpicking, and Additional Protocol I to the Geneva Convention does not state that the criteria the Misson lists are necessary to constitute "effective warnings." It merely appears to be the Mission's interpretation of what Additional Protocol I should mean. In fact, Article 57 requires effective warnings "unless circumstances do not permit"[296]. In other words, when circumstances do not permit, warnings are not necessary. The ICRC Commentary on Additional Protocol I also states that "[w]arnings may also have a general character. A belligerent could, for example, give notice by radio that he will attack certain types of installations or factories"[297]. *The fact that Israel issued warnings even when it appears that it was not legally required to do so indicates intent to avoid civilian casualties.*

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[292] *Id.* ¶ 502.
[293] *Id.* ¶ 37.
[294] *Id.* ¶ 527.
[295] *Id.* ¶ 528.
[296] Additional Protocol I, *supra* note 69, art. 57(2)(c).
[297] ICRC Commentary on Additional Protocol I, *supra* note 74, art. 57(2)(c), ¶ 2225, http://www.icrc.org/ihl.nsf/1a13044f3bbb5b8ec12563fb0066f226/d80d14d84bf36b92c12563cd00434fbd!OpenDocument.

The warning obligation is only one aspect of the broader obligation imposed on *all* belligerents to mitigate the risk to civilians during armed conflict. A *prima facie* aspect of this broader set of obligations is the obligation imposed on belligerents to refrain from placing military objectives in the vicinity of civilian population centres[298]. It is clear that Hamas made no effort to comply with this obligation and, in fact, deliberately engaged in commingling tactics in order to gain a tactical advantage against Israeli forces.

In truth, many civilians heeded IDF warnings and evacuated their homes and neighbourhoods when instructed to do so. This helps explain why the number of civilian casualties was so low, especially given the very high population density in Gaza[299]. While many civilians decided to evacuate, those who did not assumed the risk of remaining in the combat zone. Hamas also made a practice of firing from near UN buildings where civilians were taking refuge, thus exacerbating the likelihood of civilian casualties[300].

The Report's discussion of Israel's deficiencies in issuing warnings is also somewhat contradictory. For instance, it criticises Israel for issuing two sets of warnings to owners and employees of a flour mill that were not followed by strikes, thus putting them "into a state of fear as a result of the false alarms"[301]. Then it

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[298] *Id.* art. 58, ¶ 2240, http://www.icrc.org/ihl.nsf/1a13044f3bbb5b8ec12563fb0066f226/d37f727128e875d4c12563cd0043518b!OpenDocument.

[299] The Report at times pays Israel's military backhanded compliments by praising its sophistication. For instance, it says,

> The Israeli armed forces are, in technological terms, among the most advanced in the world. Not only do they possess the most advanced hardware in many respects, they are also a market leader in the production of some of the most advanced pieces of technology available, including UAVs. They have a very significant capacity for precision strikes by a variety of methods, including aerial and ground launches.

Goldstone Report, *supra* note 5, ¶ 1182. The Mission's apparent implication is that because the Israeli military is so technologically advanced, any civilian deaths must have been deliberate or indiscriminate, at the very least. However, if that were really the Israeli military's goal—killing civilians—then it seems to have been quite inept at doing so (given the overall number of civilian deaths) for such a sophisticated military. Clearly, however, that is *not* what the Israeli military sought to do.

[300] MFA, OPERATION IN GAZA, *supra* note 11, ¶ 331.

[301] Goldstone Report, *supra* note 5, ¶ 919.

further criticises Israel for eventually striking the mill, allegedly without prior warning, which it says raises "questions about the efficacy or seriousness of the warnings system"[302]. It neglects to discuss how Israel's prior warnings are evidence that the military strove to protect innocent lives. If anything, the fact that warnings were issued out of extra caution even when strikes did not immediately follow demonstrates just how serious the warning system was.

Finally, the Report's observation that Israel bombed targets in densely populated areas, though certainly true, resulted from the fact that Hamas situated its forces and supplies in, and operated out of, densely populated areas, thereby endangering the civilian population and using them as shields.

The Report, of course, omits discussion of the fact that warnings are only one aspect of the entire spectrum of legal provisions related to determining what is a lawful object of attack and what measures should be employed to mitigate risk to civilians. Because of the reality that belligerent forces may either deliberately or unavoidably commingle military objectives with civilians, determining whether places or things are or are not lawful objects of attack requires a case-by-case analysis based on the mission, enemy, troops available, terrain, time, and presence of civilians[303]. A central component of this analysis is the complementary rule established in Article 51 of Additional Protocol I which provides that "*[t]he 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"[304].

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[302] *Id.*
[303] Additional Protocol I, *supra* note 69, art. 57. *See generally* Fenrick, *supra* note 231.
[304] Additional Protocol I, *supra* note 69, art. 51(7) (emphasis added).

Pursuant to this rule, the presence of civilians in or around what qualifies as a military objective does not "immunise" the thing or area from attack. Instead, the operational decision-maker is obligated to analyse the legality of the attack pursuant to the complementary prohibition against engaging in indiscriminate attacks and to assess whether the anticipated harm to civilians or civilian property will be excessive in relation to the concrete and direct military advantage anticipated[305]. If an attack is deemed lawful, then the commander should consider the cost/benefit equation related to issuing warnings[306]. When he determines warnings can be issued feasibly, he should do so to the best of his ability[307]. *Even from the Report, it appears this is what Israeli commanders did, despite being confronted with willful and deliberate violations of the prohibition against commingling engaged in by their enemy*.

3. The Report Accuses Israel of Aggressive Behavior and Indiscriminate—and Even Deliberate—Attacks Against Civilians.

The Mission's accusations that Israeli forces indiscriminately and deliberately targeted Palestinian civilians runs throughout the entire Report. The Report focuses on certain incidents, in particular, which warrant specific attention.

One is the strike against the al-Samouni family. The Report alleges that on 4 January 2009, Israeli soldiers entered the al-Samouni house by force and shot 45-year old Ateya al-Samouni who had his arms raised and was holding his driver's license[308]. The Report claims that Israeli soldiers opened fire inside a room where 20 family members had gathered[309]. Only later does the Report acknowledge that "there is some

[305] *See id*. art. 51(5)(b).
[306] *Id*. art. 57(2)(c).
[307] *See id*.
[308] Goldstone Report, *supra* note 5, ¶ 707.
[309] *Id.*

indication there might have been a presence of Palestinian combatants in the al-Samouni neighourhood during the first hours of the Israeli ground attack"[310].

Certainly, the events as the Report describes them sound horrible indeed. And, if sufficient evidence exists to prosecute the involved soldiers for criminal behavior, Israeli authorities should proceed with such prosecutions—and past incidents indicate that they would. However, the Report's allegations should be met with skepticism. First, even if the incidents as alleged are largely true, there is far from sufficient information to assess intent and hence criminal culpability. It is entirely possible that confusion existed inside the house. Soldiers could have thought some of the inhabitants had weapons. Some of the inhabitants may indeed have possessed weapons. There is no way to know based on the information available at this moment. Furthermore, the Report recounts events without citing the sources relied upon, making the claims even more dubious[311].

There is also ample reason to question the Mission's account of events in that al-Samouni neighbourhood generally. In describing the "shelling of Wa'el al-Samouni's house"[312], the Report conveniently omits to note that several members within the home were affiliated with the terrorist group, Palestinian Islamic Jihad[313]. A Palestinian Islamic Jihad flier acknowledged the contributions of Muhammad al-Samouni and Walid Rashad al-Samouni, stating that, "[h]e (Muhammad al-Samouni), along with the *mujaheed* Walid Rashad al-Samouni, blew up the tank, causing the

[310] *Id.* ¶ 722.
[311] *Id.* ¶¶ 707–709.
[312] *Id.* ¶ 714.
[313] Jonathan Dahoah-Halevi, *Blocking the Truth of the Gaza War: How the Goldstone Report Understated the Hamas Threat to Palestinian Civilians*, JERUSALEM CTR. FOR PUBLIC AFFAIRS, 18 Sep. 2009, http://jcpa.org/JCPA/Templates/ShowPage.asp?DBID=1&LNGID=1&TMID=111&FID=442&PID=0&IID=3086.

deaths of a number of Zionists, as admitted by the enemy, on the first night of the ground invasion during the war south of the Zeitun neighborhood"[314].

Palestinian Islamic Jihad also stated that its fighters launched an RPG at an Israeli tank and attacked Israeli soldiers on the evening of 4 January 2009. At 1:20 a.m. on 5 January 2009, a Palestinian Islamic Jihad unit allegedly detonated a 50-kg bomb near Wa'el al-Samouni's house, and at 6:30 a.m., detonated another bomb near an IDF unit in Zeitun, according to the group[315]. These accounts directly contradict the Report, which states that, "as far as the al-Samouni neighbourhood is concerned, this report would appear to support the statements of the witnesses that there was no combat"[316]. Based on the admissions of Palestinians themselves, it appears that combatants taking an active part in hostilities were operating from these areas and that the Israeli military was not simply engaging in indiscriminate attacks without justification—as the Report implies.

The Report also mentions that Israeli soldiers shot Iyad al-Samouni in the leg while he was walking with others towards Gaza City[317]. However, it is only in a footnote that the Report acknowledges the following information:

> According to the researchers of a Palestinian NGO who investigated this case, the mobile phone in the pocket of the cousin walking in front of Iyad al-Samouni rang and Iyad al-Samouni tried to take the phone out of his pocket (the cousin's hands were tied as well, so he could not reach into his pocket himself), whereupon the Israeli soldier opened fire. This detail was not mentioned to the Mission in its interview[318].

A more careful analysis of the information reveals several things. First, the Mission is relying upon information gathered by others. Second, the fact that the "detail" was omitted raises questions about the trustworthiness and reliability of the

[314] *Id.*
[315] *Id.*
[316] Goldstone Report, *supra* note 5, ¶ 724.
[317] *Id.* ¶ 736.
[318] *Id.* ¶ 736 n.417.

witnesses that the Mission interviewed and apparently relies upon so heavily. It is also interesting that the Mission downplayed the "detail" by putting it in a footnote. Clearly, the soldiers could have perceived Iyad's movements as a threat and could have perceived him as reaching for a weapon.

The Report discusses the alleged killing of Majda and Rayya Hajaj. The Mission reports that the two, who were carrying white flags, along with a group of others, evacuated homes and started walking towards a group of Israeli tanks roughly 320 metres away[319]. When they were about 120 metres away, the Israeli tanks allegedly fired upon them, which the Report called a deliberate killing[320]. The Report states that, "considering that the civilians were at a distance of more than 100 metres from them, the Israeli soldiers could not have perceived an imminent threat from the movement of people in that area . . ."[321]. What the Report neglects to mention, though, is that if the civilians were far enough away that soldiers could not have perceived them as an imminent threat, then they also could have been far enough away to be mistaken for combatants. That is, of course, if the Report's depiction of the events even remotely resembles what actually took place.

As a result of the above and other similar alleged incidents, the Report concludes that "Israeli forces repeatedly opened fire on civilians who were not taking part in the hostilities and who posed no threat to them. These indicate that the instructions given to the Israeli armed forces moving into Gaza provided for a low threshold for the use of lethal fire against the civilian population"[322]. The Report quotes a soldier who said, "[n]o one actually said 'shoot regardless' or 'shoot anything that moves.' But we were not ordered to open fire only if there was a *real*

[319] *Id.* ¶ 764.
[320] *Id.* ¶ 767.
[321] *Id.*
[322] *Id.* ¶ 800.

threat"[323]. The statement that there was a low threshold is clearly intended to imply that the reckless targeting of civilians was part of broader military-sanctioned modus operandi. The facts, however, do not seem to support that implication, and, in fact, the soldier's quote above explicitly acknowledges that deliberately targeting citizens was not part of some predetermined military policy.

The Report also details another incident, which has been reported in other NGO reports, and which the government of Israel has explained is simply not true. The Report says that Israeli soldiers shot a woman and her two children after they evacuated their house and allegedly took a left, accidentally, instead of a right[324]. In fact, it was two suspicious men who were shot at when they ignored warnings to stop walking towards Israeli soldiers who feared they could be suicide bombers[325].

The Report also repeats one of the most widely spread allegations made by various NGOs, namely the Abed Rabbo family incident. According to the Report, Israeli soldiers in tanks approached the Rabbo family house on 7 January 2009[326]. Allegedly, members of the Rabbo family, including three children, exited their front door with white flags[327]. The Report then claims that two Israeli soldiers were sitting atop a tank less than 10 metres away eating chips and chocolate when a third soldier emerged from the tank and starting shooting the three young daughters and their grandmother[328].

Independent studies have revealed that members of the Abed Rabbo family, which the Mission describes as "credible and reliable"[329], have actually provided

[323] *Id.* ¶ 801 (emphasis added).
[324] *Id.* ¶ 803.
[325] MFA, OPERATION IN GAZA, *supra* note 11, ¶ 328.
[326] Goldstone Report, *supra* note 5, ¶ 770.
[327] *Id.* ¶ 771.
[328] *Id.* ¶ 771.
[329] *Id.* ¶ 775.

more than 14 different recorded versions of the story[330]. Moreover, the Palestinian news agency Ma'an first announced that it was an Israeli air-strike that caused the casualties[331]. The Palestinian Authority Daily quoted the same family as explaining how their home, which overlooked Sderot—the city that suffered the brunt of Hamas rocket attacks—was used by Hamas for military purposes[332]. Finally, the Report neglects to mention that there was an exchange of fire between the IDF and Palestinian combatants in the area around this time—as reported by the Izz al-Din al-Qassam Brigades—raising the possibility of accidental casualties[333]. The Report neglects to mention any of these facts that could cast doubt on the credibility of the account.

The Report also completely de-legitimises the very genuine threat of suicide bombers and other threats to Israelis. It concludes that, "[i]n reviewing the above incidents the Mission found in every case that the Israeli armed forces had carried out direct intentional strikes against civilians"[334] and "in none of the cases reviewed were there any grounds which could have reasonably induced the Israeli armed forces to assume that the civilians attacked were in fact taking a direct part in the hostilities and had thus lost their immunity against the attacks"[335]. And this without any Israeli input.

These allegations constitute pure speculation and gross hyperbole. How can the Mission honestly contest, based on its limited information, that there were

[330] NGO Monitor, *House of Cards: NGOs and the Goldstone Report*, *supra* note 121.
[331] Understanding the Goldstone Report, Airstrike Kills Three Sisters During Supposed Lull, Ma'an News, 7/1/09, http://www.goldstonereport.org/case-study/abd-rabbo/174-airstrike-kills-three-sisters-during-supposed-lull-maan-news-7109 (last visited 20 Dec. 2009).
[332] Understanding the Goldstone Report, PMW, Gaza Victims Describe Being Used as Human Shields by Hamas, Al-Hayat Al-Jadida, 27/109, http://www.goldstonereport.org/case-study/abd-rabbo/233-pmw-gaza-victims-describe-being-used-as-human-shields-by-hamas-al-hayat-al-jadida-27109 (last visited 20 Dec. 2009).
[333] Jonathan Dahoah-Halevi, *Blocking the Truth of the Gaza War: How the Goldstone Report Understated the Hamas Threat to Palestinian Civilians*, JERUSALEM CTR. FOR PUBLIC AFFAIRS, 18 Sep. 2009, http://jcpa.org/JCPA/Templates/ShowPage.asp?DBID=1&LNGID=1&TMID=111&FID=442&PID=0&IID=3086.
[334] Goldstone Report, *supra* note 5, ¶ 808.
[335] *Id.* ¶¶ 808–809.

absolutely no grounds for thinking individuals may have been involved in hostilities? Hamas has been known to employ women[336] and children[337] as suicide bombers, and, invariably, suicide bombers look like innocent civilians. This necessitates that the IDF view civilians generally with suspicion, but especially those who have been warned to keep their distance and do not heed such warnings. While this certainly does not give troops a license to kill anybody in a restricted area, it does account for the possibility of reasonable mistakes and should have precluded stating with certainty that no grounds for suspicion existed. Such a comment is remarkably ignorant and fails to account for battlefield realities, where persons are not clearly marked as a civilian or a combatant.

This reality also underscores a larger problem about fighting an enemy that embeds itself and its military infrastructure among civilians and how to respond to allegations of impropriety. Since everything looks ostensibly civilian when fighting such an enemy, most of the targeting decisions are necessarily based on classified intelligence. By its nature, classified intelligence cannot be revealed as it would endanger the sources providing such information. Therefore, Israel is unable to provide full evidence justifying each attack since much of it is classified. The Report is critical of Israel for its "refus[al] to meet the Mission and to provide access to Government officials, including military, and documentation"[338]. However, there is certain information that is simply too sensitive to reveal to third parties and any criticism for refusal to do so is misplaced.

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[336] Arnon Regular, *Mother of two becomes first female suicide bomber for Hamas*, 15 Jan. 2004, HAARETZ, http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=383183&contrassID=1&subContrassID=5&sbSubContrassID=0&listSrc=Y.

[337] BBC News, *Child suicide attacks 'must stop': An international human rights group has called on Palestinian militants to stop using children in suicide bombings and military attacks*, 3 Nov. 2004, http://news.bbc.co.uk/2/hi/middle_east/3979887.stm.

[338] *Id.* ¶ 162.

4. The Report Accuses Israel of Misusing Controversial Munitions.

Israel's use of white phosphorous has provoked significant criticism. A small number of exploding munitions containing white phosphorous were used during Operation Cast Lead but only in open unpopulated areas and only for marking and signaling[339]. According to the IDF, they ceased using exploding munitions with white phosphorous on 7 January 2009 as a precautionary effort to avoid civilian harm[340]. The IDF also used smoke screening projectiles with white phosphorous, which were used to create protective screens for IDF soldiers and tanks in battle[341].

The international community accepts that white phosphorous munitions may be used in hostilities and recognises Israel's legitimate use of them in Operation Cast Lead. Of special note, Peter Herby, the head of the ICRC mine-arms unit, acknowledged that, "[i]n some of the strikes in Gaza it's pretty clear that phosphorus was used . . . . [I]t's not very unusual to use phosphorus to create smoke or illuminate a target. *We have no evidence to suggest it's being used in any other way*"[342].

The Chemical Weapons Convention does not list white phosphorous as a prohibited chemical weapon. It is certainly not *per se* unlawful[343] if used for a legitimate military purpose and not in a manner calculated to cause unnecessary suffering of combatants or excessive incidental injury to civilians.

Of course, the Report omits the type of careful analysis necessary to render this judgement, and, instead,

> concludes that, given the evident threat of substantial damage to several hundred civilian lives and to civilian property in using white

[339] MFA, OPERATION IN GAZA, *supra* note 11, ¶ 407.
[340] *Id.* ¶ 408.
[341] *Id*. ¶ 409.
[342] Bradley S. Klapper, *ICRC: Israel's Use of White Phosphorous Not Illegal*, FOXNEWS.COM, 13 Jan. 2009, http://www.foxnews.com/wires/2009Jan13/0,4670,EURedCrossWhitePhosphorus,00.html (emphasis added).
[343] MFA, OPERATION IN GAZA, *supra* note 11, 147–48, 151.

> phosphorous in that particular line of fire, the advantage gained from using white phosphorous to screen Israeli armed forces' tanks from anti-tank fire from armed opposition groups could not be deemed proportionate[344].

This downplays the significance of protecting one's own soldiers, as the implication is that the Israeli military should leave its soldiers unprotected if there is risk of civilian harm by employing smoke screens. That is simply preposterous, and no military could be reasonably expected to do so. Not only does the Mission's proportionality analysis reek of speculative non-sense, but it also seems to ignore the fact that white phosphorous is usually non-lethal and it is designed to protect soldiers from potentially lethal attacks. In that sense, white phosphorous is designed to comply with proportionality rules. Regardless, one wonders what makes the Mission qualified to decide—months after the fact—what is proportionate in circumstances of actual combat.

One expert, Lt. Col. Raymond Lane, who is a chief instructor at the Irish Defence Forces School, noted that the "quality of smoke produced by white phosphorous is superb. If you want real smoke for real coverage, white phosphorus will give it to you"[345]. White phosphorous smokescreens are especially critical during urban warfare due to the vulnerability of armor and troops advancing along streets that are lined with buildings housing concealed enemy firing positions. The alternatives—which are sometimes necessary as well—including razing of buildings and increased firepower, are much more destructive.

Further, any allegation that Israel should be blamed for not disclosing its use of white phosphorous, as some organisations contend, is also misguided. A military is not obligated to disclose to its enemies what tactics or weapons it is using. Doing so

[344] Goldstone Report, *supra* note 5, ¶ 591.
[345] UN Watch, *Military Expert Testifies on Weapons Use by Hamas, Israel at Goldstone's Gaza Hearings*, 7 July 2009, http://blog.unwatch.org/?p=413.

could severely compromise the military effectiveness and place the lives of Israeli soldiers at greater risk, which is a legitimate concern of any commander.

5. The Report Accuses Israel of Breaching its International Legal Obligations to Deliver Humanitarian Aid During Operation Cast Lead.

The Report accuses Israel of imposing an illegal blockade against Gaza and failing to allow sufficient humanitarian assistance to enter Gaza during Operation Cast Lead. The allegations are legal conclusions based on a lack of accurate information and a misreading of international law. The Report alleges that Israel's blockade against Gaza is illegal because it constitutes a form of "collective punishment"[346]. Under that logic, any blockade or sanctions imposed against anyone anywhere could constitute an illegal form of collective punishment. Clearly, that is not the case.

The Report states that "the closure of or the restrictions imposed on border crossings by Israel in the immediate period before the military operations subjected the local population to extreme hardship and deprivations that are inconsistent with their protected status . . . . Israel has and continues to violate its obligations as an occupying Power under the Fourth Geneva Convention"[347].

This is but one of many references to Israel as an "occupying power" in the Report, a highly inflammatory phrase used by those in the international community to defame Israel[348]. Despite such rhetoric, the facts tell a different story. It was widely

[346] Goldstone Report, *supra* note 5, ¶ 78.
[347] *Id.* ¶ 1301.
[348] The Organisation of the Islamic Conference ("O.I.C.") is one such member of the international community. *See* Letter from Bashar Ja'afari, Ambassador, Syria, to U.N. Gen. Assembly, at 2–3, U.N. Doc. A/ES-10/465 (22 Oct. 2009), http://daccessdds.un.org/doc/UNDOC/GEN/N09/571/85/PDF/N0957185.pdf?OpenElement; Org. of the Islamic Conference, *Resolution on Islamic Office for the Boycott of Israel*, Res. No. 1/36-IBO, O.I.C. Doc. OIC/CFM-36/2009/IBO/Res/Final (25 May 2009), http://www.oic-oci.org/36cfm/w/en/res/36-CFM-IBO-RES-FINAL.pdf. In addition to the O.I.C., the parties to the Fourth Geneva Convention (pertaining to protection of civilians during times of war) have referred to Israel as an "occupying power". Conference of High Contracting Parties to the Fourth Geneva Convention, Geneva, Switz., 5 Dec. 2001, *Declaration*, ¶¶ 3, 12–15. The only parties

reported that Israel unilaterally withdrew its forces from Gaza in 2005, and thus, the term "occupying power" is not appropriate[349]. Although such a claim provides convenient support for the Mission's agenda, this characterisation of Israel's relationship with Gaza is inconsistent with the concept of belligerent occupation under the law of armed conflict. Occupation is quintessentially a question of fact: occupation requires the state to assert effective control over a given enemy territory. As is noted in the United States Army Field Manual on the Law of Land Warfare,

> [m]ilitary occupation is a question of fact. It presupposes a hostile invasion, resisted or unresisted, as a result of which the invader has rendered the invaded government incapable of publicly exercising its authority, and that the invader has successfully substituted its own authority for that of the legitimate government in the territory invaded.
>
> . . . .
>
> It follows from the definition that belligerent occupation must be both actual and effective, that is, the organized resistance must have been overcome and the force in possession must have taken measures to establish its authority[350].

The Fourth Hague Convention of 1907 states that, "[t]erritory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised"[351]. It further specifies that occupation is when "[t]he authority of the legitimate power [has] in fact passed into the hands of the occupant . . ."[352].

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that did not participate in that conference were the United States, Israel, and Australia; the United States and Israel boycotted the conference, while Australia failed to show up when the conference reconvened. Rachel Pomerance, *Geneva Meeting Targets Israel*, JEWISH TELEGRAPHIC AGENCY, 5 Dec. 2001, http://jta.org/news/article/2001/12/05/8249/GenevaConvention. The United Nations General Assembly has also referred to Israel as an "occupying power." *E.g.*, G.A. Res. 60/105, U.N. Doc. A/RES/60/105 (18 Jan. 2006).

[349] Greg Myre, *Israeli Withdrawal from Gaza Proceeds Faster than Predicted*, N.Y. TIMES, 19 Aug. 2005, http://www.nytimes.com/2005/08/19/international/middleeast/20gazacnd.html.

[350] U.S. ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, ch. 6, § 1, ¶¶ 355–56, http://www.marines.mil/ news/publications/Documents/FM%2027-10%20W%20CH%201.pdf.

[351] Convention Respecting the Law & Customs of War on Land (Hague, IV), Oct. 18, 1907, art. 42, 1907, http://www.icrc.org/ihl.nsf/FULL/195.

[352] *Id.* art. 43.

Given the above authority, it is disingenuous to characterise Israel as an occupying power over Gaza because Israeli forces withdrew from Gaza and voluntarily gave up the ability to assert effective control over that territory. Israel does not exercise authority or governmental functions in Gaza. The Mission should, therefore, have avoided that characterisation in its purportedly "objective" Report.

Notwithstanding its use of inaccurate and pejorative language, the Mission also blatantly misconstrues international law when accusing Israel of breaching its duties to the Gaza populace. Even assuming *arguendo* that Israel is still bound by the principles of the occupation regime of the law of armed conflict (which we contend is not the case), Article 23 of the Fourth Geneva Convention governs obligations regarding delivery of humanitarian supplies. Based on the text of Article 23, it is clear that Israel went above and beyond its legal obligations. Article 23 provides as follows:

> Each High Contracting Party shall allow the free passage of all consignments of medical and hospital stores and objects necessary for religious worship intended only for civilians *of another High Contracting Party*, even if the latter is its adversary. It shall likewise permit the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases[353].

Note, first, that "Palestine" (including the Hamas-controlled Gaza Strip) is not—and, in fact, cannot be—a High Contracting Party, because only "States" can accede to the Conventions[354]. Nonetheless, despite having no legal obligation to do

[353] Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, art. 23, 6 U.S.T. 3517, 75 U.N.T.S. 287 [hereinafter "Fourth Geneva Convention"] (emphasis added), http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6756482d8614 6898c125 641e004aa3c5.

[354] *See* Int'l Comm. of the Red Cross, *States Party to the Geneva Conventions and Their Additional Protocols*, at 2–8, 20 May 2003, http://www.aiipowmia.com/legis/protocoles.pdf. Indeed, in 1989 the Palestinian National Council sent a letter to the Swiss Federal Council, attempting to accede to the Geneva Conventions. In response, the Swiss Federal Council sent a letter to the State parties to the Geneva Conventions, explaining that "it was not in a position to decide whether the letter constituted an instrument of accession, due to the uncertainty within the international community as to the existence or non-existence of a State of Palestine." *Id*. (internal quotation marks omitted). Even more,

so, Israel has voluntarily committed itself to comply with the spirit and principles of the law of belligerent occupation[355]. Further, Article 23 qualifies the obligation and provides that,

> the obligation of a High Contracting Party to allow the free passage of the consignments . . . is subject to the condition that this Party is satisfied that there are no serious reasons for fearing: (a) that the consignments may be diverted from their destination, (b) that the control may not be effective, or (c) that a definite advantage may accrue to the military efforts or economy of the enemy through the substitution of the above-mentioned consignments for goods which would otherwise be provided or produced by the enemy or through the release of such material, services or facilities as would otherwise be required for the production of such goods[356].

Thus, even assuming it were bound by Article 23, Israel had no obligation to provide food or humanitarian supplies if it reasonably believed that the goods would be diverted or aid Hamas in its war effort[357]. *Indeed, readily available evidence existed that it was Hamas that was violating international law by diverting humanitarian aid for its own military purposes*[358]*, thus triggering this pragmatic qualification to the humanitarian intervention obligation.*

For instance, Nawaf Feisal Attar, from Al-Atatra (a neighbourhood in Gaza about 10 kilometres north of Gaza City[359]), stated that Hamas members received all of the humanitarian aid sent from Israel to the Gaza Strip. Gazans who were supposed to receive the aid for free had to pay for it, and Hamas members identified the aid that came from Israel because of the Hebrew letters on the packaging[360]. Medicine bottles,

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a "country" is equated with a "state" in Paragraph 4 of this document, suggesting that Palestine cannot be a "state." *See id.* at 2.

[355] MFA, OPERATION IN GAZA, *supra* note 11, 11, 72.

[356] Fourth Geneva Convention, *supra* note 353, art. 23.

[357] Abraham Bell, *Is Israel Bound by International Law to Supply Utilities, Goods, and Services to Gaza?*, INT'L L. (Jerusalem Ctr. for Pub. Affairs, Jerusalem, Isr.), 28 Feb. 2008, http://www.jcpa.org/JCPA/Templates/ShowPage.asp?DBID=1&LNGID=1&TMID=111&FID=378&PID=0&IID=2037.

[358] MFA, OPERATION IN GAZA, *supra* note 11, 74–76.

[359] Goldstone Report, *supra* note 5, ¶ 1108.

[360] IICC, EVIDENCE OF THE USE OF THE CIVILIAN POPULATION AS HUMAN SHIELDS: HAMAS OPERATIVES DETAINED DURING OPERATION CAST LEAD RELATED THAT WEAPONS WERE SITUATED IN SCHOOLS, MOSQUES, AND RESIDENTIAL DWELLINGS, THAT OPERATIVES SHOT FROM WITHIN

transferred to the Gaza Strip as humanitarian aid by Israel, were also used by Hamas as grenades against IDF troops during Operation Cast Lead. The medicine bottles were filled with explosives, holes were drilled in the caps, and fuses were installed[361].

The Jerusalem Post also reported that on 12 January 2009, "Hamas raided some 100 aid trucks that Israel had allowed into Gaza, stole their contents and sold them to the highest bidders"[362]. UNRWA reported that Hamas members stole blankets and food from the Shati refugee camp, prompting the UNRWA to eventually suspend imports of aid[363]. Unfortunately, as part of its pattern of misstatements, the Report claims that "UNRWA had to suspend its delivery of food assistance due to the total depletion of its food stocks. Other humanitarian agencies had to reduce or postpone delivery of food and other forms of assistance"[364]. The implication is that Israel was to blame for the UNRWA's decision, whereas it was widely reported that the UNRWA blamed Hamas[365]. The Report completely neglects to report on that.

Nonetheless, the facts indicate that Israel still made significant efforts—which seem to have gone above and beyond its legal obligation—to continue to deliver and facilitate humanitarian aid[366]. A total of 1,511 trucks carrying 37,162 tons of supplies entered Gaza from Israel during Operation Cast Lead[367]. Even the Report

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RESIDENTIAL NEIGHBORHOODS, AND THAT HAMAS OPERATIVES STOLE THE HUMANITARIAN AID FOR THEIR OWN USE 8–9 (2009), http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/pdf/hamas_e055.pdf.

[361] Yaakov Katz, *Hamas Threw 'Medicine Grenades' at IDF*, JERUSALEM POST, 13 Feb. 2009, http://www.jpost.com/servlet/Satellite?cid=1233304770155&pagename=JPost%2FJPArticle%2FShowFull.

[362] Yaakov Katz & JPost.com Staff, *Hamas Raids Aid Trucks, Sells Supplies*, THE JERUSALEM POST, Jan. 12, 2009, http://www.jpost.com/servlet/Satellite?cid=1231424932109&pagename=JPost/JPArticle/ShowFull.

[363] MFA, OPERATION IN GAZA, *supra* note 11, ¶ 206.

[364] Goldstone Report, *supra* note 5, ¶ 322.

[365] *See UN Hamas Meet to Discuss Stolen Gaza Aid*, HAARETZ.COM, 8 Feb. 2009, http://www.haaretz.com/hasen/spages/1062219.html.

[366] *See, e.g.*, *Israel Stops Bombing to Allow Aid Into Gaza*, TELEGRAPH.CO.UK, 7 Jan. 2009, http://www.telegraph.co.uk/news/worldnews/middleeast/israel/4159915/Israel-stops-bombing-to-allow-aid-into-Gaza.html (detailing Israel's cessation of attacks while working with NGOs to open a "humanitarian corridor" into Gaza).

[367] MFA, OPERATION IN GAZA, *supra* note 11, ¶ 271.

acknowledges that after the start of Operation Cast Lead, humanitarian deliveries increased by up to 500% (although, the Report denigrates that number by saying it was not sufficient to meet the needs of the population)[368]. Israel also apparently made significant efforts to coordinate with humanitarian organisations and provide humanitarian supplies. Upon commencement of Operation Cast Lead, Tzipi Livni, the Foreign Minister at the time, held a meeting with representatives of humanitarian organisations to assess needs in Gaza[369]. Members of the IDF also met with representatives from humanitarian organisations on a daily basis to coordinate humanitarian aid[370].

The Israeli High Court of Justice even reviewed two petitions during the conflict that accused Israel of failing to comply with humanitarian obligations. The Court denied both petitions on the grounds that the military was in compliance with its obligations[371].

Finally, Israel self-imposed a unilateral three hour humanitarian ceasefire each day. However, efforts to provide humanitarian relief were complicated by Hamas attacks during the daily pauses, as it fired 44 rockets and mortars during these periods[372].

6. The Report Accuses Israel of Using Civilian Shields.

The Mission ignores significant, easily adducible evidence of Hamas using human shields, and then, in the height of irony, accuses Israelis of using Palestinians as human shields when conducting house sweeps where combatants could have been hiding.

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[368] Goldstone Report, *supra* note 5, ¶ 317.
[369] MFA, OPERATION IN GAZA, *supra* note 11, ¶ 268.
[370] *Id*. at ¶ 269.
[371] *Id*. at ¶ 278.
[372] *Id*. at ¶ 276.

The Report, in typically conclusory fashion, accuses the Israeli armed forces of violating the Fourth Geneva Convention and customary international humanitarian law. Article 28 of the Fourth Geneva Convention states that "[t]he presence of a protected person may not be used to render certain points or areas immune from military operations"[373]. Article 51 of Additional Protocol I adds that "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[374]. Article 31 of the Fourth Geneva Convention states that "no physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties"[375].

One allegation involved Majdi Abd Rabbo, whose house Israeli soldiers allegedly entered on 5 January 2009. The Report states that "the soldiers then forced him to walk in front of them as they searched the house, room by room, holding a firearm to his head"[376]. Yet, according to the allegations, the soldiers crossed to a neighbouring house over the roof with Majdi Abd Rabbo, and when they suspected movement in the neighbouring house, *they quickly pulled him back for his own protection*[377].

They allegedly then moved to an adjacent mosque with Majdi Abd Rabbo and supposedly began shooting at his house[378]. The Report states that the soldiers shot at

[373] Fourth Geneva Convention, *supra* note 353, art. 28.
[374] Addition Protocol I, *supra* note 69, art. 51(7).
[375] Fourth Geneva Convention, *supra* note 353, art. 31.
[376] Goldstone Report, *supra* note 5, ¶ 1033.
[377] *Id.* ¶¶ 1033–1034.
[378] *Id.* ¶ 1035.

the house for about 30 minutes[379]. While it makes no mention of return fire, merely shooting at the detainee's house does not constitute using him as a civilian shield.

Even according to allegations in the Report, it is clear that the Israeli fire was directed at nearby terrorists. The Report alleges that Israeli soldiers made Majdi Abd Rabbo go check the neighbouring house where he found armed al-Qassam Brigades members who had been the targets of the Israeli strike[380]. Supposedly, Majdi Abd Rabbo then returned to the Israeli soldiers and told them what he had seen, after which Israeli forces allegedly continued firing at the house and once again made Majdi Abd Rabbo return and check to see if the Hamas members were dead[381]. It is alleged that this was repeated multiple times.

The Report concedes that Rabbo's story, which he repeated several times to NGOs and journalists, has been inconsistent. Nevertheless, the Report states that "[t]here are some minor inconsistencies, which are not, in the opinion of the Mission, sufficiently weighty to cast doubt on the general reliability . . . [T]hese inconsistencies do not undermine the credibility of Majdi Abd Rabbo's account"[382]. The Mission neglects to explain what the inconsistencies were, so as to enable an objective reader to assess whether they undermine his credibility.

The Report also relies upon an Israeli soldier from Breaking the Silence for information about the Majdi Abd Rabbo case, despite the fact that "the soldier does not appear to have been a direct witness to the incident, but rather heard it from others…"[383]. So, the Report quotes a "witness" to corroborate its account and then *concedes in a footnote that its corroboration is not based on the witness's personal knowledge or observation.*

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[379] *Id.* ¶ 1036.
[380] *Id.* ¶ 1039.
[381] *Id.* ¶¶ 1039–1042.
[382] *Id.* ¶ 1087.
[383] *Id.* ¶ 1088 n.532.

The Report discusses another incident involving Mahmoud Abd Rabbo al-Ajrami, allegedly a member of Fatah. He remained in his home, and Israeli soldiers apparently came and interrogated him about the location of tunnels, weapons, and Shalit.[384] He was then blindfolded and "forced to walk in front of [the soldiers]"[385]. Obviously his ability to assess exactly where the soldiers were positioned and what their objectives were must have been limited by his inability to actually see anything, which raises obvious questions about the veracity of his accounts. Moreover, blindfolding captives is a common practice that does not imply his being used as a human shield.

The IDF has denied using civilian shields. A spokesman explained that "IDF troops were instructed unequivocally not to make use of the civilian population within the combat framework for any purpose whatsoever, certainly not as 'human shields'"[386]. Hypothetically, even if incidents occurred that violated the IDF's policy—and certainly no one should *assume* that they did—by no means was it part of an IDF sanctioned policy. Further, if sufficient evidence exists to indicate a violation, then there is no reason to doubt that Israel can be expected to respond appropriately, given that the "IDF's rules of engagement strictly prohibit the use of civilians as human shields," which the Supreme Court has reiterated[387] and given Israel's history of responding to violations. Israel is currently in the process of investigating several alleged violations using human shields.

[384] *Id.* ¶ 1076.
[385] *Id.* ¶ 1077.
[386] *Id.* ¶ 1085.
[387] *Id.* ¶ 1097.

7. The Report Accuses Israel of Illegally Causing Excessive Property Damage.

The Report accuses Israel of destroying property in violation of the laws of war. It acknowledges, however, that "[a]lthough the Mission does not have complete information on the circumstances . . . the information in its possession strongly suggests that they were destroyed outside of any combat engagements with Palestinian armed groups"[388]. Not only does the Mission lack the information it would need to definitely reach such conclusions, but it neglects to consider fully the applicable legal standards for striking property targets during combat.

Article 23(g) of the Hague Regulations of 1907 states that it is forbidden "to destroy or seize the enemy's property *unless such destruction or seizure be imperatively demanded by the necessities of war*"[389].

The Israeli government admits that "extensive damage to civilian infrastructure and personal property occurred in the course of the Gaza Operation," but that "[m]uch of the damage was demanded by the necessities of war and was the outcome of Hamas' mode of operating"[390].

Israel discusses its rationale for striking many of these targets—although the Report predictably does not give credence to these explanations. The Israel Report states:

> As part of this challenge, IDF forces demolished structures that threatened their troops and had to be removed. These included (1) houses which were actually used by Hamas operatives for military purposes in the course of the fighting, (2) other structures used by Hamas operatives for terrorist activity, (3) structures whose total or partial destruction was imperatively required for military necessities, such as the movement of forces from one area to another (given that many of the roads were booby-trapped), (4) agricultural elements used as cover for terrorist tunnels and infrastructure, and (5) infrastructure next to the security fence between Gaza and Israel, used by Hamas for

[388] *Id.* ¶ 994.
[389] Hague, IV, *supra* note 351, art. 23(g) (emphasis added).
[390] MFA, OPERATION IN GAZA, *supra* note 11, ¶ 437.

operations against IDF forces or for digging tunnels into Israeli territory[391].

In fact, the Israeli Military Advocate General (the "MAG") has investigated allegations of unlawful strikes against private property. Although, in most cases, the MAG found no illegalities, a commander intervened in one case and appropriate disciplinary action was taken[392]. The Report neither acknowledges these facts nor analyses the military necessity of the properties Israel struck.

It does not discuss the possibility that many of these properties could have been contributing to the war efforts of Hamas. Article 52(2) of Additional Protocol I states that "military objectives are limited to 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 neutralization, *in the circumstances ruling at the time*, offers a definite military advantage"[393].

For example, the ICRC Commentary states that, "[c]learly, there are objects which by their nature have no military function but which, by virtue of their location, make an effective contribution to military action"[394]. This could be "a site which is of special importance for military operations in view of its location, either because it is a site that must be seized or because it is important to prevent the enemy from seizing it, or otherwise because it is a matter of forcing the enemy to retreat from it"[395]. The Commentary further explains that "[m]ost civilian objects can become useful objects to the armed forces. Thus, for example, a school or a hotel is a civilian object, *but if they are used to accommodate troops or headquarters staff, they become military*

[391] *Id.* at ¶ 439.
[392] *Id.* at ¶ 442.
[393] Additional Protocol I, *supra* note 69, art. 52(2) (emphasis added).
[394] ICRC Commentary on Additional Protocol I, *supra* note 74, art. 52(2), ¶ 2021, http://www.icrc.org/ihl.nsf/1a13044f3bbb5b8ec12563fb0066f226/5f27276ce1bbb79dc12563cd00434969!OpenDocument.
[395] *Id.*

objectives"[396]. Objects that appear to be civilian in nature might actually be legitimate targets of military strikes. All that they have to do is provide a contribution to military action by virtue of their nature, location, purpose *or* use.

In one example, the Report discusses a strike to a wastewater treatment plant and speculates that there was no justification for doing so[397]. At the same time, the Report concedes that "[t]he plant occupies a position at the top of a hill and provides a view over a considerable area of open land . . . [I]t might reasonably be considered to be of strategic interest"[398].

B. The Report's Reliance on Unreliable and Uncorroborated Data, Detailed Above, Begets a Host of Erroneous Legal Conclusions in its Report.

International armed conflict is governed by the "Law of Armed Conflict", also known as the "Law of War" and "International Humanitarian Law" ("IHL")[399]. It is not a settled legal question whether Operation Cast Lead constituted an international armed conflict, but Israel applies the laws of international conflict nonetheless. The law of armed conflict is comprised of both conventional law and customary law[400]. Conventional law, however, only binds those States that have acceded to such conventions[401]. Those treaties that Israel has *not* acceded to—most notably the Rome Statute of the International Criminal Court and the two 1977 Additional Protocols to the 1949 Geneva Conventions[402]—are not binding *as a matter of treaty law*. However, Israel has been, and remains, committed to the provisions of these treaties regarded as

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[396] *Id.* ¶ 2022 (emphasis added).
[397] Goldstone Report, *supra* note 5, ¶ 971.
[398] *Id.* ¶ 969.
[399] INT'L COMM. OF THE RED CROSS ADVISORY SERV. ON INT'L HUMANITARIAN LAW, WHAT IS INTERNATIONAL HUMANITARIAN LAW? (2004), http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/humanitarian-law-factsheet/$File/What_is_IHL.pdf.
[400] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, pt. 1, ch. 1, intro. note (1987).
[401] *Id.*
[402] *See* Int'l Comm. of the Red Cross, Treaties & Documents, Israel, http://www.icrc.org/ihl.nsf/Pays?Read Form&c=IL (last visited 20 Dec. 2009).

reflections of customary international law (most notably in the context of Operation Cast Lead)—the principles of military objective, distinction, and the prohibition against indiscriminate attack[403]. Yet, Israel also believes that Hamas is also bound by these principles as a matter of customary international law,[404] a fact generally ignored by the Report.

The Report also gives no consideration to the fact that the status of international law as it applies to terrorist organisations and asymmetric warfare is nebulous and unsettled, at best. *There are very credible sources claiming that, as presently understood, international law standards do not even apply to actions taken by a sovereign nation against a terrorist army like Hamas*[405]. In fact, the ICRC only recently published guidance that attempted to elucidate the notion of "direct participation in hostilities" in asymmetrical warfare contexts—after *six years* of research[406]. Because the international legal norms are currently so ill-defined, any attempt to indict Israelis for failure to adhere to them is misplaced. Only with this foreknowledge can one accurately assess the ramifications of Operation Cast Lead.

The Report also accuses Israel of committing criminal acts and violating several international treaties, including the International Covenant on Civil and Political Rights ("ICCPR"), the International Covenant on Economic, Social and

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[403] MFA, OPERATION IN GAZA, *supra* note 11, ¶ 120.
[404] *Id.* ¶¶ 180, 194.
[405] *E.g.*, Antonio Cassese, *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law*, 12 EUR. J. INT'L L. 993, 993 (2001) (expressing the need to rethink international legal categories in light of the 11 September 2001 terrorist attacks); Toni Pfanner, *Asymmetrical Warfare from the Perspective of Humanitarian Law and Humanitarian Action*, 87 Int'l Rev. Red Cross 149, 158, No. 857 (2005) ("It is debatable whether the challenges of asymmetrical war can be met with the current law of war".). It is also far from obvious to what extent—if at all—International Human Rights Law is applicable in armed conflicts that are supposedly regulated by International Humanitarian Law. *See* Int'l Comm. of the Red Cross, *International Humanitarian Law and International Human Rights Law: Similarities and Differences*, Jan. 2003, http://www.ehl.icrc.org/images/resources/pdf/ihl_and_ihrl.pdf.
[406] NILS MELZER, INT'L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2009), http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-report_res/$File/direct-participation-guidance-2009-icrc.pdf.

Cultural Rights ("ICESCR"), and the UN Convention on the Rights of the Child. Although, Israel has ratified all of the above treaties, allegations that Israel violated its obligations under them are unwarranted. First, there are cases where human rights statutes explicitly contemplate a suspension of duties. For instance, the ICCPR provides for the following exception:

> In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin[407].

The application of the ICCPR to a party to the Convention is also explicitly limited to "within its territory"[408]. Gaza is not within the territory of Israel, meaning the ICCPR would not apply. Finally, it is Israel's position that the legal framework that human rights laws create does not apply in cases of armed conflict, but rather are human rights treaties that protect citizens from their own government in times of peace[409].

It is also not clear whether Operation Cast Lead would fall under the classification of international or non-international conflict. The Rome Statute provides that non-international conflicts include "armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups"[410]. Conversely,

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[407] International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification, and accession by General Assembly Resolution 2200A (XXI) of 16 Dec. 1966, entry into force 23 Mar. 1976, in accordance with art. 49, part II, art. 4(1), http://www2.ohchr.org/english/law/ccpr.htm.
[408] *Id.* at part II, art. 2(2).
[409] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 177 (July 9) [hereinafter "ICJ Advisory Opinion"], http:// www.icj-cij.org/docket/files/131/1671.pdf.
[410] Rome Statute, *supra* note 129, art. 8(2)(f).

international conflicts generally refer to those between sovereign states[411]. However, in Operation Cast Lead, the conflict did not take place in the territory of a state or between states, since Gaza does not constitute a sovereign state. *Nonetheless, Israel, as a matter of policy, intentionally applies the rules of armed conflict governing both international and non-international conflicts*[412].

1. The Goldstone Report Fails to Properly Analyse the Events Surrounding Operation Cast Lead Even Under the Standards Set Forth in the Rome Statute[413].

The Report states that "[t]he Prosecutor may determine that for the purposes of Article 12, paragraph 3, under customary international law, Palestine qualifies as 'a state'"[414], despite clear statutory language and customary international legal precedent to the contrary. The Report clearly concludes that the ICC would have subject matter jurisdiction over events in Gaza[415] and recommends "that the United Nations Human Rights Council formally submit this report to the Prosecutor of the International Criminal Court"[416] and that the Security Council consider doing so as well[417]. As such, it is important to consider the applicable provisions of the Rome Statute.

Article 5 of the Rome Statute limits ICC jurisdiction to "the most serious crimes of concern to the international community"[418]. Specifically, these include genocide, crimes against humanity, war crimes, and aggression[419]. The Report

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[411] International Committee of the Red Cross, *How is the term "Armed Conflict" defined in international humanitarian law?*, 17 Mar. 2008, http://www.icrc.org/web/eng/siteeng0.nsf/html/armed-conflict-article-170308.
[412] MFA, OPERATION IN GAZA, *supra* note 11, ¶ 30.
[413] *Id.* at ¶¶ 120-131.
[414] Goldstone Report, *supra* note 5, ¶ 1632.
[415] *Id.* ¶ 1763.
[416] *Id.* ¶ 1765.
[417] *Id.* ¶ 1766.
[418] Rome Statute, *supra* note 129, art. 5(1). This Memorandum details the legal standards for these crimes despite the fact that Israel is not a signatory to the Rome Statute. Additionally, the ECLJ believes that the Palestinian territories are not eligible to ratify the Rome Statute or accede to ICC jurisdiction, given their non-State status.
[419] *Id.*

repeatedly accuses Israel of committing war crimes and, potentially, crimes against humanity. Specifically, the Report states the following:

> From the facts gathered, the Mission found that the following grave breaches of the Fourth Geneva Convention were committed by Israeli forces in Gaza; willful killing, torture or inhuman treatment, willfully causing great suffering or serious injury to body or health, and extensive destruction of property, not justified by military necessity and carried out unlawfully and wantonly. As grave breaches these acts give rise to individual criminal responsibility. The Mission notes that the use of human shields also constitutes a war crime under the Rome Statute of the International Criminal Court[420].
>
> . . . .
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> The Mission further considers that the series of acts that deprive Palestinians in the Gaza Strip of their means of subsistence, employment, housing and water, that deny their freedom of movement and their right to leave and enter their own country, that limit their rights to access a court of law and an effective remedy, could lead a competent court to find that the crime of persecution, a crime against humanity, has been committed[421].

The Mission simply draws legal conclusions without the necessary analysis to assess whether the elements of these crimes were met. Over and over again, the Mission either disregards the elements of the offenses or, in conclusory fashion, simply declares them met. But without careful and comprehensive analysis of what is required to establish that an offense has been committed, there is no way to evaluate the accuracy of the charges.

Our analysis focuses on allegations of war crimes and crimes against humanity. While the Report clearly concludes that Israelis are guilty of war crimes, it only states that crimes against humanity *may have been committed*. There is no allegation that Israelis are guilty of genocide. The Report's analysis of these alleged crimes is shallow, at best, and it simply draws legal conclusions devoid of the necessary

[420] Goldstone Report, *supra* note 5, ¶ 1732.
[421] *Id*. ¶ 1733.

analysis or the necessary evidence to assess whether the elements of these crimes were met.

Article 7 of the Rome Statute sets forth the elements of crimes against humanity, which "means any of the following acts when committed as part of a widespread or systematic attack *directed against any civilian population*, with knowledge of the attack"[422]. Article 7 then lists a series of crimes that qualify, including murder, extermination and torture[423], among others. However, each requires that the crime meet the other specific elements set forth above, namely (1) acts committed as part of a widespread or systematic attack (2) directed against any civilian population, (3) with knowledge of the attack. Although the Report acknowledges the need to prove a *mens rea*, it simply concludes in most cases that the requisite intent existed. *But the members of the Mission lack the facts, the military expertise, and the battlefield assessments to draw such conclusions accurately.*

Article 7 also provides, "[f]or the purposes of paragraph 1: (a) 'Attack against any civilian population' means a course of conduct involving multiple commission of acts referred to in paragraph 1 against any civilian population, *pursuant to or in furtherance of a State or organized policy to commit such attack*"[424]. This constitutes an even higher standard to establish crimes against humanity. *An attack against a civilian population cannot be an isolated incident or the act of a rogue soldier.* It requires "multiple" acts as part of an organized or State "policy." Clearly, the standard for crimes against humanity is meant to be extremely high. This is consistent with the overall purpose of the Court, which is to punish the most egregious crimes of international concern.

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[422] Rome Statute, *supra* note 129, art. 7.
[423] Although the Report accuses Israel, among other things, of using torture during its interrogations, the allegations amount to legal conclusions without any analysis of the relevant law or evidence to reach such a conclusion. Goldstone Report, *supra* note 5, ¶¶ 1162, 1173.
[424] Rome Statute, *supra* note 129, art. 7.

Article 8 sets forth the elements necessary for war crimes. Similar to crimes against humanity, "[t]he Court shall have jurisdiction in respect of war crimes in particular when committed as part of *a plan or policy or as part of a large-scale commission* of such crimes"[425]. The Statute defines war crimes as "[g]rave breaches of the Geneva Conventions of 12 August 1949"[426]. It then lists specific acts, including the following:

- Wilful killing;
- Wilfully causing great suffering, or serious injury to body or health;
- Extensive destruction and appropriation of property, *not justified by military necessity* and carried out unlawfully and wantonly;
- *Intentionally* directing attacks against the civilian population as such or against individual civilians *not taking direct part in hostilities*; and
- *Intentionally* directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law[427].

On many occasions, the Report alleges "willful" and "wanton" acts that are "part of a plan or policy" of the State of Israel. However, such allegations are completely conclusory and contradict the official policies of the Israeli military and the facts on the ground. The Mission levels broad charges against Israeli officials and soldiers *without having reviewed any evidence from the IDF*, making it impossible to discern either the intent of IDF soldiers during combat or the sort of military advantage that was anticipated. The Mission had no way of knowing if attacks were aborted due to the presence of civilians or if an attack was executed based on a good faith (albeit ultimately erroneous) judgement of legality. It simply lacked the real-time military information necessary to make such assessments. But, *rather than*

[425] *Id.* art. 8. (emphasis added).
[426] *Id.* art. 8(2)(a).
[427] *Id.* art. 8(2)(a), (e). It should be noted that sub-part (b), which contains the largest list of war crimes, applies only to conflicts of an international character. We believe that Operation Cast Lead was not such a conflict. Thus, any attempts to enforce provisions therein against Israel are baseless.

admitting that it lacked vital information necessary to draw the conclusions it did, the Mission simply assumed what had to be proven and condemned Israel and its forces. The condemnations in the Report are therefore legally meaningless, as Goldstone himself admitted[428].

Article 8 lists other acts that could constitute war crimes as well, including "[o]ther 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"[429]. The Statute then lists specific crimes that require intent. They include the following:

- Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
- Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
- Intentionally directing attacks against personnel, installations, material, units or vehicles involved in humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
- 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*[430];

Again, it cannot be overemphasized that these crimes all require specific intent. And the prohibition on directing attacks against civilians is always qualified by whether or not the civilians are part of legitimate military targets or are entitled to protections under international law, which they are not when engaged in combat or part of the armed forces.

[428] *See supra* note 15
[429] Rome Statute, *supra* note 129, art. 8.
[430] *Id.* (emphasis added).

Further, these decisions made during Operation Cast Lead must be evaluated according to a reasonable military personnel standard. The Report cites the Committee that was established to review the NATO bombing of Federal Republic of Yugoslavia in 1998, which stated, "[i]t 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 . . . . [T]he determination of relative values must be that of the 'reasonable military commander'"[431]. "*The balancing may not be second-guessed in hindsight*, based on new information that has come to light; *it is a forward-looking test based on expectations and information at the time the decision was made*"[432].

This is a critical aspect of any legitimate critique of the legality of military decision-making in armed conflict. Transforming the obligations related to the application of combat power to criminal sanction is a complex process. The law regulating such application was developed to operate prospectively, providing operational leaders a framework to guide their decision-making process. Reliance on these rules as the source of criminal sanction requires a retrospective critique of this decision-making process. This involves the *classic "subjective/objective" test: an objective standard of assessment is applied by analysing decisions through the subjective perspective of the defendant*. This is essential to ensure that commanders are not held liable based on a retrospective assessment of facts and circumstances. It is also an established principle of war crimes liability, often referred to as the

[431] Goldstone Report, *supra* note 5, ¶ 693.
[432] ICRC CIL Study, Practice, ch. 4, ¶¶ 195–205 (emphasis added). The military manuals of many states reflect this view. They include Australia, Belgium, Canada, Ecuador, and the United States. *See id.* ¶¶ 207–11.

"Rendulic Rule" [433] in reference to the war crimes prosecution of a German commander for engaging in a "scorched earth" campaign in Norway during a tactical retreat at the end of World War II[434]. Lothar Rendulic was ultimately acquitted by the Nürnberg war crimes tribunal of the charge of wanton devastation for this "scorched earth" campaign[435]. *This precedent stands for the proposition that, when subjecting a commander's judgement to criminal critique, it is necessary to consider the situation through the perspective of that commander at the time the judgement was made*. The Report makes no attempt to do this.

The absolutely essential point is that to establish that a war crime has been committed requires proof of several elements, most notably proof of illicit intent. Again, the law recognises that civilians may suffer harm as the result of incidental injury from a lawful attack on a military objective. Although civilians in such situations do not lose their immunity from being made the *deliberate* object of attack, their presence does not immunise the target from attack. Instead, an attacking commander must determine whether the incidental injury anticipated by the attack will be *excessive* in relation to the military advantage anticipated[436]. In critiquing an attack that results in civilian casualties, it is, therefore, first necessary to determine whether the attack was directed against a lawful military objective[437]. If it was, the presence of civilians does not automatically render the attack unlawful[438]. It must then be determined whether the attacking commander should have determined that the risk of incidental (knowing, but unintentional) injury to civilians would be excessive

[433] David A.G. Lewis, *The Protection of Civilian Educational Institutions During the Active Hostilities of International Armed Conflict in International Humanitarian Law*, *in* HUMAN RIGHTS LAW: FROM DISSEMINATION TO APPLICATION 99, 102 (Jonas Grimheden & Rolf Ring eds., 2006).
[434] *See* United States v. Wilhelm List (The Hostages Trial), 8 L. Rep. Trials War Crim. 34, 67–69 (U.S. Military Trib. 1948).
[435] *Id.*.
[436] 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT'L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES 47 (2005).
[437] *Id.* at 25.
[438] *See id.* at 31.

in relation to the advantage to be gained[439]. Thus, unless the attacking force deliberately targeted individuals they knew were civilians who were immune from attack, or engaged in a lawful attack with a reckless disregard for the excessive injury to civilians the attack would produce, the harm to civilians is unfortunate but lawful[440]. *The Report overflows with accusations of war crimes that lack proof of intent, as well as any meaningful analysis of the other elements of war crimes.* Hence, its conclusions are *ipso facto* unfounded.

Article 30 of the Rome Statute also explicitly deals with the "Mental Element" needed to prove a crime under the Statute, saying, "[u]nless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court *only if* the material elements are committed with intent and knowledge"[441]. "[A] person has intent where: (a) In relation to conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events"[442].

Sub-part (b) is especially important in evaluating accusations contained in the Report. In analysing whether an act was committed intentionally—hypothetically, say the targeting of civilians—the individual not only must have intended the act, which might be aiming a gun at a structure and pulling the trigger. Additionally, to fulfill the intent element, the individual must have specifically intended to cause the death of the civilian or expected that it would occur in the ordinary course. It is not enough that the soldier merely intended to do the act itself.

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[439] *Id.* at 47.
[440] *See* MFA, OPERATION IN GAZA, *supra* note 11, ¶ 129.
[441] Rome Statute, *supra* note 129, art. 30 (emphasis added).
[442] *Id.*

The *Mission, however, misstates the legal standard for specific intent*. It says in one particular instance that

> [t]he firing of the projectile was a deliberate act in so far as it was planned, by Israel's admission, to strike the al-Daya house. The fact that target selection had gone wrong at the planning stage does not strip the act of its deliberate character. The consequences may have been unintended; the act was deliberate[443].

This is manifestly incorrect. Virtually any act could be called "deliberate" to some extent, but to imply that it satisfies a *mens rea* standard is highly misleading. The ICRC Commentary explicitly clarifies 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*"[444].

Once again, *the Mission repeatedly goes beyond its mandate by issuing legal opinions*. Even worse, though, it incorrectly states the legal standards and then authoritatively accuses Israelis of criminal intent without sufficient evidence.

Article 30 also explicitly provides that "'knowledge' means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. 'Know' and 'knowingly' shall be construed accordingly."[445] Again, it would not be enough to prove the necessary mental element of a Rome Statute crime by showing that a soldier shot a gun at a structure, which resulted in the death of civilians. In addition to intending to cause a certain consequence, the soldier also must have possessed knowledge about the circumstances—say, the presence of civilians in the structure—that would indicate such soldier intended to cause the result.

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[443] Goldstone Report, *supra* note 5, ¶ 861.
[444] ICRC Commentary on Additional Protocol I, *supra* note 74, art. 51, ¶ 1934 (emphasis added), http://www.icrc.org/ihl.nsf/1a13044f3bbb5b8ec12563fb0066f226/5e5142b6ba102b45c12563cd00434741!OpenDocument.
[445] Rome Statute, *supra* note 129, art. 30.

Under Article 32, *both mistakes of fact and law can be grounds for excluding criminal liability if they negate the mental element required by the crime*[446]. So, if a soldier thought, for instance, that a building was a military structure rather than a civilian structure, that mistake of fact would negate the necessary intent to be guilty of committing a war crime. Or, in the above case, if a target was mistakenly struck with the belief that it was a military target, the soldier would not be guilty of deliberately killing innocent civilians. In all cases, in order to be found guilty of committing a Rome Statute crime, the *mens rea* element must be proved. The Report lodges accusation after accusation without sufficient evidence to establish that the necessary *mens rea* existed.

2. The Report Mischaracterises the International Law Principles of Self-Defence, Proportionality, Distinction, and Necessity.

Perhaps the Report's gravest flaw is its failure to acknowledge Israel's legal right to act in self-defence. Israel launched Operation Cast Lead as a defensive response to Hamas terrorist attacks. Article 51 of the UN Charter proclaims "the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations . . ."[447]. Not once in the 575-page Report is there a mention of Article 51 of the UN Charter or of Israel's right to act in self-defence, whereas, to the contrary, it repeatedly references Palestinians' right of "self-determination" as "derived from the Charter of the United Nations"[448].

Instead, the Report frequently cites the ICJ's Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* to support the clearly illogical legal proposition that Israel is an occupying power and has certain affirmative duties that it did not fulfill. In addition, the ICJ Advisory

[446] *Id.* art. 32.
[447] U.N. Charter art. 51, *supra* note 157.
[448] Goldstone Report, *supra* note 5, ¶ 269.

Opinion asserts that Israel lacks the right to act in "self-defence" against a non-state actor—in particular a non-state actor that launches attacks from an allegedly "occupied" territory. The ICJ Advisory Opinion states that "Article 51 of the Charter thus recognizes the existence of an inherent right of self defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State"[449]. The ICJ Opinion completely rewrites the UN Charter by reading into Article 51 a requirement that self-defence only applies to state attacks. Not only is such an interpretation illogical, it defies the language of the statute. This is why the ICJ's Advisory Opinion on the Wall remains so controversial.

And while the ICJ Opinion speaks with certainty, many within the international legal community would dispute the Court's ruling. Judge Buergenthal of the ICJ, for one, authored a separate opinion in the ICJ Advisory Opinion citing a different interpretation of Article 51 and criticising the court's "legally dubious conclusion" about the inapplicability of Article 51[450]. Buergenthal observed that "the United Nations Charter, in affirming the inherent right of self defence, does not make its exercise dependent upon an armed attack by another State"[451]. Further, "evolving customary international law suggests that attribution to a State is no longer required and that non-State actors can independently commit armed attacks within the meaning of article 51"[452].

Judge Rosalyn Higgins, although concurring in the ICJ Advisory Opinion, echoed Buergenthal's concerns, having said that, "[a]lthough ultimately I have voted

[449] ICJ Advisory Opinion, *supra* note 409, at 194.
[450] *Id.* at 242 (Declaration of Judge Buergenthal), http://www.icj-cij.org/docket/files/131/ 1687.pdf.
[451] *Id.*
[452] Stephanie A. Barbour and Zoe A. Salzman, *The Tangled Web: The Right of Self-Defense Against Non-State Actors in the* Armed Activities *Case*, 40 N.Y.U. J. INT'L L. & POL. (SPECIAL ISSUE) 53, 84 (2008).

in favour of the decision to give the Opinion, I do think matters are not as straightforward as the Court suggests"[453]. She continued:

> There is, with respect, nothing in the text of Article 51 that thus stipulates that self-defence is available only when an armed attack is made by a State[454].
>
> . . . .
>
> I also find unpersuasive the Court's contention that, as the uses of force emanate from occupied territory, it is not an armed attack 'by one State against another'. I fail to understand the Court's view that an occupying Power loses the right to defend its own civilian citizens at home if the attacks emanate from the occupied territory - a territory which it has found not to have been annexed and is certainly 'other than' Israel. Further, Palestine cannot be sufficiently an international entity to be invited to these proceedings, and to benefit from humanitarian law, but not sufficiently an international entity for the prohibition of armed attack on others to be applicable. This is formalism of an unevenhanded sort[455].

As others have observed, the right of self-defence is "inherent," meaning the *UN Charter merely codifies a right that already exists*[456]. The ICJ, in fact, has articulated this interpretation as follows:

> [T]he United Nations Charter, the convention to which most of the United States argument is directed, by no means covers the whole area of the regulation of the use of force in international relations. On one essential point, this treaty itself refers to pre-existing customary international law; this reference to customary law is contained in the actual text of Article 51, which mentions the 'inherent right' (in the French text the 'droit naturel') of individual or collective self-defence, which 'nothing in the present Charter shall impair' and which applies in the event of an armed attack. The Court therefore finds that Article 51 of the Charter is only meaningful on the basis that there is a 'natural' or 'inherent' right of self-defence, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter[457].

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[453] ICJ Advisory Opinion, *supra* note 409, at 207 (Declaration of Judge Higgins), http://www.icj-cij.org/docket/files/131/1681.pdf.
[454] *Id.* at 215.
[455] *Id.*
[456] Barbour and Salzman, *supra* note 452.
[457] International Criminal Court, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgement. I.C.J. Reports 1986, p. 14, at 94, http://www.icj-cij.org/docket/files/70/6503.pdf.

As such, the right to use military force in self-defence is part of customary international law and not merely a product of legal positivism. It is an inherent, customary legal right due to its obvious logical and moral implications. A nation, like an individual, is permitted to respond with force to an attack. The same logic certainly applies to Israel, which was being attacked by Hamas-launched rockets and has been subject for years to terrorist attacks, thereby triggering its inherent right to respond in self-defence.

Even assuming *arguendo* that the ICJ Advisory Opinion's legally dubious conclusion about Article 51 had merit, Israel's military operations in Gaza would still not be prohibited by international law. The UN Charter restricts Members "from the threat or use of force against the territorial integrity or political independence of any state . . ."[458]. As Gaza does not constitute a state, Israel's use of force would not be prohibited, even if one argues that Article 51 does not apply in cases of non-state attacks.

Notwithstanding the ICJ Advisory Opinion's—and presumably the Goldstone Mission's—interpretation of Article 51, the UN Security Council passed resolutions 1368 and 1373 in 2001, recognising the right of self-defence against acts of terrorism. In fact, resolutions 1368 and 1373 obligate Israel and other states to combat terrorism. Specifically, states are obligated to do the following:

- Prevent and suppress the financing of terrorist acts;
- Criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts;
- Take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information;

[458] U.N. Charter, art. 4(2), *supra* note 157.

- Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens;
- Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens;
- Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts; and
- Prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents[459].

The ICJ, however, in another case of reading provisions into the resolutions, states that resolutions 1368 and 1373 are not applicable to Israeli defenses against Palestinian terrorist groups because,

> Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory. The situation is thus different from that contemplated by Security Council resolutions 1368 (2001) and 1373 (2001), and therefore Israel could not in any event invoke those resolutions in support of its claim to be exercising a right of self defence[460].

The ICJ Opinion's interpretation is hardly dispositive, and, once again, Judge Buergenthal took issue with the Court's position, saying that, "[i]n neither of these resolutions did the Security Council limit their application to terrorist attacks by State actors only, nor was an assumption to that effect implicit in these resolutions. In fact, the contrary appears to have been the case"[461]. The ICJ's interpretation, based on the belief that the words "international terrorism" means the attack must emerge from a foreign state, makes little sense. The most logical interpretation of "international

[459] S.C. Res. 1373, U.N. Doc. S/RES/1373 (28 Sept. 2001); S.C. Res. 1368, U.N. Doc. S/RES/1368 (12 Sept. 2001).
[460] ICJ Advisory Opinion, *supra* note 409, at 194.
[461] *Id.* at 242 (Declaration of Judge Buergenthal), http://www.icj-cij.org/docket/files/131/ 1687.pdf.

terrorism" is not an overly formalistic one requiring that an attack must travel across state lines. It more sensibly refers to terrorism or terrorist groups that pose international threats or which have been designated internationally as terrorist organisations. Further, the U.S. was not attacked by state actors on 11 September 2001, which led to passage of the resolutions 1368 and 1373, but by non-state terrorist networks, indicating that the ICJ interpretation is misplaced. Finally, resolution 1368 "[e]xpresses its readiness . . . to combat *all* forms of terrorism . . ."[462], not just terrorism that travels across state lines.

Adopting a reading of resolutions 1368 and 1373 similar to the ICJ's could lead to absurd results legal results. For instance, if al-Qaeda launched an attack from within the U.S. (hypothetically, for instance, if a cell in Virginia attacked Washington, D.C.), the U.S. would have no recourse under the UN Charter or under resolutions 1368 and 1373, according to that logic[463]. Clearly, that is not what the resolutions intended.

The ICJ's Opinion is also based on the very questionable assumption that Gaza remains occupied, a position that is contradicted by Israel's withdrawal from Gaza in 2004. The assumption of continued occupation is one that runs throughout the Mission's Report and one that, if untrue, would undermine many of its legal conclusions.

Notwithstanding these issues, when one does act in self-defence, international law "does not require a defender to limit itself to actions that merely repel an attack; a state may use force in [self-defence] to remove a continuing threat to future

[462] S.C. Res. 1368, *supra* note 459.
[463] Incidentally, Judge Goldstone, while speaking at a lecture at New York Law School on 20 October 2009, used this exact analogy to explain why the right of self-defence would not apply. To accept this reasoning is to grant terrorists virtual impunity.

security" [464] . The Report frequently criticises Israel for allegedly using disproportionate force not militarily necessary. Self-defence, however, does not limit an actor to a tit-for-tat response but provides the necessary flexibility to reduce or eliminate a threat. The degree of force employed in self-defence can be greater than that used in the original armed attack[465]. And, once again, the assessment must be based on a "reasonable military person" standard, not on a "reasonable international fact-finder" standard[466].

Hamas has launched deadly terrorist attacks, as well as bombing campaigns, against Israel for years. Israel has a legal right to defend itself against such attacks, and all indications are that it acted consistent with that right, its duty to distinguish between military and civilian objects, and its obligation to combat terrorism under international law.

The Report also repeatedly accuses Israeli officials and soldiers of violating the principle of distinction by launching indiscriminate attacks without distinguishing between military and civilian targets. However, "by definition, the principle of distinction does not forbid the targeting of combatants, nor the targeting of civilians who take a direct part in the hostilities"[467]. And again, the law of armed conflict contemplates the possibility of civilian death or damage to civilian infrastructure so long as such damage is not "excessive in relation to the concrete and direct military advantage anticipated"[468].

Article 48 of Additional Protocol I sets forth the basic rule of distinction, stating,

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[464] SEAN D. MURPHY, PRINCIPLES OF INTERNATIONAL LAW 447 (2006).
[465] ROSALYN HIGGINS, PROBLEMS & PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 232 (1995); *see also* CHRISTOPHER GREENWOOD, ESSAYS ON WAR IN INTERNATIONAL LAW 80 (2006).
[466] *See* Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, ¶¶ 50–52 (n.d.), http://www.icty.org/sid/10052.
[467] HENCKAERTS & DOSWALD-BECK, *supra* note 436, at 11.
[468] Additional Protocol I, *supra* note 69, art. 51(5).

> [i]n 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[469].

Indiscriminate attacks are those that are untargeted and launched without consideration as to where harm will fall—exactly like Hamas rocket attacks directed against southern Israel[470]. They are defined as,

> (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[471].

Attacks are prohibited if "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"[472].

The Report concludes that both Israel and Palestinian armed groups violated prohibitions against indiscriminate attacks. However, to even compare the methods by which Israel and Hamas fight is specious. The Israeli military actually seeks to achieve military advantages by choosing its targets carefully. To the contrary, Hamas rocket attacks against civilian centres do not in any way seek to achieve military objectives. They are, quite simply, terrorist attacks—a phrase the Mission is reluctant to use unless directed at Israel—aimed at spreading fear among civilians.

In terms of Israel's operations, the fact that tragic incidents occur during military conflict that result in civilian deaths does not establish a violation of law—or even wrongdoing for that matter. The Office of the Prosecutor at the International

[469] *Id*. art. 48.
[470] *Id.* art. 51(4).
[471] *Id.*
[472] *Id.* art. 51(5).

Tribunal for the former Yugoslavia reached the same conclusion, and the Committee Established to Review the 1999 NATO Bombing Campaign Against the Federal Republic of Yugoslavia reported to the Prosecutor that "the mere cumulation of [legitimate individual attacks] . . . cannot *ipso facto* be said to amount to a crime"[473]. While military forces are clearly prohibited from targeting civilians who are not taking part in hostilities, the principle of distinction does not address incidental harm caused when attempting to strike legitimate military targets[474].

The American Red Cross has also interpreted correctly that,

> not all civilian deaths are unlawful during war. [International Humanitarian Law] does not outlaw armed conflict, but instead attempts to balance a nation's acknowledged legal right to attack legitimate military targets during war with the right of the civilian population to be protected from the effects of the hostilities. In other words, given the nature of warfare, IHL anticipates a certain amount of 'collateral damage,' which sometimes, regrettably, may include civilian casualties[475].

The ICRC Commentary to Additional Protocol I of the Geneva Convention also states the following:

> In combat areas . . . it often happens that purely civilian . . . buildings or installations are occupied or used by the armed forces and such objectives may be attacked, provided that this does not result in excessive losses among the civilian population. For example, it is clear that if fighting between armed forces takes place in a town which is defended house by house, these buildings—for which Article 52 . . . '(General protection of civilian objects),' paragraph 3, lays down a presumption regarding their civilian use—will inevitably become

[473] Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, at ¶¶ 50–52 (n.d.), http://www.icty.org/sid/10052.

[474] Many countries, including Australia, Canada, France, Italy, New Zealand, and the United Kingdom, stated upon ratification that article 52(2) of Additional Protocol I was neither intended to address, nor did it address, the question of incidental or collateral damage resulting from an attack directed at a military objective. Int'l Comm. of the Red Cross, International Humanitarian Law, State Parties/Signatories, 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, http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=P (select hyperlinks under "Reservation/Declaration" column for each of the above countries).

[475] Am. Red Cross, Introduction to Int'l Humanitarian Law (IHL), http://www.redcross.org/portal/site/en/menuitem.d8aaecf214c576bf971e4cfe43181aa0/?vgnextoid=22874749b48bb110VgnVCM10000089f0870aRCRD (last visited 20 Dec. 2009).

> military objectives because they offer a definite contribution to the military action. However, this is still subject to the prohibition of an attack causing excessive civilian losses[476].

The key factor, of course, is *excessiveness*. *The Mission has neither the expertise nor the necessary facts to determine whether civilian casualties were excessive when part of a legitimate military strike.* That determination is necessarily influenced by the military advantage—which should be judged from the standpoint of the entire operation, not just an isolated part,[477] and is based upon the "reasonable military personnel" standard. The "security of the attacking forces" is also part of the consideration in assessing military advantage[478]. The standard is intended to prevent "[*m*]*anifestly* disproportionate collateral damage inflicted in order to achieve operational objectives," not close calls[479].

While military advantage is sometimes evident, it is not always obvious on the surface. For several years, Hamas has held incommunicado hostage IDF soldier Gilad Shalit. Among its other aims, Israel may have been acting on intelligence and trying to locate or rescue Shalit during Operation Cast Lead. Obviously, any operation designed to rescue Shalit would be extremely sensitive, and the Israeli military would be completely justified in not revealing such information either before or after-the-fact, as doing so could further risk the life of Shalit and other Israeli soldiers.

Even when the Report attempts to analyse combatant status or proportionality, it does so in conclusory, meaningless fashion. For example, the Mission discusses the targeting of "policemen" on 27 December 2008 and concludes that they "cannot be

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[476] ICRC Commentary on Additional Protocol I, *supra* note 74, art. 51(4)(a), ¶ 1953, http://www.icrc.org/ihl.nsf/1a13044f3bbb5b8ec12563fb0066f226/5e5142b6ba102b45c12563cd00434741!OpenDocument.
[477] ICRC CIL Study, Practice, ch. 2, ¶¶ 336, 361.
[478] *Id*. ¶¶ 329, 331, 336, 339.
[479] Stefan Oeter, *Methods and Means of Combat*, *in* THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 119, 135 (Dieter Fleck ed., 2d ed. 2008).

said to have been taking a direct part in hostilities"[480]. That initial conclusion is simply based on the Mission's belief—despite abundant evidence to the contrary—that the police and the military wings are separate units. However, the Report then continues to analyse

> whether the attacks on the police stations could be justified on the basis that there were, allegedly, members of Palestinian armed groups among the policemen. The question would thus be one of proportionality . . . . [T]he Mission finds that the deliberate killing of 99 members of the police at the police headquarters and three police stations . . . constitutes an attack which failed to strike an acceptable balance between the direct military advantage anticipated . . .[481].

The Mission provides no basis for the conclusions it makes. What criteria are used to determine proportionality? *Nowhere does the Mission engage in any meaningful analysis, and, quite frankly, it is not qualified to do so.* Such analysis is more appropriately conducted by the military, which has access to the relevant operational and intelligence data. For the Mission simply to conclude after the fact that certain strikes were "disproportionate" is specious, and such conclusions should be afforded no weight.

The Report also consistently implies that the presence of civilians renders a target immune. However, as the foregoing analysis explains, the presence of civilians at a site does not preclude an attack on an otherwise legitimate military target, and, under Article 28 of the Fourth Geneva Convention, "the presence of a protected person may not be used to render certain points or areas immune from military operations"[482].

All indications are that Israeli military strikes were carried out in the reasonable, good faith belief that the targets were military ones. The IDF checked and cross-checked targets and often refrained from carrying out attacks, or diverted them,

[480] Goldstone Report, *supra* note 5, ¶ 432.
[481] *Id.* ¶¶ 433, 435.
[482] Fourth Geneva Convention, *supra* note 353, art. 28.

due to potential disproportionate civilian casualties[483]. One of the best examples of this restraint, as previously mentioned, was Israel's refusal to attack al-Shifa Hospital in Gaza City, where Hamas set up its main headquarters (in clear violation of the law of armed conflict). Israel declined to attack the hospital out of concern for civilians present in the area, powerful evidence that the military did not engage in indiscriminate attacks, as alleged[484]. Other sensitive sites like UN and Red Cross facilities were marked on IDF operational maps and photographs, and the IDF distributed this information to all levels of command[485].

The ICRC Commentary acknowledges that the realities of warfare render complete accuracy impossible. It states the following:

> The military character of an objective can sometimes be recognized visually, but most frequently those who give the order or take the decision to attack will do so on information provided by the competent services of the army. In the majority of cases they will not themselves have the opportunity to check the accuracy of such information; they should at least make sure that the information is precise and recent, and that the precautions and restrictions laid down in Article 57 . . . '(Precautions in attack)' are observed. In case of doubt, additional information must be requested[486].

The Israeli military complied with those basic precautions, but, given the violence and chaos in battle, assessing intent becomes extremely difficult—especially when attempted months after the specific incidents being investigated occurred.

The Report nonetheless blithely indicts the Israeli military without anything close to sufficient information, consistently speculating about the intent of Israeli soldiers and the situation on the ground. It says things like "Zeytoun was an area of particularly intense action by Israeli forces, yet there are almost no indications of

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[483] MFA, OPERATION IN GAZA, *supra* note 11, at ¶ 115.
[484] *Id.* at ¶ 131.
[485] *Id.* at ¶ 259.
[486] ICRC Commentary on Additional Protocol I, *supra* note 74, art. 51(4)(a), ¶ 1952, http://www.icrc.org/ihl.nsf/1a13044f3bbb5b8ec12563fb0066f226/5e5142b6ba102b45c12563cd00434741!OpenDocument.

armed resistance"[487]. The Report, in typical fashion, does not identify the basis for its conclusion. Although the Mission sought Israeli operational data, Israel was within its sovereign right in not providing it. The reality is there is no way to know what Israelis saw without such data.

3. The Report Misconstrues International Law in Its Charge That Israel Illegally Targeted Humanitarian Protected Structures.

The Report also accuses Israel of illegally targeting humanitarian structures, including UN facilities, hospitals, and schools[488]. Such accusations constitute legal conclusions about IDF intent without supporting evidence.

Article 8 of the Rome Statute prohibits "[i]ntentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions *in conformity with international law*"[489]. It is clear that commission of this crime is contingent, inter alia, on proof that these targets were being properly utilized[490].

Hamas, on several occasions, used medical vehicles, hospitals, and uniforms for military and terrorist purposes, *as the Mission could have readily discerned if it had made even a cursory effort to do so*[491]. Instead, it was silent.

The IDF has investigated a number of cases allegedly involving attacks on medical vehicles and facilities. It found that, in some cases, the ambulance driver was driving the vehicle suspiciously or without prior coordination with IDF forces, which soldiers feared could mean suicide attackers[492]. And, as Muhammad Shriteh, an

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[487] Goldstone Report, *supra* note 5, ¶ 344.
[488] *Id.* ¶¶ 334, 584–94, 1718 (at pages 533–34).
[489] Rome Statute, *supra* note 129, art. 8(b)(iii) (emphasis added).
[490] *Id.*
[491] MFA, OPERATION IN GAZA, *supra* note 11, ¶¶ 119, 154, 155, 171-180; *see also* Marcus & Crook, *supra* note 171; Hamas Booby Trapped School and Zoo 11 Jan. 2009, *supra* note 172; Hamas Admits It Uses Human Shields, *supra* note 85; Israeli Defense Forces Video, *supra* note 173; Israeli Defense Forces Video, *supra* note 174; Israeli Defense Forces Video, *supra* note 175.
[492] MFA, OPERATION IN GAZA, *supra* note 11, ¶ 377.

ambulance driver, revealed, Hamas frequently hijacked ambulances and medical equipment for military purposes[493]. The Report tries to discredit individuals like these who risked their lives, though, saying, "[n]one of the ambulance drivers that were directly interviewed by the Mission reported any attempt by the armed groups to use the ambulances for any ulterior purpose"[494]. The Mission refused to delve deeper into differing accounts, as they certainly did not fit the general tenor of the Report's conclusions.

The Report also criticises the Israeli military for denying ambulances unfettered movement. However, the fact that terrorist groups were hijacking ambulances for combat purposes would justify the military's caution. But the Report speculates that "the Israeli armed forces must have known that there were no combatants among the people to be rescued or in the immediate vicinity"[495]. Again, there is no sound basis for speculating about what soldiers "must have known". On another occasion, the Report criticises Israeli soldiers for making an ambulance stop and ordering the driver and a nurse out of the vehicle. The possibility of suicide attacks made such precautions necessary, however[496]. Nowhere does the Report account for these obvious realities.

As previously discussed, in one of the best examples of the restraint employed by the IDF, it refused to strike the al-Shifa hospital, where Hamas had established a base of operations, out of concern for collateral damage. And, in one of the best examples of the inherent bias of the Report, the Mission refused to investigate or report on Israel's restraint *vis-à-vis* al-Shifa hospital. The Report did, however, discuss incidents surrounding al-Quds hospital.

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[493] *Id.* ¶ 179.
[494] Goldstone Report, *supra* note 5, ¶ 472.
[495] *Id.* ¶ 469.
[496] *Id.* ¶ 715.

In the Israeli government's July 2009 report, it does not cite any intelligence data (for obvious security reasons) to explain why a strike on al-Quds hospital was warranted. Instead, it refers to a *Newsweek* article to illustrate that combatants were carrying out attacks from within or near the hospital. The article quotes hospital director Dr. Khalid Judah, who said, "I am not able to say if anyone was using [the two Palestinian Red Crescent Society buildings adjacent to the hospital], but I know for a fact that no one was using the hospital"[497]. The Israeli Report quotes Talal Safadi, an official in the Palestinian People's Party, who said that resistance fighters were firing from all around the hospital[498].

The Report, however, dismisses the implications of Safadi's statements and adopts a sarcastic mocking tone towards the Israeli position, saying,

> The Mission understands that the Israeli Government may consider relying on journalists' reporting as likely to be treated as more impartial than reliance on its own intelligence information. The Mission is nonetheless struck by the lack of any suggestion in Israel's report of July 2009 that there were members of armed groups present in the hospital at the time[499].

It continues:

> [The Mission] takes account of the sighting of at least one tank whose direct line of fire, bearing in mind that it was surrounded by tall buildings on both sides, was the hospital itself . . . . [T]he Mission finds that there are reasonable grounds to believe that the hospital and the ambulance depot, as well as the ambulances themselves, were the object of a direct attack by the Israeli armed forces . . . and that the hospital could not be described in any respect at that time as a military objective . . . . [T]he Mission takes the view that there was intent to strike the hospital[500].

There is clear evidence by Palestinians' own admissions that armed groups were firing at Israelis from the area near the hospital. Yet, the Mission dismisses that

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[497] Barak Mendelsohn, *Hamas and Its Discontents*, FOREIGN AFFAIRS, 20 Jan. 2009, http://www.scribd.com/doc/20438218/Hamas-and-Its-Discontents-The-Battle-Over-Islamic-Rule-in-Gaza.
[498] MFA, OPERATION IN GAZA, *supra* note 11, ¶ 173.
[499] Goldstone Report, *supra* note 5, ¶ 612.
[500] *Id.* ¶¶ 620, 621, 625.

evidence and then refers to battlefield schematics, including what would have been visible to Israeli soldiers, to conclude that Israeli attacks on the hospital were deliberate. On what grounds can the Mission conclude what was visible to soldiers on the battlefield? Finally, the Mission speculates on the intent of Israeli soldiers based upon what it surmises they must have seen. The Mission then concludes this is sufficient evidence to declare a violation of the Geneva Convention and international legal requirements of proportionality[501]. This is, of course, non sense, pure and simple.

The Report also criticises Israel for striking mosques. Yet, houses of worship cannot be used to render militants immune from strikes[502], and Hamas used mosques for military purposes throughout Operation Cast Lead in violation of international law[503]. Unfortunately, the Mission only chose to investigate incidents surrounding the al-Maqadmah mosque, another instance of cherry-picking certain allegations and failing to investigate others that do not bolster the Mission's predetermined conclusions. The Mission claims that it "found no evidence that this mosque was used for the storage of weapons or any military activity by Palestinian armed groups . . . . However, the Mission is unable to make a determination regarding the allegation in general nor with respect to any other mosque that was attacked by the Israeli armed forces during the military operations"[504].

Once again, the Mission could have easily discovered instances of Hamas using mosques with minimal investigation. They are well documented, including in Israel's July Foreign Ministry report. They include a mosque in the Tel al-Hawa area of Gaza City, which served as a storehouse for armaments and a launching site for

[501] *Id.* ¶ 627.
[502] Additional Protocol I, *supra* note 69, art. 53(b).
[503] MFA, OPERATION IN GAZA, *supra* note 11, ¶¶ 7, 23, 139, 141, 154,155, 164-166, 183, 187, 233-234, 352, 401.
[504] Goldstone Report, *supra* note 5, ¶ 463.

terrorist attacks[505], and the Al-Khulafa mosque in Jabaliya, which served as a terrorist operations room and a long-range Grad rockets storage arsenal[506]. The Israeli military lawfully struck the two mosques, respectively, on 31 December 2008 and 1 January 2009[507].

They also include the al-Maqadmah mosque, which the Report calls a civilian target that Israel intentionally targeted[508]. First, it is not clear that Israel actually struck the mosque, as it has denied doing so[509]. Assuming *arguendo* that it did, however, many within the mosque were members of Hamas, which would render the strike legitimate, since use of otherwise protected structures by enemy military forces converts protected structures into legitimate military targets[510]. To conclude, however, that the al-Maqadmah mosque was not being used for militant activities, the Report cites the fact that the mosque was not mentioned in the Israeli government's "illustrative" list of military targets in its July 2009 report[511]. Yet, as the word "illustrative" implies, it is not an exclusive list. Moreover, at least six of the fifteen people killed in that incident were members of Al Qassam Brigades, as the Palestinian Centre for Human Rights' list confirms[512].

The Report also discusses alleged strikes near condolence tents[513]. The Report speculates that "[t]he repeated nature of the strikes indicates that there was a deliberate attempt to kill members of the group or the entire group . . ." and that "the families participating in the condolence tents were civilians and taking no direct part

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[505] MFA, OPERATION IN GAZA, *supra* note 11, ¶ 234.
[506] *Id.*
[507] *Id*.
[508] Goldstone Report, *supra* note 5, ¶¶ 836, 838.
[509] *Id.* ¶¶ 829–831.
[510] *Id.* ¶ 829.
[511] MFA, OPERATION IN GAZA, *supra* note 11, at 86.
[512] Palestinian Ctr. for Human Rights, *Weekly Report: On Israeli Human Rights Violations in the Occupied Palestinian Territories*, No. 01/2009, 01-07 Jan. 2009, http://pchrgaza.org/files/W_report/English/2008/08-01-2009.htm.
[513] Condolence tents are where friends and families go to pay respects to the deceased and comfort relatives.

in hostilities"[514]. This conclusion, however, is simply that, a conclusion based on very incomplete information. It does not address the possibility of operational error or that some of the targets were combatants, i.e., legitimate targets.

Hamas also operated in or near other civilian structures. The Report even concedes "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,"[515] and "there are indications that Palestinian armed groups launched rockets from urban areas . . . . [T]he question remains whether this was done with the specific intent of shielding the combatants from counter-attack"[516].

The Mission has not been able to obtain any direct evidence on this question"[517]. An Israeli colonel submitted a report based upon Palestinian admissions of seizing homes for military and ambush purposes, deploying explosives near residences, booby-trapping homes and shooting from populated areas[518]. The obvious question—notwithstanding existing evidence—is why Hamas would utilize these tactics if it was not either shielding itself from counter-attacks or trying to maximize civilian deaths for propaganda purposes.

Yet, the Report states that "the International Crisis Group and Human Rights Watch found that the practice of firing close to or within populated areas became more prevalent as the Israeli armed forces took control of the more open or outlying areas"[519]. In other words, even when admitting that militant groups did, in fact, fire from within populated areas, placing Palestinian civilians at risk, the Mission casts blame upon Israel for creating the conditions that made such tactics more likely. One

[514] Goldstone Report, *supra* note 5, ¶¶ 874–878.
[515] *Id.* ¶ 444.
[516] *Id.* ¶ 450.
[517] *Id.*
[518] *Id.* ¶ 454.
[519] *Id.* ¶ 448.

wonders why the Mission utterly failed to apply such reasoning against Hamas for its actions that triggered the Israeli incursion in the first place.

The Report also dismisses claims that Palestinian armed groups make on their websites, because apparently one of the sites alleges—perhaps falsely—that it prepared an ambush in a civilian home and then captured an Israeli soldier[520]. The Mission states, "[t]his example suggests that some websites of Palestinian armed groups might magnify the extent to which Palestinians successfully attacked Israeli forces in urban areas[521]. Again, this represents a very disturbing pattern of assumptions throughout the Report. *When Palestinians say things that could indict them, the Mission dismisses the statements, saying they are not dispositive and could be an exaggeration. When, an Israeli says something that could be construed as an indictment (like soldiers' testimonies from Breaking the Silence), the statements are treated as gospel*. Similarly, if the Mission is skeptical of Palestinian claims in certain contexts, why is it so deferential when the claims involve allegations of wrongdoing against Israelis? The answer is bias, pure and simple.

Finally, the Report accuses Israel of illegally striking UN facilities. In the small and densely populated area of Gaza, there exist over 750 UN facilities and nearly 1,900 sensitive facilities overall[522]. Israel has released photographs showing the close proximity of UN facilities and schools to many Hamas launch sites[523]. While Israel took great precautions to avoid striking these sensitive sites, damage nonetheless occurred, which Israel continues to investigate[524]. It also cooperated with the UN Board of Inquiry established by the Secretary General to investigate such

[520] *Id.* ¶ 456.
[521] *Id.* ¶ 456.
[522] MFA, OPERATION IN GAZA, *supra* note 11, ¶ 259.
[523] *Id.* at ¶ 331.
[524] *Id.* at ¶ 333.

issues, and the Secretary General has acknowledged Israel's cooperation[525]. This further undermines the Report's allegations, which we detail further, that Israel does not take investigations into potential wrongdoing seriously.

4. Individuals Who Directly Participate in Hostilities Are Not Entitled to Civilian Protection.

International law examines whether one takes a "direct part in hostilities"[526] or an "active part in hostilities"[527], which the International Criminal Tribunal for Rwanda determined has the same meaning[528]. The legal standard takes a broad view of "the scale of the whole operation," not just specific incidents in making such a determination[529]. The Report often takes a far too narrow, specific view or simply concludes without sufficient evidence whether an object or person is serving only a civilian purpose.

The Report criticises Israeli strikes on Hamas buildings, saying "buildings attacked and destroyed served a public purpose that cannot be regarded as 'promoting Hamas terrorist activity'"[530]. That analysis is dubious at best. Although it is true, as the Report states, that "military objectives are limited to 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 neutralization, in the circumstances ruling at the time, offers a definite military advantage"[531], the Mission lacks the

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[525] *Id.* at ¶ 334.
[526] Additional Protocol I, *supra* note 69, art. 51(3).
[527] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, art. 3, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter "First Geneva Convention"], http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/fe20c3d903ce27e3c125641e004a92f3.
[528] *See Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement, ¶ 10 (2 Sept. 1998), http://www.unhcr.org/refworld/publisher,ICTR,,,40278fbb4,0.html.
[529] *See Case Concerning Oil Platforms (Iran v. U.S.)*, 2003 I.C.J. 161, 198 (Nov. 6), http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=op&case=90&k=0a.
[530] Goldstone Report, *supra* note 5, ¶ 382.
[531] *Id.* ¶ 383.

information to know if these buildings served a military purpose when attacked, given its lack of operational and intelligence data.

It also cannot be overstated that Hamas is a terrorist organisation. If Hamas used buildings—even traditional civilian structures—in such a manner that their nature, location, purpose *or* use made an effective military contribution, then they became legitimate targets of military strikes, taking into account proportionality rules[532]. The Report even states that "[t]he Mission further notes that international humanitarian law also recognizes a category of civilian objects which may nonetheless be targeted in the course of armed conflict to the extent that they have a 'dual use'"[533]. That is precisely what many of the Israeli targets were.

Simply because a member of Hamas is not engaged in active hostilities *at the very moment of an attack* does not suddenly render him immune from attack. If that were the standard, it would be easy for combatants to suddenly declare themselves removed from hostilities when convenient. The ICRC Commentary to Additional Protocol I echoes that logic, saying,

> any interpretation which would allow combatants as meant in article 43 to 'demobilize' at will in order to return to their status has civilians and to take up their status as combatants once again, as the situation changes or as military operations may require, would have the effect of canceling any progress that this article has achieved . . . . *[Article 44] does not allow [a] combatant to have the status of a combatant while he is in action, and the status of a civilian at other times*"[534].

Further, the "immunity afforded individual civilians is subject to an overriding condition, namely, on their abstaining from *all* hostile acts"[535].

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[532] *See* Additional Protocol I *supra* note 69, art. 52(2).
[533] Goldstone Report, *supra* note 5, ¶ 386.
[534] ICRC Commentary on Additional Protocol I, *supra* note 74, art. 43, ¶ 1678 (emphasis added),http://www.icrc.org/ihl.nsf/1a13044f3bbb5b8ec12563fb0066f226/0cdb7170225811a0c12563cd00433725!OpenDocument.
[535] *Id.* art. 51, ¶ 1942 (emphasis added), http://www.icrc.org/ihl.nsf/1a13044f3bbb5b8ec12563fb0066f226/5e5142b6ba102b45c12563cd00434741!OpenDocument.

The foregoing undermines the Report's assessment that many of the "civilians" killed—including "police officers"—were actually innocent bystanders. *As the ICRC Commentary highlights, once you become a combatant, you cannot just step back into the civilian role when convenient.*

The ICRC attempted to define what constitutes direct participation in hostilities as follows:

> 1. The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and
> 2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and
> 3. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus)[536].

The Commentary also states,

> Undoubtedly there is room here for some margin of judgement: to restrict this concept to combat and active military operations would be too narrow, while extending it to the entire war effort would be too broad, as in modern warfare the whole population participates in the war effort to some extent, albeit indirectly[537].

Other scholars have stated, "[i]t is fair to conclude . . . that a clear and uniform definition of direct participation in hostilities has not been developed in state practice" [538]. There was widespread disagreement among experts who made recommendations to the ICRC about how to define "direct participation," and many

[536] ICRC, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 16–17 (2009), http://www.unhcr.org/refworld/docid/4a670dec2.html.
[537] ICRC Commentary on Additional Protocol I, *supra* note 74, art. 43, ¶ 1679, http://www.icrc.org/ihl.nsf/1a13044f3bbb5b8ec12563fb0066f226/0cdb7170225811a0c12563cd00433725!OpenDocument.
[538] HENCKAERTS & DOSWALD-BECK, *supra* note 436, at 23.

of them actually withdrew from the discussions because they regarded the definition as far too narrow[539].

The fact that the ICRC sought to address the issue of what exactly constitutes "direct participation" in hostilities, and that so many of the experts whose opinions were sought felt the need to withdraw, shows just how much legitimate disagreement there is on the issue and how unsettled the legal doctrine is. It makes it all the more inappropriate for the Mission to state its interpretation—based on incomplete information—with such certainty. The Report by no means constitutes an authority on the topic either in its legal or factual application. Given the uncertainty and disagreement surrounding the question, Israel's attempted good faith application of the rule would certainly seem entitled to the benefit of the doubt. To seek prosecutions of soldiers who are left to apply abstract and unsettled legal principles in the heat of battle reeks of a politically motivated perversion of justice.

In the International Criminal Tribunal for the Former Yugoslavia, the Trial Chamber stated that,

> relevant factors in this respect include the activity, whether or not the victim was carrying weapons, clothing, age and gender of the victims at the time of the crime. While membership of the armed forces can be a strong indication that the victim is directly participating in the hostilities, it is not an indicator which in and of itself is sufficient to establish this[540].

Israel's High Court of Justice has defined direct participation in hostilities even broader as "a civilian bearing arms (openly or concealed) who is on his way to

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[539] *See* Bill Gertz, Inside the Ring, *Terrorists and Laws of War*, WASH. TIMES, 18 June 2009, http://www.washingtontimes.com/news/2009/jun/18/inside-the-ring-95264632/?page=2 (scroll half-way down on the page in order to see article).

[540] See *Prosecutor v. Halilovic*, Case No. IT-01-48-T, Judgement, ¶ 34 (16 Nov. 2005), http://www.un.org/icty/halilovic/trialc/judgement/index.htm. Footnote 78 in this case also states that, "[t]he Trial Chamber notes that a person may be listed as a member of an armed force, without being mobilised. Furthermore, it is possible that in a state of war, the civilian police by law become part of the armed forces." *Id.* ¶ 34 n.78.

the place where he will use them against the army, at such place, or on his way back from it," or,

> a person who collects intelligence on the army, whether on issues regarding the hostilities . . . or beyond those issues; a person who transports unlawful combatants to or from the place where the hostilities are taking place; a person who operates weapons which unlawful combatants use, or supervises their operation, or provides services to them, be the distance from the battlefield as it may[541].

There would certainly seem to be a presumption that any member of Hamas takes direct part in hostilities, but, in general, there are a number of factors that impact the determination. In combat, where life and death depends on split second decisions, these are not easy assessments to make. For the Mission to simply conclude months later, based on incomplete evidence, that civilians were deliberately targeted is outlandish and should hold no legal weight whatsoever.

III. ISRAEL CONTINUES TO INVESTIGATE POTENTIAL INTERNAL WRONGDOING AND ILLEGALITY IN ACCORDANCE WITH THE MOST STRINGENT INTERNATIONAL STANDARDS.

The Report repeatedly accuses Israel of failing to establish and conduct independent and impartial investigations into the conduct of IDF forces. That is patently incorrect, as even a cursory investigation reveals.

Israel's military is one of the most highly trained, morally conscious, and self-critical in the world. It utilises lawyers during battle who examine the legality of military strikes and generally ensure compliance with international law[542]. It also has one of the most refined processes of any country in the world for internally reviewing misconduct. Even the United States' system, the legitimacy of which is not seriously

[541] HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov't of Isr., [2005] IsrSC (n.p.) 25–26, http://74.125.93.132/search?q=cache:tP0_q6a3IZEJ:elyon1.court.gov.il/Files_ENG/02/690/007/A34/02007690.A34.pdf+Public+Committee+against+Torture+in+Israel+v.+Government+of+Israel&cd=1&hl=en&ct=clnk&gl=us (select link to access opinion).
[542] MFA, OPERATION IN GAZA, *supra* note 11, ¶ 216.

questioned, does not provide for independent judicial review of whether to commence a criminal proceeding against military officials, as is the case in Israel[543].

Although it is our position that the International Criminal Court does not possess and should not exercise jurisdiction over events in Gaza because the "Government of Palestine" does not represent a sovereign *State* and, therefore, is ineligible to accede to ICC jurisdiction, the principle of complementarity also makes jurisdiction improper[544]. The Preamble of the Rome Statute "[e]mphasiz[es] that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions"[545].

Article 17 of the Rome Statute states that,

> the Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute[546].

Israel's commitment to—and history of—investigating matters internally—and prosecuting wrongdoing where appropriate—should preclude any exercise of ICC jurisdiction and any UN Security Council referral of these matters to the ICC.

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[543] *Id.* at ¶¶ 310-311.

[544] While the Report encourages the ICC Prosecutor to make a decision on whether the Court has jurisdiction pursuant to the "Government of Palestine" declaration under Article 12(3) of the Rome Statute, the Report also acknowledges that the conditions for acceding to ICC jurisdiction are not met. Under the language of the Rome Statute, only States can accede to the Court's jurisdiction, and the Report explicitly recognises that Palestine is not a State. It says, "[a] second issue relates to the human rights obligations of the Palestinian Authority, the de facto authority in the Gaza Strip and other political and military actors. As non-State actors, the question of their human rights obligations must be addressed." Goldstone Report, *supra* note 5, ¶ 304.

[545] Rome Statute, *supra* note 129, pmbl.

[546] *Id.* art. 17.

As of November, the IDF has investigated 128 incidents, including incidents raised by human rights reports[547]. Of those, 25 are currently being reviewed by the Military Advocate General (MAG) to determine if further investigation or proceedings are necessary[548]. Of the other 103 cases, criminal investigations have been opened in 27 of them[549]. Simply because a summary of previous investigations has been presented to the MAG does not mean that the investigations are closed[550]. One soldier has already been convicted for theft[551].

All IDF investigations are subject to review by the MAG, who is independent from the IDF command hierarchy, and then subject to further review by the Attorney General and then the Supreme Court of Israel[552]. The scope of judicial review for the Supreme Court is very broad, as any interested party (including non-governmental institutions) can directly petition the Court. In 2008, over 2,000 petitions were filed with the Supreme Court, which even heard petitions by NGOs during Operation Cast Lead[553]. The Court has also adjudicated hundreds of cases pertaining to rights claimed by Palestinians[554].

If there is sufficient evidence for an indictment, then the MAG Corps will proceed with prosecutions in the Military Courts. *From 2002 through 2008, 1,467 criminal investigations were opened into alleged soldier misconduct, 140 indictments issued and 103 defendants convicted, persuasive evidence that the process is*

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[547] ISR. MINISTRY OF FOREIGN AFFAIRS, STATUS OF IDF INVESTIGATIONS OF GAZA INCIDENTS, 5 Nov. 2009, http://www.mfa.gov.il/MFA/Government/Law/Legal+Issues+and+Rulings/Examination_allegations_by_IDF_Oct_2009.htm.
[548] *Id.*
[549] *Id.*
[550] MFA, OPERATION IN GAZA, *supra* note 11, ¶ 320.
[551] Initial Israeli Response, *supra* note 4, at 21, n. 23.
[552] *Id.* ¶¶ 298-299.
[553] *Id*. at ¶ 302.
[554] *Id*.

legitimate[555]. These facts clearly seem to indicate both Israel's *willingness and ability* to investigate and prosecute its own personnel, which preempts ICC jurisdiction. The Report, rather than acknowledging Israel's commitment to justice, states that "[i]n the past, every case in which a Palestinian not participating in hostilities was killed was subject to criminal investigations. This policy changed in 2000. Criminal investigations are now the exception"[556].

It is true that not every civilian death results in an investigation, as they are usually undertaken when there is suspicion of wrongdoing—although civilian casualties are routinely the subject of operational inquiries by senior-level commanders. And still, the numbers cited above clearly contradict the Report's implication that investigations are not serious in Israel.

The Report also cites a Human Rights Watch study that concluded that Israel initiated few full criminal investigations and fewer indictments during the period from 2000 to 2004[557]. It is unclear why the period studied was 2000 to 2004 and whether the period was chosen deliberately in order to support a predetermined conclusion. Regardless, the fact that indictments were not issued does not mean that Israel did not conduct legitimate investigations. There very well could have been insufficient evidence to procure an indictment or conviction. A thorough, objective investigation by independent investigators fully satisfies international standards if such investigators demonstrate that there is insufficient evidence to proceed to trial or that such charges were wrong.

The Report also cites testimonies from soldiers to Breaking the Silence, a European-funded NGO that solicits disgruntled Israeli soldiers who are willing to criticise the military. Israel investigated the Breaking the Silence report on Operation

[555] *Id.* ¶ 293.
[556] Goldstone Report, *supra* note 5, ¶ 1399.
[557] *Id.* ¶ 1615 (at page 505).

Cast Lead and concluded that the allegations were mostly anonymous and not based on personal knowledge or observation[558]. In fact, most of the allegations are anonymous and lacking in critical detail, *and some of the soldiers were not even in Gaza at the time of battle but were on reserve duty at the time*[559].

Overall, the Report concludes that "a delay of six months to start these criminal investigations constitutes undue delay in the face of the serious allegations that have been made by many people and organizations"[560]. That statement is not based on any legal authority whatsoever. The Mission has no basis for saying why the period constitutes "undue delay" other than the opinions of its members. Moreover, the Mission has no idea when Israel actually launched its investigations. It is merely speculating that it took six months. One can imagine if different parties were involved and the state apparatus quickly investigated and convicted the alleged offenders, the same people would argue that the process was too quick to convict and did not allow proper time for all facts to emerge. These are just further examples of the Mission trying to impose its *ad hoc* views of justice on one of the most advanced and legitimate legal systems in the world.

Finally, in June of 2009, the Criminal Chamber of the National Court of Spain affirmed the legitimacy of Israel's internal investigations by denying universal jurisdiction for events that occurred in Gaza in 2002. The Court acknowledged that Israel is investigating the matter internally[561]. It is an acknowledgment that should be obvious to any honest observer. Unfortunately, the Goldstone Mission's *modus operandi* was not honest observation.

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[558] *Id.* ¶ 1761.
[559] Kosky, *supra* note 177; *see also* Katz & Jerusalem Post Staff, *supra* note 177.
[560] *Id.* ¶ 1617 (at page 505).
[561] *Spain Court Drops Gaza Probe into Israeli Air Raid*, YNETNEWS, 30 June 2009, http://www.ynetnews.com/articles/0,7340,L-3739264,00.html.

CONCLUSION

The international community, including bodies within the United Nations and the International Criminal Court, should disregard the Goldstone Report's biased, procedurally flawed, and substantively erroneous report. The facts indicate that Operation Cast Lead was a focused military operation justified by the inherent right of self-defence and conducted in response to repeated terrorist acts emanating from the Gaza Strip. All indications are that the IDF forces expended great effort to mitigate the risk to innocent civilians during this operation. This does not, of course, mean that Israel (or its military) is perfect or that mistakes and tragedies do not occur in war. However, what should be clear is that the Israeli military has instituted anything but a "culture of impunity". Israeli soldiers are highly disciplined and trained in minimising civilian casualties. When allegations of wrongdoing are made, the Israeli military independently, thoroughly, and honestly investigates such complaints, which are subject to review at the highest level of the Israeli legal system. Where appropriate, those who commit criminal acts in war have been indicted *and prosecuted*.

Hamas, on the other hand, openly terrorises not only Israelis but fellow Palestinians as well. It operates with two goals: maximise death and maximise propaganda. It hides among civilians and invites attacks that will kill innocent people. Nonetheless, the Mission ignores Hamas' transgressions, omitting crucial context in its Report, and instead focuses almost exclusively on Israel. Its data is not reliable, and its perspective is not objective.

The Report largely ignores Israel's efforts to minimise civilian casualties and facilitate humanitarian aid to people living in Gaza. It downplays Hamas terrorist

attacks against the Israeli people and its intimidation tactics used on the Palestinian people. It uncritically uses biased third-party data in reporting on events in Gaza.

As such, the UN Security Council should decline to refer events surrounding Operation Cast Lead to the International Criminal Court. The International Criminal Court should decline to open investigations or cases involving Operation Cast Lead or to consider the Goldstone Report as credible evidence of wrongdoing on the part of Israel. In addition to the clearly erroneous conclusions of fact and law contained within the Report, Israel is already committed to investigating wrongdoing and prosecuting it where appropriate. It has done so in the past, is doing so at present, and will do so again in the future.

Hamas's indiscriminate strikes on Israel triggered the Israeli response. *But for* Hamas's actions, there would have been no Operation Cast Lead. What occurred in Gaza during Operation Cast Lead is a political, legal and military matter that should be dealt with by Israel. And, if any party to the conflict is to be condemned, it is Hamas, since its actions triggered the war.