

**INITIAL RESPONSE TO REPORT OF THE FACT FINDING MISSION  
ON GAZA ESTABLISHED PURSUANT TO RESOLUTION S-9/1 OF THE  
HUMAN RIGHTS COUNCIL**

**General:**

1. The Report of the Fact-Finding Mission established pursuant to Human Rights Council resolution S-9/1 was instigated as part of a political campaign, and itself represents a political assault directed against Israel and against every State forced to confront terrorist threats.
2. In the eyes of the authors of the Report, Israel's operation in Gaza had nothing to do with the 12,000 rockets and mortars fired by Hamas over eight years on towns and villages inside Israel, nor with the fact that close to one million Israeli citizens had to live their lives within seconds of bomb-shelters because they were in range of Hamas attacks. Nor, in their view, did it have anything to do with the smuggling of weapons and ammunition to terrorist groups through hundreds of tunnels under the Gaza-Egypt border. Indeed, neither the right to self defense nor the smuggling of weapons into the Gaza Strip are even mentioned in the Report.
3. Rather, the Report advances a narrative which ignores the threats to Israeli civilians, as well as Israel's extensive diplomatic and political efforts to avoid the outbreak of hostilities. In this narrative self defense finds no place – Israel's defensive operation was nothing other than a "deliberately disproportionate attack designed to punish, humiliate and terrorize a civilian population" (¶ 1690(2)<sup>1</sup>).
4. In support of this vicious and unfounded assertion, the Report has no qualms about bending both facts and law. In the spirit of the one-sided mandate it was

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<sup>1</sup> Apparently due an editing error, some paragraph numbers repeat themselves in the Advance Edited Version of the Mission's Report. Where a paragraph number appears twice, this paper will indicate which paragraph is referred to as first reference (1) or second (2).

given by the HRC resolution, and the clearly stated political prejudices of some of its Members, of the Mission carefully selected its witnesses and the incidents it chose to investigate for clearly political ends. Yet even within this self-selected body of evidence, the Report engages in creative editing, misrepresentations of facts and law, and repeatedly adopts evidentiary double standards, attributing credibility to every anti-Israel allegation, and invariably dismissing evidence that indicates any wrongdoing by Hamas.

5. The Report repeatedly downplays or ignores the reality of terrorist threats, and the complexity of the military challenges in urban warfare. It also goes far beyond its mandate as a fact-finding mission, making legal and judicial determinations of criminal wrongdoing, even in the absence of crucial information.
6. The Report dismisses the Israeli legal system and its extensive investigation process of allegations of misconduct by Israeli armed forces. In so doing, the Report effectively calls into question the internal investigation procedures of the armed forces of most democratic states since Israel's system is similar to, and in many cases more stringent than, those of many other countries.
7. The Report's recommendations are fully in line with its one-sided agenda and seek to harness the Security Council, the General Assembly the International Criminal Court, the Human Rights Council, and the entire international community in its political campaign against Israel.
8. Israel is committed to studying every report, from whatever body, on the conduct of its forces, and to fully examining every allegation of wrongdoing.<sup>2</sup> However, the agenda and tone of this Report clearly undermines the role it might have played in any genuine dialogue about the complex challenges faced in the Gaza operation.

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<sup>2</sup> On 29 July 2009 the Israeli Government published an extensive document, *The Operation in Gaza – Factual and Legal Aspects*, which addresses many of the challenges and dilemmas which arose in the Gaza Operation. It also summarizes the findings to date of Israel's investigations into the Operation. The document and updates with regard to Israel's investigations are available at: [www.mfa.gov.il](http://www.mfa.gov.il).

9. The initial comments set out in this paper are not a comprehensive account of the errors and distortions in the Report. Rather these comments identify some of the most troubling tendencies and implications of the Report and the process that produced it, both for Israel and for any nation involved in armed conflict with terrorist organizations, under the following headings:.

- **The Mandate of the Mission**
- **The Composition and Conduct of the Mission**
- **Selection of Incidents**
- **Evidentiary double standards**
- **Misrepresentations of law and fact**
- **Simplistic approaches to complex military challenges**
- **Minimizing terrorist threats – and vindicating terrorist tactics**
- **Legal and Pseudo-legal findings**
- **Dismissal of national investigations and legal systems**
- **One-Sided Recommendations**

### **The Mandate of the Mission**

10. The Fact-Finding Mission was established by the Human Rights Council in Resolution S-9/1 adopted on 9 January 2009. Even within the context of the Council's disproportionate obsession with criticizing Israel (five out of its eleven special sessions since its founding in 2006 have been devoted to this), this resolution crossed a new threshold, condemning Israel in inflammatory and prejudicial language. This same resolution initiated no less than four separate reporting mechanisms into allegations against Israel, with not a single mechanism to examine Hamas' activities. One of these mechanisms was the Fact Finding Mission.

11. In operative paragraph 14 of the resolution, the Council decided: "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".
12. This wording of the resolution clearly provided that the mandate of the Mission is limited to investigating "violations" by "the occupying Power, Israel against the Palestinian people" (OP14). The explicitly one-sided mandate of the Gaza Fact Finding Mission, and the resolution that established it, were the reason that so many states on the Council refused to support it - including the member states of the European Union, Switzerland, Canada, Korea and Japan.
  13. The prejudicial nature of the mission also led several distinguished individuals, including former High Commissioner for Human Rights Mary Robinson, to refuse invitations to chair the mission. In doing so Mary Robinson admitted that it was "guided not by human rights but by politics"<sup>3</sup>.
  14. Israel, for its part, stated that it would not cooperate with a Mission mandated to investigate the lawful use of force by a State to protect its citizens, yet required to ignore the illegal armed attacks by terrorist groups which made such action necessary. Israel, however, continued its ongoing dialogue with the Office of the High Commissioner of Human Rights, and its engagement and cooperation with numerous international organizations and NGO's conducting inquiries into events in Gaza.
  15. A number of statements were made by Justice Goldstone to the effect that the terms of the mandate of the Mission had been changed.<sup>4</sup> However, as a matter of

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<sup>3</sup> *Le Temps*, 4 February 2009

<sup>4</sup> Indeed Justice Goldstone made every effort to distance the mission from the HRC resolution, such as changing the manner of signing his letters from the "Fact-finding Mission *established under HRC Resolution S-9/I*" to "International Independent Fact Finding Mission".

law, no statement by any individual, only a resolution of the Council has the legal force to change the mandate of the Mission and it never did so.<sup>5</sup>

16. Accordingly, the mandate of the Mission remained the objectionably one-sided mission established in Resolution S-9/1. Nonetheless, in the entire 575 pages of the Mission's report, not a single reference is made to OP 14, which provides the legal basis for its work.

### **The Composition and Conduct of the Mission**

17. The composition of the Mission and its conduct in practice raised serious concerns about its impartiality. In particular:

- A number of Mission members had expressed clear political statements about the conflict prior to the investigation or had been involved in prior investigations regarding Gaza. Most troubling was that during the conflict Mission member Professor Christine Chinkin signed a letter to the Sunday Times insisting that Israel's actions against Hamas attacks were acts of "aggression not self-defense" and "contrary to international humanitarian and human rights law"<sup>6</sup>, prejudging the investigation before it had even begun. Despite repeated requests to the Mission, Professor Chinkin was not recused for her clearly stated positions.
- The conduct of the Mission, including its unprecedented decision to hold live broadcast public hearings, also gave cause for concern. The very point of a fact-finding mission is that a team of experts bring their experience and judgment to bear in assessing the available evidence and drawing responsible conclusions –

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<sup>5</sup> In practice the Mission failed to act in accordance with its own version of the allegedly amended mandate. In particular, while the mandate called for investigation of violations committed "in the context of the military operation conducted in Gaza" the Mission devoted considerable attention to condemning Israel for a broad range of allegations regarding activities in the West Bank, and even regarding its own civilians in Israel, arguing that the term "in the context" of the military operations in Gaza required it to go beyond the violations that occurred in and around Gaza" (¶ 1367).

<sup>6</sup> *Sunday Times Letters Page*, 11 January 2009

not that raw evidence, perhaps of questionable authenticity, is directly broadcast into the public arena. Moreover such a trial by public opinion can of necessity give no weight to confidential or sensitive information.

- The fact that all the witnesses were prescreened and selected, and that none of the Palestinian witnesses in the broadcast hearings were asked questions relating to any Palestinian terrorist activity or the location of weaponry and terrorists in civilian areas, only supports concerns that they were part of an orchestrated political campaign.
- Reports that the members of the Mission were accompanied at every stage of their visit to Gaza by Hamas officials give serious reason to doubt that any true picture of the situation in Gaza, and especially of the cynical abuse of the civilian population by Hamas, can possibly emerge. While Justice Goldstone has denied the Palestinian media report, the Report itself admits that the witnesses interviewed appeared "reluctant to speak about the presence or conduct of hostilities by the Palestinian armed groups" - a reluctance which it suggests "may have stemmed from a fear of reprisals" (¶ 438).

### **Selection of Incidents**

18. Like the prescreened and selected witnesses permitted to appear in the Mission's public hearings, the incidents covered in the Report appear to have been carefully cherry-picked for political effect. For example:

- Despite Israeli and independent sources confirming that the Southern Command Center of Ismail Haniyeh had been located in the Shifa Hospital in Gaza, the Report states that it did "not investigate the case of Al-Shifa hospital and is not in a position to make any finding with regard to these allegations" [¶ 466].
- Similarly, despite widespread reports of the use of mosques to hide weaponry and terrorist activity, the Mission examined only one incident involving a mosque and

found no evidence that this mosque was used for the storage of weapons or any military activity by Palestinian armed groups<sup>7</sup>. The Mission then absolves itself of any responsibility to examine allegations of the abuse of mosques elsewhere in any other instance:

"As far as this mosque is concerned, therefore, the Mission found no basis for such an allegation. However, the Mission is unable to make a determination regarding the allegation in general nor with respect to any other mosque" [¶ 463].

- A troubling insight into the approach of the Mission in selecting the incidents it wished to address was provided in response by Justice Goldstone to an enquiry asking why the Mission had ignored requests to invite witnesses such as Colonel Richard Kemp, the former commander of British forces in Afghanistan and an adviser to the UK cabinet, and a recognized expert in the field of warfare in conditions similar to that in Gaza<sup>8</sup>. In an open response dated 21 September 2009 explaining the refusal to invite Colonel Kemp to testify, Goldstone admitted that the Mission had *deliberately selected* incidents so as to evade the complex dilemmas of confronting threats in civilian areas:

"[t]here was no reliance on Col. Kemp mainly because in our Report we 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". ***We avoided***

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<sup>7</sup> As evidence of the fact the mosque was not being used for terrorist activity, the Report, incredibly, relies on the fact that the mosque was not included in a representative list of sites used by Hamas for terrorist purposes in the Israeli Government publication: *The Operation in Gaza – Factual and Legal Aspects* (¶ 234), though nowhere is it suggested that this list is inclusive; to the contrary, it is specifically described as "illustrative". Moreover, a simple cross check of the casualties against the terrorist groups' own published lists would have revealed that at least six of the fifteen killed in that incident were acknowledged members of Al Qassam Brigades – see, for example, the lists published by the Palestinian Centre for Human Rights at [http://pchrgaza.org/files/W\\_report/English/2008/08-01-2009.htm](http://pchrgaza.org/files/W_report/English/2008/08-01-2009.htm) and Al Qassam's lists of terrorists killed in the operation at <http://www.alqassam.ps/arabic>.

<sup>8</sup> An alternative explanation for the Mission's refusal to invite Colonel Kemp to give evidence may be his reported comments on the BBC on January 9, 2009: "There has never been a time in the history of warfare when any army has made more efforts to reduce civilian casualties and death, than the IDF is doing today in Gaza."

*having to do so in the incidents we decided to investigate."*[emphasis added]

## **Evidentiary double-standards**

19. Hamas launched thousands of rocket and mortar attacks on Israel and admitted embedding itself within the civilian population of Gaza. But the Report strives mightily to avoid finding that Hamas bears *any* responsibility for deaths and destruction in the Gaza Strip. In contrast, the Report is quick to blame Israel, presuming guilt absent compelling evidence to the contrary. Throughout, the Report deems statements of Israeli officials inherently untrustworthy, except where it misuses them to support its ordained conclusions. By contrast, the Report regularly credits statements by the “Gaza authorities” - *i.e.*, the Hamas terrorist organization - as legitimate evidence, except where such statements admit wrongdoing or justify Israeli actions. Moreover, despite overwhelming evidence that Hamas and other terrorist groups operated from densely populated areas and from within hospitals and mosques, booby-trapped civilian areas, and sought to blend in with Palestinian non-combatants, the Report fails to investigate the most egregious and publicly known examples of such conduct, and even goes so far as to raise doubts regarding the intentionality of Hamas’ tactics.

- *Presumption that Israeli military sources are untrustworthy.* Routinely treating Israeli statements as inherently unreliable, the Mission discounts even the veracity of photographic and satellite image data supplied by the IDF, on no more basis than the fact that the Mission did not have a means to verify the data independently. (¶ 449) The Report also points to Israel’s reliance on newspaper reports rather than its own intelligence to explain its conduct of the operation as an admission that IDF sources are unreliable (¶ 612), failing to recognize that, in many circumstances, intelligence information -- no matter how compelling -- simply cannot be disclosed to the public. Perhaps most tellingly, the only



circumstance in which the Report appears to accept and emphasize Israeli statements is where it finds such statements useful to condemn Israel.<sup>9</sup>

- *Refusal to accept even the most direct admissions by Hamas as evidence of guilt.* The Report cites the admission<sup>10</sup> of a Hamas official that Hamas “created a human shield of women, children, the elderly and the *mujahideen*, against the Zionist bombing machines.” (¶ 475) The Report then states, incredibly, that it does not consider this confession “to constitute evidence that Hamas forced Palestinian civilians to shield military objectives against attack. (¶ 476) The Report cites the admission of a fighter for Islamic Jihad that “*the most important thing is achieving our military goals. We stay away from the houses if we can, but that’s often impossible.*” (¶ 451) The Report then states, incredibly, that this admission of using civilian homes where needed for military objectives, “*suggests the absence of intent.*” (¶ 451)
- *'Reinterpretation' of Hamas statements.* In seeking to support its assertion that the Hamas police were not involved in terrorist activity, the Report has to deal with the admission of police spokesperson Islam Shahwan who that the police had been given orders "to face the [Israeli] enemy". The Mission unquestioningly accepted his explanation that the intention was that in the event of a ground invasion the police would continue ensuring the movement of foodstuffs and upholding public order(¶ 414). The Mission is similarly accepting of an interpretation given by the director of the Police that by "resistance fighters" his intention was that they would develop into a law enforcement force (¶ 416). At

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<sup>9</sup> The Report's double-standard in attributing credibility is clearly apparent in its treatment of inconsistencies. In relation to an incident at al-Fakhura junction in Jabalya, the Mission "considers the credibility of Israel's position [that Hamas groups were firing mortars from the area] damaged by the series of inconsistencies, contradictions and factual inaccuracies in the statements justifying the attack" (¶ 41), and "views as being unreliable the versions given by the Israeli authorities" regarding this incident (¶700). Regarding contradictions in Palestinian evidence, by contrast, the Report is forgiving in the extreme, noting: "There are some minor inconsistencies, which are not, in the opinion of the Mission, sufficiently weighty to cast doubt on the general reliability of Majdi Abd Rabbo. There are also, not surprisingly, some elements of the long account which appear in some versions and not in others. The Mission finds that these inconsistencies do not undermine the credibility of Majdi Abd Rabbo's account"(¶1087).

<sup>10</sup> Indeed the Report even questions the authenticity of the stated ("reportedly stated") even though the statement in question was submitted as an original video clip of a Hamas television broadcast.

the same time, the Report dismisses posters and photographs of policemen praising their involvement as members of the terrorist groups, arguing that this does not mean that these individuals "were involved in resistance in any way" and suggesting that they had been "adopted" post-mortem by terrorist groups(¶ 421). Beyond these reinterpretations of the evidence, the Report claims that no other evidence has been presented against "the civilian nature of the police in Gaza" (¶ 417), quite simply ignoring numerous explicit statements in Israel's report: *The Operation in Gaza – Factual and Legal Aspects*, which it quotes on many other matters. Among the many statements cited, ignored by the Report, is the admission by Hamas police chief Jamal al-Jarrah that "the police took part in the fighting alongside the resistance".

- *Picking and choosing its sources for political effect.* At times even the same source is regarded by the Report as reliable insofar as its criticism of Israel is concerned but is discounted to the extent that it indicates wrongdoings by Hamas. The group of Israeli soldiers, "Breaking the Silence", for example, is quoted authoritatively throughout the report for its criticisms of Israel (¶ 457, 725, 800, 949, 996, 1022, 1088 – this last paragraph admitting "the soldier does not appear to have been a direct witness to the incident, but rather heard it from others ", 1089, 1183 and footnotes 362, 558), and yet the statements of the group are given no weight when they confirm that Hamas booby trapped civilian buildings<sup>11</sup>. (¶ 460)
- *Selective quotations regarding goals of the operation.* The Report relies on uncited quotations in an NGO report as questionable support for its assertion that "[s]tatements by political and military leaders prior to and during the military operations in Gaza leave little doubt that disproportionate destruction and violence against civilians were part of a deliberate policy." (¶ 1211) Yet the Report ignores repeated statements of Israel's leaders emphasizing that, to the

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<sup>11</sup> Needless to say, other testimonies reported by *Breaking the Silence* providing accounts of soldiers caring for injured civilians, and commanders even forbidding their soldiers from sitting on the sofas of the homes they entered, are not deemed worthy of inclusion in the Report.

contrary, Israel's aim was to spare no effort to avoid or minimize civilian casualties.<sup>12</sup>

## **Misrepresentations of fact and law**

20. Beyond the adoption of evidentiary double-standards, and the creative interpretation of inconvenient evidence, the Report frequently presents explicit misstatements of both facts and law. For example:

### ***Misstatements of fact:***

- The Report accuses Israel of discriminating against its non-Jewish citizens by not providing shelters to protect Arab towns and villages from the rocket attacks. (¶ 1709, 1711(1)). In fact, the relevant decision<sup>13</sup> of the Government of Israel made no such discrimination, and provided all municipalities up to seven kilometers from the fence with a budget to cover the building of shelters. Municipalities

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<sup>12</sup> The position of Israel was stated directly by Prime Minister Ehud Olmert at a press briefing on 27 December 2008:

*On Thursday, 25 December 2008, I made it clear to the residents of Gaza that we are not acting against them and that we have no intention of punishing them for the actions of Hamas. We will see to the needs of the population in Gaza and will do our utmost to prevent a humanitarian crisis that will impinge upon residents' lives. Residents of Gaza, we are not your enemies and we are not fighting against you. This terrorist organization has brought disaster to two peoples. Israel is not fighting the Palestinian people but the Hamas terrorist organization that has taken it upon itself to act against the residents of Israel. Therefore, the targets that were attacked today were selected accordingly, with stress being placed on avoiding harm to innocents.*

Similarly, President Shimon Peres emphasized on 28 December 2008:

*I feel that in our hearts, we don't have any hatred for the Gazan people. Their suffering doesn't carry any joy in our hearts. On the contrary, we feel that the better they will have it, better neighbors we shall have. Now that Hamas is turning to the Arab world for help, the truth is that the Arab world has to turn to Hamas for the help of Hamas. If Hamas will stop it, there is no need for any help. Everything can come again to normalcy. Passages: open; economic life: free; no Israeli intervention; no Israeli participation in any of the turnarounds in Gaza.*

Foreign Minister Tzipi Livni made similar statements, for example on 4 January 2009:

*We are not fighting the Palestinians – we are fighting Hamas, a terrorist organization which controls the Gaza Strip. True, there are also civilian casualties, but we are trying to avoid civilian casualties, even though it is not easy while Hamas is targeting our civilians.*

<sup>13</sup> Govt. Decision number 2341

located further away from the fence, which included non-Jewish villages as well as the Jewish cities of Be'er Sheva and Ashqelon, did not qualify for this funding.

- The Report repeatedly misrepresents historical facts, particularly in the context of 'explaining' Israel military operations. It states that Operation "Hot Winter" was launched by Israel in February 2008 following a rocket attack towards the city of Ashkelon that caused 'light injuries' (¶ 196). In fact, Roni Yihye, aged 47, a student at Sapir College, was killed after sustaining massive wounds to his chest. Similarly it states that Operation "Days of Penitence" was launched in September-October of 2004, in retaliation for the firing of rockets against the town of Sderot and Israeli settlements, but fails to mention the deaths of Yuval Abebeh (aged 4) and Dorit (Masarat) Benisian (aged 2) of Sderot, killed by a Kassam rocket fired into Gaza while playing in the street. In both cases Hamas claimed responsibility for the attacks.

***Misstatements of law:***

- The description of Israel's military courts system (¶1599-1600) contains numerous errors and inaccuracies. For example, its description of the appeals process relies on provisions which were amended in 2004 and are no longer in force today.
- In support of its assertion that the Gaza Strip is to be regarded as occupied territory, even following the withdrawal of all Israeli forces and all 9000 Israeli civilians in the Disengagement Initiative in 2005, the Report cites as authority UN Security Council Resolution 1860 (footnote 163 to ¶277). But this resolution makes no such assertion. In fact, in the negotiations prior to the adoption of this resolution, a Libyan draft which sought to insist that Gaza was still occupied was specifically *not* adopted by the members of the Security Council.

## **Simplistic approaches to complex military challenges**

21. The Report fails to consider the realities of the conflict and in particular the mode of operation of terrorist organizations which deliberately endanger civilians and make urban areas their battlefield of choice. It makes no reference to the recruitment and exploitation of children by Hamas and the smuggling of weapons and ammunition through tunnels, and ignores clear evidence of the abuse of mosques and hospitals. At the same time, it makes unfounded assumptions regarding military options and so places unrealistic and unworkable demands on any State seeking to protect its civilians from terrorist attacks.
22. The Report pays lip service to the established international law principle that the legality of military action must be assessed based on the information available to a “reasonable military commander” at the time of each individual targeting decision, and not based on hindsight. But the Report nonetheless repeatedly reaches sweeping conclusions about “war crimes” without ever examining such real-time information. The Report does not examine what information was available to the commanders in the field, how they might have perceived the immediate threats to themselves and their soldiers, what weapons were available at that moment on the ground, and what information was available about potential risks to civilians. Instead, time and time again, the Report substitutes its own hindsight judgment. For example:
- *Second-guessing choice of weapons and tactics without knowledge of available resources.* The Report concludes that with respect to one particular incident, Israeli forces should have used different weapons to further limit the risk to civilians in the area, and is untroubled by the fact that it has no information regarding the available troops, weapons or intelligence. The Report observes that forces had 50 minutes in which to respond to a significant threat (the time used by the force to accurately identify the source of fire), and opines that given this time, “it is difficult to believe that mortars were the most accurate weapons available” (¶ 696). Displaying a troubling disconnect from the reality of urban fighting on many simultaneous fronts, it suggests that the forces in the field should used

"helicopters and fighter jets", assuming that these are readily available to commanders in the field.<sup>14</sup>

- *Second-guessing what commanders should have anticipated.* The Report concludes with respect to another incident that Israeli forces should not have been surprised that they were faced with anti-tank missile fire in the vicinity of a UNRWA installation, and therefore should have taken different steps to respond to this hostile fire, other than applying the commonly used technique of smoke screening (¶ 588). Again, the Report seeks to substitute its judgment for that of the commanders in the field, without any of the information necessary to conduct a proper analysis under the applicable law.
- The Report also ignores Israel's extensive efforts, even in the midst of fighting, to maintain humanitarian standards and protect civilians. It makes no mention, for example, of IDF precautions such as cross-verification of intelligence prior to targeting or the numerous incidents in which operations were aborted due to concerns about disproportionate civilian harm<sup>15</sup>. And while the Report does, reluctantly, acknowledge Israel's "significant efforts" to issue warnings before attacks, it dismisses these as not having been effective (¶ 1717(2)).

### **Minimizing terrorist threats – and vindicating terrorist tactics**

21. The Report adopts an approach that encourages armed terrorist groups worldwide to adopt the strategy of hiding behind civilians and civilian infrastructure. The Report strongly condemns as unlawful Israel's attacks on terrorists - even those actively engaged in combat - when the latter were in the vicinity of civilians. Under the Report's view of appropriate rules of engagement, any State would be

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<sup>14</sup> The United Nations Headquarters Board of Inquiry, which investigated the same incident, refrained from making such naïve and blasé assertions, concluding that: "it was not in a position to assess whether such a means was available to the IDF at the time and, if it was not, the length and consequences of any delay until it might have been."

<sup>15</sup> See for example: *The Operation in Gaza – Factual and Legal Aspects*, paras 249-283

virtually powerless to target a terrorist group that operates in densely populated areas and seeks to blend in with the civilian population. The Report also suggests that the members and infrastructure of a terrorist organization enjoy protected status under international law so long as the organization exercises *de facto* control over a civilian population. Presumably, the Taliban in Afghanistan and Pakistan, the FARC in Colombia, and other armed groups unlawfully controlling territory in any part of the world would enjoy similar protections under the Report authors' worldview, which differs materially from the established principles of international law.

22. The following are examples of the Report's logic:

- *Justification for terrorism.* The Report supports the so-called "right" of Hamas to use force against Israel in the name of self-determination (¶ 269), while ignoring the consistent approach of Hamas – as evident in its Charter and the statements of its leaders - which not only rejects the peace process agreed by Israel and the PLO but explicitly calls for the destruction of Israel. The Report describes the rocket attacks from Gaza, including those which immediately followed Israel's withdrawal of all forces and civilians from the area, as “reprisals” (¶109, ¶1662-1665(2)), in clear contradiction to the decisive position of the international community that terrorist acts are "in any circumstances unjustifiable".<sup>16</sup> At the same time, the Report fails to acknowledge that stopping the rocket attacks was a valid objective and discusses the rocket attacks almost as an afterthought. (¶1212).
- *Minimizing the impact of terrorist attacks on Israel.* The Report seeks to limit the scope of a State's response to terrorist threats by downplaying and minimizing the effects of such attacks. For example, describing rocket and mortar attacks on the Israeli town of Ashdod, the Report describes the impact as "a brief interruption to [its] economy brought about by the temporary displacement of some of their

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<sup>16</sup> See e.g. UNGA Resolution 51/210, March 1977

residents"(¶ 107), simply ignoring the death and injury to Ashdod's residents caused by missile attacks.

- *Finding that use of force against terrorists operating in proximity to civilians is unlawful.*

The Report effectively suggests that Israel was not permitted to fire upon terrorists located in proximity to civilians (¶ 42, ¶ 520, and ¶ 698). In reaching this conclusion, the Report effectively validates the terrorist tactic of hiding behind the civilian population. Moreover, the Mission acknowledges that Hamas fighters mingled with the population (¶ 35), but then, disregarding the explicit admission of a Hamas officials of the use of human shields, and the overwhelming corroborative evidence, the Report concludes that the Mission “found no evidence to suggest that Palestinian armed groups either directed to civilians to areas where attacks were being launched or forced civilians to remain within the vicinity of attacks.” (¶ 492)

- *Legitimization of Hamas based on its de facto control over civilian activities in the Gaza Strip.* The Report scarcely acknowledges that Hamas is a terrorist organization and instead refers to its leaders as “Gaza authorities” (e.g. ¶ 380-90)<sup>17</sup>. The Report states, that even if military components of Hamas are terrorist, the organization has “distinct political, military and social welfare components.” disregarding the determinations of the European Union and other countries drawing no such distinction. With regard to the targeting of Hamas infrastructure, the Report fails to investigate the multitude of military uses to which Hamas has put ostensibly civilian targets (¶ 384-389). Furthermore, the Report has refused to give any weight to the fact that the targeting of infrastructure by Israeli forces has been consistent with a number of engagements, such as those by NATO forces in Yugoslavia, that have been found to be lawful in the past. (¶¶ 1197-98).

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<sup>17</sup> Indeed by asserting that "Israel...considers Hamas to be a terrorist organization" (¶ 1206), the Report inaccurately suggests that is not so regarded by other States.



## Legal and Pseudo-legal findings

23. Justice Goldstone, as Head of the Mission, repeatedly insisted that the Mission was not a judicial inquiry and so "could not reach judicial conclusions."<sup>18</sup> The Report, however, is highly judicial in nature, reaching conclusive judicial determinations of guilt, and including 'detailed legal findings' even in the absence of essential information, including sensitive intelligence information which Israel did not feel able to provide. These determinations are made notwithstanding the Report's admission that it does not "pretend to reach the standard of proof applicable in criminal trials"(¶ 27).

24. The Report is rife with purported legal analysis and findings that Israeli forces committed "grave breaches" of international law and "war crimes", without any recognition that such findings can only be based on affirmative evidence of intention to target civilians (as opposed to military objectives). In other words, there must have been intent to cause harm to civilians, as distinct from the knowledge that civilians may be harmed as an unintended consequence of pursuing a military goal.<sup>19</sup>

25. In applying the intentionality requirement, the Report commits the following egregious errors:

- *Inferring the commander's state of mind from circumstantial evidence.* The Report states that "In almost all of the cases the Mission has ... been able to

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<sup>18</sup> Indeed it was on this basis that Goldstone excused the inclusion of the clearly partisan Mission member Professor Christine Chinkin, admitting that: "[I]f it had been a judicial inquiry, that letter [Chinkin] signed would have been a ground for disqualification" (Interview to *BusinessDay*, 4 August 2009)

<sup>19</sup> As stated by a recognized treatise on the subject, "[t]he prerequisite for a grave breach is intent; the attack must be intentionally directed at the civilian population or individual civilians, and the intent must embrace physical consequences." (Rüdiger Wolfrum & Dieter Fleck, *Enforcement of International Humanitarian Law*, in *The Handbook of International Humanitarian Law* 675, 697 (Dieter Fleck ed., 2d ed. 2008)). Indeed, according to the International Criminal Tribunal for the former Yugoslavia, to constitute a war crime "must have been conducted *intentionally* in the *knowledge*, or when it was impossible not to know, that civilians or civilian property were being targeted." (*Prosecutor v. Galić*, Case No. IT-98-29-T, *Judgment and Opinion*, ¶ 42 (5 December 2003) quoting *Prosecutor v. Blaškić*; Case No. IT-95-14-T, Trial Judgment, ¶ 180 (3 March 2000)).

determine whether or not it appears that the acts in question were done deliberately.” (¶ 25) In fact, the Report reaches a finding that Israeli forces intentionally targeted civilians or U.N. facilities by simply inferring this because the Mission lacked information to the contrary. (¶ 809) This approach is fundamentally flawed, as it reverses the burden of proof under international law, which requires that intentionality be established by evidence, rather than assumed in the absence of evidence to the contrary. In dealing with Hamas, by contrast, the Report rejects the existence of specific intent to shielding its operatives from counter-attack by acting from civilian facilities, since "the Mission has not been able to obtain any direct evidence on this question" (¶ 450).

- *Highly implausible and unjustifiable assumptions regarding malicious intent of Israeli forces.* In the case of the bombing of a flour mill, the Report states that Israeli forces attacked the mill “for the purposes of denying sustenance to the civilian population.” (¶ 50) No evidence is presented to show the existence of such a nefarious motive, and there is no attempt to reconcile this conclusion with Israel’s humanitarian efforts, including enforced pauses in fighting to allow for the crossing into Gaza of food and other basic goods<sup>20</sup>. Instead, the malicious intent is simply presumed.
- *Suggestion that intentional firing of a weapon satisfies the willfulness requirement for responsibility under international law.* The Report states that Israeli fire was “intentionally directed” at civilians in numerous incidents in which it is obvious that the civilians were not the *object* of attack, but rather its unintended victims. (¶ 810) Moreover, in one example where a civilian home was struck due to operational error of Israeli forces, the Report makes the following incredible assertion: “The firing of the projectile was a deliberate act in so far as it was planned.... The fact that target selection had gone wrong at the planning stage does not strip the act of its deliberate character.” (¶ 861) Of course, aside from the rare case in which a weapon fires due to a malfunction, any firing can always

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<sup>20</sup> During the conflict a total of 1,511 trucks carrying 37,162 tons of supplies from Strip including 525 trucks carrying 14,208 tons of flour entered the Gaza Strip from Israel through the Keren Shalom Crossing. See: *The Operation in Gaza – Factual and Legal Aspects*, para 271.

be said to have been “planned.” This does not make every firing of a weapon that happens to injure civilians an intentional violation of international law.

- *Adverse inferences on intent from the extensive Israeli efforts to protect civilians.*  
The Report considers that Israel’s extensive system of training, operational planning and supervision to ensure compliance with international law is relevant only insofar as it establishes that Israel’s violations were deliberate (¶ 61). Furthermore, rather than applaud Israel’s use of precision weapons, the Report highlights such use only to assist it in finding intentionality of striking civilian targets (¶¶ 1186-1188). Finally, instead of recognizing Israel’s massive efforts to implement a system of warnings to protect the civilian population as evidence of intent to avoid civilian casualties, the Report uses Israel’s continued efforts to improve the warning system as evidence of its inadequacy (¶¶ 522-523).

### **Dismissal of national investigations and legal systems**

26. Throughout the Report, Israel is treated as a banana republic, rather than as a democratic nation with an effective and respected judicial system designed to protect the rule of law (including international law)<sup>21</sup>. Despite the highly developed jurisprudence of the Israeli Supreme Court on international humanitarian law -- jurisprudence on which the Report itself explicitly relies -- the Report discounts the availability of direct petitions to the Court as a means of addressing any unlawful conduct by IDF forces. The Report’s conclusions are diametrically opposed to those in a recent decision of the Spanish appeals court in the *Shehadeh* case, which found the military, civilian and judicial review system of Israel to be legitimate and available to redress grievances against the Israeli

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<sup>21</sup> For examples of the regard in which Israel's Supreme Court is held in House of Lords and European Court of Justice cases, see for instance, Judgments, UK Parliamentary Business, *Parliament*, June 2005; Opinion Of Advocate General Poiares Maduro, Case C-415/05 P, *European Court of Justice*, 23 January 2008. See also *The Operation in Gaza – Factual and Legal Aspects*, para 304 and footnotes 237 and 238 for additional examples of reliance on and respect for Israel Supreme Court decisions in Canadian, US and European judicial systems.

military for an allegedly unlawful air strike in Gaza. That court, which unlike the Mission, is a genuine judicial organ, explained:

“[D]isputing the impartiality and organic and functional separation from the Executive of the Israeli Military Advocate General, the Attorney General of the State of Israel and the Investigation Commission appointed by the Israeli Government involves ignoring the existence of a social and democratic state with rule of law, where the members of the Executive and the Judiciary in question are subject to the rule of law.”<sup>22</sup>

27. The Court of Appeals concluded that, “[o]n the basis of those premises, there can be no doubt whatsoever with regard to the exercise of pertinent criminal actions in the event that the existence of any criminally relevant conduct on the part of the individuals who ordered, planned and carried out the bomb attack should come to light in the course of the investigations performed.”

- *Criticism of standard investigative practices.* The Report makes sweeping condemnations about the Israeli system of investigation and prosecution, concluding that it does not comply with international standards of impartiality and independence. (¶ 121). The criticism rests on the supposed “fatal flaw” that the system includes, at the outset, “operational debriefings” through internal IDF field investigations. But field investigations are common to most major militaries in the world, and indeed are necessary to apply the proper legal standards, which require a determination of what was known to commanders and soldiers at the time of an incident, regarding targets, available weapons systems, and risks of civilian casualties. Indeed, operational briefings are a critical tool used to improve military operational procedures and save civilian lives. If the use of “operational debriefings” were a basis for condemning justice systems as violating international standards, most States would be at risk of similar condemnation.

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<sup>22</sup> Unofficial translation of Decision no. 1/2009, 17 July 2009 (plenary), of the National Criminal Court of Appeals (“Sala de lo Penal de la Audiencia Nacional”), at 24, regarding Preliminary Criminal Proceedings no. 154/2008 of the Central Investigation Court no. 4.

- *Overlooking the many independent levels of scrutiny existing in the judicial system.* The results of field investigations are reviewed in the first instance by the Military Advocate General, which is independent from the IDF command hierarchy. Decisions of the Military Advocate General regarding the opening or non-opening of criminal investigations connected to the operation in Gaza, as well as all decisions regarding the filing or non-filing of indictments, are subject to review by the Attorney General. Further, complainants or non-governmental organizations who are dissatisfied with a decision of the Military Advocate General or the Attorney General may petition directly to Israel's Supreme Court. The Supreme Court allows direct access to Israelis and Palestinians to petition for judicial review of decisions of the Israeli Government and military officials, including the decision whether to open a criminal investigation in a specific case. This system compares favorably with those of many other democratic States, which also rely on a combination of military, criminal and administrative investigations.
- *Ignoring the Israeli investigations underway.* The Report expresses doubt that Israel will “carry out genuine investigations” (¶ 122) and condemns Israel for “increasing unwillingness ... to open criminal investigations” (¶ 1654). But as Israel publicly reported in July, there are scores of investigations now underway, including into many of the very incidents that the Report prejudices.<sup>23</sup> For

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<sup>23</sup> Following the end of the Gaza Operation in January 2009, the Israel Defense Forces conducted five major "command investigations" in response to complaints and allegations raised regarding with five broad areas: allegations of attacks on UN facilities, allegations of attacks on medical facilities and staff, incidents with a large number of civilian casualties, use of munitions containing white phosphorus, and allegations regarding the destruction of private property for military needs. The findings of these investigations are currently being examined by the Military Advocate General in order to determine whether their findings give cause for the opening of criminal investigations by the Military Police. The conclusions and decisions of the Military Advocate General in this regard are subject to the review of Israel's Attorney General and the ultimate review of Israel's Supreme Court. Within the framework of these five broad investigations, 20 specific incidents were examined including four incidents that appear in the Goldstone Report. In addition to these broad investigations, 80 other incidents have been investigated. Some of these investigations are the result of complaints directly presented to the Military Advocate General or to Israel's Attorney General by Israeli and international non-governmental organizations. Four incidents that appear in the Goldstone report have already appeared in those reports and are currently under investigation within this framework. Of the more than 100 incidents that have been investigated so far, 15 Military Police criminal investigations were opened almost immediately after their submission, without being referred to preliminary field investigations, since they dealt with suspected acts which were outside the course of operational military activities, such as the mistreatment of prisoners and theft. One case, thus far, dealing with theft, has already led, in July 2009, to an indictment and conviction. Recently, eight additional criminal investigations by the

example, the Military Advocate General is now awaiting the findings of field investigations into forty incidents involving deaths or injuries to civilians, and there are twenty three additional Military Police criminal investigations currently in process. These include investigations of incidents involving the alleged shooting of civilians carrying white flags and alleged use of civilians as human shields. Despite numerous public announcements about the conduct and findings of these investigations, the Report does not even acknowledge that such incidents are presently under review.

- *Inventing a new standard of “undue delay” in commencing investigations.* The Report complains that investigations of some of the incidents did not begin until several months after the events (¶ 1617(2)), though it gives no indication as to how it determined the date of the commencement of the investigations. Moreover, no standard of international law deems several months as undue delay. The implications of this pronouncement are troubling for other countries, which may find their entire judicial system summarily condemned as violating international standards, because the pace of their investigations is deemed unsatisfactory.

28. The Report's dismissal of Israel's own legal safeguards and judicial mechanisms is accompanied by a troubling disdain for broader democratic values. While the Report has no hesitation in relying heavily on reports of Israeli human rights organizations, it devotes considerable attention to "repression of dissent in Israel".

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Military Police were ordered regarding matters more closely connected to "operational activities", including allegations of shooting towards civilians carrying white flags and directing flechette munitions towards civilians or civilian targets. Seven incidents that appear in the Goldstone report are currently under Military Police criminal investigation. In a typical Military Police investigation, evidence is taken from Palestinian and other complainants who may have witnessed the events. In such cases, the investigative office of the Military Police approaches the complainant to assist in contacting potential witnesses. For example, the investigative office of the Military Police has approached human rights NGO's for assistance regarding currently ongoing cases. Additionally, the investigative office of the Military Police has, via Israel's Ministry of Foreign Affairs, approached the Office of the High Commissioner for Human Rights to receive additional information regarding an incident where claims of use of human shields were raised. That incident remains under investigation.

It bases this assertion in large part on the widespread support for the military operation in the Israeli public, assuming that Israel has "created a political climate in which dissent is not tolerated" (¶ 1700). The notion that the majority of Israelis genuinely supported action to bring years of continuous rocket and missile attacks against Israeli civilians to an end does not appear to have occurred to the members of the Mission. Nor, it should be noted, does the brutal repression of dissent by the Hamas regime warrant a mention in the Report.

### **One-Sided Recommendations**

29. The Report's recommendations are as one-sided as its findings. It seeks to harness the Human Rights Council, the Security Council, the General Assembly, the Office of the High Commissioner of Human Rights, the International Criminal Court and the international community as part of its campaign.
30. While token recommendations are made in respect of the Palestinian side, the Report seeks to generate international pressure directed solely against Israel. For example:
  - The Report calls for the United Nations General Assembly to establish an escrow fund (¶1768(2)) – but the only victims entitled to claim compensation are "Palestinians who have suffered loss and damage" and the only party required to fund this is Israel. The Report does not make any demands on Hamas to make reparation for the damage and injury caused by its terrorist attacks – even though the Report recognizes that the rocket and mortar attacks on Sderot alone have forced Israel to spend hundreds of millions of dollars to protect civilian homes and buildings.
  - The Report calls for an 'urgent discussion' on the "future legality of the use of certain munitions referred to in this Report". Pending the outcome of this attempt to make unlawful currently lawful munitions – and notwithstanding continued

terrorist threats - it calls on Israel to "undertake a moratorium in the use of such weapons"(¶1768(2)). No similar call is directed to Hamas' with regard to its use of inherently indiscriminate rockets.

- Notwithstanding its ostensible call for a six month waiting period for the conduct of credible investigations into allegations of wrongdoing by the parties, and the established principle of complementarity which gives priority to local proceedings, the Report issues an immediate call on States Parties to the Geneva Convention to "start criminal investigations in national courts, using universal jurisdiction"(¶1772(2)). That the intention of the Report is that such investigations be directed only against Israel, and not the Hamas terrorists, is made clear by its statement: "In the context of increasing unwillingness *on the part of Israel* to open criminal investigations that comply with international standards the Mission supports the reliance on universal jurisdiction..." (¶127).

## **Conclusion**

31. In the final analysis, the true test of such a Report can only be whether in future armed conflicts it will have the effect of increasing or decreasing respect for the rule of law by the parties. Regrettably a one-sided report of this nature, claiming to represent international law but in fact perverting it to serve a political agenda, can only weaken the standing of international law in future conflicts.
32. A Report of this nature broadcasts a troubling – and legally unfounded - message to States everywhere confronting terrorist threats that international law has no effective response to offer them, and so serves to undermine willingness to comply with its provisions. At the same time, it signals an even more troubling message to terrorist groups, wherever they are, that the cynical tactics of seeking to exploit civilian suffering for political ends actually pays dividends.