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Goldstone Reconsidered

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GOLDSTONE RECONSIDERED

RICHARD D. ROSEN*

*“The Gaza military operations were, according to the Israeli Government, thoroughly and extensively planned. While the Israeli Government has sought to portray its operations as essentially a response to rocket attacks in the exercise of its right to self-defence, the Mission considers the plan to have been directed, at least in part, at a different target: the people of Gaza as a whole.”*¹

*“While the investigations published by the Israeli military and recognized in the U.N. committee’s report have established the validity of some incidents that we investigated in cases involving individual soldiers, they also indicate that civilians were not intentionally targeted [by Israel] as a matter of policy.”*²

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1. U.N. Human Rights Council, *Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact Finding Mission on the Gaza Conflict*, ¶ 1883, U.N. Doc. A/HRC/12/48 (Sept. 25, 2009) [hereinafter *Goldstone Conclusions*], available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf>.

2. Richard Goldstone, *Reconsidering the Goldstone Report on Israel and War Crimes*, WASH. POST, Apr. 1, 2011, http://www.washingtonpost.com/opinions/reconsidering-the-goldstone-report-on-israel-and-war-crimes/2011/04/01/AFg111JC_story.html [hereinafter *Reconsidering the Goldstone Report*].

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INTRODUCTION

Two weeks into Israel's 2008-2009 military operation in Gaza and nearly a week before the guns fell silent, the United Nations Human Rights Council (Human Rights Council) directed the dispatch of an "independent fact-finding mission" to investigate the conflict, specifically "violations of international human rights law and international humanitarian law" by Israel.³ On April 3, 2009, "the President of the Human Rights Council established the United Nations Fact Finding Mission on the Gaza Conflict,"⁴ appointing South African Jurist Richard Goldstone to head the inquiry.⁵ The Mission conducted field visits and interviews, including publicly broadcasted hearings in Gaza and Geneva.⁶

In September 2009, the Mission issued its findings and conclusions in a nearly 500-page report that contained a variety of Palestinian grievances against Israel, many of which had nothing to do with the Gaza conflict at all.⁷ The Mission's most explosive finding,

3. Human Rights Council Res. S-9/1, *The Grave Violations of Human Rights in the Occupied Palestinian Territory, Particularly Due to the Recent Israeli Military Attacks Against the Occupied Gaza Strip*, 9th Sess., Jan. 9-12, 2009, ¶ 14, U.N. Doc. A/HRC/S-9/L.1, (Jan. 12, 2009) [hereinafter H.R.C. Res. S-9/1], available at www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/docs/A-HRC-S-91-L1.doc.

I use the terms "international humanitarian law," "law of war," and "law of armed conflict" interchangeably. In this regard, the terms deal with the conduct of military operations (*jus in bello*) as opposed to the legality of a state's recourse to force (*jus ad bellum*). See Christopher Greenwood, *Historical Development and Legal Basis*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 11, 13-14 (Dieter Fleck ed., 2d ed. 2008).

4. U.N. Human Rights Council, *Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact Finding Mission on the Gaza Conflict*, ¶ 131, U.N. Doc. A/HRC/12/48 (Sept. 25, 2009) [hereinafter *Goldstone Report*].

5. *Id.* ¶ 132; Press Release, Human Rights Council, Richard J. Goldstone Appointed to Lead Human-Rights Council Fact-Finding Mission on Gaza Conflict, U.N. Press Release (Apr. 3, 2009), available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=8469&LangID=E>.

6. *Goldstone Report*, *supra* note 4, ¶¶ 5, 7, 141.

7. For example, the report deals with such subjects as the treatment of Palestinians on the West Bank (*id.* ¶¶ 1381-1440); the detention of Palestinians in Israeli prisons (*id.* ¶¶ 1441-1507); restrictions on Palestinian movement (*id.* ¶¶ 1508-49); Israeli settlements (*id.* ¶¶ 1538-39); and repression of dissent in Israel proper (*id.* ¶¶ 1692-1772). While the Human Rights Council mandate was sufficiently broad to cover these matters, the Mission's primary responsibility was to deal with the Gaza conflict. H.R.C. Res. S-9/1, *supra* note 3, ¶ 14; see also Trevor Norwitz, *An Open Letter to Richard Goldstone*, COMMENTARY, Oct. 19, 2009, <http://www.commentarymagazine.com/viewarticle.cfm/an-open-letter-to-richard-goldstone-15284>; David Landau, *The Gaza Report's Wasted Opportunity*, N.Y. TIMES, Sept. 20, 2009, at WK-10, <http://www.nytimes.com/2009/09/20/opinion/20landau.html>; Moshe Halbertal, *The*

however, was that Israel—as a matter of state policy—intended to kill Palestinian civilians and destroy their property,⁸ thereby committing grave violations of the law of armed conflict.⁹ The Mission predicated its conclusion upon the number of Palestinian civilian casualties,¹⁰ statements by current and former Israeli officials about Israeli military objectives in Gaza and other conflicts,¹¹ and Israel’s advanced targeting technology and proficiency.¹² By an October 16, 2009, resolution, the Human Rights Council endorsed the Mission’s findings and conclusions.¹³ The United Na-

Goldstone Illusion, in THE GOLDSTONE REPORT 346, 354 (Adam Horowitz, Lizzy Ratner, & Philip Weiss eds., 2011).

The Report also criticizes as discriminatory Israel’s “right-of-return” for Jews to maintain Israel’s identity as a Jewish state. *Goldstone Report*, *supra* note 4, ¶ 207. The Report fails to mention, however, that the Hamas Covenant calls for a wholly Islamic Palestinian state to govern both the occupied territories and Israel proper. Hamas, *The Covenant of the Islamic Resistance Movement*, AVALON PROJECT, YALE LAW SCHOOL, art. 11, (Aug. 18, 1988), http://avalon.law.yale.edu/20th_century/hamas.asp (last visited June 4, 2012) [hereinafter *Hamas Covenant*]:

The Islamic Resistance Movement believes that the land of Palestine is an Islamic Waqf consecrated for future Moslem generations until Judgment Day [sic]. . . .

This is the law governing the land of Palestine in the Islamic Shari’a (law) and the same goes for any land the Moslems have conquered by force, because during the times of (Islamic) conquests, the Moslems consecrated these lands to Moslem generations till the Day of Judgement [sic].

Similarly, the Palestinian Basic Law declares that Islam is the official religion of the Palestinian state and that “principles of Islamic[]*Shari’a* shall be a principal source of legislation.” PALESTINIAN BASIC LAW, art. 4 (2003 as amended), *available at* <http://www.palestinianbasiclaw.org/2003-amended-basic-law>. The Palestinian Basic Law is consistent with the constitutions of surrounding Arab states, which declare that Islam is the official state religion and that they are Arab nations. *E.g.*, CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, *as amended*, May 22, 1980, May 25, 1980, March 26, 2007, arts. 1-2; Articles 1-3, Doustour Joumhouriat al-Iraq [The Constitution of the Republic of Iraq] of 2005 3; CONSTITUTION OF THE HASHEMITE KINGDOM OF JORDAN, arts. 1-2; BASIC LAW OF THE SULTANATE OF OMAN (Royal Decree 101/96) arts. 1-2; BASIC LAW OF GOVERNANCE, art. 1 (Saudi Arabia); CONSTITUTION OF SYRIA, arts. 1, 3; CONSTITUTION OF THE UNITED ARAB EMIRATES arts. 6-7; CONSTITUTION OF THE REPUBLIC OF YEMEN, arts. 1, 3.

8. *Goldstone Report*, *supra* note 4 ¶ 1215; *Goldstone Conclusions*, *supra* note 1, ¶¶ 1877, 1881-95; U.N. Fact Finding Mission on the Gaza Conflict, Statement by Richard Goldstone on behalf of the Members of the United Nations Fact Finding Mission on the Gaza Conflict before the Human Rights Council (Sep. 29, 2009), <http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/factfindingmission.htm>.

9. *Goldstone Report*, *supra* note 4, ¶ 46; *Goldstone Conclusions*, *supra* note 1, ¶ 1935.

10. *Goldstone Report*, *supra* note 4, ¶¶ 360-62; *see infra* notes 123, 126-89 and accompanying text.

11. *Id.* ¶¶ 1179, 1192-1219; *see infra* notes 124, 190-216 and accompanying text.

12. *Id.* ¶¶ 576-78, 1185-91; *see infra* notes 125, 217-23 and accompanying text.

13. Human Rights Council Res. S-12/1, The Human Rights Situation in the Occupied Palestinian Territory, Including East Jerusalem, 12th Sess., Oct. 15-16, 2009, ¶ B.3, U.N. Doc A/HRC/RES/S-12/1, (Oct. 16, 2009), *available at* <http://unispal.un.org/UNISPAL.NSF/0/13A7589213CE095B85257657004239A1>; *see also* Press Release, Human Rights Council, Human Rights Council Endorses Recommendations in Report of Fact-Finding Mission Led by Justice Goldstone and Calls for Their Implementation, U.N. Press Release (Oct. 16, 2009),

tions General Assembly (U.N. General Assembly) followed suit on December 1, 2009.¹⁴

The Goldstone Report generated unprecedented editorial and academic criticism, challenging both the process by which the Mission operated and the substance of the Mission's findings and conclusions.¹⁵ Most controversial was the Mission's finding that Isra-

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=9532&LangID=E>.

14. G.A. Res. 64/10, U.N. Doc. A/RES/64/10 (Dec. 1, 2009), available at daccess-dds-dny.un.org/doc/UNDOC/GEN/N09/462/43/PDF/N0946243.pdf?OpenElement.

15. E.g., Abraham Bell, *A Critique of the Goldstone Report and Its Treatment of International Humanitarian Law*, 104 AM. SOC'Y. INT'L L. PROC. ANN. MEETING 79 (2010); Laurie R. Blank, *Finding Facts But Missing the Law: The Goldstone Report, Gaza and Lawfare*, 43 CASE W. RES. J. INT'L L. 279 (2010) [hereinafter Blank, *Finding Facts*]; Laurie R. Blank, *The Application of IHL in the Goldstone Report: A Critical Commentary*, 12 Y.B. INT'L HUMANITARIAN L. 347 (2009) [hereinafter Blank, *Application of IHL*]; AMICHAH COHEN, JERUSALEM CTR. FOR PUB. AFFAIRS, PROPORTIONALITY IN MODERN ASYMMETRICAL WARS (2010), <http://www.jcpa.org/text/proportionality.pdf>; Irwin Cotler, *The Goldstone Mission—Tainted to the Core (Part I)*, JERUSALEM POST, Aug. 16, 2009, <http://middleeastinfo.org/forum/lofiversion/index.php/t16511.html>; Irwin Cotler, *The Goldstone Mission—Tainted to the Core (Part II)*, JERUSALEM POST, Aug. 18, 2009, http://www.eyeontheun.org/assets/attachments/articles/6118The_Goldstone_Mission.doc; Alan Dershowitz, *The Case Against the Goldstone Report: A Study in Evidentiary Bias* (Harvard Pub. Law, Working Paper No. 10-26, 2010), available at <http://www.alandershowitz.com/goldstone.pdf>; Editorial, *War Unchecked*, WASH. POST, Nov. 15, 2009, at A22 [hereinafter *War Unchecked*]; Robert O. Freedman, *A Biased War Report*, BALT. SUN, Oct. 20, 2009, [http://www.humanevents.com/article.php?id=33618](http://articles.baltimoresun.com/2009-10-20/news/0910190045_1_human-rights-council-israel-and-hamas-bias; Nile Gardiner, The U.N.'s Anti-Israel Crusade Continues</i>, HUM. EVENTS, Sept. 21, 2009, <a href=); Halbertal, *supra* note 7; Lt. Col. (ret.) Jonathan D. Halevi, *Blocking the Truth of the Gaza War: How the Goldstone Commission Understated the Hamas Threat to Palestinian Civilians*, JERUSALEM CTR. FOR PUB. AFFAIRS, (Sept. 18, 2009), <http://jcpa.org/article/blocking-the-truth-of-the-gaza-war/>; INTELLIGENCE & TERRORISM INFO. CTR., HAMAS AND THE TERRORIST THREAT FROM THE GAZA STRIP (2010) [hereinafter HAMAS AND THE TERRORIST THREAT], <http://www.crethiplethi.com/hamas-and-the-terrorist-threat-from-the-gaza-strip/israel/2010/>; Chris Jenks & Geoffrey Corn, *Siren Song: The Implications of the Goldstone Report on International Criminal Law*, 7 BERKELEY J. INT'L L. PUBLICIST, <http://bjil.typepad.com/publicist/2011/03/publicist07-jenks-corn.html>; Richard Landes, *Goldstone's Gaza Report: Part One: A Failure of Intelligence*, MIDDLE E. REV. INT'L AFF. J., (2009) [hereinafter Landes, *Part One*], <http://www.gloria-center.org/meria/2009/12/landes1-2009-12-01/>; Richard Landes, *Goldstone's Gaza Report: Part Two: A Miscarriage of Human Rights*, MIDDLE E. REV. INT'L AFF. J., (2009), <http://www.gloria-center.org/2009/12/landes2-2009-12-02/>; Ed Morgan, *The UN's Book of Judges*, 16 GLOBAL GOVERNANCE 160 (2010) [hereinafter Morgan, *U.N.'s Book of Judges*]; Ed Morgan, *Goldstone Report Undermines Faith in International Law*, TORONTO STAR, Oct. 22, 2009, <http://www.thestar.com/comment/article/713921>; Michael A. Newton, *Illustrating Illegitimate Lawfare*, 43 CASE W. RES. J. INT'L L. 255 (2010); Joshua Muravchik, *Goldstone: An Exegesis*, 173 WORLD AFF. J. 17 (2010), <http://www.worldaffairsjournal.org/articles/2010-MayJune/full-Muravchik-Traub-MJ-2010.html>; Norwitz, *supra* note 7; Melanie Phillips, *The Moral Inversion of Richard Goldstone*, SPECTATOR, Sept. 16, 2009, <http://europenews.dk/en/node/26358>; Richard D. Rosen, *The Protection of Civilians During the Israeli-Hamas Conflict: The Goldstone Report*, in PROTECTING CIVILIANS DURING VIOLENT CONFLICT (David W. Lovell & Igor Primoratz eds., forthcoming May 2012); Amnon Rubinstein & Yaniv Roznai, *Human Shields in Modern Armed Conflicts: The Need for a Proportionate Proportionality*, 22 STAN. L. & POL'Y REV. 93 (2011); Justus Reid Weiner & Avi Bell, *The Gaza War of 2009: Applying International Humanitarian Law to Israel and Hamas*, 11 SAN DIEGO INT'L L.J. 5 (2009).

The Report also has a considerable number of defenders. E.g., Susan Breau, *An Assessment of the Gaza Report's Contribution to the Development of International Humanitarian Law*, in PROTECTING CIVILIANS DURING VIOLENT CONFLICT (David W. Lovell & Igor Primoratz eds., forthcoming May 2012); *The Goldstone Report*, *supra* note 4 (containing a num-

el's military operation was intended to punish Gaza's civilian population—a conclusion reached with only a superficial inquiry into the combat environment the Israeli Defense Force (IDF) faced during the conflict.¹⁶

A year and a half after the issuance of the Mission's report, Justice Goldstone reconsidered the Mission's conclusion, acknowledging for the first time that Israel may not have intentionally targeted Palestinian civilians and their property during the conflict.¹⁷ His partial retraction came shortly after the Hamas leadership admitted that it suffered much higher combat losses than earlier reported,¹⁸ calling into serious doubt the number of civilians actually killed during the conflict.

Justice Goldstone's reconsideration of the report's most important conclusion implicitly confirms the most serious criticism of the report: the Mission did not provide impartial assessments of the asymmetrical conflict in Gaza or explain how a modern armed force might successfully comply with international humanitarian law while at the same time achieving its military objectives.¹⁹ That is, the Mission consciously failed to deal with the central issues surrounding the deaths of civilians and the destruction of civilian property during the conflict: determining the nature of Hamas's tactical and strategic doctrine, how it was actually employed, and whether IDF responded in a manner consistent with the principles of distinction and proportionality given the facts known to commanders at the time.²⁰

In fact, the Mission's investigation and findings are so fundamentally flawed—both procedurally and substantively—that the

ber of essays, all but one supporting the report); Richard Falk, *The Goldstone Report: Ordinary Text, Extraordinary Event*, 16 GLOBAL GOVERNANCE 173 (2010); Dinah PoKempner, *Valuing the Goldstone Report*, 16 GLOBAL GOVERNANCE 144 (2010); Milena Sterio, *The Gaza Strip: Israel, Its Foreign Policy, and the Goldstone Report*, 43 CASE W. RES. J. INT'L L. 229 (2010).

16. See, e.g., Bell, *supra* note 15, at 6; COHEN, *supra* note 15, at 16-19; Dershowitz, *supra* note 15, at 47-48; *War Unchecked*, *supra* note 15; Freedman, *supra* note 15; Halbertal, *supra* note 7, at 356-57; Jenks & Corn, *supra* note 15; Landes, *Part One*, *supra* note 15; Norwitz, *supra* note 7; Rubinstein & Roznai, *supra* note 15, at 105-07.

17. *Reconsidering the Goldstone Report*, *supra* note 2. Neither the Human Rights Council nor the other Mission members have reconsidered the Mission's conclusions. See Ed Pilkington & Conal Urquhart, *Goldstone's Gaza Report Stands, UN Insists*, GUARDIAN, Apr. 5, 2011, <http://www.guardian.co.uk/world/2011/apr/05/goldstone-gaza-report-stands-un>; Hina Jilani, Christine Chinkin, & Desmond Travers, *Goldstone Report; Statement Issued by Members of UN Mission on Gaza War*, GUARDIAN, Apr. 14, 2011, <http://www.guardian.co.uk/commentisfree/2011/apr/14/goldstone-report-statement-un-gaza>.

18. *Palestine: Hamas Acknowledges Higher Casualties in Gaza War*, ISLAMIC NEWS (Nov. 1, 2010, 4:49 PM), <http://theislamicnews.com/palestine-hamas-acknowledges-higher-casualties-in-gaza-war/>.

19. See, e.g., Halbertal, *supra* note 7, at 354-56; Landau, *supra* note 7; *War Unchecked*, *supra* note 15.

20. HAMAS AND THE TERRORIST THREAT, *supra* note 15, at 132; see *War Unchecked*, *supra* note 15; Norwitz, *supra* note 7; COHEN, *supra* note 15, at 27; Freedman, *supra* note 15.

Goldstone Report does nothing to advance the cause of protecting civilians in combat, the *raison d'être* of international humanitarian law.²¹ Instead, the report does just the opposite: it condones a method of insurgent warfare that intentionally places civilians and their property at risk.²² The Goldstone Report also demonstrates that the Human Rights Council lacks the impartiality (and perhaps even the ability) to investigate seriously alleged violations of international humanitarian law in connection with the Israeli-Palestinian conflict.²³

An article of this length cannot cover all of the Report's alleged violations of the law of war arising out of the Israeli-Hamas conflict. Moreover, a law professor sitting in Lubbock, Texas cannot resolve the factual disputes that have arisen about the conflict. Nor does this paper discount the possibility (or even probability) that individual IDF members committed war crimes during the conflict. Rather, using open-source material, this article focuses on the Mission's findings that the IDF purposely targeted civilians. Part II provides a historical setting for the conflict; Part III deals with the process by which the Goldstone Mission was conceived. Part IV discusses what the Goldstone Mission found and concluded about the IDF operation, while Part V examines the critical issues the Mission did not explore: Hamas's strategic and tactical doctrines and the resulting operational environment confronted by Israel during the war. Finally, the paper concludes by briefly discussing some of the major institutional shortcomings in the current approach to international humanitarian law.

I. HISTORICAL BACKGROUND

Part of the British Palestine Mandate,²⁴ the Gaza Strip was captured by Egypt during the Arab-Israeli War of 1948.²⁵ Except

21. See, e.g., *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 257 (July 8); NILS MELZER, INT'L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 4 (2009); see also MICHAEL IGNATIEFF, *THE WARRIOR'S HONOR* 119-20 (1998).

22. See Blank, *Finding Facts*, *supra* note 15, at 282, 289; Morgan, *U.N.'s Book of Judges*, *supra* note 15, at 161-62 (discussing the Council's prejudgment of Israeli actions before issuance of Goldstone Report), 168-69 (noting examples of lack of impartiality by HRC's Special Rapporteur on the Occupied Territories), 170 (noting the U.N.'s and the Council's lack of objectivity); Rubinstein & Roznai, *supra* note 15, at 105-07.

23. See, e.g., John Bolton, *Israel, the U.S. and the Goldstone Report*, WALL ST. J., (Oct. 19, 2009, 9:34 AM), <http://online.wsj.com/article/SB10001424052748704500604574480932924540724.html>; Freedman, *supra* note 15; Morgan, *U.N.'s Book of Judges*, *supra* note 15, at 167.

24. Michael Dumper, *Forty Years Without Slumbering: Waqf Politics and Administration in the Gaza Strip, 1948-1987*, 20 BRIT. J. MID. E. STUD. 174, 175 (1993).

25. NATHAN SHACHAR, *THE GAZA STRIP: ITS HISTORY AND POLITICS* 57 (2010).

for a brief interlude following Israel's seizure of the Strip during the Suez War of 1956,²⁶ the Egyptians administered the territory from 1948 to 1967.²⁷ Israel captured the Gaza Strip during the 1967 Arab-Israeli War,²⁸ established a military administration,²⁹ and in 1971 began to build Jewish settlements in the Strip.³⁰

In August 2005, as part of a policy of disengagement, Israel withdrew its military forces and civilian settlers from the Gaza Strip.³¹ Among other objectives, Israel hoped that disengagement from Gaza would lead to better security and reduce friction with the Palestinian population.³² In January 2006, Hamas won the Palestinian Legislative Council elections and, in June 2007, violently seized control of the Gaza Strip from the Palestinian Authority.³³ As the Goldstone Report notes, after Hamas took control of the Gaza Strip, Israel declared Gaza "hostile territory,"³⁴ and followed the declaration with "severe reductions in the transfer of goods and supplies of fuel and electricity to the Strip."³⁵

The Mission neither provides context for Israel's declaration and subsequent blockade nor discusses the nature of Hamas or its abject refusal to recognize Israel or the peace process.³⁶ Instead,

26. *Id.* at 63.

27. *Id.* at 58-68; Dumper, *supra* note 24, at 177-81.

28. SHACHAR, *supra* note 25, at 70; Dumper, *supra* note 24, at 182; *Goldstone Report*, *supra* note 4, ¶ 177.

29. Dumper, *supra* note 24, at 182; *Goldstone Report*, *supra* note 4, ¶ 177.

30. SHACHAR, *supra* note 25, at 84-85.

31. ELISHA EFRAT, THE WEST BANK AND GAZA STRIP: A GEOGRAPHY OF OCCUPATION AND DISENGAGEMENT 183-95 (2006); Mark S. Kaliser, Note, *A Modern Day Exodus: International Human Rights Law and International Humanitarian Law Implications of Israel's Withdrawal from the Gaza Strip*, 17 IND. INT'L & COMP. L. REV. 187, 219-20 (2007).

32. STATE OF ISRAEL, DISENGAGEMENT PLAN OF PRIME MINISTER ARIEL SHARON (Apr. 16, 2004), http://www.knesset.gov.il/process/docs/DisengageSharon_eng.htm (last visited June 4, 2012). The Israeli decision to withdraw from Gaza was not an easy one; some believed that Gaza would be used as a base for launching attacks against Israel. See Barry Rubin, *Israel's New Strategy*, 85 FOREIGN AFF. 111, 111 (2006); Mortimer B. Zuckerman, *Life After Gaza*, U.S. NEWS & WORLD REP., Sept. 5, 2005, at 69. In fact, disengagement did not bring peace—"instead, it was followed almost immediately by rocket fire." Jeffrey Goldberg, *Letter from Gaza: The Forgotten War*, NEW YORKER, Sept. 11, 2006, at 40-47; see also *Holiday Marks Anniversary of Yom Kippur War*, U.S. FED. NEWS, Oct. 6, 2008 ("Since Israel's Gaza withdrawal, Iran-backed Hamas and other terrorist groups in Gaza have fired more than 5,800 rockets and mortars into Israel."); Bren Carlill, *New World in Their Hands*, AUSTRALIAN, Sept. 13, 2008, at 24 (noting "dramatic increase" in rockets fired into Israel from Gaza since the Israeli withdrawal).

33. *Goldstone Report*, *supra* note 4, ¶ 190; Captain Gal Asael, *The Law in the Service of Terror Victims: Can the Palestinian Authority Be Sued in Israeli Civilian Courts for Damages Caused by Its Involvement in Terror Acts During the Second Intifada?*, ARMY LAW., July 2008, at 6.

34. Carey James, Note, *Mere Words: The 'Enemy Entity' Designation of the Gaza Strip*, 32 HASTINGS INT'L & COMP. L. REV. 643, 645 (2009); ISRAELI MINISTRY OF FOREIGN AFF., SECURITY CABINET DECLARES GAZA HOSTILE TERRITORY (Sept. 19, 2007), <http://www.mfa.gov.il/MFA/Government/Communiques/2007/Security+Cabinet+declares+Gaza+hostile+territory+19-Sep-2007.htm> (last visited June 4, 2012).

35. *Goldstone Report*, *supra* note 4, ¶ 192.

36. Halbertal, *supra* note 7, at 355.

the Goldstone Report obfuscates Hamas's character and its goals, dealing with Hamas's political philosophy in one cryptic footnote. It notes that "Hamas subscribed to the so-called Prisoners' Document, a common political platform shared by Fatah, Hamas, Islamic Jihad, the Popular Front for the Liberation of Palestine (PFLP) and the Democratic Front for the Liberation of Palestine (DFLP)."³⁷ The Report suggests that because the Prisoners' Document refers to the right to establish an independent Palestinian state on all territories occupied by Israel in 1967,³⁸ it constitutes Hamas's implicit recognition of Israel.³⁹

The Report's suggestion is indefensible and, given the centrality of Hamas's philosophy to Israel's Gaza policy, inexplicable. First, nothing in the Prisoner's Document remotely intimates recognition of Israel. Second, the Hamas leadership in Syria expressly rejected the document and—within weeks of the document's issuance—Hamas's military wing (*Izz ad-Din al-Qassam* Brigades) and two other groups attacked the IDF in Israel (apparently to express their displeasure with the document), killing two Israeli soldiers, wounding four, and kidnapping one (Corporal Gilad Shalit).⁴⁰ Third, even a cursory "Google search" of the Prisoners' Document readily reveals that the Hamas leadership, in fact, rejected and continues to reject recognition of and peace with Israel.⁴¹ And despite the existence of a

37. *Goldstone Report*, *supra* note 4, ¶ 188 n.25.

38. See Press Release, Miftah, Full Text of the National Conciliation Document of the Prisoners (May 26, 2006), <http://www.miftah.org/display.cfm?DocId=10371&CategoryId=32> (last visited June 4, 2012).

39. *Goldstone Report*, *supra* note 4, ¶ 188 n.25.

40. JEREMY M. SHARP ET AL., CONG. RESEARCH SERV., RL33566, LEBANON: THE ISRAELI-HAMAS-HEZBOLLAH CONFLICT 32 (2006), available at <http://www.fas.org/sgp/crs/mideast/RL33566.pdf>.

41. See, e.g., BENNY MORRIS, *ONE STATE, TWO STATES* 154 (2009) (indicating Hamas has never superseded or abandoned its covenant); Daniel Byman, *How to Handle Hamas: The Perils of Ignoring Gaza's Leadership*, 89 FOREIGN AFF. 45, 45 (2010) ("Hamas seeks to undermine the peace process. Many Hamas members have not reconciled themselves to the Jewish state's existence."); "We Will Never Recognize Israel": *Hamas Leader*, AL ARABIYA, Dec. 14, 2010, <http://www.alarabiya.net/articles/2010/12/14/129619.html> ("We said it five years ago and we say it now . . . we will never, we will never, we will never recognize Israel"); *Hamas Stands Firm: No Recognition of Israel*, AL JAZEERA, Jan. 23, 2010, <http://www.aljazeera.com/news/middleeast/2010/01/20101230202291283.html> ("Hamas political leader has said that his group will not recognise Israel despite new pressures and will give priority to building resistance to the Jewish state."); Khaled Abu Toameh, *Haniyeh: Hamas Will Liberate Palestine*, JERUSALEM POST, Dec. 14, 2009, <http://www.jpost.com/MiddleEast/Article.aspx?id=163130> ("Hamas Prime Minister Ismail Haniyeh said that gaining control of the Gaza Strip was 'just a step toward liberating all of Palestine.'"); *Hamas Reiterates Non-Recognition of Israel*, MONSTERS & CRITICS (June 11, 2007, 1:13PM), http://www.monstersandcritics.com/news/middleeast/news/article_1242137.php/Hamas_reiterates_non-recognition_of_Israel (quoting Hamas spokesman that Hamas has not changed its policy with regard to recognition of Israel); *Own Worst Enemy*, TIMES (LONDON), June 14, 2007, http://www.timesonline.co.uk/tol/comment/leading_article/article1929366.ece (noting that Hamas still calls for "the destruction of Israel in its rhetoric"); *Hamas Resists Israel Recognition*, BBC NEWS (June 27, 2006, 9:45PM) http://news.bbc.co.uk/2/hi/middle_east/5122822.stm; Michael Herzog, *Can Hamas Be Tamed?*, 85 FOREIGN AFF. 83, 88 (2006) (cit-

ceasefire, at the time this article was written, Israel was still under attack from the Hamas.⁴²

Hamas has its genesis in the Muslim Brotherhood, established in Egypt in 1928 “on the eve of the collapse of the Ottoman Empire.”⁴³ The Muslim Brotherhood’s objective is the establishment of individual Islamic states that will ultimately be united into a single Muslim nation.⁴⁴ Hamas itself formed in December 1987 during the first Palestinian *intifada* (rebellion).⁴⁵ By its founding charter, Hamas seeks the complete destruction of Israel by violent means⁴⁶ and the extermination of the Jews;⁴⁷ it absolutely rejects any

ing Hamas leader Mahmoud al-Zahar that “any cease-fire along the 1967 borders would not come with a recognition of Israel or relations with it, but would be merely a step in the continued struggle”; cf. Efraim Inbar, *The Rise and Demise of the Two-State Paradigm*, 53 ORBIS 265, 274 (2009) (“At this historic juncture, Palestinian society, under the spell of a nationalist and Islamic ethos, is unable to do what is necessary to end the conflict: compromise with the Zionist movement.”).

42. See, e.g., *Barrage of Rockets from Gaza Strike Israel; Sites in Gaza Targeted*, CNN (Aug. 22, 2011, 10:07 AM), <http://www.edition.cnn.com/2011/WORLD/meast/08/21/israel.violence/index.html?iref=mpstoryview> (describing multiple rocket attacks on Israel from Gaza); D.L., *Attacks in Israel: Terror Down Under*, ECONOMIST (Aug. 18, 2011, 5:05 PM), <http://www.economist.com/blogs/newsbook/2011/08/attacks-israel> (describing attack from Gaza on military and civilian targets in southern Israel); *EQB Declares Responsibility for Kfar Sa'ad Operation*, AL-QASSAM (July 4, 2011, 9:44 PM), http://www.qassam.ps/news-4391-EQB_declares_responsibility_for_Kfar_Saad_operation.html (stating that Hamas took credit for attack on Israeli civilian bus); Elad Benari, *Terrorists Fire Rockets at Southern Israel*, ISR. NAT'L NEWS, Apr. 25, 2012, available at 2012 WLNR 8779928 (over 200 rockets fired into Israel in a four day period in March 2012).

43. KHALED HROUB, *HAMAS: A BEGINNER'S GUIDE* 6 (2006).

44. *Id.* at 7.

45. *Id.* at 12; see also Bruce A. Arrigo, *Identity, International Terrorism and Negotiating Peace: Hamas and Ethics-Based Considerations from Critical Restorative Justice*, 50 BRIT. J. CRIM. 772, 778 (2010).

46. *Hamas Covenant*, *supra* note 7, art. 11; see also ANTHONY H. CORDESMAN, CTR. FOR STRATEGIC & INT'L STUDIES, *THE "GAZA WAR": A STRATEGIC ANALYSIS* 6 (2009) (Final Review Draft), http://csis.org/files/media/isis/pubs/090202_gaza_war.pdf (last visited June 4, 2012). The U.N. Secretary-General's Report on the May 31, 2010 Flotilla Incident acknowledges the serious threat Hamas and its allies pose to Israel, finding that Israel's naval blockade of Gaza is legitimate, although its method of enforcing the blockade in this instance was “unacceptable.” U.N. Secretary-General, *Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident*, at 4, 39-40 (Sept. 2011), available at http://www.un.org/News/dh/infocus/middle_east/Gaza_Flotilla_Panel_Report.pdf [hereinafter *Palmer Report*].

47. *Hamas Covenant*, *supra* note 7, art. 7:

[T]he Islamic Resistance Movement aspires to the realisation of Allah's promise, no matter how long that should take. The Prophet, Allah bless him and grant him salvation, has said:

“The Day of Judgement [sic] will not come about until Moslems fight the Jews (killing the Jews), when the Jew will hide behind stones and trees. The stones and trees will say O Moslems, O Abdulla, there is a Jew behind me, come and kill him.”

See also Irwin Cotler, *Global Antisemitism: Assault on Human Rights* 6 (Yale Initiative for the Interdisciplinary Study of Antisemitism, Working Paper No. 3, 2009).

peaceful settlement with Israel.⁴⁸ Hamas is considered a terrorist organization not only by Israel⁴⁹ but by other nations as well.⁵⁰

Even before the seizure of Gaza, Hamas militants crossed into Israel and killed two Israeli soldiers and kidnapped a third.⁵¹ And within only two weeks of coming to power, Hamas joined other armed groups and “resumed rocket fire against Israel.”⁵² Thereafter, Hamas and its allies fired thousands of rockets into Israel.⁵³

48. *Hamas Covenant*, *supra* note 7, art. 13:

Initiatives, and so-called peaceful solutions and international conferences, are in contradiction to the principles of the Islamic Resistance Movement. Abusing any part of Palestine is abuse directed against part of religion. Nationalism of the Islamic Resistance Movement is part of its religion. Its members have been fed on that. For the sake of hoisting the banner of Allah over their homeland they fight. . . .

There is no solution for the Palestinian question except through Jihad. Initiatives, proposals and international conferences are all a waste of time and vain endeavors. The Palestinian people know better than to consent to having their future, rights and fate toyed with.

See also Nadia Baranovich & Ravichandran Moorthy, *Terror Strategies in the Israeli-Palestinian Conflict: An Analysis of Hezbollah & Hamas*, 5 INT'L PROCEEDINGS OF ECON. DEV. & RES. 229 (2011) <http://www.ipedr.net/vol5/no2/51-H10155.pdf>; Mortimer B. Zuckerman, *Waiting for War in Gaza*, U.S. NEWS & WORLD REP., Nov. 11, 2006, at 68, <http://www.usnews.com/usnews/opinion/articles/061105/13edit.htm>; Andrea Levin, *The Truth About Hamas's Mission*, BOSTON GLOBE, Jan. 17, 2009, http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2009/01/17/the_truth_about_hamass_mission/.

49. See HCJ 9132/07, Al-Bassiouni Ahmed v. Prime Minister, unpublished, ¶ 22 [2008] (Isr.) available at http://elyon1.court.gov.il/Files_ENG/07/320/091/n25/07091320.n25.pdf.

50. See, e.g., U.S. Dep't of State, Office of the Coordinator for Counterterrorism, *Foreign Terrorist Organizations* (Jan. 27, 2012), <http://www.state.gov/j/ct/rls/other/des/123085.htm>; *Listing of Terrorist Organizations*, AUSTRALIAN GOVERNMENT, <http://www.ema.gov.au/agd/www/nationalsecurity.nsf/AllDocs/95FB057CA3DECF30CA256FAB001F7FBD?OpenDocument> (listing Hamas's Izz al-Din Al-Qassam Brigades as terrorist group and renewed listing in September 2009); Ministry of Public Safety Canada, *Currently Listed Entities*, PUBLIC SAFETY CANADA (Aug. 24, 2011), <http://www.publicsafety.gc.ca/prg/ns/le/cle-eng.aspx>; Council Decision 2005/930/EC, available at http://eur-lex.europa.eu/lex/LexUriServ/site/en/oj/2005/l_340/l_34020051223en00640066.pdf; United Kingdom Home Office, *Proscribed Terrorist Groups*, UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, (Nov. 11, 2011), <http://www.homeoffice.gov.uk/publications/counter-terrorism/proscribed-terror-groups/proscribed-groups?view=Binary> (listing Hamas's Izz al-Din Al-Qassam Brigades).

51. See SHARP ET AL., *supra* note 40 and accompanying text; Thomas Omestad, *The Flames of War, and Small Hopes for Peace*, U.S. NEWS & WORLD REP., July 24, 2006, at 12-14; Larry Cohler-Esses, *Hamas Wouldn't Honor a Treaty, Top Hamas Leader Says*, JEWISH DAILY FORWARD, Apr. 19, 2012, <http://forward.com/articles/155054/hamas-wouldn-t-honor-a-treaty-top-leader-says/>.

52. SHACHAR, *supra* note 25, at 177; see also HCJ 9132/07, Al-Bassiouni Ahmed, ¶ 2. See generally *supra* note 32 and accompanying text.

53. See, e.g., Ed Blanche, *Behold, The Humble Qassem*, THE MIDDLE E., Apr. 2008, at 18; *A Riddle of Rockets: The Gaza Strip*, ECONOMIST, Oct. 13, 2007, at 50; David Eshel, *Military Confrontation with Hamas in Gaza Unavoidable*, MILITARY TECH., no. 31, 2007, at 5. From 2000 to 2008, Israel sent dozens of letters to the President of the Security Council and the High Commissioner for Human Rights describing the rocket attacks, with no apparent effect. ISRAELI MINISTRY OF FOREIGN AFF., THE OPERATION IN GAZA: FACTUAL AND LEGAL ASPECTS 19-21 nn.29-31 (July 29, 2009) [hereinafter *Operation in Gaza*], <http://www.mfa.gov.il/NR/rdonlyres/E89E699D-A435-491B-B2D0-017675DAFEF7/0/GazaOperationwLinks.pdf>.

The Mission took considerable time to examine all aspects of Israel's relations with the Palestinians, including matters well outside the 2008-2009 Gaza conflict.⁵⁴ Its failure to explore—even briefly— Hamas's stated policy towards Israel is puzzling at best. One can only assume that an accurate description of Hamas did not fit within the Mission's preconceived narrative about the conflict.⁵⁵

In June 2008, Egypt brokered a six-month ceasefire between Israel and Hamas.⁵⁶ Although periodically violated,⁵⁷ the truce brought a period of relative calm until November 2008. On November 4, 2008, Israeli ground and air forces attacked Hamas militants to destroy a 250-meter tunnel being built under the Israeli-

54. See *supra* note 7 and accompanying text.

55. The Mission's failure to give context to Israel's Gaza blockade and its conflict with Hamas is not unique; it exhibits the same shortcoming throughout the report. For example, in criticizing Israel's "separation wall" between Israel and the West Bank, the Mission never once acknowledges Israel's stated justification for the wall—to prevent terrorist attacks from the West Bank into Israel. *Goldstone Report*, *supra* note 4, ¶ 185. See also Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 43 I.L.M. 1009, 1079 (July 9, 2004) (separate opinion of Judge Buergenthal). Likewise, in citing Israel's Operation Defensive Shield in 2002, the Mission describes the impact of the operation on Palestinians, but it never mentions the terrorist attacks against Israeli civilians that triggered the operation, including March 27, 2002, suicide bombing of a Passover Seder in Netanya, Israel, in which thirty people were killed and 120 wounded. *Goldstone Report*, *supra* note 4, ¶ 193. See also Press Release, Israel Ministry of Foreign Affairs, Passover Suicide Bombing at Park Hotel In Netanya (Mar. 27, 2002), available at http://www.mfa.gov.il/MFA/MFAArchive/2000_2009/2002/3/Passover%20suicide%20bombing%20at%20Park%20Hotel%20in%20Netanya; Robert A. Caplen, *Mending the "Fence": How Treatment of the Israeli-Palestinian Conflict by the International Court of Justice at the Hague Has Redefined the Doctrine of Self-Defense*, 57 FLA. L. REV. 717, 743-44 (2005) (noting the U.N. General Assembly's failure to condemn Palestinian terrorist attacks on Israeli civilians).

56. INTELLIGENCE & TERRORISM INFO. CTR. AT THE ISR. INTELLIGENCE & COMMEMORATION CTR., THE SIX MONTHS OF THE LULL ARRANGEMENT 2 (2008) http://www.terrorism-info.org.il/data/pdf/PDF_08_300_2.pdf [hereinafter SIX MONTHS LULL]; see also Rory McCarthy, *Israel and Hamas Agree Ceasefire as Strikes Kill Six Palestinian Fighters*, GUARDIAN, June 17, 2008, <http://www.guardian.co.uk/world/2008/jun/18/israelandthepalestinians.egypt>.

57. See, e.g., *Rockets 'Violated Gaza Ceasefire'*, BBC NEWS, (June 24, 2008, 10:27 PM), http://news.bbc.co.uk/2/hi/middle_east/7470530.stm (two rockets fired into Israel from Gaza); Hisham Abu Taha, *Israel Seals Border with Gaza After Rocket Firing*, ARAB NEWS, Aug. 27, 2008, available at 2008 WLNR 18496925 (two homemade rockets from Gaza fired into Israel); *VOA News: Israel Shuts Gaza After Rocket Strike*, U.S. FED. NEWS, Oct. 21, 2008, available at 2008 WLNR 20181725 (concerning Gaza militants firing rocket into Israel); Colin Rubenstein, *Obstacles to Israeli-Palestinian Peace*, JAKARTA POST, Sept. 16, 2008, at 7, available at 2008 WLNR 17537737 (noting that, in spite of the ceasefire, rockets continue to fall on Israeli towns, "albeit much more sporadically"); SIX MONTHS LULL, *supra* note 56, at 6 (From June 19 to November 4, 2008, a total of 20 rockets and mortar shells were fired from Gaza; three of the rockets and five of mortar shells fell into Israel.). Some observers suggest that Hamas used the ceasefire to build its arsenal. See Karin Laub, *Gaza Tunnels: Covert to Overt*, CHI. TRIB., Oct. 10, 2008, available at 2008 WLNR 19310959; SIX MONTHS LULL, *supra* note 56, at 20-27.

Gaza border intended to enable abductions of Israelis by Hamas.⁵⁸ Hamas, in turn, fired dozens of rockets into Israel.⁵⁹

Thereafter, the ceasefire was never fully restored. Hamas continued to fire rockets and mortars into Israel⁶⁰—deliberately targeting its southern cities⁶¹—while Israel attempted to stop these attacks by striking at militants⁶² and periodically closing its border with Gaza.⁶³ Although the truce had been repeatedly violated, Israeli officials expressed their desire to extend the six-month ceasefire; however, Hamas refused.⁶⁴ The ceasefire expired on December 19, 2008,⁶⁵ and

58. SIX MONTHS LULL, *supra* note 56, at 9; James Hider, *Back in the Line of Fire: Rocket War Resumes After Raid on 'Kidnap Plot Tunnel,'* TIMES (LONDON), Nov. 6, 2008, at 44, available at 2008 WLNR 21173188; CORDESMAN, *supra* note 46, at 52.

59. Nidal al-Mughrabi, *Israel-Hamas Violence Disrupts Gaza Truce*, REUTERS (Nov. 5, 2008, 5:08 PM), <http://www.reuters.com/article/2008/11/05/us-palestinians-israel-violence-idUSTRE4A37B520081105>; Daa Hadid, *Israel Launches First Airstrike on Gaza Since June*, CHARLESTON GAZETTE & DAILY MAIL, Nov. 5, 2008, at 15A, available at 2008 WLNR 21144545; Ethan Bronner & Taghreed El-Khodary, *Hamas Rockets Hit Israel, Sending 18 to Hospital*, N.Y. TIMES, Nov. 15, 2008, at A7, available at 2008 WLNR 21812926.

60. SIX MONTHS LULL, *supra* note 56, at 9-10; Isabel Kershner & Taghreed El-Khodary, *Airstrike Kills Four Palestinian Militants*, PITTSBURGH POST-GAZETTE, Nov. 17, 2008, at A4, available at 2008 WLNR 21928051; Ethan Bronner & Taghreed El-Khodary, *Rocket Barrage into Israel Heightens Gaza Tensions*, GLOBE & MAIL, Nov. 15, 2008, at A21, available at 2008 WLNR 21816760.

61. ISRAEL MINISTRY OF FOREIGN AFF., VIOLATIONS OF CALM: ROCKETS STRIKE SDEROT, ASHKELON, WESTERN NEGEV (Dec. 18, 2008) http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Hamas+war+against+Israel/Rockets_strike_Sderot_Ashkelon_western_Negev_16-Nov-2008.htm (last visited June 4, 2012); Daa Hadid, *Israeli Airstrikes Imperil Gaza Truce with Hamas*, SEATTLE TIMES, Nov. 6, 2008, at A11 available at 2008 WLNR 21280555; Gaza: *Rocket Fire and Israeli Strike Disrupt Cease-Fire*, N.Y. TIMES, Nov. 6, 2008, at A19, available at 2008 WLNR 21173891; Daa Hadid, *Rocket Attacks Escalate Gaza Violence*, DESERET MORNING NEWS, Nov. 15, 2008, at A04 available at 2008 WLNR 21837697.

62. SIX MONTH LULL, *supra* note 56, at 9.

63. *Israel Closes Gaza Crossings*, ALJAZEERA.NET, Nov. 18, 2008, available at 2008 WLNR 22000226.

64. *Goldstone Report*, *supra* note 4, ¶ 262; Yaakov Kaatz, Khaled Abu Toameh & Herb Keinon, *Hamas Divided Over Continuing Cease-Fire*, JERUSALEM POST, Dec. 15, 2008, at 1, available at 2008 WLNR 24598446; Yaakov Kaatz, *Why Israel Prefers the Cease-Fire in Gaza*, JERUSALEM POST, Dec. 15, 2008, at 2, available at 2008 WLNR 24598450; Taghreed El-Khodary & Isabel Kershner, *Hamas, Showing Split, May Extend Israel Truce*, N.Y. TIMES, Dec. 15, 2008, at A10, available at 2008 WLNR 23990603.

65. Richard Boudreaux, *Hamas Formally Ends Gaza Cease-Fire with Israel*, L.A. TIMES, Dec. 19, 2008, at 15, available at 2008 WLNR 24369458; *Hamas Refuses to Renew Gaza Truce*, EVENING STANDARD, Dec. 19, 2008, at 28, available at 2008 WLNR 24401760. The U.N. Special Rapporteur for the Palestinian Territories blames Israel for the collapse of the ceasefire in large part because of its November 4, 2008 incursion into Gaza that killed Hamas militants attempting to tunnel into Israel to kidnap Israeli soldiers. Special Rapporteur, *The Palestinian Territories Occupied Since 1967 for Presentation to the Special Session of the Human Rights Council on the Situation in the Gaza Strip*, U.N. HIGH COMMISSIONER FOR HUM. RTS. (Jan. 9, 2009), <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/14B004C3AE39004BC125753900599B5D?opendocument> (last visited June 4, 2012) [hereinafter *Special Rapporteur*]; see SIX MONTHS LULL, *supra* note 56, at 9; James Hider, *Back in the Line of Fire: Rocket War Resumes After Raid on 'Kidnap Plot Tunnel,'* TIMES (LONDON), Nov. 6, 2008, at 44, available at 2008 WLNR 21173188; CORDESMAN, *supra* note 46, at 52. The Special Rapporteur's position seemingly assumes that (1) Israel had no right under international law to prevent Hamas from achieving its goal of kidnapping Israeli soldiers,

Hamast responded by firing more rockets into Israel, including into Israeli cities.⁶⁶

Facing increasing domestic pressure from the incessant rocket and mortar attacks,⁶⁷ Israel issued warnings of imminent military action.⁶⁸ Hamas ignored the warnings, and on December 27, 2008, Israel launched Operation Cast Lead.⁶⁹

and (2) Hamas rocket and mortar attacks on Israeli civilians were appropriate responses under international law to the attack on its militants.

66. Yaakov Katz, Khaled Abu Toameh & Herb Keinon, *Gazans Fire Dozens of Rockets at Negev Towns as 'Truce' Ends*, JERUSALEM POST, Dec. 21, 2008, at 1, available at 2008 WLNR 25000385; *Gaza Rockets Hit Southern Israel*, ALJAZEERA.NET, Dec. 21, 2008, available at 2008 WLNR 24485745; Ben Lynfield, *Livni and Netanyahu Vow to Oust Hamas After Gaza Rocket Strikes*, INDEP. (U.K.), Dec. 22, 2008, at 20, available at 2008 WLNR 24502385; *Israel Hit by Rocket Fire from Gaza*, ALJAZEERA.NET, Dec. 24, 2008, available at 2008 WLNR 24663434; Matt Brown, *Hamas Unleashes Artillery Barrage on Israel*, AUSTL. BROADCASTING CORP., Dec. 25, 2008, available at 2008 WLNR 24691971; *Peace in Bethlehem as Hamas Fires on Israel*, AUSTL., Dec. 26, 2008, at 7, available at 2008 WLNR 24726004; Isabel Kershner, *Gaza Rocket Attack of Israel Intensifies*, PITTSBURGH POST-GAZETTE, Dec. 25, 2008, at A4, available at 2008 WLNR 24695964; Herb Keinon & Yaakov Katz, *IDF Poised for Limited Gaza Operation*, JERUSALEM POST, Dec. 26, 2008, at 1, available at 2008 WLNR 25046531.

Colonel Desmond Travers of Ireland, a member of the UN fact-finding mission as well as its military advisor, said in an interview subsequent to the issuance of the Mission's report that only two rockets had been fired from Gaza into Israel following the breakdown of the ceasefire on November 4, 2008. See Dr. Hanan Chehata, *Exclusive MEMO Interview with Colonel Desmond Travers*—Co-author of the UN's Goldstone Report, MIDDLE E. MONITOR (Feb. 2, 2010), <http://www.middleeastmonitor.org.uk/downloads/interviews/interview-with-colonel-desmond-travers.pdf> [hereinafter *Colonel Travers Interview*]. Colonel Travers' statement is belied by the findings of human rights groups and independent media groups. See, e.g., HUM. RTS. WATCH, *ROCKETS FROM GAZA: HARM TO CIVILIANS FROM PALESTINIAN ARMED GROUPS' ROCKET ATTACKS 10* (2009), <http://www.hrw.org/node/84868> (stating 203 rockets were fired from the end of the ceasefire to the commencement of Israeli military operations); *Israel Preparing for an Invasion of Gaza*, N.Y. TIMES, Nov. 25, 2008, <http://www.nytimes.com/2008/12/25/world/africa/25iht-mideast.3.18922963.html> (noting 80 rockets and mortars fired in single day); Isabel Kershner & Taghreed El-Khodary, *Airstrike Kills Four Palestinian Militants*, PITTSBURGH POST-GAZETTE, Nov. 11, 2008, at A4, available at 2008 WLNR 21928051 (noting 20 rockets over a weekend); Ethan Bronner & Taghreed El-Khodary, *Rocket Barrage into Israel Heightens Gaza Tensions*, GLOBE & MAIL, Nov. 15, 2008, at A21, available at 2008 WLNR 21816760 ("barrage of rockets"). Colonel Travers' statement is also contradicted by statements from Palestinian militant groups and the findings of the Report itself. See, e.g., Ezzedeen Al Qassam Brigades—Information Office, Statements, Nov. 4, 2008–Dec. 18, 2008, <http://www.qassam.ps/statements-page6.html> (last visited June 4, 2012) (describing numbers and targets of mortars and rockets fired at Israel between November 4 through November 18, 2008); *Goldstone Report*, supra note 4, ¶¶ 257-59, 1601 (indicating 212 rockets fired between ceasefire and Israeli military operations).

67. Patrick Martin, *Israelis Question Reasons for Restraint*, GLOBE & MAIL, Dec. 22, 2008, at A11, available at 2008 WLNR 24514418; Editorial, *More Rockets from Gaza—Israel Must Protect Its Citizens—But can it do so by Military Action?*, WASH. POST, Dec. 23, 2008, at A16, <http://www.washingtonpost.com/wp-dyn/content/article/2008/12/22/AR2008122201844.html>; see also Khaled Abu Toameh, *Hamas Mocks Israel's Nonresponse to Rocket Attacks*, JERUSALEM POST, Dec. 25, 2008, at 2, available at 2008 WLNR 25046493; *Israel Issues an Appeal to Palestinians in Gaza*, N.Y. TIMES, Dec. 26, 2008, at A15, available at 2008 WLNR 24747964.

68. Orly Halpern, *Israel Vows Attack If Rockets from Gaza Don't Stop*, GLOBE & MAIL, Dec. 26, 2008, at A1, available at 2008 WLNR 24747079; Ashraf Khalil, *Israel Warns of Gaza Action*, CHI. TRIB., Dec. 26, 2008, at 18, available at 2008 WLNR 24751030.

69. Yaakov Katz, *225 Killed as Israel Rains Fire on Hamas in Bid to End Kassams*, JERUSALEM POST, Dec. 28, 2008, at 1, available at 2008 WLNR 25052442; Todd Venezia, *Hell*

II. THE PROCESS

A. Standards for Fact-Finding Missions

“[T]he United Nations has not provided comprehensive criteria for the guidance of fact-finding missions to be carried out under its auspices.”⁷⁰ By a 1991 U.N. General Assembly resolution, however, it directed that such investigations be, *inter alia*, “objective” and “impartial.”⁷¹ In 1980, the International Law Association issued more complete guidance for international fact-finding missions, known as the Belgrade Rules,⁷² which were intended to “curb serious abuses and departures from fundamental norms of due process.”⁷³ While not binding on the Human Rights Council, the rules are certainly instructive, and several of the provisions are particularly relevant to the Human Rights Council’s Gaza mission.

With respect to the “Terms of Reference” or “Mandate” for an international fact-finding mission, “[t]he organ of an organization establishing a fact finding mission should set forth objective terms of reference *which do not prejudge the issues to be investigated.*”⁷⁴ In other words, “[t]he resolution authorizing the mission should not prejudge the mission’s work and findings.”⁷⁵ Moreover, “[t]he fact-finding mission should be composed of persons who are respected for their integrity, *impartiality*, competence and *objectivity.*”⁷⁶

Fire Rains on Gaza, N.Y. POST, Dec. 28, 2008, at 4, available at 2008 WLNR 25008702.

70. Nigel S. Rodley, *Assessing the Goldstone Report*, 16 GLOBAL GOVERNANCE 191, 191 (2010).

71. G.A. Res. 46/59, U.N. GAOR, 67th Plenary Sess., U.N. Doc. A/RES/46/59, ¶ 3 (Dec. 9, 1991), available at <http://www.un.org/documents/ga/res/46/a46r059.htm>; see also *id.* ¶ 25 (“Fact-finding missions have an obligation to act in strict conformity with their mandate and perform their task in an impartial way.”). For a brief background of the resolution, see Rodley, *supra* note 70, at 201 n.1.

72. Rodley, *supra* note 70, at 191.

73. Thomas Franck, *The Belgrade Minimal Rules of Procedure for International Human Rights Fact-finding Missions*, 75 AM. J. INT’L L. 163, 163 (1981); see Thomas M. Franck & H. Scott Fairley, *Procedural Due Process in Human Rights Fact-Finding by International Agencies*, 74 AM. J. INT’L L. 308, 309 (1980) (“if fact-finding is to become more than another chimera, the sponsoring institutions must develop universally applicable minimal standards of due process to control both the way the facts are established and what is done with them afterwards”). Franck and Fairley identified “five key indicators of procedural probity: (1) choice of subject, (2) choice of fact finders, (3) terms of reference, (4) procedures for investigation, and (5) utilization of product.” *Id.* at 311.

74. Franck, *supra* note 73, at 163 (emphasis added); see also Franck & Fairley, *supra* note 73, at 316.

75. Franck, *supra* note 73, at 163.

76. *Id.* (emphasis added). The International Bar Association and Raoul Wallenberg Institute have published similar guidelines for non-governmental organization (NGO) human rights fact-finding missions, known as the Lund-London Guidelines. The guidelines are similar to the Belgrade Rules. For example, the “terms of reference [that create a fact-finding mission] must not reflect any predetermined conclusions about the situation under investigation.” *Guidelines on International Human Rights Fact-Finding Visits and Reports*

As a related matter, the U.N. General Assembly created the Human Rights Council to replace the Commission on Human Rights because of the Commission's "declining credibility and professionalism" brought about by states who sought Commission membership "not to strengthen human rights but to protect themselves against criticism or to criticize others."⁷⁷ In establishing the Council, the U.N. General Assembly directed that the Council "be guided by the principles of universality, *impartiality*, *objectivity* and *non-selectivity*, constructive international dialogue and cooperation"⁷⁸ and that the Council's work be "transparent, *fair* and *impartial*."⁷⁹

The Human Rights Council's Goldstone Mission failed to meet both the minimal standards for international fact-finding as well as its charter mandate for fairness and impartiality.⁸⁰

(The Lund-London Guidelines), RAOUL WALLENBERG INSTITUTE OF HUMAN RIGHTS AND HUMANITARIAN LAW, ¶ 5 (2009), <http://www.factfindingguidelines.org/> (last visited June 4, 2012). Furthermore, "[t]he mission's delegation should comprise individuals who are *and are seen to be unbiased*." *Id.* ¶ 8 (emphasis added). In this regard:

If it transpires during the course of the mission that there is a conflict of interest or other circumstances involving any member of the delegation which might jeopardize their independence and impartiality, or which might give the appearance that their independence and integrity is compromised, the leader of the delegation should inform the NGO and that member should desist from participating in a particular meeting, or where necessary from the remainder of the mission.

Id. ¶ 32 (emphasis added).

77. U.N. Secretary-General, *In Larger Freedom, Towards Development, Security, and Human Rights for All: Rep. of the Secretary-General*, ¶ 182, U.N. Doc. A/59/2005 (Mar. 21, 2005) (emphasis added), available at <http://www.unhcr.org/refworld/pdfid/4a54bbfa0.pdf>; see also Christine Chinkin, *U.N. Human Rights Council Fact-Finding Missions: Lessons from Gaza*, in LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN 475, 482 (2010); Patrizia Scannella & Peter Splinter, *The United Nations Human Rights Council: A Promise to Be Fulfilled*, 7 HUM. RTS. L. REV. 41, 42-43 (2007); Ladan Rahmani-Ocora, *Giving the Emperor Real Clothes: The UN Human Rights Council*, 12 GLOBAL GOVERNANCE 15, 16-17 (2006); Anne Bayefsky, *The UN and the Jews*, COMMENTARY, Feb. 2004, at 42, 44-45.

78. G.A. Res. 60/251, ¶ 4, U.N. Doc. A/RES/60/251 (Apr. 3, 2006) (emphasis added).

79. *Id.* ¶ 12 (emphasis added).

80. Chinkin, *supra* note 77, at 484-85; Cotler, *supra* note 47, at 9. The Human Rights Council, like the Commission on Human Rights before it, has "had a long record of unfairness toward Israel. . . . [S]ome two-thirds of its resolutions have been against Israel," while the Council has ignored more serious human rights abuses elsewhere. Ambassador Stuart E. Eizenstat, *International Advocate for Peace Award Acceptance Speech*, 12 CARDOZO J. CONFLICT RESOL. 143, 146 (2010). In short, "it is already clear that the new Council shares all of the pathologies of the old Commission." William W. Burke-White & Abraham Bell, Debate, *Is the United Nations Still Relevant?*, 155 U. PA. L. REV. PENNUMBRA 74, 81 (2006), <http://www.pennumbra.com/debates/pdfs/un-full.pdf> (Bell, Rebuttal); see also *The Human Rights Council: Shortcomings and Prospects for Reform: Hearing before the Subcomm. on International Operations and Organizations, Democracy and Human Rights of the S. Comm. on Foreign Relations*, 110th Cong., 3 (2007) (statement of Hon. Kristen Silverberg, Asst. Sec'y, Bureau of International Affairs, Dep't of State); Scannella & Splinter, *supra* note 77, at 61-62; Ved P. Nanda, *The Protection of Human Rights Under International Law: Will the U.N. Human Rights Council and the Emerging New Norm "Responsibility to Protect" Make a Difference?*, 35 DENV. J. INT'L L. & POL'Y 353, 360 (2007); Ruth Wedgwood, *Zionism and*

B. Goldstone Mission's Terms of Reference/Mandate

The Council unquestionably prejudged the issues to be investigated: in spite of the deliberate Hamas rocket and mortar attacks against the Israeli civilian population that triggered the Gaza Conflict and the manner in which Hamas and its allies used Gaza's civilian population to shield their military operations, the resolution establishing the fact-finding mission limited the inquiry to Israeli violations of international law.⁸¹

By the same resolution, and well before the fact-finding mission was appointed, the Human Rights Council condemned Israel alone for its "massive violations of human rights" of Palestinian civilians.⁸² Even prior to the ceasefire, the U.N. Special Rapporteur for the Palestinian Territories accused Israel of committing war crimes during its Gaza campaign.⁸³ And, a month before the Goldstone Mission submitted its findings, a report of the U.N. High Commissioner for Human Rights on the implementation of the Council's resolution determined that Israel breached international law during the conflict.⁸⁴ To his credit, Justice Goldstone expanded the scope of the fact-finding mission to include all "international human rights and humanitarian law violations related to recent

Racism, Again, WORLD AFF., Spring 2009, at 84, 85.

81. H.R.C. Res. S-9/1, *supra* note 3, ¶ 14. By the resolution, the Human Rights Council

dispatch[ed] 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[.]

Id. (emphasis added). See generally Franck & Fairley, *supra* note 73, at 312 ("[N]ormativeness can be demonstrated only by showing that there exists a generalized practice, which, in turn, requires that all allegations of violations be examined factually and that violators be routinely, not selectively, held to account.").

82. H.R.C. Res. S-9/1, *supra* note 3, ¶ 1. See *Legal Memorandum in Opposition to Erroneous Allegations and Flawed Conclusions Contained in the UN Human Rights Council's Goldstone Report*, EUROPEAN CENTRE FOR LAW & JUSTICE, 13 (Jan. 26, 2010) http://www.eclj.org/pdf/ECLJ_MemoonGoldstoneReport_20100126.pdf [hereinafter *ECLJ Memo*] ("[T]he 'facts' to be ascertained by the fact-finding Mission were asserted as already established from the outset").

83. *Special Rapporteur*, *supra* note 65, ¶¶ 9-11.

84. U.N. High Comm'r for Human Rights, *Human Rights Situation in Palestine and other Occupied Arab Territories: Rep. of the United Nations High Commissioner for Human Rights*, U.N. Doc. A/HRC/12/37 (Aug. 19, 2009), available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A.HRC.12.37.pdf>.

conflict in the Gaza Strip.”⁸⁵ However, except for Hamas’s rocket and mortar attacks against Israel, the Mission ignored breaches of international humanitarian law by Palestinian militants during their combat operations against Israel.⁸⁶

The Mission’s biased mandate, typical of others the Council has issued with respect to the Israeli-Arab conflicts, exposes the Council’s inability to address the Israeli-Palestinian conflict in an objective and rational manner. For example, following the Israeli-Hezbollah conflict of 2006, the Council condemned only Israel for violating international law,⁸⁷ in spite of the fact that Hezbollah’s attack on Israel triggered the hostilities⁸⁸ and Hezbollah fired between 4,000 and 5,000 rockets (many directed at civilian population centers) into Israel.⁸⁹ By the same resolution, the Council limited the scope of its fact-finding mission to alleged Israeli war crimes.⁹⁰ In this case, the Mission limited its inquiry to Israel’s conduct during the conflict.⁹¹ Similarly, in 2010, following the Is-

85. Press Release, Human Rights Council, Richard J. Goldstone Appointed to Lead Human Rights Council Fact-Finding Mission on Gaza Conflict, U.N. Press Release (April 9, 2009) <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=8469&LangID=E> (last visited June 4, 2012).

86. See *infra* notes 349-360 and accompanying text.

87. Human Rights Council Res. S-2/1, The Grave Situation of Human Rights in Lebanon Caused by Israeli Military Operations, Special Sess., ¶¶ 1-3 (Aug. 11, 2006) [hereinafter Grave Situation], available at <http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/2/index.htm> (last visited June 4, 2012); see also Yvonne Terlingen, *The Human Rights Council: A New Era in UN Human Rights Work?*, 21 ETHICS & INT’L AFF. J. 167, 174 (2007).

88. On July 16, 2006, Hezbollah fighters ambushed an IDF convoy in Israel, killing eight soldiers and kidnapping two others. Catherine Bloom, *The Classification of Hezbollah in Both International and Non-International Armed Conflicts*, 14 ANN. SURV. INT’L & COMP. L. 61, 62 (2008).

89. DR. RUEVEN ERLICH (LT. COL. RET.), INTELLIGENCE & TERRORISM INFO. CTR., HEZBOLLAH’S USE OF LEBANESE CIVILIANS AS HUMAN SHIELDS 11 (Overview), 1-34 (Part III) (Nov. 2006), <http://www.jewishvirtuallibrary.org/jsource/arabs/hizreport.html>; SHARP ET AL., *supra* note 40, at 10-11. Hezbollah’s leader, Hassan Nasrallah, publicly stated that Israeli population areas were the intended targets of Hezbollah rockets and missiles. Erlich, *supra*, at 13-14, 27-29, app. 2(iii) (Part III).

90. Grave Situation, *supra* note 87, ¶ 7: The Council decided

to establish urgently and immediately dispatch a high-level commission of inquiry comprising eminent experts on human rights law and international humanitarian law, and including the possibility of inviting the relevant United Nations special procedures to be nominated to the Commission: (a) To investigate the systematic targeting and killings of civilians by Israel in Lebanon; (b) To examine the types of weapons used by Israel and their conformity with international law; (c) To assess the extent and deadly impact of Israeli attacks on human life, property, critical infrastructure and the environment.

Id. (emphasis added).

91. Rep. of the Comm’n of Inquiry on Lebanon Pursuant to Human Rights Council Resolution S-2/1, 1014th Meeting, ¶¶ 5-7, U.N. Doc A/HRC/3/2 (Mar. 4, 1969) <http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/2/CI-Lebanon/index.htm> (last visited June 4, 2012). Specifically, the mission noted:

A fundamental point in relation to the conflict and the Commission’s man-

raeli interdiction of a ship attempting to blockade the Gaza Strip that resulted in the loss of life, the Council adopted a resolution that focused only on Israel's alleged transgressions of international law and attempted to circumscribe its fact-finding mission to determining Israeli wrongdoing.⁹²

In this regard, the Human Rights Council is no different than its predecessor, the U.N. Commission on Human Rights, which was equally unable to deal objectively with the Israeli-Arab conflict. For example, in 2002, in the aftermath Palestinian terrorist attacks inside Israel and Israel's launching of Operation Defensive Shield in the West Bank, the U.N. Commission on Human Rights enacted a resolution that exclusively mentioned alleged Israeli violations of international law. It completely ignored the Palestinian terrorist attacks leading to the operation and the actions of Palestinian militants that contributed to—if not caused—Palestinian civilian casualties.⁹³ As early as 1969, the Commission evidenced bias in dealing with Israel when it adopted a resolution condemning Israel alone for actions in the Occupied Territories while at the

date as defined by the Council is the conduct of Hezbollah. The Commission considers that any independent, impartial and objective investigation into a particular conduct during the course of hostilities must of necessity be with reference to all the belligerents involved. Thus an inquiry into the conformity with international humanitarian law of the specific acts of the Israel Defense Forces (IDF) in Lebanon requires that account also be taken of the conduct of the opponent.

Id. ¶ 6. Nevertheless, the Mission refused to consider Hezbollah's conduct because "[t]o do so would exceed the Commission's interpretative function and would be to usurp the Council's powers." *Id.* ¶ 7; see also James G. Stewart, *The UN Commission of Inquiry on Lebanon*, 5 J. INT'L CRIM. JUST. 1039, 1041 (2007).

92. Human Rights Council Res. 14/1, *The Grave Attacks by Israeli Forces Against the Humanitarian Boat Convoy*, 14th Sess., May 31–June 18, 2010, ¶¶ 1, 8, U.N. Doc. A/HRC/RES/14-1 (June 23, 2010), available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/RES.14.1_AEV.pdf. The Council decided "to dispatch an independent, international fact-finding mission to investigate violations of international law, including international humanitarian and human rights law, resulting from the *Israeli attacks* on the flotilla of ships carrying humanitarian assistance." *Id.* ¶ 8 (emphasis added). By contrast, the U.N. Secretary-General dispatched a fact-finding mission that impartially considered both sides of the incident. *Palmer Report*, *supra* note 46.

93. Comm'n on Human Rights Res. 2002/1, *Situation of Human Rights in the Occupied Palestinian Territory*, 58th Sess., Mar. 18–Apr. 26, 2002, U.N. Doc. E/CN.4/RES/2002/1 (Apr. 5, 2002), available at <http://domino.un.org/unispal.nsf/0/f9a0f66f68-83325f85256b9c006b96cb?OpenDocument>. The resolution requested that "the High Commissioner for Human Rights to head a visiting mission that would travel immediately to the area and return expeditiously to submit its findings and recommendations." *Id.* ¶ 3. A subsequent Human Rights Commission resolution likewise dealt solely with claims of Israeli violations of international law. Comm'n on Human Rights Res. 2002/8, *Question of the Violation of Human Rights in the Occupied Arab Territories, Including Palestine*, 58th Sess., Mar. 18–Apr. 26, 2002, U.N. Doc. E/2002/23-E/CN.4/2002/200 (Apr. 15, 2002), available at <http://unispal.un.org/UNISPAL.NSF/0/DF9CAA26E9BEB10485256BAB00666603>. See generally Emanuel Gross, *Use of Civilians as Human Shields: What Legal and Moral Restrictions Pertain to a War Waged by a Democratic State Against Terrorism?* 16 EMORY INT'L L. REV. 445, 502-03 (2002); Richard D. Rosen, *Targeting Enemy Forces in the War on Terror: Preserving Civilian Immunity*, 42 VAND. J. TRANSNAT'L L. 683, 753-57 (2009).

same time establishing a Working Group of Experts “[t]o investigate allegations concerning Israel’s violations of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949.”⁹⁴

C. Goldstone Mission’s Fact-Finders

In addition to working under a predisposed mandate,⁹⁵ the Mission’s members also prejudged the conclusions of the investigation and did not enter the inquiry with open minds.⁹⁶ Both Justice Goldstone and a second Mission member, Ms. Hina Jilani, signed a letter a month before their appointment stating that “there is an important case to be made for an international investigation of gross violations of the laws of war, committed by all parties to the Gaza conflict[,]” and that the events in Gaza “shocked [them] to the core.”⁹⁷

Another member of the Mission, Professor Christine Chinkin, was more direct. On January 11, 2009, before implementation of the ceasefire, Professor Chinkin signed a letter published in the *Sunday Times*, asserting that Israel had violated international humanitarian and human rights law in its “invasion and bombardment of Gaza.”⁹⁸ At the very least, Professor Chinkin’s letter gave the appearance of a bias against Israel and a predisposition to finding that it was guilty of war crimes.⁹⁹

94. Comm’n on Human Rights, Res. 6(XXV), Question of Human Rights in the Territories Occupied as a Result of Hostilities in the Middle East, 25th Sess., ¶ 4, U.N. Doc. E/CN.4/RES/6(XXV), (Mar. 4, 1969), <http://unispal.un.org/UNISPAL.NSF/0/A229BE99D7F567928025646C005B5FB9> (last visited June 4, 2012). See Theodore C. van Boven, *Fact-Finding in the Field of Human Rights*, 3 ISRAEL Y.B. HUM. RTS. 93, 95 (1973).

95. See *supra* notes 81-86 and accompanying text. See also Rodley, *supra* note 70, at 194 (“Few such resolutions contained as arrantly prejudicial language as that setting up the Goldstone Mission.”).

96. Eizenstat, *supra* note 80, at 146.

97. *Gaza: World’s Leading Investigators Call for War Crimes Inquiry*, AMNESTY INT’L UK (Mar. 16, 2009), http://www.amnesty.org.uk/news_details.asp?NewsID=18109.

98. Letter from Ian Brownlie et al., *Israel’s Bombardment of Gaza Is Not Self-Defence—It’s a War Crime*, SUN. TIMES, Jan. 11, 2009; see also Dershowitz, *supra* note 15, at 4; *UN Watch Request to Disqualify Prof. Christine Chinkin from UN Fact Finding Mission on the Gaza Conflict*, UN WATCH (Aug. 20, 2009), http://www.unwatch.org/atf/cf/%7B6DEB65DA-BE5B-4CAE-8056-8BF0BEDF4D17%7D/2207UN_Watch_Request_to_Disqualify_Christine_Chinkin_from_UN_Goldstone_Mission_on_Gaza_20_August_2009.pdf; *ECLJ Memo*, *supra* note 82, at 31-32.

99. See Dershowitz, *supra* note 15, at 4-5; Rodley, *supra* note 70, at 192; see also CHATHAM HOUSE, REPORT OF AN EXPERT MEETING WHICH ASSESSED PROCEDURAL CRITICISMS MADE OF THE UN FACT-FINDING MISSION ON THE GAZA CONFLICT (THE GOLDSTONE REPORT) 7 (2009), <http://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/il271109summary.pdf> (while expressing “complete confidence in the personal integrity of Professor Chinkin,” the report notes that “fact-finding missions should avoid any perception of bias.”). Professor Chinkin herself recognizes the need for fact-finders who do not appear to be biased. Chinkin, *supra* note 77, at 489 (“A significant issue of fact-finding is that of participation. Mission members should be unbiased *and seen to be so*”)

The fourth Mission member, Irish Colonel Desmond Travers, joined in the letter signed by Justice Goldstone and Hina Jilani.¹⁰⁰ More revealing, however was an interview Colonel Travers gave after issuance of the Goldstone Report. In it, he intimated a certain degree of animus against Israel “because so many Irish soldiers [peacekeepers in southern Lebanon] had been killed by Israelis, (some too by Palestinians and/or their Lebanese cohorts), with a significant number who were taken out deliberately and shot.”¹⁰¹ Moreover, when asked about British military officers who defended Israeli conduct during the conflict, Travers’ answer was tinged with anti-Semitism: “*Britain’s foreign policy interests in the Middle East seem to be influenced strongly by Jewish lobbyists. I find it interesting that the two former military officers quoted in the media in defence of Israeli military actions in Gaza are both British.*”¹⁰² Travers also blamed *rabbis* for inciting Israeli troops to commit war crimes. When he was asked whether Israeli politicians and military leaders were culpable of war crimes, he responded in part:

Do you realise now that *there is a very fervid Rabbinate in the military?* For the first time ever the Rabbis travelled with the combat troops and this is a new and troubling development. It is also reported that the Rabbis in the Israeli Defence Forces have on occasion challenged the authority of military commanders. This must surely be a development that has negative consequences for good order and respect for authority in the Israeli army.¹⁰³

As a career soldier, Colonel Travers certainly knows that many nations (including his own) deploy chaplains to accompany combat troops in time of war.¹⁰⁴ One can only conclude that Colo-

(emphasis added).

100. See *supra* note 97 and accompanying text.

101. *Colonel Travers Interview*, *supra* note 66.

102. *Id.* (emphasis in the original).

103. *Id.* (emphasis in the original).

104. For example, chaplains have served with the troops in the United States Army since the Revolutionary War. DEPT OF THE ARMY, FIELD MANUAL 1-05: RELIGIOUS SUPPORT ¶ 1-7 (2003), <http://www.globalsecurity.org/military/library/policy/army/fm/1-05/fm1-05.pdf>. Today, Army chaplains are located at every echelon of command above battalion. *Id.* ¶ 1-19. Military chaplains and their assistants constitute Unit Ministry Teams (UMTs), which “*are assigned to units whose primary mission is warfighting. The UMT deploys with its unit and provides religious support for all units in the commander’s area of responsibility during each stage of force projection.*” *Id.* ¶ 1-27 (emphasis added). The Irish Army’s chaplains similarly support Irish soldiers during deployments. *Overseas Service*, THE CHAPLAINCY SERV., <http://www.militarychaplaincy.ie/overseas/index.html> (last visited June 4, 2012). British Army chaplains also serve “wherever British soldiers have been sent. Korea, Suez, Aden,

nel Travers believes—without any evidence to substantiate it—that Jewish chaplains have an insidious effect on soldiers in combat. Ironically, while insinuating that rabbis were somehow responsible for instigating war crimes, Colonel Travers suggested that any assertions that Hamas used medical vehicles and religious facilities for military purposes constituted negative religious stereotypes and slurs.¹⁰⁵

Whether Colonel Travers's beliefs were known before he served on the Mission is not known, but he did not come into the investigation as an impartial fact-finder.

D. Israel's Role in the Fact-Finding Mission

Israel refused to cooperate with the Goldstone Mission,¹⁰⁶ asserting that the Human Rights Council's resolution establishing the Mission was “inflammatory and prejudicial” and constituted a “one-sided mandate.”¹⁰⁷ Even given the bias of the Mission's original mandate and composition, however, Israel seemingly blundered by declining to play a role in the inquiry.¹⁰⁸ By refusing to participate in the investigation, Israel permitted the Mission to discount Israel's evidence of Hamas's tactical doctrine and operations, which played into Hamas's strategic narrative of an “Israeli ‘holocaust’ in Gaza.”¹⁰⁹ While the Mission might have ultimately

Northern Ireland, The Falklands, Iraq, Sierra Leone, the former Yugoslavia and Afghanistan.” *Army Chaplains' History*, BRITISH ARMY WEBSITE, <http://www.army.mod.uk/chaplains/23350.aspx> (last visited June 4, 2012). The Australian Army also has a similar system of religious support for its soldiers. *Chaplain: Defence Jobs*, DEF. FORCE RECRUITING (AUSTL.), <http://www.defencejobs.gov.au/army/Jobs/Chaplain/?entryTypeId=5> (last visited June 4, 2012).

105. *Colonel Travers Interview*, *supra* note 66; see Alan Dershowitz, *An Anti-Israeli Extremist Seeks Revenge Through the Goldstone Report*, HUFFINGTON POST (Feb. 12, 2010, 12:02PM) http://www.huffingtonpost.com/alan-dershowitz/an-anti-israel-extremist_b_460187.html.

106. *Goldstone Report*, *supra* note 4, ¶¶ 8, 144, 162, 1179.

107. ISRAEL MINISTRY OF FOREIGN AFF., LETTER FROM AMBASSADOR LESHNO-YAAR TO GOLDSTONE, http://www.mfa.gov.il/MFA/Foreign+Relations/Israel+and+the+UN/Issues/Letter_from_Israel_Ambassador_Leshno-Yaar_to_Goldstone_2-Jul-2009.htm (last visited June 4, 2012).

108. *Cf.* Muravchik, *supra* note 15 (“In sum, Goldstone's mission began with a mandate that categorically prejudged the issues, and a panel made up of four individuals who had done likewise. The outcome of its deliberations was thus predetermined from the outset. For this reason, Israel declined to cooperate.”).

109. See MICHAEL L. GROSS, MORAL DILEMMAS OF MODERN WAR: TORTURE, ASSASSINATION, AND BLACKMAIL IN AN AGE OF ASYMMETRIC CONFLICT 259 (2010); Yoram Cohen & Jeffrey White, *Hamas in Combat: The Military Performance of the Palestinian Islamic Resistance Movement*, POL'Y FOCUS #97, WASH. INST. FOR NEAR EAST POL'Y 18 (2009), http://www.voltairenet.org/IMG/pdf/Hamas_in_Combat.pdf; Lieutenant Colonel Michael D. Snyder, *Information Strategies Against a Hybrid Threat: What Recent Experiences of Israel Versus Hezbollah/Hamas Tell the US Army, in BACK TO BASICS: A STUDY OF THE SECOND LEBANON WAR AND OPERATION CAST LEAD* 103, 106 (Lieutenant Colonel Scott C. Farquhar, ed., 2009), available at <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA498599>. Dr.

ignored evidence offered by Israel,¹¹⁰ Israel would at least have had the opportunity to set out its case on the world stage.

Compounding the error was Israel's decision to bar independent foreign media from the Gaza Strip during the conflict. Independent press reporters who were able to gain access to the Gaza Strip often supported Israel's contention that Hamas militants used the civilian population areas for their military operations.¹¹¹ Greater press access might have lent credibility to Israel's insistence that its forces did not violate the laws of war, and the absence of multiple media outlets for its information likely cost Israel the "information war."¹¹²

III. THE MISSION'S FINDINGS AND CONCLUSIONS

Operation Cast Lead began with an air campaign against Hamas targets in the Gaza Strip.¹¹³ A week later, on January 3,

Barry A. Feinstein, *Proportionality and War Crimes in Gaza under the Law of Armed Conflict*, 36 RUTGERS L. REC. 224, 236 (2009).

110. There is reason to believe that it would. For example, the Mission generally discounted statements from Israeli sources unless the information was adverse to Israel. Muravchik, *supra* note 15. Colonel Travers refused to accept as probative Israeli photographic evidence of the use of mosques to store military equipment. *Colonel Travers Interview*, *supra* note 66.

111. See, e.g., Ulrike Putz, "Who Has Won Here?", SPIEGEL ONLINE (Jan. 23, 2009, 4:30PM), <http://www.spiegel.de/international/world/0,1518,603203,00.html> (describing Hamas' use of civilian homes for military purposes); Ethan Bronner, *Parsing Gains of Gaza War*, N.Y. TIMES, Jan. 19, 2009, at A1, <http://www.nytimes.com/2009/01/19/world/middleeast/19assess.html> (describing Hamas' strategy of firing rockets from between houses); Dominic Lawson, *No, We Are Not All Hamas Now*, TIMES ONLINE, Jan. 11, 2009, <http://mideasttruth.com/forum/viewtopic.php?t=8854> (describing Hamas' use of civilians as shields).

112. See Editorial, *Misguided Media Ban*, JERUSALEM POST, Feb. 27, 2009, available at 2009 WLNR 3996994:

[Israel] insisted on keeping all Israel-based foreign journalists out of the conflict arena, thereby ensuring that the fighting would instead be reported by Palestinian stringers. Whatever concerns Israel may have had about the balances and biases of foreign reporters, it is impossible to imagine that they would be more hostile than their Palestinian counterparts.

Israel should have learned from the bitter precedent of Jenin in 2002, during Operation Defensive Shield—when a false narrative of Israeli massacres and mass killings was allowed to fester—that a ban on the foreign press has a boomerang effect. To paraphrase a familiar quotation, the worst lies speed rapidly around the world to stand uncontested, and it's far too late by the time truth is allowed to get its boots on.

Israel was concerned about operational security. During the war with Hezbollah, "Hezbollah had the ability to anticipate Israeli actions simply by listening to the media." Snyder, *supra* note 109, at 124. Perhaps embedded reporters with restrictions on "real-time" reporting might have been a workable compromise between security and media access.

113. Matt M. Matthews, *Hard Lessons Learned: A Comparison of the 2006 Hezbollah-Israeli War and Operation CAST LEAD*, in BACK TO BASICS: A STUDY OF THE SECOND LEBANON WAR AND OPERATION CAST LEAD 27 (Lieutenant Colonel Scott C. Farquhar, ed., 2009).

2009, the IDF commenced ground operations in Gaza,¹¹⁴ which lasted until a ceasefire was declared on January 18.¹¹⁵ According to Israel, Operation Cast Lead had two objectives: (1) to stop the bombardment of Israeli civilians by destroying Hamas's mortar and rocket launching apparatus and infrastructure; and (2) to reduce the ability of Hamas and other terrorist organizations in Gaza to perpetrate future attacks against the civilian population in Israel.¹¹⁶

The Goldstone Mission determined that Israel had, in fact, another objective for its operation: to target the people of Gaza.¹¹⁷ Considering its position to "be firmly based in fact,"¹¹⁸ the Mission asserted that Israel pursued a "deliberate policy of disproportionate force aimed not at the enemy but at the 'supporting infrastructure.' In practice, this appears to have meant the civilian population."¹¹⁹ Without seriously taking into consideration how Hamas's tactics affected the operational environment,¹²⁰ the Mission condemned Israel for its "repeated failure to distinguish between combatants and civilians," which it deemed to be "the result of deliberate guidance issued to soldiers."¹²¹ The Mission concluded that "[w]hatever violations of international humanitarian and human rights law may have been committed, the systematic and deliberate nature of the activities described in this report leave the Mission in no doubt that responsibility lies in the first place with those who designed, planned, ordered and oversaw the operations."¹²²

The Mission predicated its conclusions upon the number of civilian casualties inflicted during the conflict,¹²³ statements by current and former Israeli officials about Israeli military objectives in

114. ISRAEL MINISTRY OF FOREIGN AFF., OPERATION CAST LEAD EXPANDED (Jan. 3, 2009), http://www.mfa.gov.il/MFA/Government/Communiques/2009/Second_stage_Operation_Cast_Lead_begins_3-Jan-2009.htm ("The objective of this phase of the operation is to intensify the heavy blow already dealt to Hamas and to take control of area from where most of the rocket attacks against Israel originate, in order to reduce those rocket attacks.") (last visited June 4, 2012).

115. Isabel Kershner & Michael Slackman, *Cease-Fire Holding as Israelis Pull out of Gaza*, INT'L HERALD TRIB., Jan. 20, 2009, at 5, available at 2009 WLNR 1106907.

116. ISRAEL MINISTRY OF FOREIGN AFF., GAZA FACTS—THE OPERATION AGAINST HAMAS IN GAZA: THE ISRAELI PERSPECTIVE <http://www.mfa.gov.il/GazaFacts> (last visited June 4, 2012).

117. *Goldstone Conclusions*, supra note 1, ¶¶ 1877, 1883, 1890, 1892; *Goldstone Report*, supra note 4, ¶ 1215.

118. *Goldstone Conclusions*, supra note 1, ¶ 1884.

119. *Id.* ¶ 1886.

120. See *infra* note 310 and accompanying text.

121. *Goldstone Conclusions*, supra note 1, ¶ 1889.

122. *Id.* ¶ 1895.

123. *Goldstone Report*, supra note 4, ¶ 362; *Goldstone Conclusions*, supra note 1, ¶ 1885.

Gaza and other conflicts,¹²⁴ and Israel's advanced targeting technology and proficiency.¹²⁵

A. Number of Civilian Deaths

The Mission relied upon what it described as disproportionate deaths among civilians as indicia of Israeli intent to target civilians and their infrastructure. No consensus exists, however, about the total number killed in Gaza during the conflict; figures range from an Israeli-asserted 1,166¹²⁶ to about 1,400 claimed by Israeli and Palestinian NGOs.¹²⁷ The percentage of civilian casualties is also unclear: Israeli claims 60% of those killed were combatants,¹²⁸ while NGO figures range from 16% to 41%.¹²⁹ The Mission stated that, because it did not investigate all incidents involving the loss of life, it “[would] not make findings regarding the overall number of persons killed nor regarding the percentage of civilians among those killed.”¹³⁰ Nevertheless, the Mission expressed concern about the “exceedingly high percentage of civilians among those killed,”¹³¹ and—without explanation—accepted the highest casualty figures in its conclusion.¹³²

Critics of Israel's Gaza campaign use hyperbolic adjectives such as “severe,”¹³³ “countless,”¹³⁴ “terrible,”¹³⁵ “catastrophic,”¹³⁶ “vastly disproportionate,”¹³⁷ and even “unprecedented,”¹³⁸ to describe the civilian casualties. *Really?* The Russians killed more than 25,000

124. *Goldstone Report*, *supra* note 4, ¶¶ 63-64, 1192-1212, 1215-16; *Goldstone Conclusions*, *supra* note 1, ¶¶ 1877, 1894.

125. *Goldstone Report*, *supra* note 4, ¶¶ 61, 576-78, 1185-91; *Goldstone Conclusions*, *supra* note 1, ¶ 1893.

126. *Goldstone Report*, *supra* note 4, ¶ 359.

127. *Id.* ¶¶ 352-58.

128. *Id.* ¶¶ 354-59.

129. *Id.* ¶¶ 353-56.

130. *Id.* ¶ 360.

131. *Id.* ¶ 362.

132. See generally *Goldstone Conclusions*, *supra* note 1, ¶¶ 1885-91.

133. PoKempner, *supra* note 15, at 145.

134. Sterio, *supra* note 15, at 248.

135. *The True Picture of the Brutal Gaza Invasion Comes into Focus*, Editorial, INDEP., Oct. 23, 2010, <http://www.independent.co.uk/opinion/leading-articles/leading-article-the-true-picture-of-the-brutal-gaza-invasion-comes-into-focus-2114267.html>.

136. George E. Bisharat et al., *Israel's Invasion of Gaza in International Law*, 38 DENV. J. INT'L L. & POL'Y 41, 98 (2009).

137. NAT'L LAWYERS GUILD DELEGATION TO GAZA, ONSLAUGHT: ISRAEL'S ATTACK ON GAZA AND THE RULE OF LAW 35 (2009) [hereinafter ONSLAUGHT].

138. Reem Salahi, *Israel's War Crimes: A First Hand Account of Israel's Attacks on Palestinian Civilians and Civilian Infrastructure*, 36 RUTGERS L. REC. 201, 221 (2009) (emphasis added); see also AL MEZAN CTR. FOR HUM. RTS., CAST LEAD OFFENSIVE IN NUMBERS 2 (2009) (emphasis added), available at <http://www.vho.org/aaargh/fran/livres9/castlead.pdf> (describing the military offense as an “unprecedented in terms of the scale of grave and systematic violations of the rules of international humanitarian law”).

Chechen civilians in the 1994 Battle of Grozny over a similar period of time;¹³⁹ Serb militias killed more than 8,000 Bosnian Muslims at Srebrenica in the month of July 1995.¹⁴⁰ In 1985, the Soviet Union murdered—in one day—more than 1,000 Afghan men, women, and children in raids against civilians supporting Islamic militants.¹⁴¹ The U.S. Army killed between 500 and 1500 persons, many of them civilians, in a mere 17-hour span in a 1993 battle in Mogadishu, Somalia;¹⁴² NATO killed at least 500 (the Serbs claim 1,200-5,700) civilians in seven weeks of bombing during the 1999 Kosovo conflict.¹⁴³ Iraq killed about 5,000 Kurds in merely twenty bombing missions against the city of Halabjah in March 1988.¹⁴⁴ In less than three weeks in 1982, the Syrians massacred between 5,000 and 25,000 persons in the city of Hama in its battle with the

139. William G. Rosenau, "Every Room Is a New Battle": *The Lessons of Modern Urban Warfare*, 20 *STUDIES IN CONFLICT & TERRORISM* 371, 382 (1997). "Estimates of [total] deaths [in the Russo-Chechen War of 1994-1996] range from around 20,000 to 120,000; estimates by human rights groups tend to range up to 50,000." Johanna Nichols, *The Chechen Refugees*, 18 *BERKELEY J. INT'L L.* 241, 244 (2000); see also Svante E. Cornell, *International Reactions to Massive Human Rights Violations: The Case of Chechnya*, 51 *EUR.-ASIA STUD.* 85, 88 (1999) (noting Russians indiscriminate bombing of civilian areas); Brian Glyn Williams, *The Russo-Chechen War: A Threat to Stability in the Middle East and Eurasia?*, *MIDDLE E. POL'Y*, Mar. 31, 2001, at 128, available at 2001 *WLNR* 4516461; *The War in Chechnya: Russia's Conduct, the Humanitarian Crisis, and United States Policy before the S. Comm. on For. Rels*, 106th Cong. 11, 12 (2000) (statement of Mr. Peter Bouckaert, Investigator, Human Rights Watch).

140. David Gibbs, *The Srebrenica Massacre, After Fifteen Years*, *FOREIGN POL'Y IN FOCUS*, (July 10, 2010), http://www.fpif.org/articles/the_srebrenica_massacre_after_fifteen_years; Marko Attila Hoare, *Genocide in the Former Yugoslavia from the 1940s to the 1990s* 14 (Kingston Univ. Working Papers Series, No. 4, 2007), <http://eprints.kingston.ac.uk/5536/1/Hoare-M-5536.pdf>; *Prosecutor v. Popovic*, Case No. IT-05-88-T, Judgment, ¶ 664 (Int'l Crim. Trib. for the Former Yugoslavia June 10, 2010).

141. Barry Renfrew, *Raids in Afghanistan Soviets Purportedly Kill 1,000*, *PHILA. INQ.*, May 15, 1985, at A20, available at 1985 *WLNR* 230867. In its war against Mujahedeen guerrillas, the Soviets were indiscriminate in the use of force, leveling villages and cities, destroying food and water supplies, employing chemical weapons, and causing millions of civilians to flee. THOMAS T. HAMMOND, *RED FLAG OVER AFGHANISTAN* 160-62 (1984); *Mass Killings of Afghans Confirmed*, *BOSTON GLOBE*, May 15, 1985, at 1, available at 1985 *WLNR* 131769. By some estimates, over one and a half million people died. Svante E. Cornell, *The War Against Terrorism and the Conflict in Chechnya: A Case for Distinction*, 27 *FLETCHER F. WORLD AFF.* 167, 180 (2003).

142. Dr. RICHARD W. STEWART, *CTR. FOR MILITARY HISTORY, THE UNITED STATES ARMY IN SOMALIA 1992-1994*, 23 (2006), <http://www.history.army.mil/brochures/Somalia/Somalia.htm>. U.S. Ambassador to Somalia, Robert Oakley, estimated between 1500 and 2000 Somalis were killed during the battle. The Ambassador noted that "women and children were being used as shields and [in] some cases women and children were actually firing weapons, and were coming [at American troops] from all sides." Interview by PBS Frontline with Ambassador Robert Oakley, U.S. Ambassador to Somalia, <http://www.pbs.org/wgbh/pages/frontline/shows/ambush/interviews/oakley.html>.

143. ERIC V. LARSON & BOGDAN SAVYCH, *MISFORTUNES OF WAR: PRESS AND PUBLIC REACTIONS TO CIVILIAN DEATHS IN WARTIME* 64-65 (2006), http://www.rand.org/pubs/monographs/2006/RAND_MG441.pdf.

144. S. Taheri Shemirani, *The War of the Cities, in THE IRAN-IRAQ WAR: THE POLITICS OF AGGRESSION* 32, 33 (Farhang Rajaee, ed., 1993); *Whatever Happened to the Iraqi Kurds?*, *HUM. RTS. WATCH* (Mar. 10, 1991), <http://www.unhcr.org/refworld/country,,HRW,,IRN,,47fdfb1b0,0.html>.

Muslim Brotherhood¹⁴⁵ and the U.N. has estimated that it has killed more than 9,000 civilians during the ongoing uprising.¹⁴⁶ Coalition forces killed between 1,000 and 3,500 civilians in just over a month of bombing during the First Gulf War.¹⁴⁷ Depending on the source, the United States is purported to have killed between 1,700 and 45,000 civilians during its invasion of Iraq in 2003.¹⁴⁸ A U.N.-backed, Congolese military operation killed 1,400 civilians between January and September 2009.¹⁴⁹ And over the span of just 100 days in 1994, “the Rwandan government, assisted by tens of thousands of soldiers, militia, and ordinary citizens,”¹⁵⁰ most armed with primitive weapons,¹⁵¹ killed between 500,000 and 800,000 Tutsis.¹⁵² Ironically, at the same time Justice Goldstone and his Mission were investigating Israeli operations in Gaza on behalf of the Human Rights Council, the Council commended the Government of Sri Lanka for its defeat of the Tamil Tigers,¹⁵³ a

145. Seth Krummrich, *Shaping Jihadism: How Syria Molded the Muslim Brotherhood* (Mar. 2007) (Master's thesis approved for public distribution, Naval Postgraduate School), <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA467079&Location=U2&doc=GetTRDoc.pdf> (between 5,000 and 25,000 killed); *Massacre of Hama (February 1982): Genocide and a Crime Against Humanity*, SYRIAN HUM. RTS. COMM. (Feb. 2, 2006), <http://www.shrc.org/data/aspx/d5/2535.aspx> (over 25,000 killed); Marco Vicenzino, *Syria's Existential Crisis*, GLOBAL VIEWS: VIEWPOINTS, Oct. 26, 2005 (placing number of deaths at 10,000).

146. Louis Charbonneau & Michele Nichols, *UPDATE 3—UN Raises Civilian Death Toll to Over 9,000*, REUTERS, (Mar. 27, 2012, 1:17PM) <http://www.reuters.com/article/2012/03/27/syria-un-idUSL2E8ERNGB20120327>.

147. LARSON & SAVYCH, *supra* note 143, at 21-22.

148. *Id.* at 159-61; *see also* Colin H. Kahl, *In the Crossfire or the Crosshairs: Norms, Civilian Casualties, and U.S. Conduct in Iraq*, 32 INT'L SECURITY 7, 11 (2007); Peter Ford, *Surveys Point to High Civilian Death Toll in Iraq*, CHRISTIAN SCIENCE MONITOR, May 22, 2003, at 1, <http://www.csmonitor.com/2003/0522/p01s02-woiq.html>.

149. Stephanie McCrummen, *U.N. Urged to Cease Aid to Congo Regime Accused of Horrific Acts*, WASH. POST, Dec. 15, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/12/14/AR2009121401383.html>. At least one NGO estimates that more than 5.4 million people have died as a result of the ongoing conflict in the Congo since 1998, about 45,000 every month. *Measuring Mortality in the Democratic Republic of Congo*, INT'L RESCUE COMM. (2007), http://www.rescue.org/sites/default/files/resource-file/IRC_DRCMortalityFacts.pdf.

150. *Rwanda: Tribunal Risks Supporting 'Victor's Justice'*, HUM. RTS. WATCH (June 1, 2009), <http://www.hrw.org/en/news/2009/06/01/rwanda-tribunal-risks-supporting-victor-s-justice>.

151. Philip Verwimp, *Machetes and Firearms: The Organization of Massacres in Rwanda*, 43 J. PEACE RES. 5, 11 (2006) (“Most victims were hacked to death with traditional weapons such as machetes or clubs.”), <http://jpr.sagepub.com/content/43/1/5.full.pdf+html>.

152. *Id.* at 10 (between 500,000 and 8,000,000 killed); *see also Rwanda: How the Genocide Happened*, BBC NEWS (Dec. 18, 2008, 9:53PM), <http://news.bbc.co.uk/2/hi/1288230.stm> (800,000 killed).

153. Human Rights Council Res. S-11/1, Assistance to Sri Lanka in the Promotion and Protection of Human Rights, 11th Sess., May 26, 2009, A/HRC/S-11/2 (May 27, 2009) (the Human Rights Council “Welcom[es] the conclusion of hostilities and the liberation by the Government of Sri Lanka of tens of thousands of its citizens that were kept by the [Liberation Tigers of Tamil Eelam] against their will as hostages, as well as the efforts by the Government to ensure the safety and security for all Sri Lankans and bringing permanent peace to the country . . .”). *See* Louise Arbour, *Opinion: Sri Lanka Still Demands Justice*,

conflict costing the lives of more than 20,000 Tamil civilians during the government's final assault in the campaign.¹⁵⁴

Thus, assume for the sake of argument that the Mission is correct: Israel deliberately targeted civilians. What is Israel to make of the fact that—with one of the world's most technologically lethal militaries and a mission of killing civilians in “one of the most densely populated tracts of land” on earth¹⁵⁵—only 1,400 people were actually killed? To be facetious, the word “ineffective” comes to mind,¹⁵⁶ particularly when compared to the casualties inflicted by less modern militaries (and even civilians) in much more sparsely populated regions of the world.

Of course, not all Palestinians killed during the Israeli-Hamas conflict were civilians; many were combatants and legitimate targets under international humanitarian law.¹⁵⁷ The Gaza police

GLOBAL POST (June 8, 2010, 9:29PM), <http://www.globalpost.com/dispatch/worldview/100607/sri-lanka-war-government-tamil-tigers> (contrasting the reaction of the Human Rights Council to conflicts in Gaza and in Sri Lanka).

154. Ben Farmer, *Sri Lankan Army Accused of Massacring 20,000 Tamil Civilians in Final Assault*, TELEGRAPH (U.K.), (May 29, 2009, 9:54AM), http://www.observatori.org/paises/pais_75/documentos/191%20War%20Crimes%20in%20Sri%20Lanka.pdf; Catherine Philip, *The Hidden Massacre: Sri Lanka's Final Offensive Against the Tamil Tigers*, SUNDAY TIMES (London), May 29, 2009; see also *Civilian Casualties Rising in Sri Lanka Conflict*, AMNESTY INT'L, (Apr. 21, 2009), <http://www.amnesty.org/en/news-and-updates/news/civilian-casualties-rising-sri-lanka-conflict-20090421> (noting the death of 4,500 civilians in the northeastern region of the country); Lydia Polgreen, *Sri Lanka Forces Blamed for Most Civilian Deaths*, N.Y. TIMES, May 17, 2010, at A6, available at 2010 WLNR 10163605 (“United Nations workers counted about 7,000 dead in the last weeks of April, just before the last phase of the fighting, but diplomats, aid workers and human rights activists have long argued that those figures far underestimated the dead”); Rhys Blakely, *Tamil Death Toll “Is 1,400 a Week” at Manik Farm Camp in Sri Lanka*, SUNDAY TIMES (LONDON), July 10, 2009 (stating about 1,400 people are dying each day at internment camp set up by Sri Lanka to detain Tamil refugees). For a comprehensive report of alleged war crimes committed by Sri Lanka and the Liberation Tigers of Tamil Eelam (LTTE), see *War Crimes in Sri Lanka*, INT'L CRISIS GRP. (May 17, 2010), <http://www.crisisgroup.org/~media/Files/asia/south-asia/sri-lanka/191%20War%20Crimes%20in%20Sri%20Lanka.pdf>.

The United Nations did conduct an investigation of the Sri Lankan conflict, albeit under the auspices of the Secretary-General, not the Human Rights Council. See U.N. Secretary-General, *Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka* (Mar. 31, 2011), http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf. The Panel of Experts found credible allegations that the Sri Lankan army, using “large-scale and widespread shelling,” caused large numbers of civilian casualties. *Id.* at ii. This included shelling of government-declared “No Fire Zones,” where the government encouraged the civilian population to concentrate. *Id.* In spite of these findings, the Human Rights Council has yet to condemn Sri Lanka.

155. *Gaza Strip: Population*, BBC NEWS, http://news.bbc.co.uk/2/shared/spl/hi/middle_east/03/v3_israel_palestinians/maps/html/population_settlements.stm. The Gaza Strip is 360 square kilometers (about twice the size of Washington, D.C.), and has an estimated 2011 population of about 1.6 million. *Middle East: Gaza Strip*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/gz.html> (last visited June 4, 2012); Salahi, *supra* note 138, at 207.

156. See Dershowitz, *supra* note 15, at 20; Norwitz, *supra* note 7.

157. Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 52.2, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]; see also *Goldstone Conclusions*, *supra* note 1, ¶ 1886 (noting that not all collateral civilian casualties constitute law of war violations).

constituted the largest group of fatalities—between 18% and 21% of the total—over which a dispute exists as to combatant status.¹⁵⁸ The Mission asserted that the police were civilians and not subject to attack.¹⁵⁹ Since publication of the Mission's report, however, the Hamas leadership has admitted much greater combat losses than initially reported, and it recognized the police among its combatants killed.¹⁶⁰ In total, Hamas has stated that it lost between 600-700 men,¹⁶¹ close to the figure provided by Israel immediately following the conflict.¹⁶² Hamas's admission was one of the bases for Justice Goldstone's retreat from his report's conclusions.¹⁶³ Thus, the Mission's inclusion of police losses as civilian casualties was incorrect as a matter of fact.

Even had the Hamas leadership not made such an admission, the Goldstone Report findings were still factually and legally inaccurate. The Mission relied primarily upon *post-conflict* testimony from Gaza police authorities that the Gaza police did not engage in combat with the IDF, but instead dealt with matters of internal security and protecting the civilian population.¹⁶⁴ The Mission acknowledged, however, statements by senior police officials made *before* and *during* Operation Cast Lead that the police would assume a military role against any Israeli incursions into the Gaza Strip.¹⁶⁵

The foundation of Gaza's police is the Executive Force created by Hamas after its election victory in 2006. Hamas did not initially

158. See *Goldstone Report*, *supra* note 4, ¶ 393 (248 members of Gaza police killed). The ratio of police to the total number of Palestinians killed depends, of course, upon which figures are accepted as the total Palestinian deaths during the conflict.

159. *Id.* ¶¶ 34, 434; *Goldstone Conclusions*, *supra* note 1, ¶ 1923.

160. *Hamas Confirms Losses in Cast Lead for First Time*, JERUSALEM POST, Nov. 1, 2010, <http://www.jpost.com/MiddleEast/Article.aspx?id=193521> (quoting Hamas Interior Minister Fathi Hammad that "[o]n the first day of the war, Israel targeted police stations and 250 martyrs who were part of Hamas and the various factions fell." [Hammad] . . . added that, 'about 200 to 300 were killed from the Qassam Brigades, as well as 150 security personnel.'" (emphasis added)).

161. *Hamas Admits 600-700 of Its Men Were Killed in Cast Lead*, HAARETZ (Sept. 11, 2010, 11:24AM), <http://www.haaretz.com/news/diplomacy-defense/hamas-admits-600-700-of-its-men-were-killed-in-cast-lead-1.323776>.

162. *Goldstone Report*, *supra* note 4, ¶ 359 (Israel claimed killing 709 Hamas combatants).

163. *Reconsidering the Goldstone Report*, *supra* note 2; see also Steven Stotsky, *Hamas's Revelation Undermines Key Conclusion of Goldstone Report*, COMMITTEE FOR ACCURACY IN MIDDLE E. REPORTING IN AM. (Nov. 19, 2010), http://www.camera.org/index.asp?x_context=2&x_outlet=118&x_article=1952.

164. *Goldstone Report*, *supra* note 4, ¶¶ 409-18, 420. The statements received by the Mission are inconsistent with other post-conflict comments made by Hamas officials about the military role of the police. HAMAS AND THE TERRORIST THREAT, *supra* note 15, at 271-73, 293-95; STATE OF ISRAEL, GAZA OPERATION INVESTIGATIONS: SECOND UPDATE ¶ 81 (2010), <http://www.mfa.gov.il/NR/rdonlyres/1483B296-7439-4217-933C-653CD19CE859/0/GazaUpdateJuly2010.pdf> (last visited June 4, 2012) [hereinafter *Gaza Operation Investigations: Second Update*].

165. *Goldstone Report*, *supra* note 4, ¶¶ 412, 416.

acquire control of the Gaza security services, so it created its own security organization—the Executive Force—filled with members of its military wing, the Al-Qassam Brigades.¹⁶⁶ When Hamas took control of the Gaza Strip, it established from the Executive Force a new police force in which members of the Al Qassam Brigade continued to serve.¹⁶⁷

Both the Al-Qassam Brigades and the police are subordinate to the Ministry of the Interior.¹⁶⁸ The police are armed with Kalashnikov or M-16 assault rifles, hand-grenades, and anti-tank weapons—unusual armaments for a purely civilian police force.¹⁶⁹ The police train, patrol, share headquarters, and conduct joint operations with the Al Qassam Brigades, and they have been involved in military engagements with Israeli forces before and during Cast Lead.¹⁷⁰ Pronouncements made by Gaza officials before, during, and after the conflict confirm the military mission of the police force: it is part of the “resistance” under the direction and control of the Interior Ministry.¹⁷¹

The law of war does not require commanders to be omniscient; they are judged by the information they have at the time of an attack.¹⁷² Thus, *post-conflict* assurances about the “civilian” character of the Gaza police received by the Mission are inconsequential. The question is what information did the IDF have on December 27 when it commenced Operation Cast Lead and struck Gaza po-

166. HAMAS AND THE TERRORIST THREAT, *supra* note 15, at 273.

167. *Id.* at 274.

168. *Id.* at 273.

169. *Id.* at 276, 283; *Operation in Gaza*, *supra* note 53, at 30.

170. HAMAS AND THE TERRORIST THREAT, *supra* note 15, at 277-84, 288-92; INTELLIGENCE & TERRORISM INFO. CTR., HAMAS' MILITARY BUILDUP IN THE GAZA STRIP 7, 14 (Apr. 2008), http://www.jcpa-lecape.org/UserFiles/File/hamas_080408.pdf [hereinafter *Hamas' Military Buildup*]; Penny L. Mellies, *Hamas and Hezbollah: A Comparison of Tactics, in BACK TO BASICS: A STUDY OF THE SECOND LEBANON WAR AND OPERATION CAST LEAD* 45, 50 (Lieutenant Colonel Scott C. Farquhar, ed., 2009), *see also Goldstone Report*, *supra* note 4, ¶ 429 (noting obituary stating that one of the training courses being conducted at police headquarters in Gaza on December 27, 2008, was a “‘military refresher course’”). *See generally* GROSS, *supra* note 109, at 256 (“[I]n an asymmetric war, guerilla forces cannot fight effectively, if at all, unless they can call on armed police officers or specialized civilian personnel to aid them.”).

171. HAMAS AND THE TERRORIST THREAT, *supra* note 15, at 271-73, 293-95; INTELLIGENCE & TERRORISM INFO. CTR., MOUNTING EVIDENCE INDICATES THAT DURING OPERATION CAST LEAD (AND IN ORDINARY TIMES) MEMBERS OF HAMAS' INTERNAL SECURITY FORCES SERVED AS COMMANDERS AND OPERATIVES IN HAMAS' MILITARY WING IZZ AL-DIN AL-QASSAM BRIGADES (Mar. 24, 2009), http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/html/hamas_e067.htm; *Operation in Gaza*, *supra* note 53, at 90, 92; Dershowitz, *supra* note 15, at 17.

172. *See* Prosecutor v. Galic, Case No. IT-98-29-T, Judgement and Opinion, ¶ 51 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003); Théo Boutruche, *Credible Fact-Finding and Allegations of International Humanitarian Law Violations: Challenges in Theory and Practice*, 16 J. CONFLICT & SEC. L. 105, 126-27 (2011); William J. Fenrick, *Attacking the Enemy Civilian as a Punishable Offense*, 7 DUKE J. COMP. & INT'L L. 539, 564 (1997); *see infra* notes 246-50 and accompanying text.

lice targets,¹⁷³ not what assurances the Mission received when it interviewed senior police operatives after the conflict ended.

Based upon the police forces' armaments and activities—together with declarations by Gaza authority officials about the force's mission—Israel had sufficient intelligence to conclude that the Gaza police force was an organized, armed group under the command of the Interior Minister who also commanded the military wing of Hamas—the Al-Qassam Brigades. As the Israeli government has noted,

[e]xtensive information gathered by the IDF prior to the Operation substantiated the military function of the police force in Gaza based on its military, operational, logistic and administrative ties and cooperation with the military wing of Hamas, both as a matter of routine and particularly during a state of emergency, for instance during an Israeli military operation inside the Gaza Strip.¹⁷⁴

As such, IDF commanders could reasonably conclude that the Gaza police constituted a lawful military target.¹⁷⁵

173. See Blank, *Application of IHL*, *supra* note 15, at 355-56.

174. *Gaza Operation Investigations: Second Update*, *supra* note 164, ¶ 80.

175. Commentary on Protocol I, Art. 43 states:

[A]ll members of the armed forces [except medical and religious personnel] can participate directly in hostilities, i.e., attack and be attacked. . . . All members of the armed forces are combatants, and only members of the armed forces are combatants. . . . A civilian who is incorporated in an armed organization . . . becomes a member of the military and a combatant throughout the duration of the hostilities

CLAUDE PILLOUD ET AL., INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 ¶ 1677, at 515 (1987); see INT'L COMM. OF THE RED CROSS, 2 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 88 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) (“[T]he armed forces of a party to the conflict [consist of] all organised armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates”) [hereinafter CUSTOMARY INTERNATIONAL HUMANITARIAN LAW]; MELZER, *supra* note 21, at 71 (“Members of organized armed groups belonging to a non-State party to the conflict cease to be civilians for as long as they remain members by virtue of their continuous combat function.”); see also *Prosecutor v. Kordić & Cerkez*, Case No. IT-95-14/2-A, Judgement ¶ 51 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 17, 2004); *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgement, ¶ 114 (Int'l Crim. Trib. for the Former Yugoslavia July 29, 2004); *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, INT'L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA, ¶ 39 (2000), <http://www.icty.org/sid/10052> [hereinafter *Comm. to Review NATO Bombing Campaign*]; YORAM DINSTEN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 34-36, 104 (2010); *Operation in Gaza*, *supra* note 53, at 89-90.

Some have argued that under Protocol I, article 51(3), the Gaza police were civilians until they actually engaged in hostilities. David Luban, *Was the Gaza Campaign Legal?*, 31 ABA NAT'L SECURITY L. REP. 2, 5-6 (2009); see also *Goldstone Report*, *supra* note 4, ¶ 431

In addition, a study commissioned by Israel's prime minister indicated that many Gaza policemen killed during the conflict were also members of the Al-Qassam Brigades,¹⁷⁶ a fact the Mission acknowledged.¹⁷⁷ Thus, the Mission noted that the strike against the police raised the question of proportionality.¹⁷⁸ The Mission concluded, however, that even with the presence of combatants—because the police were engaged in civilian tasks in civilian facilities—Israel's attack “failed to strike an *acceptable balance* between the direct military advantage anticipated (*i.e.*, the killing of those policemen who may have been members of Palestinian armed groups) and the loss of civilian life (*i.e.*, the other policemen killed and members of the public who would inevitably have been present or in the vicinity).”¹⁷⁹ Assuming, for the sake of argument, that the police force is a civilian entity, it is difficult to discern how the Mission reached such a conclusion without at least determining the number of police killed who were members of armed groups (versus those who were not) and the military advantage to be achieved by targeting members of the police force who were combatants.¹⁸⁰

n.289 and accompanying text. This argument assumes, however, that the police are not part of Hamas's organized military units. If the police are a component of Hamas's military, then they constitute a legitimate military target whether or not actually engaged in hostilities. See Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT'L SECURITY J. 5, 35 (2010); W. Hays Parks, *Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. J. INT'L L. & POL. 769, 804 (2010); MELZER, *supra* note 21, at 71-73.

176. *Goldstone Report*, *supra* note 4, ¶ 422; Dershowitz, *supra* note 15, at 17 n.74.

177. *Goldstone Report*, *supra* note 4, ¶ 436.

178. *Id.* ¶ 435.

179. *Id.* ¶ 437 (emphasis added). The Mission's use of the term “acceptable balance” is inappropriate. The presence of civilians in or near a military objective does not render the objective immune from attack. See Protocol I, *supra* note 157, at art. 51(7); DINSTEIN, *supra* note 175, at 123; Stefan Oeter, *Methods and Means of Combat*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 120, 186-88 (Dieter Fleck ed., 2d ed. 2008); *infra* notes 239-43 and accompanying text. The test is whether, based upon information available to a commander at the time of an attack, DINSTEIN, *supra* note 175, at 132; A.P.V. ROGERS, LAW ON THE BATTLEFIELD 97-98 (2d ed. 2004); Fenrick, *supra* note 172, at 564; CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 175, at 331-34, the expected loss of civilian life, injury to civilians, and damage to civilian property “would be *excessive* in relation to the concrete and direct military advantage to be gained.” Protocol I, *supra* note 157, at art. 57(2)(b) (emphasis added). If not, the attack is lawful and may proceed. DINSTEIN, *supra* note 175, at 135-36; KNUT DORMANN, ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 136 (2003); see *infra* notes 239-50 and accompanying text. The Rome Statute of the International Criminal Court requires more: the incidental loss of life or injury to civilians or damage to civilian objects must be “*clearly excessive*” to the overall military advantage anticipated. Rome Statute of the International Criminal Court (ICC), art. 21(b), July 17, 1998, 2187 U.N.T.S. 90, 95 (emphasis added), available at <http://untreaty.un.org/cod/icc/statute/romefra.htm> [hereinafter Rome Statute].

180. See COHEN, *supra* note 15, at 16-17; Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 VA. J. INT'L L. 795, 825, 827 (2010); see also *supra* notes 18, 160-61 and accompanying text; see also LT. COL. (RET.) JONATHAN D. HALEVI, JERUSALEM CTR. FOR PUB. AFFAIRS, PALESTINIAN

Depending upon the total casualty figures used,¹⁸¹ the percentage of Palestinian combatant deaths (including the police) during Operation Cast Lead was somewhere between 42% and 60% of the total number killed during the operation, with ratios of civilian to combatant deaths ranging from about 3:2 to 2:3. If the objective of the IDF was to kill Palestinian civilians, one would expect the number to be much higher.¹⁸² “By the 1990’s, 75% of all casualties resulting from armed conflicts were civilian, and in some cases the rate has allegedly reached as high as 90%.”¹⁸³ For example, Professor Mary Ellen O’Connell claims that U.S. drone attacks in Afghanistan and Pakistan kill up to 50 civilians for every one intended target (a 50:1 ratio).¹⁸⁴ Thus, the Mission’s finding that Israeli operations in Gaza caused “an *exceedingly high percentage* of civilians among those killed”¹⁸⁵ is mistaken when compared to

“POLICEMEN” KILLED IN GAZA OPERATION WERE TRAINED TERRORISTS, (Sept. 13, 2009) <http://jcpa.org/article/palestinian-“policemen”-killed-in-gaza-operation-were-trained-terrorists/> (indicating that up to 91 percent of the civilian police were also members of Palestinian militant groups); *Operation in Gaza*, *supra* note 53, at 94.

181. Professor Dershowitz notes that the casualty figures from Palestinian sources are suspect because they count as civilians people who were clearly combatants and do not account for many of those killed. Dershowitz, *supra* note 15, at 18-19; *see also* Feinstein, *supra* note 109, at 244-46.

182. Norwitz, *supra* note 7; Halbertal, *supra* note 7, at 354; Dershowitz, *supra* note 15, at 20. A study conducted by the International Institute for Counter-Terrorism found that “63% to 75% of the Palestinians killed in Operation Cast Lead were “combat-aged males.” Avi Mor et al., *Casualties in Operation Cast Lead: A Closer Look*, INT’L INST. FOR COUNTER-TERRORISM, 1 (2009), http://www.ict.org.il/Portals/0/Articles/ICT_Cast_Lead_Casualties_A_Closer_Look.pdf.

183. Aaron Xavier Fellmeth, *Questioning Civilian Immunity*, 43 TEX. INT’L L.J. 453, 455 (2008). Professor Fellmeth states that these “figures are likely exaggerated by the inclusion of post-conflict casualties.” *Id.*; *see also* Dershowitz, *supra* note 15, at 20.

184. Mary Ellen O’Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009* 1-3 (Notre Dame School Legal Stud. Res. Paper Series, No. 09-43, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1501144 (quoting David Kilcullen & Andrew McDonald, *Death From Above, Outrage Down Below*, N.Y. TIMES, Mar. 17, 2009); *see also* War *Unchecked*, *supra* note 15 (describing the U.S. launching at least 15 missile strikes to kill one Taliban leader, resulting in the death of 200-300 people, at least a quarter of whom were civilians). The accuracy of Professor O’Connell’s claimed ratio of civilian to combatant deaths has been challenged. *See* Afsheen John Radsan & Richard Murphy, *Measure Twice, Shoot Once: Higher Care for CIA-Targeted Killing*, 2011 U. ILL. L. REV. 1201, 1221 (2011).

185. *Goldstone Report*, *supra* note 4, ¶ 362 (emphasis added).

other contemporary conflicts.¹⁸⁶ Indeed, the percentage of civilians killed is substantially lower.

Finally, whether civilian casualties constitute violations of international humanitarian law depends in large measure upon the combat environment in which they lost their lives. The Mission should have considered civilian losses in the context of how Hamas conducted its military operations during the conflict. Civilian casualties alone—while always a tragedy—are not always a war crime,¹⁸⁷ particularly when a belligerent intentionally places itself in the civilian population.¹⁸⁸ Thus, neither the number of civilian casualties nor the ratio of civilian to combatant deaths alone establishes that Israel intended to target civilians.¹⁸⁹

B. Statements by Current and Former Israeli Officials

The Mission cited statements made by current and former Israeli officials and military officers to demonstrate Israel's intent to kill civilians and destroy their property.¹⁹⁰ The Mission cherry-picked five comments that it asserted support its conclusion; none of the comments came from the Prime Minister, the Defense Minister, or any military official charged with implementing Israel's Gaza campaign plan.

In part, the Mission looked to writings of military officers—one active-duty general officer (Major General Gadi Eisenkot) and two retired officers (Major General (retired) Giora Eiland and Colonel

186. See Feinstein, *supra* note 109, at 241 (“It is noteworthy that the extent of civilian casualties and concomitant damage was not far greater than it was, particularly given the incredibly dense urban environment of the tiny land area of Gaza.” (footnote omitted)). One commentator states that the Goldstone Report did “not accuse[] Israel of killing as many civilians as it could—only that it “intended to inflict *substantial* civilian destruction.” Jerome Slater, *The Attacks on the Goldstone Report*, in THE GOLDSTONE REPORT, *supra* note 7, at 360, 364-65. This statement is true; however, in reaching its finding that Israel deliberately targeted civilians, the Mission placed considerable reliance on the percentage of civilians killed. *Goldstone Report*, *supra* note 4, ¶ 362. The Mission concluded that the “principal focus in the aftermath of military operations [is] the people who have been killed.” *Id.* ¶ 1885. Based on similar conflicts, the number of civilians killed certainly does not by itself prove that Israel intended, as a matter of national policy, to kill civilians.

187. See *Prosecutor v. Kordic & Cerkez*, Case No. IT-95-14/2-A, Judgement, ¶ 52 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 17, 2004); Laurie R. Blank, *A New Twist on an Old Story: Lawfare and the Mixing of Proportionalities*, 43 CASE W. RES. J. INT'L L. 707, 727 (2011); Judith Gail Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L L. 391, 398 (1993); W. Hays Parks, *Air War and the Law of War*, 32 AIR FORCE L. REV. 1, 177 (1990).

188. See GROSS, *supra* note 109, at 168; Johan D. van der Vyver, *Legal Ramifications of the War in Gaza*, 21 FLA. J. INT'L L. 403, 430-31 (2009); *infra* Part V.

189. Halbertal, *supra* note 7, at 354.

190. See *supra* note 124 and accompanying text. At the same time, the Mission dismissed statements by Hamas officials reflecting Hamas's intent to fight among the civilian population. *Goldstone Report*, *supra* note 4, ¶ 478; see Dershowitz, *supra* note 15, at 11; *infra* notes 293-301 and accompanying text.

(retired) Gabriel Siboni).¹⁹¹ All of the officers' comments related to the Israel-Hezbollah War of 2006, not Operation Cast Lead.¹⁹² Each officer advocated using "disproportionate force" in response to future Hezbollah attacks. The Mission interpreted their remarks to indicate an IDF intent to target civilians and their property during future conflicts with Hezbollah.

The Mission's analysis of the officers' statements is faulty on several levels. First, none of the officers advocated that civilians *qua* civilians should be the target of Israeli attacks.¹⁹³ Second and more significantly, the Mission misinterpreted the import of the statements. It construed the officers' comments to mean that Israel would dispense with *jus in bello* proportionality in a future conflict with Hezbollah, thereby causing excessive civilian casualties or damage to civilian objects. That is not what the officers said. The Mission's reading of their comments conflates the concepts of *ad bellum* and *in bello* proportionality.¹⁹⁴

The question of proportionality in the *ad bellum* context is not whether the response will cause disproportionate "collateral damage," but whether the degree of force used in response to a *causus belli* is necessary, and if so, for what military objective.¹⁹⁵ The Israeli officers argued that Israel would not simply respond to Hezbollah attacks in a "tit-for-tat" manner; rather, regardless of the nature of the *causus belli*, if Israel were attacked again, it would use the force necessary (force far greater than that used by Hezbollah to attack Israel) to ensure that Hezbollah and its state sponsors (including Lebanon) did not attack Israel again.¹⁹⁶ Thus, for

191. The Mission failed to provide any evidence that the retired officers spoke on behalf of the Israeli government. Instead, reflecting a considerable degree of circular reasoning, the Mission concluded that it did "not have to consider whether Israeli military officials were directly influenced by these writings. It is able to conclude from a review of the facts on the ground that it witnessed for itself that what is prescribed as the best strategy appears to have been precisely what was put into practice." *Goldstone Report*, *supra* note 4, ¶ 1199.

192. *Id.* ¶¶ 1192-97.

193. Dershowitz, *supra* note 15, at 10.

194. See Robert D. Sloane, *The Cost of Conflation: Preserving Dualism of Jus ad Bellum and Jus in Bello in the Contemporary Law of War*, 34 YALE J. INT'L L. 47, 100, 108-09 (2009); Michael J. Glennon, *The Fog of War: Self-Defense, Inherence, and Incoherence in Article 51 of the UN Charter*, 25 HARV. J.L. & PUB. POL'Y 539, 551 (2002); PoKempner, *supra* note 15, at 147. Not all accept my interpretation of General Eisenkot's statement; see GROSS, *supra* note 109, at 174; Falk, *supra* note 15, at 177.

195. George P. Fletcher, *Is Justice Relevant to the Law of War?*, 48 WASHBURN L.J. 407, 422 (2009); see also Blank, *supra* note 187, at 713 ("The primary issue in analyzing *jus ad bellum* proportionality is whether the defensive use of force is appropriate in relation to the ends sought, measuring the extent of the use of force against the overall military goals, such as fending off an attack or subordinating the enemy."); Enzo Cannizzaro, *Contextualizing Proportionality: Jus ad Bellum and Jus in Bello in the Lebanese War*, 88 INT'L REV. RED CROSS 779, 781 (2006) ("In *jus ad bellum*, proportionality has a dual role: it serves to identify the situations in which the unilateral use of force is permissible; and it serves to determine the intensity and the magnitude of military action.")

196. Amos Harel, *Analysis/IDF Plans to Use Disproportionate Force in Next War*,

example, the United States used disproportionate force in reacting to the al-Qaeda attacks of September 11, 2001; it did not simply strike those directly responsible, but overthrew the government of Afghanistan.¹⁹⁷ This is not to suggest that the Israeli position is without controversy,¹⁹⁸ however, it does not constitute the grave

HAARETZ (May 10, 2008, 12:00AM), <http://www.haaretz.com/print-edition/news/analysis-idf-plans-to-use-disproportionate-force-in-next-war-1.254954>; Giora Eiland, *The Third Lebanon War: Target Lebanon*, STRATEGIC ASSESSMENT, Nov. 2008, at 9, 16-17; see also Robert A. Caplen, *The "Charlie Brown Rain Cloud Effect" in International Law: An Empirical Case Study*, 36 CAP. U. L. REV. 693, 746-47 (2008); Zachary Myers, Note, *Fighting Terrorism: Assessing Israel's Use of Force in Response to Hezbollah*, 45 SAN DIEGO L. REV. 305, 328-30 (2008).

197. Sloane, *supra* note 194, at 109. Likewise, in responding to the Japanese attack on Pearl Harbor, the United States did not simply attempt to sink the Japanese fleet. Rather, it engaged in total war, destroying not only the Japanese military, but the Japanese homeland. Glennon, *supra* note 194, at 551.

198. Israel's position is seemingly inconsistent with the International Court of Justice decision in the *Oil Platforms* case. *Oil Platforms* (Iran v. U.S.), 2003 I.C.J. 161 (Nov. 6). The *Oil Platforms* case involved U.S. strikes on Iranian oil complexes and oil platforms following Iranian attacks on a Kuwaiti tanker and the collision between a U.S. warship and an Iranian mine in international waters. *Id.* at 175. The International Court of Justice held the U.S. reaction disproportionate, viewing self-defense as applying only to the response to the incident that triggered it. *Id.* at 198-99; see also Pieter H.F. Bekker, *The World Court Finds that U.S. Attacks on Iranian Oil Platforms in 1987-1988 Were Not Justifiable as Self-Defense, but the United States Did Not Violate the Applicable Treaty with Iran*, AM. SOC'Y INT'L L. INSIGHTS (Nov. 2003), <http://www.asil.org/insigh119.cfm>. In other words,

[a] defensive strike is only *ad bellum* necessary, . . . if carried out, first, in *immediate* response to a particular attack and, second, against the attack's *direct* source. . . . [S]trategic strikes in self-defense carried out in an effort to deter future attacks of the same sort were per se unlawful.

Sloane, *supra* note 194, at 84; see also Solon Solomon, *The Great Oxymoron: Jus in Bello Violations as Legitimate Non-Forcible Measures of Self-Defense: The Post-Disengagement Israeli Measures Towards Gaza as a Case Study*, 9 CHINESE J. INT'L L. 501, ¶ 16 (2010).

Professor Sloane notes that "[t]his parsimonious, almost *lex talionis*, position leads to absurd results and does not conform to state practice." Sloane, *supra* note 194, at 109; see also Solomon, *supra* note 198, ¶ 17. Instead, an alternative view of *jus ad bellum* is inevitable:

[S]elf-defense must be *ad bellum* proportionate to the *aggregate* attacks on a state rather than to the specific, atomized attack that ultimately instigated defensive force. *Ad bellum* proportionality, in this view, means that "force, even if it is *more* intensive than [the *casus belli*] is permissible so long as it is not designed to do anything more than protect the territorial integrity or other *vital interests* of the defending party."

Sloane, *supra* note 194, at 109 (quoting Frederic L. Kirgis, *Some Proportionality Issues Raised by Israel's Use of Armed Force in Lebanon*, AM. SOC'Y INT'L L. INSIGHTS, Aug. 17, 2006, <http://www.asil.org/insights060817.cfm>). Thus, the *Oil Platforms* case neither reflects customary international law, nor should it. Robert Ago, *Addendum to Eighth Report on State Responsibility*, 2 Y.B. INT'L L. COMM'n 13, 69 (1980); U.N. Doc. A/CN.4/318/Add.5-7 ("It would be mistaken . . . to think that there must be proportionality between the conduct constituting the armed attack and the opposing conduct. The action needed to halt and repulse the attack may well have to assume dimensions disproportionate to those of the attack suffered."). See YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENSE* 197-98, 208-12 (3d ed. 2001); JUDITH GAIL GARDAM, *NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES* 160-61 (2004); Glennon, *supra* note 194, at 551-53; Michael N. Schmitt, "Change

violations of international law caused by indiscriminate attacks on civilians or by attacks on military objectives that cause excessive civilian casualties.

Colonel Siboni made his position clear when he wrote:

Israel does not have to be dragged into a war of attrition with Hizbollah. Israel's test will be the intensity and quality of its response to incidents on the Lebanese border or terrorist attacks involving Hizbollah in the north or Hamas in the south. *In such cases, Israel again will not be able to limit its response to actions whose severity is seemingly proportionate to an isolated incident.* Rather, it will have to respond disproportionately in order to make it abundantly clear that the State of Israel will accept no attempt to disrupt the calm currently prevailing along its borders.¹⁹⁹

That Colonel Siboni did not mean that civilians would become the target of an Israeli counter-strike against Hezbollah and Hamas was made plain in an article by another retired IDF officer—Colonel (ret.) Giora Segal—whom the Mission chose to ignore. He described the notion of “disproportionate force” as a “concentrated effort” designed “to attain a significant operational achievement, a knock-out rather than a victory on points.”²⁰⁰ Segal noted “[t]he difficulty of military action requiring the concentration of operational effort among a civilian population[,]” arguing that the “battlefield must be prepared in advance. Preparing targets to be attacked and determining the objectives of the ground maneuver, *while making every effort to minimize the harm to civilians*

Direction” 2006: *Israeli Operations in Lebanon and the International Law of Self-Defense*, 29 MICH. J. INT'L L. 127, 153-54 (2008); see also Mark B. Baker, *Terrorism and the Inherent Right of Self-Defense (A Call to Amend Article 51 of the United Nations Charter)*, 10 HOUS. J. INT'L L. 25, 46-47 (1987); Samuel Estreicher, *Privileging Asymmetric Warfare? (Part II)?: The “Proportionality” Principle Under International Humanitarian Law*, 12 CHI. J. INT'L L. 143 (2011); Thomas M. Franck, *On Proportionality of Countermeasures in International Law*, 102 AM. J. INT'L L. 715, 728 (2008).

199. Gabriel Siboni, *Disproportionate Force: Israel's Concept of Response in Light of the Second Lebanon War*, INST. FOR NAT'L SECURITY STUD. (Oct. 2, 2008) (emphasis added), <http://www.inss.org.il/publications.php?cat=21&incat=&read=2222>; see also MAJOR GENERAL (RES.) YAAKOV AMIDROR, JERUSALEM CTR. FOR PUB. AFF., *MISREADING THE SECOND LEBANON WAR* (Jan. 16, 2007), <http://jcpa.org/article/misreading-the-second-lebanon-war/> (“The determination of Israel's government to respond and to retaliate is a very important factor in restoring deterrence. Now those around Israel understand that Israel has certain red lines, and that if these lines are crossed, Israel's retaliation will be intentionally disproportionate. As a small country, we cannot allow ourselves the luxury of reacting proportionally.” Israel's military action sent a very important message to the people around us).

200. Giora Segal, *Trapped Between Maneuver and Firepower: Hamas and Hezbollah*, 1 MILITARY & STRATEGIC AFF., Apr. 2009, at 77, 79-80, [http://www.inss.org.il/upload/\(FILE\)1272780093.pdf](http://www.inss.org.il/upload/(FILE)1272780093.pdf).

and the damage to residences and the greater environment.”²⁰¹ Segal added that, with respect to Operation Cast Lead, the IDF’s Department of International Law was involved in the operational planning, allowing the IDF “to prepare the battlefield in terms of its legal constraints.”²⁰²

Major General (ret.) Eiland similarly argued for a disproportionate response, albeit in a somewhat different context. He believed that any future war with Hezbollah must involve Lebanon (among others), which Eiland claims has become Hezbollah’s state sponsor.²⁰³ Without involving Lebanon (which necessarily affects Lebanese civilians), Eiland asserts that Israel cannot defeat Hezbollah because Hezbollah will still be able to launch long-range missiles at Israel’s civilian population from areas beyond its base in southern Lebanon.²⁰⁴ In this respect, the situation in Lebanon is

201. *Id.* at 80 (emphasis added).

202. *Id.* at 87 n.3.

203. Eiland, *supra* note 196, at 14:

Today, the Lebanese president and government recognize not only Hizbollah’s right to continue bearing its own arms, but also see these arms as a vital and legitimate means for achieving the national interests Moreover, recent remarks by the Lebanese president and prime minister likewise offer national support for Hizbollah’s arguments regarding the need “to liberate Shab’a Farms” and its right to be a defensive shield that protects Lebanon from “Israeli aggression.”

General Eiland’s claim has a basis in fact. The UN Security Council, in several resolutions, calls for the disarmament of militias in Lebanon, but the Government of Lebanon has failed to take any action to implement the resolutions. *See* S.C. Res. 1559, ¶ 3, U.N. Doc. S/RES/1559 (Sept. 2, 2004); S.C. Res. 1680, ¶ 6, U.N. Doc. S/RES/1680 (May 17, 2006); S.C. Res. 1701, ¶¶ 3, 5, 10, 14, U.N. Doc. S/RES/1701 (Aug. 11, 2006); Bloom, *supra* note 88, at 79-81 (noting that the Lebanese government has consistently failed to respond to Hezbollah and that Hezbollah acts on behalf of the Lebanese government); Zachary Myers, Comment, *Fighting Terrorism: Assessing Israel’s Use of Force in Response to Hezbollah*, 45 SAN DIEGO L. REV. 305, 311-12 (2008) (noting Lebanese government’s inability or unwillingness to control Hezbollah); Keith A. Petty, *Veiled Impunity: Iran’s Use of Non-State Armed Groups*, 36 DENV. J. INT’L L. & POL’Y 191, 195 (2008) (noting Lebanon’s unwillingness to disarm Hezbollah); Major Jason S. Wrachford, *The 2006 Israeli Invasion of Lebanon: Aggression, Self-Defense, or a Reprisal Gone Bad?*, 60 AIR FORCE L. REV. 29, 44-46 (2007) (noting Lebanon’s unwillingness or inability to prevent Hezbollah from carrying out its operations).

The Security Council has also directed the U.N. Interim Force in Lebanon (UNIFIL) to assist Lebanon with the disarmament of militias, but UNIFIL has failed to do so. S.C. Res. 1701, *supra* at ¶¶ 11, 14. *See, e.g.*, Burke-White & Bell, *supra* note 80 at 84 (noting failure of UN to implement Security Council resolution directing disarmament of Hezbollah); Wrachford, *supra* at 46 (noting UN’s lack of success in meeting Hezbollah threat); Harry De Quetteville & Michael Hirst, *UN Force in Lebanon Will Not Intercept Weapons From Syria*, TELEGRAPH (London), Aug. 27, 2006, at 26, <http://www.telegraph.co.uk/news/1527391/UN-will-not-stop-Syria-sending-weapons-to-Lebanon.html> (describing UN’s refusal to prevent Syria from re-arming Hezbollah in violation of Security Council Resolution 1701).

204. Eiland wrote:

[I]t is not possible to defeat an effective and well-equipped guerrilla organization if three conditions exist: the organization operates from country A against country B; the organization enjoys the full support of country A; and country A, along with its army and infrastructure, is entirely immune to offensive attacks launched by country B. The State of Israel failed in the Second Lebanon War (and may also fail

sui generis and inapposite to the Gaza conflict. In any event, Major General Eiland seemingly expressed his personal views and not those of the Government of Israel; his comments are apparently part of an ongoing debate about the strategy in a future conflict with Hezbollah.²⁰⁵

The Mission noted comments made by one active duty officer, Major General Gadi Eisenkot, who spoke of a future war with Hezbollah in which Israel would wield “disproportionate force on . . . [villages from which shots are fired on Israel,] and cause great damage and destruction . . . From . . . [Israel’s] standpoint, these are . . . military bases.”²⁰⁶ Like Siboni and Eiland, Major General Eisenkot certainly did not indicate that Israel would seek to inflict disproportionate civilian casualties; he stated that Israel’s response would not be proportionate to the nature of the Hezbollah attack.

In addition, Eisenkot mentioned that villages from which Israel receives fire would be treated as military bases. There is nothing extraordinary about this statement: if Hezbollah uses a village as a base to attack the IDF or to strike Israel itself (a tactic extensively used by Hezbollah in 2006²⁰⁷), it becomes a legitimate military

in a subsequent encounter) because it targeted the wrong enemy. Israel fought against Hizbollah instead of fighting against the Republic of Lebanon.

Eiland, *supra* note 196, at 9-10; *see id.* at 12-13. Eiland also noted that when the enemy is a country that is accountable to its population and responsible for its infrastructure, the battlefield will “be far removed from civilian population centers. This refers to both sides of the equation, that is, the battlefield is removed from both sides’ civilian populations.” *Id.* at 15. Hezbollah, however, does not fight this way and is “less sensitive to the pressure of public opinion and international pressure.” *Id.*

205. For example, in the same issue of the journal in which Eiland presented his views appears an article, ignored by the Mission, by IDF Brigadier General (retired) Yossi Kupperwasser, who recommends against striking Lebanon in a future conflict with Hezbollah and disapproves of any suggestion that Lebanon’s civilian population should be engaged during a future conflict with Hezbollah. Yossi Kupperwasser, *The Next War with Hizbollah: Should Lebanon Be the Target?*, 11 STRATEGIC ASSESSMENT 19, 22 (2008); *see also* Shlomo Brom, *Political and Military Objectives in a Limited War Against a Guerilla Organization*, in THE SECOND LEBANON WAR: STRATEGIC PERSPECTIVES 22 (Shlomo Brom & Meir Elran eds., 2007) (“In order to achieve the objectives of the war, it was important in the long term that Lebanon pay the price as a state without Israel exceeding the rules of international law and the war norms, and without the result being prolonged occupation of Lebanese territory that would enable Hizbollah to present itself as a movement resisting foreign occupation.”). In fact, despite early “saber-rattl[ing]” towards Lebanon, Israel made it clear during its 2006 campaign against Hezbollah that its enemy was not Lebanon, and “Israel assiduously avoided striking Lebanese government facilities and equipment, at least absent an express link to Hezbollah.” Schmitt, *supra* note 198, at 138-39; *see also* Eiland, *supra* note 196, at 9-10.

206. *Goldstone Report*, *supra* note 4, ¶ 1195.

207. ANTHONY H. CORDESMAN, LESSONS OF THE 2006 ISRAELI-HEZBOLLAH WAR 41-42 (2007); DR. REUVEN ERLICH (COL. RET.), INTELLIGENCE & TERRORISM INFO. CTR. AT THE CTR. FOR SPECIAL. STUD., HEZBOLLAH’S USE OF LEBANESE CIVILIANS AS HUMAN SHIELDS: THE EXTENSIVE MILITARY INFRASTRUCTURE POSITIONED AND HIDDEN IN POPULATED AREAS 6-7, 32-34 (2006), <http://www.ajcongress.org/site/DocServer/Part1.pdf?docID=861> [hereinafter *Hezbollah’s Use of Lebanese Civilians as Human Shields*].

objective even if civilians and their property are present.²⁰⁸ Hezbollah has in fact built extensive military fortifications in southern Lebanese villages.²⁰⁹ Moreover, Hezbollah's use of the civilian population during the 2006 war is particularly relevant because Hamas tried to emulate the tactic in its 2008-2009 war with Israel.²¹⁰

Finally, the Mission referred to comments by two Israeli government officials: Eli Yishai, who at the time of Operation Cast Lead was the Minister of Industry, Trade and Labor,²¹¹ and Tzipi Livni, then Israel's Foreign Minister.²¹² The report cites two statements by Mr. Yishai, one made near the end of the conflict and one after the ceasefire. Notably, Mr. Yishai was not a member of Israel's Inner Security Cabinet,²¹³ and the Mission does not show that either statement reflected the policy of the Israeli government during the war. Moreover, both comments dealt with the

208. Protocol I, *supra* note 157, at arts. 51(7), 52(2); THE JUDGE ADVOCATE GENERAL'S LEGAL CTR. & SCHOOL, U.S. ARMY, OPERATIONAL LAW HANDBOOK 20 (2011) [hereinafter OP LAW HANDBOOK]; *Manual on International Law Applicable to Air and Missile Warfare*, PROGRAM ON HUMANITARIAN POL'Y & CONFLICT RES., 13 (2009), <http://www.ihresearch.org/amw/manual/>; *Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare*, PROGRAM ON HUMANITARIAN POL'Y & CONFLICT RES., 108 (2010) ("The 'use' of an object relates to its present function, with the result that a civilian object can become a military objective due to its use by armed forces."); INT'L INST. OF HUMANITARIAN LAW, THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT 6 (2006) [hereinafter MANUAL OF NON-INTERNATIONAL ARMED CONFLICT]; DINSTEIN, *supra* note 175, at 97-98.

209. CORDESMAN, *supra* note 207, at 42-43:

One of the tactics that Hezbollah used to fortify its positions along the border was to prepare "friendly" villages in the south of Lebanon to use as safe havens and fortresses in the event of an Israeli assault . . . Hezbollah] built its facilities in towns and populated areas, used civilian facilities and homes to store weapons and to carry out its activities, and embedded its defenses in built-up areas.

See also CONG. RES. SERVICE, *LEBANON: THE ISRAELI-HAMAS-HEZBOLLAH CONFLICT 10* (2006), available at <http://www.fas.org/sgp/crs/mideast/RL33566.pdf>; *Hezbollah's Use of Lebanese Civilians as Human Shields*, *supra* note 207, at 6-7, 23, 28-30, 35-51.

Hezbollah continues to reinforce its military infrastructure in southern Lebanese villages, near schools and mosques and often inside homes. Yaakov Kaz, *IDF Reveals Hizbullah Positions*, JERUSALEM POST (July 7, 2010, 5:23PM), <http://www.jpost.com/Israel/Article.aspx?id=180733>; Anshel Pfeffer, *IDF Reveals Intel on Huge Hezbollah Arms Stockpile in Southern Lebanon*, HARETZ (Aug. 7, 2010, 12:54AM), <http://www.haaretz.com/print-edition/news/idf-reveals-intel-on-huge-hezbollah-arms-stockpile-in-southern-lebanon-1.300656>.

210. See, e.g., Matthews, *supra* note 113, at 25; Mellies, *supra* note 170, at 59, 62-63, 69; HAMAS AND THE TERRORIST THREAT, *supra* note 15, at 48, 110, 122; *infra* notes 281-83, 289 and accompanying text.

211. ELIYAHU YISHAI, ISRAELI MINISTRY OF FOREIGN AFF., MK, DEPUTY PRIME MINISTER AND MINISTER OF THE INTERIOR (SHAS), <http://www.mfa.gov.il/MFA/Government/Personalities/From+A-Z/Eliyahu+Yishai.htm> (last visited June 4, 2012).

212. TZIPI LIVNI, ISRAELI MINISTRY OF FOREIGN AFF., MK, HEAD OF OPPOSITION (KADI-MA) http://www.mfa.gov.il/MFA/MFAArchive/2000_2009/2003/2/Tzipi+Livni.htm (last visited June 4, 2012).

213. *Israel's Ministerial Committee for National Security Issues*, MIDDLE E. PROGRESS (May 19, 2009), <http://middleeastprogress.org/2009/05/israel's-ministerial-committee-for-national-security-issues/>.

level of force to be used against Hamas, and neither suggested the targeting of civilians.

On January 6, 2009, Mr. Yishai purportedly spoke in terms of the “complete destruction of terrorism and Hamas,” including their homes, tunnels, and industries.²¹⁴ On January 13, 2009, less than a week before the ceasefire ended the conflict, Ms. Livni said that the military offensive had “restored Israel’s deterrence . . . Hamas now understands that when you fire on . . . [Israel’s] citizens it responds by going wild—and this is a good thing,”²¹⁵ which—aside from being pure political rhetoric—again referred to Israel’s *jus ad bellum* response. Neither official ever suggested that civilians would be targeted; both officials spoke solely in terms of destroying Hamas and its terrorist infrastructure, unquestionably legitimate military objectives.²¹⁶

C. Israel’s Advanced Targeting Technology and Proficiency

The Mission found that because the IDF has high-technology targeting systems, is proficient in their use, and carefully planned the operation, the IDF must have intended to attack the civilians killed during the conflict.²¹⁷ Of course, the Mission should have recognized that the use of high-tech weapons—even by the most proficient sol-

214. *Goldstone Report*, *supra* note 4, ¶ 1204. Although of doubtful relevance since the statement occurred after the conflict ended, Mr. Yishai advocated the destruction of 100 homes for every rocket fired even if the rocket “falls in an open air [sic] or to the sea.” *Id.* ¶ 1205. Professor Dershowitz observes, however, that “the report omits that in the same speech Yishai clarifies that homes destroyed will be ‘terrorists’ homes, while informing them in advance—so as not to hurt the family members.’” Dershowitz, *supra* note 15, at 13, *quoting* Raanan Ben-Zur, *Yishai: Destroy 100 Houses for Each Rocket Fired*, YNET, (Feb. 2, 2009, 11:56PM), <http://www.ynetnews.com/articles/0,7340,L-3665517,00.html> (last visited Sep. 7, 2011). Mr. Yishai also added: “We’re not doing this gladly or with pleasure; we are doing it in order to defend Israel’s citizens. The situation in the south, if we don’t act as we demand, will worsen as we are witnessing in day to day life.” *Id.*

In any event, the Mission presents no evidence that Yishai’s statements constituted Israeli policy or that the IDF attempted to achieve this result. To the contrary, the Mission found that more than 8,000 rockets and mortars had been fired at Israel since 2001, and 230 rockets and 298 mortars since June 18, 2008, nearly all of them fired after November 4, 2008. *Goldstone Report*, *supra* note 4, ¶ 103. Israel allegedly destroyed 2,400 houses. ON-SLAUGHT, *supra* note 137, at 16; *Goldstone Report*, *supra* note 4, ¶ 67. This number falls considerably short of those purportedly advocated by Mr. Yishai. *See infra* note 299 and accompanying text.

215. Kim Sengupta & Donald Macintyre, *Israel Cabinet Divided Over Fresh Gaza Surge*, INDEPENDENT, Jan. 13, 2009, <http://www.independent.co.uk/news/world/middle-east/israeli-cabinet-divided-over-fresh-gaza-surge-1332024.html>.

216. Dershowitz, *supra* note 15, at 10-11; *see also supra* text accompanying note 208. Noting that the Mission found Israeli military and political leaders who “repeatedly announced” a military doctrine that “intentionally targeted civilians,” one commentator stated that there are many such statements not mentioned in the report. Jerome Slater, *supra* note 186, at 364-65. He does not, however, provide any sources for his assertion.

217. *Goldstone Report*, *supra* note 4, ¶¶ 61, 576-78, 1185-91; *Goldstone Conclusions*, *supra* note 1, ¶ 1893.

diers—does not ensure that intended targets will be hit or that intelligence about the nature of a target is accurate.²¹⁸ Professor Dinstein notes that weapons can go awry because of human error,²¹⁹ technical malfunctions,²²⁰ or inclement weather conditions.²²¹ Similarly, the intelligence about a particular target may be faulty, resulting in civilian casualties.²²² Of greater significance is the fact the Mission evaluated Israel's targeting without considering the other side of the equation: what were Palestinian forces doing and what were the Israelis shooting at?²²³ The article addresses this question next.

218. CORDESMAN, *supra* note 46, at 18 (“No matter how careful planners are, some targets will be empty or misidentified. No matter how careful pilots are, any large-scale use of ordinance will—and did—lead to significant numbers of misidentified targets, misfires, and weapons that do not hit their target with the intended precision.”); COHEN & WHITE, *supra* note 109, at 21 (“when modern weapons are employed near civilians in military operations, civilians will be killed”); *see, e.g., NATO Cites Errant Missile in Libya Civilian Deaths*, MSNBC (June 16, 2011, 4:09PM), http://www.msnbc.msn.com/id/43454221/ns/world_news-mideast_n_africa/nato-cites-errant-missile-libya-civilian-deaths/ (number of civilian casualties caused by NATO missile that did not hit its intended target); Joshua Partlow, *NATO Rockets Miss Target, Kill 12 Afghan Civilians*, WASH. POST, Feb. 14, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/14/AR2010021400593.html>; DEP'T OF DEF., FINAL REPORT TO CONGRESS: CONDUCT OF THE PERSIAN GULF WAR 702-03 (1992), available at <http://www.ndu.edu/library/epubs/cpgw.pdf> (describing U.S. attack on al-Amariyah bunker that killed 200-300 civilians during First Persian Gulf War); Steven Lee Myers, *Chinese Embassy Bombing: A Wide Net of Blame*, N.Y. TIMES, Apr. 17, 2000, available at 2000 WLNR 3277999 (NATO bombing of Chinese Embassy during Kosovo conflict). Indeed, nearly half of the IDF fatalities during the conflict were due to so-called “friendly fire;” *see* Stuart A. Cohen, *The Futility of Operation Cast Lead 4* (Begin-Sadat Ctr. for Strategic Stud., Perspectives Papers, No. 68, Feb. 16, 2009), available at <http://www.biu.ac.il/SOC/besa/docs/perspectives68.pdf>.

219. DINSTEIN, *supra* note 175, at 135. For example, in January 2000, when I was the Staff Judge Advocate of III Armored Corps and Fort Hood, I served as a legal advisor to an investigation of a Paladin 155-millimeter self-propelled howitzer that bombarded an off-post ranch for over an hour. *See Firing Practice on Hold as Army Probes Blasts*, HOUS. CHRON., Jan. 29, 2000, available at 2000 WLNR 9390196. The investigation revealed that, when the howitzer's digital system went down, the howitzer's commander made the simple error of failing to determine in which direction the tube was pointed. In fact, the tube was pointed 180 degrees in the wrong direction. This incident occurred in peacetime on an Army installation in Texas; the probability of human error necessarily increases in the urgency and “fog of war.”

220. DINSTEIN, *supra* note 175, at 135; *see also* JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-60: JOINT TARGETING I-11 (Apr. 13, 2007) (“Effects [of targeting] often spill over to create unintended consequences, which may be counterproductive or may create opportunities. An example of a counterproductive consequence entails injury or collateral damage to persons or objects unrelated to the intended target.”).

221. DINSTEIN, *supra* note 175, at 135.

222. *Id.* at 135; Michael N. Schmitt, *Precision Attack and International Humanitarian Law*, 87 INT'L REV. RED CROSS 445, 447 (2005); OP LAW HANDBOOK, *supra* note 208, at 11 (describing attack on al Firdus bunker in Baghdad during First Gulf War); *see also supra* text accompanying note 218.

223. Peter Berkowitz, *The Goldstone Report and International Law*, POLY REV., Aug. 1, 2010, <http://www.hoover.org/publications/policy-review/article/43281> (“Whether Hamas used water-wells, sewage treatment plants, flour mills, and residential homes, along with mosques, hospitals, and police officers, as part of its combat operations are factual questions bound up with questions about Hamas's strategy and tactics. Answering them accurately is crucial to determining whether Israel crafted a strategy and adopted tactics consistent with the principles of distinction and proportionality.”); *see also* Muravchik, *supra* note 15.

IV. WHAT THE MISSION IGNORED

A. Introduction

Members of the Israeli military may well have violated international humanitarian law during the Gaza conflict, and some of the violations may constitute war crimes.²²⁴ If so, Israel must bring them to justice.²²⁵ The Goldstone Mission identified 34 (out of between 470 and 700) Palestinian civilian deaths allegedly deliberately caused by Israeli fire.²²⁶ The Mission used these deaths, to-

224. Not every violation of the law of armed conflict is a war crime. Michael N. Schmitt, *Investigating Violations of International Law in Armed Conflict*, 2 HARV. NAT'L SEC. J. 31, 37 (2011). Even if an act is not a war crime, however, it may violate domestic law. See, e.g., *infra* note 225 (discussing the al-Samouni family deaths).

225. A United Nations Committee of Independent Experts reported in March 2011 that "the Government of Israel has conducted some 400 command investigations in relation to Operation Cast Lead. Reports indicate that the Israeli Military Advocate General (MAG) has opened 52 criminal investigations into allegations of wrongdoing. Of these 52 investigations, thus far three cases have been submitted to prosecution; two have resulted in convictions, while the trial of one case is still ongoing." Hum. Rts. Council, Rep. of the Comm. of Indep. Experts in Int'l Humanitarian & Hum. Rts. Law Established Pursuant to Council Resolution 13/9, at 6, A/HRC/16/24 (Mar. 11, 2011), available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A.HRC.16.24_AUV.pdf [hereinafter UN Committee of Independent Experts].

226. *Goldstone Report*, *supra* note 4, ¶ 812. Among the civilian casualties specifically mentioned, the most serious were the deaths of at least 23 members of the al-Samouni family. *Id.* ¶¶ 706-44. Israeli soldiers instructed the family to take shelter in a house, which was later shelled at the direction of a brigade commander, who ostensibly misread drone images of the house and believed it was being used for military operations. Amira Hass, *What Led to IDF Bombing of House Full of Civilians During Gaza War*, HAARETZ, (Oct. 24, 2010, 1:57PM), <http://www.haaretz.com/news/diplomacy-defense/what-led-to-idf-bombing-house-full-of-civilians-during-gaza-war-1.320816>. The IDF initiated a criminal investigation into the incident. Amos Harel & Anshell Pfeffer, *IDF Probes Top Officers on Gaza War Strike that Killed 21 Family Members*, HAARETZ, (Oct. 22, 2010, 2:41PM), <http://www.haaretz.com/print-edition/news/idf-probes-top-officers-on-gaza-war-strike-that-killed-21-family-members-1.320505>; STATE OF ISRAEL, GAZA OPERATION INVESTIGATIONS: AN UPDATE 34 n.109 (2010), <http://www.mfa.gov.il/NR/rdonlyres/8E841A98-1755-413D-A1D2-8B30F64022BE/0/GazaOperationInvestigationsUpdate.pdf> (last visited June 4, 2012). The UN Committee of Independent Experts did not receive an update of the investigation. UN Committee of Independent Experts, *supra* note 225, at 7; see also Goldstone, *Reconsidering the Goldstone Report*, *supra* note 2.

Whether the shelling of the al-Samouni household constitutes a war crime has yet to be determined because it is unclear if the requisite *mens rea*—the intent to kill civilians—existed at the time of the incident. Rome Statute, *supra* note 177, arts. 8.2(a)(i) (willful killing); 8.2(b)(i) ("intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities"), 8.2(b)(ii) (intentionally directing attacks against civilian objects, that is, objects which are not military objectives), 8.2(b)(v) (attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives). Under the statute, "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." *Id.* art. 30.2. A mistake of fact is a "ground for excluding criminal responsibility only if it negates the mental element required by the crime." *Id.* art. 32.1. Regardless of whether the specific intent required of a war crime was committed, under U.S. military law, a soldier might be tried under the circumstances

gether with claimed Israeli attacks against civilian property in Gaza,²²⁷ to bolster its conclusion that Israel intentionally targeted Gaza's civilian population.²²⁸

The underlying problem with the Mission's conclusions is that they do not result from an analysis of the combat environment in which civilians were killed and their property damaged or destroyed. The Mission mentions but ignores the significance of the challenge the IDF faced in confronting an enemy that deliberately entrenched itself in civilian population centers and for whom civilian casualties—even their own—are a critical part of their strategic objective. As Professor Abraham Bell wrote, the Mission:

Repeatedly . . . stated that Israeli criminal intent could be presumed since (a) civilians died and (b) Israel had precision weaponry at its disposal. QED. Therefore, *pace* Goldstone Report, it was unnecessary to investigate Hamas's fighting practices, the rules of engagement actually given to Israeli forces, or any other facts that would shed light on Israeli intent.²²⁹

for murder. UNIFORM CODE OF MILITARY JUSTICE (UCMJ) art. 118(a)(4); 10 U.S.C. § 911(a)(4) (2003); Manual for Courts-Martial (MCM) part IV, ¶¶ 43.b(3), 43.c(4) (2008) (killing while engaged in an act which is inherently dangerous to others and evinces a wanton disregard of human life); or involuntary manslaughter, UCMJ art. 119(b)(1), 10 U.S.C. § 119(b)(1); MCM Part IV, ¶¶ 44.b(2), 44.c(2)(a) (killing by culpable negligence); or negligent homicide. UCMJ art. 134, 10 U.S.C. § 934; MCM part IV, ¶ 85.

227. See *Goldstone Report*, *supra* note 4, ¶¶ 596-652 (hospitals), ¶¶ 913-41 (flour mill), ¶¶ 942-61, 1018 (chicken farms), ¶¶ 962-74, 1022-25 (water and sewage installations), ¶¶ 975-89 (wells), ¶¶ 990-1007 (housing), ¶¶ 1008-11, 1019-20 (industry), ¶ 1012 (cement plant), ¶ 1021 (greenhouses).

228. See *supra* notes 117-25 and accompanying text.

229. Bell, *A Critique of the Goldstone Report*, *supra* note 15, at 6 (footnote omitted); see also Blank, *supra* note 187, at 727.

B. Legal Standards²³⁰

230. An issue in academic circles is what law applies to the Israel-Hamas conflict: international humanitarian law or human rights law. The dispute's predicate is whether Gaza remains an occupied territory and, if it is, whether Israel's treatment of Hamas is governed by human rights law as opposed to the law of war. The Goldstone Report and some scholars believe that, despite Israel's disengagement from the territory, Gaza remains occupied. See Goldstone Report, *supra* note 4, ¶¶ 302-03; Bisharat, *supra* note 136, at 46-50; James, *supra* note 33, at 643; Ariel Zeman, *Taking War Seriously: Applying the Law of War to Hostilities Within an Occupied Territory*, 38 GEO. WASH. INT'L L. REV. 645, 664 (2006). *But see* Luban, *supra* note 175, at 3; *id.* at 7-8 (responding to the author's argument, Amos Guiora agrees with the author that "Israel does not occupy the Gaza Strip"). While the issue is beyond the scope of this paper, the question of the applicable law is relevant.

Professor George Bisharat makes an eloquent argument that Israel's operations in Gaza be evaluated by law enforcement standards. Bisharat, *supra* note 136, at 56. At the same time, however, Professor Bisharat asserts that the Israeli invasion of Gaza arguably constituted aggression. *Id.* at 68-70. He cannot have it both ways: to adhere to a law enforcement model of preventing Hamas attacks on Israel necessarily requires wholesale Israeli reengagement in the Gaza Strip, including assumption of police and judicial functions. See Luban, *supra* note 175, at 3 ("[I]f the point of declaring Gaza 'occupied' is to assert that Israel should be exercising governmental authority in Gaza, then Israel would have to re-engage rather than disengaging from Gaza. Nobody, especially Hamas and the Gazan people, wants that."). Moreover, if Protocol I applied to the conflict, I suspect Professor Bisharat would deem the conflict to be one in which Hamas and its allies are fighting against "colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination," in which case international humanitarian law governs. Protocol I, *supra* note 157, at art. 1(4); see Bisharat, *supra*, note 136 at 68. Israel, however, is not a party to Protocol I, and article 1(4) does not constitute customary international law. See H CJ 769/02 Public Comm. Against Torture in Israel v. Government of Israel 2 IsrLR 459, ¶ 20, at 479 [2005]. NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW 249 (2008) [hereinafter MELZER, TARGETED KILLING]; OP LAW HANDBOOK, *supra* note 208, at 13.

Nevertheless, states, jurists, and academics alike have recognized that an armed conflict can exist between a state and a non-state actor, triggering the application of international humanitarian—rather than human rights—law. For example, the International Criminal Tribunal for the Former Yugoslavia has held

an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.

Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (emphasis added). Likewise, the Rome Statute applies to hostilities between states and organized armed groups. Rome Statute, *supra* note 179, art. 8.2(f). The International Law Association has similarly found that armed conflicts can exist involving non-state actors satisfying "two essential minimum criteria": (a) "the existence of organized armed groups" (b) "engaged in fighting of some intensity." Int'l Law Ass'n, Use of Force Comm., *Final Report on the Meaning of Armed Conflict in International Law*, 32 (2010). Relevant factors for organized groups—all of which Hamas possesses—include the existence of a "command structure; exercise of leadership control; governing by rules; providing military training; organized acquisition and provision of weapons and supplies; recruitment of new members; communications infrastructure; and space to rest." *Id.* at 29. In addition, the fighting must be

The protection of noncombatants, especially civilians, is the primary basis of international humanitarian law.²³¹ The law rests upon the twin principles of distinction and proportionality; that is, only combatants and military objects (as opposed to civilians and civilian objects) may be attacked²³² and even then not if the resulting harm to civilians and their objects is excessive to the military advantage to be gained.²³³

The principle of distinction requires belligerents “to engage only in military operations the effects of which distinguish between the civilian population . . . and combatant forces, directing the application of force solely against the latter.”²³⁴ The discrimination requirement applies to both sides of the conflict. All combatants must “ ‘distinguish themselves from the civilian population so as not to place the civilian population at undue risk. This includes not only physical separation of military forces and other military objectives from civilian objects . . . but also other actions, such as wearing uniforms.’ ”²³⁵

In this regard, defending forces have an obligation to “endeavor to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives [and] avoid locating military objectives within or near densely populated areas.”²³⁶ “The presence or movements of the civilian population or individual civilians shall not be used to render cer-

“more than a minimal engagement or incident,” *id.* at 2, considering such factors as “the number of fighters involved; the type and quantity of weapons used; the duration and territorial extent of fighting; the number of casualties; the extent of destruction of property; the displacement of the population; and the involvement of the Security Council . . . to broker cease-fire efforts.” *Id.* at 30 (footnotes omitted). The 2008-2009 Gaza conflict unquestionably met all of the intensity criteria. *See also* HCJ 769/02, 2 IsrLR ¶ 18, at 477 (applying international humanitarian law to Israeli-Palestinian conflict). *See generally* ANDREA BIANCHI & YASMIN NAQVI, *INTERNATIONAL HUMANITARIAN LAW AND TERRORISM* 16 (2011); JIMMY GURULE & GEOFFREY S. CORN, *PRINCIPLES OF COUNTER-TERRORISM LAW* 58-64 (2011); David Kretzmer, *Rethinking the Application of IHL in Non-International Armed Conflicts*, 42 *ISR. L. REV.* 8, 34-35 (2009). Finally, the Goldstone Report, while noting Israel’s responsibilities as an occupying power, applied the international humanitarian law to the conflict. Goldstone Report, *supra* note 4, ¶¶ 270, 304, 308, 326.

231. *See supra* text accompanying note 21.

232. Protocol I, *supra* note 157, at arts. 48, 51(4). The term “attacker” does not mean “aggressor.” A nation can attack an adversary as a defensive measure. *See id.* at art. 49(1); *MANUAL OF NON-INTERNATIONAL ARMED CONFLICT*, *supra* note 208, at 7.

233. Protocol I, *supra* note 157, at art. 57(2)(b).

234. *OP LAW HANDBOOK*, *supra* note 208, at 12; *see also* Protocol I, *supra* note 157, at arts. 48, 51(2), 51(3), 51(4), 52(2); *MANUAL OF NON-INTERNATIONAL ARMED CONFLICT*, *supra* note 208, at 18-19, 20.

235. *OP LAW HANDBOOK*, *supra* note 208, at 12 (quoting W. Hays Parks, *Special Forces’ Wear of Non-Standard Uniforms*, 4 *CHI. J. INT’L L.* 493, 514 (2003)); *see also* GARY D. SOLIS, *THE LAW OF ARMED CONFLICT* 251 (2010).

236. Protocol I, *supra* note 157, at art. 58(a)-(b); *MANUAL ON NON-INTERNATIONAL ARMED CONFLICT*, *supra* note 208, at 44. The Goldstone Mission never mentions article 58, which would have required Hamas and its allies to avoid civilian areas in the conduct of their military operations. *See infra* notes 353-55 and accompanying text.

tain 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.”²³⁷ Thus,

[a]ny inquiry into whether the parties to an armed conflict have complied with the laws of war requires a two-stage inquiry: asking not only (1) whether attackers have transgressed the limits IHL places on attacks, *but also* (2) whether defenders have observed the limits IHL places on what fighters can do to defend themselves.²³⁸

The presence of civilians or civilian objects does not necessarily prevent a belligerent from attacking a military objective “in their midst.”²³⁹ For example, civilian objects or property used for military purposes—such as hospitals, churches, or mosques—may be legitimate targets for attack.²⁴⁰ Whether the military strike may proceed depends upon whether the anticipated loss of civilian life and damage to civilian property incidental to the attack are “excessive in relation to the concrete and direct military advantage anticipated.”²⁴¹ In other words, the anticipated civilian harm may not be disproportionate to the projected military goals to be achieved.²⁴² Thus, international humanitarian law does not “rule out altogether the possibility of civilian casualties and damage to civilian objects in wartime. In fact, some civilian casualties and damage are virtually taken for granted as long as they constitute

237. Protocol I, *supra* note 157, at art. 51(7); Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 28, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 973 (“The presence of a protected person may not be used to render certain points or areas immune from military operations.”) [hereinafter GC].

238. Samuel Estreicher, *Privileging Asymmetric Warfare? Part I: Defender Duties under International Humanitarian Law*, 11 CHI. J. INT’L L. 425, 435 (2011) (emphasis added); see also Kenneth Anderson, *A Public Call for International Attention to Legal Obligations of Defending Forces as Well as Attacking Forces to Protect Civilians in Armed Conflict*, KENNETH ANDERSON’S LAW OF WAR AND JUST WAR THEORY BLOG (Mar. 19, 2003), <http://kennethandersonlawofwar.blogspot.com/2006/07/civilian-collateral-damage-and-law-of.html> (posted on Jul. 21, 2006) (last visited June 4, 2012); Bouttruche, *supra* note 172, at 124-25; Parks, *supra* note 187, at 59. Under Protocol I, the failure of a defending force to take appropriate action to protect civilians under its control does not relieve an attacker of its duty to minimize civilian casualties or refrain from an attack. Protocol I, *supra* note 157, at art. 51(8); see also SOLIS, *supra* note 235, at 285. The Protocol does not necessarily reflect customary international law. See DINSTEIN, *supra* note 175, at 155.

239. GROSS, *supra* note 109, at 236.

240. See *supra* notes 179, 208 and accompanying text.

241. Protocol I, *supra* note 157, at art. 51(5)(b).

242. DINSTEIN, *supra* note 175, at 129; MANUAL ON NON-INTERNATIONAL ARMED CONFLICT, *supra* note 208, at 22. Commanders must cancel or suspend an attack “if it becomes apparent that the objective is not a military one . . . or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. . . .” Protocol I, *supra* note 157, at art. 57(2)(b).

lawful collateral damage”²⁴³—that is, damage proportionate to the expected military advantage.

The military advantage to be attained is not limited to expected tactical gains, but includes the full context of war strategy. Thus, “[b]alancing between incidental damage to civilian objects and incidental civilian casualties may be done on a target-by-target basis, but also may be done in an overall sense against campaign objectives.”²⁴⁴ The proportionality analysis includes a variety of factors, including the security of the attacking force.²⁴⁵

Importantly, the determination of whether an attack has caused an excessive loss of civilian life or property is not predicated upon “the actual outcome of the attack *but* the initial expectation and anticipation . . . The linchpin is what is mentally visualized before the event.”²⁴⁶ The assessment of the attack must be made through the eyes of a “reasonable commander” acting under the facts *known at the time of the attack*.²⁴⁷ Ultimately, “what is ‘necessary’ to achieve the submission of the enemy with a minimum expenditure of time, life and physical resources involves a complex assessment that is likely to be strongly influenced by subjective perceptions, particularly when determined with respect to individual operations against specific targets.”²⁴⁸ The evaluation must factor “the extreme nature and reality of armed conflict,”²⁴⁹ including the confusion or “fog of war” that is endemic to any battlefield.²⁵⁰

243. DINSTEIN, *supra* note 175, at 123. The Rome Statute uses the term “clearly excessive” as the measure of disproportionate civilian casualties versus the anticipated military advantage. Rome Statute, *supra* note 179, at art. 21(b).

244. OP LAW HANDBOOK, *supra* note 208, at 12; *see also* MANUAL ON NON-INTERNATIONAL ARMED CONFLICT, *supra* note 208, at 24.

245. OP LAW HANDBOOK, *supra* note 208, at 12; DINSTEIN, *supra* note 175, at 141; *but see* SOLIS, *supra* note 235, at 285 (“Force protection does not supersede the requirements of proportionality”); *see also* W. Michael Reisman, *The Lessons of Qana*, 22 YALE J. INT’L L. 381, 396-97 (1997) (noting that democratic nations “will seek to avoid elective military action[, and when they] cannot, will select and deploy weapons that provide maximum safety to [their] own forces,” which will increase the unintended casualties to civilians).

246. DINSTEIN, *supra* note 175, at 132 (emphasis added).

247. *Id.* at 139; *see also* GURULE & CORN, *supra* note 230, at 81; Boutruche, *supra* note 172, at 126-27; Michael A. Newton, *Illustrating Illegitimate Warfare*, 43 CASE W. RES. J. INT’L L. 255, 275-76 (2010); *see also* United States v. List (*The Hostage Case*), Case No. 7, XI TRIAL OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS 755, 1296 (1950) (whether a commander’s action is criminal depends upon the situation as it appeared to the commander at the time of his action even if the conclusion he reached is ultimately deemed to be faulty).

248. MELZER, TARGETED KILLINGS, *supra* note 230, at 291. *See also* *Comm. to Review the NATO Bombing Campaign*, *supra* note 175, ¶ 50; GARDHAM, *supra* note 198, at 106; MELZER, *supra* note 21, at 80; Prosecutor v. Galic, No. IT-98-29-T ¶ 58 (Dec. 3, 2002).

249. MELZER, TARGETED KILLINGS, *supra* note 230, at 296.

250. DINSTEIN, *supra* note 175, at 127; *see also* Kahl, *supra* note 148, at 26 (stating that many of the real or perceived cases on noncompliance international law by U.S. after the invasion of Iraq was “at least partly attributed to the incredibly thick ‘fog of war’”); SOLIS, *supra* note 235, at 255 (“On today’s battlefields, combatants must sometimes make hard decisions instantaneously. Their decisions do not always cut against distinction and non-

Fulfillment of the principles of distinction and proportionality depends in large measure upon adherence to the law of war by both sides to a conflict; the law is based upon reciprocal responsibilities of the belligerents.²⁵¹ For example, to ensure that an attacker can distinguish combatants from civilians, belligerents differentiate their combatants from the civilian population,²⁵² such as by having them wear fixed, distinctive signs recognizable at a distance (*i.e.*, uniforms) and by carrying their arms openly at all times.²⁵³ And because the presence of civilians or civilian objects near a military objective does not render the objective immune from attack,²⁵⁴ conventional belligerents avoid locating military objectives or conducting their military operations within or near the civilian populations under their control so as not to place the civilians in danger of attack.²⁵⁵ In a classic conventional conflict between parties who adhere to the law of war, the principles of distinction and proportionality minimize the conflict's effects on civilians and their property. Each party to a conflict distinguishes its combatants from civilians to ensure only combatants are attacked, and, to the extent possible, they conduct their military operations away from civilian populations and civilian objects.²⁵⁶

For conventional belligerents, the principles make good military sense: attacking civilians or their property serves no legiti-

combatants.”).

251. See Parks, *supra* note 175, at 772; COHEN, *supra* note 15, at 5; Feinstein, *supra* note 109, at 232; Daphne Richmond, *Transnational Terrorist Organizations and the Use of Force*, 56 CATH. U.L. REV. 1001, 1012, 1025 (2007).

252. DINSTEIN, *supra* note 175, at 35: “[The law of international armed conflict] can effectively protect civilians from the prospect of attack in war *only if* and when the enemy can tell them apart from combatants.” (Emphasis added)

253. See Geneva Convention Relative to the Treatment of Prisoners of War art. 4(a)(1-2), August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; see also GURULE & CORN, *supra* note 230, at 72-73. Until Protocol I, wearing a uniform and carrying arms openly was the traditional prerequisite for prisoner of war status upon capture. See, *e.g.*, *id.*; Hague Regulations (IV) of 1907 art. 1; Project of an International Declaration concerning the Laws and Customs of War. arts. 1,9 (Brussels, Aug. 27, 1874) (“Brussels Declaration of 1874”).

Protocol I intentionally obscures the distinction between civilians and combatants by removing the distinctive-insignia requirement, Protocol I, *supra* note 157, at art. 44(3) (dispensing with need for a distinctive sign recognizable at a distance (*i.e.*, uniform) and limiting requirement that arms be carried openly to military deployments and attacks). See Samuel Vincent Jones, *Has Conduct In Iraq Confirmed the Moral Inadequacy of International Humanitarian Law? Examining the Confluence Between Contract Theory and the Scope of Civilian Immunity During Armed Conflict*, 16 DUKE J. COMP. & INT'L L. 249, 270 (2006). Israel is not a party to Protocol I (nor is the United States), and art. 44 does not represent customary international law. Yoram Dinstein, *Comments on Protocol I*, INT'L REV. OF THE RED CROSS, Oct. 31, 1997, at 515-19, <http://www.icrc.org/web/eng/siteeng0.nsf/html/57JNV5>; OP LAW HANDBOOK, *supra* note 208, at 16.

254. See *supra* notes 239-243 and accompanying text.

255. See *supra* notes 235-238 and accompanying text.

256. Eyal Benvenisti, *The Legal Battle to Define the Law on Transnational Asymmetric Warfare*, 20 DUKE J. COMP. & INT'L L. 339, 343 (2010).

mate military purpose,²⁵⁷ namely, to destroy the enemy's military capabilities and its will to fight.²⁵⁸ U.S. military doctrine recognizes ten fundamental Principles of War that "represent the most important nonphysical factors that affect the conduct of operations at the strategic, operational, and tactical levels . . . [T]hey summarize the characteristics of successful operations."²⁵⁹ Targeting civilians—instead of military objectives—contravenes at least two of these basic principles. First, attacks on civilians violate the "Principle of Objective." Combat power is necessarily limited; "commanders never have enough."²⁶⁰ The Principle of Objective "allows commanders to focus combat power on the most important tasks" and prevents commanders from undertaking "actions that do not contribute directly to achieving the objectives."²⁶¹ A related principle is "Economy of Force," which dictates that commanders "allocate only the minimum combat power necessary to shaping and sustaining operations so they can mass combat power for the decisive operation."²⁶² Both principles discourage commanders from using scarce combat power for purposes other than defeating the enemy's military, and attacking civilians necessarily squanders the resources needed to accomplish this central mission.²⁶³

Contemporary wars, however, are rarely fought between symmetrical, conventional belligerents; instead, conflicts are asymmetrical, generally between technologically advanced armies and military forces that are not.²⁶⁴ To compensate for their inability to confront modern armies directly on the battlefield, less advanced forces—particularly insurgent and terrorist groups—often discard attempts to distinguish themselves from the civilian population and conduct their military operations from civilian population centers.²⁶⁵ Many depend upon their adversaries' adherence with inter-

257. MICHAEL WALZER, *JUST AND UNJUST WARS* 136, 154 (3d ed. 1977); Parks, *supra* note 187, at 150; C.B. Shotwell, *Economy and Humanity in the Use of Force: A Look at the Aerial Rules of Engagement in the 1991 Gulf War*, 4 U.S. AIR FORCE ACAD. J. LEGAL STUD. 15, 21 (1993).

258. JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-0, JOINT OPERATIONS V-13 TO V-14 (Sep. 16, 2006, with Change No. 2, Mar. 22, 2010) [hereinafter JP 3-0]; DEPARTMENT OF THE ARMY, FIELD MANUAL 3-0, OPERATIONS ¶ A-2 (Feb. 2008) [hereinafter FM 3-0].

259. FM 3-0, *supra* note 258, ¶ A-1.

260. *Id.*

261. *Id.*

262. *Id.* ¶ A-10.

263. See HECTOR OLASOLO, UNLAWFUL ATTACKS IN COMBAT SITUATIONS 161 (2008); Guy B. Roberts, *The New Rules for Waging War: The Case Against Ratification of Additional Protocol I*, 26 VA. J. INT'L L. 109, 119 (1985).

264. JP 3-0, *supra* note 258, at xi, I-6. See generally Lawrence Freedman, *The Third World War?*, SURVIVAL, Winter 2001-2002, at 61, 64-65; Laurie R. Blank & Amos Guiora, *Teaching an Old Dog New Tricks: Operationalizing the Law of Armed Conflict in New Warfare*, 1 HARV. NAT'L SEC. J. 45, 45-47 (2010).

265. Michael N. Schmitt, *Asymmetrical Warfare and International Humanitarian Law*, 62 AIR FORCE L. REV. 1, 14, 18 (2008); Benvenisti, *supra* note 256, at 344; Blank & Guiora,

national humanitarian norms, believing the presence of civilians will either force their enemies to restrict the employment of technologically advanced weapons systems (such as air power) or to avoid targeting the groups altogether.²⁶⁶

Civilians not only afford a degree of protection to insurgent and terrorist groups, but their presence also serves the groups' greater strategic political objectives.²⁶⁷ If insurgent or terrorist groups are attacked, any resulting civilian casualties are dutifully reported by the media whose news reports, particularly if Israel is involved, are followed by a knee-jerk condemnation of the IDF by the U.N. and its Human Rights Council.²⁶⁸ Thus, insurgents win when an adversary refrains from attack in fear of causing civilian casualties, and they win if they are attacked and civilian casualties occur. Given the strategic and tactical advantages insurgents and terrorists obtain from noncompliance with the law of war and from their adversaries' observance of the law, they have absolutely no reason *not* to place civilians at risk.²⁶⁹

supra note 264, at 47-48; *see also* Richemond, *supra* note 251, at 1026.

266. Gross, *supra* note 93, at 447; Schmitt, *supra* note 265, at 14-15, 18; Dakota S. Rudesill, *Precision War and Responsibility: Transformational Military Technology and the Duty of Care Under the Laws of War*, 32 YALE J. INT'L L. 517, 537 (2007).

267. Blank, *supra* note 187, at 735-36; Gross, *supra* note 93, at 456; Schmitt, *supra* note 265, at 14-15, 18; Rudesill, *supra* note 266, at 537.

268. *See, e.g.*, W. Chadwick Austin & Antony Barone Kolenc, *Who's Afraid of the Big Bad Wolf? The International Criminal Court as a Weapon of Asymmetric Warfare*, 39 VAND. J. TRANSNAT'L L. 291, 305-06 (2006); Alan Baker, *Legal and Tactical Dilemmas Inherent in Fighting Terror: Experience of the Israeli Army in Jenin and Bethlehem (April—May 2002)*, in 80 ISSUES IN INTERNATIONAL LAW AND MILITARY OPERATIONS 273 (Richard B. Jaques, ed., 2006); Gross, *supra* note 93, at 447, 467; Michael Y. Kieval, Note, *Be Reasonable! Thoughts on the Effectiveness of State Criticism in Enforcing International Law*, 26 MICH. J. INT'L L. 869, 897-98 (2005); Jeremy Rabkin, *The Fantasy World of International Law: The Criticism of Israel Has Been Disproportionate*, WEEKLY STANDARD (Aug. 21, 2006), <http://weeklystandard.com/Content/Public/Articles/000/000/012/580outtca.asp>; Jefferson D. Reynolds, *Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict, and the Struggle for a Moral High Ground*, 56 AIR FORCE L. REV. 1, 35 (2005); Shotwell, *supra* note 257, at 34-35. *See generally* Richard H. Schultz, Jr., *The 21st Century Conflict Environment: Challenges Posed by a Multiplicity of Non-State Armed Groups* (NAT'L STRATEGIC INFO. CTR. (2011), <http://www.strategycenter.org/wp-content/uploads/2011/07/Challenges-Posed-by-a-Multiplicity-of-Armed-Groups.pdf> (last visited June 4, 2012)).

269. *See* ROGERS, *supra* note 179, at 128. The focus of such a conflict is not the enemy's military forces, but its will to fight, using "methods that defy recognized standards of acceptable behavior in war." Charles J. Dunlap, Jr., *A Virtuous Warrior in a Savage World*, 8 U.S.A.F. ACAD. J. LEG. STUD. 71, 73 (1997-1998). *See generally* Jeremy Rabkin, *The Politics of the Geneva Conventions: Disturbing Background to the ICC Debate*, 44 VA. J. INT'L L. 169 (2003).

C. The Operational Environment

1. Overview

The Goldstone Report mentions—but never critically considers— Hamas’s military doctrine and tactics during the conflict; however, any determination of whether the IDF violated international humanitarian law must take into account the combat environment Israeli soldiers actually faced on the ground.²⁷⁰ As noted above, civilian casualties by themselves do not violate the law of armed conflict.²⁷¹

The Mission received information about the Palestinians conducting both offensive and defensive combat operations from civilian population centers while dressed in civilian clothing.²⁷² While acknowledging the information, the Mission took no apparent steps to corroborate the reports. It neither interviewed members of Hamas or any other Palestinian armed group nor had any direct contact with Palestinian combatants involved in the conflict.²⁷³ And when the Mission questioned the “Gaza authorities” about the conflict, the “authorities” denied any connection to Hamas’s military arm, the Al-Qassam Brigades, or any other Palestinian armed organization.²⁷⁴ Incredibly, the Mission generally took the “Gaza authorities” at their word.²⁷⁵

270. See, e.g., HAMAS AND THE TERRORIST THREAT, *supra* note 15, at 111, 117.

271. See *supra* notes 187, 243 and accompanying text.

272. *Goldstone Report*, *supra* note 4. For example, the Mission had information about (1) Palestinian combatants firing at Israeli soldiers from the vicinity of a UN school (*id.* ¶ 446); (2) Palestinian combatants firing rockets from residential areas and near schools (*id.* ¶¶ 446-47, 449-50); (3) Palestinian combatants firing at Israelis from and operating in residential areas (*id.* ¶¶ 448, 451, 453-56); and (4) Palestinian combatants dressed in civilian clothes (*id.* ¶ 480).

273. *Goldstone Report*, *supra* note 4, ¶ 441 (“To gather first-hand information on the matter, the Mission requested a meeting with representatives of armed groups. However, the groups were not agreeable to such a meeting. The Mission, consequently, had little option but to rely upon indirect sources to a greater extent than for other parts of its investigation.”); see also *id.* ¶ 1636.

274. *Id.* ¶ 441 (“The Mission also addressed questions regarding the tactics used by Palestinian armed groups to the Gaza authorities. They responded that they had nothing to do, directly or indirectly, with al-Qassam Brigades or other armed groups and had no knowledge of their tactics.”); see also *id.* ¶ 1635 (“In response to questions by the Mission . . . the Gaza authorities stated that they had ‘nothing to do, directly or indirectly, with al-Qassam or other resistance factions’ . . .”).

275. *Id.* ¶¶ 441, 1635. The Mission never refers to the “Gaza authorities” as Hamas, as if the “Gaza authorities” are some disembodied entity wholly unconnected to Hamas or its military wing. Why the Mission would accept at all the assertion that the Gaza authorities and Hamas’s military wing—the Al Qassam Brigades—were unrelated is difficult to comprehend. They are essentially one and the same. See Mellies, *supra* note 170, at 47; see also HAMAS AND THE TERRORIST THREAT, *supra* note 15, at 4-8, 24-26; HROUB, *supra* note 43, at 121. In fact, in Hamas’s 2008 governing body (Shura Council) elections, only four out of 23 representatives elected to the body were from the political wing of Hamas— “[t]he remainder were activists associated with the military wing of the movement.” *BICOM Analysis: Hamas’ Threat to the Peace Process*, BRIT. ISR. COMM. & RES. CENTER (March 3, 2010) <http://www.bicom.org.uk/context/research-and-analysis/latest-bicom-analysis/bicom->

The Mission relied in large part upon the public testimony of Gaza residents, who were accompanied by Hamas officials and who were reluctant to speak openly—particularly about Hamas’s misdeeds²⁷⁶—and the Mission did not ask the witnesses “whether Palestinian fighters were in the area of the incidents about which they were testifying.”²⁷⁷ When the Mission actually considered Hamas’s conduct during the conflict, it either discounted the conduct,²⁷⁸ minimized its impact on the IDF’s ability to distinguish military targets from civilians and their property,²⁷⁹ or applied improper legal standards in measuring Israel’s response.²⁸⁰

2. Hamas’s Military Doctrine and Tactics

In developing its defensive and offensive doctrine, Hamas took its cue from Hezbollah, which had achieved a measure of success against the Israeli military in its 2006 war.²⁸¹ Hamas’s approach is not surprising given that both Hezbollah and Hamas receive funding, weapons, and training from Iran, which is reflected in their

analysis--hamas-s-threat-to-the-peace-process; see also *Iranians, Saudis Competing for Influence with Hamas*, WORLD TRIB., Oct. 17, 2008.

276. *Goldstone Report*, *supra* note 4, ¶¶ 440, 455; *Colonel Travers Interview*, *supra* note 66.

277. Muravchik, *supra* note 15; see also Halevi, *supra* note 15. Based on Justice Goldstone’s remarks at the public hearings in Gaza, the hearings’ purpose was not to determine the appropriateness of Israel’s conduct in the context of the conditions it confronted on the ground; rather, their aim was “primarily to allow the face of human suffering to be seen and to let the voices of victims be heard.” Statements of Richard Goldstone, *United Nations Fact-Finding Mission on the Gaza Conflict*, Gaza City Morning Session, June 29, 2009, Unofficial Transcript, 28-30, available at <http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/FactFindingMission.htm>.

278. See, e.g., *Goldstone Report*, *supra* note 4, ¶¶ 454-56 (dismissing as exaggerated the claim on a Palestinian militant group website that it engaged in such tactics such as “seizing houses as military positions for the purpose of staging ambushes against IDF forces’ and ‘employing explosive charges of various types (IEDs, penetrating, bounding, anti personnel etc.) in the vicinity of residences and detonating them’, ‘boobytrapping houses . . . and detonating the charges’, and ‘conducting fighting and sniper fire at IDF forces operating in the built-up areas’); *id.* ¶¶ 466, 485 (stating that, despite the fact the Mission did not investigate Israeli claims of hospitals being used by Hamas for military purposes and could not make a finding with regard to the allegations, the Mission could not find any evidence that Gaza officials used hospital facilities to shield military activities).

279. HAMAS AND THE TERRORIST THREAT, *supra* note 15, at 119-20.

280. Blank, *Finding Facts*, *supra* note 15, at 282, 289.

281. Matthews, *supra* note 113, at 25; Guy Aviad, *Hamas’ Military Wing in the Gaza Strip: Development, Patterns of Activity, and Forecast*, 1 MILITARY & STRATEGIC AFF., April 2009, at 3, 7-8; HAMAS AND THE TERRORIST THREAT, *supra* note 15, at 110, 121-23.

military strategy and tactics²⁸²—a fact the Mission never mentions except to note that Hamas had an Iranian-designed rocket.²⁸³

After Israel's military withdrawal from southern Lebanon in 2000, Hezbollah filled the resulting vacuum.²⁸⁴ Unfettered by an Israeli military presence and supported financially and materially by Iran,²⁸⁵ Hezbollah built an extensive military infrastructure, using in part civilian population centers for military depots and fighting positions.²⁸⁶ During the 2006 conflict, it used this infrastructure to great effect, particularly in the villages of southern Lebanon such as Maroun al-Ras and Bint Jbeil.²⁸⁷ Throughout the conflict, Hezbollah used the civilian population to screen its military operations and to provide a level of security for its forces.²⁸⁸

Hamas tried to emulate Hezbollah's success.²⁸⁹ After Israel's disengagement from Gaza in 2005 and Hamas's violent takeover of the Strip in 2007, Hamas began to embed its military infrastructure into populated areas—using mosques, hospitals, schools, and residences for storage facilities, command and communication centers, and fighting positions.²⁹⁰ It planned to fight and hide among

282. *Hamas's Military Buildup*, *supra* note 170, at 5; Aviad, *supra* note 281, at 4, 7; Cohen & White, *supra* note 109, at ix; Bryan P. Schwartz & Christopher C. Donaldson, *Protecting the Playground: Options for Confronting the Iranian Regime*, 35 *BROOK. J. INT'L L.* 395, 396 (2010); Segal, *supra* note 200, at 77; Petty, *supra* note 203, at 203-05. Hamas also receives support from Syria. Ethan Corbin, *Principals and Agents: Syria and the Dilemma of Its Armed Group Allies*, 35 *FLETCHER F. WORLD AFF.* 25, 26, 30-31 (2011); Gary C. Gambill, *Sponsoring Terrorism: Syria and Hamas*, 4 *MID. E. INTEL. BULL.*, Oct. 2002, http://www.meforum.org/meib/articles/0210_s1.htm.

283. *Goldstone Report*, *supra* note 4, ¶ 1621; see *HAMAS AND THE TERRORIST THREAT*, *supra* note 15, at 103.

284. See MATT M. MATTHEWS, *WE WERE CAUGHT UNPREPARED: THE 2006 HEZBOLLAH-ISRAELI WAR*, COMBAT STUDIES INSTITUTE 16 (2008), <http://usacac.army.mil/cac2/cgsc/carl/download/csipubs/matthewsOP26.pdf>.

285. Petty, *supra* note 203, at 194–203.

286. See CORDESMAN, *supra* note 207, at 42-43 (2007); AMOS HAREL ET AL., 34 DAYS: ISRAEL, HEZBOLLAH, AND THE WAR IN LEBANON 47 (2008); Frank G. Hoffman, *Hybrid Warfare and Challenges*, 52 *JOINT FORCE Q.* 34, 37 (2009), <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA516871&Location=U2&doc=GetTRDoc.pdf>; Sarah E. Kreps, *The 2006 Lebanon War Lessons Learned*, 37 *PARAMETERS* 72, 78 (2007); Andrew Exum, *Hizballah at War: A Military Assessment*, *POL'Y FOCUS* #63, *WASH. INST. FOR NEAR EAST POLICY* 4 (2006), <http://www.washingtoninstitute.org/templateC04.php?CID=260>.

287. HAREL ET AL., *supra* note 286, at 131-43; Matthews, *supra* note 284, at 43–50; *Hezbollah's Use of Lebanese Civilians as Human Shields*, *supra* note 207, at 8, 32, 39, 48-51.

288. CORDESMAN, *supra* note 207, at 41:

Israel's problems in fighting the political and perceptual battle were compounded by the fact that Hezbollah used Lebanon's people and civilian areas as both defensive and offensive weapons . . . [Hezbollah] built its facilities in towns and populated areas, used civilian facilities and homes to store weapons and to carry out its activities, and embedded its defenses and weapons in built up areas."

289. Cohen & White, *supra* note 109, at 9; see also THANASSIS CAMBANIS, *A PRIVILEGE TO DIE: INSIDE HEZBOLLAH'S LEGIONS AND THEIR ENDLESS WAR AGAINST ISRAEL* 17 (2010).

290. Cohen and White, *supra* note 109, at x; *HAMAS AND THE TERRORIST THREAT*, *supra*

the civilian population²⁹¹—a tactic at the very center of asymmetrical conflicts conducted by insurgents in urban environments,²⁹² and one in which the Mission showed remarkably little interest.

Early in 2008, a senior Hamas leader acknowledged that the employment of civilian population was integral to Hamas's strategy in a conflict with Israel:

[The enemies of Allah] do not know that the Palestinian people has developed its [methods] of death and death-seeking. For the Palestinian people, death has become an industry, at which women excel, and so do all the people living on this land. The elderly excel at this, and so do the *mujahideen* and the children. This is why they have formed

note 15, at 110; see also Bruce Maddy-Weitzman, *The Israel-Hamas War: A Preliminary Assessment*, 154 ROYAL UNITED SERVS. INST. J. 24, 25 (2009).

291. Cohen & White, *supra* note 109, at 9–10; COL. (RET.) JONATHAN FIGHEL, HAMAS IN GAZA—URBAN WAR STRATEGY, INT'L INST. FOR COUNTER-TERRORISM, (2009), <http://www.ict.org.il/NewsCommentaries/Commentaries/tabid/69/Articlsid/604/currentpage/1/Default.aspx>; Matthews, *supra* note 113, at 25; Matt M. Matthews, *The Israeli Defense Forces Response to the 2006 War with Hezbollah: Gaza*, MIL. REV., July-Aug. 2009, at 41, 44; Carmit Valensi & Brigadier General Itay Brun, *The Revolution in Military Affairs of the "Other Side,"* YALE UNIVERSITY, 27, <http://www.yale.edu/macmillan/fif/publications/OtherSide.pdf>.

292. See, e.g., DEP'T OF THE ARMY, FIELD MANUAL 3-06.11, COMBINED ARMS OPERATIONS IN URBAN TERRAIN ¶¶ 1-3b(2), 1-5f, 2-16e (2002), <http://www.globalsecurity.org/military/library/policy/army/fm/3-06-11/ch1.htm#par3>. Describing the threat posed by insurgents in urban areas to U.S. military forces, Field Manual 3-06.11 notes:

Threat forces may use the population to provide camouflage, concealment, and deception for their operations. Guerilla and terrorist elements may look no different than any other members of the community. Even conventional and par-military troops may have a "civilian" look. . . . The civil population may also provide cover for threat forces, enhancing their mobility close to friendly positions.

Id. at ¶¶ 2-16e(1)(a) & (b). See also U.S. MARINE CORPS INTELLIGENCE ACTIVITY, URBAN WARFARE STUDY: CITY CASE STUDIES COMPILATION 23, 25, 28 (Apr. 1999), <http://smallwarsjournal.com/documents/urbancasestudies.pdf> (noting the PLO's use of civilian populations as shields during Israel's Operation Peace for Galilee in 1982); WALZER, *supra* note 257, at 184 ("[G]uerrillas don't merely fight as civilians; they fight among civilians."); Estreicher, *Part I*, *supra* note 238, at 427 ("The essential military theory of guerilla warfare is to strike the enemy and then merge back into the civilian population in the hope either of discouraging a counter-attack or, of even greater value to the cause, inviting a military response laying waste to civilian areas and their inhabitants."); A.P.V. Rogers, *Zero-Casualty Warfare*, 82 INT'L REV. RED CROSS 165 (2000) (indicating that guerrillas "merge with the civilian population" and "prefer to launch attacks out of civilian anonymity"); Patrick D. Marques, *Guerrilla Warfare Tactics in Urban Environments* 29–30, 36–39, 43, 45–48, 53–54 (June 6, 2003) (unpublished Master of Military Art and Science thesis, U.S. Army Command & General Staff College) (on file with author), available at <http://www.fas.org/man/eprint/marques.pdf> (noting the failure of insurgent groups—including the Irish Republican Army, the Mujahedeen in Afghanistan, the Chechen rebels in Grozny—to distinguish themselves from civilian populations); HAMAS AND THE TERRORIST THREAT, *supra* note 15, at 110 (noting insurgents use of densely populated areas to shield their operations and prevent an attack against them). See generally JENNIFER MORRISON TAW & BRUCE HOFFMAN, UNITED STATES ARMY, THE URBANIZATION OF INSURGENCY: THE POTENTIAL CHALLENGE TO U.S. ARMY OPERATIONS 7, 11–15 (1994) (describing the increasingly urban nature of insurgencies).

human shields of the women, the children, the elderly, and the *mujahideen*, in order to challenge the Zionist bombing machine. It is as if they were saying to the Zionist enemy: 'We desire death like you desire life.'²⁹³

Similarly, on March 1, 2008, Damascus-based Hamas leader Khaled Mashal told a press conference: "If you are stupid enough to enter the Gaza Strip, we will fight you. You have to face not only thousands of fighters but a million and a half people who will fight you, out of their desire to die the deaths of martyrs."²⁹⁴

The Mission mentioned the Hammad speech (but not the others).²⁹⁵ Interestingly (but not unexpectedly), the Mission discarded the speech as irrelevant: "Although the Mission finds this statement morally repugnant, it does not consider it to constitute evidence that Hamas forced Palestinian civilians to shield military objectives against attack. The Government of Israel has not identified any such cases."²⁹⁶ Aside from the false assertion that such cases did not exist,²⁹⁷ why the comments of a Hamas official are any less pertinent than varied statements by current and former Israeli civilian and military personnel about Israeli military doctrine is never explained.²⁹⁸ The Mission failed to identify cases proving the more hyperbolic Israeli statements on which it relied.²⁹⁹ Moreover, evidence did exist about the use of human shields; the Mission chose not to recognize or accept it.³⁰⁰ Finally, the Mission purposely chose not to examine Hamas's doctrine and tactics during its investigation.³⁰¹ Not surprisingly, then, it "found" nothing to corroborate Mr. Hammad's comments.

293. Fathi Hammad, *We Used Women and Children as Human Shields*, speech aired on Al-Aqsa Television (Feb. 29, 2008), <http://www.memritv.org/newsletter/clip1710.htm> (last visited June 4, 2012).

294. INTELLIGENCE & TERRORISM INFO. CTR., *HAMAS EXPLOITATION OF CIVILIANS AS HUMAN SHIELDS* 27 (Jan. 2009), http://www.terrorism-info.org.il/data/pdf/PDF_08_204_2.pdf; see also *Operation in Gaza*, *supra* note 53, at 29 (quoting 2007 statement by Abu Obeida, a spokesman for Hamas's Izz al-Din al-Qassam Brigades, that "[Hamas's] defence plan is based, to a great extent, on rockets which have not yet been used and on a network of ditches and tunnels dug under a large area of the [Gaza] Strip.") (emphasis added); *HAMAS AND THE TERRORIST THREAT*, *supra* note 15, at 134 (quoting January 15, 2009, Al-Jazeera interview of Abu Nidal, commander of the military wing of the PFLP-GC in the Gaza Strip: "The resistance . . . understood from the beginning what the extent of the Zionist attack was, and defended itself. These areas do not present a problem because of the population and building density, which provide the resistance with a shield and enable it to move easily to strike blows at Zionist vehicles . . . which try to move in.") (emphasis in the original).

295. *Goldstone Report*, *supra* note 4, ¶ 477.

296. *Id.* ¶ 478.

297. See, e.g., *supra* notes 290-291, *infra* notes 302-08 and accompanying text.

298. See Dershowitz, *supra* note 15, at 11, 32, 45.

299. See *supra* note 214, discussing Eli Yishai's statements.

300. See *supra* notes 272, 290-91; *infra* notes 302-08 and accompanying text.

301. See *infra* note 310 and accompanying text.

In point of fact, Hamas and other Palestinian military groups did fight from civilian areas while dressed as civilians,³⁰² making it difficult for Israeli forces to identify them. They fired rockets from residential neighborhoods and engaged Israeli forces from or near houses, hospitals, mosques, schools, and U.N. compounds.³⁰³ Seeking protection from Israeli attacks, Hamas established its major command post at Gaza's main hospital,³⁰⁴ stored weapons and ammunition in civilian buildings,³⁰⁵ and used civilians to shield combatants from attack.³⁰⁶ In short:

Hamas used the urban terrain to its advantage in terms of providing cover and operational and tactical shielding. It placed fighters and weapons caches inside schools, mosques, and other public buildings in addition to homes.

302. Steven Erlanger, *A Gaza War Full of Traps and Trickery*, N.Y. TIMES, Jan. 11, 2009, <http://www.nytimes.com/2009/01/11/world/middleeast/11hamas.html>; Landes, Part One, *supra* note 15, at 8; HAMAS AND THE TERRORIST THREAT, *supra* note 15, at 196-201, 213-15.

303. See *supra* notes 272, 290 and accompanying text; AMNESTY INT'L, ISRAEL/GAZA OPERATION 'CAST LEAD': 22 DAYS OF DEATH AND DESTRUCTION 74 (2009); CORDESMAN, *supra* note 46, at 43-47, 49, 51-52, 54-55; GROSS, *supra* note 109, at 253; Abraham Cooper & Harold Brackman, Opinion, *The Threat of the Human Shield Strategy Hamas Uses Extends Beyond Israel, Gaza*, U.S. NEWS & WORLD REPORT, Jan. 9, 2009, <http://www.usnews.com/articles/opinion/2009/01/09/the-threat-of-the-human-shield-strategy-hamas-uses-extends-beyond-israel-gaza.html>; Bronner, *supra* note 111; Yaakov Katz, *Gazans Tell Israeli Investigators of Hamas Abuses*, JERUSALEM POST, Apr. 11, 2011, <http://www.jpost.com/Home/Article.aspx?id=131380>; Yaakov Katz, "Shelled UN Building Used by Hamas," JERUSALEM POST, Jan. 15, 2009, <http://www.jpost.com/Home/Article.aspx?id=129393>; Yaakov Katz, *IDF Unveils Hamas Map Seized in Gaza*, JERUSALEM POST, Jan. 8, 2009, <http://www.jpost.com/Home/Article.aspx?id=128484>; Lawson, *supra* note 111; Rod Norland, *Hamas and Its Discontents*, THE DAILY BEAST/NEWSWEEK, (Jan. 19, 2009, 7:00PM) <http://www.newsweek.com/2009/01/19/hamas-and-its-discontents.html>; Putz, *supra* note 111; Sebastian Rotella, *Conflict in Gaza: Hamas' Weapon of Choice*, L.A. TIMES, Jan. 15, 2009, available at 2009 WLNR 775471; Andy Soltis, "Hide Amid Kids" A Top Thug Tactic, N.Y. POST, (Jan. 7, 2009, 7:05AM) http://www.nypost.com/p/news/international/item_4hi6JT6s4a0Mn8suEcc6tJ; Yoav Stern, *Gaza Reporter Caught on Tape Confirming Hamas Fired Rockets Near TV Offices*, HAARETZ, (Jan. 20, 2009, 9:00PM), <http://www.haaretz.com/hasen/spages/1057129.html>; Craig Whitlock & Reyham Abdel Kareem, *Gaza Clan Finds One Haven After Another Ravaged in Attacks*, WASH. POST., Jan. 16, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/15/AR2009011503832.html>.

304. Amos Harel, *Sources: Hamas Leaders Hiding in Basement of Israel-Built Hospital in Gaza*, HAARETZ, (Feb. 22, 2009, 2:22PM), <http://www.haaretz.com/hasen/spages/1054569.html>; HAMAS AND THE TERRORIST THREAT, *supra* note 15, at 164, 166-67; Norwitz, *supra* note 7. Oddly, the Mission did not investigate this matter even though the misuse of such a protected facility constitutes a war crime. *Goldstone Report*, *supra* note 4, ¶ 468; see *infra* note 357 and accompanying text; see also Blank, *Application of IHL*, *supra* note 15, at 360-62; Feinstein, *supra* note 109, at 236. See generally OP LAW HANDBOOK, *supra* note 208, at 24.

305. Steve Erlanger, *Weighing Crimes and Ethics in the Fog of Urban Warfare*, N.Y. TIMES, Jan. 16, 2009, <http://www.nytimes.com/2009/01/17/world/middleeast/17israel.html>; HAMAS AND THE TERRORIST THREAT, *supra* note 15, at 145-62 (mosques), 165 (medical facilities), 172-77 (ambulances), 179-94 (schools and universities), 202-11 (civilian houses).

306. Dore Gold, *The Dangerous Bias of the United Nations Goldstone Report*, US NEWS & WORLD REP., March 24, 2010, available at 2010 WLNR 6217934; HAMAS AND THE TERRORIST THREAT, *supra* note 15, at 141; Segal, *supra* note 200, at 81.

In preparation, Hamas booby-trapped houses and buildings, placed IEDs in homes, and used its tunnel network to move and resupply, albeit not as effectively as Hezbollah. Hamas used Gaza's main hospital as a command center and defensive fighting position.³⁰⁷

Any resulting civilian casualties caused by Israeli attacks, no matter how discriminate and proportional, became part of Hamas's strategic narrative of Israel's disproportionate response and war crimes.³⁰⁸

D. *The Mission's Approach*

The Goldstone Mission neither explored nor critically considered how Hamas's tactics might have affected the IDF's military operations. To illustrate, in October 2009, British Colonel Richard Kemp, the former commander of British forces in Afghanistan, testified before the Human Rights Council about Israel's conduct in Gaza:

[T]he Israeli Defence Forces did more to safeguard the rights of civilians in a combat zone than any other army in the history of warfare. Israel did so while facing an enemy that deliberately positioned its military capability behind the human shield of the civilian population . . . [O]f course innocent civilians were killed. War is chaos and full of mistakes . . . But mistakes are not war crimes. More than anything, the civilian casualties were a consequence of Hamas' way of fighting. Hamas deliberately tried to sacrifice their own civilians . . . ”³⁰⁹

307. Mellies, *supra* note 170, at 69; see also Jessica Elgot, *Col. Tim Collins: Hamas "Committing War Crimes,"* JEWISH CHRON. ONLINE (Jan. 20, 2010, 5:51PM) <http://www.thejc.com/news/uk-news/26235/col-tim-collins-hamas-committing-war-crimes> (inspection of bombed Gaza mosque revealed secondary explosions indicating storage of explosives); HAMAS AND THE TERRORIST THREAT, *supra* note 15, at 110-19, 215-44; *Gaza Operation Investigations: Second Update*, *supra* note 164, ¶ 146.

308. Cohen & White, *supra* note 109, at 18; HAMAS AND THE TERRORIST THREAT, *supra* note 15, at 141; Aviad, *supra* note 281, at 9; Snyder, *supra* note 109, at 106, 130; COHEN, *supra* note 15, at 4; Dershowitz, *supra* note 15, at 26; Tom R. Przybelski, *Hybrid War: The Gap in the Range of Military Operations* 13 (unpublished paper, Naval War College, Department of Joint Military Operations, 2011), <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA546270&Location=U2&doc=GetTRDoc.pdf>.

309. Statement of Colonel Richard Kemp, U.N. Human Rights Council, 12th Special Sess., Geneva (Oct. 16, 2009), available at <http://www.unwatch.org/site/apps/nlnet/content2.aspx?c=bdKKISNqEmG&b=1313923&ct=7536409>.

When asked about Colonel's Kemp's testimony, Justice Goldstone replied:

I would also mention that there 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 having to do so in the incidents we decided to investigate.³¹⁰

One might have thought that the chief purpose of an inquiry into purported violations of the principles of distinction and proportionality would entail an investigation of operations on both sides of the battlefield.³¹¹

While correctly recognizing that Hamas and other Palestinian armed groups were bound by international humanitarian law,³¹² on those occasions when the Mission acknowledged that Palestinian combatants fought from civilian areas or wore civilian clothing, it diminished the significance of such tactics by questioning whether the armed groups had done so intentionally or for the purpose of shielding themselves from attack.³¹³ What is one to make of such findings? That Hamas and other Palestinian combatants *accidentally* found themselves in civilian areas? Or that, as Professor Moshe Halbertal wondered, Palestinian militants did "not wear their uniforms because they were inconveniently at the laundry?"³¹⁴

Furthermore, on what possible basis could the Mission possibly conclude that Palestinians did not deliberately fight from civilian

310. E-mail from Judge Richard Goldstone to Maurice Ostroff, International Coalition of Hasbara Volunteers (Sep. 21, 2009, 22:34:29), <http://maurice-ostroff.tripod.com/id233.html> (emphasis added); see also Dershowitz, *supra* note 15, at 23.

311. See *supra* notes 19-20, 235-38, 251-55, 265-69 and accompanying text; see also Berkowitz, *supra* note 223.

312. *Goldstone Report*, *supra* note 4, ¶ 304. See *Prosecutor v. Sam Hinga Norman*, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), ¶ 22 (May 31, 2004):

[I]t is well-settled that *all* parties to an armed conflict, whether states or non-state actors, are bound by international humanitarian law, even though only states may become parties to international treaties. Customary international law represents the common standard of behaviour within the international community, thus even armed groups hostile to a particular government have to abide by these laws. It has also been pointed out that non-state entities are bound by necessity by the rules embodied in international humanitarian law instruments, that they are "responsible for the conduct of their members" and may be "held so responsible by opposing parties or by the outside world."

313. See *Goldstone Report*, *supra* note 4, ¶¶ 452-53, 482-83, 493-98.

314. Halbertal, *supra* note 7, at 347.

areas or in civilian garb? The Mission made absolutely no effort to study Hamas's combat doctrine or the means by which it was employed,³¹⁵ and it disregarded statements by Hamas leaders and their allies that they would use populated areas to conduct their military operations.³¹⁶ While it took the opportunity to examine the entire spectrum of Israeli-Palestinian relations,³¹⁷ the Mission evidently could not find the time either to review open-source materials that would have laid out in detail how Hamas intended to fight Israel³¹⁸ or how insurgents fight in urban areas generally.³¹⁹ Finally, the Mission neither met with any Palestinian armed groups³²⁰ nor asked those witnesses whom it did question about the presence or activities of the armed groups.³²¹ And the "Gaza authorities" approach to the conflict mimicked *Hogan's Heroes*' "Sergeant Shultz": "We see nothing; we know nothing."³²²

How Hamas planned and conducted its combat operations during the conflict *is* exactly the issue the Mission should have examined. Civilian casualties by themselves do not establish either a violation of international law or a war crime.³²³ Thus, the Mission should have given context to the Israeli military campaign.³²⁴ What did the IDF commanders and soldiers on the ground know? What threats were they confronting? Where were Hamas and other Palestinian combatants situated? Did they distinguish themselves from the civilian population? Where were Hamas' command and control centers and its storage facilities? If Israeli soldiers deliberately targeted civilians, they must be punished.³²⁵ But the rec-

315. See *supra* notes 16, 229, 310 and accompanying text.

316. See *supra* notes 293-301 and accompanying text.

317. See *supra* note 7 and accompanying text.

318. See, e.g., CORDESMAN, *supra* note 46; BACK TO BASICS: A STUDY OF THE SECOND LEBANON WAR AND OPERATION CAST LEAD (Lieutenant Colonel Scott C. Farquhar ed., 2009); *Hamas's Military Buildup*, *supra* note 170.

319. See *supra* note 292 and accompanying text.

320. See *supra* note 273 and accompanying text.

321. See *supra* note 276-77 and accompanying text. Even had it asked the witnesses about the activities of Palestinian militants, the Mission acknowledged that the witnesses would have been reluctant to answer. See *supra* text accompanying note 275.

322. See *supra* notes 274-75 and accompanying text; for Sergeant Schultz, see <http://www.youtube.com/watch?v=34ag4nkSh7Q> (last visited June 4, 2012).

323. See *supra* notes 187-88, 239-43 and accompanying text.

324. See Jones, *supra* note 253, at 277; Asa Kasher, *Operation Cast Lead and the Ethics of Just War*, AZURE, Summer 2009, at 9, <http://www.azure.org.il/article.php?id=502>; Newton, *supra* note 15, at 273.

325. Landes *Part One*, *supra* note 15, at 4. As noted above, I do not discount the possibility that Israeli soldiers may, in fact, have committed grave breaches of the law of war. See *supra* text accompanying note 225. The testimony of some witnesses before the Mission is compelling and heart-wrenching. See, e.g., Testimony of Mr. Wail El-Samouni, Unofficial Transcript, June 28, 2009, *supra* note 277, at 3-19, (describing deaths of family members and destruction of property during the conflict); see also *supra* note 226; Testimony of Khaled Abed Rabbo, Unofficial Transcript, June 28, 2009, *supra* note 277, at 29-34 (describing killing of family members by Israeli forces). As noted, the Government of Israel has re-

itation of anecdotal incidents representing a small percentage of alleged civilian casualties does not warrant an indictment against the entire IDF or the Government of Israel.

Hamas and its allies intentionally added to the normal “fog of war” as their leaders said they would, and the conditions created by these groups’ tactics necessarily made it much more difficult for the Israelis to distinguish military targets from civilians and civilian objects.³²⁶ Israel took steps to minimize civilian casualties—not all of them successful.³²⁷ For example, it gave warnings of impending attacks,³²⁸ it chose (in some cases) weapon systems likely to cause the least collateral harm,³²⁹ and it avoided targets where the resulting collateral damage would be too great;³³⁰ however, “many Hamas targets were so deeply embedded in densely populated areas and located so close to civilian buildings that it was impossible to avoid collateral damage.”³³¹

Many of the anecdotal examples of alleged Israeli attacks on civilians cited by the Mission actually involved combat between the IDF and Palestinian armed groups. For example, the attack that the Mission claimed destroyed the Gaza Main Prison,³³² was in fact a strike against Hamas security force barracks³³³—

portedly conducted some 400 command investigations in relation to Operation Cast Lead and opened 52 criminal investigations. *See supra* note 225; *see also Gaza Operation Investigations: Second Update, supra* note 164, ¶ 10. On the other hand, “Hamas authorities in Gaza have neither investigated nor disciplined anyone for ordering or carrying out hundreds of deliberate or indiscriminate rocket attacks into Israeli cities and towns during the fighting in December 2008 and January 2009.” *Israel/Gaza: Wartime Inquiries Fall Short*, HUMAN RIGHTS WATCH (Aug. 10, 2010), <http://www.hrw.org/en/news/2010/08/10/israelgaza-wartime-inquiries-fall-short>.

326. According to the Government of Israel: “The Gaza Operation presented complex military challenges in protecting civilians from the hazards of battle. Urban warfare and the cynical choice made by Hamas to imbed itself in civilian urban areas and to use civilian structures as shields contributed to the great challenges for Israeli air and ground forces.” *Gaza Operation Investigations: Second Update, supra* note 164, ¶ 146; *see also* Dershowitz, *supra* note 15, at 21; Landes, *supra* note 15, at 4.

327. Erlanger, *Weighing Crimes and Ethics, supra* note 305.

328. Interview, Colonel Richard Kemp, former commander of British forces in Afghanistan, BBC NEWS, Jan. 18, 2009, <http://www.youtube.com/watch?v=LrLfIMm86tA> (last visited June 4, 2012); *see also* CORDESMAN, *supra* note 46, at 17 (describing IAF’s “systematic effort[s] to limit collateral damage”). Evidence exists that Hamas used Israeli warnings of impending strikes on particular targets to “organize” civilians into human shields to deter the attacks. Gold, *supra* note 306; HAMAS AND THE TERRORIST THREAT, *supra* note 15, at 254-56; *see also* Erlanger, *Weighing Crimes and Ethics, supra* note 305; Matthews, *supra* note 113, at 33.

329. *Gaza Operation Investigations: Second Update, supra* note 164, ¶ 85; CORDESMAN, *supra* note 46, at 17. Professor Cordesman noted that “the use of these lighter weapons sometimes had to be mixed with the use of the equivalent of larger bombs in order to strike successfully at larger, hardened and sheltered targets.” *Id.*

330. Statement of Colonel Richard Kemp, *supra* note 309.

331. CORDESMAN, *supra* note 46, at 17.

332. *Goldstone Report, supra* note 4, ¶¶ 32, 336, 366-70, 380-81.

333. *Gaza Operation Investigations: Second Update, supra* note 164, ¶¶ 89-91.

unquestionably a legitimate target.³³⁴ Similarly, purported casualties and damage caused by the IDF to the United Nations Relief and Works Agency (UNRWA) compound,³³⁵ the UNRWA school,³³⁶ the Sawafeary Chicken Coops,³³⁷ the Abu Jubbah Cement-Packaging Plant,³³⁸ the al-Wadiyah factories,³³⁹ and the El-Bader Flour Mill³⁴⁰ all occurred in connection with military operations against Palestinian combatants.³⁴¹

The Mission placed considerable emphasis on the Palestinian deaths that resulted from an IDF strike against Palestinian combatants in the vicinity of an UNRWA school. In fact, Israeli soldiers took mortar fire from Palestinian combatants, who were situated about 80 meters from the facility.³⁴² The IDF responded with mortars.³⁴³ The Mission acknowledged that the IDF may have come under fire from Palestinian mortars,³⁴⁴ but nevertheless concluded that the Israeli commander was reckless in his choice of weapon.³⁴⁵ As was its practice throughout the investigation, the Mission was wholly indifferent to actions of the Palestinian militants who placed the school in jeopardy by embedding their mortars near the school. The Mission also (contrary to Justice Gold-

334. See, e.g., DINSTEIN, *supra* note 175, at 96, see also *supra* notes 163-80 and accompanying text.

335. *Goldstone Report*, *supra* note 4, ¶¶ 543-95.

336. *Id.* ¶¶ 653-73.

337. *Id.* ¶¶ 942-61.

338. *Id.* ¶¶ 1012-17.

339. *Id.* ¶¶ 1018-21.

340. *Id.* ¶¶ 913-41.

341. *Operation in Gaza*, *supra* note 53, at 128-30; *Gaza Operation Investigations: Second Update*, *supra* note 164, ¶¶ 61-66, 92-97, 118-45.

342. *Operation in Gaza*, *supra* note 53, at 128. See generally HAMAS AND THE TERRORIST THREAT, *supra* note 15, at 177-94 (describing Hamas's use of educational institutions for military operations).

343. *Operation in Gaza*, *supra* note 53, at 128.

344. *Goldstone Report*, *supra* note 4, ¶ 690. The Mission faulted Israel for giving conflicting versions of what happened at the school. *Id.* ¶¶ 676, 679-81, 686, 702. The Mission says nothing, however, about UNRWA's false claim that Israel had targeted the school itself, an assertion it had persisted in making for a month. Tovah Lazaroff & Yaakov Katz, *UN: IDF Did Not Shell UNRWA School*, JERUSALEM POST, Feb. 1, 2009, <http://www.jpost.com/MiddleEast/Article.aspx?id=131379>.

A clerical error led the UN to falsely accuse Israel of shelling one of its Gaza schools in the Jabalya refugee camp during Operation Cast Lead, the international organization admitted this week. For close to a month, the UN accused the Israel of hitting the educational compound ran by its Relief and Works Agency for Palestine Refugees, which was sheltering more than 1,300 Gazans as the IDF battled Hamas in the camp on January 6.

See also Amos Harel, *UN Backtracks on Claim that Deadly IDF Strike Hit Gaza School*, HAARETZ, (Feb. 3, 2009, 5:39PM), <http://www.haaretz.com/news/un-backtracks-on-claim-that-deadly-idf-strike-hit-gaza-school-1.269314>.

345. *Goldstone Report*, *supra* note 4, ¶¶ 41-42, 697-700.

stone's later claim³⁴⁶) attempted to second-guess the decision of the Israeli commander without examining his options,³⁴⁷ what information he had at the time of the attack, or the danger created by the Palestinian mortars to his soldiers.³⁴⁸

What is more, except for Hamas rocket attacks against Israeli civilians,³⁴⁹ unless the Mission was investigating purported Israeli violations of international law, it consciously closed its eyes to possible war crimes committed by Palestinian militants in the conduct of their military operations. The Mission claimed that it "necessarily had to be selective in its choice of issues and incidents for investigation[,] but concluded that "the report is illustrative of the main patterns of violations."³⁵⁰ With respect to the tactics employed by Palestinian combatants, this statement is simply not true.

The Mission had information that Hamas established its military headquarters in a hospital, stored weapons in mosques, and fought from civilian areas in civilian clothing, yet it did not investigate these allegations and generally minimized them.³⁵¹ In fact, in some instances it simply concluded that, because it could not confirm the incidents, they did not happen.³⁵²

Thus, the Mission completely missed the fact that Hamas and its allies violated Article 58 of Protocol I,³⁵³ which requires combatants to take certain precautions with respect to civilians under their control so as not to place them in danger from military operations.³⁵⁴ Indeed, "[u]tilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations" is a war crime.³⁵⁵ Further, fighting in civilian garb to feign civilian or noncombatant status constitutes

346. See *supra* note 310 and accompanying text.

347. For example, air support was unavailable to the unit at the time. *Gaza Operation Investigations: Second Update*, *supra* note 164, ¶¶ 65. The mortars used by Israel contained "advanced target acquisition and navigation systems and was the most precise weapon available to Israeli forces at the time." *Id.*

348. See Jenks & Corn, *supra* note 15, at 4: "Critiquing targeting decisions as the Mission did distorted the findings of the Goldstone Report because the assessment was divorced from the military commander's operational requirements and relies on facts and circumstances that may have only come to light in the aftermath of events." See also *supra* notes 247-50 and accompanying text.

349. *Goldstone Report*, *supra* note 4, ¶¶ 103-10,

350. *Id.* ¶ 157.

351. See *supra* note 272 and accompanying text. The Mission, for example, only examined mosques and hospitals that were damaged during Israeli attacks. *Goldstone Report*, *supra* note 4, ¶¶ 464-65 (mosque), 596-652 (hospitals).

352. *Goldstone Report*, *supra* note 4, ¶¶ 468-69, 487, 495.

353. Blank, *Finding Facts*, *supra* note 15, at 301-02; Blank, *Application of IHL*, *supra* note 15, at 388-90.

354. See also GC, *supra* note 237, art. 28.

355. Rome Statute, *supra* note 179, art. 8.2(b)(xxiii).

perfidy,³⁵⁶ and using hospitals emblazoned with the Red Crescent is a grave breach of the Geneva Convention.³⁵⁷ The Mission did note that armed groups have an obligation “to protect civilians from the inherent dangers created by military operations[.]”³⁵⁸ but it concluded with nothing more than the statement that, “if” the Palestinian armed groups failed in this obligation, “they would bear responsibility for the damage done to civilians living in Gaza.”³⁵⁹ On their face, the actions of Palestinian combatants constituted war crimes and—assuming a full and fair investigation—should have warranted further inquiry.³⁶⁰

Finally, and most fundamentally, the Mission should have addressed how a military committed to compliance with the law of war is supposed to deal with an insurgent or terrorist group that embeds itself into a civilian population either to deter an attack or to reap the strategic “benefits” of the inevitable deaths of civilians resulting from an attack.³⁶¹ While recognizing (at least to some extent) that Hamas and other militant groups used civilian areas for their combat operations,³⁶² the Mission placed the onus of avoiding civilian casualties entirely on Israel.³⁶³

The distinction between so-called “Hague Law,” which traditionally governed the means and methods of warfare, and “Geneva Law,” which deals with the treatment of combatants and civilians that fall into a belligerents hands, is important in this regard. A nation that captures combatants or detains civilians has plenary and exclusive control over them; “nothing prevents or excuses a nation’s unqualified adherence to the law of war.”³⁶⁴ In the case of the appropriate means and methods of conducting operations,

356. Protocol I, *supra* note 157, at art. 37(1)(c); Louis Rene Beres, *Israel, Lebanon, and Hizbullah: A Jurisprudential Assessment*, 14 ARIZ. J. INT’L & COMP. L. 141, 147-48 (1997); Blank, *Application of IHL*, *supra* note 15, at 362-64; Weiner & Bell, *supra* note 15, at 22-23; OP LAW HANDBOOK, *supra* note 208, at 13.

357. Protocol I, *supra* note 157, at art. 85(3)(f).

358. *Goldstone Report*, *supra* note 4, ¶ 497.

359. *Id.* ¶ 498 (emphasis added).

360. See Rodley, *supra* note 70, at 196 (discussing Mission’s failure to investigate Hamas’s use of the Al-Shifa Hospital for its military headquarters); cf. Franck and Fairley, *supra* note 73, at 312-13 (discussing danger of selectivity in fact-finding).

361. Landes *Part One*, *supra* note 15, at 2. See generally Parks, *supra* note 187, at 179; Michael N. Schmitt, *The Principle of Proportionality in 21st Century Warfare*, 2 YALE HUM. RTS. & DEV. L.J. 143, 169 (1999); Reynolds, *supra* note 268, at 79; Jonathan Keiler, *The End of Proportionality*, PARAMETERS, Spring 2009, at 53, 58.

362. See *supra* note 272 and accompanying text.

363. An editorial written by Justice Goldstone after release of the report is illustrative: “Israel is correct that identifying combatants in a heavily populated area is difficult, and that Hamas fighters at times mixed and mingled with civilians. *But that reality did not lift Israel’s obligation to take all feasible measures to minimize harm to civilians.*” Richard Goldstone, *Justice in Gaza*, N.Y. TIMES, Sep. 17, 2009, <http://www.nytimes.com/2009/09/17/opinion/17goldstone.html> (emphasis added).

364. Rosen, *supra* note 93, at 692; see also Parks, *supra* note 187, at 181-82; OLASOLO, *supra* note 263, at 2.

however, the defender—in this case Hamas—picks the battlefield. It alone decides whether to fight among civilians.³⁶⁵ The Mission blames Israel for civilian casualties even though Hamas and its partners selected the ground on which the battle would be fought, knowing (and perhaps hoping) that civilian lives and property would be jeopardized.³⁶⁶

CONCLUSION: THE WAY FORWARD

The Goldstone Report is illustrative of institutional shortcomings prevalent in the observance and enforcement of international humanitarian law generally, and to asymmetric conflicts specifically. The reactions of organizations such as the UN (particularly the Human Rights Council), NGOs, and the media to civilian casualties in asymmetrical wars involving Israel (and sometimes the United States) is *Pavlovian*—they make allegations ranging from the response was disproportionate (in the *ad bellum* sense), to the failure of Israeli or U.S. forces to prevent “needless” civilian casualties by not discriminating between military objectives and civilians or by not using proportionate force in attacking the military targets.³⁶⁷ While occasionally acknowledging the failure of insurgent or terrorist groups to distinguish themselves from the civilian population or their use of civilian areas for combat operations, these groups almost invariably give insurgents and terrorists a “pass.” And the opprobrium heaped upon Israel or the U.S. feeds the insurgents’ or terrorists’ strategy by delegitimizing their enemies. Ultimately, the international community’s narrative affords insurgents and terrorists a tremendous incentive to continue to ignore the most basic obligations of international law.³⁶⁸

365. Jones, *supra* note 253, at 271-72; Parks, *supra* note 185, at 28-29.

366. Nevertheless, the Government of Israel reports that it has implemented new procedures and doctrines to improve the protection of the civilian population, such as “advance research into and the precise identification and marking of existing infrastructure, including that pertaining to water, food and power supplies, sewage, health services, educational institutions, religious sites, economic sites, factories, stores, communications and media, and other sensitive sites as well as cultural institutions.” *Gaza Operation Investigations: Second Update*, *supra* note 164, ¶ 151. It also claims that it has a

“new written procedures mandate . . . aimed at safeguarding the civilian population . . . [including] safe havens for civilians to take refuge; evacuation routes for civilians to safely escape combat areas; medical treatment for civilians; methods for effectively communicating with and instructing the population; and provisions for humanitarian access during curfews, closures and limitations on movement.”

Id. ¶ 152.

367. See COHEN, *supra* note 15, at 16-19.

368. See *supra* note 269 and accompanying text; Parks, *supra* note 187, at 137; Jacob Turner, *Towards a Synthesis Between Islamic and Western Jus in Bello*, 21 J. TRANSNAT'L L. & POL'Y 165, 172 (2012) (footnotes omitted):

International humanitarian law does not (nor should it) create a system that awards a belligerent a “handicap” because it may be militarily weaker than its opponent.³⁶⁹ The laws of armed conflict do not exist to ensure a “fair fight,” only a fight according to basic rules that protect those who do not or cannot participate in the conflict.³⁷⁰ To allow one party to a conflict to ignore its obligations under international law, or worse to benefit strategically and tactically from its enemy’s compliance with the law, threatens the demise of the entire international humanitarian law system.³⁷¹

[T]he current state of IHL permits belligerents to claim the full rights of civilians, and avoid the liabilities of combatants Armies fighting against belligerents using such tactics are thus prone to accusations of having deliberately and indiscriminately targeted civilians. In an age where media support for or consternation with military tactics can have enormous bearing on military strategy, such behaviour on the part of belligerents may act as a powerful weapon in furthering their policy aims via the discrediting of the opposition in the eyes of world opinion.

Alan M. Dershowitz, *The Israel-Hezbollah War*, AMAZON SHORTS 5 (2006) (on file with the author) (“Whenever a democracy . . . chooses to defend its civilians by going after the terrorists hiding among civilians, the[] predictable condemners [international community and human rights organizations] can be counted on by terrorists to accuse the democracy of ‘overreaction,’ or ‘disproportionality,’ and ‘violations of human rights.’ In so doing, they play into the hands of the terrorists and cause more terrorism and more civilian casualties on both sides”); Editorial, *Hamas’s Human Shields*, JERUSALEM POST, Mar. 5, 2008, at 13, available at 2008 WLNR 4446011 (arguing that “Hamas’s brazen use of human shields is directly facilitated by the international community’s reluctance to address the issue and denounce the premeditated endangerment of ordinary people”); Cooper & Brackman, *supra* note 303 (“The future of international humanitarian law could be at stake in Gaza. But the deadly menace stems not from the IDF but from Hamas’s twin campaign of terrorism against both Israeli and Palestinian innocents. The Gaza terrorist state that turns its own people into human shields also threatens to strip the entire civilized world of the protections of international law.”).

369. See Parks, *supra* note 187, at 169; Michael N. Schmitt, *Targeting and Humanitarian Law: Current Issues*, in ISSUES IN INTERNATIONAL LAW AND MILITARY OPERATIONS 173 (Richard B. Jacques ed., 2006). But see Gabriel Swiney, *Saving Lives: The Principle of Distinction and the Realities of Modern War*, 39 INT’L LAW. 733, 755 (2005) (“It is unfair to create a legal standard that handicaps insurgents.”).

370. See Blank, *Application of IHL*, *supra* note 15, at 386; Rosen, *supra* note 93, at 726-27.

371. See Anderson, *supra* note 238:

Th[e] emphasis on the need for strict compliance by all parties is of utmost importance, both in minimizing collateral damage in future conflicts and in buttressing the long-term viability of the entire armed conflict-related body of law. Any effort to accept or justify the proposition that the laws of war’s strictures bind some parties more than others, or that non-compliance by some parties is somehow excusable or justifiable, would irredeemably erode the laws of war.

Newton, *supra* note 15, at 277: “Lawfare that creates uncertainty over the application of previously clear rules must be opposed vigorously because it does perhaps irrevocable harm to the fabric of the laws and customs of war. Illegitimate lawfare will marginalize the precepts of humanitarian law if left unchecked, and may serve to create strong disincentives to its application and enforcement;” see also Paul H. Robinson, Opinion, *Israel and the Trouble with International Law*, WALL ST. J., Sept. 22, 2009, at A25 (“A law seen as unjust promotes resistance, undermines compliance, and loses its power to harness the powerful forces of

The irony is that Israel and the United States (along with its allies) make adherence to the law of war a central component of their military doctrine and operations.³⁷² Most states that actually engage in conflict ignore the twin principles of distinction and proportionality. The same, of course, is true for non-state organized, armed groups. The 800-pound gorilla in the room is whether the international humanitarian law's most basic tenet—the preservation of civilian immunity—represents the practice (as opposed to the words)³⁷³ of belligerents. A visitor from another planet assessing the devastation wrought on civilians in conflicts in the past 50 years would likely conclude that, on earth, civilians are lawful targets.³⁷⁴

Thus, Goldstone Report defenders who perceive concepts such as “asymmetrical war” or “lawfare” as antithetical to international humanitarian law and an excuse to harm or kill civilians have it backwards.³⁷⁵ Only states that actually care about the preservation

social influence, stigmatization and condemnation.”).

Part of the problem is Protocol I itself. While Protocol I recognizes that both attackers and defenders have reciprocal responsibilities to protect civilians, it essentially gives little more than “lip service” to the duties of the defender. Jones, *supra* note 253, at 272; Parks, *Air War*, *supra* note 187, at 14, 28-29. The Protocol's emphasis on protecting defending forces must be considered in the context of its development. The Protocol was not drafted solely (or in some cases primarily) with the concern of protecting civilians and or combatants rendered *hors de combat*; instead, it represents an effort by developing nations, assisted by the Soviet Bloc, “to even the playing field” against more technologically advanced militaries. See Rosen, *supra* note 93, at 687-88, 716, 724-27; Parks, *supra* note 187, at 165, 218; Reynolds, *supra* note 268, at 58. For that reason, some western nations that actually fight wars—such as the United States and Israel—have decided not to become parties to the treaty. Daniel Bethlehem, *The Methodological Framework of the Study*, in PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 3, 6-7 (Elizabeth Wilmshurst & Susan Breau eds., 2007); see also Parks, *supra* note 187, at 112 (noting that the rules established by Protocol I “bear no relation to the way warfare has evolved over the past two centuries”).

372. JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-60, JOINT TARGETING I-8, E-2 to E-3 (Apr. 13, 2007); DEP'T OF THE ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE ¶¶ 40-41 (Jul. 1956) (Change No. 1 July 15, 1976); U.S. NAVY, U.S. MARINE CORPS/U.S. COAST GUARD, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, NWP 1-14M, NCWP 5-12.1, COMDTPUB P5800.A, ch. 8 (2007); OF LAW HANDBOOK, *supra* note 208, at 10, 13; HCJ 769/02, Pub. Comm. Against Torture v. Gov't of Israel, ¶¶ 23, 26 [2005] (Isr.) (Barak, J.); ISRAEL MINISTRY OF FOREIGN AFF., BACKGROUND PAPER, RESPONDING TO HAMAS ATTACKS FROM GAZA—ISSUE OF PROPORTIONALITY (Dec. 2008), <http://www.mfa.gov.il/NR/rdonlyres/A1D75D9F-ED9E-4203-A024-AF8398997029/0/GazaProportionality.pdf>; see also Kieval, *supra* note 268, at 888-89; Steven R. Ratner, *Geneva Conventions*, FOR. POL'Y, Mar. 1, 2008, at 26.

373. W. Hays Parks, *The ICRC Customary Law Study: A Preliminary Assessment*, 99 AM. SOC'Y INT'L L. PROC. 208, 210 (2005); Leah M. Nichols, *The Humanitarian Monarchy Legislates: The International Committee of the Red Cross and Its 161 Rules of Customary International Law*, 17 DUKE J. COMP. & INT'L L. 223, 244 (2006); see also Reynolds, *supra* note 268, at 74 (“Despite convenient or timely accusations against any one state for an incident of collateral damage, the only states in a probable position to maintain the moral high ground are those states that have never been to war.”).

374. Rosen, *supra* note 93, at 774-76.

375. See, e.g., Naomi Klein, *Introduction: The End of Israeli Exceptionalism*, IN THE GOLDSTONE REPORT: THE LEGACY OF THE LANDMARK INVESTIGATION OF THE GAZA CONFLICT

of civilian immunity have real concerns about how to fight enemy forces that use civilians in their military operations.³⁷⁶ Most states that fight wars, as well as insurgent and terrorist groups, are not at all concerned about the challenges of asymmetrical war: they simply target civilians and combatants alike without regard to the principles of distinction or proportionality or any other protections under international law.³⁷⁷ Simply put, their approach is to “shoot everyone down and sort the civilians out on the ground.”³⁷⁸ Thus, in virtually every conflict, both international and non-international, in the past 50 years, combatants have ignored international humanitarian law’s basic tenets.³⁷⁹

xvi (Adam Horowitz et al. eds., 2010) (“When Israel and its supporters respond to Goldstone by waging war on international law itself, characterizing any possible legal challenge to Israeli politicians and military officials as ‘lawfare,’ they are doing nothing less than recklessly endangering the human rights architecture that was forged in the fires of the Holocaust.”); Slater, *supra* note 186, at 366 (noting the term “asymmetrical warfare” is just “current jargon for age-old guerilla warfare,” and to those who suggest it gives Hamas an “unfair advantage,” “What is it that Israel wants? Permission to fearlessly attack defenseless population centers with planes, tanks and artillery.”) (quoting Zerv Sternhall).

376. See GROSS, *supra* note 109, at 260:

Hammas built its tactics around an implicit understanding that Israeli military actions were not entirely unrestrained. It is unlikely that Hamas would have placed their command centers in hospitals or used children to transport arms if they believed the Israelis would ruthlessly attack any of these targets. Israel’s norms of conduct were precisely those that allowed Hamas to feel secure about adopting tactics that might easily invite catastrophe in other circumstances.

377. Nicolas Lamp, *Conceptions of War and Paradigms of Compliance: The “New War” Challenges to International Humanitarian Law*, 16 J. CONFLICT & SEC. L. 225, 244-45 (2011).

378. My apologies to the Army Air Defense Artillery. See, e.g., HAROLD COYLE, SWORD POINT 217 (1988); *Murphy’s Law of Combat Operations*, MILITARY QUOTES, #47, <http://www.military-quotes.com/murphy.htm> (last visited June 4, 2012).

379. Rosen, *supra* note 93, at 774-76 nn. 522-28 (describing modern conflicts in which states have failed to abide by the fundamental precepts of the law of armed conflict). Since the article was published, one can add Sri Lanka, Ivory Coast, Syria, Libya, Sudan (again), Somalia (again), and Yemen. See *supra* note 154 and accompanying text; Marlise Simons, *Ivory Coast: Hague Inquiry Is Sought*, N.Y. TIMES, June 23, 2011, <http://www.nytimes.com/2011/06/24/world/africa/24briefs-Ivorycoast.html> (“[D]uring the postelection violence at least 3,000 people were killed”); Monica Mark, *Ivory Coast Epilogue: The Fate of the Gbagos*, TIME, Aug. 22, 2011, <http://www.time.com/time/world/article/0,8599,2089794,00.html> (noting 3,000 people killed in postelection violence); S.C. Res. 2000, ¶ 7(a), U.N. Doc. S/RES/2000 (July 27, 2011) (condemning violence against civilians); S.C. Res. 1975, ¶ 5, U.N. Doc. S/RES/1975 (Mar. 30, 2011) (reiterating the U.N.’s “firm condemnation of all violence committed against civilians”); see *supra* notes 145-46 and accompanying text (noting Syrian armed forces attacks against protesters cause over 2,600 civilian deaths); C.J. Chivers, *Qaddafi Troops Fire Cluster Bombs into Civilian Areas*, N.Y. TIMES, Apr. 15, 2011, <http://www.nytimes.com/2011/04/16/world/africa/16libya.html?pagewanted=all> (describing attacks by Libyan armed forces using heavy weapons, including cluster bombs, against residential neighborhoods in Misurata); David D. Kirkpatrick & Kareem Fahim, *In Libya, Both Sides Gird for a Long War as Civilian Toll Mounts*, N.Y. TIMES, Mar. 5, 2011, <http://www.nytimes.com/2011/03/06/world/africa/06libya.html?pagewanted=all> (describing attacks on residential neighborhoods); S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011) (condemning Libyan government’s attacks on civilians); U.N. S.C. Rep. of the Panel of Experts on the Sudan established pursuant to Resolu-

An international legal regime that benefits belligerents who deliberately place civilians and civilian objects at risk cannot long be sustained. States can neither be expected to permit their citizens to be placed in jeopardy from insurgent or terrorist attacks, nor to endure severe combat losses because an insurgent or terrorist force discards the law and bases its strategy on its opponent's adherence to the law. Nations follow international law because it is in their interest to do so;³⁸⁰ when it ceases to be in their interest, the law will no longer bind their actions.³⁸¹ While some in academia, NGOs, or the Human Rights Council may applaud the Goldstone Report's findings and conclusions, international law is not made in the parlors of academia, the offices of NGOs, or the halls of the Human Rights Council.³⁸² States, particularly those that actually engage in combat, make the law of armed conflict, and all the fulminations of academics, NGOs, or the Human Rights Council will not alter a state's obligation to protect its citizens or to minimize its combat losses, nor should they.

At the center of these asymmetrical conflicts are the civilians. When they are alive, civilians are integral parts of the insurgent or terrorist military arsenal—to be used to deter enemy attacks and to conceal military facilities and operations. When they are dead, they serve as props, used by insurgents and terrorists to delegitimize their enemies and gain the world's sympathy.³⁸³ The real tragedy is that the strategy works.³⁸⁴

tion 1591 (2005), ¶¶ 101-04, U.N. Doc. S/2011/111 (Mar. 8, 2011) (addressing attacks against civilians by Sudan and its allies); Joe DeCapua, *U.N. Humanitarian Official Says Somali Civilian Casualties Rise*, VOANEWS.COM, Apr. 14, 2010, <http://www.voanews.com/english/news/africa/decapua-somalia-un-14apr10-90849259.html> (describing attacks on civilians by Islamist militias and the Transitional Federal Government); Sarah Childress, *Civilian Casualties Dog Troops in Somalia*, WALL ST. J., July 29, 2010, <http://online.wsj.com/article/SB10001424052748704895004575395111138942560.html> (describing African Union attacks on civilian areas); Hakim Almasari, *Activist Group: Dozens of Yemeni Civilians Killed*, CNN, July 9, 2011, http://articles.cnn.com/2011-07-09/world/yemen.unrest_1_abyan-province-civilian-deaths-yemeni-forces?_s=PM:WORLD (describing indiscriminate attacks by Yemeni armed forces on civilians); *UN Rights Official Calls for Investigation into Yemen Civilian Deaths*, VOANEWS.COM, Sept. 18, 2009, <http://www.voanews.com/english/news/a-13-2009-09-18-voa47-68758287.html> (noting an air strike by Yemeni warplanes that "killed dozens of citizens").

380. COHEN, *supra* note 15, at 5. See generally Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1115, 1132-33 (1999).

381. See *supra* text accompanying note 371.

382. See, e.g., Eric A. Posner, *Dockets of War*, NAT'L INT., Feb. 23, 2011, <http://nationalinterest.org/article/dockets-war-4890>.

383. Blank, *supra* note 187, at 735-36.

384. See, e.g., Ian O'Doherty, *Why the Israeli People Have Finally Had Enough*, INDEP., Jan. 5, 2009, <http://www.independent.ie/opinion/columnists/ian-odoherty/why-the-israeli-people-have-finally-had-enough-1592022.html> ("The civilian deaths in Gaza are to be mourned, and anyone who says otherwise is reprehensible. But is a sick and twisted irony, they are mourned more by Israelis than by Hamas, who know that every dead Palestinian kid is worth another piece of propaganda."); Dershowitz, *supra* note 15, at 26 ("Every time a Palestinian terrorist kills an Israeli civilian, Hamas wins. And every time an Israeli soldier

The Goldstone Mission had an opportunity to break this cycle—to put the imprimatur of the Human Rights Council, which historically has been pathologically hostile to Israel,³⁸⁵ on an inquiry that would have seriously dealt with the question of how modern militaries should respond to belligerents that make civilians and their property part of the battlefield.³⁸⁶ In every respect, the Mission was singularly unsuccessful, and civilians in future conflicts will ultimately pay the price with their lives and treasure.³⁸⁷ Justice Goldstone's reconsideration of the Report's conclusion does not by itself correct the trajectory of how the international community addresses asymmetrical conflicts, but perhaps it is a start.

kills a Palestinian civilian, Hamas wins. That is their strategy . . .”).

385. See *supra* text accompanying note 80.

386. See *supra* notes 264-69 and accompanying text.

387. Anderson, *supra* note 238 (“Defenders’ violations of their obligations under international humanitarian law, while not relieving attackers of their obligations, will in fact tend to make collateral damage from even legally permitted attacks more likely and more extensive.”); see also Reynolds, *supra* note 268, at 76.

