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Judge Richard Goldstone
Head of the UN HRC Fact Finding Mission on Gaza
Via email

Dear Richard:

I have finally completed my review of your Report¹ which, by its very length, defends itself against the risk of being read quickly or widely, to paraphrase that infamous war criminal (by your definition) Winston Churchill.

I am profoundly disappointed by the contents of your Report, but I am also troubled by the *ad hominem* attacks that have been directed towards you. I offer this analysis and critique in the spirit of your article in the Jerusalem Post today², looking only at the substance of your Report and relying neither on its authors' motives nor their reputation. I do so in an effort to advance the cause of truth and in the hope that you may yet be willing to take actions to mitigate the terrible injustice and damage that your Report is causing. To that end, I am respectfully including some suggestions for you at the end of this letter (which is longer than the one I sent you on July 14 – attached again for your reference – but which I hope you will take time to read).

In a nutshell, your Report is a deeply flawed document that is not only unbalanced and inflammatory, but reflects a procedurally deficient rush to judgment incapable producing any meaningful findings, least of all charges as grave, politically loaded and emotionally laden as those of “war crimes” and “crimes against humanity”.

I acknowledge at the outset that your Report was difficult to read not only because of its obvious lack of balance, but also because it does raise some hard questions about the precise manner in which Israel reacted to the years of rocket attacks against its towns and people and the threats it faces³. I hope that, to the extent it has not already done so, Israel will investigate and explain the incidents you have highlighted which have undoubtedly been part of a chain of events that has resulted in much human suffering. Sadly though, because your Report is so one-sided and unfair, these important questions may receive less attention than they deserve.

As someone who had expected⁴ a relatively fair and balanced investigation because of your involvement, I am struggling to understand why you would go out of your way and beyond even the “very lopsided unfair resolution” (to use your own words⁵) of the group⁶ that authorized your Mission to demonize Israel while legitimizing and even whitewashing Hamas. (For while you may object to that characterization, that is indeed what your Report does, as I describe below.)

I do not intend to focus on factual inaccuracies in your Report (which others better placed that I are already starting to address⁷), but wish to emphasize rather the *manner* in which your investigation was conducted and its “findings” reported. The imbalance and partiality that

permeate your Report are evident at many levels. They are manifested in the methodology you adopted to conduct your investigation and reach your conclusions, in the way in which you chose to characterize your Mission and select which incidents you would investigate and which you would ignore, in the fundamental premises which underlie your investigation and conclusions, in the manner in which you have misrepresented the history of the Middle East conflict, and in your use of language both throughout your Report and in your subsequent public statements. Of course this letter can not be comprehensive but can only illustrate a few of the many examples where this one-sidedness shows through your purported factual and legal findings.

Your Procedurally Flawed Investigation

In my earlier letter to you, I made three points: (i) I implored you not to hold the Israeli government's refusal to cooperate with your investigation against Israel or allow that to be a source of injustice, (ii) I begged you to try to find out the relevant facts regarding the activities and actions of Hamas and other terrorist groups operating in Gaza and Israel's efforts to avoid civilian casualties, notwithstanding the refusal of the Israeli government to assist you, and (iii) I urged you to put your findings in their proper context. You said you would take these things into account but unfortunately I now see my worst fears realized.

Passing judgment based on one-sided (and tainted) evidence. Your Mission took Israel's refusal to cooperate as an invitation (or perhaps as an excuse) to allow the scales of justice to weigh with only one pan being filled. Time and time again, you made findings of fact based solely on evidence provided by the Palestinian side of the conflict (even though your Report expressly acknowledges that the testimony you received from witnesses in Gaza was tainted by duress⁸, not to mention obvious, if understandable, bias). Almost every one of your "findings of fact" was arrived at using the formula: the direct evidence the Mission collected said X; no evidence to the contrary has been provided; therefore "*on the information available to it*"⁹, the Mission finds" X. And you did this in the full knowledge that you had heard only half the story. I understand that you and your fellow Commissioners were outraged by Israel's decision to snub you (as is evident in the numerous references to their refusal to cooperate throughout your Report – I stopped counting at forty) but if your investigation was truly seeking to uncover the truth, you quite simply could not have reached conclusions and made such momentous and awful accusations based on one-sided evidence. In your October 19 article in the Jerusalem Post, you state: "Our mission obviously could only consider and report on what it saw, heard and read. If the government of Israel failed to bring facts and analyses to our attention, we cannot fairly be blamed for the consequences." I strongly disagree. As one entrusted to find the facts, you had a moral if not legal obligation to seek the truth, and if you were not able to do so, you should have said just that, rather than pretending that you have established the truth ("based on information provided") when you knew that was not so and that you had only heard one side of the story.

Failure to Investigate Critical Facts. Moreover, your Report shows virtually no effort to look beyond the evidence presented to you (overwhelmingly from the Palestinian side) to find out what really happened in Gaza and – most crucially – *why*: why Israel launched the (unfortunately named) "Operation Cast Lead" and why individual officers and soldiers took the actions they did in the heat of battle.

To cite one important example, it was widely reported that the Hamas high command was camped out in the Al-Shifa Hospital, which would of course constitute a war crime and would probably have justified Israel attacking that hospital notwithstanding the civilian presence there. Fortunately for any actual civilians in the hospital, the Israel Defense Forces (IDF) refrained (although neither that nor any other act of restraint by the IDF – and there is much evidence that the IDF pulled back from many attacks against legitimate military targets because of the presence of civilians – was deemed worthy of a mention in your Report). You note those reports about the Al-Shifa Hospital but simply state (at 466): “The Mission did not investigate the case of the Al-Shifa Hospital and is not in a position to make any finding with regard to these allegations.” You then immediately go on – astoundingly – to make a formal finding of fact (at 467) that “[o]n the basis of the investigations it has conducted, the Mission did not find any evidence to support the allegations made by the Israeli government [that Hamas used medical facilities for cover].”

A second example of your Mission’s inappropriate wholesale reliance on one-sided evidence relates to your findings that Israel’s attacks on the Legislative Council building (in which you note there were no casualties) and Gaza main prison (in which a prison guard was killed) were war crimes. In your standard formulation, you conclude: “There is an absence of evidence or, indeed, any allegation from the Israeli Government and armed forces that the Legislative Council building, the Ministry of Justice or the Gaza main prison ‘made an effective contribution to military action.’ *On the information available to it*, the Mission finds that the attacks on these buildings constituted deliberate attacks on civilian objects in violation of the rule of customary international humanitarian law . . .” It is notable that this finding follows your observation (paragraph 367, footnote 235) that there was evidence that of the approximately 300 prisoners in custody in the prison at the time it was struck there were “roughly 115 alleged collaborators with Israel [and] about 70 Fatah supporters held on various charges . . .” Even without Israel’s having to spell it out for you, you might easily have discerned several potential military advantages to be obtained from attacking this prison (which based on evidence your Mission uncovered does not appear to be a facility dedicated solely to civilian activities of the Gaza authorities) and facilitating the escape of its inmates. Your rejection of Israel’s determination to attack the “command and control” infrastructure of Hamas is rooted in the distinction which you insist on drawing between Hamas and its military wing, and your insistence on the legitimacy and sanctity of the former. These highly dubious premises that underlie many of your “war crime” findings fly in the face of the broad recognition of Hamas as a terrorist organization.

Use of Hearsay and Anonymous Accusations as Evidence. Another serious procedural flaw in your Report is your reliance on hearsay and accusations made anonymously to “corroborate” your allegations. One clear example of this is the anonymous report by a group called Breaking the Silence entitled “Soldiers’ Testimony from Operation Cast Lead, Gaza 2009” which is cited dozens of times in your Report as providing “strong corroboration,” and the validity and veracity of which you accept without question. Indeed you criticize Israel’s efforts to lobby countries that funded this anonymous report as “contrary to the spirit of the Declaration [on Human Rights Defenders]”. As a judge, you must obviously appreciate that such anonymous accusations, particularly to the extent they merely recite what the anonymous speaker heard from some other source and are thus pure hearsay, would not be admissible as evidence in a court, precisely because the prejudicial impact of those allegations is far outweighed by any probative value they

may have. I expect that your response may be that your investigation was not a court of law and therefore not subject to the same evidentiary rules. But I would argue that in this situation, where the prejudicial impact on Israel and the Jewish people in general of your accusations of “war crimes” and “crimes against humanity” was obviously going to be so devastating, it behooved you and your fellow commissioners to, at a minimum, adhere to basic principles of evidence and procedural fairness.

More Prejudice than Proof. Indeed this failure to strike an appropriate balance between what is probative and what is prejudicial is a central feature of your investigation and your Report. There are innumerable examples of offhand remarks and references in your Report to terrible things that Israel and Israelis are alleged to have done, without any justification or evidence offered. Sometimes these are stated as naked allegations (for example you refer to “concerns of torture and other ill-treatment” of Palestinian detainees) (209), while on many other occasions they are simply stated as facts even though they are not facts. To cite just one example, at 642 you state: “On 5 February 2003, for instance, Israeli snipers shot and killed two staff nurses who were on duty inside the hospital.” These unsubstantiated and often false allegations reflect a bias and a flagrant disregard for the basic principles of due process and all norms of fairness and justice.

One last – and more serious – example of this disregard for the balance between probative and prejudicial is your decision to televise the interviews with Palestinian witnesses. You state (at 166): “The purpose of the public hearings, which were broadcast live, was to enable victims, witnesses and experts from all sides to the conflict to speak directly to as many people as possible in the region as well as in the international community. The Mission is of the view that no written word can replace the voice of victims.”¹⁰ It hardly bears mentioning that any probative value of these interviews (particularly when they only tell one side of the story and, as you acknowledge, were tainted by duress) does not justify the inflammatory effects of televising them before the report is issued. The fact that you chose to publicize these hearings is a further indication that your Report was designed to play into a trial in the “court of public opinion,” rather than to be a true finding of facts.

The Appointment and Composition of your Mission. Speaking of the “court of public opinion” provides a good segue to my next procedural point. I will not belabor the well-aided point (which I included in my last letter to you) that Christine Chinkin should have been recused at the outset due to the evidence of her predisposition to find Israel guilty of war crimes. That fact alone should be sufficient to render your Report tainted and unreliable. What has received less publicity (and indeed I did not know it when I first wrote to you) was that you and the other two members of your panel were among a small group of eminent jurists who had written to the Secretary General of the United Nations expressing that “events in Gaza had shocked [you] to the core,” effectively volunteering for the job you were later given. While I could be wrong, I do not believe that this group of jurists that had ever written to the United Nations expressing such shock or called for an investigation during the eight years of rocket attacks on Israeli civilian population centers. If that is the case, that would also suggest a predisposition among the signatories of that letter to seek to make an example of Israel only and would call into question their impartiality. I also wonder whether this group or these jurists independently called for

similar investigations into other comparable incidents, the shelling of Groznyy perhaps or the Sri Lankan government's actions against the Tamil Tigers.¹¹

Double Standard in Assessment of Credibility of Evidence and Intentions. One of the most surprising elements of your Report is the ease with which you made findings of fact regarding the subjective intentions of the Israeli government and individual Israeli soldiers to strike at civilian targets and to murder civilians. In fact, you assert that you were able to determine the presence of the subjective fault element (*mens rea*) required for criminal liability “[i]n almost all of the cases [you examined]”. (25) Your accusations that Israel willfully and intentionally attacked civilians could not be more stark. To quote just one of very many examples: “In reviewing the above incidents the Mission found in every case that the Israeli armed forces had carried out direct intentional strikes against civilians.” (808) And you purported to be able to make these determinations without once speaking to the Israelis whom you accuse of such horrific actions and intentions.

In contrast, you were virtually never able to ascertain any improper intention on the part of the Palestinian parties to this dispute even where the intention behind their actions would seem to be fairly obvious and even though you “enjoyed” their full support and cooperation.

Example: Firing rockets from civilian areas: “On the basis of the information it gathered, the Mission finds that there are indications that Palestinian armed groups launched rockets from urban areas. The Mission has *not been able to obtain any direct evidence that this was done with the specific intent of shielding the rocket launchers from counterstrikes* by the Israeli armed forces.” (480)

Another example: Hamas fighters mingling with civilians: “The Mission finds that the presence of Palestinian armed fighters in urban residential areas during the military operations is established. . . While reports reviewed by the Mission credibly indicate that members of Palestinian armed groups were not always dressed in a way that distinguished them from civilians, the *Mission found no evidence that Palestinian combatants mingled with the civilian population with the intention of shielding themselves from attack.*” (481)¹²

The evidence on which you base your conclusions that Israel consistently and as a matter of policy attacked civilians and civilian objects consisted of the fact of Israel's technological superiority and on statements by a handful of Israeli leaders.¹³ The section on Israel's strategy in your Report concludes (at 1211): “Statements by political and military leaders prior to and during the military operations in Gaza leave little doubt that disproportionate destruction and violence against civilians were part of a deliberate policy.”

Aside from the inadequacy of using this sort of circumstantial evidence to determine subjective intentions, and the fact that you have a tendency to take these quotes out of context,¹⁴ it is striking how unhesitatingly and how fully you attribute probative value to public statements by Israeli leaders (even if they appear to have been made in a political context and could easily be understood to be mere “puffery”). On the other hand, your Report does not include any quotes from Hamas leaders regarding their intentions to attack Israeli civilians – or the Hamas charter which calls for the destruction of Israel and killing of Jews – and even when Hamas does admit

that it uses human shields or that policemen killed by Israeli strikes were its operatives, you cast doubt on that admission and suggest that *it* is mere puffery.¹⁵ Even in case of “Palestinian armed groups” firing rockets at Sderot in Israel where their intentions are quite obvious, you are unwilling to attribute any subjective intent but merely find that “there is significant evidence to suggest that one of the primary purposes of the rocket and mortar attacks is to spread terror amongst the Israeli civilian population. . .”

This double standard in your treatment of witnesses is also evident throughout your report where you accord full credibility to virtually all Palestinian witness and praise their objectivity (even though you acknowledge the presence of duress) but almost invariably cast doubt upon Israeli accounts you received. The Israeli government cannot even acknowledge an error without your Report casting doubt on it,¹⁶ while the only times you seem to doubt the credibility of Palestinian witnesses is when so doing would be exculpatory.¹⁷

I could go on and on with examples but the point is clear: your Mission simply took the accusations made by obviously interested parties¹⁸ and (by your own admission) coerced witnesses, in some cases “corroborated” by anonymous reports, and repackaged them into “findings of fact” and the most horrific of allegations. Virtually no effort was made to uncover the truth or to get behind the accusations and ask *why* particular actions were taken, beyond asking Israel to explain and drawing a negative inference from their refusal, on principle, to respond. You may disagree with Israel’s decision to ignore your Mission, but when that becomes the fundamental linchpin on which you reach your conclusions, that is not fact-finding. It is politics. I myself was unsure of the Israeli government’s decision not to cooperate with your investigation, but it becomes hard to argue with those who say that your Report validates the view that the deck was so stacked against Israel that it was not worth playing the game.

Your Selection of Incidents to Investigate

A closely related point is your Mission’s selection of which matters to investigate and which to ignore. Your Mission investigated 36 incidents in Gaza and stated that it “considers that the report is illustrative of the main patterns of violations.” (17) Since virtually all of these incidents were cases involving Israeli actions and Palestinian casualties or damage, it is clear that the “pattern of violations” that interested you most were those where Israel could be condemned.

As discussed above, the efforts you made to find the relevant facts underlying the operation left much to be desired. Very little effort was made to investigate the behavior of Hamas and the other “Palestinian armed groups”: did they direct attacks at civilian targets? Did they use civilians as human shields? Did they hide weapons in civilian buildings like mosques, schools and hospitals? You do not even raise as a possibility the question of whether Hamas and the other “Palestinian armed groups” intentionally drew fire towards civilian objects to score public relations victories (I do not believe in their wildest dreams they ever expected the PR and strategic windfall that you have awarded them), although this appears to be a central element of their *moqawamma* (“resistance”) strategy. I understand that seeking those facts was difficult – the people you were talking to would not talk about that (because of both bias and intimidation) and the people who would talk about it (the Israelis) refused to talk to you – but that should not relieve honest fact-finders of their obligation to try find the facts. Reviews by others of the video

clips of interviews with Palestinian witnesses posted on your website suggest that you did not even press witnesses for answers to these questions¹⁹. Instead you simply relied on the absence of countervailing evidence to validate the “facts” reported to you by those biased and intimidated witnesses.

On a few occasions, you accepted the “possibility” that there might be another side to the story that you “could not entirely discount,” that is, that there may have been inappropriate actions on the Palestinian side. For example: “The Mission finally notes that it *cannot entirely discount the possibility* that Palestinian civilians may have been killed as a result of fire by Palestinian armed groups in encounters with the Israeli armed forces, as argued in a submission to the Mission, although it has not encountered any information suggesting that this was the case.” (361) “[W]hile *the Mission would not rule out the possibility* that there might be individuals in the police force who retain their links to the armed groups, it believes . . .” (417) “[T]he Mission accepted, on the basis of information in the reports it had seen, the *possibility of mortar attacks from Palestinian combatants in the vicinity of the school.*” (444) The Mission *cannot discount the possibility* that Palestinian armed groups were active in the vicinity of such [United Nations] facilities.” (483)

However these matters were never investigated to the point of ascertaining whether they amounted to war crimes or whether they justified the Israeli actions under investigation. For the most part, you were satisfied simply to state that you were unable to make any determination regarding these matters: “The Mission is unable to make any determination on the general allegation that Palestinian armed groups used mosques for military purposes.” (484) “*On the basis of the investigations it has conducted*, the Mission did not find any evidence to support the allegations that hospital facilities were used by the Gaza authorities or by Palestinian armed groups to shield military activities . . .” (485) “*On the basis of the information it gathered*, the Mission found no indication that the civilian population was forced by Hamas or Palestinian armed groups to remain in areas under attack from the Israeli armed forces.” (486)

On other occasions, where the evidence of bad behavior on the Palestinian side was so clear you could not deny it or profess ignorance, you proceed – astonishingly – to justify it or explain it away.

Example: Firing rockets from civilian areas: “[T]he Mission finds that there are indications that Palestinian armed groups launched rockets from urban areas . . . Palestinian armed groups do not appear to have given Gaza residents sufficient warning of their intention to launch rockets from their neighbourhoods to allow them to leave and protect themselves against Israeli strikes at the rocket launching sites . . . Given the densely populated character of the northern half of the Gaza Strip, once *Israeli forces gained control of the more open or outlying areas* during the first days of the ground invasion, *most – if not all – locations still accessible to Palestinian armed groups were in urban areas.*” (480) In other words, you explain and even seek to justify Hamas’ actions endangering civilians because it would have been dangerous for it to fight Israel otherwise.

Another example: Booby trapping houses: “From the information it gathered, the Mission does not discount the use of booby traps by the Palestinian armed groups. The Mission has *no basis to conclude that civilian lives were put at risk*, since none of the reports records the presence of

civilians in or near the houses that were allegedly booby-trapped.” (482) Your willingness to accept a “no-harm-no-foul” defence for booby trapping civilian houses is as telling as your reluctance to find improper intentions on the Palestinian side.

These few examples (of the many more that could be cited) should suffice to demonstrate that your Mission chose only to investigate one side of the conflict (Israel), and made its findings based on evidence presented by only one side one the conflict (the Palestinians).

Your Characterization (and Extension) of Your Mission

HRC Resolution S-9/1, that “very lopsided unfair resolution” (again, those are your words) which was introduced by Cuba, Egypt and Pakistan and passed by many of the world’s most repressive regimes, established your “fact-finding mission” to gather evidence to support their determination that Israel had violated the human rights of the Palestinian people. When you agreed to head the Mission, to your credit you insisted to the President of the HRC that your Mission be authorized to look at violations on all sides²⁰ It is therefore very surprising that you made so little effort to find the facts relating to violations on the Palestinian side, as described above. Equally surprising is how you chose to characterize your Mission and even broaden its scope in certain respects, all of which appear to have the purpose and most certainly had the effect of heightening criticism of Israel. It is interesting that even the terminology in which you chose to cast your allegations against Israel is more extreme that that used in the “very lopsided unfair resolution,” which spoke in terms of human rights violations but did not talk about “war crimes” or “crimes against humanity.” That phraseology with all of its evocative connotations for the Jewish people is all yours.²¹

Seeking Political Impact Rather than Truth. Instead of viewing yourselves as a fact-finding mission, with the specific purpose of uncovering the truth, you chose to characterize yourselves as a victim-oriented mission: “The Mission gave priority to the participation of victims and people from the affected communities.” (22). “The Mission has made victims its first priority and it will draw attention to their plight . . .” (136)

As I noted to you in my earlier letter, such a victim-focused investigation is not an appropriate method for establishing the facts in a conflict such as this. There are undeniably more victims on the Palestinian side of the conflict but “draw[ing] attention to their plight” is not a fact-finding objective. It is a political objective. In some cases, such as the South African Truth and Reconciliation Commission, which appears to have been, at least in part, the model for your proceedings, that may be appropriate and very laudable. However that is not the job of a fact-finding mission in the midst of an ongoing political conflict. The question that the honest fact finder should be trying to answer is not how can I “draw attention to their plight,” but *whose victims are they?* It is clear from your Report, and apparently from the videotaped interviews which your Mission has published²², that you were far more concerned about effects than causes, and not asking enough of the right questions.

Law-Making Rather than Fact-Finding. A second manner in which you extended the scope of your fact-finding mission was in your decision to go beyond fact-finding and to express legal opinions on which you then based your accusations of war crimes. For example, the question of

whether Gaza should still be considered “occupied” following Israel’s unilateral and complete withdrawal is a legal question and a highly contentious one. Certainly Israel maintains that Gaza is no longer occupied and there are strong arguments in that regard. That substantive question is beyond the scope of this letter²³, but the point is that you chose to reach a legal conclusion in the context of a fact-finding mission, based very grave accusations on that legal position, and did so with no due process and no opportunity for debate on the merits of the legal issue.

A second instance of law making is your holding “that the Israeli system of investigation does not comply” with the “standards of impartiality, independence, promptness and effectiveness” required by International law. I will leave it to others better placed than I am to address the substance of your holding and note only that it is my understanding that the Israeli standards for investigating the actions of its own military are not very different from those followed by the United States, Britain and other modern countries with active and honorable militaries.

Similarly (although probably a matter of mixed fact and law) is your finding that that the Gaza police force was a civilian police force entitled to protection under international humanitarian law. To be sure you did some fact-finding. You unearthed the details regarding the IDF’s attack on the Gaza police-stations at the outbreak of the operation. You also established that, after Hamas seized control of Gaza in July 2007, it “merged the Gaza police with the ‘Executive Force’ it had created after its election victory,” and that “a great number of the Gaza policemen were recruited among Hamas supporters or members of Palestinian armed groups”. You noted that you had been provided with information on Gaza police members’ alleged affiliation with armed groups that purported to be “based to a large extent on the websites of the armed groups” themselves²⁴, and you accepted (in your usual noncommittal way regarding allegations against Palestinians that you preferred not to investigate) “that there may be individual members of the Gaza police that were at the same time members of Palestinian armed groups and thus combatants”. You nevertheless concluded: “[F]rom the facts gathered by it, the Mission finds that there is *insufficient information to conclude* that the Gaza police as a whole had been ‘incorporated’ into the armed forces of the Gaza authorities” and that the Gaza police were a “civilian law-enforcement agency.” Clearly Israel had a different view on this issue but again you were happy to reach this conclusion – and the resulting verdict of guilty of “war crimes” – without their input.

Piling On Gratuitous Anti-Israel Criticisms. You also expanded the scope of your Mission beyond what was required by the HRC’s “very lopsided unfair resolution” in other notable respects. You expend over 20 pages criticizing Israel for “repressing dissent” and limiting freedom of association as well as for excluding the press and human rights monitors from Gaza during the operation. This is not only gratuitous given the primary scope of your Mission and the many important areas you decided not to investigate at all, but ironic in the extreme given the critical mass of highly repressive countries that commissioned your Report. Israel is a robust democracy – the only one in the Middle East – and has a vigorous free and highly critical press and a strong commitment to human rights. Very few of its accusers can claim that. The limited actions taken in the middle of a war to prevent the opening of a second front (even your Report acknowledges that “in the main, the protests were permitted to take place”(111)) have to be seen against this backdrop. I know I am not alone in wishing that eminent jurists like yourselves would devote as much time and effort to criticizing repression of dissent in Iran, China,

Zimbabwe, Cuba or a host of other countries as you have investigating and formulating such allegations against Israel.

It is also telling that you and your fellow Commissioners even felt compelled – in the context of a fact-finding mission regarding the war in Gaza – to call into question Israeli laws that are central to its identity as the Jewish homeland, including the so-called Law of Return that guarantees Israeli citizenship for all of Jewish ancestry.²⁵

The above examples show that the way you chose to characterize your Mission and the scope you established for your investigation and Report reflect a biased and political effort. What did you do when the “very lopsided unfair resolution” of the HRC commissioned your group to find facts to support their determination of human rights violations by Israel? You did that and more: you decided to use your Mission as a political vehicle to “draw attention to [the victims’] plight; you established new legal standards that you then found Israel did not live up to; you gratuitously (and ironically) lambasted Israel for repressing dissent and freedom of the press and association; and you even gratuitously raised questions concerning Israel’s right to exist as a Jewish state.

Fundamental but Dubious Assumptions

Without denying that there are matters raised in your report that deserve further investigation and explanation by Israel, it appears that your wholesale condemnations of Israel and accusations of “war crimes” rest in large part on certain fundamental premises or a “world view” shared by you and your fellow Commissioners. These premises reflect assumptions that underlie much of your Report, but their validity is not incontrovertible. Indeed they are highly contentious and to the degree these assumptions are wrong, your Report’s conclusions are invalid.

Legitimizing Hamas. One of these fundamental assumptions that permeates your entire analysis is that Hamas is a nonviolent political organization distinct from its military wing. This characterization of Hamas is entirely implausible. It requires more than naiveté to reach that conclusion, in light of all the readily available evidence, including that organization’s refusal to renounce the use of violence or even to recognize the existence of the State of Israel (which together torpedoed the peace process and damned Gaza to its present state of destitution), the express statements of Hamas’ own leadership regarding the use of violence and terrorist tactics, and the fact that the Hamas charter calls for the destruction of Israel and genocide against the Jewish people (which remarkably does not merit a mention in your Report). Because it openly embraces terrorist tactics, Hamas is widely condemned as a terrorist organization. In light of all the readily available evidence, the suggestion that Hamas can be neatly separated from its military wing is spurious.

Earlier I stated that your Report not only legitimizes but whitewashes Hamas. Although the press has chosen not to highlight this, a close review of every reference to Hamas throughout your Report will reveal that, while there are some perfunctory condemnations of “armed Palestinian groups” (which include Hamas’ Al-Qassam Brigades) and some measured criticism of the “Gaza Authorities” regarding things they could have done better (sins of omission rather than commission), Hamas itself gets off virtually scot-free in your Report and even emerges looking like an innocent victim. My point here is not to refute as a substantive matter that highly

troubling aspect of your Report – I shall leave that to others – but simply to observe that a critical assumption underlying many of your claims of “war crimes” is that Hamas should be considered independent of its infamous military wing. To the extent that this assumption is flawed, the conclusions on which it is based are invalid. But the very fact that you approached your fact-finding mission with this as a basic assumption indicates a perspective that calls the conclusions drawn by your Mission into question.

Gaza Still Occupied? A second fundamental assumption, discussed above, is the notion that Gaza remains occupied by Israel notwithstanding its complete unilateral withdrawal four years ago which, in your view²⁶, has “‘done nothing’ to alter the character of Israel as an occupying Power.”²⁷ Again, I will leave it to others to debunk this dubious legal conclusion, noting simply that it is one of the foundations on which you build your case for the prosecution. The implications of your position are dramatic. For example, although Israel facilitated the supply of significant humanitarian aid to Gaza and even your Report acknowledges “that the supply of humanitarian goods, particularly foodstuffs, allowed into Gaza by Israel temporarily increased during the military operations” (72), you nevertheless condemn Israel as violating the Fourth Geneva Convention for not doing enough “as Occupying Power” to provide such supplies. In other words, your report twists Israel’s humanitarian efforts (done from its perspective out of kindness rather than legal obligation) into a war crime because you reached a different legal conclusion on the status of Gaza. If you are wrong in your conclusion that Gaza remains occupied, then rather than being condemned as war criminals, Israel should be commended for its humanitarian efforts to support the Palestinian civilian population even while that it was in the midst of a bloody war to root out the terrorists who had converted their homes into rocket launching sites.

Placing Blame. Perhaps the most fundamental and flawed assumption underlying your Report is the position that the tragic situation of the Palestinian people, and especially those in Gaza, is all Israel’s fault. That your Mission is of this view is clear from the way you characterize (or rather mischaracterize) the history of the region; it is clear from your use of language throughout your Report; it is clear from your failure to seek to understand *why* actions were taken – why Israel shut border crossings? Why Israel built the security barrier? Why Israel felt the need to undertake the Gaza operation at all? And it is clear from your refusal to acknowledge what Hamas and its charter say unequivocally that Hamas exists to destroy the Jewish State. Your perspective is also clear from specific statements, including the curious analysis you offer in one of your concluding paragraphs where you say: “After decades of sustained conflict, the level of threat to which both Palestinians and Israelis are subjected has not abated, but if anything increased . . . The State of Israel is therefore also failing to protect its own citizens *by refusing to acknowledge the futility of resorting to violent means and military power.*” (1711) It is telling that it is Israel you criticize in this regard, and it is unclear what you expect Israel to do in the context of a foe that refuses to negotiate but only wants to fight.²⁸

There are other elements of the “world view” with which you and your fellow Commissioners approached your assignment and which impacted your Report – assumptions regarding Israel’s right to exist as a Jewish state at all, for example, or regarding the legitimacy of a separation barrier to protect Israeli civilians from terrorist attacks, or whether Israel is a decent country (for example at 132 you state: “The Mission is also of the view that the Israeli system presents

inherently discriminatory features that have proven to make the pursuit of justice for Palestinian victims very difficult.”) This is not the place to debate these interesting topics; I mention them solely to make the point that there are perspectives and prejudices that underlie your investigation that cannot but influence your findings.

Your Ahistorical Context

Consistent with the third and last entreaty of my letter, you accepted that the Gaza operation and events under investigation should not be considered in isolation, but to you and your fellow Commissioners that did not mean they should be placed in the context of the thousands of rockets that were fired from Gaza at Israeli towns since Israel’s unilateral and complete withdrawal from Gaza. No, to you, Israel’s actions “are part of a broader context, and are deeply rooted in the many years of Israeli occupation of Palestinian territory.”

The “historical context” offered by your Report is not a history that any objective person with any knowledge of the Middle East would recognize.²⁹ On the contrary, what you chose to include in the brief historical context you provide is a simplistic canned recitation of the revisionist “Palestinian narrative”.

Numerous affirmative statements in your Report mischaracterize the history of the region³⁰ but more telling is what you chose to leave out. How, for example, can you purport to deal with the conflict between Israel and Hamas without once mentioning that the charter of Hamas calls for the destruction of the State of Israel? How can the historical context you cite make no reference at all to the persistent pan-Arabist rejection of the State of Israel, the many wars that were waged against Israel by many Arab states, the terror campaign waged against Israel by Hamas (save for a couple of lines that cites the number of suicide bomb attacks “according to Israel’s Ministry of Foreign Affairs”)? Your Report fails to address the fundamental question of why the Gaza operation was launched at all, or why Israel had to build its security barrier (which you criticize), or why the border crossings were frequently closed. Indeed a reader of your Report with limited knowledge of the situation would have to conclude based on the absence of any of this background and the numerous accusations you make against Israel of intentionally targeting Palestinian civilians that Israel’s intentions were genocidal (which would be ironic since it is of course Hamas that propagates a genocidal philosophy against Israel and the Jewish people³¹). They would also have to conclude that the IDF was terribly incompetent, given their low rate of success if they were deliberately targeting Palestinian civilians, with some 2,300 to 3,000 sorties flown during the operation and their overwhelming firepower from land, sea and air. Without minimizing in any way the terrible tragedy inherent in any loss of life of innocent civilians, the number of casualties relative to the amount of firepower brought to bear surely indicates that significant efforts were made, including through careful targeting and provision of warnings, to avoid loss of life.

You purport to go through a detailed chronology of events that seems to show how every rocket attack by the “Palestinian armed groups” was in fact a response to some Israeli provocation. The clear suggestion from your recitation of events is that what happened in the years between Israel’s unilateral withdrawal from Gaza and the Gaza operation was not just a “cycle of violence” (the mantra favored by reporters who wish to draw a moral equivalence between Israel

and its attackers) but that the problems were actually instigated by Israel. Set against the incontrovertible fact (that again – astoundingly – your Report does not even mention) that Hamas’ stated goal is not the liberation of Gaza but the destruction of Israel, it can only be said the historical context in which you place the operations under investigation is derived from a Palestinian fairy tale.

I could go on but I think the point is clear that the historical context you adopted and with which you approached your assignment is a biased and ahistorical one, which reflects a pro-Palestinian, anti-Israel political world-view that dictated the tone and preordained the outcome of your investigation.

The Language of Your Report Illustrates Its Bias

As already shown by the various quotes taken from your Report, the language used throughout your Report defies any claim of evenhandedness. This is evident in the big themes, as when you wax eloquent about “the right of the Palestinian people to self-determination” without ever noting the denial by Hamas and others who refuse to accept Israel’s legitimacy of the Jewish people’s right to self-determination (and indeed you even call the latter into question yourself³²). And it is evident in the hundreds of little references peppered throughout your recitation of the historical background and your “findings of fact” which are stated in ways unfavorable to Israel (and questionable in fact). To mention just a handful of arbitrary examples: there is the recitation of Israeli aircraft attacking a “car maintenance workshop” (without any explanation that it was probably also a rocket factory) (261); there is the description of the tunnels built under the Gaza-Egypt border as “a lifeline for the Gaza economy and the people” enabling them to get “fuel . . . as well as consumables” without even mentioning the smuggling of rockets, IEDs and other weapons (253 and 320); there are the unsubstantiated incidental “drive-by” allegations of intentional attacks on civilians (for example that an Israeli plane “fired a missile at a group of Palestinian children who were sitting in a street” (260)); there are all those references to “blockades” and “occupation” (even after the Israeli withdrawal from Gaza); and of course there is the refusal ever to use the word “terrorist” or “terrorism” except when quoting an Israeli source. Indeed an analysis of the use of the word “terror” of your report will reveal the ironic fact that Israel is the only party in connection with whom you use the word “terrorize”³³ and the party you frequently accuse of spreading terror, with just one acknowledgment of the terror caused by over 8,000 rockets fired by Hamas and its ilk (without mentioning them by name of course³⁴).

Differences in Tone and Equivocation. Your “findings” and accusations against the Israeli government and the IDF, which overwhelmingly dominate your Report, are expressed unequivocally and in words of one syllable using the most serious accusation that can be made: “**war crimes**”. You repeat this charge against Israel over and over again. See, for example, paragraphs 1169 to 1173, even though you did offer your standard perfunctory acknowledgement that you did not have all the facts (without saying all the “facts” you did have came from one side): “*From the facts available to it, and in the absence of any information refuting the allegations that the incidents described above took place, the Mission finds that there have been a number of violations of international humanitarian law and human rights law.*”(1165)

Your criticisms of the “Palestinian armed groups” are not only far fewer and more limited but are also much more tentative and measured, and of course Hamas itself is almost untouched. As described above, for the most part you simply avoid looking at Palestinian offences, either just saying you are “not in a position to make any finding” or expressly exonerating them “on the basis of your investigations” or on occasion saying you “cannot exclude the possibility” of bad actions. Of course, you cannot avoid acknowledging that “Palestinian armed groups have launched about 8,000³⁵ rockets and mortars into southern Israel since 2001”. These rocket attacks, you determined (in your boldest accusation against the Palestinians), “constitute *indiscriminate* attacks upon the civilian population of southern Israel and that where there is no intended military target and the rockets and mortars are launched into a civilian population, they constitute a deliberate attack against a civilian population. These acts *would* constitute war crimes and may amount to crimes against humanity. Given the seeming inability of the Palestinian armed groups to direct the rockets and mortars towards specific targets and given the fact that the attacks have caused very little damage to Israeli military assets, the Mission finds that there is significant evidence to suggest that one of the primary purposes of the rocket and mortar attacks is to spread terror amongst the Israeli civilian population, a violation of international law.” (109) The tone and equivocation with which you make this one finding against “Palestinian armed groups” is quite different to that used in your multiple accusations of war crimes against Israel. And of course the charge is virtually meaningless anyway because no party that can be held accountable is named.

Israel can do nothing right in your eyes. Another striking feature of your Report is how every positive action Israel takes is twisted into a negative and an accusation, generally of war crimes. We have already noted how the very substantial amount of humanitarian aid facilitated and delivered by Israel even in the midst of an ongoing war was regarded by you as inadequate to fulfill its obligation as “Occupying Power” and thus a violation of the Geneva Convention. The same pattern is evident in your consideration of the multi-level warning system Israel instituted to try to minimize civilian casualties which has been described as “unprecedented in the history of warfare”.³⁶

You do devote two lines to acknowledging Israel’s efforts in this regard: “The Mission acknowledges the significant efforts made by Israel to issue warnings through telephone calls, leaflets and radio broadcasts and accepts that in some cases, particularly when the warnings were sufficiently specific, they encouraged residents to leave an area and get out of harms way.” (37) But you then proceed to spend about ten pages detailing why these efforts were imperfect and inadequate, so that Israel’s conduct still amounted to war crimes.

One particular case is quite instructive. Israel was aware that a favorite Hamas tactic when they receive a warning that a particular house is about to be targeted (because it is used for storing weapons or for some other reason) is to send people (civilians?) up onto the roof to wave off the Israeli planes. It is not clear whether these “human shields” perform this task willingly, as suggested by Hamas leader Fathi Hammad,³⁷ or are coerced, but in either case the fact that they do it suggests they have a greater appreciation for the IDF’s restraint than you seem to have. Knowing this, Israel invested in the technology and training to effect a “warning shot” by missile, the practice referred to as “roof knocking”. There is video evidence of its efficacy. This tactic could be viewed as an innovative effort to add a layer of warning to lower the risk of

civilian casualties when striking at legitimate military targets. You, however, chose to describe it as “reckless in the extreme” saying: “the idea that an attack, however limited in itself, can be understood as an effective warning in the meaning of article 57 (2) (c) [of Chapter IV of Additional Protocol I to the Geneva Conventions] is rejected by the Mission.” (530 to 533) One wonders if you would apply the same standard to any warning shot, which I expect would be a novel interpretation of the laws of war.

I will cite one final example of how in your Report almost everything Israel does is twisted to portray it in the worst possible light. Your Report notes that, because of the thousands of rockets that have been launched at Sderot and other Israeli cities and towns near the Gaza border, Israel installed at great cost a warning system that would give residents 15 seconds warning of incoming rockets. Your principle reason for mentioning this appears to be so that you can condemn “the disparity in treatment of Jewish and Palestinian citizens by the Government of Israel in the installation of early warning systems and provision of public shelters and fortified schools between its Jewish and Palestinian citizens” even though the Palestinian towns and informal villages are not the target of the rocket attacks from Gaza. (110, 1714)

Gilad Shalit. Your treatment of the Shalit matter is troubling. Contrary to press reports³⁸, even after hearing from his father, you could not even bring yourself to demand his immediate release by Hamas. The most you can bring yourself to do is issue a “recommendation” to unidentified “Palestinian armed groups” that he be released “on humanitarian grounds” and until then be treated as a “prisoner of war”. (1770) For the most part, your discussion of Shalit consists of criticizing Israel’s heavy-handed response after he was “captured during an enemy incursion into Israel,” and your indication of concern that Israel not impose “collective punishment of the civilian population of the Gaza Strip” by “maintaining the blockade of the Gaza Strip until the release of Gilad Shalit” as some Israeli politicians have suggested (78). Your approach to the Shalit matter appears to be, consistent with the rest of your Report, that his capture was a legitimate act of resistance on the part of “armed Palestinian groups” against the ongoing “Israeli occupation”. Gilad Shalit was captured in an illegal cross border raid by Hamas (and others) that constituted an act of war and a grave escalation in hostilities. You (and Hamas) cannot have it both ways: you cannot consider Shalit a “legitimate” prisoner of war unless you are willing to admit that Hamas-ruled Gaza is actively at war with Israel, with all that entails.

Post-Publication Comments. I have seen reference to a number of public statements you have made publicly following the release of your Report that have added to my consternation. One of these arose in an interview with Christiane Amanpour when she asked you about whether the standards you were applying to Israel and possible International Criminal Court proceedings might not implicate “what NATO or the US is doing let’s say in Afghanistan or in Iraq”.

You responded by saying: “Well, that’s correct. But the United States, I think to its credit, has always taken care to protect innocent civilians. When innocent civilians have been killed and injured, it hasn’t been because it was intentional. It may have been negligent, it may even have been, and I don’t know I haven’t looked in to it, it may have been more than negligent but I have no doubt that it hasn’t been deliberate.”

I firmly share your conviction that the United States does not intentionally target civilians. I also firmly believe that is true of Israel. What troubles me is how you, as a judge, can make such a statement without having done any investigation whatsoever. Coupled with your unsubstantiated “findings” that Israel intentionally attacked and murdered hundreds of civilians, this statement speaks volumes.

I also wish to comment on a statement you made in your address to the HRC delivering your final Report. You stated that “the teaching of hate and dehumanization by each side against the other contributes to the destabilization of the whole region”. The teaching of hate and dehumanization by Hamas and even the Palestinian Authority is well known and well documented. I am curious what research you did to conclude that Israel teaches “hate and dehumanization” of Palestinians. I think it very likely that your statement was not researched at all but was just another superficial attempt to sound even-handed, but one that leads to injustice.

The Implications of your Report

In my earlier letter to you, I expressed the hope that, even though your Mission was the product of a manifestly biased institution and process (as you have acknowledged), you would make something good come out of it, including by sending an unequivocal message that humanity’s vitally important global institutions and the force of international law can not be cynically manipulated for political purposes. Sadly, your Report does just the opposite: it compounds the original sin of your Mission’s establishment: it manipulates law and fact for political purposes; and it is likely to encourage the worst of human behavior and set back the quest for peace in the Middle East.

Already your Report has had enormous global repercussions, including some that you probably did not intend. Aside from the general anguish that your accusations of “war crimes” have caused in Israel and among the Jewish people, and the anger and hatred that it has fueled among their enemies, specific identifiable consequences of your Report already include: the last-minute cancellation of NATO joint military exercises among Israel, Turkey, the United States and Italy (and consequent waste of millions of dollars and downgrading of Israeli-Turkish relations); the degradation of negotiations between Israel and the Palestinian Authority; the weakening of the Palestinian Authority and strengthening of Hamas; travel restrictions on Israeli leaders; and further polarization of the HRC and frustration of the Obama Administration’s stated policy of constructive engagement to try to develop the HRC into a useful and meaningful human rights organization³⁹.

While your Reports works its way through the United Nations Security Council and International Criminal Court processes, I am sure many others will examine it closely and point out all of its factual errors and legal flaws. I hope that this takes place in the context of a thorough investigation by Israel of the serious allegations that you have made. I expect that by the time the truth emerges regarding the cases you investigated (not to mention situations you chose to ignore), the credibility of your Report will be thoroughly undermined. Of course that will be cold comfort for Israel and the Jewish people, as the libel you have perpetrated – unparalleled in both its heinous accusations and widespread publication – has already taken hold and the truth, when it emerges, will have no power against the venom and hate that has already been spread.

My Suggestions For You

It appears from your recent public remarks (at least in the Jewish press) that you may now realize that your Report overstates (to use a euphemistic term) the case against Israel. Your statements like “[i]f this was a court of law, there would have been nothing proven” and “I wouldn’t consider it in any way embarrassing if many of the allegations turn out to be disproved”⁴⁰ are welcome – because they are true – although they are somewhat perplexing because they are so inconsistent with the unqualified charges you made in your Report itself.

It is also clear that you are frustrated and “saddened”⁴¹ that the HRC is continuing in its usual one-sided anti-Israel mode and not even condemning the “Palestinian armed groups” for the violations your Report did establish. (You should not be surprised that Hamas is not named in the HRC resolution for, as I have pointed out, your Report does not condemn them either, only their military wing.) It seems possible that you may even now be seeing the damage and injustice that is being and will continue to be caused by this document that bears your name and will, for better or worse, be your enduring legacy (even as I am sure you continue to believe that Israel’s leaders and soldiers should be held accountable if they overstepped legal bounds). And you may even be wondering whether there is anything you can do to mitigate the damage, injustice and pain that your Report is causing.

My suggestion to you is that, in the interests of truth and justice, you should publish an article in which you do the following (much of this should not be difficult or controversial as you have already done it in a more limited forum):

1. Acknowledge that the type of scrutiny and standards you are applying against Israel have never been applied against any country in a comparable situation.
2. Acknowledge that based on the standards by which you are judging Israel, many other countries would also have been found guilty of war crimes (including in recent and ongoing conflicts and most certainly the Allied powers that defeated Germany and Japan in World War Two).
3. Admit and explain that your determinations were made on the basis of one-sided evidence which, as you have already acknowledged, was tainted by duress.
4. Acknowledge that there are many credible allegations of actions taken by Hamas and other Palestinian armed groups that, if true, would constitute war crimes but that you did not investigate.
5. Acknowledge that your Report was unbalanced in terms of the allocation of focus on Israel, the incidents it chose to investigate, the selective historical context it included, and the language it used.

6. Acknowledge that in a judicial proceeding a person who had demonstrated prejudgment of the issue at hand, as Christine Chinkin had, would not have been eligible to participate as a judge.
7. Acknowledge that your taking into consideration of hearsay and anonymous reports is not consistent with standards that would apply in any judicial inquiry.
8. Explain, as you have already said orally, that much of the evidence you considered (including hearsay and anonymous reports) would not be admissible in a court and that your conclusions do not reflect anything that has been proven.
9. Acknowledge that a central pillar of your argument was that Hamas should be considered separately from its military wing and if that distinction does not hold up in fact, numerous of your allegations of war crimes and other violations would cease to apply.
10. Acknowledge that a central pillar of your argument is that Israel continues to “occupy” Gaza, and if that characterization does not hold up as a matter of law, numerous of your allegations would cease to apply.
11. Given the aspersions your Report has cast on the Israeli judicial system, repeat and emphasize (and not only in Israeli and Jewish media) your statement that “Israel has a strong history of investigating allegations made against its own officials reaching to the highest levels of government . . . Israel has an internationally renowned and respected judiciary that should be envied by many other countries in the region.”
12. Acknowledge that Israel is not alone responsible for the casualties and damage resulting from Operation Cast Lead but that some substantial portion of the responsibility (parties may differ on the allocation) must go to Hamas and the other Palestinian armed groups that attacked Israel with missiles.
13. Acknowledge that Israel has a right to act in self-defence and an obligation to defend its citizens and is not required or expected to suffer missiles being launched at it from Gaza or across any other border.
14. Acknowledge that the refusal by Hamas and other entities and states to recognize and accept the State of Israel is inconsistent with the Charter of the United Nations and a major impediment to peace in the region.
15. *Demand* (not just “recommend as a humanitarian gesture”) the release of Gilad Shalit who is not just being held captive illegally but who was taken captive illegally.

In writing this letter to you, I am by no means suggesting that Israel is perfect or should be immune from criticism or even condemnation, when appropriate. It is entirely possible that individual Israeli soldiers or the IDF as a whole may have overstepped the bounds during Operation Cast Lead, including perhaps in some of the incidents that you have looked at. As noted in your Report, there are still many investigations, including some criminal cases, open in Israel regarding Operation Cast Lead and if any credible allegations you have raised are not

already being investigated, I sincerely hope they will be added. In any such cases, I hope and trust that the Israeli authorities will take all appropriate action so that the “purity of arms” on which the IDF has always rightfully prided itself will not be compromised.

But for all the reasons I have described above, your Report as written is an abominable travesty of justice. The damage that you and your Report have already done – to Israel, to the Jewish people and to truth itself – can never be undone. But it can be mitigated if you are willing to admit the flaws in your Report loudly and clearly.

Sincerely,



Trevor Norwitz

New York, New York USA

¹ For the most part, I reviewed the Advance Edited Version released on September 15, 2009. I understand from your speech to the HRC that the final version submitted on September 29, 2009 redressed certain inaccuracies. Although I doubt that any corrections made will significantly affect the substance of my letter, I will be happy to review the changes if a version marked to highlight them is made available. I believe the paragraph references I use apply to both the Advance Edited Version and the final version.

² My Mission – and Motivation, Jerusalem Post (jpost.com) October 19, 2009.

³ I am reminded of that famous statement by Prime Minister Golda Meir from forty years ago: “When peace comes we will perhaps in time be able to forgive the Arabs for killing our sons, but it will be harder for us to forgive them for having forced us to kill their sons.” It is nothing less than tragic that forty years later this is still true, except that the word “sons” should be replaced in both places with the word “children”.

⁴ My disappointment is especially acute because I have for months been assuring doubters that the investigation would likely be fair and balanced because of your involvement.

⁵ Your interview with Christiane Amanpour of CNN on September 30. It is troubling that you decline to speak and write plainly and openly before all audiences about the lopsidedness of the authorizing resolution. You obviously recognize it and have acknowledged it (before an American audience on CNN and in the Israeli press) and yet you continue to hide the biased origin of your Mission, for example in the Introduction to the Report (1) and in your introductory remarks to the HRC rendering your final report.

⁶ I will generally refer to this body as the HRC. I can not bring myself to use the full name because the irony is too bitter and tragic given the critical importance of human rights in today’s world.

⁷ See for example: *Blocking the Truth of the Gaza War: How the Goldstone Commission Understated the Hamas Threat to Palestinian Civilians* by Jonathan D. Halevi, Jerusalem Center for Public Affairs, Vol. 9, No. 10, 18 September 2009, available at www.jcpa.org.

⁸ Of course you phrased it a little more delicately: “The Mission was faced with a certain reluctance by the persons it interviewed in Gaza to discuss the activities of the armed groups.” (35.) “Whatever the reasons for their reluctance, the Mission does not discount that the interviewees’ reluctance may have stemmed from a fear of reprisals.” (Report at 438.) Really? You think? See also paragraphs 453 and 1585.

⁹ The emphasis of this frequently used phraseology and other italicized terms within quotes is added throughout.

¹⁰ This is one example of the objection, which is discussed later in the letter, that your report evidences a political motivation behind what was supposed to be a “fact-finding” mission.

¹¹ It is not too late for that group of eminent jurists to call for an investigation into events in eastern Congo where there have been recent reports of over a thousand civilians murdered and nearly 900,000 displaced by Rwandan Hutu militiamen and Congolese forces, with allegations of widespread rape, looting and forced labor.

¹² One wonders what reason you might ascribe to the decision of Palestinian combatants to fight out of uniform. Perhaps they thought their uniform so unfashionable, they would not want to be caught dead in it.

¹³ So for example you state (at 61): “The Israeli armed forces . . . have a very significant capacity for precision strikes by a variety of methods, including aerial and ground launches. Taking into account the ability to plan, the means to execute plans with the most developed technology available, and statements by the Israeli military that almost no errors occurred, the Mission finds that the incidents and patterns of events considered in the report are the result of deliberate planning and policy decisions.”

¹⁴ Two examples of Israeli comments taken out of context: (1) when the Israeli leaders in question threatened a “disproportionate” response to rocket attacks it is likely they were not using that word in the legal sense (in relation to the military object to be achieved) but in the more colloquial sense of making Hamas pay a disproportionately high price for attacking Israel, which is entirely appropriate and does not translate into your “disproportionate destruction and violence against civilians were part of a deliberate policy”; and (2) several times you cite a comment from after the Gaza operation by Deputy Prime Minister Eli Yishai that, if attacked, Israel would “destroy 100 homes for every rocket fired” (64. 1201 and 1212) as evidence that Israeli leaders intended the “destruction of civilian objects . . . as a response to rocket attacks” but you fail to consider that in his earlier comments it was clear he was talking about homes of terrorists (see 1200). See also 389.

¹⁵ For example, Hamas leader Fathi Hammad stated: “The Palestinian people has developed its [methods] of death seeking. For the Palestinian people, death became an industry, at which women excel and so do all people on this land: the elderly excel, the mujahideen excel and the children excel. Accordingly, [Hamas] created a human shield of women, children, the elderly and the mujahideen, against the Zionist bombing machine.” You responded: “Although the Mission finds this statement morally repugnant, it does not consider it to constitute evidence that Hamas forced Palestinian civilians to shield military objectives against attack. The Government of Israel has not identified any such cases.” (476)

See also 421: “Often, when persons . . . are killed by actions of the Israeli armed forces , political and/or armed groups ‘adopt’ them as ‘martyrs’ placing their photographs on their websites and commending their contribution to resisting occupation. This does not mean that those persons killed were involved in resistance activities in any way.”

¹⁶ See 47 in which, reacting to Israel’s acknowledgment of a tragic “operational error” you expressed “significant doubt about the Israeli authorities’ account of the incident”.

¹⁷ See for example 456.

¹⁸ Much of the data and evidence you received and cited in your report came from a division of the Gaza authorities (that is, Hamas) called the “Central Commission for Documentation and Pursuit of Israeli War Criminals”. Maybe the name of this group suggests it may not be entirely objective.

¹⁹ See the Halevi piece referred to above.

²⁰ The legal implications of the President’s consent are unclear since the “very lopsided unfair resolution” was never actually amended or expanded.

²¹ I suppose the Jewish people should be grateful that for the most part your Report leaves implicit its equation of Israel and the Nazis. The only time you draw an express parallel between Israel and Hitler’s Germany is when you compare Israel’s withdrawal from Gaza to allow the Palestinians to govern themselves with the German invasion of Denmark. (279)

²² As an example, see again the Halevi piece referred to above.

²³ It is curious though that you do not accuse Egypt, which shares a border with Gaza and which, if there is indeed a “blockade,” must by definition be a participant in it. It is also notable that you again do not allow yourself to be distracted by the underlying reasons for the “blockade” you decry. Although you frequently mention the closing of the border crossings as part of the “blockade” you chose not to investigate the reasons for these closings, the fact that there were routinely attacked by Hamas and other terrorist groups, and the weapons smuggling that the border controls were designed to prevent (although you do note without any further commentary that weapons, including Iranian and Chinese rockets, are “thought to be smuggled into Gaza”).

²⁴ However you dismiss these reports as unreliable because, you say, of the tendency of Palestinian groups to “adopt” dead Palestinians as “martyrs” after their death and “[t]his does not mean that those persons killed were involved in resistance activities in any way.” (421) Indeed this reflects another troubling tendency in your Report,

namely that you are quick to dismiss Palestinian statements against interest as unreliable “puffery,” but you frequently cite Israeli “puffery” as evidence of bad intent.

²⁵ See 206 to 208. For example you say: “The Committee on Economic, Social and Cultural Rights also has recognized that Israel’s application of a “Jewish nationality” distinct from Israeli citizenship institutionalizes discrimination that disadvantages all Palestinians . . .”. An interesting debate perhaps, but it is most interesting that you feel the need to question Israel’s right to exist as a Jewish state in the context of your fact-finding mission .

²⁶ Quoting with approval (at 279) the nonbinding (and extremely one-sided and dubious) decision of the International Court of Justice, in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.

²⁷ A peculiar implication of this conclusion is that, if Israel is bound by the same obligations it was when it actually occupied Gaza, its proper course of action in light of its obligation to protect its own citizens from rocket attacks is presumably to recapture Gaza, impose order and govern the Gazans in accordance with humanitarian law. I doubt very much that this is what you are proposing but it does show how divorced your Report is from the political realities of the Gaza situation

²⁸ I am reminded of that insightful quote attributed to Mark Twain: “If a man invites you to take a walk with him, you can say that you are too tired. Should a man invite you to dinner, you can say that you have just eaten. If a man asks you to have a drink with him, you can say it is against your religion. However, if a man asks you to fight him, then you must oblige him.”

²⁹ There are of course many books you could read that would provide the more traditional history of the region. For a balanced (if not entirely up-to-date) summary of the recent developments in the Israeli-Palestinian conflict, I refer you to Part II, The Historical Setting, of the paper *When You Have Not Decided Where To Go, No Wind Can Take You There: A Strategy To Achieve A Comprehensive Israeli-Arab Peace* by Yair Hirschfeld PhD, an Israeli academic and one of the architects of the Oslo accords, published by The James A. Baker III Institute for Public Policy at Rice University in 2007 and available online at <http://www.bakerinstitute.org/personnel/fellows-scholars/yhirschfeld> .

³⁰ To mention just one example, you describe the second *intifadah* unleashed by Yasser Arafat when he did not get everything he wanted at Camp David as a “second popular uprising [that] erupted after . . . Ariel Sharon conducted a controversial visit to the Temple Mount/al-Haram-al-Sharif”. (180) I find it telling that you cannot even bring yourself to say that Jerusalem is the site of the Jewish Temple. In footnote 10 you state: “The Temple Mount/al-Haram-al-Sharif (the Noble Sanctuary) is the location of al-Aqsa and the Dome of the Rock mosques, the third most sacred place in Islam. It is also *believed to be* the location of the two ancient Jewish temples.”

³¹ For example see the following quotes from the Charter of Hamas: “Israel will exist and will continue to exist until Islam will obliterate it, just as it obliterated others before it.” (The Martyr, Imam Hassan al-Banna, of blessed memory) . . . “The Prophet, Allah bless him and grant him salvation, has said: ‘The Day of Judgement will not come about until Muslims fight the Jews (killing the Jews), when the Jew will hide behind stones and trees. The stones and trees will say O Muslims, O Abdulla, there is a Jew behind me, come and kill him. Only the Gharkad tree, would not do that because it is one of the trees of the Jews.’ (related by al-Bukhari and Muslim)”.

³² See 206 to 208 and the discussion above at footnote 24.

³³ “[T]he Mission concludes that what occurred in just over three weeks at the end of 2008 and the beginning of 2009 was a deliberately disproportionate attack designed to punish, humiliate and terrorize a civilian population . . .” (1690; see also 5117, 1162 and 1256.)

³⁴ “[T]he Mission finds that the rocket and mortars attacks, launched by Palestinian armed groups in Gaza, have caused terror in the affected communities of southern Israel and in Israel as a whole.” (1724)

³⁵ I understand, including from footnotes in your Report that Israel believes the number is much higher – close to 12,000. You do not explain how you made your finding that the lower 8,000 number is more credible.

³⁶ “I don’t think there’s ever been a time in the history of warfare when any army has made more efforts to reduce civilian casualties and deaths of innocent people than the IDF is doing today in Gaza.” British Colonel (retired) Richard Kemp. In my letter I cited you to Col. Kemp’s work on the challenges faced by countries trying to fight within the provisions of international law against an enemy that deliberately and consistently flouts international law, and urged you to reach out to him but I gather you chose not to do so.

³⁷ See quote at 475.

³⁸ In your Jerusalem Post article of October 19 you state that the Mission “called for his release”. Not to be too pedantic, but this provides a good example of how things get distorted in the press: the Report says “recommend”; you say “called”; the Press says “demanded.”

³⁹ See for example John Bolton, *Israel, the U.S. and the Goldstone Report*, Wall Street Journal, October 19, 2009.

⁴⁰ See The Jewish Daily Forward, issue of October 23, 2009, available at <http://www.forward.com/articles/116771>.

⁴¹ See for example U.N. Council Backs Gaza War-crimes Report, The Washington Post, October 17, 2009, available at <http://www.washingtontimes.com/news/2009/oct/17/un-council-backs-gaza-war-crimes-report>

July 14, 2009

Justice Richard Goldstone
Fact-Finding Mission of the United Nations
Human Rights Council on the Gaza Conflict

Dear Justice Goldstone,

I have always known you to be a person of the highest integrity, both from your reputation and from our personal interactions. It is out of this respect that I am writing to you today to wish you strength and offer you support as you pursue the Herculean task that you have undertaken as head of the Independent Fact-Finding Mission of the United Nations Human Rights Council on the Gaza conflict.

Because I know you are very busy I will be very brief, and limit myself to three points. First, while I understand you are disappointed that Israel has chosen not to participate with your investigation, I implore you to be understanding of the reasons for this decision and not to hold it against Israel or allow it to unduly prejudice their position. Second, even though you will not have the benefit of Israel's help, I urge you to do the best you can to gather the evidence that is available regarding the efforts that Israel made in the Gaza operation to prevent and avoid civilian casualties and about the tactics and actions of Hamas. Finally, it is my sincere hope that, if your report does criticize the Israeli Defense Forces (and I realize there is enormous pressure to do so), you will put these criticisms in a proper context, taking into account the geopolitical and physical circumstances, the behavior of Hamas and the efforts that Israel made to minimize civilian casualties, as well as the context and implications of your own Mission.

1. Do not penalize Israel for "taking the Fifth". I understand you were surprised and disappointed that Israel declined to cooperate with your investigation. While some may question the wisdom of that decision, I trust you can understand the reasons. The history of bias against Israel at the United Nations, and particularly at its Human Rights Council and predecessor Commission, is beyond serious contention¹. The resolution² that established your Fact-Finding Mission (which was introduced by Cuba, Egypt and Pakistan and approved by many of the world's most repressive regimes and virtually no Western democracies) is – as I know you appreciate – grotesquely one-sided. It clearly evidences that, from the Council's perspective, the question of Israel's culpability had already been pre-judged, and the Mission's sole purpose was to gather supporting evidence. Your expansion of the mandate to include terrorism and war crimes on the Palestinian side as well is admirable, but at the same time both insufficient to remove the taint of bias, and unnecessary, since Hamas openly brags of its actions which are *prime facie* acts of terrorism and war crimes. One member of your panel accepted the appointment even though she had already publicly declared Israel guilty of war crimes.³ I understand that you believe Professor Chinkin is open-minded, and that is possible, but clearly this creates a terrible impression of bias. With Israel being uniquely singled out by this dubious authority for an investigation, while no similar treatment has been accorded to other countries for their adventures in such places as Georgia, Chechnya, Afghanistan, Iraq, Pakistan, Xinjiang and Tehran (to name but a few), and while Sri Lanka is praised by the Human Rights Council for its victory over the Tamil Tigers after devastating the civilian Tamil population⁴, one cannot but appreciate Israel's view that the United Nations has double standards and the Fact-Finding Mission is fatally flawed. Indeed, from the Israeli perspective, the Mission itself could be viewed as a continuation of the onslaught that Israel has faced since its establishment by those who would delegitimize and ultimately eliminate it, as a part to their strategic campaign that has come to be known as "lawfare". I know that you personally had no such intent and without doubt hope and intend to do the job with the integrity you have always brought to such matters, but I expect that the

Israelis were at least as surprised and disappointed at your decision to undertake this assignment as you were that at theirs not to cooperate.

2. Gather the relevant evidence from whatever sources you can. You may disagree with Israel's decision not to cooperate, but I urge you not to hold that against Israel and its people. Clearly their decision makes it harder for you to do your work, and harder for you to be fair to Israel. I implore you, however, not to allow that hurdle to pervert justice, as the International Court of Justice did in the case involving Israel's security fence. In that case also Israel declined to participate, and most of the judges happily used that as a convenient excuse to simply ignore the truth – which was obvious then and has been borne out in fact since – that the barrier was necessary to save civilian lives⁵.

Everything I have been able to read about the investigation you have conducted so far leaves me very concerned that your Fact-Finding Mission may not be finding, or even looking for, the right facts. It appears that the focus of the investigation has been on “victims” as one might expect in a post-conflict truth-and-reconciliation-type commission. Interviewing Noam Shalit and Israeli victims of Hamas rockets, while worthwhile and cathartic for them, will not evidence a balanced investigation. Indeed, hearing from Israeli victims is largely unnecessary since Hamas does not deny but boasts proudly about rocketing Israeli civilian centers and its actions in regarding Gilad Shalit. What is critical, however, is that you gain the best understanding you can about: (i) the efforts, which I believe to have been substantial if not unprecedented, that the Israelis made to avoid and prevent collateral damage to civilians; and (ii) the behavior of Hamas before and in the course of the Israeli operation, including hiding military resources in hospitals, schools and mosques, using civilians as human shields and deliberately drawing fire towards civilians and nonmilitary installations to intentionally endanger innocents for political gain. In recent engagements, this last, most despicable, tactic has become a favorite of extremist groups and it will continue to grow until it is recognized for what it is, and not rewarded but forcefully rejected by the international community. This presents a significant opportunity for your Fact-Finding Mission to serve humanity by having absolute moral clarity on this point.

It is unfortunate that you will not be able to receive evidence on these points from the government of Israel, which would have been the best source regarding Israel's actions and perhaps on Hamas' behavior as well. But that of course does not absolve your Fact-Finding Mission of its obligation to seek out those facts from other sources. Some of the information on these critical subjects can be gleaned from public sources⁶, including public statements made by the Israeli government⁷. There must be many NGOs and other private parties that have relevant data and information on these matters and would be willing to cooperate, even if they will likely not be as authoritative as the Israeli government could have been. For example, if you have not already done so, you should reach out to British Colonel (retired) Richard Kemp who has studied the challenges faced in trying to fight within the provisions of international law against an enemy that deliberately and consistently flouts international law⁸ and stated: “I don't think there's ever been a time in the history of warfare when any army has made more efforts to reduce civilian casualties and deaths of innocent people than the IDF is doing today in Gaza”. Although I myself have no relevant expertise or information (other than what I learn from the media), I would be willing to try to find appropriate parties and to gather this sort of evidence if that would be helpful to you.

Naturally you will be receiving much information and support from the Palestinian side of this conflict. You have already spent considerable time hearing testimony from affected Palestinians in Gaza (generally, I understand, in the presence of Hamas minders). Since you are getting most of your input from the Palestinian side (and in particular from Hamas), I sincerely hope that you will take judicial notice of the fact that in the past Palestinian sources have frequently if not consistently lied both about

their own activities and about Israeli actions. I recognize of course that this is a highly sensitive point, but it is objectively verifiable (the so-called “Jenin Massacre,”⁹ the Mohammed Al Dura case¹⁰, and the doctored photographs in the Lebanon war¹¹ are just a few high-profile examples) and goes directly to the credibility of the people who are providing most of your inputs¹². In a context where the balance of information that will be offered to you will be so lopsided, and the pressure on you to condemn Israel so great, you will need a finely tuned propaganda detector. I would not be so arrogant as to suggest to you, one of the great investigatory judges of our time, how to gather evidence, but I know that Israel’s rejection was an unexpected setback, and the information and the reports I have seen regarding people who have offered and been invited to give testimony show no indication that you are receiving input on these vital matters. Speaking only to victims can only help you understand the *effects* of the battle but not its *causes* or how the parties conducted themselves. A focus only on the *victims* rather than *causes and behavior* is likely to lead to a conclusion that both sides are guilty (indeed many suggest simplistic apportionment of blame by body count), which would be grossly unjust, and precisely the political victory that Israel’s enemies who initiated and authorized your Fact-Finding Mission hope to achieve.

3. Put it in context and keep it in perspective. Perhaps the most difficult part of your Fact-Finding Mission will be putting the facts you find in proper context and keeping them in perspective. It is entirely possible, even likely, that there were instances in that fierce engagement when individual IDF soldiers may have stepped over the line. I do not believe there has ever been a war in which the same could not be said of any army, and this was a particularly difficult fight, waged on a treacherous battlefield of Hamas’ choosing. It is certain that some mistakes were made, as they always are in war (the deaths of the daughters of Dr. Ezzeldeen Abu al-Aish was one tragic example, and that of several Israeli soldiers by “friendly fire” another), and it is possible that some of these might have been prevented by stricter rules of engagement (that would have put Israeli soldiers’ lives at even greater risk). As unjust as it is that Israel should be uniquely singled out for an investigation such as this, Israel is not immune from criticism, and if you determine that actions were taken that overstepped the bounds of acceptable behavior in comparable military situations, I know you will not be shy to say so. The establishing resolutions of your Fact-Finding Mission call for you to look at Israel’s actions in this operation in a vacuum. But this you know you cannot do and to your credit have said you will not do. As you sit in judgment on Israel’s actions, I hope you will not lose sight of the context in which this operation was commenced and unfolded, including: Hamas’ avowed determination (as evidenced in its Charter) to destroy Israel by any means possible and its subversion of the peace process that showed so much promise in the years after Oslo; Israel’s unilateral and complete withdrawal from Gaza several years ago; Hamas’ actions since then in turning Gaza into a fortified terrorist enclave and, funded and armed by Iran (which has itself stated its intent to wipe Israel off the map and is developing weapons with which it might do so), launching thousands of rockets of increasing range on an almost daily basis against Israeli population centers; the inability (or lack of will) of the international community, and especially the United Nations, to stop these incessant acts of war despite Israel’s protestations and warnings; and, most importantly, the tactics employed by Hamas which were callously designed to maximize civilian damage for political purposes, and Israel’s efforts and sacrifices as they tried to put an end to the rocket attacks with minimal civilian casualties. Unfortunately you will not receive the amount and quality of information on these matters that you might have were Israel willing to provide it, but there is much that you can get if you try.

Finally, I hope you will be sensitive to the context of your own report. It is clear from the authorizing resolutions that those who commissioned your Fact-Finding Mission intended it to be used as a powerful weapon to vilify Israel. I know that this was not your intention when, for reasons I will not pretend to understand, you accepted the assignment. I am sure that enormous pressure will be brought to bear on

you to declare Israel guilty of “war crimes,” a designation that would for obvious reasons be particularly painful for the Jewish people and joyous for their detractors. A superficial evenhandedness – declaring both Hamas and Israel guilty of war crimes – would be a huge victory for Israel’s enemies, as it would equate the Jewish state with a terrorist gang. Others have succumbed to the pressure or been seduced by the promise of international stardom to simply say what they know others want to hear, but I have faith that you will be strong enough to actually seek and speak the truth.

It may be the case that this Fact-Finding Commission was “born in sin,” but you and your fellow fact-finders have the ability to redeem it and allow something positive come out of it. Indeed, you are in a unique position today to make an impact on the world, for better or worse. By uncovering and speaking the truth, and decrying the tactics of terrorist groups like Hamas, Hezbollah, Al Qaeda and others, you can send a firm message to those who cynically manipulate our legal and political institutions and callously use and abuse human beings to further their political goals that their machinations are seen for what they are and will not work. If you simply give those who commissioned the investigation what they want, you would be sending the opposite message, with tragic consequences.

Many who support Israel’s right to exist in peace and security are nervous or, worse, resigned to the expectation that your report will be another abominable miscarriage of justice by the “human rights” organs of the United Nations, but I have faith in your integrity and I wish you fortitude in your pursuit and reporting of the truth. I look forward to reading your report.

Sincerely,

Trevor Norwitz
New York, NY

¹ If there is any need to substantiation, I refer you to the website for [UN Watch](#), of which I expect you are aware. One may not agree with all of their views, but the statistics they report are enough to prove the point.

² [HRC Resolution S-9/1](#) adopted on January 12, 2009.

³ I am referring of course to the article she signed in The Sunday Times on January 11, 2009 entitled “[Israel’s bombardment of Gaza is not self-defence – it’s a war crime](#)”

⁴ The Council’s behavior regarding Sri Lanka has been [widely criticized](#) and the double-standard noted.

⁵ Although this is obvious from the statistics, the terrorist groups that favored suicide bombings have themselves [admitted as much](#).

⁶ For example [this slideshow](#) [http://www.slideshare.net/marissyb29/international-law-and-the-fighting-in-gaza-power-point-aas2-1105805?from=email&type=share_slideshow&subtype=slideshow], although partial in tone (no more than most reports from the Palestinian side) contains important information and statistics that are objectively verifiable. [This website](#) (although I do not support its tone or all of its commentary) includes some very useful information and clips; I particularly suggest you look at “Hamas in their Own Voices” and “Hamas fires from foreign press office in Gaza”.

⁷ Presumably you are aware that the Israel Defence Forces have provided a substantial amount of information on their websites including [this video blog](#) which includes a significant amount of video evidence.

⁸ I highly recommend that you read this recent article by Colonel Kemp, [Hamas, the Gaza War and Accountability Under International Law](#), if you have not already done so.

[<http://www.jcpa.org/JCPA/Templates/ShowPage.asp?DBID=1&TMID=111&LNGID=1&FID=378&PID=0&IID=3026>]

⁹ There is [abundant evidence](#) of the systematic lying that surrounded Israel’s operation in Jenin in April 2002.

¹⁰ Although the full story is not yet told, this incident of [dubious authenticity](#)], which fueled the Second Intifada and led to untold bloodshed[http://en.wikipedia.org/wiki/Muhammad_al-Durrah], is considered by many to have been the most effective of many “Pollywood” productions. [<http://en.wikipedia.org/wiki/Pollywood>]

¹¹ The [spate of incidents](#) of [fraudulent photography](#) came to be called Hezbollywood.

¹² While I am in no way suggesting that this expedient view of lying applies to all adherents of Islam, its apparent validity among fundamentalists is explained in Raymond Ibrahim’s article [War and Peace - and Deceit - in Islam](#). [<http://www.meforum.org/2066/war-and-peace-and-deceit-in-islam>]