

**SUBMISSION TO THE INQUIRY CONDUCTED BY**  
**HIS HONOUR JUSTICE RICHARD GOLDSTONE,**  
**UN HUMAN RIGHTS COUNCIL,**  
**CONCERNING THE RECENT MILITARY CONFLICT IN GAZA.**

**A Introduction**

1. The following submission has been prepared by a group of lawyers in Australia who are concerned about the recent military conflict in Gaza and the legal and humanitarian issues to which it has given rise. We are especially concerned to ensure that any investigation and inquiry seeking to explore these issues under the mandate of the United Nations Human Rights Council (UNHRC) observes the rules of procedural fairness and is strictly impartial. We do not question your Honour's integrity or eminence as a lawyer and human rights advocate. We regret, however, that the past record of the UNHRC and of its predecessor, the United Nations Human Rights Commission, is such that its bona fides cannot simply be assumed. The UNHRC is currently composed of 47 member States of the UN, most of which are Muslim-majority States and their allies with a long record of implacable hostility to Israel's very existence, in direct contravention of the Purposes and Principles of the UN Charter.

**B The terms of the mandate for the Inquiry**

2. Your Honour's mandate for the Inquiry was initially established by UNHRC Resolution S/9-1 (A/HRC/S-9/L.1, 12 January 2009) which decided (at paragraph 14) to conduct "an urgent, independent international fact-finding mission ... to investigate all violations of international human rights law and international humanitarian law by the occupying Power, Israel, against the Palestinian people throughout the Occupied Palestinian Territory, particularly in the occupied Gaza Strip, due to the current aggression." The resolution bears the title "The grave violations of human rights in the Occupied Palestinian Territory, particularly due to the recent Israeli military attacks against the occupied Gaza Strip".

3. This mandate would have prejudged two critical issues that ought, with respect, to have been matters for the Inquiry. One party to the conflict, Israel, was to be characterised *a priori* as both:
- (i) "the Occupying Power" and
  - (ii) the aggressor.

Both propositions are deeply contentious and it ought to have been left to those conducting the Inquiry to form their own conclusions based on their findings and interpretation of the law.

4. On 3 April 2009, the President of the UNHRC announced that the Inquiry would have a mandate

*"to investigate all violations of international human rights law and international humanitarian law that might have been committed at any time in the context of the military operations that were conducted in Gaza during the period from 27 December 2008 and 18 January 2009, whether before, during or after."*

(<http://www2.ohchr.org/english/bodies/hrcouncil/specialesession/9/FactFindingMission.htm>, accessed on 29 June 2009).

5. It is unclear what authority, if any, the President of the UNHRC had, in effect, to over-ride the express terms of Resolution S/9-1. But the fact that he has done so, or purported to do so, tends to validate the contention that the text of the resolution is irredeemably tainted with bias and that the UNHRC lacks the bona fides to auspicate a credible inquiry. Perhaps it was for this reason that it was reported that several experts invited to serve on the Inquiry refused because they considered the mandate one-sided. (Los Angeles Times, April 8 2009, [http://www.latimes.com/news/nationworld/world/la-fg-goldstone8-2009apr08\\_0,5260353.story](http://www.latimes.com/news/nationworld/world/la-fg-goldstone8-2009apr08_0,5260353.story), accessed on 29 June 2009).

6. Another disturbing matter that impugns the integrity of the Inquiry arises from your Honour's widely reported statement at the time of your appointment that you were "shocked, as a Jew" to be invited to head the Inquiry (see for example Agence France Presse at <http://www.google.com/hostednews/afp/article/ALeqM5h7Rrw6IAyaGk7jpNm5Kh7DSJlcqw> accessed on 29 June 2009). No doubt, if the reports are accurate, your Honour made this comment innocently. We are confident that the fact that your

Honour is Jewish will not influence one way or the other the manner in which your Honour will perform your functions. Our concern is that your Honour's statement has been used by others to suggest that, as your Honour is Jewish, the Inquiry is incapable of being biased against Israel. (As reported in Los Angeles Times, April 8 2009, [http://www.latimes.com/news/nationworld/world/la-fg-goldstone8-2009apr08\\_0,5260353.story](http://www.latimes.com/news/nationworld/world/la-fg-goldstone8-2009apr08_0,5260353.story), accessed on 29 June 2009). This is an insidious proposition and is manifestly untrue. For the reasons we have outlined, the bias is inherent in the terms of the original mandate and throughout the text of Resolution S/9-1.

7. We trust that in the Inquiry's final report the bias that is discernible in the terms of its mandate and the cynical use of your Honour's Jewish identity to lend the Inquiry an appearance of impartiality will be seriously addressed.

### **C Responsibility for the outbreak of hostilities**

8. From time immemorial nations have recognised that they are bound by laws governing both the resort to force (the *jus ad bellum*) and the conduct of war (the *jus in bello*). Over time those laws have been developed and refined into the extensive body of rules that apply in the contemporary world. Whilst every armed conflict entails human suffering, it does not follow that legal (or moral) responsibility for the suffering necessarily lies with the party that inflicts it. No State or international body or tribunal has ever claimed that legal responsibility for the devastation of the Axis powers in World War II should be attributed to the Allied States that wrought that devastation (principally the US, USSR and Britain). On the contrary, the UN Charter itself, the foundational document of the current international legal order, characterises the Axis powers as "enemy States" (Articles 53 and 107) whose acts of aggression made their comprehensive defeat at the hands of the Allied powers lawful in every respect.
9. Whether the terms of the mandate for the Inquiry your Honour is conducting are as set out in Resolution S/9-1 or in the statement issued by the President of the UNHRC on April 3, 2009, they seem to be directed exclusively at *jus in bello* issues and to preclude any consideration of which party is responsible for the outbreak of hostilities.
10. The relevant *jus ad bellum* questions in connection with the Gaza conflict include:

- (i) Did the Hamas rocket attacks against civilian population centres in Israel between December 19 and December 27 2008 constitute an "armed attack" against Israel within the meaning of Article 51 of the UN Charter?
- (ii) If so, was Israel's decision to resort to force to quell those attacks a legitimate exercise of its right of self-defence?

11. The answers to these questions have obvious significance for subsidiary issues of necessity and proportionality in both the *jus ad bellum* and *jus in bello* contexts. Yet these vital questions seem to have been placed outside the purview of the Inquiry. If any consideration of how and why force was resorted to by Israel is precluded, that would make it impossible, in our respectful submission, for the Inquiry to reach any cogent conclusions about where the preponderance of legal responsibility lies for the ensuing suffering.
12. Without delving into the current state of the international law of self-defence, what follows is a summary of the relevant factual background that provides the essential context for any consideration of the above questions.
13. There has been an ongoing armed conflict between Israel and Hamas since the unlawful seizure of executive power in Gaza by Hamas in mid-2007. Hamas has exercised effective control in the Gaza Strip since that time. This followed the complete termination of Israel's military and civilian presence in the Gaza Strip in August 2005. Although rocket fire from Gaza has been directed at Israeli towns, cities and other civilian targets since 2001, Hamas has used its control of the territory since mid-2007 to step up the smuggling of weapons and munitions into Gaza from Egypt and its use of Gaza as a base from which to launch rocket attacks against Israel. The rocket attacks are in clear violation of Article 51(4) of Additional Protocol 1 to the Fourth Geneva Convention which prohibits "indiscriminate attacks" that are "not directed at a specific military target". The prohibition is a rule of customary international law.
14. In June 2008, Israel and Hamas agreed to a truce for a period of 6 months. The intensity of rocket fire tailed off somewhat during the truce period but continued intermittently.
15. On September 14 2008, a Qassam rocket struck a construction site in the western Negev town of Sderot, sparking a fire. The Al Quds Brigades, the military wing of

the Islamic Jihad, an ally of Hamas against Israel, claimed responsibility for the attack.

16. On October 21 2008 a Qassam rocket of the kind typically used by Hamas was fired into the western Negev. The rocket struck an open area near Nativ Ha'asara. Defense Minister Ehud Barak consulted his advisors and security officials following the strike, and later announced his decision to shut down the border crossings between Israel and the Strip in response. This decision was in keeping with Israel's routine response to Qassam fire underscoring the message that rockets result in closed borders. (Reported in "Ha'aretz" October 22 2008).
17. On October 31 2008 a group of Palestinians fired two anti-tank missiles at Israeli troops along the Gaza-Israel border. Israeli troops investigating suspicious movements along the fence near the Kissufim crossing came under fire from inside Gaza. There were no injuries (Reported in "Ha'aretz" November 2 2008).
18. These violations of the truce – all of which were committed by the Palestinian side - climaxed in an attempt by Hamas to construct a tunnel from the Gaza Strip into Israeli territory, apparently for the purpose of abducting Israeli soldiers, as occurred with the abduction of Gilad Shalit three years earlier. This was a clear violation of the truce, clearly attributable to Hamas.
19. On November 4 2008, IDF soldiers entered Gaza to destroy the tunnel which had begun to be constructed in the area east of Deir el-Balah at a house belonging to the Abu Hamam family. A Hamas gunman was killed and two others were wounded. An exchange of fire took place between the troops and Hamas gunmen. Four IDF soldiers were wounded during the operation, two of them moderately. The others were lightly injured. On that day also Hamas gunmen fired six mortar shells at Israel from Gaza. (Reported in "Ha'aretz" November 11 2008).
20. From that day onwards, Hamas effectively disregarded the truce and steadily increased the number of daily rocket attacks against Israel. According to Israel's Ministry of Foreign Affairs, a total of 223 rockets and 139 mortar shells were fired at Israel during the truce period (June 18 - Dec 19, 2008), including 203 rockets and 121 mortar shells between November 4 and December 19. (See <http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Hamas+war+against+Israel/Missile+fire+from+Gaza+on+Israeli+civilian+targets+Aug+2007.htm> accessed on 29 June 2009).

21. The Israeli government nevertheless sought to negotiate an extension of the truce that was due to expire on December 19 2008. One day before the truce was due to expire, Hamas leaders convened a meeting with other armed groups in Gaza and announced their decision to reject any extension of the ceasefire. According to Fawzi Barhum, a Hamas spokesman in Gaza: "The truce will end tomorrow. There is no possibility of renewing the truce." Israel, which had hoped for an extension of the truce, had no immediate reaction to the Hamas statement. However, Defence Minister Ehud Barak indicated in earlier remarks that Israel would respond only if attacked. (See story by Shona Bhattacharyya, Agence France Presse, <http://www.france24.com/en/20081218-hamas-rejects-renewing-truce-gaza-israel>).
22. The number of rockets and mortars fired at Sderot and other civilian targets in Israel increased significantly after December 19 2008. Ironically, and tragically, a projectile fired by Palestinians on December 27 fell short of its target in Israel, striking a house in northern Gaza and killing two Palestinian schoolgirls. None of Gaza's militant factions took responsibility for the deadly attack on the house in Beit Lahiya. Gaza Health Ministry official Dr. Moiyaya Hassanain identified the two victims as 5-year-old Hanin Abu Khoussa and her 12-year-old cousin, Sabah Abu Khoussa. Three other young people were wounded, Hassanain said. (See <http://www.haaretz.com/hasen/spages/1050364.html> accessed on June 29 2009)
23. Israel did not respond immediately to these outrages despite the ongoing danger to its own citizens who have, on average, 15 seconds of warning of incoming rocket fire. It was only after all diplomatic efforts proved fruitless and the number of rocket attacks reached 60-80 per day that Israel finally launched "Operation Cast Lead" on December 27 2008.

#### **D Proportionality**

24. International law imposes a requirement of proportionality on the use of force in self-defence. But it is far from clear what the principle of proportionality means, and how it should be applied in specific cases. What it does not mean is "tit for tat". The principle does not require that the forms, substance and strength of the force used by each side must be roughly equivalent or that the number of casualties (military or civilian) on each side must be roughly equal.

25. In the *jus ad bellum* context the principle of proportionality requires that any recourse to force in self-defence must be limited to the objective of halting or repelling the attack and preventing a recurrence. That, in essence, is why it is a misconception to think that in the *jus in bello* context the extent of the force used must be equivalent in some sense to the extent of the force used in the initial attack. According to Robert Ago, when he was President of the International Court of Justice:

*The action needed to halt and repulse the attack may well have to assume dimensions disproportionate to those of the attack suffered. What matters in this respect is the result to be achieved by the "defensive" action, and not the forms, substance and strength of the action itself.*

(Roberto Ago (Rapporteur), 'Addendum to Eighth Report on State Responsibility', [1980] Vol II (1) Year Book of the International Law Commission, at 69-70).

26. As removal of the danger, rather than mere repulsion, is the "proportionate" goal, it follows that the principle of proportionality in a forcible defensive response to an armed attack does not require that the content and strength of the action taken to halt and repel the attack, and to remove the danger of further attack, must be commensurate with the content and strength of the attack itself. What matters in this respect is the result to be achieved by the "defensive" action, and not the forms, substance and strength of the action itself.
27. Given the sequence of events leading up to the outbreak of hostilities, including Hamas's announced decision to reject all efforts by Israel and others to renew the truce and to step up the level of rocket attacks against Israel, Israel was lawfully entitled to use whatever force was needed to remove the danger of Hamas rockets and mortars and to prevent a recurrence of the attacks on its civilians. That included destroying command and control centres and military and communications facilities, wherever they were located. As long as the rocket attacks continued, Israel was entitled to respond.
28. The text of relevant legal instruments that reflect customary international law confirm that the proportionality calculus is not "tit for tat" in the *jus in bello* context. Article 57(2)(b) of Additional Protocol 1 to the Fourth Geneva Convention talks of civilian casualties that are disproportionate to the expected military advantage, not numbers of casualties that are disproportionately on one side or the other. Any

attempt to shrink the concept of military advantage is at odds with the history of the relevant treaties. What is relevant is whether an individual attack makes a measurable contribution to the overall military objective. It is a misconception to suggest that destroying a small missile depot or a single rocket launcher, insufficient in itself to change the strategic or tactical balance, can never justify harm to civilians. The law is otherwise, so long as the attack has more than a trivial effect on the overall war effort. Wars are typically won by an accumulation of small actions, not by a few decisive blows.

29. As Israel's former UN Ambassador, Dore Gold notes, Israel "is not required to calibrate its use of force precisely according to the size and range of the weaponry used against it." "Just war" theorist Michael Walzer has also remarked that the concept of proportionality cannot be applied "speculatively." He points out that the test of proportionality is in relation to the future expected military advantage, not in relation to past events or civilian deaths from previous attacks. In his view, those accusing Israel of using "disproportionate" force do so only when it is "simply violence they don't like, or it is violence committed by people they don't like." Therefore, "Israel's Gaza war was called 'disproportionate' on day one, before anyone knew very much about how many people had been killed or who they were." (From "The Gaza War and Proportionality", Dissent Magazine, January 8, 2009 at <http://www.dissentmagazine.org/online.php?id=191> accessed on 29 June 2009).

#### **E Application of specific *jus in bello* rules**

30. We accept that, even though Israel was responding to an armed attack, its defensive response was nevertheless subject to legal constraints. Foremost among these is the principle of distinction - requiring combatants to do their best to distinguish between civilians and combatants and civilian objects and military objectives. The principle is a rule of customary international law and it is given expression in Article 48 of Additional Protocol 1 to the Fourth Geneva Convention.
31. Any claim that Israel deliberately targets civilians or does not attempt to distinguish between civilian and military targets is entirely unfounded. The IDF has legal advisors embedded with combat units making analyses prior to any military action. Many attacks have been aborted when it was deemed that the potential harm to civilians was too great. Moreover, those levelling these charges usually do not possess military expertise, detailed information on the dispersal of weapons by Hamas, and they are not privy to Israeli targeting decisions. Such information is



essential in order to make a credible evaluation of Israeli military responses to the thousands of rocket attacks by Hamas.

32. As a rule of customary international law, the principle of distinction also equally binds Hamas. So too does the prohibition against using civilians as "human shields" contained in Article 51(7) of Additional Protocol 1. Yet Hamas is open about its use of Palestinian civilians as human shields. Indeed, Hamas legislator Fathi Hamad boasted on Al-Aksa TV on 29 February 2008 (emphasis added):

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

See <http://www.youtube.com/watch?v=CWIDZ7Jpdqg>

33. Further, Hamas's "fighters" often wear no uniform or identifying symbols as soldiers of national armies are required to do under Articles 37, 38 and 39 of Additional Protocol 1, and its perfidy makes it far more difficult to distinguish its operatives from civilians in the first place. The confusion was compounded by the claim that Hamas operatives who were wearing "police" uniforms and who were killed by Israel were "civilians". Yet Article 43(1) of Additional Protocol 1 provides that:

*The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or authority not recognized by an adverse Party.*

34. It can hardly be denied that the Hamas "policemen" were members of a unit under a command responsible to Hamas for their conduct. They fall squarely within the definition of "armed forces".
35. Hamas as a terrorist organization has dispatched death squads to summarily execute Palestinians accused of "collaborating" with Israel. Hamas has seized

children and other civilians and illegally used them to shield combatants from attack. It has hidden weapons and combatants in mosques and hospitals. Hamas has targeted and murdered Israeli Jews in the service of an explicitly genocidal ideology as set out in its Charter. Hamas has denied wounded Palestinian civilians permission to cross the border to waiting Egyptian ambulances in Sinai. Hamas has sought to pre-empt challenges to its post-coup d'etat rule in Gaza by detaining, maiming and murdering rivals in the Fatah terror group/militia. And, of course, Hamas itself is a terrorist organization to which states must deny material support and safe haven under Security Council Resolution 1373 and various international conventions.

36. Focusing on Israel's obligation to distinguish between civilians and combatants and civilian objects and military objectives while disregarding Hamas's use of civilians as human shields and other violations of customary international law elides the point that Hamas' violations do not immunize dual use military sites from attacks which inevitably have collateral consequences of harm to civilians. Under Article 51(7) of Additional Protocol 1, civilians "shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations." Further, under Article 28 of the Fourth Geneva Convention itself, "the presence of a protected person may not be used to render certain points or areas immune from military operations." Therefore, Israel is not prohibited from attacking a military target simply because there are civilians present. The documentary and video proof of Hamas's exploitation of schools, mosques, hospitals and cultural centres to carry out its attacks is overwhelming, and responsibility for any civilian deaths that follow belongs to Hamas.
37. To insist that Israel must not attack Hamas command and weapons storage sites because that would endanger civilians, would be to confer on Hamas *de facto* immunity from military action except at the precise instant a rocket is being launched and then only if no civilians were in the vicinity, a circumstance that does not often exist in Gaza. It is certain that those nations which ratified the Geneva Conventions and the Additional Protocols did not intend international law to be an impenetrable shield for terrorists in such circumstances.
38. Israel has been accused of fear-mongering among Palestinian civilians by giving them advance warning of planned attacks. The criticism is perverse, as the giving of such warnings is required by Article 57(2)(c) of Additional Protocol 1.

39. Civilian casualties as such are always truly tragic and to be avoided if possible. They are not illegal per se under the law as it currently exists.
40. Another accusation levelled at Israel is that its military action was a form of "collective punishment" of Palestinians. "Collective punishment" refers to the imposition of criminal penalties and does not refer to the legal act of retorsion (e.g. sanctions, blockades). Restriction on the flow of goods in a war environment does not constitute "collective punishment" under international law and this charge is not only false legally, but factually as well. In fact, pursuant to Article 23 of the Fourth Geneva Convention (which sets standards for the provision of limited humanitarian aid), Israel has no obligation to provide any goods, even minimal humanitarian supplies, if it is "satisfied" that such goods will be diverted or supply of such goods will aid Hamas in its war effort. As numerous credible accounts have reported, Hamas has diverted supplies from Gaza's civilian population. Although Israel is under no legal obligation and despite the attacks on the Israeli border crossings, including the April 9 2008 attack on the Nahal Oz fuel depot and the May 22 2008 truck bomb attack at the Erez crossing, Israel continues to provide thousands of tons of humanitarian supplies to Gaza. This is above and beyond any obligation under international law and the claim of "collective punishment" is entirely unjustified.
41. Finally, Israel's Gaza operation needs to be understood in the light of its numerous binding obligations to fight terrorism under international law. These include Security Council Resolution 1373 (2001) made pursuant to Chapter VII of the UN Charter requiring Israel to:
- prevent and suppress the financing of terrorist acts";
  - "criminalize the wilful provision or collection, by any means, directly or indirectly, of funds" used to carry out terror attacks";
  - "refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts";
  - "deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens";
  - "prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens";

- “prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents.”

## **F Use of White Phosphorous**

42. As a general rule in most jurisdictions in advanced countries the reports of non-government and international organisations are not of themselves accepted as evidence in support of their own conclusions. For example, in *MA v Immigration and Naturalization Service* (1990), the US Court of Appeal, Fourth Circuit, warned against relying on “pronouncements of private organisations or the news media” and said:

*We do not know how courts are expected to evaluate the proffered explanations for various incidents of military activity or to gauge the extent to which such activity may or may not implicate official policies. We are also uncertain of the criteria by which courts would analyze the reports of private groups... Although we do not wish to disparage the work of private investigative bodies in exposing inhumane practices, these organisations may have their own agendas and concerns, and their condemnations are virtually omnipresent.*

43. The court concluded that reports issued by human rights organisations are an unsuitable basis “for issuing judicial condemnations of the conduct of a foreign government”. (See Vol. 88, *International Law Reports* 1 at 22 and note 6).
44. The wisdom of the court’s caution is highlighted by the contradictory conclusions expressed by different observer organisations concerning Israel’s use of white phosphorous in Gaza. Human Rights Watch’s criticism of Israel in this regard was directly contradicted by statements issued by the International Committee of the Red Cross during the fighting.
45. Part of the difficulty lies in identifying and interpreting the relevant law. Protocol III of the 1980 UN Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons prohibits certain uses of air-delivered incendiary weapons. Israel is not a party to Protocol III and its provisions therefore do not apply, except to the extent that they may reflect customary international law.

46. In any event, the Protocol's definition of an incendiary weapon expressly excludes "illuminants, tracers, smoke or signalling systems" and other weapons that are not primarily designed to set fire to objects. According to a statement issued by Peter Herby, the head of the mines-arms unit of the International Committee of the Red Cross, Israel confined its use of incendiaries to the illumination of targets at night and the creation of smoke screens for day attacks. On January 13 2009, during the fighting, Herby told the Associated Press (emphasis added):

*In some of the strikes in Gaza it's pretty clear that phosphorus was used, but it's not very unusual to use phosphorus to create smoke or illuminate a target. We have no evidence to suggest it's being used in any other way.*

Herby said that using phosphorus to illuminate a target or create smoke is legitimate under international law, and that there was no evidence Israel was intentionally using phosphorus in a questionable way, such as burning down buildings or consciously putting civilians at risk. (See Associated Press Writer Bradley S. Klapper, "ICRC: Israel's Use of White Phosphorous Not Illegal" at [http://news.yahoo.com/s/ap/20090114/ap\\_on\\_re\\_eu/eu\\_red\\_cross\\_white\\_phosphorus\\_2](http://news.yahoo.com/s/ap/20090114/ap_on_re_eu/eu_red_cross_white_phosphorus_2)).

#### **G      Unfounded criticisms of Israel by UNRWA and NGO's**

47. Shortly after hostilities ceased the UN Relief and Works Agency was forced to retract a highly publicised allegation against Israel that was at the centre of one of the biggest controversies of the Gaza war. The allegation was that an Israeli mortar attack that killed 43 people hit a school run by UNRWA. It was entirely false. The incident that gave rise to the allegation occurred on January 6, 2009 and was widely described in the media at the time as the "school massacre".
48. Almost a month later, on February 5 2009, the UN Office for the Co-ordination of Human Affairs issued a statement acknowledging that it had wrongly blamed the deaths at the time on the "shelling of the UNRWA (Relief and Works Agency) school... The humanitarian co-ordinator would like to clarify that the shelling, and all of the fatalities, took place outside rather than inside the school."
49. The clarification came several days after a journalist for Canada's Globe and Mail newspaper, Patrick Martin, interviewed Palestinians living near the school and a teacher, who told him that none of the casualties were in the school. The only

casualties occurred on the street outside, as Israel had contended at the time. Israeli army spokesmen during the war said Israeli troops had fired three mortar shells in response to mortar fire from the area near the school, not from the school itself. They said the dead included two identifiable Palestinian militants believed to have been involved in the mortar firing.

50. In a television interview on the day of the incident at a Gaza hospital where casualties were brought, the UNRWA operations director in Gaza, John Ging, an Irish national, did not explicitly say the shells had hit the school but he mendaciously left that impression. "Those in the school were all families seeking refuge," he said. "There's nowhere safe in Gaza."
51. Neither Mr Ging nor other UN officials attempted subsequently to dispel the widespread suspicions of Israeli culpability, although they knew otherwise, until the newspaper report. The retraction was far less widely publicised than the original – false – report.
52. Military analyst Anthony Cordesman, in a study of the Gaza conflict released in early February 2009, concluded that the Israeli Defence Forces did not violate the rules of war during the three-week campaign. He said Hamas was not bound by international conventions but was able to "manipulate humanitarian considerations" for propaganda leverage.
53. "The end result is a situation where one side can potentially be limited by international law where the other is not, and that effectively makes international law a potential weapon for the side that rejects and exploits it," wrote Professor Cordesman, of Washington's Centre for Strategic and International Studies.

*It is a situation that empowers and incentivises extremists to use civilians as the equivalent of human shields by embedding their forces in civilian populations and using sensitive buildings like mosques and schools. There is nothing new about such tactics.*

(See

[http://74.125.153.132/search?q=cache:TVORYPjyeC8J:www.csis.org/component/option,com\\_csis\\_pubs/task.view/id,5250/type,1/+anthony+cordesman+gaza&cd=2&hl=en&ct=clnk&gl=au](http://74.125.153.132/search?q=cache:TVORYPjyeC8J:www.csis.org/component/option,com_csis_pubs/task.view/id,5250/type,1/+anthony+cordesman+gaza&cd=2&hl=en&ct=clnk&gl=au) accessed June 29 2009).

54. An Israeli watchdog organisation, NGO Monitor, released a report accusing international human rights organisations of ignoring the use by Hamas of human shields while "publishing unverified eyewitness evidence and unaccountable

casualty figures throughout the conflict, which have since been refuted. These claims helped create an assumption of Israeli guilt and were amplified by the media, influencing the conflict itself."

(See "UN backs down on 'school massacre' in Gaza" at

<http://www.ireport.com/docs/DOC-208310?ref=feeds%2Flatest> accessed on 29 June 2009).

55. In a BBC interview on January 9, 2009, Colonel Richard Kemp CBE, a former commander of British forces in Afghanistan, and a senior adviser on army issues to the British government concluded:

*I don't think there has ever been a time in the history of warfare when any army has made more efforts to reduce civilian casualties and deaths of innocent people than the IDF is doing today in Gaza.*

[http://www.timesonline.co.uk/tol/comment/columnists/dominic\\_lawson/article5489436.ece](http://www.timesonline.co.uk/tol/comment/columnists/dominic_lawson/article5489436.ece)

This assessment by an independent military expert presents an entirely different perspective of Israel's military incursion into Gaza to that which was conveyed by UNRWA, sections of the NGO community and the media.

#### H. Gilad Shalit

56. We are appalled that the mandate for the Inquiry to be conducted by your Honour appears to preclude any consideration of the situation of Gilad Shalit who has been deprived of all contact with his family and any friendly interlocutor for more than three years. This omission from your mandate and the refusal of the NGO community to demand Red Cross access to Gilad Shalit represent a significant moral failure. International humanitarian law was enacted to guarantee the rights and protections of prisoners of war. The Third Geneva Convention lays out these rights unequivocally: the right to humane treatment (article 13); the right to have knowledge of a POW's location (article 23); the right to send and receive letters and cards on a monthly basis (article 71); the right to unfettered access to the Red Cross (article 126), and others. Hamas has flouted each of these provisions and the silence of the NGO community causes considerable damage to international humanitarian law and universal human rights and compounds the trauma and anguish experienced by the young man's family.

## I Conclusion

57. The foregoing is a necessarily brief survey of some of the complex issues of fact and law that emerge from the conflict in Gaza. Whilst some of these issues may fall outside the scope of the UNHRC's mandate for the Inquiry, it is our respectful submission that they bear crucially upon the matters that fall within the mandate. The unseemly attempt in UNHRC Resolution S/9-1 to pre-judge these issues corresponds disturbingly to the predisposition of certain other international organisations, NGO's and sections of the media to rush to judgement in their condemnations of Israel. The lynch mob mentality towards Israel that is frequently manifested by these groups recalls the ignorant and condemnatory attitude towards Jews that prevailed in an earlier age. Your Honour's reputation as a jurist leaves us with hope that the Inquiry will not simply capitulate to these pressures. We respectfully recall the Biblical injunction: *Justice, justice shall you pursue.* (Deuteronomy 16:20).

30 June 2009

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