

THE REPORT OF THE HUMAN RIGHTS COUNCIL COMMISSION OF
INQUIRY ON THE 2014 OPERATION IN THE GAZA STRIP - A
CRITICAL ANALYSIS

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I. INTRODUCTION

On June 22, 2015, the UN Independent Commission of Inquiry, established by the Human Rights Council to investigate the conduct of the parties to the 2014 military conflict in the Gaza Strip (hereinafter, the “COI”), released its report (hereinafter, the “Report”).¹ Since its publication, and as is often the case with similar reports issued by international bodies of inquiry, the Report has been significant for Israel in several respects. It has served to evaluate and assess the legality of Israel's actions within the U.N. system, e.g., leading to general resolutions on the subject and the establishment of follow-up mechanisms. It can potentially facilitate efforts to advance legal proceedings against Israeli officials in national courts through universal jurisdiction (as evidence of alleged offenses); and it has affected and continues to affect general legitimacy of the Israel Defence Forces’ (hereinafter, the “IDF”) conduct in the eyes of the international community. In addition, the Report is undoubtedly one of the main sources of information being examined by the Office of the Prosecutor of the International Criminal Court in the preliminary examination that it is currently conducting into the events that took place in Israel, the Gaza Strip and the West Bank in the summer of 2014.²

However, beyond the potential ramifications of the Report for Israel, the COI Report also carries significance for other States in that it includes general methodology and analysis concerning the conduct of hostilities, which could be applied in other contexts and to other militaries. Therefore, given the potential impact of the Report both on Israel and on the analysis of

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¹ UN Human Rights Council, *Report of the Independent Commission of Inquiry Established pursuant to Human Rights Council resolution S-21/1* (June 25, 2015) UN Doc A/HRC/29/52 (hereafter, the “Report”), available at [www.ohchr.org/EN/HRBodies/HRC/CoI GazaConflict/Pages/ReportCoIGaza.aspx](http://www.ohchr.org/EN/HRBodies/HRC/CoI%20GazaConflict/Pages/ReportCoIGaza.aspx).

² For the Prosecutor’s announcement regarding the opening of the preliminary examination see ICC, *The Prosecutor of the International Criminal Court, Fatou Bensouda, Opens a Preliminary Examination of the Situation in Palestine* (January 16, 2015) ICC-OTP-20150116-PR1083, available at www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1083.aspx.

the conduct of militaries in general – particularly with respect to conflicts between States and non-State actors – it is important to examine the Report and assess its methodology, analysis, findings and conclusions.

The mandate of the COI was to investigate all violations of international humanitarian law and international human rights law in the Gaza Strip and the West Bank, including Jerusalem, which took place in the course of military operations in the summer of 2014.³ It should be noted that the same resolution, which established the COI to examine possible violations of international law, included a condemnation of Israeli violations⁴ – in essence predetermining what the COI was being tasked with investigating – thus generating serious concerns about whether the COI was indeed meant to be an independent and objective body of inquiry.⁵ This apprehension increased

- ³ Paragraph 13 of Resolution S-21/1 of July 23, 2014 states the following:
 “[d]ecides to urgently dispatch an independent, international commission of inquiry, to be appointed by the President of the Human Rights Council, to investigate all violations of international humanitarian law and international human rights law in the Occupied Palestinian Territory, including East Jerusalem, particularly in the occupied Gaza Strip, in the context of the military operations conducted since 13 June 2014, whether before, during or after, to establish the facts and circumstances of such violations and of the crimes perpetrated and to identify those responsible, to make recommendations, in particular on accountability measures, all with a view to avoiding and ending impunity and ensuring that those responsible are held accountable, and on ways and means to protect civilians against any further assaults, and to report to the Council at its twenty-eighth session. UN Human Rights Council, *Report of the United Nations High Commissioner for Human Rights the implementation of Human Rights Council resolution S-21/1 on ensuring respect for international law in the Occupied Palestinian Territory, including East Jerusalem*, (October 7, 2014) UN Doc A/HRC/27/76 (Report of UNHCR), available at <http://www.refworld.org/docid/5465ff1b4.html>;
- ⁴ Paragraph 2 of the resolution states that the Human Rights Council “Condemns in the strongest terms the widespread, systematic and gross violations of international human rights and fundamental freedoms arising from the Israeli military operations carried out in the Occupied Palestinian Territory since 13 June 2014, particularly the latest Israeli military assault on the occupied Gaza Strip, by air, land and sea, which has involved disproportionate and indiscriminate attacks, including aerial bombardment of civilian areas, the targeting of civilians and civilian properties in collective punishment contrary to international law, and other actions, including the targeting of medical and humanitarian personnel, that may amount to international crimes, directly resulting in the killing of more than 650 Palestinians, most of them civilians and more than 170 of whom are children, the injury of more than 4,000 people and the wanton destruction of homes, vital infrastructure and public properties.” *Ibid.*
- ⁵ The HRC is notorious for its bias against Israel, as acknowledged by the US and others. See, e.g., C. Morello, “Kerry defends Israel against U.N. ‘bias’ amid strains over Iran nuclear talks”, *The Washington Post* (March 2, 2015) available at www.washingtonpost.com/world/kerry-and-lavrov-meet-in-geneva/2015/03/02/41e8f2d2-9ac5-4408-bf7f-031674cc1a0d_story.html. See also TheTower.org, “New Watchdog Report Traces Pattern of Bias at UN Human Rights

with the appointment of Professor William Schabas, an outspoken critic of Israel, to chair the COI. Schabas would ultimately resign after it became public that he had provided paid legal advice to the Palestine Liberation Organization. This previously undisclosed discovery revealed a conflict of interest given the COI's mandate, further substantiating his alleged bias.⁶

Israel declared that it would not cooperate with the COI, stating that it “rejects the notion of being investigated by a biased Commission of Inquiry, established by a Human Rights Council which has discredited itself with its disregard for human rights”.⁷ The Palestinian Authority cooperated with the COI. Hamas, usually referred to in the Report as “the authorities in Gaza”, submitted several written and unpublished reports to the COI, but did not respond to requests to relate to specific incidents or to legal and policy issues.⁸ The COI was not granted physical access to Israel and the West Bank or to the Gaza Strip by Israel or by Egypt. As a result, the COI had limited access to most of the relevant information and evidence relating to the conflict it was investigating.⁹

Notwithstanding the above concerns over possible bias and the inherent limitations on the ability to conduct a comprehensive investigation from afar, the published Report deserves to be judged on its own merit. This article explores the Report and examines whether the COI succeeded in conducting an objective, professional and impartial analysis of the hostilities.

Council” *The Tower* (June 25, 2015) <www.thetower.org/2214-new-watchdog-report-traces-pattern-of-bias-at-un-human-rights-council/>.

⁶ For more information on this bias see T. Escribá, “Head of U.N. Inquiry into Gaza Conflict to Quit over Israeli Bias Claim”, *Reuters* (February 2, 2015) <www.reuters.com/article/us-un-israel-gaza-idUSKBN0L628L20150202>. See also H. Keinon, “The Indelible Stain on the UN committee once chaired by William Schabas” *The Jerusalem Post* (April 2, 2015) available at <www.jpost.com/Arab-Israeli-Conflict/Analysis-The-indelible-stain-on-the-UN-committee-once-chaired-by-William-Schabas-389928?utm_source=newsletter+2-4-2015&utm_campaign=newsletter>.

⁷ Israel's Ministry of Foreign Affairs elaborates that “for example, in 2014, the Council adopted more resolutions against Israel than against Iran, Syria and North Korea combined”. It also states that: ‘Schabas' resignation cannot whitewash the fundamental and inherent bias of the commission itself, including in its mandate. The removal of one symptom does not cure the disease. Furthermore, Schabas' imprint on the final report - to be delivered next month - cannot be purged after he directed and conducted the five-months-long research and evidence-gathering phases, with the drafting work already begun.” Israel Ministry of Foreign Affairs, “Behind the Headlines: Schabas' resignation from UNHRC Commission of Inquiry” (February 5, 2015) <<http://mfa.gov.il/MFA/ForeignPolicy/Issues/Pages/Schabas-resignation-from-UNHRC-Commission-of-Inquiry-5-Feb-2015.aspx>>.

⁸ Report at 3-5.

⁹ *Id.* at 18.

In doing so, this article will focus exclusively on the COI's analysis regarding the Gaza Strip, which forms the central part of the Report.¹⁰ It will examine the way in which the Report addresses the context of the conflict, the analysis of the actions of Hamas and other armed groups operating in the Gaza Strip, and the way Israeli and IDF conduct is assessed. It will then conclude by presenting the general trends identified in the Report.

II. CONTEXT

Any evaluation of an analysis of events must first take into account the relevant context on the basis of which the analysis was made and presented. This is especially true when examining adherence to the law, which is by its very nature contextual. If the understanding of the context is wrong, whether erroneously or intentionally, it follows then that the whole analysis becomes skewed.

The context of the 2014 Operation in the Gaza Strip – as set by the COI for the purpose of its analysis – was the following:

1. The Gaza Strip is still occupied by Israel as, 'the size of Gaza and the fact that it is almost completely surrounded by Israel facilitates the ability for Israel to make its presence felt'.¹¹
2. The general background of the Operation is presented as including: the protracted occupation of the West Bank and the Gaza Strip; an increasing number of rocket attacks on Israel; very low prospects for reaching a peaceful resolution of the conflict between Israel and the Palestinians; the naval blockade on the Gaza Strip, which is strangling its economy; and threats to Israeli security from rockets and tunnels.¹²
3. There were ongoing attempts to reach a unity agreement between the Palestinian Authority and Hamas, and a government of national consensus was about to be created when active hostilities broke out, thereby leaving Hamas exercising government-like functions.¹³
4. The immediate background of the Operation is portrayed as an escalation in violence, commencing on June 12, 2014 with the abduction and murder of three Israeli teenagers in the West Bank by Palestinians and then the cruel murder of a young Palestinian by Israelis, which lead

¹⁰ While the analysis in the Report of matters pertaining to the West Bank and Jerusalem is also of importance, it is beyond the scope of this Article.

¹¹ Report at 27. The COI refers to additional factors.

¹² *Id.* at 53-55.

¹³ *Id.* 56.

to widespread clashes between Palestinians and the IDF. The Operation itself was 'commenced by Israel' on July 7th.¹⁴

This description of the context and immediate background of the Operation – while not patently wrong – is partial and misleading because it leaves out several relevant and central facts.

First, without entering into the legal debate on whether the Gaza Strip is still occupied by Israel in the legal sense of the term,¹⁵ the suggestion that Israel has the ability to "make its presence felt" in the Gaza Strip whenever it wishes, which the COI presents as a basis for its legal determination, does not reflect reality. Although Israel shares a border with the Gaza Strip (and thus exercises its sovereignty with regards to the entrance and exit between the Gaza Strip and Israel), and although the Gaza Strip partially relies on Israel for the supply of water, electricity and other goods, Israel has no practical ability to "make its presence felt" in Gaza. The Gaza Strip is under the complete control of the Hamas government, which has full domination over all governmental powers, a well-organized military component and significant military capabilities.

Accordingly, any attempt to enter the Gaza Strip by the IDF, with the exception, perhaps of a narrow strip on the Gazan side of the Green line, is equivalent to entering foreign terrain controlled by a hostile party, and involves fierce fighting. This was evident by the intensity and the protracted nature of the encounters between the IDF and the forces inside the Gaza Strip in the course of ground operations conducted in the Gaza Strip, during which the IDF suffered dozens of casualties, and by the fact that Hamas and other Palestinian armed groups in the Gaza Strip succeeded in unceasingly firing rockets and mortars up until the agreed cease-fire. The high intensity combat that took place during the ground operations is referred to in the Report, as will be discussed below.

Second, while the general background of the operation as described in the Report is correct, it is far from complete and neglects to mention that Hamas has continuously refused to engage in any kind of peace negotiations with Israel.¹⁶ On the contrary, Hamas explicitly opposes any form of compromise

¹⁴ *Id.* 57-58.

¹⁵ See, e.g., the analysis of M. Milanovic, "Is Gaza Still Occupied by Israel?" *EJIL Talk* (March 1, 2009) available at www.ejiltalk.org/is-gaza-still-occupied-by-israel/.

¹⁶ R. Miller, "Hamas' Lost Decade, Behind the Group's Uphill Battle for International Legitimacy", *Foreign Affairs* (January 27, 2016) available at www.foreignaffairs.com/articles/israel/2016-01-27/hamas-lost-decade.

which would entail recognition of the right of the State of Israel to exist.¹⁷ In the years since 2007, when Hamas took control of the Gaza Strip, violently overthrowing the Fatah controlled Palestinian Authority, over 10,000 rockets and mortars have been fired towards Israel.¹⁸ This led to two previous rounds of high level hostilities, in December 2008 and in November 2012.¹⁹

Third, the Report gives the impression that the Palestinian Authority and Hamas were on the brink of forming a government of national consensus, and that this did not happen due to the commencement of the Operation. In reality, the relationship between the more moderate Fatah controlled Palestinian Authority and Hamas, which controls the Gaza Strip, was far from being resolved at the time.²⁰ Moreover, some experts have estimated that the reason Hamas intensified its attacks against Israel prior to the Operation was to strengthen its public support, which was diminishing due to criticism over corruption and mismanagement of the Gaza Strip.²¹

Fourth, the account of the immediate events leading up to the Operation neglects to mention that between June 12th and July 7th over 300 rockets and mortars were fired towards Israel from the Gaza Strip, in one case hitting a children's day camp in an Israeli city.²² The report does mention that "Palestinian armed groups increasingly launched rockets during June and July 2014",²³ but this is not included in the paragraph describing the immediate timeline preceding the Operation. As a result, the Report creates the impression that Israel decided of its own volition to commence the

¹⁷ See, e.g., N. Al-Mughrabi, "Hamas holds Gaza Military Parade, Vows Israel's Destruction", *Reuters* (December 14, 2014) available at www.reuters.com/article/us-mideast-hamas-israel-idUSKBN0JS0LO20141215.

¹⁸ See graph on page 16 of the Government of Israel's Report "The 2014 Gaza Conflict: Factual and Legal Aspects", (May 2015) (hereafter, the "GOI Report"), available at <http://mfa.gov.il/ProtectiveEdge/Documents/2014GazaConflictFullReport.pdf>. The GOI Report has been published in a Special Supplement to the 2015 Israeli Yearbook on Human Rights, 45 *Isr. Y.B. Hum. Rts.* 237 *et seq.* (2015).

¹⁹ GOI Report at 48-51.

²⁰ See, e.g., analysis by K. Elgindy, 'Palestinian political crisis deepens with collapse of unity government' *Al Jazeera* (June 19, 2015) available at <http://america.aljazeera.com/articles/2015/6/19/palestinian-political-crisis-deepens-with-collapse-of-unity-government.html>. The rift between the two is one of the main reasons that the reconstruction of the Gaza Strip is delayed, as explained in N. Zilber, "Gaza Reconstruction Stalled by Fatah-Hamas Deadlock", *Policywatch* 2369 (2015) available at <http://www.washingtoninstitute.org/policy-analysis/view/gaza-reconstruction-stalled-by-fatah-hamas-deadlock>.

²¹ A. B. Hodgkins, "Why Hamas Escalated, When Before They Didn't" (July 15, 2014) available at <http://politicalviolenceataglance.org/2014/07/15/why-hamas-escalated-when-before-they-didnt/>.

²² GOI Report at 59.

²³ Report at 55.

Operation, and not that it was under constant attack prior to the Operation; putting the onus on Israel as the instigator of the recent round of hostilities. Moreover, the COI finds it important to mention that commencement of the Operation by Israel occurred “during Ramadan, the Muslim month of fasting”.²⁴ This creates the impression that Israel chose this date intentionally in order to inflict the greatest harm on Palestinians and not due to the fact that it was responding to a surge in rocket attacks against it – attacks which Hamas and other armed groups chose to carry out during this month of fasting.

Fifth, the Report fails to make any mention of the fact that Israel made repeated offers to halt its military actions if Hamas would stop the rocket and mortar attacks. Hamas refused.²⁵ This seems a relevant point when describing the context of the Operation and one would expect it to be mentioned by the COI in order to give the reader a full picture of the context.

The partial and incomplete depiction of the context of the Operation by the COI is significant. The impression given to the reader of the Report is that Israel picked the Muslim holiday of Ramadan deliberately to attack a weak Palestinian party situated in an area which is under *de-facto* Israeli control, in response to occasional rocket fire towards Israeli localities; perhaps also due to the deterioration of the situation in the West Bank, or with the intention of preventing a Palestinian unity government. When this is the context in which Israeli actions are then examined, it begs the conclusion that Israel used excessive force by employing its superior air power and ground forces against a feeble enemy for questionable reasons.

The actual situation, however, is quite different. The Gaza Strip is not under Israeli physical control. Hamas has full governmental powers there, is completely embedded in the area,²⁶ and has a strong military wing whose main mission is to fight Israel.²⁷ Hamas has never participated in any peace negotiations, and calls for the total destruction of the State of Israel.²⁸

Furthermore, the recurring rocket and mortar attacks against Israel are more than just a disturbance – they make life unbearable in large parts of Israel. In order to comprehend the seriousness of the threat one need only

²⁴ *Id.* at 58.

²⁵ This appears in the GOI Report which was published before the COI Report. *See* Introduction, paragraph 6 of the GOI Report, at 2. *See also* GOI Report at 79-80.

²⁶ The relatively long time Hamas has been in control of the Gaza Strip has enabled it to embed its military operations within and under the urban terrain. – *Id.* at 255.

²⁷ *Id.* at 55.

²⁸ *See id.* at 36-42 and the sources referred to therein.

attempt to imagine a city or town in Europe or America facing daily rocket attacks that force its residents to run to shelters every few hours – or even every few minutes in certain places. A ground maneuver into the Gaza Strip is a difficult and complex move, which entails endangering both military forces and local civilians in the areas of the maneuver. Admittedly, Israel has superior aerial capabilities, but these do not offer a full-proof response to rocket attacks and sub-terrain threats, as the ongoing attacks against Israel throughout the 52 days of the Operation proved. According to official Israeli statements, the Operation was "focused on neutralizing the ongoing and imminent threat of attacks, in order to protect its civilian population".²⁹ The fact that Israel continually offered a mutual unconditional cessation of hostilities serves to support this reasoning and the COI does not argue differently.

The manner in which the COI presents the general context of the conflict is indicative of a more widespread feature of the Report,³⁰ which presents the facts and the legal analysis regarding Israel's use of force in a manner detached from the relevant background. The narrative chosen by the COI to describe the general context of the operation serves to weaken the legal validity and legitimacy of Israel's decision to use force in the first place.³¹ It also has an impact on the subsequent analysis of Israel's actions throughout the Operation. From a legal perspective, *jus in bello* and *jus ad bellum* are separate fields, and the question of which of the parties to the conflict is "just" in its actions is distinct from the examination of the legality of actual use of force by each side during the conflict.³² Nevertheless, from a moral perspective, there is a natural tendency to be more critical of the actions of the party to the conflict that is perceived to be in the wrong. Presenting the context in a way that lays the bulk of the blame on Israel leads to a more critical evaluation of Israeli conduct, as will be shown below.

III. PRINCIPAL FINDINGS OF THE REPORT

The main chapter of the Report is titled "Principal Findings and Conclusions." This chapter begins with a description and analysis of rocket and mortar attacks by Hamas (paras 59-109). This is followed by a much

²⁹ *Id.* at 35. *See also id.* at 15.

³⁰ As will be discussed later.

³¹ *See* in this regard the analysis of D. Reisner, "Reflections on the UN Commission of Inquiry Gaza Report, Part I: The Historical Narrative" *Lawfare* (August 20, 2015) available at www.lawfareblog.com/reflections-un-commission-inquiry-gaza-report-part-i-historical-narrative.

³² Preamble to Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977, 1125 *U.N.T.S.* 3 (hereafter, "Additional Protocol I").

more elaborate examination of Israel's actions (paras 110-465). The Report then returns to examining the conduct of Palestinian armed groups and its impact on the population in the Gaza Strip (paras 466-502). Apart from the notable disparity in the level of discussion dedicated to each of the parties' conduct (356 paragraphs on Israel vis-à-vis 87 paragraphs on Hamas), the main problem with this structure is that Hamas' *modus operandi* of conducting its operations from within or near densely populated areas appears only after the detailed analysis of the Israeli attacks on populated areas, which led to civilian casualties and destruction. As a result, the relevant context of the fighting, which is a central factor in understanding the cause of these unfortunate results, is missing from the assessment of the Israeli use of force. This is significant to the analysis in the Report, as will later be further demonstrated.

The following section examines the way in which the Report analyzes the conduct of Hamas (and other armed groups). In contrast to the Report, this section will discuss in sequence both the analysis of the attacks carried out against Israel as well as the practice of operating from within civilian localities. The following section will then examine the COI's analysis of Israel's conduct during the Operation, including both its aerial attacks and its ground operations.

IV. PALESTINIAN CONDUCT – HAMAS AND OTHER ARMED GROUPS

An interesting and recurring feature of the analysis throughout the Report is that it refrains from referring to Hamas as the *de facto* government of the Gaza Strip (although it does make some reference to the 'authorities in Gaza').³³ At the same time, the Report does not make a distinction between Hamas and other armed groups operating in the Gaza Strip. This is evident in the opening paragraph of the chapter analyzing the attacks against Israel, which begins with the following sentence: 'Up to ten organized armed groups, often linked to political movements of various ideologies, were active in Gaza in the summer of 2014',³⁴ and then refers to 'the two largest and best-equipped groups, the Izz Al Din Al Qassam Brigades and Al Quds Brigades'.³⁵ This trend continues through the entire analysis in this chapter of the Report.

The reference to the forces in the Gaza Strip as a cluster of "organized armed groups" is misleading. As already noted, Hamas is a *de facto*

³³ See, e.g., Report at 481, 482 and 683.

³⁴ *Id.* at 59.

³⁵ *Id.* at 60.

government, which controls and runs all aspects of life in the Gaza Strip and has ministries, an education system, a tax establishment, a judiciary, a police force and all other governmental departments.³⁶ It also has a structured and organized military wing, which is called the Izz al-Din al-Qassam Brigades, comprised of around 16,000 militants³⁷ who are well trained and equipped. However, the Report does not convey to the reader that it is Hamas in its capacity as the governing authority that directs the actions of these militants. Instead, one receives the impression that the military wing is an "armed group" that is separate and distinct from the Hamas government when in practice, the Izz al-Din al-Qassam Brigades are the armed forces of the *de-facto* government in control of the Gaza Strip.

In addition to this military force, there are indeed several other organized armed groups operating in the Gaza Strip, including the Al-Quds Brigades which belong to the Palestinian Islamic Jihad. In many instances these forces cooperate with Hamas, especially in times of high intensity operations such as the one examined in the Report. This is evident from available open-source material and statements made by Hamas and other factions.³⁸ Yet the Report does not examine at all the implications of such cooperation on Hamas' responsibility for the actions of other armed groups operating in the Gaza Strip.

By ignoring the governmental nature of Hamas, equating Hamas's military forces with those of other armed groups operating in the Gaza Strip and refraining from examining Hamas's prominent role in the management of the conflict on the Palestinian side, the Report makes it easier to avoid making firm demands on Hamas to fulfill its legal obligations towards Israeli civilians and towards the Palestinian population.³⁹ This leads to a general tendency in the Report to analyze Hamas' actions more leniently, without placing full responsibility on the organization for its actions.

³⁶ For a description of Hamas see Z. Laub, "Hamas' Council on Foreign Relations" (August 1, 2014) available at www.cfr.org/israel/hamas/p8968. See also B. Berti, "Non-State Actors as Providers of Governance: The Hamas Government in Gaza between Effective Sovereignty, Centralized Authority, and Resistance", *The Middle East Journal* (Winter 2015).

³⁷ GOI Report at 55.

³⁸ A. Hadi, "Gaza: An Exclusive Look into the Roles of al-Qassam Brigades and Islamic Jihad" *Al-Akhbar* (July 14, 2014) available at <http://english.al-akhbar.com/node/20730>.

³⁹ This is evident when examining the conclusions at the end of the Report.

A. Attacks against Israeli Civilians

According to the Report, Hamas and other armed groups fired over 4,500 rockets and mortars towards Israel throughout the Operation.⁴⁰ Israel claims that approximately 4,000 of those were directed at Israeli cities, towns and residential communities (the rest were directed at IDF forces inside the Gaza Strip or landed short inside the Gaza Strip after being fired towards Israel).⁴¹ The Report stresses that ‘the authorities in Gaza’ assured the Commission that Palestinian armed groups did not target civilians and were attempting to direct their rockets at military targets in Israel.⁴²

The Report mentions that Hamas representatives openly stated in official statements on more than one occasion that they were aiming at “Israeli towns and settlements”.⁴³ Despite this fact, the Report avoids expressly concluding that Hamas had a policy of intentionally directing attacks towards civilians, and continuously makes an effort to give Hamas the benefit of the doubt, even when faced with clear-cut “admissions” of wrongdoing.⁴⁴

In this vein, the Report makes an effort to identify potential Israeli military targets in the cases it examines, even when these seem rather far-fetched. For example, in one case the Report notes that public sources indicated that the Israeli Chief of Staff was visiting the region on the day of a mortar attack, subsequently suggesting the possibility that Hamas was aiming its attack

⁴⁰ Report at 66. The Report notes that UN figures are even higher – 4,881 rockets and 1,753 mortars.

⁴¹ *Id.* at 84.

⁴² *Id.* at 84.

⁴³ *Id.* at 90, 98. The term “settlements” used by Hamas refers to locations inside the State of Israel.

⁴⁴ See the criticism of Wittes and Schwartz in this regard: “There are two major oddities, however, in the commission’s discussion of this conduct. The first is the degree to which the commission gives the benefit of the doubt to armed groups that made no secret about their intentional targeting of civilians. On page 18, for example, the commission introduces the subject of rocket attacks into Israel by describing Hamas’s military wing as focused chiefly on attacking military targets. ... It doesn’t take too many pages before the reality catches up with the wishful thinking. On page 21, for example, the commission notes a Qassam Brigades statement that it had launched rockets at the city of Dimona. Three pages later, it notes the announcement that the group had mortared Kibbutz Nirim and other communities. ... Yet the commission keeps coming back to uncertainty as to Hamas’s targeting aims and practices, despite at the same time repeatedly citing statements by Hamas that they were targeting Israeli cities and civilians (see pp. 26-27, in particular).” B. Wittes & Y. Schwartz, “What to Make of the UN’s Special Commission Report on Gaza?” *Lawfare* (2015) (hereafter, “Wittes & Schwartz”) available at www.lawfareblog.com/what-make-uns-special-commission-report-gaza.

specifically against him.⁴⁵ This conjecture lacks any concrete analysis of whether the mortar was fired at the relevant time or at a location connected to the Chief of Staff's visit. It also disregards the continuous attacks carried out against Israeli civilian communities ("kibbutzes") even when there was no such pretext.⁴⁶

Another example is the reference in the Report to the attacks against the Erez Crossing. The Report notes that there were several attacks against this location. The Report stresses that there is a small permanent military base adjacent to the Erez Crossing and suggests that the attacks were aimed at this military base.⁴⁷ Interestingly, the Report fails to mention that the Erez Crossing was the main exit and entry point between the Gaza Strip and Israel, was the transfer point for wounded Gazans, medical personnel, journalists, *etc.*⁴⁸

Thus, for example, on August 24th a large rocket and mortar barrage fired at the crossing point injured four Israeli-Arab taxi drivers who were at the crossing to pick up wounded Gazans and bring them into Israel for medical treatment.⁴⁹ The Report notes that an attack took place against the Erez Crossing on this date,⁵⁰ but fails to mention the specific circumstances of the attack and in fact refers to it as an example of an attack against a military target. How the COI reached this conclusion is unclear, as the incident could equally serve as an example of an attack targeting civilians and intended to prevent Israel from providing humanitarian assistance to Gaza residents.⁵¹

Beyond the fact that Hamas made no effort to hide its intention to target civilians, there is no doubt that the weapons it employed, especially the rockets, were unguided and inaccurate. The COI acknowledges that "[t]he majority of projectiles fired by Palestinian armed groups consisted of rockets that at best were equipped with only rudimentary guidance systems and in

⁴⁵ Report at 78.

⁴⁶ "Kibbutz Nahal Oz tells Residents to Stay Away", *The Jerusalem Post* (September 8, 2014) available at www.jpost.com/Breaking-News/Kibbutz-Nahal-Oz-tells-residents-to-stay-away-370572.

⁴⁷ Report at 73.

⁴⁸ GOI Report at 379-384. A field hospital dedicated to treating wounded Gaza Strip residents was also established at the Crossing.

⁴⁹ L. Berman & M. Newman, "Waiting to Transport Sick, Drivers at Gaza Crossing come under Attack", *The Times of Israel* (August 24, 2014) available at www.timesofisrael.com/waiting-to-transport-sick-drivers-at-gaza-crossing-come-under-attack/.

⁵⁰ See Report, *supra* note 6 (p.22) at 73.

⁵¹ See additional examples in GOI Report at 396-397.

the vast majority of cases had none at all.⁵² Accordingly, the Report states that '[s]uch rockets cannot be directed at a specific military objective and therefore strikes employing these weapons constitute indiscriminate attacks in violation of the customary rule reflected in article 51(4) of Additional Protocol I.'⁵³ Based on this conclusion, it is unclear why the COI accepts (even theoretically) the claim that Hamas attempted to attack military targets, when it obviously lacked such capability.⁵⁴

Generally speaking, the COI analysis of the attacks against Israel is brief and offers very few descriptions or details. The Report's account of rocket attacks against Israel is limited to two paragraphs. The first deals with the rocket attack of July 19th, which killed Ouda Al Waj and injured three others.⁵⁵ This is the one case that the Report elaborates on, yet even here the focus is not on the responsibility of Hamas or other armed groups for the fatal result. Rather, the Report focuses on the fact that the victims lived in a Bedouin village which was not protected by Israel's air defense system Iron Dome and that presumably the family did not receive compensation from Israel following the attack.

The COI's criticism in this context is therefore not directed at Hamas for firing the lethal rocket, but instead at Israel and its domestic policy regarding the Bedouin population. The inclusion of such criticism, even if warranted, is misplaced.⁵⁶ It serves to once more shift responsibility from Hamas to Israel, even for Israeli casualties killed by Hamas's (or other armed groups') rocket fire.

The second paragraph dedicated to rocket attacks targeting Israel⁵⁷ mentions very briefly several other cases in which Israeli civilians were

⁵² Report at 97.

⁵³ *Id.* at 97.

⁵⁴ It is similarly unclear why the COI sees it relevant to point out in para. 88 that the IDF headquarters are located in the midst of a densely populated area. IDF headquarters are located in Tel Aviv and Hamas had no way of directing an attack towards such a target – which means that the location of the HQ could not serve as a legal basis to justify a rocket attack against Tel Aviv. See D. Reisner, "Reflections on the UN Commission of Inquiry Gaza Report, Part II: The Target Audience", *Lawfare* (August 31, 2015) available at www.lawfareblog.com/reflections-un-commission-inquiry-gaza-report-part-ii-target-audience.

⁵⁵ Report at 69.

⁵⁶ And indeed the issue of the Bedouin communities is addressed in para. 567. It should also be noted that the family members were recognized as victims of hostilities and compensated accordingly for the death and bodily injuries, as well as for damage to their home and vehicles. Information received, upon request of the author, from the Israel Ministry of Defense.

⁵⁷ Report at 70.

injured. Beyond this, the Report refers readers to the report published by the State of Israel on the factual and legal aspects of the operation⁵⁸ without any further detail or description of the incidents included in that report. The Report makes no mention of attempts by the COI to investigate these incidents or to demand that Hamas address allegations that these incidents constituted deliberate attacks towards Israeli civilians.

This is very different from the way in which the Report deals with allegations regarding attacks carried out by Israel. These cases are analyzed with great detail and where doubt exists as to the aim of the attack, the burden of proof is placed by the COI on Israel to prove the precise military objective of each attack.⁵⁹

The very limited reference to the attacks carried out against Israeli civilians in this part of the Report impacts the level of responsibility the Report ascribes to Hamas. The reader is left with a feeling that the rockets were nothing more than a nuisance and therefore Hamas's actions should not be viewed too seriously. However, as already mentioned, dozens of rockets being fired on a daily basis towards civilians is not a mere inconvenience – it is an unlivable situation and one which directly causes death and injury, as well as psychological and economic harm. When the Report blurs this reality it affects both the seriousness with which Hamas's actions are viewed as well as the appreciation of the Israeli response.

As one commentator correctly states:

This disparity also reflects an endemic flaw in the methodology of the analysis used throughout the Report: the focus on effects as the touchstone of LOAC compliance. The analysis of Hamas's violations focuses primarily on the harmful effects produced by their illegal targeting, and in so doing minimizes the widespread evidence of their effort to produce unlawful effects – efforts that were, as the result of Israeli countermeasures, largely unsuccessful.⁶⁰

Minimizing the seriousness of Hamas's attacks against Israel is further demonstrated by the fact that the legal analysis in this chapter begins with an

⁵⁸ *Id.* at 70. The referral is to the GOI report, as defined in note 18 *supra*.

⁵⁹ See analysis below.

⁶⁰ G. Corn, "Analysis of the U.N. Report on the 2014 Gaza Conflict: The Distorting Effects of Flawed Foundations", *Jinsa*, at 6 (June 2015) available at www.jinsa.org/files/AnalysisOfTheU.N.Report_ProfCorn.pdf.

examination of the issue of warnings and not with the more significant breach of the basic duty under the principle of distinction not to direct attacks against civilians. Once again the context and the tone of the Report demonstrate that the COI went out of its way to be very lenient in its criticism of Hamas's activities and practice.

The Report finds that in a few instances 'it appears that Palestinian armed groups attempted to warn civilians in Israel of attacks that might affect them'.⁶¹ One case mentioned is that of an announcement made by Hamas in both Arabic and Hebrew that it would carry out an attack on Tel Aviv at a certain time.⁶² A second example refers to a warning to airlines not to fly to Ben Gurion International Airport 'as it considered the airport to include a military base'.⁶³

Here the COI gets both the facts and the law wrong. A warning is a precautionary measure aimed to minimize harm to civilians from an attack against a legitimate military objective.⁶⁴ To "warn" civilians that they are about to be attacked intentionally or indiscriminately at a certain hour is not a warning, but rather a threat aimed at causing terror among the population. As such, it amounts to an unlawful act of "terrorizing the civilian population".⁶⁵

The warning to airlines not to fly to Ben Gurion Airport is also a clear threat intended to stop foreign airliners from flying to and from Israel.⁶⁶ The reference to Hamas aiming at a military base is odd at best, since Hamas itself admits⁶⁷ that it does not have the capability to carry out precise attacks on military targets, especially those that are so distant from the Gaza Strip. Giving advance notice of an intention to carry out an attack which is inherently indiscriminate is not a warning but, again, a forbidden threat.

⁶¹ Report at 92.

⁶² *Id.* at 92.

⁶³ *Ibid.*

⁶⁴ Article 57(2)(c) of Additional Protocol I, *supra* note 32; J. F. Quéguiner, "Precautions under the Law Governing the Conduct of Hostilities", 88.864 *Int'l Rev. Red Cross* 793, 795 (2006).

⁶⁵ Article 51(2) of Additional Protocol I, *supra* note 32; P. Sharvit Baruch & N. Neuman, "Warning Civilians Prior to Attack under International Law: Theory and Practice", 87 *Int'l L. Stud. Ser. US Naval War Col* 359, 375-376 (2011).

⁶⁶ Such flights were indeed suspended after a rocket fired from Gaza struck about a mile from the airport's runways – M. Hunter, K. Hetter & C. J. Carter, "US, European Airlines Suspend Flights to Israel" *CNN* (July 23, 2014) available at <http://edition.cnn.com/2014/07/22/travel/israel-flights-suspended/>.

⁶⁷ Report at 97.

A similar trend of both trivializing the threat that Hamas poses to Israel and of trying to find a legitimizing rationale for Hamas's actions can be seen in the Report's analysis on the issue of cross-border tunnels. The Report quotes an Israeli mother who explains the terrorizing feeling of having someone emerge out of the ground and kidnap your children.⁶⁸ However, the focus of the Report's short analysis is on the fact that these tunnels could have been constructed by Hamas to be used only against military targets,⁶⁹ belittling the potential threat to civilians.⁷⁰

B. Operating From Within Civilian Locations

As already noted, the COI chose to separate the analysis of the military use of civilian infrastructure by Hamas and other armed groups from the discussion of their attacks on Israel, and discussed the former only after analyzing the IDF's actions.⁷¹ This sequence hinders the ability to accurately assess the actions of both parties to the conflict. In order to provide a more structured analysis, the Report's analysis of this aspect of the conduct of Hamas and other armed groups will now be presented.

The Report begins its analysis with an explanation of the difficulty in receiving information about the use of civilian homes and sites for military purposes from the Palestinian residents themselves due to fear of reprisals by armed groups.⁷² Despite this difficulty and despite the reluctance of the COI to rely on Israeli sources and allegations (which were plentiful in this regard), it nevertheless managed to find enough objective support from foreign journalists' accounts, UN Board of Inquiry findings, and from statements made by Hamas representatives themselves that "Palestinian armed groups appear to have conducted military operations within or in close proximity to sites benefiting from special protection under international humanitarian law, such as hospitals, shelters and places dedicated to religion and education."⁷³

⁶⁸ *Id.* at 104.

⁶⁹ *Id.* at 108.

⁷⁰ The *Wall Street Journal* described an attack tunnel inspected by one of its reporters as, 'designed for launching murder and kidnapping raids. The 3-mile-long tunnel was reinforced with concrete, lined with telephone wires, and included cabins unnecessary for infiltration operations but useful for holding hostages'. J. T. Conway, "The Moral Chasm Between Israel and Hamas", *The Wall Street Journal* (July 24, 2014) available at www.wsj.com/articles/james-t-conway-the-moral-chasm-between-israel-and-hamas-1406243128. See also GOI Report at 26.

⁷¹ Report at 466, 124.

⁷² *Id.* at 467.

⁷³ *Id.* at 475.

The COI also acknowledged that:

Given the number of cases in which Palestinian armed groups are alleged to have carried out military operations within or in the immediate vicinity of civilian objects and specifically protected objects, it does not appear that this behaviour was simply a consequence of the normal course of military operations.⁷⁴

It concludes:

if it is confirmed that in using the aforementioned locations to conduct military operations, armed groups did so with the intent to use the presence of civilians or persons hors de combat in locations such as shelters or hospitals to prevent their military assets from being attacked, this would constitute a violation of the customary law prohibition to use human shields ...⁷⁵

The Report also mentions that ‘different representatives of the authorities in Gaza made several public declarations requesting Gaza residents not to heed the warnings issued by the IDF instructing residents of different neighbourhoods and towns to evacuate...’⁷⁶ The practice of operating from within civilian areas also appears quite clearly in a Manual of Hamas captured by Israel and referred to in the Report.⁷⁷ Since this manual seems a valuable source of information with regard to Hamas conduct it is unclear why the COI gives it almost no weight in its analysis.⁷⁸

Despite these serious findings, the COI carries out a very limited analysis of this systemic practice of Hamas and other armed groups to intentionally operate from within populated areas so as to exploit the presence of civilian and civilian objects to its benefit. One notable weakness in the Report is the lack of any serious attempt to investigate and analyze specific incidents

⁷⁴ *Id.* at 478.

⁷⁵ *Id.* at 479.

⁷⁶ *Id.* at 482.

⁷⁷ *Id.* at 472: “the commission notes the IDF asserts it found an Al-Qassam Brigades manual on urban warfare, which is said to explain the advantage of conducting military operations in populated areas and allegedly provides instructions on how to hide weapons in buildings.” For details about this Manual *see* GOI Report at 125-126, 166, 258.

⁷⁸ The COI argues that it did not have access to the original copy and could not affirm its veracity. This claim and its wording “the IDF asserts” might be construed as an insinuation that the IDF might be fabricating documents – a very serious allegation against a democratic state. Report at 472.

which raise concerns regarding the exploitation of civilian infrastructure for military purposes, even when such concerns are based on reliable sources. An example is the allegation made regarding Hamas's use of ambulances for military purposes. The Report mentions this allegation in a single sentence, and proceeds to fault Israel with providing just one specific allegation in its documentation, which 'lacked a date or location of the incident'.⁷⁹ This is despite the fact that the IDF website provided video evidence of the incident (and actually included a date).⁸⁰

The Report constantly refers to Israeli "allegations", which the COI finds difficult to verify. The COI does not seem to regard the Israeli "allegations" as credible, even though it admits that they were made "in some cases in great detail".⁸¹ It simply "regrets that it was unable to verify these individual allegations" due to Israel's denying it access to the Gaza Strip and the Palestinian witnesses' fear of reprisals by armed groups and local authorities.⁸² The Report does not mention any efforts made by the COI to verify the "allegations" despite these obstacles. Furthermore, the COI does not place upon Hamas the burden of proving the allegations wrong. This is despite abundant evidence strongly suggesting that this mode of operation was both intentional and widespread. This stands in stark contrast to the manner in which the COI examines Israeli conduct placing the burden on Israel to disprove allegations, despite the fact that they stand in contradiction to official statements and publicized rules of conduct.⁸³

A second weakness of the Report, in this regard, is that it neglects to address the principle of distinction when analyzing the practice employed by Hamas and other armed groups of operating from civilian areas in civilian clothes with an apparent intention to blend into the civilian population and to use it as a human shield. The principle of distinction requires belligerents to distinguish themselves from civilians and civilian property. The violation of the principle of distinction in this way impedes the fulfillment of the main aim of international humanitarian law ("IHL")⁸⁴ to enhance the protection of civilians in armed conflict situations. As Geoffrey Corn notes:

⁷⁹ *Id.* at 477.

⁸⁰ See IDF Blog, "Hamas Uses Hospitals and Ambulances for Military Purposes" (July 28, 2014) available at <https://www.idfblog.com/blog/2014/07/28/hamas-uses-hospitals-ambulances-military-purposes/>

⁸¹ Report at 467.

⁸² *Ibid.*

⁸³ See analysis below.

⁸⁴ Also known as the Law of Armed Conflict (LOAC).

It is ... self-evident that Hamas violated this aspect of distinction: their fighters not only did not distinguish themselves from the civilian population, they deliberately exploited the civilian population, civilian property, and the uncertainty created by cloaking themselves in the appearance of civilians to gain tactical advantage against an enemy committed to compliance with the first aspect of the distinction obligation.

The routine violation of this fundamental LOAC [laws of armed conflict] requirement produces highly negative consequences, most notably the dilution of the LOAC's protective effect for actual civilians and for civilian property that has not been transformed by the enemy into a lawful military objective.⁸⁵

The COI's interpretation of the obligation under IHL to avoid locating military objectives within or near densely populated areas is a watered-down one. In its view, this obligation is "not absolute" and "even if there are areas that are not residential, Gaza's small size and its population density make it particularly difficult for armed groups always to comply with these requirements".⁸⁶ Interestingly, it quotes the author of this article in support of its position.⁸⁷ While it is understandable that not all military activity can be conducted exclusively on a remote and distant battlefield, especially in a densely populated area such as the Gaza Strip, this can in no way justify or excuse embedding military infrastructure, weapons and rocket launchers into sensitive protected sites or inside residential buildings, particularly when the latter are occupied by civilian residents. The quote relied on by the COI is in this same vein. Therefore, the COI's reliance on the statement of this author when absolving Hamas from responsibility for putting civilians and civilian structures in harm's way is misguided.

The lenient treatment by the COI of this practice of Hamas and other armed groups is very unfortunate. The use as shields of civilians and sensitive sites, such as hospitals, clinics, schools, mosques and UN facilities, is one of the most problematic practices employed not only by Hamas, but by similar armed organizations. The aim of these tactics is to force the other side to the conflict – when it is a democratic State that has fundamental respect for the law and to whom public image is of significance – to make the difficult choice between foregoing an attack against a legitimate military

⁸⁵ See Corn, *supra* note 60 at 7.

⁸⁶ Report at 473.

⁸⁷ *Id.* at 474.

target such as a rocket launcher or military headquarters in order to avoid civilian casualties, or to execute the attack and face public accusations and diplomatic pressure over the loss of civilian lives. This tactic often employed by non-State armed groups is one of the deadliest for civilians who find themselves in war zones.⁸⁸

This problem is reflected further in that the COI does not make any reference to this practice in its conclusions and recommendations.⁸⁹ Rather than using the Report as a platform to make emphatically clear that the tactic is unacceptable and illegal, and will not be tolerated by the international community, the COI squanders the opportunity. Moreover, the COI's treatment of the issue (or rather its lack thereof) actually strengthens the practice's appeal for non-State armed groups. On the one hand, given the little attention devoted to the subject by the COI, employing the practice does not appear to exact a toll on non-State actors. On the other hand, this systemic practice is not taken into account as a relevant circumstance in examining the practice of the other party to the conflict, typically a State, leading to accusations that harm caused to civilians was intentional, indiscriminate or disproportionate. This makes this *modus operandi* a winning card, encouraging its continued and increased use by others.

A third weakness in the analysis of the COI is the structuring of the Report so that the analysis of Hamas' exploitation of civilians and civilian infrastructure arrives towards the end of the Report, following the analysis of the Israeli mode of operation. While this flaw in the structure of the Report has already been addressed elsewhere, it is nonetheless worthwhile to note the following pointed observation made by Benjamin Wittes and Jonathan Swartz:

As the commission notes, "the obligation to avoid to the maximum extent possible locating military objectives within densely populated areas was not always complied with." This sentence appears on page 127, and that actually says a lot. The conduct of Hamas does not in any way shape the report's evaluation of Israeli targeting or alter the way the authors look at Israeli conduct. When the commission describes a residence as 'prima facie' not a valid military target, which it does repeatedly in assuming that attacks on houses that kill civilians are

⁸⁸ For an analysis of the Lawfare strategy of Hamas see C. J. Dunlap, Jr., "Guest Post: Has Hamas Overplayed Its Lawfare Strategy?" *Just Security* (August 5, 2014) available at www.justsecurity.org/13781/charles-dunlap-lawfare-hamas-gaza/.

⁸⁹ Report at 673, 683, which refer to the "Palestinian armed groups" are silent on this topic.

presumptively failures of discrimination, that is hard to justify in the context of a conflict in which — as the commission finally admits — Hamas often used civilian protected objects for military purposes and “it does not appear that this behavior was simply a consequence of the normal course of military operations.

In a more rigorous report, Hamas’s tactics would be the fundamental lens through which Israeli conduct got analyzed. When one side systematically violates the rules designed to protect civilians, after all, and a lot of civilians then get killed, those systematic violations have to be central to the inquiry into the reasons for those civilian deaths. In this report, those systematic violations are an afterthought. And somewhat shockingly—and very tellingly—they are also entirely absent from the report’s ‘conclusions and recommendations.’⁹⁰

Hence, the failure to seriously address Hamas’s *modus operandi* from both a factual and legal perspective; the absence of this issue from the Report’s final conclusions and recommendations; and the detached review of Hamas’s actions from IDF actions – all of these result in a relatively lax attitude in the Report towards serious violations of IHL perpetrated by Hamas and other armed groups. This approach carries with it the potential to erode rather than strengthen the protections IHL wishes to provide to civilians. It also stands in stark contrast to the COI’s analysis of Israel’s actions, which will be discussed next.

V. ISRAEL

The COI’s analysis of Israel’s actions during the Operation is very different in comparison to the analysis of Hamas actions. This disparity can perhaps be attributed to several factors: Israel is a democratic State, while Hamas is a recognized terror organization that has no standing in the international community; Israel has a strong and sophisticated military and is much stronger than Hamas and other organized armed groups operating in the Gaza Strip; the number of victims in the Gaza Strip was much higher than the number of Israeli casualties; the destruction in the Gaza Strip was immense, while in Israel the physical harm was limited. These factors are common to many contemporary conflicts between Western States and non-

⁹⁰ See Wittes Shwartz, *supra* note 44.

State actors. However, a professional body of inquiry must not let these factors cloud its analysis or allow it to jump to conclusions.

A. Israeli Air Strikes

1) Fulfilling the Principle of Distinction?

Israel has emphasized time and again that its official policy, operational plans and standing orders are cognizant of the principle of distinction and forbid intentional attacks against civilian objects that are not military objectives.⁹¹ However, rather than taking the Israeli official position as the starting point for its analysis and examining whether there are indications to the contrary, the COI instead analyzes Israel's actions in reverse. It relies on the large scale harm to civilians and civilian infrastructure, coupled with accounts by Palestinian residents that there was no military activity from these civilian areas to assume that the object of an attack was civilian – an assumption that it is then up to Israel to disprove.

The COI notes that Israel carried out more than 6,000 airstrikes in the Gaza Strip during the Operation.⁹² Of these 6,000, the Commission examines in detail only 15 strikes on residential buildings. In six of these cases the Report states that there is little or no information available as to why the residential buildings were considered military objectives. Regarding the other nine incidents the COI suggests possible military objectives, mostly individuals who were or could have been present in the buildings that were struck.⁹³

The COI concludes that “[i]n the absence of precise information about the possible military use of these premises, the commission is unable to make a final assessment regarding the principle of distinction.”⁹⁴ This would seem a sound conclusion, but the COI adds the following:

However, the massive scale of destruction and the number of homes and civilian buildings attacked raise concerns that Israel’s interpretation of what constitutes a “military objective” is broader than the definition provided by international humanitarian law. Should attacks have been directed against buildings that did not

⁹¹ GOI Report at 231-232, 15.

⁹² Report at 111.

⁹³ *Id.* at 219-220.

⁹⁴ *Id.* at 223.

constitute a military objective this may amount to a war crime.⁹⁵

Thus, while conceding that it does not have any indication that targets were attacked without a sound legal basis, the Report nevertheless suggests that the scale of destruction alone indicates that Israel carried out unlawful attacks against civilian objects. As explained below, this is an erroneous legal analysis.

Before addressing the analysis in the Report, it is worthwhile to briefly recall the relevant legal framework in this regard. Under the principle of distinction, an attack is lawful only if aimed towards a combatant, a civilian who is directly participating in hostilities or towards a military objective.⁹⁶

Defining who is considered a combatant in conflicts involving non-State actors like Hamas and other organized armed groups is more complex than when facing a State's military force comprised of uniformed soldiers. In addition, with regard to civilians, the question is what kind of activity can be considered 'taking direct part in hostilities'. The COI refers to the issue and notes that 'under international humanitarian law, a member of an armed group has to have a continuous combat function to constitute a legitimate military target.'⁹⁷ This pronouncement of the law is based on the ICRC Interpretive Guidance.⁹⁸ The COI neglects to mention however (even in a footnote) that this formulation of the ICRC has not been accepted by Israel, or by other militaries and many leading scholars.⁹⁹ Therefore, the legal

⁹⁵ *Ibid.*

⁹⁶ Article 48, 51(2), 51(3), 52(2) of Additional Protocol I, *supra* note 32; ICRC, 'Rule 1: The Principle of Distinction between Civilians and Combatants' Customary IHL Database, available at www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1_rule1 March 3, 2016.

⁹⁷ Report at 220.

⁹⁸ ICRC, "Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law", *supra* note 112 at 71 (2009).

⁹⁹ ICRC, "Rule 6: Civilians' Loss of Protection from Attack' Customary IHL Database, available at www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1_rule6#Fn_32_14. That this is the Israeli position is clearly stated in the GOI Report in para. 264 and note 422. The COI does not refer to this position in the Report. *See also* analysis of Corn, *supra* note 48 at 11, and M. N. Schmitt & J. J. Merriam, "The Tyranny of Context: Israeli Targeting Practices in Legal Perspective", *U. Pa. J. Int'l L.*, 110-115 (2015). For the US position, *see* U.S. Department of Defense, "US Law of War Manual" at 5.8.3, 5.9.2.1, 5.9.3 (2015) available at www.defense.gov/Portals/1/Documents/pubs/Law-of-War-Manual-June-2015.pdf. For the position that the ICRC guidance is controversial, on this and on other issues, *see, e.g.*, a concentration of critical articles in Vol. 42 of the New York University Journal of International Law and Politics, (2009-2010) available at

analysis that the COI conducts is based upon a legal framework that does not reflect the customary legal rule that applies to Israel or to most other militaries involved in fighting organized armed groups.

Beyond the legal challenge of determining who is a civilian and who is a combatant, there are also practical challenges. Making this determination is very difficult when those fighting on behalf of Hamas and other armed groups do not wear uniforms or other insignia to distinguish themselves from civilians, and when civilians are known to often participate in hostilities.¹⁰⁰ Under these circumstances, it is difficult to determine whether a casualty was a protected civilian who was an illegal target or a combatant or DPH, who are each a lawful target for attack.

This challenge is present at the time the order to attack is given, when decisions have to be made in split seconds with limited information;¹⁰¹ and even more so, when attempting to categorize casualties after the fact, given that all are plain-clothed, seemingly civilian, casualties. The COI adopts the position that, unless Israel positively confirms that a person killed or injured was a combatant or DPH, he or she is presumed to be a civilian.¹⁰² In doing so, it disregards the practical problems this position creates. To prove post-

<http://heinonline.org/HOL/LandingPage?handle=hein.journals/nyuilp42&div=&id=643&page>>.

¹⁰⁰ See, e.g., the report of Patrick Martin: “The presence of militant fighters in Shejaia became clear Sunday afternoon when, under the cover of a humanitarian truce intended to allow both sides to remove the dead and wounded, several armed Palestinians scurried from the scene. Some bore their weapons openly, slung over their shoulder, but at least two, disguised as women, were seen walking off with weapons partly concealed under their robes. Another had his weapon wrapped in a baby blanket and held on his chest as if it were an infant.” P. Martin, “Death Tolls Mount as Israel Expands Offensive, Hamas Resistance Hardens” *The Globe and Mail* (July 20, 2014) available at www.theglobeandmail.com/news/world/thousands-flee-gaza-homes-as-israel-expands-ground-assault/article19683732/>.

¹⁰¹ The determination of civilian status by the soldiers must be done based on the information available to them at the time of making the decision. See UK Ministry of Defense, ‘Joint Service Manual of the Law of Armed Conflict (2004 ed., 2011): “In the practical application of the principle of civilian immunity and the rule of doubt, (a) commanders and others responsible for planning, deciding upon, or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is available to them at the relevant time, (b) it is only in cases of substantial doubt, after this assessment about the status of the individual in question, that the latter should be given the benefit of the doubt and treated as a civilian, and (c) the rule of doubt does not override the commander’s duty to protect the safety of troops under his command or to preserve the military situation.”, available at www.gov.uk/government/uploads/system/uploads/attachment_data/file/27874/JSP38320_04Edition.pdf>.

¹⁰² Report at 228.

conflict that a person was indeed a lawful target may entail revealing sensitive intelligence, a recurring problem that will be discussed below. Moreover, when the targeting is based on what soldiers witnessed prior to the attack, the post-conflict analysis becomes even more difficult, since usually it is impossible to prove after the fact that a person was indeed involved in the fighting (for example, was detonating an IED or a booby-trapped structure before being attacked).

With respect to the targeting of objects, IHL defines a "military objective" as an object that by its nature, location, purpose or use makes an effective contribution to military action and whose destruction offers a definite military advantage.¹⁰³ A civilian object that meets this definition becomes a military objective, which may then be lawfully targeted. The COI references this definition of a military objective.¹⁰⁴ However, it fails to apply it to the circumstances of the conflict.

This failure is evident from the emphasis placed by the COI on the civilian nature of the residential buildings that were attacked, without any mention of the potential military use of these buildings. In this context, it is critical to take into account the fact that almost all of the military activity of Hamas was conducted from or in the vicinity of residential buildings and civilian structures, including homes, schools, mosques, hospitals and clinics, and that there is an abundant amount of evidence to this effect.¹⁰⁵ This is acknowledged by the COI, as explained above.¹⁰⁶

Since more than 4,500 rockets and mortars were fired towards Israel during the Operation and thousands of military operatives were moving around and fighting from within civilian buildings, it is clear that a significant number of seemingly civilian buildings were actually military objectives and therefore legally targetable. As Laurie Blank puts it:

the report's approach is entirely inconsistent. With regard to Israel's actions, the report utterly ignores the context of an enemy that deliberately violates LOAC by co-mingling with the civilian population, using civilians

¹⁰³ Article 52(2) of Additional Protocol I, *supra* note 32.

¹⁰⁴ Report at 216.

¹⁰⁵ As the COI itself acknowledges: 'Palestinian armed groups appear to have conducted military operations within or in close proximity to sites benefiting from special protection under international humanitarian law, such as hospitals, shelters and places dedicated to religion and education'. *Id.* at 475.

¹⁰⁶ *See, e.g.*, Report at 478. See the analysis in the section on 'operating from within civilian locations'.

and civilian objects as shields, and abusing protected sites for tactical and strategic advantage. Nowhere in the discussion of Israeli conduct does the report reference the nature of urban warfare against such an enemy, essentially ratifying Hamas' conduct and strategy of exploiting Israel's law compliance.¹⁰⁷

Moreover, there is no mention in the Report of any efforts made by the COI to determine whether military activity took place next to the buildings that were attacked, beyond mentioning residents' denials that such activity took place. As is acknowledged elsewhere in the Report, interviewed Palestinians were reluctant to provide information that could incriminate Hamas for fear of reprisals,¹⁰⁸ thus making it impracticable to rely exclusively on their statements in this regard. It is also striking that the Report does not mention any attempt made to question Hamas directly about allegations of military activity in the vicinity of the residential buildings prior to their attack.

The Report quotes article 52(3) of Additional Protocol I, which states that in case of doubt, "whether an object which is normally dedicated to civilian purposes ... is being used to make an effective contribution to military action, it shall be presumed not to be so used". The Report asserts that this represents customary international law,¹⁰⁹ but the COI disregards the fact that there are various interpretations of this rule.¹¹⁰

For example, the recently published US Law of War manual states that "[u]nder customary international law, no legal presumption of civilian status exists for persons or objects, nor is there any rule inhibiting commanders or other military personnel from acting based on the information available to him or her in doubtful cases."¹¹¹ This manual explains that "[a] legal

¹⁰⁷ L. Blank, 'The UN Gaza Report: Heads I Win, Tails You Lose' *Lawfare* (June 29, 2015) available at <https://www.lawfareblog.com/un-gaza-report-heads-i-win-tails-you-lose>.

¹⁰⁸ Report at 467.

¹⁰⁹ *Id.* at 219, note 4.

¹¹⁰ The different opinions can be seen in the recent Tallinn Manual on Cyber Warfare in which it is explained that some of the experts 'denied the existence of a presumption of civilian use and argued that the article improperly shifted the burden of proof with regard to the precise use of an object from the defender to the attacker'. Accordingly the rule in the manual (rule 40) reads: 'In case of doubt as to whether an object that is normally dedicated to civilian purposes is being used to make an effective contribution to military action, a determination that it is so being used may only be made following a careful assessment.' M N. Schmitt, *Tallinn Manual on the International Law Applicable to Cyber Warfare*, at 116 (2013).

¹¹¹ US Law of War Manual, at sec. 5.5.3.2.

presumption of civilian status in cases of doubt may demand a degree of certainty that would not account for the realities of war. Affording such a presumption could also encourage a defender to ignore its obligation to separate military objectives from civilians and civilian objects.” Even the ICRC Customary IHL Study acknowledges a lack of clarity regarding the issue.¹¹² The COI neglects to mention these diverging views.

The methodology of the Report is also problematic. The Report acknowledges that there were over 6,000 IDF airstrikes in the Gaza Strip during the Operation. The COI examined only 15 of them. It did not explain the rationale behind choosing the particular cases that were examined. Ultimately, with respect to just six of these cases, the COI did not find indications of military use of the structures that were struck.¹¹³ Its conclusions in this regard were based on statements of witnesses, residents or neighbors. The potential for inaccuracies or omissions in such testimony has already been noted.

Following its analysis of the cases, the COI states:

In many of the cases examined by the commission, as well as in incidents reported by local and international organizations, there is little or no information as to how residential buildings, which are *prima facie* civilian objects immune from attack, came to be regarded as legitimate military objectives.¹¹⁴

In other words, the COI recognized that it lacked the information required to determine whether the objects of IDF attacks were military or civilian. Given Israel's consistent stated position that it is fully committed to the principle of distinction and strictly prohibits intentional attacks against civilians and civilian objects, the COI could have conceded its inability to reach definite conclusions. Instead, the COI made the following induction:

In relation to each attack on a residential building that resulted in significant destruction and civilian deaths or injuries, the onus is on Israel to explain the factual elements that have rendered the house or the person(s)

¹¹² Commentary accompanying Rule 10, ICRC, Customary IHL Database, *supra* note 112, available at www.icrc.org/customary-ihl/eng/docs/home.

¹¹³ The COI also refers to attacks on certain residential buildings, such as the high rise buildings attacked towards the end of the Operation which did not lead to civilian casualties but which raise, in its view, questions about the legal basis for the attack.

¹¹⁴ Report at 215.

present inside a military target. In this regard, Israel should provide specific information on the effective contribution of a given house or inhabitant to military action and the clear advantage to be gained by the attack.¹¹⁵

The COI went even further and contended that this information “must be released to independent and impartial mechanisms which have the effective power to ensure accountability”.¹¹⁶ The COI made a similar assertion with regard to attacks on individuals.¹¹⁷

This assertion by the COI raises substantial legal and practical questions. From a legal standpoint, the basis for determining that a state is legally obligated to disclose such information, in general, and more particularly to do so to “an independent and impartial mechanism”, is unclear. The Report offers no reference on this issue, either in treaty law or in customary law.¹¹⁸ Furthermore, its position essentially dismisses to a great extent national accountability mechanisms.

From a practical perspective, this contention is highly problematic. In essence, it obligates states to publicly share information regarding why certain persons or objects came to be regarded as legitimate targets. This can be impossible for a state to do for two main reasons.

First and foremost, many times identifying the military role or use of the target is based on sensitive intelligence. Revealing such intelligence will most likely lead to losing the source and to exposing intelligence-gathering capabilities, therefore hindering the possibility of acquiring further necessary intelligence. This is especially important in an ongoing conflict, such as the one between Israel and Hamas, where retaining such intelligence sources is imperative.

This is true both with regard to technological means, as well as human assets. Revealing human sources of intelligence means much more than just losing an intelligence asset. Exposing a source is tantamount to signing that individual's death warrant. The extra-judicial executions carried out by

¹¹⁵ *Id.* at 219.

¹¹⁶ *Id.* at 217.

¹¹⁷ In Report at 228, it is stated that: “[t]he onus is on Israel to make available information about those objectives and explain how attacking them contributed to military action. Only once that information is known can the legality of the attacks in terms of distinction, proportionality and precautions be assessed.”

¹¹⁸ See analysis by Corn, *supra* note 48, at 9, and Wittes & Schwarz, *supra* note 44.

Hamas during and in the aftermath of the Operation due to suspicions of collaboration with Israel¹¹⁹ are a clear indication of the serious and tangible risks to human intelligence assets. The COI acknowledged in its Report that '[b]ased on its research, the commission documented summary executions of at least 21 persons, including one woman, committed between August 5th and 22nd 2014 in Gaza City, allegedly for being collaborators for Israel.'¹²⁰ Interestingly, however, the COI did not address the connection between its demand that States release information regarding the basis for their target selection, even when based on sensitive human sources, to the potentially fatal results of such disclosure.

Furthermore, revealing the basis for viewing a certain civilian object as a military objective or a particular individual as participating in hostilities is often impossible for practical reasons. As explained in the Report of the GOI, and quoted in the COI Report:

In the context of wide-scale military operations, it is often extremely difficult to provide evidence demonstrating exactly why certain structures were damaged. While the IDF targets only military objectives, forensic evidence that a particular site was used for military purposes is rarely available after an attack. Such evidence is usually destroyed in the attack or, if time allows, removed by the terrorist organisations who exploited the site in the first place. It is therefore unsurprising that forensic evidence of military use cannot usually be traced following attacks....¹²¹

The COI responds to this explanation with the assertion that 'in the commission's view, accepting that logic would undermine any efforts to ensure accountability'.¹²²

¹¹⁹ H. Sherwood, " Hamas Kills 21 Suspected Informers" *The Guardian* (August 22, 2014) available at www.theguardian.com/world/2014/aug/22/hamas-executes-suspected-informers-gaza. See, e.g., , "Palestinian Sentenced to Death in Gaza for Providing info to Israel" *Al-Arabia* (August 24, 2015) available at <http://english.alarabiya.net/en/News/middle-east/2015/08/24/Palestinian-sentenced-to-death-in-Gaza-for-providing-info-to-Israel.html>.

¹²⁰ Report at 494. See generally the discussion in the Report at 490-502, which also refers to allegations of torture and ill treatment.

¹²¹ *Id.* at 215, quoting Israel, Ministry of Foreign Affairs, 'Israel's Investigation of Alleged Violations of the Law of Armed Conflict', 27. See GOI Report at 286.

¹²² *Id.* at 215.

This is a perplexing position. If the COI accepts that in some cases a State simply cannot provide the required information because it is unavailable, why should the State be faulted for failing to disclose non-existent information? Moreover, how can one base serious allegations of war crimes on such a shaky construction? This is particularly odd given that even the COI concedes that civilian objects were widely used for military activities during the Operation. The COI does not attempt to offer a practical solution to this conundrum.

The unreasonableness of the COI's construction is thoughtfully articulated by Wittes and Schwarz:

Pause a minute over this. The commission here is saying that in the absence of evidence that a target was legitimate, it will assume that it was not and therefore that a strike against a residential building was presumptively a war crime. In this formulation, a state must either release information or face condemnation. It is a kind of grafting of FOIA [Freedom of Information Act] onto IHL, and the commission could not be more explicit about it: "the onus is on Israel to make available information about [its military] objectives [in each attack] and explain how attacking them contributed to military action". Having put the burden on Israel to prove every attack legitimate and having no access to Israeli decision-making, it is no wonder that the commission regularly finds that many of the strikes it examines may have been war crimes.¹²³

Furthermore, the COI's severe analysis of Israel's actions is markedly different from how it deals with Hamas. With regard to allegations that Hamas was operating from civilian structures, the COI maintains that it was not able to verify such allegations due to civilians' fears of testifying about Hamas' use of civilian buildings for military purposes.¹²⁴ The COI refrains from making presumptions about such military use and does not demand that Hamas disprove the allegations. In contrast, with respect to allegations that Israel attacked civilian objects, which could not be considered military objectives, the COI relies on statements made by Palestinians that no military activity took place (those same statements which it admits are

¹²³ See Wittes and Schwartz, *supra* note 44. See also the analysis by Corn, *supra* note 48 at 9, who also points out that the COI did in fact have access to several reports and material which supported the Israeli positions but chose to disregard them.

¹²⁴ Report at 467.

unreliable) as a basis for presuming that civilian objects were attacked with no justification, thus placing the burden of proof on Israel to disprove these allegations.

The COI's unbalanced analysis in the Report may have been affected by Israel's refusal to cooperate with the COI. Justified or not, Israel's position cannot warrant basing factual findings on questionable, unverified testimonies and on unfounded assumptions. It also cannot excuse applying what are presented as obligating legal standards, when these do not represent the applicable legal framework. In contrast, although Hamas did not cooperate with the COI or respond to allegations regarding its misconduct,¹²⁵ this does not seem to have affected the COI's willingness to grant it the benefit of the doubt

2) *Fulfilling the Principle of Proportionality?*

Under IHL, an attack is considered disproportionate if the expected harm to civilians and civilian objects from the attack is deemed excessive in relation to the anticipated military advantage.¹²⁶ The determination of proportionality is made with regard to each attack separately and must be based on the information that was in the possession of the commander making the decision at the time the decision was made, without the benefit of hindsight. It must take into account the uncertainties of armed conflict situations. There is no formula to determine what is considered proportionate. The standard is that of a reasonable military commander.¹²⁷

The position adopted by the COI with regard to Israel's adherence to the principle of proportionality is the following:

In most of the incidents examined by the commission and others, ... it is possible to conclude that a reasonable commander must have been aware that such an attack was likely to result in a high number of civilian casualties as well as in considerable destruction. Given

¹²⁵ *Id.* at 5, 87.

¹²⁶ Article 51(5), 57 of Additional Protocol I, ICRC, 'Rule 14: Proportionality in Attack' Customary IHL Database, available at www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter4_rule14.

¹²⁷ Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (June 2000) (hereafter, "NATO Bombing Review") available at www.icty.org/x/file/Press/nato061300.pdf; see also ICRC, *Handbook on International Rules Governing Military Operations*, at 5.22.4 (December 2013) available at www.icrc.org/eng/assets/files/publications/icrc-002-0431.pdf.

the absence of information suggesting in each case that the anticipated military advantage at the time of the attack was such that the expected civilian casualties and damage to the targeted and surrounding buildings were not excessive, there are strong indications that these attacks could be disproportionate, and therefore amount to a war crime.¹²⁸

This formulation is composed of two parts. The first part focuses on the assessment of the COI that a reasonable commander would be aware that the attack was likely to result in significant collateral damage to civilians and civilian objects. The second part focuses on the lack of information about the anticipated military advantage. This led the COI to the conclusion that the expected collateral damage was probably excessive in comparison to the anticipated military advantage. This analysis suffers from several significant flaws.

First, the COI seems to assume that all of the damage inflicted was anticipated prior to the attack. However, the inevitable reality of armed conflict situations is that it is usually impossible to assess the exact number of potential civilian casualties. This is demonstrated by the attack on the El-Salam tower in Gaza City on July 21, 2014.¹²⁹ According to the Report:

On 21 July, at around 8 p.m., the nine-storey Al Salam tower in Gaza city was bombed, killing all members of the Al Kilani and Derbass families who had sought shelter in the tower. In total, 11 people from those two families died including 5 children aged between 3 and 11. It appears that a member of the Al Quds Brigades, who was on the fourth floor, was also killed. The rest of the building was empty except for the family of Abdul Karim Madder, a lawyer on the second floor, all of whom escaped before the upper floors collapsed.¹³⁰

As noted in the Report, the Al Salam tower was not a residential building. It was an office building, to which the families had relocated two days prior to the attack since they believed it to be a safe place. The Report notes that the attack was carried out in the evening ‘during *iftar* dinner’.¹³¹ The COI estimates that the attack was carried out by “a JDAM equipped 500 lb bomb,

¹²⁸ Report at 221.

¹²⁹ *Id.* at 168 - 174, Case (x).

¹³⁰ *Id.* at 168.

¹³¹ *Id.* at 170.

likely inert, as that would ensure the collapse of the floors while minimizing collateral damage”.¹³²

The Israeli official account of the attack, with which the COI was familiar,¹³³ is as follows:

on 21 July 2014, the IDF had conducted an aerial attack on Sha'aban Dachdouch, a senior commander in the Palestinian Islamic Jihad, at a rank equivalent to that of a Battalion Commander. The attack was carried out at a time when the target was present in an office in the Al-Salam building. **The attack was carried out in the late evening hours, in light of the assessment, premised upon timely intelligence, that there would not be civilians present at that time in the building, which was known to be an office building.** Additionally, the attack was planned in such a way – from the type of munition selected, to the method according to which the attack was executed – that the damage would be limited to that part of the building where the target was located. The aim was to minimize, to the extent feasible, the collateral damage that would result from the attack, without frustrating its success. Regrettably, after the fact, there was an unforeseen collapse in the upper floors of the building approximately half an hour after the attack. As a result of the attack, the senior commander in question was killed, and it was alleged that a further 14 civilians were killed, most of them members of the Kilani and Derbas families, who had been staying, according to the complaints received by the MAG Corps, on the same floor in the building as the target of the attack.¹³⁴ [Emphasis added.]

Comparing the two accounts reveals a crucial point, which is that the COI based its analysis on the assumption that the forces conducting the attack were aware of the presence of civilians in the building. It is unclear why the

¹³² *Id.* at 171.

¹³³ *Id.* at 174 (partially quoted).

¹³⁴ IDF Military Advocate General's (MAG), 'Decisions of the IDF MAG Regarding Exceptional Incidents that Allegedly Occurred During Operation 'Protective Edge' (June 11, 2015) Update No. 4 available at <http://mfa.gov.il/MFA/ForeignPolicy/IsraelGaza2014/Pages/Operation-Protective-Edge-Investigation-of-exceptional-incidents-Update-4.aspx> [emphasis added].

COI finds it reasonable to assume that the IDF knew that the two families had moved into an office building two days prior to the attack. While the IDF does have extensive intelligence capabilities, it is not omniscient. The expectation that the IDF (or any other military fighting in similar conditions) could be aware of any civilian presence at any given moment is unrealistic.¹³⁵

The comparison also shows that the COI's interpretation of the timing of the attack in the evening during the *iftar* dinner as an indication of disregard of potential civilian casualties, is misplaced. Given that this was an office building, attacking in the evening supports the position that the IDF attempted to minimize harm to civilians, since such buildings are typically empty at night.¹³⁶

A more serious flaw in the analysis of the COI is its misrepresentation of Israel's findings regarding this incident. The COI provides a partial quote of the IDF Military Advocate General (MAG) statement provided above in full,¹³⁷ beginning with the word "regrettably" and omitting the IDF's statement that it believed that there would be no civilians at the office building in the evening. The reader of the COI Report is therefore given the impression that the IDF knew there would be civilians in the building and determined that their death or injury would amount to proportionate collateral damage, whereas according to the Israeli report the IDF assessed that there were no civilians in the building.

This is very worrisome and impacts the credibility of the COI and its standing as an unbiased and professional body of inquiry. The fact that the COI decided to omit a central element of the Israeli explanation and treat this incident as an example of disproportionate use of force strongly suggests that the COI did not make a sincere effort to seriously consider the Israeli perspective, even when Israel supplied reasonable explanations for IDF conduct.

The example above also demonstrates that when assessing expected collateral damage, it is not always possible to estimate in advance the level

¹³⁵ This unrealistic expectation is also evident in the COI claiming that since the target of the attack (a high level commander) 'had left the building several times in the days preceding the attack' this 'indicates that there may have been the possibility to target him elsewhere, when fewer civilians were in the vicinity'. See Report at 232.

¹³⁶ The use of an accurate weapon, as acknowledged by the COI, is further evidence of an attempt to minimize harm to civilians, as required by the obligation to take precautions prior to attack. See discussion below.

¹³⁷ Report at 174.

of damage that will result from an attack. According to Israel's account of the incident, the collapse of additional floors was not anticipated. This reality should be borne in mind when assessing other cases wherein the actual damage was greater than the damage foreseen at the time of the attack.¹³⁸

The analysis of the COI on proportionality often focuses on the results of the attacks more than on the process. This is a flawed analysis, as explained by Laurie Blank:

the law does not operate by starting with a number of civilians killed or injured and working back to assign blame. Rather, LOAC's key principles – military necessity, humanity, distinction, proportionality and precautions — provide a methodology for the planning and execution of military operations so as to maximize both the effectiveness of military operations and the protection of civilians. An effects-based analysis either disregards or devalues any investigation or evidence of the commander's knowledge or intent at the time of the attack—information that is central to any valid LOAC analysis. In effect, the standard becomes strict liability by eliminating reasonableness and creating a standard of no errors. ... Any assessment of targeting therefore must be based on the commander's intent and whether the decision to launch the attack in question was objectively reasonable based on the information available at the time of decision, including the full range of operational execution variables that influence the actual effects of an attack.¹³⁹

Furthermore, from the Report it is clear that the COI was highly influenced by the purported aggregate number of civilian casualties in its assessment of whether Israel abided by the principle of proportionality. In this regard, it should be stressed that under IHL the application of the principle of proportionality is carried out separately with regard to each attack. It is not

¹³⁸ See examples in GOI Report at 328.

¹³⁹ L. Blank, "Guest Post: Israel's Report on the 2014 Gaza Conflict", *Just Security* (June 18, 2015) available at www.justsecurity.org/23977/guest-post-israels-report-2014-gaza-conflict/.

performed by comparing the number of civilian casualties on each side or by comparing the ratio of civilians to combatant deaths.¹⁴⁰

The collateral damage assessment prior to an attack also includes damage to civilian property. The COI misstates the law in this regard. According to the Report, collateral damage includes “expected civilian casualties and damage to the targeted and surrounding buildings” [Emphasis added].¹⁴¹ However, from a legal standpoint, once a civilian building is used for military purposes, it becomes a military objective which is a lawful target. Accordingly, while the damage to surrounding buildings is relevant, the damage to the ‘targeted building’ is not part of the collateral damage that needs to be evaluated prior to the attack.¹⁴² It follows then that the assessments made by the COI about the disproportionality of damage to civilian property are unreliable, as they are based on a potential misapplication of the relevant law.

As has already been noted, the COI in its proportionality analysis admitted that it had no information about the anticipated military advantage from each attack.¹⁴³ From a purely methodological point of view, in the absence of any information about the military advantage sought, it is unclear how the COI could make an informed determination that the expected collateral damage was excessive.

On an empirical level, while the COI may not have had information about the exact military purpose of each attack, it was well aware of the fact that nearly all of the military activity against Israel was carried out from within residential and other civilian buildings in the densely populated Gaza Strip.¹⁴⁴ Since thousands of rockets and mortars were fired at Israel from these areas, and additional military activity was conducted there against IDF forces, the COI should have, at a minimum, mentioned that objectively there was at least a potential military advantage from attacks against apparently civilian buildings.

¹⁴⁰ L. Blank, “Asymmetries and Proportionalities”, *The Hill* (July 29, 2014) available at <http://thehill.com/blogs/pundits-blog/international/213546-asymmetries-and-proportionalities>.

¹⁴¹ Report at 221.

¹⁴² I. Henderson, *The Contemporary Law of Targeting*, 207 (2009). There might be differing positions whether all the parts of the target building are considered part of the military objective or only the part with the military use. In any event, no one claims that the target itself is part of the collateral damage.

¹⁴³ Report at 221.

¹⁴⁴ See the discussion above.

It is important to note in this regard that on the same days of the Israeli attacks scrutinized in the Report, dozens of rockets and mortars (many times over a hundred a day) were fired towards Israel from residential areas in the Gaza Strip.¹⁴⁵ In other words, Israel was responding to continuous attacks emanating from the Gaza Strip. This should have been noted by the COI in order to give the full picture and enable a fair analysis of the principle of proportionality.

The crucial question in assessing proportionality with regard to an attack is how to balance the anticipated military advantage with the expected collateral damage to civilians and civilian objects, and determine when the latter is excessive in relation to the former. There is neither a definite formula nor a clear criteria in this regard. It is, therefore, understandable that the COI did not offer a resolute determination; however, it did conclude that “there are strong indications that these attacks could be disproportionate”.¹⁴⁶ This reasoning is problematic. Its shortcomings are well explained by Wittes and Schwartz:

Indeed, although the Commission repeatedly expresses regret over the lack of Israeli participation, it also repeatedly proves willing to plunge ahead without key information. Take, for instance, page 60, where the commission concludes “that a reasonable commander *must have been aware*” [emphasis added] that many of 15 investigated airstrikes were “likely to result in a high number of civilian casualties as well as in considerable destruction.” In turn, this conclusion offers “strong indications that these attacks could be disproportionate, and therefore amount to a war crime.” The basis for these rather damning conclusions are pretty limited: that large numbers of civilians died, that targeted buildings were “residential in nature” and “located in densely populated areas,” that many of the attacks were carried out “in the evening” “or at dawn” “or during the night,” and that “large weapons” were used. That’s really it. But in “the absence of information suggesting in each case that the anticipated military advantage at the time of the attack” exceeded anticipated civilian damage, this proves enough for the COI to draw its conclusions.¹⁴⁷

¹⁴⁵ See chart of the number of rockets and mortars fired every day during the operation in the GOI Report at 81.

¹⁴⁶ Report at 221.

¹⁴⁷ See Wittes and Schwarz, *supra* note 44.

This is particularly true given that the COI only analyzed 15 incidents out of thousands of airstrikes.

3) *Weapons Used*

The COI acknowledges the fact that Israel used precise munitions. It focuses its criticism on the fact that the weapons used had a wide-area effect because of their size and power.¹⁴⁸ It concludes that using such weapons "in densely populated, built up areas of Gaza, is therefore likely to constitute a violation of the prohibition of indiscriminate attacks."¹⁴⁹ The COI reaches this conclusion after consulting with military experts and relying on a source that quotes statements made by "engineers and weapons designers" about the wide impacts of the GBU-31 used by Israel "in several of the cases described above".¹⁵⁰

The experts consulted by the COI remain unidentified, and the Report does not provide any details on the experts' methodology and work process.¹⁵¹ The quote relied on by the COI is taken from a 2003 article written by a San-Diego Union Tribune reporter,¹⁵² and refers to 2,000 pound bombs rather than smaller munitions primarily used by the IDF during the Operation (a fact of which the COI was well aware).¹⁵³ Reliance on the quote as if it were

¹⁴⁸ Report at 225.

¹⁴⁹ *Id.* at 226.

¹⁵⁰ *Id.* at 225.

¹⁵¹ See the comment of Corn, *supra* note 48 at 8, in this regard: "Ignoring the views of the many highly qualified military experts who rendered opinions on IDF LOAC compliance, and relying on an anonymous expert to provide the foundation for conclusions that are inconsistent with these publically available conclusions, substantially undermines the credibility of the Report."

¹⁵² M. Sauer, "On-Board Systems Guide Air-to-Surface Weapons' *San Diego Union Tribune* (March 21, 2003) available at http://legacy.sandiegouniontribune.com/news/world/iraq/20030321-9999_1n21bombs.html. The full quote is: "But in interviews with Newhouse News Service, engineers and weapons designers recently described what happens when the 2,000-pound Mark-84 JDAM, for example, strikes.... The explosion creates a shock wave exerting thousands of pounds of pressure per square inch...."

¹⁵³ According to the list of attacks which appears in the Report at 214, most of the weapons likely used were 500lb and in some cases 1000lb bombs. Only in one case (Al Dali) is it claimed that a 2000lb bomb was used, and in two more it is raised as a possibility - the Al Najjar case and the Abu Jabr case. With regard to the latter case, the table at 214 mentions a 2000lb bomb but in the analysis of the case itself at 136 a 1000lb option is also mentioned. This is beyond the question of whether the use of a 2000lb bomb is necessarily proof of an indiscriminate attack, which should be determined on the basis of the relevant specifications of the concrete attack.

case-specific to the Operation and representative of the majority of the ammunition used during the conflict is therefore misleading.

The Report does not include any additional analysis of the nature and impact of the munitions used by Israel, there is no comparative analysis of weapons used by other militaries, nor any examination of the availability of more accurate and less destructive weapons. Despite this very superficial analysis, the COI finds it justified to conclude that the Israeli attacks were “likely to constitute a violation of the prohibition of indiscriminate attacks”.¹⁵⁴

4) *Precautions*

On the issue of precautions, the COI acknowledges that “the issuing of warnings concerning specific air strikes, via phone calls and text messages is a good practice, through which Israel attempted to respect its obligation to give advance warnings of attacks, where feasible, so as to minimize civilian casualties.”¹⁵⁵ It also finds that warnings were generally effective, noting that:

attacks on more than 200 residential buildings by air strikes resulted in no civilian casualties. This indicates that specific warnings by the IDF to inhabitants of these buildings were effective in many cases. This is further illustrated by the destruction, between August 23rd and 26th 2014, of three buildings each housing several dozen apartments, which did not result in any civilian deaths.¹⁵⁶

Nevertheless, the COI concludes its short analysis with the following:

While the commission cannot know what precautionary measures were taken by the IDF in each attack, based on a number of cases, there are concerns that the IDF may not have done everything feasible to verify whether civilians were present in the buildings selected for attack and to assess whether the impending strike would result in civilian casualties and damage to civilian objects, which would be excessive in relation to the anticipated military advantage. The incidents examined in this section point to a potential failure by the IDF to take all

¹⁵⁴ Report at 226.

¹⁵⁵ *Id.* at 234.

¹⁵⁶ *Ibid.*.

appropriate measures to avoid or at the very least to minimize death and injury to civilians and damage to civilian objects.¹⁵⁷

Various precautions presented in the GOI report are acknowledged in one sentence in the COI Report without further elaboration.¹⁵⁸ It is noticeable that the concluding paragraph quoted above makes no mention of the widespread policy of the IDF to issue advance, specific and repeated warnings prior to attacks, although these are very important precautionary measures.

The COI stresses the ‘IDF’s surveillance capacity’¹⁵⁹ as a basis for its conclusion that not all feasible measures were taken in order to avoid or minimize incidental harm to civilians. It is clear that the COI assumes (or suggests to the reader) that Israel has full and precise knowledge of the whereabouts of all civilians or targets at the time of an attack. Therefore, in its view, the fact that IDF attacks nevertheless led to civilian casualties is a clear demonstration that feasible precautions were not taken.

However, it does not appear that the COI relied on verified information regarding the IDF’s actual operational capabilities. Nor did it examine the practice and capabilities of other militaries operating in urban areas when facing similar situations. The analysis made by the COI reveals a fundamental misunderstanding of the shortcomings of their capabilities. This is demonstrated by the following observation in the Report:

If the target was an individual, it can be questioned whether the individual could not have been targeted at another time or location. This is particularly apparent in the strike on the Al Salam tower, where it appears that the target was a commander of Islamic Jihad’s military wing, who, according to an eyewitness, had left the building several times in the days preceding the attack, which indicates that there may have been the possibility to target him elsewhere, when fewer civilians were in the vicinity.¹⁶⁰

The idea that a military force engaged in a high intensity armed conflict has the capability to freely choose the timing of an attack on the commander

¹⁵⁷ *Id.* at 241.

¹⁵⁸ *Id.* at 231. For the detailed Israeli account *see* GOI Report at 290 - 316.

¹⁵⁹ *Id.* at 229.

¹⁶⁰ *Id.* at 232.

of an enemy who is constantly on the move reveals a misperception of the fundamental aspects of armed conflict situations. It also disregards the fact that under IHL, militaries are obliged to take *feasible* precautions, *i.e.*, those precautions that are practically available under the circumstances.¹⁶¹ Ignoring this crucial element of the legal obligation regarding precautions casts doubt on the soundness of the COI's conclusion that the IDF appears to have failed to take appropriate measures to avoid or minimize harm to civilians and civilian objects.¹⁶²

With regard to the warning provided prior to attacks, the discussion in the Report focuses on their limited effectiveness. This analysis has two major flaws. First, the standard that the COI uses to measure the effectiveness of warnings is whether they indeed saved civilian lives. This yardstick again erroneously focuses on a result rather than a process.¹⁶³ Effectiveness is measured by estimating whether the warning provided the civilians with sufficient opportunity to protect themselves – that is, whether the warning was understandable to the civilians it addressed and whether it provided them with enough time to protect themselves from the impending attack. It is not tested based on whether they escaped the attack unharmed.¹⁶⁴

Second, the COI analysis focuses on several exceptional cases and then extrapolates from them a general rule. Naturally there will be cases in which warnings will not succeed in preventing harm to civilians. This is an inevitable consequence of the uncertainties of armed conflict situations. Relying on the fact that warnings did not always result in sparing the lives of civilians to infer that warnings in general were not effective is simply wrong. It also stands in clear contradiction to the COI's conclusion noted above that the warnings saved hundreds of lives.

In one incident criticized in the Report, IDF video captures a civilian presumably being given only five minutes to leave a building.¹⁶⁵ Upon closer examination, it appears from the recording that the civilian was warned to stay away from a neighboring building, and not told to leave his home. In any event, the exact timing of an advance warning can be a challenging operational dilemma. This is illustrated by the tragic circumstances of the

¹⁶¹ See analysis below with respect to ground operations.

¹⁶² Report at 241.

¹⁶³ See NATO Bombing Review, *supra* note 127 at 29.

¹⁶⁴ UK War Manual, at 53.2.8: “The object of warnings is to enable civilians to take shelter or leave the area and to enable the civil defence authorities to take appropriate measures. To be effective the warning must be in time and sufficiently specific and comprehensible to enable them to do this.”

¹⁶⁵ Report at 237.

attack on the Kaware home, presented in the Report.¹⁶⁶ In this case, a phone call was made and received, warning the family to leave the house. There are different accounts regarding the time that elapsed between the warning and the attack. There are testimonies that some of the residents had started to return to the house when they were hit by a projectile that had already been released and could not be diverted at that stage. If this is indeed the case, it exemplifies the need to strike a balance between allowing enough time to heed a warning and warning too far in advance.

It should be noted that one of the witnesses in this case states that some residents stayed in the house despite the warning in an attempt to "protect" the house.¹⁶⁷ This account coincides with statements made by Hamas officials not to heed warnings. The COI refers to such statements in another part of the part of the Report dealing with the impact of conduct of Palestinian groups on the population in Gaza, noting:

On 13 July 2014, a journalist from Al Aqsa TV reported that ‘..the interior ministry also urged citizens not to obey the Occupation’s warnings contained in leaflets calling on people of the Gaza border area to evacuate their homes. The interior ministry called upon people to ignore these warnings and to stay put’.¹⁶⁸

The COI also mentions that:

In one case of the bombing of a residential building examined by the commission, information gathered indicates that following a specific warning by the IDF that the house was to be targeted, several people went to the roof of the house in order to “protect” the house.¹⁶⁹

This phenomenon of knowingly and intentionally disregarding warnings is obviously a very relevant factor in examining the effectiveness of warnings. Even the most effective warning will not work if the recipient is intentionally ignoring it. The fact that this element, which the COI was patently aware of, is not taken into account throughout the analysis on

¹⁶⁶ *Id.* at 175 - 180, Case a(xi).

¹⁶⁷ *Id.* at 177.

¹⁶⁸ *Id.* at 482. *See* the IDF YouTube website that includes the actual footage of the interview, available at <https://youtu.be/UXZEzbT0H1s?list=PLObnKQho8o8PNUxfIdeGNOsDFdazchJH8>.

¹⁶⁹ *Id.* at 483.

precautions casts further doubt on the seriousness of the Report's analysis and conclusions.

Most of the analysis in the Report regarding precautions relates to the "roof-knocking" technique. The purpose of the procedure, according to the GOI report, "was to signal the impending danger and give civilians in or near the target a last opportunity to seek safety before an attack."¹⁷⁰ As such, "[t]his procedure was especially important in light of the efforts by Hamas and other terrorist organisations to encourage or coerce civilians to remain at the site of an impending attack."¹⁷¹ According to the GOI, 'IDF assessments show that the employment of "roof knocking" was highly effective, preventing many civilian injuries and deaths during the 2014 Gaza Conflict'.¹⁷²

The COI nevertheless concluded that "[b]ased on its findings...the 'roof-knocking' technique is not effective, in particular if not combined with other specific warnings."¹⁷³ This conclusion is based on a short analysis of a few cases where it is claimed that "roof knocking" caused confusion. The COI does not confront head-on the Israeli concern regarding intentional disregard of warnings described above, nor does it examine any potential alternatives to the use of the "roof-knocking" technique when other means of warning are unhelpful or unfeasible. The COI also does not contend with the question of why the IDF would dedicate substantial resources and efforts to this technique were it not effective.

5) Targeting Policy

The COI states that its observations about IDF strikes on residential and civilian buildings:

raise concern that these strikes may have constituted military tactics reflective of a broader policy, approved at least tacitly by decision-makers at the highest levels of the Government of Israel. Such tactics appear to have prioritized the perceived military objective over other considerations, disregarding the obligation to minimize effects on civilians.¹⁷⁴

¹⁷⁰ GOI Report at 313.

¹⁷¹ *Ibid.*

¹⁷² *Ibid.*

¹⁷³ Report at 239.

¹⁷⁴ *Id.* at 243.

A similar observation is made regarding the use of precautions.¹⁷⁵ This is a very serious allegation, and could be used to support the opening of criminal proceedings against Israeli officials. It is based on the results of the aerial operations. The COI notes the large numbers of civilian casualties and of targeted attacks on residential buildings. According to the COI, the fact that such attacks continued even after the dire impact of the attacks on civilians and civilian objects became apparent, without Israel taking steps to re-examine its practice, implies a pattern or policy.

The construction of the COI in this regard has some obvious deficiencies.

First, it is unreasonable to deduce the existence of a policy to intentionally attack civilians and/or civilian objects by examining a dozen or even two dozen attacks out of 6,000. Although the COI is careful not to make such an accusation explicitly, it does leave the reader with an impression that this is nevertheless the case. Absent a much wider and more comprehensive analysis, this is irresponsible.

Second, as explained above, the legality of an attack under IHL must be examined separately with regard to each attack. In a high intensity and protracted military campaign, conducted in an urban area, with thousands of rockets fired by one side to the conflict and thousands of strikes conducted by the other side, the mere fact that there is massive destruction and a considerable number of casualties cannot serve in and of itself as proof of a policy of violating IHL.

Third, different figures have been documented regarding civilian casualties during the Operation. Regardless of the exact proportion of civilian to combatant fatalities, every civilian who lost his or her life is a tragedy. Nevertheless, the COI chose to present and rely on figures that were high in comparison to other compilations, both with respect to the number of casualties as well as to the civilian-combatant ratio.¹⁷⁶ Because of the strong

¹⁷⁵ *Id.* at 242.

¹⁷⁶ Although the COI acknowledges that 'the casualty figures gathered by the United Nations, Israel, the State of Palestine and non-governmental organizations differ' [16] and [574], it chooses to present the figures from the UN Protection Cluster, according to which 2251 Palestinians were killed, including 1462 civilians. It follows from these figures that only 789 of the deceased were combatants, indicating a rate of 65% civilian casualties. IDF figures indicate that 2125 Palestinians were killed, of which 936 have been identified as militants, 761 have been classified as civilians and 428 are males between the ages of 16-50 who had not yet been categorized at the time of the publication of the GOI report - a rate of between 36% to 56% civilians; GOI Report, Annex, at 25-27. A thorough analysis of casualties has been conducted by the Center for Intelligence, which checked every name of every casualty. Their most updated figures prior to the publication of the COI

emphasis that the COI puts on the total number of civilian casualties, the disparity between the figures becomes important.

Fourth, the reference to residential homes being attacked and destroyed is misleading. As mentioned above, if a residential home is used for military purposes, it loses its civilian status and becomes a military objective, the destruction of which is lawful and does not become part of the collateral damage assessment. Since much of Hamas's military activity was conducted from civilian structures, including residential buildings, damage to such buildings should be taken out of the equation. The COI, however, does not appear to make this distinction, and as a result, its assessment of collateral damage is conflated. Further, the COI does not properly consider that in many cases, the target is a person inside the structure, and not the structure itself.

Fifth, the COI acknowledges that the Israeli policy of issuing advance warnings, both general and specific, saved hundreds of lives. This factor should also be taken into account when suggesting the existence of a policy of disregarding the obligation to minimize harm to civilians.

Sixth, the COI infers that Israel intended to cause harm to civilians or was indifferent to the impact of its actions on civilians presumably because Israel did not alter its conduct throughout the Operation. This is an assumption that the COI makes without being privy to the decision-making of IDF commanders and the political echelon. Further, it ignores reasonable alternative explanations, such as that alternate means that would minimize the harm to the civilian population in the Gaza Strip, while at the same time achieve Israel's military objectives, were not available. The COI does not suggest any alternative measures or precautions.

The question of the existence of a policy to act unlawfully - or even worse to carry out war crimes - is dependent on the initial determination of whether the conduct itself was lawful or not. As demonstrated above, the COI's analysis in this regard is lacking at best and its conclusions should be regarded with caution.

Report were the following: "The findings of our investigation so far (based on an examination of approximately 61% of the names of the dead) suggest that fatalities affiliated with terrorist organizations constitute approximately 48.7% of the names that have been identified, and non-involved civilians constitute approximately 51.3%. This ratio may vary in the future." The Meir Amit Intelligence and Terrorism Information Center, 'Examination of the names of Palestinians killed in Operation Protective Edge – Part Ten' (February 19, 2015) available at www.terrorism-info.org.il/Data/articles/Art_20774/E_020_15_614553775.pdf.

It is worth recalling once more that the analysis of the COI disregards almost completely the fact that Hamas and other armed groups intentionally used civilians as human shields and utilized sensitive civilian infrastructure as bases for their military activity. Ignoring this reality diminishes the validity of the Report's allegations about potentially unlawful Israeli policies. It also absolves Hamas from responsibility for this conduct, and encourages its continued practice by Hamas and other non-state parties in conflicts around the world. As noted by Laurie Blank:

Hamas's use of the civilian population as a shield — a blatant violation of the law of war — does not in any way absolve Israel of its obligations to comply with the law's fundamental obligations to protect civilians, including the principle of proportionality. But the effects-based analysis, or numbers game, not only minimizes Hamas's legal responsibility for such civilian harm, but actually rewards it for exploiting the law's protections for civilians by suggesting — albeit wrongly — that every civilian death in Gaza is an Israeli war crime.¹⁷⁷

B. Ground Operations

The operational challenges posed by urban warfare, some of which have already been described in the context of aerial operations, are amplified when military forces conduct operations on the ground. As explained in the GOI Report:

The density of urban infrastructure typically results in close-quarter combat. Fighting is often conducted house to house and street to street, and as result, the employment of force by both sides is concentrated in a small area, with a multiplied effect on civilians and infrastructure in the immediate surroundings. A compounding concern is that close-quarter combat substantially reduces the time available for commanders to consult and make decisions. Thus, commanders often face threats that require immediate decisions in a short timeframe.¹⁷⁸

The COI analyzes four IDF ground operations. The COI concludes that the IDF carried out attacks indiscriminately,¹⁷⁹ without taking adequate

¹⁷⁷ L. Blank, *supra* note 140.

¹⁷⁸ GOI Report at 254.

¹⁷⁹ Report at 293, 337, 365.

precautions to minimize harm to civilians¹⁸⁰ and without respecting the principle of proportionality.¹⁸¹ It also raises concern about attacks being intentionally directed against civilian objects¹⁸² and even against civilians in certain cases,¹⁸³ in breach of the principle of distinction.

The descriptions in the Report of human loss and suffering and of devastating destruction are heartbreaking. However, the Report's analysis disregards almost entirely the challenges of operating in a war zone under continuous cross-fire. The COI's examination repeatedly presupposes near-laboratory conditions on the ground, which enabled the IDF to carry out meticulous calculations in real-time and under fire. As one commentator notes with respect to the obligation to take precautions, the COI implements this obligation based on a "pre-planned" targeting context rather than on the existing "dynamic" targeting context in which these operations occurred.¹⁸⁴ Thus, it takes almost any harm to civilians and civilian objects to mean that the IDF acted unlawfully.¹⁸⁵

Numerous examples of this general approach can be found in the Report. For example, describing a situation of Palestinians fleeing their homes in Shuja'iya, the Report notes that '[a]s they walked, intense shelling and explosions were everywhere. Upon arrival at Faray Street, they found attacks there as well, so they continued walking trying to find a safe place. Some family members in the street were hit by mortars.'¹⁸⁶ The Report goes on to stress that "[w]itnesses told the commission that no family members were affiliated with an armed group and that they were all civilians, most of them women and children".¹⁸⁷ Stressing this last point by the COI reveals that it was analyzing the situation as if the attacks were directed towards the group of civilians. A much more realistic explanation is that these civilians simply found themselves tragically in the cross fire between IDF soldiers and

¹⁸⁰ *Id.* at 294, 387.

¹⁸¹ *Id.* at 296, 368.

¹⁸² *Id.* at 416-419.

¹⁸³ *Id.* at 420.

¹⁸⁴ See Corn, *supra* note 48 at 15.

¹⁸⁵ See also *id.* at 13: 'Without relevant information related to the enemy situation, this is speculative. Here, as elsewhere in the Report, the Commission reached conclusions about the application of legal rules to military operations without either sufficient knowledge of the circumstances related to the tactical execution of the operations, technical military expertise, or an adequate foundation of military experience and judgment to credibly reach such conclusions.'

¹⁸⁶ Report at 273.

¹⁸⁷ *Ibid.*

Palestinian militants. In other words, the attack was probably not intentionally directed towards the civilians who got hit.¹⁸⁸

This demonstrates that the COI is evaluating IDF conduct in isolation from the relevant operational context. This is despite the fact that it was clearly aware of the ongoing fighting that was taking place¹⁸⁹ and of the presence of militants operating in the area.¹⁹⁰ The Report also fails to mention the possibility that some of the civilian casualties may have been hit by Hamas or other armed groups firing at IDF forces.

The unrealistic standards applied by the COI are apparent in its analysis of the operation in the Shuja'iya Market. The Report states that 'The fact that the IDF did not deploy real-time aerial surveillance for a period of over one hour points to a failure to do everything feasible to assess the presence of civilians and whether the attack could be expected to cause incidental "excessive" loss of civilian life.'¹⁹¹ The question of whether aerial surveillance was available is obviously critical to establish whether this was a "feasible" precaution at the time.

The COI admits that it 'does not have inside knowledge of the workings of the IDF'.¹⁹² However, this does not prevent it from determining that it "finds it difficult to believe that the IDF, with the substantial amount of aerial means available to it and the relatively small area of Gaza to cover, would leave troops coming under constant fire without any aerial surveillance for over 50 minutes" and that "owing to the proximity of several air bases, located merely a few minutes from Gaza, the commission also finds it difficult to understand why aerial platforms with more accurate and precise weapons than mortars were not available."¹⁹³ Hence, the COI's assumption regarding the availability of aerial surveillance is based on speculation alone,

¹⁸⁸ It may also be noted that there is no certainty that the group was indeed comprised only of civilians since this fact is based only on the testimony of witnesses which are not necessarily reliable.

¹⁸⁹ Another indication of the intense fighting that took place in the area is the fact that 14 soldiers were killed in Shuja'iya, as mentioned AT 287 and 259. So were many militants of Hamas and other armed groups. According to the Meir Amit Intelligence and Terrorism Information Center 100-150 terrorist operatives were killed in the fighting in Shuja'iya Meir Amit Intelligence and Terrorism Information Center, 'Examination of the names of Palestinians killed in Operation Protective Edge – Part Three (August 19, 2014) available at <http://www.terrorism-info.org.il/en/article/20704>>.

¹⁹⁰ In the Report at 279, it is mentioned that during the humanitarian pause 'members of Palestinian armed groups reportedly emerged from buildings and were seen out in the open'.

¹⁹¹ *Id.* at 387.

¹⁹² *Id.* at 385.

¹⁹³ *Ibid.*

as is the assumption that the IDF has unlimited resources to choose from at any given time.

Beyond being unrealistic, the standards applied by the COI also lack a legal basis. IHL acknowledges that the scope of the obligation to take precautions prior to an attack is contingent on the circumstances of a situation, therefore imposing an obligation to take feasible precautions. The COI misinterprets the "feasible" component of the obligation. The COI explains that the obligation to take 'feasible precautions' "means that not only humanitarian, but also military considerations can be taken into account when deciding on the precautions to be observed".¹⁹⁴ At the same time, it misses a crucial element of the term "feasible", which is that the obligation is to take precautions that are "practicable" or "practically possible" under the given circumstances.¹⁹⁵ Hence, one cannot determine that the obligation was not met absent information on the availability and accessibility of potential precautions in a particular case.¹⁹⁶ The standards laid out by the COI, if adopted, would place a burden on militaries fighting in urban areas that could almost never be reasonably met.

After describing four ground operations, the Report turns to a legal analysis of several themes it has identified relating to the ground operations.

1) Protection of Civilians, Force Protection and the Hannibal Directive

On the issue of force protection the COI makes the following observation:

An examination of the IDF's operations ... indicates that the protection of IDF soldiers was a major consideration for the IDF, overruling and, at times eliminating, any concern for the impact of its conduct on civilians. The

¹⁹⁴ *Id.* at 338.

¹⁹⁵ See, e.g., the United Kingdom, *Statement on Ratification of AP I* (28 January 1998) 2020 *U.N.T.S.* 75-76: 'The United Kingdom understands the term 'feasible' as used in the Protocol to mean that which is practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations.' The US Law of War Manual states in SEC. 5.3.3.2: 'The standard for what precautions must be taken is one of due regard or diligence, not an absolute requirement to do everything possible.'

¹⁹⁶ Corn, *supra* note 48 at 14 states that the analysis by the COI, as appears in Report at 294 '...fails to account for the contextual assessment of "feasible" in relation to the precautions obligation. Time, enemy, terrain, available resources, and mission imperatives must all be assessed before concluding a violation of this obligation, which is not reflected in this conclusion.'

examination of these ground operations leaves the commission with the distinct impression that when soldiers' lives were at stake or there was a risk of capture, the IDF disregarded basic principles on the conduct of hostilities, namely the principles of distinction, proportionality and precautions.¹⁹⁷

The COI is correct in maintaining that force protection is not an end in and of itself, and certainly not one which automatically trumps other considerations. However, the analysis in the COI's Report ignores the tactical importance of soldiers to mission accomplishment during hostilities, which can and should be taken into account as part of proportionality assessments – allowing, where appropriate, certain levels of collateral damage.¹⁹⁸

In the case of the Gaza Operation, as explained in the GOI Report, IDF ground forces were charged with “locating and neutralising the threat to Israeli citizens posed by the sophisticated network of secret cross-border assault tunnels”.¹⁹⁹ The GOI report explains that:

As part of its mission, IDF ground forces were required to search areas thoroughly for tunnel openings, which were often located within structures that were also of a civilian nature. Once IDF forces uncovered a tunnel opening, they remained in that location in order to protect engineering and specialised forces working to neutralise the tunnels. Remaining in static positions exposed these forces to increased attacks, especially because Hamas and other terrorist organisations had predetermined positions from which to attack IDF forces. In turn, when IDF forces came under increased and heavy fire, they required additional support to repel the attacks. Thus, firefights with militants, as well as the efforts to uncover tunnel openings that lay beneath physical infrastructure, resulted in the intensive use of

¹⁹⁷ Report at 392.

¹⁹⁸ This specific point is accepted by scholars who otherwise diverge in their analyses of force protection. See Y. Shany & A. Cohen, “Contextualizing Proportionality Analysis? A Response to Schmitt and Merriam on Israel’s Targeting Practices” (May 7, 2015), available at <https://www.justsecurity.org/22786/contextualizing-proportionality-analysis-response-schmitt-merriam/>; M. N. Schmitt, “The Relationship Between Context and Proportionality: A Reply to Cohen and Shany” (May 11, 2015), available at <https://www.justsecurity.org/22948/response-cohen-shany/>.

¹⁹⁹ GOI Report at 87.

force in static positions, thereby greatly increasing the potential for significant damage to the specific areas where tunnels were located'.²⁰⁰

Protecting the lives of soldiers was, therefore, a necessary element in accomplishing the mission of the forces. The concept of mission accomplishment is directly linked to the notion of military advantage derived from the attack.

In addition, the criticism in the Report suggests that a “reasonable commander” would have assessed proportionality differently than IDF forces.²⁰¹ The legal standard is indeed that of “a reasonably military commander”, but is this the obvious conclusion? In this context, the following explanation by Geoffrey Corn is of use:

Movement to contact against an enemy in an urban environment is one of the most dangerous and complex military maneuvers. Using combat power to shield friendly forces from attack in such operations is not “force protection,” but is instead central to the maneuver itself. Use of such assets is not limited to “killing” a clearly identifiable enemy, but also involves disrupting the enemy’s ability to compromise maneuver, and retaining the initiative for friendly forces. Failure to consider this full range of military considerations undermines the conclusion that a commander would consider such use of combat power as “excessive” within the meaning of the proportionality rule.

Furthermore, the Report makes no effort to consider other examples of similar military operations, such as U.S. operations in Fallujah, Ramadi, or Panama City. Doing so would provide a touchstone to credibly assess whether this use of combat power fell far beyond the norm of military operations. Finally, the assertion that it is an “undisputed fact that force protection is not an overriding concern that could set aside all other considerations when assessing the proportionality of an attack” confuses “force protection” and the relationship of mobility and counter-mobility to effective tactical maneuver. These are not synonymous, and by conflating the two the Report distorts the proper assessment of military advantage in relation to the proportionality assessment in such operations.²⁰²

²⁰⁰ *Id.* at 256.

²⁰¹ Report at 296, 394.

²⁰² See Corn, *supra* note 48 at 14.

The COI itself acknowledges that the law with regard to the weight of force protection and mission accomplishment in assessing proportionality and determining the precautions to be taken in attack is far from settled.²⁰³ Furthermore, in establishing what a “reasonable military commander” would conclude, it is worthwhile to note the analysis conducted by other militaries when trying to determine how a “reasonable” military commander would assess proportionality in a given situation.²⁰⁴ There is no substitute to consulting with military experts who have had actual combat experience in armed conflict situations (which are distinct from policing missions or peace keeping operations). The COI does not mention having conducted such consultations.²⁰⁵

The COI devotes relatively extensive attention to the "Hannibal Directive".²⁰⁶ The substantial argument put forward in the Report is that the IDF ascribed too much weight to preventing the capture of a soldier, and therefore, the expected harm to civilians was excessive in relation to this

²⁰³ Report at 393. The US Law of War Manual, for example, asserts that: 'if a commander determines that taking a precaution would result in operational risk (i.e., a risk of failing to accomplish the mission) or an increased risk of harm to their own forces, then the precaution would not be feasible and would not be required.' US Law of War Manual, at 5.3.3.2. While some might argue that this construction goes too far, it nonetheless demonstrates that there are different opinions in this regard.

²⁰⁴ For example in an article published in the Marine Corps Gazette on the issue of infantry squad tactics in military operations on urbanized terrain, the authors, who escorted marine forces in the battlefield, make the following recommendations: 'It is the small unit leaders' duty to accomplish the mission with the fewest casualties possible.' They also stress that: 'Casualties must never be left behind!' The article does not deal with the issue of proportionality but it does show how other militaries regard the importance of retrieving wounded soldiers. The authors of the article explain that they 'have observed nearly all of the squads in the battalion and have "rolled in the stack" with many of them. This is an experience that few in the battalion have. Knowing this, we believe it is our duty to consolidate our observations, produce a comprehensive evaluation of squad tactics and techniques, and pass it onto the squad leaders.' Marine Corps Gazette, 'Infantry Squad Tactics' *Military.com* (November 5, 2005) available at www.military.com/forums/0.15240.79595.00.html.

²⁰⁵ The only reference in the Report to consultations with a military expert is at 18 in relation to assessing what kinds of weapons were most likely to have been used.

²⁰⁶ In one paragraph the Report states that this directive appears 'to be unusually expansive in terms of defining what targets are legitimate military objectives' (see Report at 360), although in another it acknowledges the IDF explanation that 'The Directive does not grant permission to violate the Law of Armed Conflict, including the rules relating to distinction and proportionality. To the contrary ... The use of unrestrained force is never permitted, even in the direst of circumstances' *Id.* at 367, quoting GOI Report at 336. See GOI Report at 334 - 336.

limited military advantage. The COI explains that “the loss of one soldier in a large army such as the IDF does not reduce its military capability”.²⁰⁷

In framing the anticipated harm to military capability this way, the COI dramatically minimizes the ramifications of a kidnapping, particularly in the context of hostilities with non-State actors. Abducting an Israeli soldier was one of Hamas's top priorities during the Operation.²⁰⁸ A successful abduction would have likely changed how the operation evolved, potentially leading to its expansion and further escalation. Not taking such considerations into account seems to be detached from the reality of complex armed conflict situations in which strategic considerations are of critical importance.

Nevertheless, the COI rejects the argument that the proportionality test must take into account the strategic consideration of denying the armed groups the leverage they could obtain over Israel²⁰⁹ and concludes that this consideration is not a concrete and direct military advantage as required by international humanitarian law.²¹⁰ Given that the question of whether strategic considerations are to be taken into account when assessing anticipated military advantage is far from conclusive,²¹¹ the COI's conclusion that this is ‘an erroneous interpretation of international humanitarian law’²¹² is far too determinative.

2) *Warnings and the Continued Protected Status of Civilians*

The COI acknowledges that “prior to most attacks, the IDF sought to warn the population in advance by means of leaflets, loudspeaker announcements, telephone and text messages and radio broadcasts, which led to the successful evacuation of some areas”.²¹³ It emphasizes that many residents did not however leave their homes and stresses that:

Failure to leave an area following a warning can in no way be viewed as directly participating in the hostilities. To infer automatically from the fact that a general

²⁰⁷ Report at 369.

²⁰⁸ GOI Report at p. 45 (“In depth: the tunnel threat”).

²⁰⁹ Report at 369.

²¹⁰ *Id.* at 370.

²¹¹ *See, e.g.*, US Law of War Manual at 2.2.3.1: “in assessing the military advantage of attacking an object, one may consider the entire war strategy rather than only the potential tactical gains from attacking that object. An interpretation of military necessity that only permitted consideration of the immediate situation could prolong the fighting and increase the overall suffering caused by the war.”

²¹² Report at 370.

²¹³ *Id.* at 396.

warning to evacuate has been issued for a given area, that anyone found inside the zone is an enemy or a person engaging in ‘terrorist activity’, or issuing instructions to this effect, contributes to creating an environment conducive to attacks against civilians.²¹⁴

The COI is correct in its analysis. This is also the position of the GOI in its report:

[a]fter providing a warning, the IDF did not assume that a relevant site or area had been evacuated. As stressed by orders issued throughout the 2014 Gaza Conflict, any estimation of the collateral damage expected as a result of an attack always required a timely assessment regarding the presence of civilians, and the provision of a warning never, on its own, affected a proportionality assessment.²¹⁵

The question therefore becomes whether IDF forces ignored or deliberately violated this policy – that is, whether IDF forces considered civilians who stayed behind “legitimate targets” as the COI seems to suggest.²¹⁶

The COI bases its suspicion on a number of statements made by IDF personnel, including an interview with a mid-ranking non-combat officer published in a military magazine. The officer is quoted explaining that the IDF tried to make every area of fighting “sterile, so any person seen there is suspected of engaging in terrorist activity.”²¹⁷ The officer does not suggest that any civilian who stayed behind was considered a legitimate target by IDF forces. Rather, the emphasis is on the forces’ efforts to operate in areas that had been cleared of a civilian presence.

Pointedly, the article itself, written in Hebrew, focuses on the IDF’s efforts to enhance the protection of civilians in conflict zones. It describes the creation of a new position of “civilian affairs officer”, who speaks Arabic and escorts the ground forces. His mission is to protect and assist the civilian population.²¹⁸ The article includes several examples of cases where these officers prevented harm to civilians during the fighting. There are also accounts of civilians asking soldiers for assistance and then attempting to

²¹⁴ *Id.* at 404.

²¹⁵ GOI Report at 306.

²¹⁶ Report at 400-401.

²¹⁷ *Id.* at 400.

²¹⁸ *See* explanation about this position in GOI Report at 377.

attack them. Despite these events, the Lt. Col. in charge of the civilian component, who is interviewed in the article, emphasizes the importance of retaining moral values by refraining from harming civilians.²¹⁹ Interestingly, this central theme of the article receives no mention in the Report.²²⁰

3) *Use of Artillery and Other Explosive Weapons in Built Up Areas*

The Report makes this conclusion with regard to the use of artillery and other explosive weapons:

the use of weapons with wide area effects by the IDF in the densely populated, built up areas of Gaza, and the significant likelihood of lethal indiscriminate effects resulting from such weapons, are highly likely to constitute a violation of the prohibition of indiscriminate attacks.²²¹

The COI does not claim that the use of artillery in densely populated areas is unlawful, but rather stresses that it is “not appropriate...regardless of the legality of resorting to such weapons”.²²² In reaching this conclusion, the COI relies on the analysis of the NGO Action on Armed Violence (AOAV), quoting the NGO's position that “such weapon systems should not be used by the IDF in attacks against residential neighbourhoods or near to other populated areas”.²²³ It is important to keep in mind that the AOAV is an advocacy group and as such, is agenda-oriented.²²⁴ While its agenda may be commendable, it does not currently reflect customary international law.

²¹⁹ See A. Bokobza, "Intermingled Fighting" 29 *BaYabasha Ground Forces J.* 65 (2014), Unofficial translation, available at <http://www.scribd.com/doc/249616628/29>.

²²⁰ The Magazine includes many articles on different aspects of the fighting in Operation Protective Edge. The issue of refraining from harming civilians is mentioned more than once in the accounts given by commanders who were involved in the fighting. For example, in the article on the engineering unit by Tomer Meir, the commander is asked whether they encountered civilians while in the urban areas, he replies 'Yes. Most of the civilians we encountered were elderly. I think they did not have where to go and their situation was not good, all they wanted was water to drink....'. T. Meir, "Between Two Cities" *BaYabasha, Ground Forces J.* 65 (2014); *Unofficial translation*, available at <http://www.scribd.com/doc/249616628/29>. Not one of the commanders interviewed claims that they viewed any civilian they encountered as a "legitimate target". The Report did not bother to include any of these other articles or quotations.

²²¹ Report at 415.

²²² *Id.* at 408.

²²³ *Id.* at 409.

²²⁴ AOAV advocates that ‘explosive weapons with wide-area impacts are unacceptable for use in populated areas. These weapons should be stigmatized and subject to strong

Most of the allegations made in the Report refer to cases in which artillery was fired to support ground forces under fire. In order to evaluate whether the use of such weapons was appropriate, a comparison of IDF practice with that of other militaries facing similar conditions would have been desirable. This was not done in the Report. All Western militaries have artillery and mortars and use them as an integral tool in their arsenal.²²⁵ The COI criticizes the use of these measures, but fails to address the question of how militaries can accomplish their missions without them. Furthermore, it ignores the in-depth analysis in the GOI Report of the use of high-explosive artillery during the Operation.²²⁶

One of the bases for the COI's deduction that IDF use of artillery and mortars was unlawful is the fact that there was a substantial increase in the use of high-explosive artillery in comparison to the Cast Lead operation in 2008.²²⁷ This analysis ignores the fact that the Cast Lead operation was substantially different from the 2014 Operation in that the ground maneuver conducted in Cast Lead was much shorter: it was not focused on detecting and destroying tunnels, the complexity of which has been mentioned above, and it encountered less opposition given that Hamas' takeover was relatively recent at the time.²²⁸ These differing circumstances can explain the increased need for firepower to defend IDF forces.²²⁹ Finally, the COI also fails to mention examinations and criminal investigations initiated by the MAG with respect to several incidents involving the use of high-explosive artillery.²³⁰ This information is of particular relevance in light of the Report's suggestion that there may have been an IDF policy to use artillery in an unlawful manner.²³¹

international standards'; AOA, 'Lobbying on weapons', available at <https://aoav.org.uk/category/explosive-weapons/policy-positions-acting-on-weapons/>.

²²⁵ See GOI Report at 348-350.

²²⁶ *Id.* at paras. 247-260.

²²⁷ Report at 408.

²²⁸ Hamas took over control over the Gaza Strip in 2007. See Miller, *supra* note 16.

²²⁹ Similarly, the reference at 413 to the statement made by the Chief Legal Adviser to the Israel Defense Ministry in 2008 is inaccurate. It is based on an article by M. Ginsburg, "Israel's Artillery Corps Torn between Precision and Power", *The Times of Israel* (October 12, 2014), which is based on an article in Hebrew by Am. Harel, "Legal opinion: Do Not Fire Guns in response to Qassams", *Haaretz* (December 17, 2008) available at www.haaretz.co.il/news/politics/1.1367889. From that article it is clear that the statement of the legal advisor of the MOD refers to an idea to respond to every rocket fired from the Gaza Strip with artillery towards the source of fire, and not to the use of artillery during a ground operation in a high intensity combat situation.

²³⁰ GOI Report at 360.

²³¹ Report at 414.

4) Destruction

The COI states that “the evidence gathered by the commission... indicate[s] that the vast scale of destruction may have been adopted as tactics of war”.²³² The COI rejects the IDF position “that the high number of buildings destroyed in Operation ‘Protective Edge’ resulted from the targeting of terrorist infrastructure and intense fighting on the ground”.²³³

The Report puts emphasis on identifying a specific effective contribution to military actions resulting from each building destroyed. In doing so, it fails to consider that the damage to buildings does not always indicate that the particular structure was considered a military target. Especially when conducting hostilities in an urban environment, damage to buildings often amounts to collateral damage from strikes, collateral damage resulting from ground forces firing in response to attacks, damage from explosions of underground tunnels, damage from the detonation of booby-traps, and so on. In other words, damage to buildings in a combat zone does not necessarily ensue from individual targeted strikes.²³⁴

In reaching its conclusion the COI focuses particularly on the “concentration of the destruction in areas close to the Green Line”.²³⁵ Why the COI finds this indicative of a tactic of war is unclear. A number of relevant factors easily explain why destruction was concentrated in this area. First and foremost, the areas close to the Green Line were the only areas to which ground forces were deployed. Combat encounters are naturally more common where ground forces are present and this usually leads to more damage. Second, these areas served as the front lines of defense for Hamas against approaching IDF forces. Thus, most of Hamas’ destructive firepower was established in those areas. Third, the cross-border tunnels, which Hamas considered a strategic asset, emanated from these areas precisely because of their close proximity to the Green Line, and in all likelihood were heavily defended.

There are also many accounts of booby-traps located adjacent to tunnel openings. The tunnels also had multiple hatches in different buildings.²³⁶

²³² *Id.* at 418.

²³³ *Ibid.*

²³⁴ A similar example is the claim in para. 310 that in Khuza'a water tanks on rooftops 'were attacked and destroyed'. Clearly a water tank which is vertically situated on the top of buildings that are under fire would be liable to get damaged. This in itself cannot serve as a basis to infer intent to harm the water tanks.

²³⁵ Report at 418.

²³⁶ *Id.* at 108.

These factors are not just educated guesses or conjecture; they were detailed in the GOI Report.²³⁷ However, the COI does not refer to these considerations or suggest an alternative means of neutralizing the threat of assault tunnels from enemy controlled areas.²³⁸

5) Targeting of Civilians

The Report purports to document a number of incidents of attacks being directed at civilians.²³⁹ Intentionally attacking civilians is unequivocally a war crime. The COI does not present any testimony suggesting the existence of an IDF policy to intentionally target civilians. Rather, the focus of the Report is on a few individual and unconfirmed cases.

A telling example is the account in the Report of the death of Ghalia Abu Reda in Kuza'a. The Report states that, according to her cousin's testimony, Ghalia Abu Reda's body was found by him with a bullet mark in her head and that a few days or weeks later, a picture was posted of an IDF soldier offering her water. The Report concludes with a quote from another relative: "The soldiers did this to pretend that they were human. They did not know that Gaza is small, and that the picture would be recognized by the family. When the family returned to Khuza'a they found Ghalia dead!"²⁴⁰

The Report does not provide any additional details. There is no indication that the COI made any attempt to substantiate this serious allegation.²⁴¹ In

²³⁷ GOI Report at 91: "Over the course of the ground operation, the IDF encountered a total of 32 cross-border assault tunnels. ... The process of locating, mapping and neutralising the cross-border assault tunnels was complex. ... An effective neutralisation of a tunnel required dismantling it entirely. To locate the various cross-border routes, IDF forces had to conduct extensive digging and engineering operations. And to dismantle the tunnels, the IDF had to use explosives, which led to damage to the ostensibly civilian structures used to conceal cross-border tunnel openings, and on occasion caused unavoidable incidental damage to the civilian buildings situated aboveground..." With regard to Shuja'iya the GOI Report further elaborates (see GOI Report at 93) that the "IDF forces found six cross-border assault tunnels directed at Israeli communities, dozens of tunnel shafts, and dozens of civilian houses rigged with booby-traps."

²³⁸ The COI also refrains from criticizing Hamas for using civilian houses for such military activities and for booby trapping civilian structures, although this tactic is one of the reasons for the widespread destruction.

²³⁹ Report at 420. It is also intertwined in the Report in its tendency to bring quotations made by witnesses who make blatant accusations against Israel without any questioning the veracity of the testimony. For example in the Report at 265 it quotes a witness saying that he 'assumed' that attacks following an abduction of a soldier 'were revenge attacks'.

²⁴⁰ Report at 333.

²⁴¹ The COI mentions this testimony was confirmed by another member of the family. This cannot be viewed as external corroboration.

fact, there is contradicting evidence with regard to the way Ms. Abu-Reda's body was discovered.²⁴² Given that there is an ongoing effort by Israel's opponents to delegitimize its actions – often by fabricating allegations against it – as part of a larger media and public opinion campaign, cross-referencing or verifying claims regarding misconduct is vital. With respect to the incident described above, the COI relies on the uncorroborated testimony of two relatives of the deceased, without considering the possibility that anti-Israel sentiment may lead to fabrications aimed at slandering – and in this case vilifying – Israel.²⁴³

At the same time, the COI's flawed methodology should not absolve Israel of its obligation to treat seriously any substantiated allegation of wrongdoing by IDF forces. Incidents of soldiers defying orders or breaking the law can occur in any armed conflict and require thorough examination. According to IDF official statements, allegations regarding the killing of civilians carrying white flags in Khuza'a were referred by the MAG to a criminal investigation.²⁴⁴

C. Incidents Relating to Shelters, the Power Plant and Ambulances

The last section of the Report relating to IDF conduct during the operation in the Gaza Strip refers to three types of incidents – attacks on UN schools serving as shelters at the time, an attack on the power plant in the Gaza Strip and attacks of ambulances.

²⁴² In the list of casualties published by the Palestinian NGO al-Haq, it is mentioned that on August 3 “[e]vening Paramedics and civil defence forces recovered 10 bodies, including Ghalia Abu Rida and nine resistance fighters from the rubble of destroyed houses in Khuza’a and Absan al-Kabira. They were killed following the shelling of the area.’ Al-Haq, “Al-Haq Field Updates from the Gaza Strip” *Al-Haq* (July 10, 2014) available at www.alhaq.org/documentation/weekly-focuses/821-al-haq-field-updates-from-the-gaza-strip. It is worth noting that the photo of the soldier giving the old lady a sip of water was publicized in a tweet of the IDF spokesman in Arabic on 3.1.2015. The allegations that she was shot in the head by IDF soldiers appeared only after this tweet, five months following the alleged incident. PIC, “Israeli Soldiers Gave Her Water and Shot Her Head”, *The Palestinian Information Centre* (January 5, 2015) available at <http://english.palinfo.com/site/pages/details.aspx?itemid=69469>. Interestingly in this report a Palestinian reporter claims that he witnessed the incident. This is a different version from the account in the Report. For an analysis of this incident by a blogger, see A. Dave, “Latest Palestinian Blood Libel: The Case Of The Thirsty Old Woman (Updated)” *Israellycool* (January 21, 2015) available at www.israellycool.com/2015/01/21/latest-palestinian-blood-libel-the-case-of-the-thirsty-old-woman/.

²⁴³ Comparing the willingness of the COI to accept face value such an extreme narrative against Israel is especially striking when it is compared to its hesitation to accept IDF assertions (and even clear-cut evidence) of Hamas violations of the law.

²⁴⁴ This is acknowledged in Report at 335.

1) Shelters

The Report refers to several cases in which IDF operations led to harm to civilians who were taking shelter in UNRWA schools in the Gaza Strip. It examines three incidents in detail. Unlike other incidents discussed in the Report, these incidents were examined by a Board of Inquiry (BOI), established by the UN Secretary General, with which Israel did cooperate. The COI was in possession of the summary of the BOI report²⁴⁵ when writing its Report.²⁴⁶ Comparing these two reports leads to a number of interesting observations.

With respect to one incident, the BOI report notes that the IDF made repeated phone calls to UNRWA officials forewarning of an attack in the days to follow and asking that civilians be evacuated from the premises.²⁴⁷ It also mentions that on the day of the incident, the CLA contacted local officials and told them to prepare the residents at the school for evacuation.²⁴⁸ The COI account of the incident, which is based on the BOI report, omits these facts.²⁴⁹ Thus the COI leaves out a central part of the relevant background critical to assessing IDF conduct.²⁵⁰

²⁴⁵ United Nations Security Council, 'Summary by the Secretary-General of the report of the United Nations Headquarters Board of Inquiry into certain incidents that occurred in the Gaza Strip between July 8, 2014 and August 26, 2014 – Annex to the Letter dated April 27, 2015 from the Secretary-General addressed to the President of the Security Council' (27 April 2015) UN Doc S/2015/286 (hereafter, the "BOI Report"), available at www.un.org/en/ga/search/view_doc.asp?symbol=S/2015/286. The full report is confidential and internal to the UN.

²⁴⁶ Report at 421.

²⁴⁷ Regarding the incident in the Beit Hanoun Elementary school, the BOI Report notes that UNRWA officials "received multiple calls from Israel's Coordination and Liaison Administration (CLA) during the three or four days prior to the incident indicating that, according to the IDF, rockets were being fired from and around the school and that it needed to be evacuated", see BOI Report, supra note 245 at 27.

²⁴⁸ See BOI Report, supra note 245 at 31. The COI refers, at 427 to the fact that representatives of the municipality came to the school to coordinate the evacuation of the residents, without mentioning that this was done following an Israeli initiative, as is clear from the BOI Report.

²⁴⁹ The COI also confuses warnings with efforts to coordinate evacuation, Report at 448. Additionally it errs once again in its analysis of what is considered an effective warning. In the Report [at 427 it states that 'the fact that the attack occurred before implementation of an evacuation agreement indicates that the advance warning was not effective'. This is not the correct way to assess "effectiveness" under the law. Effectiveness is assessed by whether it provides the opportunity for those warned to protect themselves; it is not assessed by the actual outcome, which can be influenced by many factors (failure to heed

The BOI report addresses three cases in which weapons were found on the premises of UNWRA schools, and criticizes the fact that schools were exploited by “Palestinian militant groups” during the hostilities to store weaponry and to fire from.²⁵¹ The COI mentions this phenomenon briefly,²⁵² with no legal analysis.²⁵³ Furthermore, the COI does not consider the military use by Hamas and other armed groups of UN facilities when assessing IDF responsibility for damage to UN facilities, again detaching the evaluation of IDF conduct from the relevant operational background.

The legal analysis in the Report disregards the careful and balanced analysis in the BOI report with regard to the 2014 Operation in the Gaza Strip. Instead it decides to rely on the analysis of an older report prepared by a board of inquiry appointed to examine the 2009 military operation in the Gaza Strip.²⁵⁴ The disregard of the BOI report of 2014 and reliance on the unrelated 2009 report – which incidentally is far more critical of Israel – is quite bizarre. It leads to odd results, such as criticizing the use of weapons by the IDF on the basis of a quote from the 2009 BOI report regarding projectiles containing white phosphorous, and then adding that “[w]hile in 2014, there are no allegations that the IDF used white phosphorus, the same conclusions regarding the reckless use of artillery remain valid.”²⁵⁵ This is particularly confounding – how can the conclusions remain valid if different weapons were used, and why rely on a 2009 report pertaining to an entirely different operation instead of on a recent report that addresses the same operation being examined by the COI? These questions remain unanswered.

warnings; military exigencies; change in factual circumstances, and so on). See also the analysis above in the discussion of precautions.

²⁵⁰ A similar trend can be seen in the description of the incident in Jabalia elementary girls school, where the COI, in *id.* at 433-438 refrains from referring to a statement made by a witness which stated that she had heard rockets not far from the school in the days before the incident, although this appears in the BOI Report at 39.

²⁵¹ *Id.* at 49 – 82 and accompanying letter of the Secretary General.

²⁵² Report at 444, 471.

²⁵³ The COI notes that this issue will be discussed in another part of the Report, but in that chapter there is also almost no critical analysis of this practice.

²⁵⁴ United Nations Security Council, ‘Letter dated May 4, 2009 from the Secretary-General addressed to the President of the Security Council’ (May 4, 2009) UN Doc A/63/855-S/2009/250, available at www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Gaza_S2009250.pdf. The full report is confidential and internal to the UN.

²⁵⁵ Report at 445.

2) *The Power Plant*

The Report examines an attack in which one of the power plant's fuel tanks exploded. It also refers to three previous occasions in which shells landed in close proximity to the complex, although it does not provide details about these events.²⁵⁶ It concludes that “[o]wing to the limited evidence available to the commission, it is unable to determine whether the power plant suffered incidental damage from an attack directed elsewhere, or whether it was the object of a deliberate attack.”²⁵⁷ The COI reaches this conclusion despite official Israeli statements that “IDF tank shells unfortunately missed their intended target and hit fuel tanks serving Gaza’s power plant (but not the power plant itself).”²⁵⁸

The doubts expressed by the COI with regard to the IDF explanation seem to rely on the Deputy Minister of Defense's call on the government to cut off fuel and electricity supplies to the Gaza Strip.²⁵⁹ The COI mentions this suggestion, but fails to note that his idea was rejected.²⁶⁰ The Government of Israel explicitly noted in its report that “Israel, as a matter of policy, continued the regular supply to the Gaza Strip during the 2014 Gaza Conflict.”²⁶¹ The GOI report also specifies that Israel continued to “ensure the maintenance and repair of the ten power lines through which Israel provides the electricity”²⁶² through coordination with the Palestinian Energy Authority, and that “[d]espite the challenges of repairing electricity infrastructure in an urban environment amidst intense combat operations, the Infrastructure Coordination Centre coordinated 78 repairs within the Gaza Strip during the 2014 Gaza Conflict.”²⁶³ The GOI Report goes on to explain that:

[f]ollowing an incident in which the fuel tanks servicing the power plant were put out of service as a result of IDF fire, Israel also donated ten industrial-sized electricity

²⁵⁶ *Id.* at 451. The Report relies on a HRW publication, which refers to a Gisha report and to an ICRC video. Neither gives any details about these prior incidents. It is not even clear if the damage was caused by aerial attacks or tank shells.

²⁵⁷ *Id.* at 454.

²⁵⁸ GOI Report at 289, quoted in COI Report at 453.

²⁵⁹ Report at 453.

²⁶⁰ The Deputy Defense Minister was also dismissed from his position during the operation. H. R. Gur, “Netanyahu Fires Danny Danon over Criticism of Gaza War”, *The Times of Israel* (July 15, 2014) available at www.timesofisrael.com/netanyahu-fires-danny-danon-over-criticism-of-gaza-war/.

²⁶¹ GOI Report at 392.

²⁶² *Id.* at 392.

²⁶³ *Ibid.*

generators — four to the Palestinian Authority's Ministry of Health for use at hospitals, and six for the maintenance of essential infrastructure, such as water mains, in the Gaza Strip.²⁶⁴

The authenticity of these Israeli claims was easy to verify; however the COI did not bother to so much as mention them in the Report.

These facts seem relevant in assessing whether the strike which hit the power plant was a deliberate attack – a question with which the COI seems to have grappled. The absence of any mention of the fact that Israel continued to supply electricity to the Gaza Strip is especially striking in the discussion in the Report with regard to the impact of the operation on the supply of electricity in the Gaza Strip,²⁶⁵ although this seems a very pertinent factor in that analysis.

3) *Ambulances*

The Report dedicates a separate section to attacks on ambulances in which it makes the following assertion:

[g]iven the pivotal importance of ambulances and medical personnel in areas with a civilian presence where intense shelling takes place, reports of repeated strikes on ambulances that came to the rescue of injured staff are of particular concern, as they suggest that the ambulances and personnel may have been specifically targeted.²⁶⁶

The Report stresses that ambulances and medical personnel enjoy special protection under IHL and that blocking and delaying ambulances would also constitute a breach of the obligation to respect medical transport.²⁶⁷

The main problem with the COI's analysis in this regard is that it completely ignores the factual context. These strikes occurred in areas of active hostilities with rocket launches and aerial attacks taking place and with both sides firing at each other. Under such circumstances, it is unfortunate, yet understandable, that ambulances were caught in the line of fire. Because the movement of other vehicles is very limited during high

²⁶⁴ *Ibid.*

²⁶⁵ Report at 580-583.

²⁶⁶ *Id.* at 461.

²⁶⁷ *Id.* at 464-465.

intensity combat situations, they are less susceptible to harm than ambulances that are most urgently needed in areas of intense fighting. Hence, the fact that there were several incidents involving ambulances cannot lead to an assumption of specific intent to target them.

In addition, the COI dismisses footage documenting the use of ambulances by Hamas and other armed groups for military purposes.²⁶⁸ The COI does not make any effort to seriously examine whether this was indeed a general practice of Hamas, as Israel claimed. Moreover, the Report does not mention any attempt to take steps to look into this specific incident, for example by requesting a response from Hamas. Thus, this problematic practice does not get sufficient attention.

Furthermore, even if the COI felt that it lacked sufficient support to assign responsibility to Hamas, the potential exploitation of ambulances for military purposes should have been taken into account in assessing IDF conduct. This is not done in the Report. Incidents of ambulances being struck are analyzed in complete isolation from any relevant circumstances of the operational situation.

The Report also refers to incidents involving the blocking or delaying of ambulances.²⁶⁹ The COI does not address the fact that the movement of ambulances in a zone of active fighting is complex, a relevant fact when assessing the reasonableness of a decision to restrict movement. The COI also refrains from mentioning GOI accounts about the efforts made to enable the entry of ambulances into combat zones.²⁷⁰

The Report suggests that Israeli conduct might be considered a violation of the right to health.²⁷¹ In reaching this conclusion, the Report does not make any reference to the provision of medical assistance and treatment to residents of Gaza by the IDF, which included establishing a field hospital at the Erez crossing.²⁷²

²⁶⁸ Report at 461, 477. The COI rejects the allegation on the basis that no date was given for the video provided by Israel. This is incorrect, as a date is included on the IDF YouTube website. The incidents are referred to in GOI Report at 129, 285.

²⁶⁹ Report at 465.

²⁷⁰ GOI Report at 390. In this paragraph there is also specific mention of the efforts made to coordinate a convoy of ambulances to Kuz'aa, which is not mentioned in the very critical description presented in para. 332 of the Report.

²⁷¹ Report at 465 and also the analysis in the Report at 590-595.

²⁷² GOI Report at 385-391. The COI also neglects to mention that Hamas prevented the arrival of patients to this hospital and also prevented the transfer of wounded Palestinians into Israel for medical treatment, see *id.* at 385, 396-397.

D. Accountability

The final part of the Report deals with accountability. Accountability is an important aspect of IHL from both a normative and a practical perspective. Among other things, it can strengthen adherence to international law and perhaps mitigate harm to civilians in future conflicts.

The COI's analysis of the Israeli practice is worded relatively carefully and acknowledges the 'significant steps aimed at bringing its system of investigations into compliance with international standards'.²⁷³ The main criticism is regarding lack of adequate transparency. The COI quotes the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions:

States may have tactical or security reasons not to disclose criteria for selecting specific targets....But without disclosure of legal rationale as well as the bases for the selection of specific targets (consistent with genuine security needs), States are operating in an accountability vacuum. It is not possible for the international community to verify the legality of a killing.²⁷⁴

The problematic nature of this position has already been discussed above. Without adequate solutions to the genuine concerns of states it is inevitable that states will not be able to publicly explain all their military actions. It is perhaps more prudent to focus on finding a pragmatic solution that will accommodate these concerns rather than holding states to unrealistic standards.

Despite the relatively balanced analysis of the Israeli system of investigations, the COI remains highly critical of Israel in its conclusion, stating that:

The commission is concerned that impunity prevails across the board for violations of international humanitarian and human rights law allegedly committed by Israeli forces, whether it be in the context of active hostilities in Gaza or killings, torture, and ill-treatment in the West Bank. Israel must break with its recent lamentable track record in holding wrong-doers accountable, not only as a means to secure justice for

²⁷³ Report at 608, 662.

²⁷⁴ *Id.* at 629.

victims but also to ensure the necessary guarantees for non-repetition. Those responsible for suspected violations of international law at all levels of the political and military establishments must be brought to justice.²⁷⁵

The main factors which seem to have led the COI to this conclusion are the fact that “the only indictments to date, almost one year after the events, are in connection with the relatively minor offense of theft”²⁷⁶ and “the closure of the criminal investigation into the killing of the four boys on the beach”.²⁷⁷

The first of these factors places the emphasis not on the inadequacy of the investigation process itself, but rather on the result, namely that the investigations did not lead to serious criminal prosecutions. This is a problematic illogical leap, which does not consider the possibility that perhaps the investigations conducted did not result in serious criminal charges because the conduct investigated was found to be within the confines of the law. There is also the possibility that the available evidence was insufficient to substantiate a criminal charge. The practical and legal challenges of investigations and prosecutions in armed conflict situations are detailed in the GOI report.²⁷⁸ These possibilities at the very least deserved mention.

As for the second factor, the COI is disturbed by the closure of the criminal investigation into the killing of four boys on the Gaza beach.²⁷⁹ As noted in the Report,²⁸⁰ the investigation found that a compound belonging to Hamas naval forces was located adjacent to the location of the air strike. An intelligence assessment indicated that operatives were about to gather at the compound to prepare for a military maneuver against the IDF. Aerial surveillance identified figures running into the compound who were believed to be militants; however, it was discovered after the fact that these were in fact four young boys. Based on the findings of the criminal investigation, the Military Advocate General decided to close the case without further legal proceedings. The COI criticizes this decision. It asserts that there are strong

²⁷⁵ *Id.* at 664, repeated in *id.* at 670.

²⁷⁶ *Id.* at 663. It also refers to the lack of serious prosecutions following operations "Cast Lead" and "Pillar of Defense" (*see id.* at 650).

²⁷⁷ *Id.* at 663.

²⁷⁸ GOI Report at 432-436.

²⁷⁹ Report at 663.

²⁸⁰ *Id.* at 630-633.

indications that the IDF failed to take all feasible measures to avoid the fatal outcome.²⁸¹ The COI also questions the thoroughness of the investigation.²⁸²

The following details, notably missing from the COI Report, emerge from the MAG Corps' account of the criminal investigation of the incident:²⁸³ the compound targeted was a known military compound enclosed by a fence and clearly separated from the beach serving the civilian population; and it was the object of a number of attacks on the days prior to the incident, including on military supplies stored within. As is mentioned in the Report, there was an intelligence assessment that operatives were gathering at the location. The materials reviewed in the course of the investigation revealed that the figures documented in the vicinity of the compound were not identified at any point prior to the attack as children. The MAG also stresses that 'under the circumstances in question, it would not have been possible for the operational entities involved to have identified these figures, via aerial surveillance, as children'.²⁸⁴

As for the investigation process, the MAG states the following:

During the investigation process testimony was collected from a large number of IDF soldiers and officers who were involved in the planning and execution of the attack. Additionally, an extensive number of documents relating to the attack were reviewed, along with video footage documenting the attack in real time, as well as media images and video footage which documented parts of the incident. Moreover, MPCID [Military Police's Criminal Investigation Division] investigators made efforts to collect the testimonies of Gaza Strip residents who were, allegedly, witnesses to the incident. In this context, the collection of testimony from three witnesses was coordinated. Regrettably, despite the prior coordination, the witnesses eventually declined to meet with the MPCID investigators, and instead provided affidavits in regard to the incident.²⁸⁵

²⁸¹ *Id.* at 631.

²⁸² *Id.* at 633.

²⁸³ Decisions of the IDF MAG Regarding Exceptional Incidents that Allegedly Occurred During Operation 'Protective Edge'- Update No. 4, *IDF MAG Corps website* (June 11, 2015) available at <http://www.law.idf.il/163-7353-en/Patzar.aspx>.

²⁸⁴ *Ibid.*

²⁸⁵ *Ibid.*

Given the detailed findings published by the MAG, it is unclear why the COI concludes that the investigation was unsatisfactory. The findings of the criminal investigation described above do not indicate that a crime was committed, and certainly do not justify an indictment for war crimes. The COI's reliance on this incident in support of its stand that Israel's investigations are inadequate and its conclusion that impunity prevails casts a shadow over the soundness of these conclusions.

The COI also emphasizes the lack of investigation into policy decisions of the political and military leadership as another indication of the inadequacy of the Israeli investigation system.²⁸⁶ This conclusion presupposes that the policies of the IDF should have been revised during the Operation in light of the extensive death and destruction in the Gaza Strip and that not revising them implies unlawfulness.²⁸⁷ However, as explained above, the fact that IDF actions led to "massive death and destruction" does not in and of itself indicate that the conduct was unlawful.²⁸⁸ It is therefore hard to accept the COI's rationale that the absence of investigations into why policies were not revised throughout the Operation (assuming this was the case) is indicative of a flaw in Israel's system of investigations.²⁸⁹

As for the evaluation of the Palestinian conduct in the context of accountability, the COI finds that:

Palestinian authorities have consistently failed to ensure that perpetrators of violations of international humanitarian law and international human rights law are brought to justice, and that Israeli victims are granted their right to effective remedies and reparation. With respect to the local authorities in Gaza, no steps appear to have been taken to initiate investigations into actions by Palestinian armed groups, seemingly due to a lack of political will.²⁹⁰

The COI refrains however from using the harsh term of 'impunity across the board' which it uses with regard to Israel, although the lack of any investigation and the absence of political will to investigate clearly reflect an

²⁸⁶ Report at 640-644, 672.

²⁸⁷ *Id.* at 640.

²⁸⁸ *Id.*

²⁸⁹ In the GOI Report at 443 it is mentioned that under the Israeli legal system there is a possibility to establish independent public commissions of inquiry to review practices and policies, when suitable.

²⁹⁰ Report at 666.

environment that fosters complete "impunity" for Palestinian perpetrators of international law violations.

VI. GENERAL ASSESSMENT OF THE REPORT AND CONCLUDING THOUGHTS

The COI was established by a body notorious for its anti-Israeli sentiment, by way of a resolution the text of which at the outset already included a condemnation of Israel for widespread violations of the law. Heading the inquiry originally was an outspoken critic of Israel. Despite this starting point, assessing the Report should be done on its merits. A thorough and detailed review of the Report demonstrates that despite the apparent attempt to provide a professional and objective analysis of the 2014 Gaza Conflict, the COI essentially fails in its task. The central flaws of the Report can be divided into four categories:

1. A problematic factual analysis
2. An inaccurate legal analysis
3. Lack of relevant expertise
4. Apparent lack of objectivity

1) A Problematic Factual Analysis

The COI did not have access to the scene of the conflict, nor to the internal procedures, policies or decisions of the IDF with relation to the conflict. It also did not receive a response from Hamas and other armed groups to questions addressed to them, and therefore lacked fundamental factual information regarding the events it investigated. While this is an inevitable result of Israel's decision not to cooperate with the COI, it nonetheless means that the COI's ability to reach definitive factual conclusions was very limited. This is not adequately reflected in the analysis of the COI, which is willing to make very broad assumptions in order to reach definitive conclusions. This can be seen in the following recurring patterns throughout the Report:

- a. The COI focuses its analysis on results and not on conduct, often times relying on the benefit of hindsight. It repeatedly infers from the high number of casualties and considerable level of destruction that IDF forces acted to harm civilians and civilian objects intentionally, excessively or without making sufficient efforts to minimize such harm. The circumstances which prevailed at the relevant time are not adequately presented or taken into account.

- b. The COI repeatedly fails to analyze the relevant military component of the situation. This is demonstrated, for example, by the lack of analysis of the military advantage anticipated from an attack and in the way the availability of precautions is assessed in the Report. The COI claims, time and again, that this is so because Israel did not provide it with the relevant information, but this cannot justify reaching unsubstantiated conclusions.
- c. The COI acknowledges that residents of the Gaza Strip were in all likelihood reluctant to provide information that could be used against Hamas or other armed groups for fear of reprisals. This, however, does not prevent it from heavily relying on testimonies of witnesses that no military activity took place in their surroundings, when analyzing IDF conduct and the relevant circumstances prevailing at the time, without questioning their veracity.
- d. Substantial weight is also given to testimonies by Palestinian residents claiming that members of the IDF carried out intentional and unlawful acts, despite the fact that in many cases, witnesses cannot attest to the intention of IDF commanders. In addition, the COI does not qualify its reliance on such testimonies, although it is evident that the level of animosity and hostility towards Israel could lead to fabrications.

2) An Inaccurate Legal Analysis

The COI repeatedly errs in its analysis of relevant legal rules and standards, in the following ways:

- a. It consistently adopts interpretations of IHL that are in fact either controversial or, at the very least, not widely accepted by states – such interpretations invariably consist of stricter restrictions on militaries' freedom of action than what the current state of the law reflects. This can be seen, for example, in the analysis on the subject of DPH and the determination of who is considered a member of an armed group, as well as in the legal analysis of how to address doubt regarding the military use of a civilian object.
- b. The COI declares legal obligations where none such exist in existing law. An example is the determination that states are under an obligation to disclose to independent and impartial mechanisms information about how a particular object or person came to be regarded as a legitimate target.

- c. The COI inaccurately interprets several central concepts of IHL. Such is its interpretation of what are considered “effective” warnings, which focuses on whether the warnings succeeded in preventing harm instead of on the process of providing the warning itself. A similar example is the discussion of what are considered “feasible” precautions that does not at all consider the practicality of these measures.
- d. The application of standards, such as “a reasonable military commander” is conducted without referring to the practice of other militaries and without examining what is plausible in the context of hostilities.
- e. The Report fails to adequately address the unlawfulness of practices involving the use of civilians, civilian objects and protected objects, such as hospitals and ambulances, as bases for military activity. The COI fails to condemn such practices as violating the principle of distinction and causing direct harm to civilians and civilian objects. The absence of serious consideration of this factor is apparent in the lack of any reference to such violations of IHL by Hamas and other armed groups in the conclusions and recommendations of the Report.

3) Lack of relevant expertise

The analysis in the Report demonstrates a general lack of understanding of warfare, particularly urban warfare. According to the Report, the COI consulted with an expert with regard to the types of weapons most likely used during the Operation.²⁹¹ However, this does not suffice. When analyzing an armed conflict that involves high intensity fighting, military expertise is required to assess all aspects of military conduct, and not just the weaponry angle. The lack of sufficient expertise by the COI is apparent in the following patterns:

- a. The COI makes several assumptions regarding the IDF's capabilities, which reflect a lack of military understanding. Such is its analysis of the precautions Israel should have employed in its aerial and ground operations.
- b. The COI consistently assumes that every attack on civilians or civilian objects was necessarily directed towards them, demonstrating a lack of understanding of the way militaries operate in active combat, and especially during ground operations in urban areas that are under the control of the enemy.

²⁹¹ Report at 18.

- c. The analysis of various thematic issues, such as weapons use and force protection considerations reflects a misunderstanding of tactical, operational and strategic considerations and often neglects to refer to the operational context.

4) Apparent Lack of Objectivity

The general tone in the Report is highly critical of Israel. The Report's treatment of the parties to the conflict is noticeably different. Several notable aspects of the Report reflect its lack of objectivity:

- a. The context set out in the beginning of the Report does not offer a balanced presentation of the background to the hostilities. It also fails to mention the attempts made by Israel to reach a mutual cease fire during the initial stages of the operation.
- b. The structure of the Report results in a systemic failure to properly assess IDF actions. Assessing IDF conduct prior to, and in a manner detached from Hamas's practices of operating from within civilian locations, leads to a skewed analysis of IDF's conduct.
- c. The COI often fails to make reference to relevant facts and information which appear in the GOI report, and when it does refer to the GOI Report, its tone is skeptic.
- d. When criticizing Israel, the COI is willing to use uncorroborated and unidentified singular witness testimony at face value as indicative of IDF conduct; whereas when assessing Hamas's conduct, the COI refrains from making any critical assessments even when faced with compelling accounts.
- e. The COI deals with statements made by officials of both parties in a very different manner. With regard to Israel, official statements which buttress Israeli official positions are treated with suspicion (or completely ignored), while the COI goes to great lengths to identify potential "incriminating" statements, which then receive a central place in the Report. Conversely, with regard to Hamas, official statements which support Hamas's claims are easily relied upon, with little weight assigned to statements that suggest wrongdoing.
- f. The COI makes very little mention, if any, of the humanitarian efforts carried out by Israel to alleviate some of the suffering of the Gaza Strip's civilian population, even when analyzing relevant topics. For example,

when analyzing damage to Gaza's power plant, it fails to mention that Israel continued to supply electricity throughout the operation.

These factors raise doubt about the reliability of the COI's analysis and conclusions. This is of particular importance given that the Report is probably one of the main sources of information examined by the Office of the Prosecutor (OTP) of the International Criminal Court when considering whether to open an investigation into the events related to the 2014 Gaza conflict. One hopes that the OTP will be cautious in its consideration of the COI Report.

In addition, the Report carries significant repercussions for other militaries that may have their conduct assessed by similar international bodies of inquiry, legal instances or general public opinion. Applying the standards of the COI, affirming its methodology when examining situations of armed conflict and accepting its recurring premise that the onus is on States to prove they acted lawfully in cases of doubt, is of concern. This creates a risk to other militaries that their conduct will be viewed as violating the law, even when it is lawful and reasonable, or where insufficient evidence exists to justify such conclusions.

The conflict in Gaza in the summer of 2014 was devastating for many of the residents of the Gaza Strip. Lives were lost, families broken and houses destroyed, leaving many civilians homeless. While Israelis also suffered, living in perpetual fear of rocket attacks, the physical harm is incomparable. The COI very clearly empathizes with the Palestinian victims, and understandably so. The suffering caused to the civilian population is unfortunately an unavoidable by-product of any armed conflict. This is all the more so when the civilian population is at the heart of the war zone and its presence exploited for military advantage. Under such circumstances, basing conclusions of wrongdoing entirely on the scope of harm is – simply put – erroneous. A thorough examination of the conduct of the parties must be performed, with due regard to the complexities of the factual situation. It is also important to acknowledge, where relevant, uncertainties regarding interpretation of the applicable legal rules.

A methodical and careful examination of armed conflict situations can be useful for the parties involved, as well as others for whom the experience can be valuable. Unfortunately, the COI failed in meeting this standard. The Report it produced is unsatisfactory, it misconstrues both fact and law, and ultimately could lead to erosion in the respect for the law by holding militaries to unrealistic standards. Equally troubling is the message conveyed to armed groups, which are in essence encouraged, albeit inadvertently, to

continue risking civilians and gain both military and strategic advantage, without being condemned unequivocally for their actions.

Seeking compliance with international law and accountability for IHL violations is not an exclusive interest of international bodies. Democratic states with active militaries should be equally vested in ensuring that hostilities are conducted in accordance with the principles of IHL from both a normative and a practical perspective. However, if the goal of international bodies of inquiry, such as the COI, is to contribute to ensuring accountability, they themselves must first be held to standards of professionalism and impartiality.