

February 15, 2015

The United Nations
Independent Commission of Inquiry
on the 2014 Gaza Conflict
Palais de Nations
CH-1211 Geneva
Switzerland
Attention: Mary McGowan Davis, Chair
Via email: coigaza@ohchr.org

Dear Judge McGowan Davis.

I am writing to respectfully offer some suggestions to help you avoid errors that made the 2009 Gaza Report (called the Goldstone Report before its eponym repudiated its essence) such a travesty of justice.

You may have come across my letter to Justice Richard Goldstone pointing out many of the procedural flaws in that report. If you have not, it is readily accessible online or I would be happy to provide a copy.

I will not belabor the question of the legitimacy of your mission. I am certain that you are fully cognizant of the structural and historic bias of the UN Human Rights Council against Israel. If that and the prejudicial resolution establishing the mission did not deter you from accepting the position, nothing I say will convince you to resign. I assume you will at least acknowledge these predispositions, as Justice Goldstone did, even as you seek to assure that your group behaved even-handedly, its brief notwithstanding.

One general admonition that can be derived from the 2009 report is that you – the members of the mission whose name it will bear – cannot simply accept as credible the drafts prepared by the staff hired to support you. It is very likely that many of the individuals volunteering or recruited for the task will have longstanding enmity towards Israel, as was the case in 2009 (although it was not known at that time). You may come under pressure to accept what they write because “they were the ones who spent the most time examining the evidence,” but I hope you will be skeptical of anything that seems one-sided or is prejudicially phrased, lest you allow your reputation to be used to promote the agenda of others, as Justice Goldstone sadly did.

Here are a few other lessons that can be derived from the mistakes in the 2009 report:

1. Availability of Evidence. As in 2009, Israel has chosen not to cooperate with a mission created by a biased organization by way of a lopsided resolution. While you may disagree with their decision, I hope you do not fall into the trap that the 2009 mission did of embracing it as an excuse to purport to make factual determinations while knowing you have only heard from one side. Even if the Israeli government will not formally cooperate, there are other avenues to obtain relevant information regarding the incidents you are investigating. (If you do not know how, please ask me and I will try help as best I can.) You most certainly should, for example, seek to obtain the perspective of General Martin Dempsey, Chairman of the US Joint Chiefs of Staff, who studied the Gaza situation and has observed that “Israel went to extraordinary lengths

to limit collateral damage and civilian casualties.” He has sent US military personnel to learn from the Israel Defense Forces (IDF) how to minimize civilian casualties in this kind of conflict against irregular forces fighting from among a civilian population. I urge you to also seek the views of Colonel Richard Kemp, a former Commander of British forces in Afghanistan and senior adviser to the British government on military issues who said: “I don’t think there has ever been a time in the history of warfare when any army has made more efforts to reduce civilian casualties and deaths of innocent people than the IDF is doing today in Gaza”.

2. Quality of Evidence. Everyone knows what will happen to a person in Gaza who speaks against Hamas. Accordingly, any information obtained from residents of Gaza will be tainted by duress (at a minimum). Although the 2009 report briefly acknowledged this fact, it did not seem to affect the credit given to such testimony. In addition, the shameless, almost pathological, mendacity of Hamas (and other Palestinian spokespersons) has been exposed over and over again. While this may be politically delicate, any respectable jurist must weigh such matters seriously in considering the value of evidence provided.

3. Hearsay. The 2009 mission relied heavily on anonymous allegations and hearsay, and when criticized for this, its members simply declared that they did not have to meet judicial standards because theirs was not a judicial inquiry. I hope you will better appreciate the grave consequences of accusing the nation-state of the Jewish people of war crimes and be more rigorous in your evidentiary procedures. I have heard that you will be taking submissions of “evidence” by private telephone call. This would be a highly irregular process and raise a multitude of issues impacting the credibility of any information so received. I urge you to be as open as possible, making full disclosure of all information so gathered and its source (with appropriate protections where there is a genuine risk to the source).

4. Selection of Incidents to Investigate. The gross imbalance of the incidents the 2009 mission chose to investigate, and their failure (or refusal) to look at egregious actions by Hamas, were among the more obvious indications of their prejudice. You cannot simply choose incidents based on casualty count, which would punish Israel for protecting its civilians and reward Hamas for endangering theirs. You obviously have to look at where missiles and other weapons were stored and where they were fired from, even if the damage they were intended to produce was ultimately thwarted. And especially in those tragic cases where there were civilian casualties, you have to ascertain who is responsible for that location being targeted. Just as not all civilian casualties result from war crimes, not all war crimes lead to civilian casualties. If you do not investigate the allegation (as to which there seems to be substantial prima facie evidence) that Hamas moved its headquarters beneath the Al Shifa Hospital – which would be one of the most heinous war crimes imaginable – your report will lack all credibility.

5. Historical Context. Ideally you would locate the 2014 Gaza conflagration in its proper historical context. It is impossible to understand what is happening in that region without reference to Hamas’ charter calling for the destruction of the State of Israel and the elimination of the Jewish people, and its history of suicide terrorism which preceded its rocket attacks on Israel’s cities. Neither of these even merited a mention in the 2009 report, which highlighted its partisan nature by locating that conflagration within a simplistic revisionist “Palestinian narrative”. Your report does not have to include historical context, but if you choose to, and proceed from the same disingenuous rewriting of history that the 2009 report adopted, you should not be surprised when honest people dismiss it also as mere politics.

6. Double Standards: The 2009 report was rife with double standards being applied to Israel, on the one hand, and the “armed Palestinian groups” on the other. For example, that mission purported to be able to ascertain Israel’s intent to target civilians from circumstantial evidence (like the fact that they possess precision weapons), but could never find any bad intent in Hamas’ firing its rockets from densely populated residential areas. Their assessment of the credibility of testimony provided and public statements by Israeli and Palestinian leaders also illustrated their clear favor for the Palestinian cause. It is an unfortunate fact that the Middle-East conflict is, in general, subjected to a double-double-standard, with a much higher standard of morality and restraint expected of the “Jewish state” than of any other global actor, and a much lower standard expected of Arab states and non-state actors. This is the bigotry of low expectations in action. The need to avoid such double standards in your work is of course obvious, although as noted above you can and should take into account past honesty or the lack thereof in assessing the credibility of testimony and other information provided to you.

7. Fact Finding. I urge you to stick to finding facts and avoid (as the 2009 report did not) either trying to establish legal principles or basing your report on fallacious assumptions or legal conclusions. The obvious example is the assertion that Gaza remains occupied by Israel despite Israel’s complete withdrawal almost ten years ago, so that the laws governing belligerent occupation should apply. Others are the thoroughly debunked assertion that Israel’s sea blockade of Gaza to limit the flow of weapons to Hamas and other terrorist groups is illegal, and the dubious proposition which animated the 2009 report that Hamas is a legitimate political organization separate from its armed wing.

8. Proportionality. If your report is honest (as the 2009 one was not) it will be clear that Israel did not directly target civilians. While it is always possible that an individual soldier may have out of fear or worse broken the rules of engagement, by and large the civilians who were killed in the last Gaza fight were the tragic casualties of a war planned and instigated by Hamas which took place in a densely populated area fortified and designated by Hamas as the battlefield.

The focus of your report as it relates to Israel will thus presumably be on the question of whether actions taken in the battle were “disproportionate” in a manner inconsistent with international humanitarian law. It is imperative that your report not misconstrue the principle of proportionality as the 2009 report did when it concluded that Israel’s actions in that battle constituted a “deliberately disproportionate attack”. As you well know, the legal concept of proportionality does not involve a simplistic BBC/New York Times-style body count.

As the former Chief Prosecutor of the International Criminal Court, Luis Moreno-Ocampo, has explained:

Under international humanitarian law and the Rome Statute, the death of civilians during an armed conflict, no matter how grave and regrettable, does not in itself constitute a war crime. International humanitarian law and the Rome Statute permit belligerents to carry out proportionate attacks against military objectives, even when it is known that some civilian deaths or injuries will occur. A crime occurs if there is an intentional attack directed against civilians (principle of distinction) (Article 8(2)(b)(i)) or an attack is launched on a military objective in the knowledge that the incidental civilian injuries would be clearly excessive in relation to the anticipated military advantage (principle of proportionality) (Article 8(2)(b)(iv)).

Assessing proportionality thus involves a series of logistically and morally complex determinations, ascertaining and comparing expected military advantages with anticipated civilian injuries. These decisions often have to be made quickly under extremely stressful conditions, while bullets are flying and one's soldiers are in peril. Aside from the challenge of second guessing such decisions long after the fact with the benefit of hindsight, it is extremely difficult to see how you would be able to do this at all without the full cooperation of the IDF. Fortunately, as you noted in your report following up on the 2009 Gaza report, Israel takes its obligations in this area extremely seriously and devotes substantial resources to investigating any allegations of illegal activity or other incidents where there are significant civilian casualties. I believe that the IDF makes the results of these investigations public.

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It will take enormous courage for you to write a fair and honest report, because (as you know in your heart) that is not what you were commissioned to deliver. The Council, and the OIC which dominates it, are looking for support to declare the one country on the planet that Jewish people can call their "home" guilty of war crimes. It is irrelevant that they are also willing to have Hamas tarred with the same brush: Hamas is already widely recognized as a terrorist group. Moral equivalence between the State of Israel and the terrorists is precisely the victory Israel's enemies have commissioned you to give them.

The tragedy of the 2009 Gaza report is that it missed a golden opportunity to provide moral clarity and deter the cynical manipulation of international law and institutions that has become the hallmark of modern lawfare. Instead of placing the blame for the civilian casualties in that war where it clearly belonged – with Hamas – the 2009 report provided a blueprint for terrorist groups as to how they could use international law to protect themselves and shift criticism to those trying to contain them. There can be little doubt that Hamas was emboldened by the 2009 report to dig its tunnels and fire rockets at Israeli towns and cities. I can only hope and pray you have the wisdom, honesty and courage to avoid making the same mistakes made in 2009, so that you do not provide further encouragement to Hamas, Hezbollah and all the other terrorist groups out there who, to put it mildly, do not share our passion for human rights. It is not only Israel and the Jewish people who will be damaged if you simply toe the line and give the UN Human Rights Council and the OIC what they want, but the entire system of international law.

Sincerely,

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