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Disregarding Reality, Yet Again:

The Human Rights Council Commission of Inquiry Report

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The report by the Commission of Inquiry appointed by the UN Human Rights Council to examine the events surrounding Operation Protective Edge was published on June 22, 2015. As expected, the report criticizes Israel, concluding that its military operations violated the laws of armed conflict and expressing concern regarding the possible commission of war crimes. The report is also critical of Hamas and other organized armed groups in Gaza, and raises similar concerns about their actions. In comparison to previous reports (such as the Goldstone report, which examined Operation Cast Lead), the new report is carefully worded. Still, it is also extremely critical of Israel, and again reflects a clear lack of consideration of the actual realities of warfare, drawing conclusions based on pronouncements that are factually and legally dubious.¹ This approach is problematic for Israel, which will find itself vulnerable to public criticism and perhaps even legal action based on the report's contentions.² The report is also worrisome for all other countries engaged in warfare in populated areas against enemies that do not distinguish themselves from the civilian population.

During Operation Protective Edge, the IDF fought against a semi-state organization (Hamas) and other armed groups that employed an intentional strategy of systematic violation of the laws of armed conflict, including indiscriminate firing at Israeli civilians and the use of Palestinian civilians and civilian objects (e.g., schools, hospitals, and mosques) as bases for their military activity. While the commission's report makes reference to this reality when leveling criticism at the conduct of Hamas, it fails to assign it the appropriate weight when examining Israeli actions. The result is an analysis that examines Israel's actions in a detached and one-sided manner, without relating to the

¹ See Benjamin Wittes and Yishai Schwartz, "[What to Make of the UN's Special Commission Report on Gaza?](#)"; Laurie Blank, "[The UN Gaza Report: Heads I Win, Tails You Lose](#)"; and Geoffrey Corn, "[Analysis of the U.N Report on 2014 Gaza Conflict: The Distorting Effect of Flawed Foundations](#)."

² Many of the claims are addressed in the detailed report published by the government of Israel, "[The 2014 Gaza Conflict: Factual and Legal Aspects](#)."

actions of its adversaries. This dynamic is reflected in the report's analysis of IDF compliance with the fundamental principles of the laws of armed conflict, including the principles of distinction, proportionality, and precautions in attack.

The principle of distinction obligates the parties to a conflict to distinguish between civilians and civilian objects on the one hand, and combatants and military objectives on the other hand, and to direct attacks only against the latter. With regard to Israel's airstrikes, the commission report notes that the IDF launched more than 6,000 airstrikes, of which it examined fifteen strikes on residential buildings. In nine of these incidents, the commission found indication of an attack against possible military objectives, while in the six remaining cases it did not identify a potential military objective. The commission acknowledged that the state may have difficulty releasing the intelligence on which the decision to attack was based, or proving, after the fact, that the structure was used for military purposes. Nonetheless, the report maintains that Israel is still obliged to provide sufficient details regarding each target that was attacked and the reasons it was classified as a military objective. In the absence of such information, the report holds, the Israeli airstrikes may be viewed as indiscriminate attacks and therefore may amount to war crimes. However, a state has no legal obligation to disclose such information and there are no precedents for this in the practice of other countries. Clearly, any conclusion based on Israel's non-disclosure of intelligence information of this sort is groundless.

Similarly, the commission acknowledged the fact that the ground operation involved fierce fighting, during which soldiers were killed and injured, but the report still determines that attacks on many structures in the combat zone were not conducted in accordance with the principle of distinction. In establishing this, the commission fails to take into account the realities of warfare in built-up, and in part booby-trapped, areas in which forces are fired at from different directions at once. In battles of this sort, the military response is not necessarily an attack on individual pre-defined targets – as is also reflected in the practice of other military forces fighting under similar circumstances.

With regard to proportionality, the commission likewise ignored the complex context in which the IDF was forced to operate in Gaza against an enemy that blended in with the civilian population, operated in its midst, and used it as a shield. On this basis, even in the case of airstrikes on residential buildings in which the commission identified a legitimate military objective, it still determined that these airstrikes may have been disproportionate, given the number of civilians killed – and therefore may amount to war crimes. A numerical analysis of this sort disregards the operational reality in which, in order to halt attacks launched from within a civilian population, there is no alternative sometimes but to attack legitimate targets that may result in civilian collateral damage. Without relating to this significant military necessity of stopping the incessant attacks on Israel and the military advantage gained by attacking the target, and without examining whether there

was an alternative way to achieve this result, it is impossible to determine that an attack was disproportionate based solely on the number of civilian casualties it caused.

With regard to the ground operations as well, the commission reached the conclusion that Israeli attacks were disproportionate and may be considered war crimes, based mainly on the considerable destruction caused to the neighborhoods in Gaza and the use of artillery in populated areas. The commission was particularly critical of the intensive force used to thwart the abduction of soldiers that led to civilian casualties. Here too, the commission disregarded the chaotic situation that prevails during ground operations in populated areas, especially when the enemy is fighting from within residential neighborhoods and homes, using a network of tunnels with openings in residential buildings. Moreover, in assessing proportionality, the danger posed to the lives of soldiers is a valid consideration, not only due to the significance of the loss or abduction of a soldier, but also due to the impact on mission accomplishment and continuation of the campaign.

A central element examined by the commission throughout the report is the precautions that were taken by the IDF in order to protect civilians in Gaza. The commission noted that during the operation, the IDF made phone calls, sent text messages, distributed leaflets, and used “knock on the roof” procedures in order to warn civilians, and also aborted several military operations when the presence of civilians was detected. It also noted that in many instances, these precautions were effective and saved lives. Nonetheless, the commission’s report determines that in many instances the IDF did not take all feasible precautions in order to avoid or minimize civilian casualties. In this context, the commission appears to have been operating under the misguided and unreasonable assumption that the IDF has unlimited means at its disposal during every instance of combat – in every place and at all times – and that the IDF possesses comprehensive and precise real time information regarding all that is taking place on the ground. Instead of concluding from the large number of precautions taken and the resulting success in reducing civilian injury that Israel had fulfilled the precaution requirement, the commission focused on a relatively small number of the few exceptions in which sufficient precautions were allegedly not taken or damage was not prevented to conclude that it had violated its legal obligation. In so concluding, the commission also disregarded the public assessments of foreign military experts that the precautions taken by the IDF exceeded the requirements of international law and the practices of other countries.³

³ See [“2014 Gaza War Assessment: The New Face of Conflict,”](#) the report by the JINSA-commissioned Gaza Conflict Task Force, written by five US generals. See also [“Key Preliminary Findings of the High Level International Military Group on the Gaza Conflict,”](#) the major initial findings on Operation Protective Edge in a report by eleven international generals and senior experts.

More serious is the fact that in light of the pronouncement that Israel had operated disproportionately and the fact that its military policy remained unchanged throughout the operation, the commission raised concerns that the policy, as set by senior officials, was in violation of the law. Once again, this analysis disregards the reality of the situation. As explained, numerous civilian casualties resulting from attacks on targets located in populated areas do not necessarily mean that the attack was disproportionate and therefore illegal. Indeed, every attack must be examined in its own right. Faulty decisions and mistakes in the field may have occurred, but this cannot and should not lead to a conclusion that the policy itself was illegal and should have been revised. Moreover, the commission's analysis assumes the existence of some alternative course of action that was not followed. However, beyond the provision of warnings and the use of weapons that were as precise as possible, how could the extensive harm to civilians have been prevented, except by refraining from attack altogether? And how – without these attacks – could Hamas have been prevented from continuing to fire at Israeli citizens? In the absence of answers to these questions, the commission's assertions remain accusations with no basis in reality. Without comparing the IDF's mode of operation with that of other military forces that have operated in populated areas, and without a full factual picture of the situation (which the commission itself admits to not possessing), it remains unclear on what basis the commission cast doubts on Israel's explicit official statements that it regards itself as obligated to operating in accordance with the law.

The commission's analysis of Israel's policy and mechanism of investigation is also problematic. The commission's report makes positive mention of the steps taken by Israel to improve its system of internal investigation. Nonetheless, it demands maximal external transparency, even though the legal basis for this demand remains unclear. Moreover, based on Israel's failure to issue significant indictments for acts of warfare, the commission concluded that "impunity prevails across the board" for violations of international law. Once again, this reflects a baseless assumption that the absence of indictments for war crimes is indicative of a cover-up, rather than indicative of the fact that war crimes were either not committed or could not be proven on a criminal level.

In conclusion, despite the commission's attempt to present the report as a professional and balanced document, it is extremely problematic. This article highlights only one aspect of its problematic nature and does not offer an exhaustive review of all the relevant criticism. The misguided and unprofessional analysis of combat actions taken in populated areas is based on erroneous methodology, unrealistic expectations, and standards that exceed those contained in the laws of armed conflict and applied by other military forces in the world. This is potentially detrimental not only to Israel but to the ability of other law abiding countries to confront similar challenges of warfare.