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NGO Monitor Submission to the UN Human Rights Council Committee of Independent Experts Pursuant to HRC Resolution 13/9

“I have sufficient confidence in the Israel’s legal system to conduct [] investigation[s],” --Richard Goldstone¹

Introduction

As a vibrant parliamentary democracy, located in a hostile region and faced with asymmetric war directed at its citizens, Israel faces significant challenges, including the need to balance competing rights and legal claims. Despite this complex difficulty, Israel has faced many disproportionate and indiscriminate attacks on its good faith efforts to uphold human rights while protecting against on-going terror and military strikes. Unfortunately, these complexities were not taken into account by the UN Human Rights Council Fact Finding Mission on the Conflict in Gaza led by Richard Goldstone, as noted by many prominent scholars.²

Since the issuance of the Goldstone report and in order to bolster its one-sided conclusions and recommendations,³ many organizations claiming to promote human rights and humanitarian objectives, have initiated a series of campaigns to discredit the Israeli justice system and to paint Israel as a rogue state in order to bolster politicized attempts to have Israeli officials arrested and tried in European capitals and to support the opening of an investigation against

¹ Dan Pine, “Goldstone defends Gaza report in Berkeley talk,” February 24, 2011, *JWeekly*, available at <http://www.jweekly.com/article/full/60973/goldstone-defends-gaza-report-in-berkeley-talk/>

² See, e.g., Moshe Halbertal, “The Goldstone Illusion,” *THE NEW REPUBLIC*, November 6, 2009, available at <http://www.tnr.com/article/world/the-goldstone-illusion>; Report of an Expert Meeting which Assessed Procedural Criticisms made of the U.N. Fact-finding Mission on the Gaza Conflict (The Goldstone Report), Chatham House, (Nov. 27, 2009), available at <http://www.chathamhouse.org.uk/files/15572-il271109summary.pdf>; Ed Morgan, “The UN Book of Judges,” *Global Governance*, April-June 2010, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1622307; Nigel S. Rodley, “Assessing the Goldstone Report,” *Global Governance*, April-June 2010, available at http://findarticles.com/p/articles/mi_7055/is_2_16/ai_n55407196/?tag=content;col1; Laurie Blank, “The Application of IHL in the Goldstone Report: A Critical Commentary,” 12 *Y.B. of Int’l Hum. L.* (2009); Peter Berkowitz, “The Goldstone Report and International Law,” Stanford University Hoover Institution, August 1, 2010, available at <http://www.hoover.org/publications/policy-review/article/43281>; Avi Bell, “A Critique of the Goldstone Report and its Treatment of International Humanitarian Law,” *American Society of International Law Proceedings*, Vol. 104, March 2010, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1581533; Trevor Norwitz, “Open Letter to Judge Goldstone,” October 19, 2009, available at <http://www.goldstonereport.org/pro-and-con/critics/316-trevor-norvitz-open-letter-to-judge-goldstone-191009>.

³ The Goldstone report for example only calls for the use of universal jurisdiction against Israeli officials. See Goldstone Report at paras. 127, 1856-57. Former President of the International Court for the Former Yugoslavia, Judge Fausto Pocar, criticized this bias as “one-sided and discriminatory”. (Remarks made at Hebrew University, “Securing Compliance with IHL” Conference, November 22-24, 2009.)

Israel at the International Criminal Court. Much of this campaigning has been directed towards the Goldstone Follow-up committee. NGO Monitor has prepared this submission to provide background information and context that may not be known to the Committee. We hope that this information will aid the Committee in preparing its report.

NGO Monitor is a Jerusalem-based research institution that tracks the activities and campaigns as well as the funding of NGOs operating in the Arab-Israeli conflict. For more than eight years, NGO Monitor has conducted dozens of detailed and systematic research studies on the issues of NGO transparency, accountability, international law, human rights, humanitarian aid, and the laws of armed conflict. Members of NGO Monitor's Advisory Board include Elie Wiesel; Harvard Professor Alan Dershowitz; Colonel Richard Kemp, former commander of British forces in Iraq and Afghanistan; R. James Woolsey, former US Director of Central Intelligence; Member of Italian Parliament, Fiamma Nirenstein; US Jurist and former Legal Advisor to the State Department, Abraham Sofaer; Ambassador Yehuda Avner; UCLA Professor and President of the Daniel Pearl Foundation, Judea Pearl; Harvard Professor Ruth Wisse, former US government official, Elliot Abrams; Douglas Murray, Director of the Centre for Social Cohesion, best-selling author and commentator; and British journalist and international affairs commentator, Tom Gross.

The NGO Campaign to Portray Israel as an “inherently undemocratic state”

In September 2008, Hassan Jabareen, executive director of the NGO Adalah, presented at a conference in Brussels sponsored by Swedish NGO, Diakonia, entitled, “Palestine/Israel: Making Monitoring Work: (Re-) Enforcing International Law in Europe.” The conference promoted the themes and conclusions of the antisemitic NGO Forum of the 2001 Durban Conference which called for the singling out and international isolation of Israel as a “racist” state (the “Durban strategy”). The organizers of the 2008 Brussels conference claimed that the meeting would examine the “need to bring perpetrators from Israel/Palestine, as well as their accomplices in Europe, to justice in European courts.”⁴ In practice, however, the focus of the conference was solely directed at alleged Israeli violations, and on developing tactics to specifically target Israelis. One of those strategies was articulated by Jabareen, who advised that the assembled activists “should try to portray Israel as an inherent undemocratic state” and “use that as part of campaigning internationally.”

Since then, and in conjunction with the HRC Goldstone mission, NGOs have escalated these attacks on the Israeli justice system, most notably against the Israeli Supreme Court, and the Israeli military justice framework. In carrying out these activities and as highlighted in this submission, NGOs promote legal fallacies and inaccurate information in order to advance a distorted view of rule of law, due process, and human rights, as well as to create a false picture of the Israeli justice system.

⁴ See *supra* note 1.

Attacks on the Israeli Supreme Court

The Israeli Supreme Court (High Court of Justice) is a primary target for NGO campaigning. NGOs active in this effort include Human Rights Watch (HRW), Adalah, Al Haq, the Palestinian Center for Human Rights (PCHR), Yesh Din, FIDH (France), Public Committee Against Torture in Israel (PCATI), and Amnesty International. Some of these campaigns go so far as to advocate sabotaging the Supreme Court. Al Haq (headed by a suspected senior activist for the PFLP terror organization), for instance, has called for “an advocacy campaign against the Court,” proposing that “the legal community **flood[] the Court with petitions in the hope of obstructing its functioning and resources**” (emphasis added) – an illegal measure aimed at incapacitating the Israeli court system.⁵

The following highlight several examples of these campaigns, many of which have been included in NGO submissions to the Committee:⁶

Adalah

- As mentioned, in 2008, Adalah Director Hassan Jabareen appeared at the Al Haq- and Diakonia-sponsored conference entitled, “Palestine/Israel: Making Monitoring Work: (Re-)Enforcing International Law in Europe.” In addition to his suggestion for portraying Israel as “inherently undemocratic,” he also claimed that Israel’s Supreme Court, “is not amenable to hearing [] cases that deal with acts amounting to potential war crimes.”⁷
- Jabareen filed an “expert” opinion on behalf of PCHR, in a lawsuit filed by the group in Spain. The case sought the arrest and imprisonment of seven Israeli officials for alleged “war crimes” arising out of the killing of a senior Hamas terrorist, Salah Shehade. Shehade was responsible for the murder and wounding of hundreds of Israelis, and was planning an imminent attack at the time of the operation.
 - Jabareen’s opinion claimed that the Israeli Supreme Court had engaged in “misuse of the judicial process” in reviewing the Shehade operation. It also alleged that following Israel’s 2005 disengagement from Gaza, there was a “lack of impartiality of the Israeli legal system towards Palestinians and the lack of an effective remedy before Israeli courts for Palestinians in Gaza.” Adalah also claimed that the Israeli “Supreme Court ha[s] defined all Palestinians as enemies who present

⁵ Al Haq, “Legitimising the Illegitimate? The Israeli High Court of Justice and the Occupied Palestinian Territory,” Nov. 2010, available at <http://www.alhaq.org/pdfs/legitimising.pdf>.

⁶ These are just a few of the hundreds of examples documented by NGO Monitor.

⁷ “NIF Has Crossed the Line,” NGO Monitor, May 14, 2010, available at http://www.ngo-monitor.org/article/nif_detailed_research. Notably, despite Jabareen’s claims, Adalah has filed dozens of cases where the Supreme Court has reviewed such acts and the organization has even prevailed on several occasions in changing Israeli policy.

an inherent threat to all citizens of Israel.”⁸

- Jabareen and PCHR developed the opinion at an EU-funded conference held in Madrid from January 29 – February 1, 2009. Jabareen was invited “in anticipation of Israel’s retaliation to the 29 January decision of the Spanish Court, particularly as this related to the exhaustion of national jurisdiction vis-à-vis Israel’s military investigation.”⁹

Although Adalah alleges that it has no recourse in Israeli courts, this organization files dozens of cases each year, and many are successful. In fact, Jabareen’s CV, annexed to the Adalah opinion filed with the Spanish courts, described several cases where Adalah had secured relief for Palestinian litigants in Israeli courts.

[Al Haq](#)

Al Haq is a Ramallah-based Palestinian advocacy organization that compares Israel to apartheid South Africa, is active in anti-Israel boycott, divestment, and sanctions campaigns, and refers to terror attacks on Israelis as “[legitimate resistance](#)”. Its executive director, Shawan Jabarin, is linked to the PFLP terror organization. Al Haq is a leader in the “[lawfare](#)” movement, filing several cases in North America and Europe in attempts to “judicially enforce” the widely criticized and nonbinding International Court of Justice advisory opinion on Israel’s security barrier. Al Haq also filed for an [arrest warrant](#) of Israeli Defense Minister and former Prime Minister Ehud Barak in the UK for the Gaza War.

As part of its UN campaigning and legal strategies, Al Haq routinely asserts that the Israeli Supreme Court is unwilling to rule on issues affecting the rights of Palestinians. To bolster these efforts, Al Haq has issued several publications leveling highly inflammatory and offensive accusations against the Israeli Supreme Court. Its November 2010 paper entitled, “Legitimising the Illegitimate? The Israeli High Court of Justice and the Occupied Palestinian Territory”¹⁰ makes several claims¹¹ including:

- “HCJ jurisprudence has become the ultimate rubber stamp for Israeli policies in the OPT, legitimising Israel’s illegal actions through the veneer of ‘legal’ judgments.”

⁸ April-May 2010 Digest, NGO Monitor, available at <http://www.ngo-monitor.org/article.php?id=2924>.

⁹ Anne Herzberg, “NGO ‘Lawfare’: Exploitation of Courts in the Arab-Israeli Conflict,” NGO Monitor Monograph Series, December 2010 (2nd Edition), at 51-2, available at <http://www.ngo-monitor.org/data/images/File/lawfare-monograph.pdf>

¹⁰ Al Haq, “Legitimising the Illegitimate? The Israeli High Court of Justice and the Occupied Palestinian Territory,” Nov. 2010, available at <http://www.alhaq.org/pdfs/legitimising.pdf>.

¹¹ The Canadian Appellate Court found these claims to be “devoid of merit”. (see below)

- “Studies analyses and commentaries have consistently exposed the HCJ’s often perverse application of international legal standards . . . masquerading behind a superficial façade of humanitarian and human rights.”
- “In this sense the question of justiciability is indicative of the HCJ’s role in the OPT: by imposing limits on itself through a narrow conception of its own ability to judicially review government actions, the Court is rendered ineffective and incapable of providing any real remedies for Palestinians.”
- Al Haq calls the HCJ opinion on the Security Barrier, *Beit Sourik*, a “legal perversion” simply because the decision differed from the discredited and procedurally compromised non-unanimous ICJ advisory opinion on the barrier.¹²

At the end of the report, Al Haq proposes several strategies including sabotaging the Supreme Court:

- “an advocacy campaign against the Court”
- “The legal community *flooding the Court* with petitions *in the hope of obstructing its functioning and resources.*” (emphasis added)

[Palestinian Center for Human Rights](#) (PCHR)

Like Adalah and Al Haq, As part of its political campaigning, PCHR routinely attacks the Israeli judiciary. It has filed many lawsuits to have Israeli officials arrested in Europe or civilly sued in the US (all of these cases have been dismissed by the courts in the preliminary stages).¹³ Several of these cases, filed in the UK, Spain, New Zealand, and the US, relate to the 2002 targeted killing of Hamas military leader Salah Shehade, as mentioned above, responsible for the murder and injury of hundreds of Israeli civilians. A central component of its case strategy is to impugn the Israeli justice system.

In its court filings, PCHR alleges that in the aftermath of the Shehade strike, the “Israeli judiciary was used as a legal cover for the perpetration of war crimes, and as a tool to deliberately hinder international jurisdiction under the pretext of a ‘fair’ national judicial system operating in Israel.”¹⁴

¹² Apparently, Al Haq’s vision of “justice” does not accept differing opinions. It is notable that several ICJ judges highly criticized the opinion, filing strongly worded dissents. According Al Haq’s worldview, these judges must also be “legally perverse.”

¹³ See, Herzberg, *supra* note 20.

¹⁴ *Id.* at 50.

PCHR also issued a report in 2010 entitled “Genuinely Unwilling,”¹⁵ making the following unfounded claims:

- “Israel’s judicial system is also unable to investigate senior government and military officials, and assessing criminal responsibility for violations such as those outlined, inter alia, in the Goldstone Report.”
- “This study concludes that over a year and a half after the military operation no effective domestic investigations have been conducted into the events of Operation Cast Lead, and that such investigations cannot be conducted within the Israeli national system.”
- “The State of Israel actively seeks to avoid scrutiny of its military and security apparatuses; in this regard it is assisted by the HCJ. The net result – as detailed below – is a climate of pervasive impunity, one ‘legitimised’ by the judicial system.”

“Genuinely and Unwilling” also alleges that civilian supervision of the Israeli military justice system “exists in law but not in fact” and falsely claims that “the scope of judicial review is extremely limited, negating the possibility of civilian oversight.”¹⁶ In alleged support of these claims, PCHR cites to a decision of the Israeli Supreme Court, referring to a lengthy translated quote from that case.¹⁷ The case, however, is grossly misrepresented. The cited decision relates to the discretion of the Attorney General on a limited evidentiary issue in a domestic rape case, and says nothing about nor has any applicability to civilian judicial review of the military justice system.¹⁸ In fact, Israeli courts have reviewed such cases on many occasions.¹⁹

PCHR’s accusations against the Israeli Supreme Court relating to the Shehade targeted killing are similarly unfounded. In fact, the Court has adjudicated claims arising out of the Shehade killing in two high profile cases: *Public Committee Against Torture in Israel v. State of Israel* (HCJ 769/02)²⁰ and *Yoav Hess v. Chief*

¹⁵ Genuinely Unwilling: An Update (Aug. 2010). PCHR, available at <http://www.pchrgaza.org/files/2010/Genuinely%20Unwilling%20-%20An%20Update.pdf>.

¹⁶ The NGOs Al Mezan, Al Haq, Badil, Defence for Children International-Palestine Section, FIDH joined PCHR in making this same allegation in a written submission filed with the UN Human Rights Council. “Joint Written Statement – Human Rights Council 15th Session, The Failure to Conduct Genuine Criminal Investigations and Prosecutions at the National Level,” September 1, 2010, available at <http://www.alhaq.org/pdfs/2+Joint+Written+Statement+-+The+failure+to+conduct+genuine+investigations.pdf>

¹⁷ “The decision made by the prosecuting authorities to close an investigation file on the basis of a lack of sufficient evidence [...] normally falls within the „margin of appreciation□ that is afforded to the authorities and curtails – almost to nil – the scope of judicial intervention.” <http://elyon1.court.gov.il/files/07/990/056/N45/07056990.n45.pdf>

¹⁸ Further discrediting the charges of these NGOs, an Israeli court issued a verdict on December 30, 2010 against the defendant referred to in the case cited by PCHR, convicting him on two charges of rape.

¹⁹ See, e.g., *Ashraf Abu Rahma et al. v. Military Advocate General*, HCJ 7195/08 (1 July 2009); *Jamal Abed al Kader Mahmoud Zofnan et al. v. Military Advocate General*, HCJ 425/89 (1989)

²⁰ HCJ 769/02 *Public Committee Against Torture in Israel v. State of Israel* [2002].

Military Prosecutor (HCJ 8794/03).²¹ In the *PCATI* case, the court reviewed the legality of Israel's targeted killing policy. The *Hess* case addressed the Shehade operation specifically. In addition to these cases, the Israeli government formed an independent commission to investigate the operation, and the Supreme Court granted the right to the Hess plaintiffs to petition the court for review of the committee's work should they be dissatisfied with the results.²²

Some of the same plaintiffs in PCHR's Spanish lawsuit (as well as in the other cases orchestrated abroad by PCHR) had also previously filed civil cases in Israel over the strike. Plaintiffs in *Matar v. State of Israel* (7606/03) filed in Kfar Saba Magistrate's court seeking monetary compensation. In 2004, the Supreme Court informed those who had been injured in the operation that they could file individual petitions against the government in Israeli court, but they chose not to do so. Additional claimants filed suit in August 2004 in the Hadera courts, but the plaintiffs' own attorney asked for dismissal after he was unable to contact the plaintiffs' attorney in Gaza for more information. The court agreed to dismiss the case without prejudice, meaning the plaintiffs would be able to re-file their case at a later date.

Israeli Courts, Human Rights, and International Law

The NGO claims highlighted above alleging that Israel's Supreme Court "is not amenable to hearing [] cases that deal with acts amounting to potential war crimes"²³ are simply false.

Israel's High Court of Justice is one of the most accessible courts in the world. There are few, if any, justiciability or standing limitations at the HCJ. Cases can be filed by anyone or any organization regardless of their connection to the facts or events at issue. The Court also takes a very broadminded view regarding the application of international humanitarian and human rights law.²⁴ U.S. Supreme Court Justice, Elena Kagan, has called former Supreme Court President Aharon Barak "my judicial hero" and "the judge or justice in my lifetime whom, I think, best represents and has best advanced the values of democracy and human rights, of the rule of law and of justice."²⁵

The HCJ has judged thousands of petitions (many of which were brought by the NGOs referred to in this paper) relating to Palestinian rights: examining the authority of the military commander according to the standards of proportionality;

²¹ HCJ 8794/03 *Yoav Hess v. Chief Military Prosecutor* [2003].

²² The Spanish Supreme Court found these efforts to be "substantive and genuine". (see below).

²³ See Diakonia, "Conference Report: Palestine/Israel: Making Monitoring Work: (Re-)Enforcing International Law in Europe," September 2008. Report available on file with the author.

²⁴ See e.g., AHARON BARAK, *THE JUDGE IN A DEMOCRACY*, (Princeton 2006); See also Aharon Barak, "A Judge on Judging: The Role of a Supreme Court in a Democracy," 116 *Harv. L. Rev.* 16 (2002).

²⁵ Elena Kagan: Aharon Barak my judicial hero," YNet News, Jun. 25, 2010, *available at* <http://www.ynetnews.com/articles/0,7340,L-3910619,00.html>.

restrictions on place of residence; checkpoint positioning; human shields, harm to Palestinian property due to army operations; the safeguarding of freedom of worship and the right to access to holy places; the demolition of houses; the laying of siege; the powers of the army during combat pursuant to international humanitarian law; the rights of Palestinians to food, medicine, and similar needs during combat operations; the rights of Palestinians during the arrest of terrorists; and detention and interrogation procedures.

In more than one hundred petitions, the HCJ “has examined the rights of [Palestinians] according to international humanitarian law as a result of the erection of the separation fence.”²⁶ The court has even reviewed military operations while they were underway and even while the Israeli government was in the midst of conducting political negotiations on the very issues brought before the court.²⁷ In addition, the Court is empowered to review the appointment for the General Chief of Staff, Israel’s highest ranking army official.²⁸

Attacks on Israeli Investigations

Coupled with inflammatory rhetoric and incitement against the Israeli Supreme Court, NGOs, most notably Human Rights Watch (HRW) and Amnesty International, have attacked the credibility and independence of Israeli investigations. In most cases, these organizations reject such investigations prior to the review of any evidence or issuance of any reporting.²⁹ They further dismiss the difficulty of conducting investigations in territory controlled by hostile entities and where most of the evidence has been compromised or is unavailable. These campaigns routinely misrepresent the Israeli justice system, and include many false and un-sourced claims.

This strategy is used to support NGO efforts to have Israelis tried for “war crimes” in Europe and at the International Criminal Court. Since the release of the Goldstone report and the Palestinian Authority declaration to the Prosecutor of the International Criminal Court, NGOs have greatly increased this type of campaigning.

[Amnesty International](#)

“Both Amnesty International and the Committee found that Israel’s investigations have lacked independence, appropriate expertise and

²⁶ Remarks of Justice Aharon Barak, Brandeis University “Colloquium on Israel and International Law,” January 3, 2010. Notes on file with the author.

²⁷ See, e.g. *Physicians for Human Rights v. Prime Minister of Israel*, HCJ 201/09 and 248/09 (19 January 2009); *Almadani v. IDF Commander in Judea and Samaria*, H.C. 3451/02, available at http://elyon1.court.gov.il/files_eng/02/510/034/a06/02034510.a06.pdf.

²⁸ Israeli NGOs, such as Yesh Gvul and Gush Shalom have tried to block the appointments of Yoav Galant, Yair Naveh, and Beni Gantz. “Barak, Netanyahu decide: Galant will not be next IDF chief,” *Jerusalem Post*, February 1, 2011, available at <http://www.jpost.com/Defense/Article.aspx?id=206259>; Herb Keinon, et. al., “Turkel panel to evaluate Gantz for next IDF chief,” *Jerusalem Post*, February 7, 2011, available at <http://www.jpost.com/Defense/Article.aspx?id=207117>.

²⁹ See NGO Monitor, “HRW, Amnesty, and the Reuters Cameraman Incident,” August 19, 2008, available at http://www.ngo-monitor.org/article/hrw_amnesty_and_the_reuters_cameraman_incident Amnesty attacked Israel’s investigation without ever reading the detailed 17-page report issued by the investigatory body.

transparency. More than 65 military probes have been closed without opening criminal investigations; . . . Although some Israeli investigations are still ongoing, there is no indication that these investigations overseen by the Israeli military . . . will be impartial and transparent, or result in prosecutions for serious violations.”

- [“Amnesty International Launches International Justice Campaign for Gaza Conflict Victims”](#) (January 20, 2011)

“Amnesty International has condemned the findings of an Israeli inquiry into last year’s raid on a Gaza-bound aid flotilla as a ‘whitewash’ which failed to account for the deaths of nine Turkish nationals.”

- [“Israeli inquiry into Gaza flotilla deaths no more than a ‘whitewash’,”](#) (January 28, 2011)³⁰

[Human Rights Watch](#) (HRW)

“More than one year after the conflict, neither side has taken adequate measures to investigate serious violations or to punish the perpetrators of war crimes, leaving civilian victims without redress. Israel’s investigations have fallen far short of international standards for investigations.”

- [“Turning a Blind Eye”](#) (April 11, 2010)³¹

Amnesty and HRW do not specify why Israeli investigations are not “impartial and transparent” and they fail to offer concrete examples of how Israel has refused to take “adequate measures” in its investigations. The Israeli government has already released three lengthy reports detailing its procedures in the aftermath of the Gaza War.³² Similarly, the Turkel Commission, established to examine the May 2010 attack by members of the Gaza flotilla organized by the Turkish IHH terror organization, was monitored by two highly respected international observers, Lord David Trimble and Brigadier General (Ret.) Kenneth Watkin. Two leading legal experts in IHL and maritime law, Michael Schmitt and Prof. Wolff Heintschel Von

³⁰ Israel’s flotilla inquiry not only included Israeli officials but highly respected international observers and legal experts.

³¹ See NGO Monitor, “HRW Presses Goldstone Campaign, Ignores Exposés, April 13, 2010, for NGO Monitor’s analysis of this report, *available at* http://www.ngo-monitor.org/article/hrw_presses_goldstone_campaign_ignores_expos_s

³² Ministry of Foreign Affairs of Israel, “The Operation in Gaza - Factual and Legal Aspects,” July 29, 2009, *available at* http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Hamas+war+against+Israel/Operation_in_Gaza-Factual_and_Legal_Aspects.htm; “Gaza Operation Investigations: An Update (January 2010)” *available at* <http://www.mfa.gov.il/NR/rdonlyres/8E841A98-1755-413D-A1D2-8B30F64022BE/0/GazaOperationInvestigationsUpdate.pdf>; “Gaza Operation Investigations: Second Update (July 2010),” *available at* <http://www.mfa.gov.il/NR/rdonlyres/1483B296-7439-4217-933C-653CD19CE859/0/GazaUpdateJuly2010.pdf>.

Heinegg, advised the committee on the legal aspects. The comprehensive report issued by the Commission is underpinned by a fully transparent investigatory process.³³

Moreover, contrary to the claims made by Amnesty, HRW, and other NGOs, recent legal scholarship has noted that Israel's military justice system takes a "more extreme approach" in limiting the risk of undue influence and impartiality than other countries.³⁴ As noted by legal scholar Lindsay Alleman, "between the random selection of panel members, the statutory independence of judges and MAGs, and the great limitations placed on the already minimal disciplinary powers of the District Chiefs, the issue of unlawful command influence is moot in the Israeli military justice system."³⁵

The Cox Commission, a special commission convened in 2001 to assess the military justice system of the United States, found that "in recent years, countries around the world have modernized their military justice systems, moving well beyond the framework created by the UCMJ fifty years ago. In contrast, military justice in the United States has stagnated, remaining insulated from external review and largely unchanged despite dramatic shifts in armed forces demographics, military missions, and disciplinary strategies." In making these assessments, the Commission specifically noted the influence of reform efforts in several foreign jurisdictions, including Canada and Israel.³⁶

Decisions made by the three main bodies of Israel's military justice system, the Military Advocate General's Corps, the Military Police Criminal Investigation Division, and the Military Courts³⁷ are subject to review by civilian authorities. The Israeli Attorney General may revisit decisions of the MAG regarding the opening of a criminal investigation and may order such an investigation to take place. NGOs or individual complainants may trigger this review simply by sending a letter to the Attorney General.³⁸ Judgments from the Military Court of Appeals may be directly appealed to the Israeli Supreme Court (HCJ). The HCJ can also review and reverse decisions of the MAG, the military prosecution and/or the Attorney General whether

³³ See <http://www.turkel-committee.gov.il>. The Committee's website includes comprehensive information – copies of requests for documents, transcripts from the hearings, etc... The Committee has also recommended that the government publish certain parts of the report that were classified for security reasons.

³⁴ Lindsay Nicole Alleman, Who is in Charge and Who Should Be? The Disciplinary Role of the Commander in Military Justice Systems, 16 DUKE J. COMP. & INT'L L. 169, 178 (2006) .

³⁵ *Id.*

Id. at 180. The author employs the following definition for "unlawful command influence": "the improper interference by a superior in command with the independent judgment of a person responsible for judicial decision." citing Charles A. Shanor & L. Lynn Hogue, MILITARY LAW IN A NUTSHELL 117 (1996).

³⁶ Alleman, *supra* note 45, at 173. See also Major General Menachem Finkelstein, Major Yifat Tomer, The Israeli Military Legal System – Overview of the Current Situation and a Glimpse into the Future, AIR FORCE L. REV., Winter 2002, 161-62.

³⁷ Ministry of Foreign Affairs of Israel, Gaza Operation Investigations: An Update (January 2010) at 3-6, available at <http://www.mfa.gov.il/NR/rdonlyres/8E841A98-1755-413D-A1D2-8B30F64022BE/0/GazaOperationInvestigationsUpdate.pdf>

³⁸ See e.g., Finkelstein & Tomer, *supra* note 47, at 163; Gaza Operation Investigations: An Update (January 2010) at para. 33

to investigate or indict alleged misconduct.³⁹ Furthermore, private individuals and NGOs may directly petition the court regarding the legality of IDF actions.

It is important to note that just because Amnesty International and Human Rights Watch do not agree with the results of Israeli investigations, it does not mean that credible investigations have not been conducted or that due process has been violated.⁴⁰

Courts around the world reject NGO attacks on the Israeli legal system

Courts around the world have repeatedly and soundly rejected the NGO claims mentioned above, remarking on the high quality of Israeli due process. For instance, in a decision issued on July 9, 2009, the Spanish Appeals Court wholly dismissed claims made by PCHR, highlighting that “the extensive and exhaustive documents submitted [by Israel] reveal the commencement of a series of criminal and civil proceedings well in advance of the presentation of the complaint in Spain.” The court found “it can be deduced that there has been genuine action, first on the part of the government and then on the part of the courts, to determine whether a crime may have been committed.”

The appellate judges further rejected PCHR’s claims that Israel’s investigations lacked credibility and that the plaintiffs were denied due process in Israel. Instead, the court found that PCHR’s allegations “do[] not tally with the court decisions that have been handed down in the proceedings in which the parties have intervened, among them many of the parties to the complaint brought in Spain, who have made use of the rights of allegation, proof and challenge provided for by law.” Finally, the court noted that there was no “evidence of any malicious or unjustified procedural delay” by Israel, and that PCHR’s “disputing the impartiality and organic and functional separation” between the Israeli Military Advocate General, Israel’s Attorney General, the government-appointed Investigation Commission “involves ignoring [Israel’s] existence [as] a social and democratic state with rule of law.”

An April 13, 2010, by the Spanish Supreme Court, found the appellate decision was a “well grounded and reasoned response.” The court also emphasized that Israel’s investigations are “substantive and genuine.”⁴¹

Al Haq’s attempts to impugn the Israeli justice system in foreign courts have also failed. In 2009, a Canadian court rejected a lawsuit filed by Al Haq, concluding

³⁹ Gaza Operation Investigations: An Update (January 2010), *supra* note 48, at para. 34.

⁴⁰ HRW and its Executive Director, Kenneth Roth, for example, have repeatedly misrepresented statements made by former Israeli Defense Minister Tzipi Livni, to portray her as authorizing the unfettered killing of Palestinian civilians and to support their campaigns for prosecution of Israeli officials at the International Criminal Court. HRW and Roth have refused to retract these defamatory claims even after their distortions were exposed in the media. See Anne Herzberg, “European-Funded Al Haq: Source of the Livni Blood Libel?,” NGO Monitor, *available at* http://www.ngo-monitor.org/article/ngo_gaza_war_myths_revisited#livni

⁴¹ Herzberg, *supra* note 20.

that the plaintiffs were engaging in “inappropriate forum shopping.”⁴² The court highlighted that a “review of the evidence simply does not bear out [the] preconception” made by plaintiffs that the HCJ was “unwilling to adjudicate on a politically sensitive matter.”⁴³ Moreover, the court found that the plaintiffs simply chose a Quebec forum to “avoid the necessity of . . . proving [their case] before the HCJ . . . thus ensuring for themselves a juridical advantage based on a merely superficial connection of the Action with Quebec.”⁴⁴ An August 11, 2010 decision by the Canadian Court of Appeal issued a decision affirming the lower court’s dismissal finding plaintiffs’ claims regarding Israel’s HCJ to be “devoid of merit.”⁴⁵ And on March 3, 2011, the Canadian Supreme Court affirmed the dismissal of Al Haq’s case, imposing costs.

In dismissing a 2009 lawsuit filed by Al Haq in the UK, seeking a judicially imposed arms embargo on Israel and a declaration that Israel had committed violations of international law during the Gaza War, UK Justice Malcolm Pill stressed that “this is not a case in which the breach of international law is plain and acknowledged or where it is . . . clear to the court.”⁴⁶ Pill criticized Al Haq’s citation to the International Court of Justice’s opinion on Israel’s Security Barrier as a legal precedent for judging Israeli actions in Gaza.⁴⁷ He noted that, “the Wall Opinion considers different issues and there has been no authoritative judgment upon Operation Cast Lead.”⁴⁸ Justice Cranston echoed Pill’s remarks stating that “the [ICJ opinion] is not directly applicable to Gaza.”⁴⁹

US Courts have also discarded claims attacking Israel’s legal system. In a 2005 case filed by the New York-based Center for Constitutional Rights⁵⁰ regarding an Israeli military operation in Lebanon, the US D.C. Circuit Court of Appeals, affirming the dismissal of a lower court, found that the plaintiffs could point to “no case where similar high-level decisions on military tactics and strategy during a modern military operation have been held to constitute torture or extrajudicial killing under international law.”⁵¹ The Southern District Court of New York has similarly found that there was no evidence “to support that mass indictment of [Israel’s] judicial system. . . . Indeed, readers of newspapers are aware of the fact that Israeli courts are

⁴² Decision of Justice Paul Cullen in *Bil’in Village Council v. Green Park Int’l, et.al.*, September 18, 2009, at para. 327. Available on file with the author.

⁴³ *Id.*

⁴⁴ *Id.* at para. 326.

⁴⁵ Court of Appeal, “Judgment,” August 11, 2010, available on file with the author (hereinafter Appellate Judgment).

⁴⁶ High Court of Justice, “Approved Judgment,” July 27, 2009, [2009] EWHC 1910 (Admin), Case No: C0/1739/2009, available at <http://www.alhaq.org/pdfs/Al-Haq%20v%20UK%20Judgment.pdf>.

⁴⁷ Al Haq made the same claims in its submission to the ICC.

⁴⁸ *Al Haq v. UK Secretaries of State*, Decision of Justices Pill and Cranston, July 27, 2009. Available on file with the author.

⁴⁹ High Court of Justice, “Approved Judgment,” July 27, 2009, [2009] EWHC 1910 (Admin), Case No: C0/1739/2009, available at <http://www.alhaq.org/pdfs/Al-Haq%20v%20UK%20Judgment.pdf>.

⁵⁰ PCHR partnered with CCR in two other US cases involving Israel (*Matar v. Dichter* and *Corrie v. Caterpillar*). These cases, too, were dismissed by the Courts.

⁵¹ *Belhas v. Ya’alon*, “Opinion,” February 15, 2008, at 6, available at <http://www.ccrjustice.org/files/Decision%20in%20Belhas%20v%20Ya’alon%202.15.08.pdf>

entirely capable of making judgments displeasing to those in high civil or military authority.”⁵² The European Court of Human Rights also frequently relies on Israeli precedent in its case law.⁵³

NGO ignore due process in their own campaigns

Although NGOs frequently attack the supposed lack of Israeli “due process,” these same organizations show little respect for the same norms they seek to impose on Israel. One example of such inconsistency involves the principle of the presumption of innocence. Article 14(2) of the International Covenant on Civil and Political Rights states that “[e]veryone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.” The UN Human Rights Committee [elaborates](#) that:

The presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge, guarantees that *no guilt can be presumed until the charge has been proved beyond reasonable doubt*, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle. (emphasis added)

Despite this fundamental human right, NGOs routinely and immediately declare Israeli officials and military personnel guilty of crimes without any concrete evidence and prior to any investigation or judicial process.⁵⁴ In several cases, these publications are based on false reports of events and are not retracted when NGO claims turn out to be unfounded. This is in contrast to their campaigns on behalf of Hamas and other terrorists, giving them the benefit of the doubt:

B’Tselem [on whether to classify Hamas police as civilians or combatants]:

An additional 248 [Hamas] police officers were killed in police stations, most of them on the first day of the operation. As is clearly stated on our website, *B’Tselem has placed them in a separate*

⁵² *Sussman v. Bank of Israel*, 801 F. Supp. 1068, 29-30 (S.D.N.Y. 1992); See also *Interface Partners Int’l Ltd. v. Hananel*, No. 08-1983, (1st Cir. Aug. 05, 2009) (holding Israel is an adequate alternative forum), available at <http://caselaw.findlaw.com/us-1st-circuit/1070893.html>.

⁵³ See e.g., *Neulinger and Shruk v. Switzerland*, Eur. Ct. H.R., no. 41615/07 (July 6, 2010) (Relied on Israeli family law precedent to ascertain child custody rights: “Similarly, the Israeli Supreme Court found that a custody agreement between parents contained a mutual consultation clause for major changes and unusual events, which implicitly included decisions on the residence of the child”); *Case of I. v. the United Kingdom*, Eur. Ct. H.R., no. 25680/94 (July 11, 2002) (court cited Israel’s recognition of gender re-assignment when reaching a conclusion); *Case of Evans v. the United Kingdom*, Eur. Ct. H.R., no. 6339/05 (Apr 10, 2007) (court cited as precedent the Israeli case *Nachmani v. Nachmani* (50(4) P.D. 661 (Isr)); *Lustig-Prean and Beckett v United Kingdom*, Eur. Ct. H.R., nos. 31417/96 and 32377/96 (Dec 27, 1999) (court relied on observations that Israel permitted homosexuals to join their armed forces and ultimately struck down the ban.)

⁵⁴ These claims are also based on distortions or misrepresentations of international law. See, e.g., NGO Monitor, “The NGO Front in the Gaza War,” February 2009, available at http://www.ngo-monitor.org/article/the_ngo_front_in_the_gaza_war Anne Herzberg, “Gaza War Myths Revisited,” NGO Monitor, available at http://www.ngo-monitor.org/article/ngo_gaza_war_myths_revisited

category since it does not have sufficient information on the functions of the Palestinian Police and its connection with organized armed groups in Gaza. Therefore, *it cannot be stated with certainty whether the police officers were legitimate targets or not.* (emphasis added)

[Letter to the Editor](#), *Jerusalem Post*, January 11, 2011

“Even if the army spokesperson's statement is accurate, the large toll of civilian lives **renders the attack a grave breach of international humanitarian law**. In the current situation in the Gaza Strip, it is hard to think of a definite military advantage that could have been achieved by bombing the house and killing Rayan [Hamas’ senior military commander] that can justify the killing of 13 women and children.” (emphasis added)⁵⁵

Press Release, “[The killing of Nizar Rayan and 15 members of his family](#),” January 4, 2009

Amnesty International

“Israeli forces . . . are committing violations of international humanitarian law and human rights abuses, some of which constitute war crimes or crimes against humanity . . . war crimes and crimes against humanity are among the gravest crimes under international law . . . Israeli forces have been carrying out indiscriminate and disproportionate attacks that have killed hundreds of unarmed civilians.”

[Interview with Amnesty researcher](#), Donatella Rovera, January 12, 2009

Oxfam

“The international community must not stand aside and allow Israeli leaders to commit massive and disproportionate violence against Gazan civilians in violation of international law.”

Press Release, “[Gaza: Bombing Severely Reduces Oxfam Aid Programme](#),” December 29, 2008

HRW

“Human Rights Watch found that Israeli forces failed to take all feasible precautions to verify that these targets were combatants, as required by the laws of war, or that they failed to distinguish between combatants and civilians. . . . As a result, these attacks violated international humanitarian law (the laws of war).”⁵⁶

⁵⁵ B’Tselem does not explain the contradiction in the publication which in one place accuses Israel of killing fifteen members of Rayan’s family, and thirteen in another. B’Tselem’s assumption that the wives of Nizar Rayan could not be considered to be participating in hostilities and were not involved in allowing massive quantities of weaponry to be stored in their home, reflects patronizing cultural attitudes on part of the organization.

⁵⁶ HRW frequently extols the importance of the presumption of innocence in its publications. See e.g. “Back to the Future,” July 27, 2010, available at <http://www.hrw.org/en/node/91967/section/8>.

[“Precisely Wrong,”](#) June 30, 2009

Al-Haq, Adalah, Arab Association for Human Rights, Al-Dammer, Al-Mezan, Badil, PCHR, Musawa, PNGO

“Representing the Palestinian human rights community, we write to you with an urgent request for intervention by the UN Human Rights Council to put an end to the war crimes and crimes against humanity being committed in the Occupied Palestinian Territory (OPT) as a result of the Israeli occupying forces’ ongoing attacks on the Gaza Strip. ... Grave breaches of the Fourth Geneva Convention amounting to war crimes, have been committed, including, willful killing and the extensive destruction of property not justified by military necessity and carried out unlawfully and wantonly. Furthermore, the continuing collective punishment of the Gaza strip has left medical services unable to deal with the increasing number of victims.”

Letter, [“Gross Human Rights Violations and War Crimes in the Gaza Strip – The UN Human Rights Council must urge the General Assembly to act under Resolution 377,”](#) 30 December 2008

Immediate declarations of Israeli guilt were also acute regarding [an alleged Israeli strike](#) on an UNWRA school on January 6, 2009. Many NGOs issued publications accusing Israel of murdering 43 civilians and demanded Israeli officials be punished for the alleged crime. In reality, [no civilians](#) were killed at the school and nine Hamas fighters were killed in the area after firing on IDF troops.⁵⁷

Adalah, Al Mezan, Al Haq

“In a separate incident on Tuesday, 6 January 2009, Israeli artillery missiles landed near the UNRWA Al-Fahura School for Girls. One of the missiles landed in the school yard, killing 40 people and injuring at least 100 others ... Adalah Attorney Fatmeh El-‘Ajou stated that both events, in which mostly children were killed, constitute grave breaches of international humanitarian law and amount to war crimes.”

Press Release, [“HR Organizations Demand Criminal Investigations by Israel into the Bombing of Two UNRWA Schools in Gaza Resulting in Dozens of Civilian Deaths,”](#) January 13, 2009

International Commission of Jurists

“Israel’s attacks have been indiscriminate or disproportionate . . . Violations of the prohibitions against indiscriminate and disproportionate attacks, such as through

⁵⁷ UN Watch, “New Report: U.N. Accusations of ‘Israeli Attack on School’ Were False,” February 2, 2009, available at http://www.unwatch.org/cms.asp?id=687172&campaign_id=63111

shelling the UN school in Jabaliya that claimed 43 casualties, constitute crimes under international law.”

Letter to UN Human Rights Council, “[ICJ Intervention on Serious Violations of Human Rights Law and Grave Breaches of International Humanitarian Law during the Israeli Military Operations in Gaza](#),” January 12, 2009

Although these organizations accused Israel of grave charges, none published a retraction or issued corrections, when their claims proved to be false.

Independence and Neutrality

Another key component of due process involves judicial independence and fairness. Again, although NGOs demand that Israel ensure fair and independent investigations, they rarely adhere to such standards themselves. As delineated in the [Lund-London Guidelines](#) on International Human Rights Fact Finding Visits, issued by the Human Rights Institute of the International Bar Association:

- Reports must be **clearly objective and properly sourced**, and the conclusions in them reached in a transparent manner. ... In making their findings the delegation should try to **verify alleged facts with an independent third party** or otherwise. Where this is not possible, it should be noted.
- **The terms of reference must not reflect any predetermined conclusions** about the situation under investigation.
- The mission’s delegation must comprise **individuals who are and are seen to be unbiased**. The NGO should be confident that the delegation members have the **competence, experience and expertise** relevant to the matters pertaining to the terms of reference.

NGOs repeatedly violate these legal, ethical, and moral principles (as did the Goldstone mission whose report was overwhelming based on the NGO reports highlighted in this paper). As shown in the examples above, these organizations invariably issue predetermined conclusions regarding Israeli guilt prior to any investigation or judicial process, and tailor their publications to such conclusions rather than engage in independent fact-finding. NGOs rarely verify claims with independent third parties, a highly problematic failure given the closed environments of Gaza and South Lebanon, where NGO representatives are shadowed by Hamas and Hezbollah officials. NGOs repeatedly staff their missions with individuals tainted by bias and conflicts of interest. In many cases, NGOs refuse to reveal the names of their delegations making verification of competence and expertise impossible. And as NGO Monitor research has revealed on dozens of occasions, NGOs, like HRW, continue to staff its Middle East departments with pro-Palestinian activists, rather than neutral professionals.⁵⁸

⁵⁸ As pointed out by the many legal scholars referenced in note 2, the Goldstone mission committed similar errors in its work. These errors included a biased mandate, biased mission members, tailoring evidence to fit predetermined conclusions, failure to independently verify claims, application of incorrect legal standards; biased applications of standards; promotion of antisemitism in the public hearings, and lack of transparency and severe conflicts of interest.

In addition, although these NGOs call for independent international investigations of Israeli actions, they do not demand that these international frameworks be free from bias, and even closely cooperate with and lobby for such tainted frameworks despite the lack of procedural fairness. In particular, these organizations work in conjunction with repressive and authoritarian regimes at the UN Human Rights Council, supporting one-sided initiatives of the Arab League and the Organization of the Islamic Conference.⁵⁹ NGOs further promote and lobby for the appointment and work of biased individuals such as Goldstone mission member, Christine Chinkin, UN Rapporteurs Richard Falk and John Dugard.⁶⁰ As highlighted by Robert Bernstein, the founder of HRW:

In one such small incident, the UN Human Rights [Council], so critical of Israel that any fair-minded person would disqualify them from participating in attempts to settle issues involving Israel, got the idea that they could get prominent Jews known for their anti-Israel views to head their investigations. Even before Richard Goldstone, they appointed Richard Falk, professor at Princeton, to be the UN rapporteur for the West Bank and Gaza. Richard Falk had written an article comparing Israel's treatment of Palestinians in the West Bank and Gaza to Hitler's treatment of the Jews in the Holocaust. Israel, believing this should have disqualified him for the job, would not allow him into the country. Human Rights Watch leapt to his defense, putting out a press release comparing Israel with North Korea and Burma in not cooperating with the UN. I think you might be surprised to learn the release was written by Joe Stork – Deputy Director of Human Rights Watch Middle East Division – whose previous job for many, many years, was as an editor of a pro-Palestinian newsletter.

Conclusion

The NGO campaigns highlighted in this report launched ostensibly to uphold the rule of law and due process, are manufactured as part of a coordinated strategy to internationally isolate Israel and weaken its ability to protect its citizens from asymmetrical war. They are used to bolster the discredited findings and recommendations of the Goldstone Report and in order to support the opening of an investigation against Israel at the International Criminal Court. Such NGO activities are characterized by hypocrisy and double standards. Given these destructive objectives, the Committee should give little credence to the claims advanced by these organizations and should conduct independent, objective, and fully transparent investigations that do not solely rely on these highly prejudiced claims.

⁵⁹ Two such examples include the Goldstone mission and the Arab League mission on Gaza.

⁶⁰ See www.unwatch.org for information on these individuals.