To Whom It May Concern:

I am submitting this e-mail to express my opposition to the UN's COI process, which I believe is flawed, illegitimate, biased and political in nature. This submission is made with regard to the following topic: ***"Facts and circumstances regarding alleged violations of international humanitarian law and alleged violations and abuses of international human rights law leading up to and since 13 April 2021.”***Israel did not violate international humanitarian law with regard to Hamas, which is a terrorist organization that has repeatedly targeted Israeli children with violence and used Palestinian children as human shields. The creation of this COI serves as a bigoted attack on the only Jewish state in the world, applying standards not used for any other Member State. The UN's legitimacy depends upon the cessation of its ongoing practice of singling out Israel, as well as its tendency to place Member States responsible for the most appalling human rights violations onto its "human rights" committees.

I hereby submit the following legal article in opposition to this COI: **"Hamas, Not Israel, Violated International Humanitarian Law" by Samuel Estreicher and Julian G. Ku (*see***[**https://www.law.com/newyorklawjournal/2021/06/10/hamas-not-israel-violated-international-humanitarian-law/?slreturn=20220115172653**](https://www.law.com/newyorklawjournal/2021/06/10/hamas-not-israel-violated-international-humanitarian-law/?slreturn=20220115172653)**):**

"While the armed hostilities in the Gaza Strip have ended for now, the unfounded criticism of the legality of Israel military operations has not. For instance, after the announcement of the ceasefire, Rep. Rashida Tlaib (D-Mich.) called for Israeli officials to be “held accountable for war crimes.” Similarly, her colleague Ilhan Omar (D-Minn.) termed Israel’s response to Hamas’s indiscriminate bombing of its citizens “acts of terrorism” requiring investigation and sanctions by the UN Human Rights Council (HRC) and the International Criminal Court; both promptly announced inquiries into possible violations of international humanitarian law (IHL) or the laws of war.

In our view, the assertions by the congresswomen that Israel’s military operations against Hamas in Gaza violate international law are profoundly mistaken. Application of the relevant legal standards reveals that Israel has a sound legal justification for using military force against Hamas, and that its use of such force likely conformed to the applicable international laws of war, whereas Hamas on the other hand has repeatedly violated the core, bedrock principle that civilians cannot be targeted, whatever the ostensible justification.

First, we agree with President Biden that Israel possesses a right of self-defense that legally justifies use of force against Hamas after that group began launching missiles into Israel. Those who argue Israel does not have a right of self-defense make two claims. They argue that (1) Israel cannot invoke its “inherent right” of self-defense because it is the “occupying power” of the Gaza Strip; and (2) the right of self-defense in Article 51 of the UN Charter applies only to force against other states.

Both arguments are unavailing. The first is unpersuasive for at least two reasons. First, it is highly doubtful that Israel qualifies as an “occupying” power of the Gaza Strip because it withdrew all military forces from Gaza in 2005 and exercises no authority over the territory, which is a requirement under international law before assuming the responsibility of an occupying power. UN groups like the HRC counter that Israel should nevertheless be treated as the occupier because it has imposed stringent limits on most travel and trade to Gaza due to security concerns about attacks from Hamas and its allies. But Israel is not solely responsible for the limits on trade to Gaza because Egypt has sealed off Gaza’s other border, without being accused of being an occupying power. In any event, even if Israel is the occupying power, that status would not justify intentional attacks on civilian targets in Israel or prevent Israel from using force to protect its own security or those of its armed forces due to military necessity. For example, it was not considered illegal for the United States, as the occupying power of Iraq in the immediate aftermath of the 2003 Iraq War, to use force against Iraqis who were attacking U.S. forces within Iraq.

The second argument against Israel’s right of self-defense, that it cannot invoke this right against non-state actors like Hamas, is equally untenable. Article 51 of the UN Charter states that nothing shall “impair the inherent right” of self-defense possessed by all member states, including Israel. In recent years, many governments, including the United States, have adopted the view that this right of self-defense applies against non-state actors like al-Qaeda and ISIS in situations where the government of the state in which the non-state actors are operating is “unwilling or unable” to prevent attacks by the non-state actor. The case of the Gaza conflict is much stronger for Israel than the “unwilling or unable” rationale; Israel is protecting against Hamas’ direct, indiscriminate bombing of Israeli citizens, not Hamas’ passivity.

Even though Israel has a right of self-defense, it must exercise this right in conformity with IHL (also known as the laws of armed conflict). This body of customary international law, which was codified in the 1949 Geneva Conventions and their subsequent protocols, limits the use of force to (1) situations of military necessity; (2) where the use of force makes a distinction between combatants and non-combatants; and (3) where the use of force is proportionate to the concrete military objective sought to be achieved.

Although the facts around the latest Gaza conflict remain somewhat murky, the reports on the nature of that conflict so far lead to this conclusion: Hamas’ indiscriminate use of rocket attacks against Israel almost certainly violates all three of these principles, while the Israeli Defense Forces (IDF) attacks on Gaza against Hamas’ military capacity almost certainly complies with these principles.

With respect to Hamas, it is undisputed that Hamas launched its rocket attacks against Israel first, *before* Israel used, or even threatened to use, any force against Hamas. In this circumstance, Hamas has not claimed, and could not claim, any legitimate military necessity to justify launching the rocket attacks against Israel. Neither the Israeli courts’ refusal to recognize historic property claims nor the treatment of the Al Aqsa site in Jerusalem qualifies as military necessity.

Second, and importantly, there is no evidence that Hamas applied the principle of distinction in launching its strikes at Israeli targets. Rather, it is undisputed that Hamas’ thousands of rockets were aimed at numerous civilian targets in Israel or that they were aimed without any effort to avoid hitting civilian targets. The Israeli “Iron Dome” missile defense system prevented many, but not all, of the Hamas rockets from killing Israeli noncombatants. The key point for lawfulness is that there is no evidence Hamas took steps to avoid attacking civilian targets with deadly force, and whether or not they succeeded in destroying such civilian targets, the failure to take such steps to avoid civilian targets represent a clear violation of IHL.

In contrast, the Israeli Defense Forces (IDF) publicly stated that their actions would adhere to the laws of armed conflict and there is substantial evidence showing it took reasonable measures to comply with such laws. The IDF has stated it was targeting Hamas’ military capabilities to continue its rocket attacks, which is a legitimate military purpose satisfying the principle of necessity. Secondly, it is reported, without contestation, that IDF forces warned Gaza civilians of upcoming strikes via telephone and other electronic communications, used low-grade explosives to give occupants time to flee before heavier bombs arrived, and airdropped leaflets to warn civilians to evacuate before strikes occurred. Such measures show that, at the very least, the IDF was reasonably attempting to fulfill the principle of distinction by avoiding civilian targets, or trying to warn civilians to leave military targets before such attacks take place.

Despite such measures, numerous civilians, mostly Palestinians, died in the recent Gaza conflict. Those civilian deaths, while tragic and heartbreaking, are not necessarily evidence that Israel has failed to comply with IHL. Because Hamas’ military forces are often located in or in very close proximity to Gazan civilian areas—actually a use of civilian shields also violative of IHL—legitimate attacks on those Hamas military targets appear to have also resulted in civilian deaths. Thus, to take one example, an attack on a Hamas military intelligence facility located in a building that also houses civilians could satisfy the principle of distinction if the IDF took reasonable measures to avoid civilian casualties. This may sound callous, but the laws of war do not require more. The U.S. military’s use of drone strikes against al-Qaeda and ISIS have also resulted in numerous civilian deaths despite the best efforts of the U.S. military to adhere to IHL. Indeed, requiring that Israel refrain entirely from attacks on Hamas military targets that are being actively used to launch attacks on Israeli civilian targets would render IHL unreasonably restrictive of a state’s use of military force to defend itself. The laws of war must allow states to act against legitimate military targets and to apply the principle of distinction in a manner most reasonable given the factual circumstances.

This leads us to the final legal principle: proportionality. While many critics (such as HBO commentator John Oliver) have pointed to the relative death tolls as evidence that the Israeli attacks on Gaza were disproportionate, that claim misunderstands the concept. IHL requires militaries to use force *proportional to the concrete military objective*they are seeking to accomplish, not some proportionality between casualties on both sides. The fact that Israel was able to reduce civilian casualties by use of the Iron Dome does not justify Hamas actions to increase civilian tolls on the Israelis. Without more facts, it is hard to judge whether each of Israel’s strikes fulfilled these principles, but comparing the death tolls of Gazans and Israelis is not the appropriate way to resolve this legal question.

In defending the legality of Israel’s use of force in Gaza, we are not here defending the legality of Israel’s other policies affecting Palestinians or Israeli Arabs. Some of those policies may be unwise and self-defeating. Nonetheless, opposing those policies cannot justify the indiscriminate use of force by Hamas against Israeli civilians. Nor can the objections to those policies limit Israel’s right to use military force to defend itself and to destroy and degrade Hamas’ military capabilities. Indeed, Israel’s basic legal framework and approach to using force is largely identical to that adopted by the U.S. military in its prosecution of the Global War on Terrorism against Al Qaeda and ISIS. Prominent critics of the legality of Israel’s actions in Gaza, in Congress and elsewhere, should keep these legal principles in mind before rashly accusing Israel of war crimes."

Sincerely,
Kerry Schlossberg