UNITED NATIONS FACT FINDING MISSION ON THE GAZA CONFLICT ESTABLISHED PURSUANT TO UN HUMAN RIGHTS COUNCIL RESOLUTION S-9/1 OF 12 JANUARY 2009

Before: JUSTICE RICHARD GOLDSTONE, *Head of Fact Finding Mission*
PROF. CHRISTINE CHINKIN, *Member of Fact Finding Mission*
MS. HINA JILANI, *Member of Fact Finding Mission*
COL. DESMOND TRAVERS, *Member of Fact Finding Mission*

Secretariat: Francesca Marotta, Head of the Secretariat
UN Fact Finding Mission on the Gaza Conflict
UN Office of the High Commissioner for Human Rights
Avenue G. Motta 6-17, UNOG
CH-1211 Geneva 10
Tel: +41 22 928 9205
Fax: +41 22 928 9003
E-mail: factfindinggaza@ohchr.org

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REQUEST TO DISQUALIFY PROF. CHRISTINE CHINKIN FROM UN FACT FINDING MISSION ON THE GAZA CONFLICT

Petitioner: UN WATCH
Case Postale 191
1211 Geneva 20
Switzerland
Tel: +41 22 734 1472
Fax: +41 22 734 1613
www.unwatch.org

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SUMMARY

UN Watch requests that Prof. Christine Chinkin recuse herself from the United Nations Fact Finding Mission on the Gaza Conflict on the grounds that she has already pronounced herself on the merits of the particular question to be decided by the Mission, thereby giving rise to actual bias or the appearance thereof, or that she be disqualified by the other Mission members or by the UN Human Rights Council president.

Under international law, the minimal rules of due process require that fact-finders in the human rights field be impartial. The members of the Mission have themselves repeatedly emphasized that their terms of reference, as received from the president of the UN Human Rights Council, are impartial, in contrast to the original, one-sided Council mandate of 12 January 2009. The Mission has pledged to impartially assess "all violations of international human rights law and international humanitarian law that might have been committed" in the recent Israel-Gaza conflict. Yet prior to seeing any evidence, Prof. Chinkin publicly declared that one of the parties—Israel—was guilty of both charges. The Mission cannot claim to be operating with an open mind when one of its members has already made up her mind.

The facts are straightforward and undisputed. On 11 January 2009, during the recent Israel-Gaza conflict, the Letters section of the *Sunday Times* published a joint statement signed by Prof. Chinkin (Exhibit A) that declared Israel to be the aggressor, and a perpetrator of war crimes. The letter began by "categorically rejecting" Israel's right to claim self-defence against Hamas rocket attacks, "deplorable as they are." While the end of the statement includes one passing reference to crimes committed by Hamas,

the entire rest of the statement is devoted to the thesis that Israel was guilty—of the very accusations that the Mission is meant to impartially examine.

Asked about this during a May 2009 meeting with Geneva NGOs, Prof. Chinkin denied that her impartiality was compromised, saying that her statement only addressed *jus ad bellum*, and not *jus in bello*. But this was untrue. In fact, her statement not only determined that "Israel's actions amount to aggression, not self-defence," but additionally that they were "contrary to international humanitarian and human rights law," and constituted "prima facie war crimes."

The impartiality requirement under international law, as applicable to international human rights fact-finders, is unequivocal. Scholars of international law list impartiality as the first principle of fact-finding. Impartiality as a requirement is further set forth in Articles 3 and 25 of the UN Declaration on Fact-Finding. Finally, precedents from analogous international tribunals are equally clear. In the 2004 case of *Sesay*, the Special Court for Sierra Leone disqualified a judge who had published statements on the culpability of an organization connected to the defendants. This precedent applies *a fortiori* to the case of Prof. Chinkin, whose prior determination of guilt directly concerned one of the parties under examination.

The remedy applied in *Sesay* should apply here. Never in the history of international tribunals and fact-finding panels has there been a more overt case of actual bias in the form of an arbiter's prior determination of the merits of a particular case in controversy. Even if, somehow, one were to conceive of an argument as to how Prof. Chinkin has not demonstrated actual bias, there is nevertheless the objective appearance of bias. The reasonable person would consider Prof. Chinkin to be partial after she

publicly declared the guilt of one of the concerned parties on the very case and controversy under consideration. Therefore, if justice is to be done—and to be seen to be done—the only remedy is Prof. Chinkin's recusal, or her disqualification by the Mission or the Human Rights Council president.

INTEREST OF PETITIONER AND LOCUS STANDI

1. UN Watch ("Petitioner") is a nongovernmental human rights organization accredited with the United Nations as a NGO in Special Consultative status with ECOSOC, pursuant to Article 71 of the United Nations Charter. In this capacity Petitioner is a recognized stakeholder at the UN Human Rights Council ("the Council"), and a regular participant in its proceedings, intervening on a wide range of thematic human rights issues and country situations. UN Watch reports, briefings and analyses on the Council are widely read by diplomats, academics and journalists, and our UN speeches, vigorously championing the principles of universal human rights, democracy, and accountability, are followed on the internet by hundreds of thousands of concerned citizens around the world.[1]

2. Petitioner actively participated in the special session that adopted Resolution S-9/1 of 12 January 2009, which created the mandate under which this United Nations Fact Finding Mission on the Gaza Conflict ("the Mission") was created. Petitioner has since been actively involved in numerous aspects of the Mission, including interventions at the Council seeking to clarify the Mission's mandate, correspondence with Justice Goldstone and members of the Secretariat, proposals of relevant witnesses,

[1] *See generally* UN Watch reports, articles and speeches at www.unwatch.org, and the UN Watch blog on latest U.N. and human rights developments at http://blog.unwatch.org/.

volunteering as a technical resource for participants in Mission hearings, and reporting on and analyzing the work of the Mission.

3. Consequently, Petitioner has an interest in a Mission conducted according to the principle of impartiality, and has standing to bring this petition. In addition, Petitioner has public interest standing because our request concerns serious public international issues, including the Mission's credibility to impartially decide matters of international human rights and humanitarian law. Justice Goldstone recognized this when he stated, in regard to the Mission, that "an objective assessment of the issues is in the interests of all parties, will promote a culture of accountability and could serve to promote greater peace and security in the region."[2] Finally, this petition is the only reasonable and effective means for the material defect in Prof. Chinkin's impartiality to be challenged and remedied.

STATEMENT OF FACTS

Prof. Chinkin Publishes Statement Entitled "Israel's Bombardment of Gaza is Not Self-Defence—It's a War Crime"

4. In a joint statement published on 11 January 2009 in the Letters section of London's *Sunday Times*, entitled "Israel's Bombardment of Gaza is Not Self-Defence—It's a War Crime," Prof. Chinkin publicly and unequivocally declared that Israel was guilty of committing acts during Operation Cast Lead that were "contrary to international humanitarian and human rights law," and of committing "prima facie war crimes."[3] Her letter began by "categorically reject[ing]" Israel's right to claim self-

[2] "UN Mission on Gaza Conflict Holds First Meeting in Geneva," U.N. Press Release dated 8 May 2009, http://www.unhchr.ch/huricane/huricane.nsf/0/BC7C60F307A16D1BC12575B000315895?opendocument.

[3] Christine Chinkin, Richard Falk, *et al.*, "Israel's Bombardment of Gaza is Not Self-Defence—It's a War Crime," *Sunday Times*, 11 January 2009, http://www.timesonline.co.uk/tol/comment/letters/article5488380.ece? (Exhibit A).

defence against Hamas rocket attacks, "deplorable as they are." She stated that "Israel's actions amount to aggression, not self-defence."[4]

5. The end of the statement includes one passing sentence on Hamas crimes, immediately followed by the qualifier that Israel's "operations in Gaza amount to an aggression and is contrary to international law, notwithstanding the rocket attacks by Hamas."[5] No reasonable person could read the statement without concluding—as the *Sunday Times* headline writer did—that the crux of Prof. Chinkin's joint statement was that "Israel's bombardment of Gaza is not self-defence—it's a war crime." Among the co-signatories was Richard Falk, a UN official who has accused Israel of planning "a holocaust" against the Palestinians[6], and the U.S. government of planning the 9/11 terrorist attacks.[7]

Arab and Islamic Blocs Convene Special Session,
Declare Israel Guilty of "Massive Violations"

6. Since the UN Human Rights Council was established in June 2006, the 47-nation body—dominated by a controlling majority that includes China, Cuba and Saudi Arabia—has convened more emergency "special sessions" on Israel than on the rest of the world combined. These sessions, each initiated by the Arab and Islamic blocs,

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[4] *Id.*

[5] *Id.* Some will no doubt seize upon this one sentence to exculpate Prof. Chinkin. This is to no avail. First, no reasonable person can read her statement in its entirety (*see* Exhibit A) and deny that its central thesis is that Israel is an aggressor and war criminal. Second, even if the one sentence on Hamas were to be given weight, the gross abuse of due process arising from Prof. Chinkin's commitment to a preconceived outcome regarding individuals on one side of the conflict—her absence of an open mind on the question put before the Mission—is hardly assuaged by an additional prior determination regarding individuals from the other side.

[6] "UN Expert? No, a Conspiracy Crank," *The Times* of London, April 15, 2008, http://www.timesonline.co.uk/tol/comment/columnists/david_aaronovitch/article3746592.ece.

[7] Joel Brinkley, "9/11 Conspiracy Theorist Should Leave U.N. Job," *San Francisco Chronicle*, Dec. 14, 2008, http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/12/14/INDO14KPHQ.DTL.

consistently condemned Israel for responding to cross-border attacks by Hamas and Hezbollah, but said nothing about the attacks by both Iranian-sponsored terrorist groups, thereby legitimizing their actions and granting them effective immunity and impunity. Several of the sessions, including those of July, August, and November 2006, created "fact-finding missions" that declared Israel guilty from the start. The European Union, Canada and other democracies refused to support these measures on account of their being one-sided.

7. Nearly three decades ago, Professor Thomas M. Franck, the eminent NYU scholar and former president of the American Society of International Law, who recently passed away, lamented the emergence of this U.N. pattern in his authoritative article on procedural due process in human rights fact-finding by international agencies.[8] Referring to a 1968 General Assembly resolution that had taken it for granted "that Israel was in breach of its international obligations," Prof. Franck criticized the creation of a fact-finding mission whose mandate included "conclusory language that palpably interfered with the integrity of the fact-finding process by violating the essential line between political assumptions and issues to be impartially determined." Prof. Franck's evaluation of such resolutions neatly summarizes the worth of the S-9/1 mandate: "A fact-finding group created by terms of reference that seek to direct its conclusions is essentially a waste of time. Its findings, at most, will reassure those whose minds are already made up."[9]

[8] T.M. Franck & H.S. Fairley, "Procedural Due Process in Human Rights Fact-Finding by International Agencies" (1980) 74 *American Journal of International Law* 308 at 316.

[9] *Id.* at 316.

8. In total, from its regular and special sessions, the Council has devoted more than three quarters of all its country censures to one country: Israel. By focusing the international spotlight on Israel, the collective strategy of Council members like China, Russia, Egypt, Pakistan, Cuba, and Saudi Arabia—supported by observer states like Iran, Syria, and Zimbabwe—is to shield their own crimes from scrutiny. Because they hold an automatic majority of approximately 30 out of 47 member states, the strategy is successful.

9. Following this pattern and practice, on 12 January 2009—at the initiative of Egypt on behalf of the Arab and African Groups, Pakistan on behalf of the Organization of the Islamic Conference, and Cuba for the Non-Aligned Movement, the Council met in special session on the situation in Gaza. It adopted Resolution S-9/1, "strongly condemn[ing]" Israel as being guilty of "massive violations," and calling for an "urgent, independent, international fact-finding mission," to be appointed by the Council president, in order to document this predetermined guilt.[10]

Democracies Oppose Biased Mandate

10. The Council's leading democracies rejected the mandate as one-sided and refused to support the resolution.[11] In a statement on behalf of all member states of the European Union, Germany said that, "Unfortunately, and despite the best efforts of

[10] UN Human Rights Council Resolution S-9/1 of 12 January 2009, entitled "The grave violations of human rights in the Occupied Palestinian Territory, particularly due to the recent Israeli military attacks against the occupied Gaza Strip."

[11] The resolution was adopted by a vote of 33 to 1, with 13 abstentions. *In favour*: Angola, Argentina, Azerbaijan, Bahrain, Bangladesh, Bolivia, Brazil, Burkina Faso, Chile, China, Cuba, Djibouti, Egypt, Gabon, Ghana, India, Indonesia, Jordan, Madagascar, Malaysia, Mauritius, Mexico, Nicaragua, Nigeria, Pakistan, Philippines, Qatar, Russian Federation, Saudi Arabia, Senegal, South Africa, Uruguay, Zambia. *Against*: Canada. *Abstaining*: Bosnia and Herzegovina, Cameroon, France, Germany, Italy, Japan, Netherlands, Republic of Korea, Slovakia, Slovenia, Switzerland, Ukraine, United Kingdom of Great Britain and Northern Ireland.

the European Union, and unlike Security Council Resolution 1860, the resolution before us today, and particularly its follow-up [i.e., the mandate of the Fact-Finding Mission] addresses only one side of the conflict. We also regret that some paragraphs use legal terms with very specific meaning without full evidence of whether those definitions are met."[12] Canada said that the resolution "failed to clearly recognize that rocket fire on Israel led to the current crisis," and used "unnecessary, unhelpful and inflammatory language."[13] Japan noted that despite last-minute amendments, "it is regrettable that we have to say the resolution is not yet fully balanced."[14] Similarly, Switzerland, which in the past had supported certain Arab-sponsored condemnations of Israel at the Council, cited the resolution's failure to address allegations concerning all sides as the grounds for its refusal to support the text.[15]

International Figures Refuse to Join Mission, Citing One-Sided Mandate

11. Shortly after the session, the Council president held political negotiations with the five regional groups, as well as with "the concerned parties," although apparently this did not include Israel.[16] Several international personalities were

[12] Oral Statement by Germany on behalf of the European Union, 12 January 2009, 9th Special Session of the UNHRC, *at* http://www.un.org/webcast/unhrc/archive.asp?go=090112.

[13] Oral Statement by Canada, 12 January 2009, 9th Special Session of the UNHRC, *at* http://www.un.org/webcast/unhrc/archive.asp?go=090112.

[14] Oral Statement by Japan, 12 January 2009, 9th Special Session of the UNHRC, *at* http://www.un.org/webcast/unhrc/archive.asp?go=090112.

[15] Oral Statement by Switzerland, 12 January 2009, 9th Special Session of the UNHRC, *at* http://www.un.org/webcast/unhrc/archive.asp?go=090112.

[16] *See* statement by Rolando Gomez, spokesman for the UN Office of the High Commissioner for Human Rights, at January 13, 2009 press briefing of the United Nations Office at Geneva, *at* http://www.unog.ch/80256EDD006B9C2E/(httpNewsByYear_en)/7EA09DD87688F5E4C125753D00488ED5?OpenDocument.

approached to head the Mission but declined, due to its one-sided mandate.[17] Even former UN rights chief Mary Robinson, who had participated in similar fact-finding missions created by the now-defunct Human Rights Commission, refused.[18] "Unfortunately, the Human Rights Council passed a resolution seeking a fact-finding mission to only look at what Israel had done," said Robinson, "and I don't think that's a human rights approach."[19] Robinson said that "the resolution is not balanced because it focuses on what Israel did, without calling to investigate the launching of rockets by Hamas. Unfortunately, this is a practice of the Council: adopting resolutions guided not by human rights but by politics. This is very regrettable."[20]

Democracies Again Criticize Mandate at March Session

12. On 26 March 2009, at the 10th session of the Human Rights Council, the Arab and Islamic blocs sponsored draft resolution L. 37 to condemn Israel for failure to implement Resolution S-9/1. However, the major democracies once again criticized the one-sided mandate of S-9/1. Although as a matter of principle the European Union's practice had been to vote in favor of follow-up resolutions even in cases where it had refused to support the original resolution, in this case the European Union acted differently. In a statement on behalf of all its member states, the European Union noted that "the resolution only addressed one side of the conflict. This also applied to the

[17] A. Jourdan, "Le juge Goldstone va conduire l'enquête sur la bande de Gaza," *Tribune de Genève*, April 6, 2009 ("Une mission que plusieurs personnalités, dont l'ancien président finlandais Martti Ahtisaari et l'ancien haut-commissaire de l'ONU pour les droits de l'homme Mary Robinson, ont refusé); "L'ONU charge R. Goldstone d'enquêter sur d'éventuels crimes de guerre à Gaza," *Agence France Presse*, April 3, 2009.

[18] *Id.*

[19] Interview with Democracy Now, March 9, 2009, *at* http://www.democracynow.org/2009/3/9/fmr_irish_president_mary_robinson_joins.

[20] A. Mounier-Kuhn, "Ancienne haut-commissaire aux Droits de l'homme Mary Robinson commente les dossiers les chauds de ce début d'année," *Le Temps*, Feb. 4, 2009.

dispatching of an independent international fact finding mission."[21] Moreover, the European Union was

> not convinced that the fact finding mission dispatched by the Human Rights Council is the right means to do so, especially as concerns investigation of violations of international humanitarian law. Furthermore, we find its mandate as drafted by resolution S-9/1 unbalanced. The fact that it has to date not been possible to appoint the members of the mission confirms our doubts in this regard. We also wish to remind that there are international investigations going on under the leadership of the United Nations Secretary General and Israeli investigations into the matter. For these reasons, the EU will call for a vote on resolution L. 37 and will abstain.[22]

Canada said that S-9/1 "failed to clearly establish the responsibilities and obligations of all sides involved in the conflict. Therefore, Canada will vote no on this resolution."[23]

Council President Announces Goldstone Mission

13. Finally, on 3 April 2009, pursuant to Resolution S-9/1, then Council President Martin Uhomoibhi, the Nigerian ambassador in Geneva, announced the formation of the Mission: Justice Richard Goldstone as the head, together with members Prof. Christine Chinkin, Ms. Hina Jilani, and Col. Desmond Travers.[24] At a press

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[21] Explanation of Vote on L. 37 by Germany on behalf of the European Union, 26 March 2009, 10th Session of the UNHRC, *at* http://www.un.org/webcast/unhrc/archive.asp?go=090326#pm.

[22] *Id.*

[23] Explanation of Vote on L. 37 by Canada, 26 March 2009, 10th Session of the UNHRC, *at* http://www.un.org/webcast/unhrc/archive.asp?go=090326#pm.

[24] The question of bias has also been raised regarding Justice Goldstone's own joint statement during the January war, in which he described himself as being "shocked to the core." *See, e.g.,* I. Cotler, "The Goldstone Mission—Tainted to the Core (Part I)," *The Jerusalem Post,* Aug. 16. 2009, http://www.jpost.com/servlet/Satellite?cid=1249418620191&pagename=JPost%2FJPArticle%2FShowFull and I. Cotler, "The Goldstone Mission—Tainted to the Core (Part II)," *The Jerusalem Post,* Aug. 18, 2009, http://www.jpost.com/servlet/Satellite?cid=1249418640232&pagename=JPost%2FJPArticle%2FShowFull. This separate question is not addressed in the present Request. Nor do we address the Mission's curious decision to hold public hearings, which it acknowledged was without precedent, involving witnesses in Gaza speaking under the watchful eye of the Hamas regime. (Israeli witnesses, selected by the Goldstone Mission, were heard in Geneva.) During a period when U.N. human rights diplomats in Geneva failed to convene for the state killing of protesters in Iran and China, or for any other victims, they did assemble on July 16 and 17, 2009 to attend reruns of the Gaza testimony at an official screening organized by the Goldstone Mission. *See* UN Watch blog, "U.N. diplomats watch Gaza reruns, no time for victims in China and Iran," July 16, 2009, *at* http://blog.unwatch.org/?p=446; *see also* Hillel Neuer and Marissa Cramer, "A

conference in which he implicitly acknowledged that the original mandate was one-sided, the Council president also announced new terms of reference for the Mission: "[T]o investigate all violations of international human rights law and international humanitarian law that might have been committed at any time in the context of the military operations that were conducted in Gaza during the period from 27 December 2008 and 18 January 2009, whether before, during or after."[25] However, he also suggested that the purpose of examining Palestinian violations would be strictly for the purpose of assessing the degree of Israeli guilt, as per the focus of the original mandate.[26] The initial title of the Mission included reference to the Resolution S-9/1 mandate, but this was later removed, in an

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case study in UN hypocrisy," *National Post*, July 17, 2009, http://www.unwatch.org/site/apps/nlnet/content2.aspx?c=bdKKISNqEmG&b=1319279&ct=7189893.

[25] This Request does not address the legality of the president's purported amendments to the Mission's mandate, which are clearly ultra vires, null and void. Nothing in the Charter, resolutions or rules of the United Nations gives the Human Rights Council president the power to amend a Council resolution, any more than the House Speaker in the U.S. can personally change a statute of Congress. In the case here, the Council's S-9/1 mandate deliberately imposed limits *ratione personae* (actions by Israel) and *ratione loci* (in Palestinian territories) and does not allow for a full examination of all of the aspects of the conflict, nor does it permit consideration of the conduct of all parties. Similar limits applied to and were duly noted by the Report of the 2006 Commission of Inquiry on Lebanon, established by the Council under its equally one-sided Resolution S-2/1, http://www2.ohchr.org/english/bodies/hrcouncil/docs/specialsession/A.HRC.3.2.pdf. That Commission noted as follows: "[T]aking into consideration the express limitations of its mandate, the Commission is not entitled, even if it had wished, to construe it as equally authorizing the investigation of the actions by Hezbollah in Israel. To do so would exceed the Commission's interpretative function and would be to usurp the Council's powers." *Id.*, at par. 7. The same applies to the Goldstone Mission and the S-9/1 mandate, *mutatis mutandis*. What is most important to understand is that regardless of President Uhomoibhi's purported amendments, the Goldstone Mission's report will be submitted to, treated, and followed up by the Council exclusively under the original and one-sided terms of Resolution S-9/1.

[26] The Council president: "The ultimate purpose of the Council will not be served if that mandate does not allow for the clear establishment of an independent and impartial fact-finding mission; a mission that will gain the credibility of all sides, and that will be truly independent, and will produce and report that is fair, that is balanced and that is impartial; that will address the question of proportionality.... You cannot address proportionality in a vacuum." *See* "Near verbatim transcript of press conference by the President of the Human Rights Council, Martin Ihoeghian Uhomoibhi (Nigeria) and Justice Richard J. Goldstone on the announcement of the Human Rights Council fact-finding mission on the conflict in the Gaza Strip," Geneva, 3 April 2009, *at* http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/docs/PC_Transcript_3_April.doc. The clear implication is that the true object of the Mission remains that of assessing solely Israel's guilt—and that any examination of Palestinian violations or Israeli suffering would not be an object or value in itself, but only a necessary means for examining the proportionality of Israeli actions.

apparent effort to obscure both the origin of the Mission and the destination of its report.[27]

Prof. Chinkin Defends Statement, Claims Having Made No Reference to *Jus in Bello*

14. On 7 May 2009, in a Geneva meeting held by the Mission with several non-governmental organizations, UN Watch raised the issue of Prof. Chinkin's *Sunday Times* declaration and her prior determination of Israeli guilt. In response, Prof. Chinkin said that her declaration "concerned the very particular issue about the legality of the use of force, what we call as international lawyers the *jus ad bellum,* whereas this mandate is the human rights and international humanitarian law, the *jus in bellum,* which are very different legal questions."[28] But this is untrue.

15. Rather, in her *Sunday Times* joint statement, Prof. Chinkin manifestly pronounced herself on *both* legal questions—determining not only the *jus ad bellum* question, when she said that Israel could not claim the right to self-defence, but also the *jus in bellum* question, when she said that Israel acted "contrary to international humanitarian and human rights law," and committed "prima facie war crimes."

16. While this Request is focused on the bias arising from her specific statement regarding the January 2009 operation—which she is meant to objectively

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[27] The initial title was "International Independent Fact-Finding Mission Established Pursuant to Resolution S-9/1 of the Human Rights Council." See UN press release, "Richard J. Goldstone Appointed to Lead Human Rights Council Fact-Finding Mission on Gaza Conflict, 3 April 2009, *at* http://www.unhchr.ch/huricane/huricane.nsf/view01/2796E2CA43CA4D94C125758D002F8D25?opendocument.

[28] "With respect to the letter in question, again, that was way before any question of any fact-finding mission, and the letter concerned the very particular issue about the legality of the use of force, what we call as international lawyers the *jus ad bellum,* whereas this mandate is the human rights and international humanitarian law, the *jus in bello,* which are very different legal questions." C. Chinkin, response to statement by UN Watch, during Mission consultation with NGOs, Geneva, 7 May 2009, *at* http://www.youtube.com/watch?v=BfiHbvTpmKQ; *see also* http://blog.unwatch.org/?p=408.

assess free of commitment to a preconceived outcome—it is additionally relevant to note that Prof. Chinkin has on several previous occasions also accused Israel of committing war crimes.[29]

LEGAL DISCUSSION

Applicable Law

17. Despite efforts by academics and practitioners to set forth general rules for UN human rights fact-finders, there is no definitive code. Rather, international fact-finding in the field of human rights is considered a quasi-judicial process that should be guided by the relevant substantive and procedural rules of international law.[30] These are not rigid but should be consistent with the principles of due process—a necessity for the fact-finding to be a credible procedure.[31] It is generally recognized that the credibility of fact-finding depends on the observance of fair rules of procedure.

Due Process Requires Impartiality in Human Rights Fact-Finding

18. The minimal rules of due process require that fact-finders in the human rights field be impartial.[32] This requirement implies, according to Professor Franck, that "the persons conducting an investigation should be, and should be seen to be, free of commitment to a preconceived outcome."[33] The credibility and impact of fact-finding depends upon the extent to which it is perceived to have been objective, fair and

[29] *See*, *e.g.*, M. Jansen, "Gaza suffers from rolling Israeli-engineered crises," *Jordan Times*, June 5, 2008 ("British international law professor Christine Chinkin observed that Israel's 'policy of collective punishment in a situation of occupation constitutes the notion of war crimes and possibly a crime against humanity.'")

[30] *See* Bertrand Ramcharan, "Substantive Law Applicable," in B.G. Ramcharan, ed., *International Law and Fact-Finding in the Field of Human Rights* (Boston and London, 1982), at 26.

[31] *Id.* at 26.

[32] Franck & Fairley, at 313, 344.

[33] *Id.* at 313.

impartial. Fact-finding must be "as impartial and as fair to the parties as procedural and evidentiary rules can render it without making the inquiry's task impossible, not merely for ethical reasons but in order to maximize the credibility and impact of the facts found."[34] In his outline of the procedural law applicable to international fact-finding in the field of human rights, K. T. Samson, the former coordinator for human rights of the ILO, cited the following principle first: "A basic requirement is to ensure the impartiality and objectivity of the fact-finders."[35]

UN Declaration on Fact-Finding Requires Impartiality

19. There is no one set of comprehensive standards adopted by the United Nations to govern UN fact-finding[36], but a statement of general standards is found in the *Declaration on Fact-finding by the UN in the Field of the Maintenance of International Peace and Security*.[37] Impartiality is twice listed as a requirement. Article 3 provides: "Fact-finding should be comprehensive, objective, impartial and timely." Article 25 renders this obligatory: "Fact-finding missions have an obligation to act in strict conformity with their mandate and perform their task in an impartial way." While recusal is not expressly listed in this declaration, several UN human rights bodies do list it.[38] Accordingly, by retaining Prof. Chinkin as a member—someone who has already taken

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[34] *Id.* at 310.

[35] K.T. Samson, "Procedural Law," in B.G. Ramcharan, ed., *International Law and Fact-Finding in the Field of Human Rights* (Boston and London, 1982), at 41-42.

[36] Lillich, Hannum, Anaya and Shelton (eds.), *International Human Rights: Problems of Law, Policy, and Practice* (Aspen Publishers, 2006), at 1025.

[37] U.N. Doc. A/RES/46/59, Annex (1992), *available at* http://www.un.org/documents/ga/res/46/a46r059.htm.

[38] UN human rights fact-finding bodies contemplate recusal as an option, like the Human Rights Committee and the Committee Against Torture. *See* Rules of Procedure of the Human Rights Committee, Rules 84 and 85; Rules of the CAT Committee, Rules 103 and 104, cited in Frans Viljoen, "Fact-Finding by UN Human Rights Complaints Bodies: Analysis and Suggested Reforms," *Max Planck Yearbook of United Nations Law* Vol. 8, No. 1 (2004) 49 at 86-87, http://www.mpil.de/shared/data/pdf/pdfmpunyb/viljoen_8.pdf.

as a "given" that which inherently is meant to be a "non-given"—the Goldstone Mission will necessarily be in breach of this UN resolution.

Goldstone Mission Acknowledges Impartiality Requirement

20. The Goldstone Mission has not disputed the impartiality requirement. On the contrary, the Mission has expressly recognized this obligation, saying: "The Mission's investigation will be based on an independent and impartial analysis of compliance of the parties with their obligations under international human rights and humanitarian law in the context of the recent conflict in Gaza, and on international investigative standards developed by the United Nations."[39] These standards include impartiality.

21. This commitment to be impartial was reiterated by then Council president Martin Uhomoibhi, when he announced the Mission on 3 April 2009, repeatedly emphasizing the principle of impartiality:

- The Council president was "very confident that they [the Mission members] will be able to assess all human rights situations and violations in the context of the conflict without distinction of any kind and in an impartial and objective manner."[40]

- "The ultimate purpose of the Council will not be served if that mandate does not allow for the clear establishment of an independent and impartial fact-finding mission…"[41]

[39] Goldstone Mission, Public Advance Notice, 25 May 2009, http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/docs/Public_Advance_Notice.pdf

[40] "Near verbatim transcript of press conference by the President of the Human Rights Council, Martin Ihoeghian Uhomoibhi (Nigeria) and Justice Richard J. Goldstone on the announcement of the Human Rights Council fact-finding mission on the conflict in the Gaza Strip," Geneva, 3 April 2009, *at* http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/docs/PC_Transcript_3_April.doc .

[41] *Id.*

- "A mission that will gain the credibility of all sides, and that will be truly independent, and will produce and report that is fair, that is balanced and that is impartial…"[42]

- "[T]the object of it [the mission], and I believe the object of the Council, is to have a report that truly reflects the events on the ground, and that includes dealing with all violations in an impartial and objective manner."[43]

22. Justice Goldstone, speaking at the same U.N. press conference, similarly emphasized the Mission's commitment to impartiality: "It is in the interest of all Israelis and Palestinians that the facts relevant to those allegations should be impartially investigated by an independent international mission."[44] Again, on 8 May 2009, Justice Goldstone said that the Mission members "will focus our investigation not on political considerations, but on an objective and impartial analysis. . . . I believe that an objective assessment of the issues is in the interests of all parties, will promote a culture of accountability and could serve to promote greater peace and security in the region."[45]

23. Others close to Justice Goldstone have insisted that impartiality will be paramount. "We have strongly criticized the Human Rights Council in the past for its exclusive focus on Israeli rights violations, but Justice Goldstone is committed to an independent and impartial investigation into alleged wrongdoing by Israeli forces and Palestinian armed groups alike," said Kenneth Roth, executive director of Human Rights Watch, an organization that until recently included Justice Goldstone on its board of directors, in a statement advocating on behalf of the Mission. "He has the experience and

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] U.N. press release, *supra* note 2.

proven commitment to ensure that this inquiry will demonstrate the highest standards of impartiality."[46]

24. In sum, the Mission not only recognizes its requirement to be impartial, but—in distinguishing itself from the original, one-sided mandate established by the Council— has repeatedly emphasized this as one of its greatest virtues.

International Law Requires Disqualification of Prof. Chinkin for Actual or Apparent Bias

25. Both the rules and precedents of international war crimes tribunals are a relevant source of international law for the purposes of the case at bar. While they relate to judicial proceedings, their principles are analogous to the due process principles of the quasi-judicial process of international fact-finding, and should be applied where pertinent. Court rules for these international tribunals provide that a judge whose impartiality is affected must recuse herself or be disqualified. For example, Rule 15(A) of the UN-created Special Court for Sierra Leone provides that "a Judge may not sit at a trial or appeal in any case in which his impartiality might reasonably be doubted on any substantial ground."[47] Similarly, the parallel Rule 15 (A) of the International Criminal Tribunal for Rwanda provides that a judge may not sit in any case "concerning which he has or has had any association which might affect his impartiality."[48] This provision has been interpreted to permit any allegation of bias to be raised as a basis for

[46] "Israel/Gaza: Cooperate With Goldstone Investigation," Human Rights Watch, April 14, 2009, *at* http://www.hrw.org/en/news/2009/04/14/israelgaza-cooperate-goldstone-investigation.

[47] Special Court for Sierre Leone, Rules of Procedure and Evidence, *at* http://www.scsl.org/LinkClick.aspx?fileticket=1YNrqhd4L5s%3d&tabid=70.

[48] International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, *at* http://www.ictr.org/ENGLISH/rules/290695/290695e.pdf.

disqualification.[49] The remedy for bias is disqualification of the judge or fact-finder, as contemplated by Rule 15(B) of the Special Court for Sierra Leone: "Any party may apply to the Chamber of which the Judge is a member for the disqualification of the said Judge on the above ground."[50]

26. The requirement of impartiality is violated not only where a judge is actually biased, but also where there is an appearance of bias. Professor William Schabas summarizes the law of international war crimes tribunals as follows:

> A judge may be disqualified in any case in which he or she has a personal interest, or some other association, which might affect his or her impartiality. The test is one of a "reasonable apprension of bias.[51]

The authoritative exposition of this rule comes from the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY). In the case of *Prosecutor v. Anto Furundzija*, the Appeals Chamber found that, "as a general rule, courts will find that a Justice 'might not bring an impartial and unprejudiced mind' to a case if there is proof of actual bias or of an appearance of bias."[52]

27. The ICTY reached its ruling in part by analyzing the jurisprudence of the European Court of Human Rights:

> In considering subjective impartiality, the [European Court of Human Rights] has repeatedly declared that the personal impartiality of a Justice must be presumed until there is proof to the contrary. In relation to the objective test, the Court has found that this requires that a tribunal is not only genuinely impartial, but also appears to be impartial. Even if there is no suggestion of actual bias, where

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[49] *Prosecutor* v. *Karemera et. al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Request For Disqualification of Judges Byron, Kam, and Joensen (Bureau), *at* http://www.ictr.org/ENGLISH/cases/Karemera/decisions/080307.pdf.

[50] Special Court for Sierre Leone, *supra* note 47.

[51] William A. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge University Press, 2006), at 316.

[52] *Furundzija* (Appeal Judgement), IT-95-17/1-A, International Criminal Tribunal for the former Yugoslavia, 21 July 2000, at par. 179, http://www.icty.org/x/cases/furundzija/acjug/en/furaj000721e.pdf.

> appearances may give rise to doubts about impartiality, the Court has found that this alone may amount to an inadmissible jeopardy of the confidence which the Court must inspire in a democratic society.[53]

The ICTY further noted that the European Court considers that it must determine whether or not there are "ascertainable facts which may raise doubts as to...impartiality":

> In doing so, it has found that in deciding "whether in a given case there is a legitimate reason to fear that a particular Justice lacks impartiality the standpoint of the accused is important but not decisive.…*What is decisive is whether this fear can be held objectively justified."* Thus, one must ascertain, apart from whether a Justice has shown actual bias, whether one can apprehend an appearance of bias.[54]

28. The ICTY Appeals Chamber concluded that "there is a general rule that a Judge should not only be subjectively free from bias, but also that there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias."[55] An appearance of bias exists, inter alia, where "the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias."[56]

29. Applying this rule to our case, Prof. Chinkin's commitment to a preconceived outcome clearly constitutes substantial grounds to reasonably doubt her impartiality. Prof. Chinkin's prior determination of Israeli guilt for war crimes constitutes an overt case of actual bias on the very question that the Goldstone Mission members are meant to impartially assess. Even if, somehow, Prof. Chinkin's statement did not give rise to actual bias, there is legitimate reason to fear that a reasonable observer, properly informed, would reasonably apprehend bias, a fear that can be held objectively justified.

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[53] *Id.* at par. 182.

[54] *Id.* at par. 182.

[55] *Id.* at par. 189.

[56] *Id.* at par. 189.

Case of *Sesay*: Precedent for Disqualifying Biased International Fact-Finder

30. This rule does not exist only in theory. Where actual or apprehended bias has been found, international tribunals will apply the remedy of disqualification. The Appeals Chamber of the Special Court of Sierra Leone did so in 2004, in the case of *Sesay*, when it granted defendant's motion to disqualify Justice Geoffrey Robertson, the President of the Special Court, for comments he made in a 2002 book about the events in Sierra Leone.[57] Justice Robertson had accused the Revolutionary United Front, whose members included the defendant as well as two other accused that subsequently joined the motion, of committing war crimes. When the judge refused to voluntarily recuse himself, his fellow judges on the Appeals Chamber ordered him to do so, finding there was "no doubt" that "a reasonable man will apprehend bias, let alone an accused person."[58]

31. The precedent of *Sesay* applies *a fortiori* to the remarks of Prof. Chinkin. In both cases, a judge or fact-finder required to be impartial made statements prior to their sitting that gave the appearance of bias. Prof. Chinkin's case is more severe, however, because her comments directly related to the actions of one of the concerned parties, with her determinations of fact and law almost identical to the particular questions of fact and law that the Mission is pledged to examine impartially.

32. By coincidence, one of the attorneys in Mr. Sesay's successful motion, Ms. Sareta Ashraph, is currently a member of the secretariat staffing the Goldstone

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[57] *Prosecutor v. Sesay*, Decision on Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber (Sierra Leone Appeals Chamber), 13 March 2004, par. 16, http://www.scsl.org/LinkClick.aspx?fileticket=uabm35Hc0jg%3d&tabid=195.

[58] *Id.*at par. 15.

Mission.[59] It would be ironic were the Mission to ignore a major international precedent that was achieved by one of its researchers, a precedent so clearly applicable to the bias arising from Prof. Chinkin's remarks.

National Legal Systems
Require Recusal in Cases of Bias

33. National legal systems equally apply the remedy of recusal in cases of real or apprehended bias, as surveyed by the ICTY Appeals Chamber in *Furundzija*.[60] For example, U.S. federal law provides that "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."[61] The U.S. Supreme Court has ruled that what matters here "is not the reality of bias or prejudice but its appearance," and that a judge should recuse him or herself when it would appear to a reasonable person, knowing all the relevant facts, that a judge's impartiality might reasonably be questioned. *Liteky* v. *United States*, 510 U.S. 540, 555 (1994). "[T]he appearance of partiality is as dangerous as the fact of it." *United States* v. *Conforte*, 624 F.2d 869, 881 (9th Cir. 1980).

Justice Goldstone's Defence of Prof. Chinkin
Fails to Apply Legal Test for Actual or Apprehended Bias

34. On 11 July 2009, in an interview with Israel's Channel 1 TV, Justice Goldstone was asked the following question by host Yaacov Achimeir:

> How did you agree that in your committee serves Professor Christine Chinkin of England who already stated in an article in the *Sunday Times* that Israel committed war crimes, even before the beginning of the work of your commission? Is it not a prejudice?[62]

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[59] *See* Letter of F. Marotta, Head of the Secretariat of the UN Fact Finding Mission on the Gaza Conflict, to N. Bedein (19 June 2009), *at* http://sderotmedia.org.il/bin/content.cgi?ID=487&q=6.

[60] *Furundzija,* at pars. 183-188.

[61] 28 U.S.C. 455(a).

[62] *See* transcript and links to original video at UN Watch blog, "Goldstone Defends Christine Chinkin from Bias Charge," July 13, 2009, *at* http://blog.unwatch.org/?p=416. For similar arguments by Justice

Justice Goldstone came to Prof. Chinkin's defence:

> Well, you know, firstly, it's not a judicial inquiry. It's a fact-finding mission. I've known Professor Chinkin for many years. I've found her to be an intelligent, sensible, even-handed person. And it wasn't an article—she signed a letter together with a number of other, I think, British academics, at the time, soon after the Operation Cast Lead began. But working with her now, I'm absolutely satisfied that she's got a completely open mind and will not exhibit any bias one way or the other. But in any event, she is one of four people on the committee, and I don't believe that any prima facie views she might have held at an earlier stage is going to in any way affect the findings or the recommendations in the report.[63]

35. With respect, Justice Goldstone's three principal arguments are invalid. First, as demonstrated above, whether the Mission is judicial or quasi-judicial, it is required under international law and United Nations standards to be both objective and impartial, and Justice Goldstone himself has repeatedly promised exactly this.

36. Second, the applicable test is not whether a fellow panel member is "absolutely satisfied" that Prof. Chinkin has an "open mind." What matters legally, rather, is the objectively justified apprehension of bias created by Prof. Chinkin's statement, based on knowledge of all the relevant circumstances. The apprehension of bias test reflects the maxim that "[J]ustice should not only be done, but should manifestly and undoubtedly be seen to be done." *R v Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256.

Goldstone, *see* "Goldstone Walks a Fine Line in an Ancient War Zone," *Business Day*, August 4, 2009, http://www.businessday.co.za/articles/Content.aspx?id=77618. The interview includes a revealing account of discussions held by the Mission members with Egypt, Pakistan, and Cuba, as the sponsors of S-9/1, in regard to the new terms of reference. However, the Human Rights Council plenary had the opportunity to formally recognize these changes at its June 2009 session, but declined to do so. UN Watch expressly asked this of the sponsors, but to no avail. *See* UN Watch intervention, 11th session of the UNHRC, 15 January 2009, *at* http://webcast.un.org/ramgen/ondemand/conferences/unhrc/eleventh/hrc090615am2-eng.rm?start=01:03:57&end=01:05:55.

[63] Achimeir transcript, at UN Watch blog, *id.*

37. Third, when a judge or fact-finder is found to be partial, the remedy is recusal or her removal. Prof. Chinkin's published commitment to a preconceived outcome cannot be ignored by the fact that she is only one of four people. In the *Sesay* case, the fact that Justice Robertson was one of five judges did not mitigate his lack of impartiality.

38. Ultimately, even if Justice Goldstone's assessment is correct, it is beside the point. As the courts in the U.S. have determined, "[T]he judge's actual state of mind, purity of heart, incorruptibility, or lack of partiality are not the issue. … The standard is purely objective. The inquiry is limited to outward manifestations and reasonable inferences drawn therefrom. In applying the test, the initial inquiry is whether a reasonable factual basis exists for calling the judge's impartiality into question." *United States* v. *Cooley*, 1 F.3d 985, 993 (10th Cir. 1993). Therefore, Justice Goldstone's impressions of Prof. Chinkin's sincerity are entirely irrelevant.

39. What matters, rather, is this: Would the reasonable person, aware that Prof. Chinkin, prior to hearing any evidence, published a statement "categorically rejecting" Israel's right to claim self-defence against Hamas rocket attacks, in which she further determined that "Israel's actions amount to aggression, not self-defence," and were "contrary to international humanitarian and human rights law," and constituted "prima facie war crimes," apprehend her to be biased on the Mission's assigned question of whether Israel committed violations of international human rights and humanitarian law?

40. The answer, without a doubt, is yes. Therefore, if justice is to be done—and to be seen to be done—the only remedy is Prof. Chinkin's recusal, or her disqualification by the Mission or by the Human Rights Council president.

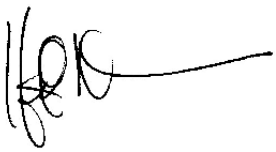
CONCLUSION

41. Wherefore, for the reasons stated above, Petitioner respectfully urges Prof. Christine Chinkin to immediately withdraw permanently and forthwith from this Fact Finding Mission. Alternatively, in the event that Prof. Chinkin does not so withdraw, Petitioner requests that she be disqualified by the remaining members of the Mission or, failing that, by UN Human Rights Council President Alex Van Meeuwen.

Dated: Geneva, Switzerland
20 August 2009

Respectfully submitted,

UNITED NATIONS WATCH



By: _____

Hillel C. Neuer

Case Postale 191
1211 Geneva 20
Switzerland
Tel: +41 22 734 1472
Fax: +41 22 734 1613
www.unwatch.org

Exhibit A

THE SUNDAY TIMES

The Sunday Times, January 11, 2009, Letters section, pg. 16.

Israel's bombardment of Gaza is not self-defence – it's a war crime

ISRAEL has sought to justify its military attacks on Gaza by stating that it amounts to an act of "self-defence" as recognised by Article 51, United Nations Charter. We categorically reject this contention.

The rocket attacks on Israel by Hamas deplorable as they are, do not, in terms of scale and effect amount to an armed attack entitling Israel to rely on self-defence. Under international law self-defence is an act of last resort and is subject to the customary rules of proportionality and necessity.

The killing of almost 800 Palestinians, mostly civilians, and more than 3,000 injuries, accompanied by the destruction of schools, mosques, houses, UN compounds and government buildings, which Israel has a responsibility to protect under the Fourth Geneva Convention, is not commensurate to the deaths caused by Hamas rocket fire.

For 18 months Israel had imposed an unlawful blockade on the coastal strip that brought Gazan society to the brink of collapse. In the three years after Israel's redeployment from Gaza, 11 Israelis were killed by rocket fire. And yet in 2005-8, according to the UN, the Israeli army killed about 1,250 Palestinians in Gaza, including 222 children. Throughout this time the Gaza Strip remained occupied territory under international law because Israel maintained effective control over it.

Israel's actions amount to aggression, not self-defence, not least because its assault on Gaza was unnecessary. Israel could have agreed to renew the truce with Hamas. Instead it killed 225 Palestinians on the first day of its attack. As things stand, its invasion and bombardment of Gaza amounts to collective punishment of Gaza's 1.5m inhabitants contrary to international humanitarian and human rights law. In addition, the blockade of humanitarian relief, the destruction of civilian infrastructure, and preventing access to basic necessities such as food and fuel, are prima facie war crimes.

We condemn the firing of rockets by Hamas into Israel and suicide bombings which are also contrary to international humanitarian law and are war crimes. Israel has a right to take reasonable and proportionate means to protect its civilian population from such attacks. However, the manner and scale of its operations in Gaza amount to an act of

aggression and is contrary to international law, notwithstanding the rocket attacks by Hamas.

Ian Brownlie QC, Blackstone Chambers
Mark Muller QC, Bar Human Rights Committee of England and Wales
Michael Mansfield QC and Joel Bennathan QC, Tooks Chambers
Sir Geoffrey Bindman, University College, London
Professor Richard Falk, Princeton University
Professor M Cherif Bassiouni, DePaul University, Chicago
Professor Christine Chinkin, LSE
Professor John B Quigley, Ohio State University
Professor Iain Scobbie and Victor Kattan, School of Oriental and African Studies
Professor Vera Gowlland-Debbas, Graduate Institute of International and Development Studies, Geneva
Professor Said Mahmoudi, Stockholm University
Professor Max du Plessis, University of KwaZulu-Natal, Durban
Professor Bill Bowring, Birkbeck College
Professor Joshua Castellino, Middlesex University
Professor Thomas Skouteris and Professor Michael Kagan, American University of Cairo
Professor Javaid Rehman, Brunel University
Daniel Machover, Chairman, Lawyers for Palestinian Human Rights
Dr Phoebe Okawa, Queen Mary University
John Strawson, University of East London
Dr Nisrine Abiad, British Institute of International and Comparative Law
Dr Michael Kearney, University of York
Dr Shane Darcy, National University of Ireland, Galway
Dr Michelle Burgis, University of St Andrews
Dr Niaz Shah, University of Hull
Liz Davies, Chair, Haldane Society of Socialist Lawyer
Prof Michael Lynk, The University of Western Ontario
Steve Kamlish QC and Michael Topolski QC, Tooks Chambers