It should also conduct a transparent and comprehensive investigation serious human rights and/or humanitarian law violations committed in the course of the' war on terror" and should take active steps to provide effective remedies to the victims of such abuses. The military detention centre at Guantánamo Bay should be closed in a human rights compliant manner and persons held there should be released or charged and tried in accordance with applicable international law standards.

Other countries that have been complicit in human rights violations arising from the war paradigm should similarly repudiate that behaviour and review legislation, policies and practices to prevent any such repetition in future.

Human rights compliant intelligence efforts

States should take steps to ensure that the work of intelligence agencies is fully compliant with human rights law. The powers of intelligence and law enforcement should be separated and intelligence agencies should not in principle have the power to arrest, detain and interrogate; if intelligence agencies are assigned such powers, the powers should be exercised in conformity with human rights standards.

Care should be taken to regulate by law the powers of intelligence agencies, the gathering of intelligence and the sharing of intelligence with other agencies. It is also imperative to establish independent oversight mechanisms. There should be precise rules on the protection of privacy and measures such as surveillance and interception of communications should require judicial authorisation.

States should provide effective remedies and reparation for human rights violations (including those carried out by their intelligence services) and conduct thorough and independent investigations into allegations of human rights violations, such as renditions and secret detentions or ill-treatment. The need to maintain secrecy of intelligence services' activities must not deprive victims access to an effective remedy and reparation.

The prevention of terrorism

Measures to prevent terrorism, especially when based on secret intelligence, must be mindful of the fundamental rights of the individuals concerned. Administrative detention, control orders, the freezing of assets and other actions on the basis of terrorist lists, must in the first place be necessary and proportionate, limited in time, non-discriminatory and subject to independent periodic review. Furthermore, those affected must have an effective and speedy opportunity to challenge the allegation before a judicial body.

States should repeal laws authorising administrative detention without charge or trial outside a genuine state of emergency; even in the latter case, States are reminded that the right to habeas corpus must be granted to all detainees and in all circumstances.

States should ensure that immigration law does not serve as a substitute for criminal law in its counter-terrorism efforts and should, in particular, reaffirm their commitment to the principle of non-refoulement. They should not rely on diplomatic assurances or other forms of non-binding agreements to transfer individuals when there is a real risk of serious human rights violations.

The UN Security Council, the Council of the European Union and other organisations using a listing system should urgently comply with basic standards of fairness and due process, including, as a minimum, allowing affected persons and organisations the right to know the grounds of listing and the right to challenge such listing in an adversarial hearing before a competent, independent and impartial body.

Reasserting the value of the criminal justice system

States should ensure that their criminal justice law, and the various agencies of the criminal justice system, are 'fit for purpose' so that they can meet the long-term challenges posed by terrorism. Priority should be given to efforts to strengthen the capacity of ordinary law enforcement and judicial systems to enforce their existing criminal law and to improve international judicial cooperation. The international community should support such efforts, including by providing technical assistance where needed to strengthen States' ability to investigate complex crimes within a framework of the rule of law.

Repudiation of serious human rights violations

The international community should repudiate the serious human rights and humanitarian law violations that have been committed worldwide by many States in the name of countering terrorism. Given the ambiguity that has arisen around previously uncontested truths, it is vital to reiterate that all forms of torture, cruel, inhuman or degrading treatment, extra-ordinary renditions, and secret detention are illegal and unacceptable.

In support of Justice Goldstone

By Arthur Chaskalson, former Chief Justice of South Africa, and George Bizos SC, senior counsel at the Constitutional Litigation Unit of the Legal Resources Centre.

Following the publication of the Report of the United Nations Fact Finding Commission on Gaza, which he chaired, Justice Richard Goldstone has been subjected to a vicious attack on his character, clearly organised in an attempt to discredit the report by discrediting him. This seemed to us at the time to be reprehensible and to call for a response. We were not concerned with criticism of the report but with the scurrilous attacks on Justice Goldstone, who we hold in high regard, making clear that this was our concern. Those who disagree with the report are free to criticise its provisions; they should however do that, and not seek to discredit the report by attacking Richard Goldstone's character. Our response was published in the media. We do not intend to repeat all that we said then. But more recently there has been a scurrilous attack on Justice Goldstone's record as a judge in South Africa, published in Yediot Ahronot, an Israeli newspaper with a mass circulation in Israel, which leads us to repeat the following from our previous statement:

'Not every judge appointed during the apartheid era was a supporter of apartheid. There were a number among, them including Richard Goldstone, who accepted appointment to the Bench in the 70s and 80s in the belief that they could keep principles of the law alive. They included Michael Corbett, Simon Kuper, Gerald Friedman,

HC Nicholas, George Coleman, Solly Miller, John Milne, Andrew Wilson, John Didcott, Laurie Ackermann, Johann Kriegler and others. There is a considerable body of evidence that they discharged their functions with courage and integrity. This is recognised in the report of the Truth and Reconciliation Commission which observed that 'there were always a few lawyers (including judges, teachers and students) who were prepared to break with the norm.' Commenting on such judges, it says 'they exercised their discretion in favour of justice and liberty wherever proper and possible … and (the judges, lawyers, teachers and students referred to) were influential enough to be part of the reason why the ideal of a constitutional democracy as the favoured form of government for a future South Africa continued to burn brightly throughout the darkness of he apartheid era.'

Richard Goldstone was one of those judges. In recognition of this he was appointed by President Mandela to the new Constitutional Court established after the collapse of apartheid, and was a member of that court from its inception in 1994 until he retired in October 2003. When he retired there was a ceremony in the Constitutional Court to mark his service to the law. A large gathering assembled in the court to pay tribute to him. We repeat and endorse what was said then in the tribute from the court:

'Judges with an understanding of and a willingness to acknowledge the suffering and frustrations caused by apartheid, had an important role to play in those dreadful days. In its report, the Truth and Reconciliation Commission was highly critical of the role of the judiciary under apartheid, but it acknowledged the few who "exercised their judicial discretion in favour of justice and liberty wherever possible." Justice Goldstone was one of those referred to. I will mention but one decision which had a profound effect at the time it was given. It concerned the Group Areas Act and was given at a time when the state was attempting to enforce that Act in circumstances in which its provisions were being ignored by large numbers of people in Johannesburg. The process used was to charge the people concerned with criminal offences, to secure convictions and an order evicting the persons concerned from the premises that they were occupying. Mr Govender was dealt with in this way and as all the targeted persons did in resistance to the state's campaign, he appealed, in order to buy time. He did far better than ever he had thought. Justice Goldstone was one of the two judges who heard the appeal. He gave the judgment and dealt with the matter as follows:

"It appears to have been accepted by all the participants in the trial in the court below that, the appellant having been found guilty of contravening … the Act, an ejectment order… would follow automatically as part of the sentence. This appears also to have been accepted by the magistrate. We were informed from the Bar that the expectation followed from the practice which has grown up in these cases. If indeed such a practice does exist, in my opinion, the sooner it ceases the better" (*S v Govender* 1986 (3) SA 969 (T)).

Thus said, he then went on to explain why, holding that the exercise of the power [to evict] was not obligatory, but discretionary, which, as he said, if exercised may, and in most case will, seriously affect the lives of the person or persons concerned. There was no evidence directed to this issue because all had assumed that if the occupation was illegal an eviction order would follow. That, however, proved not to be an obstacle to Mr Govender's appeal. An order as drastic as that, said Justice Goldstone, should not,be made without the fullest enquiry … A court should not make such an order unless requested to do so and there appears to me to be no onus upon the convicted person to dissuade the court from granting the order. A prosecutor seeking such an order was obliged to place material before the court justifying the exercise of the court's discretion and, said Justice Goldstone, "I cannot imagine any circumstances which would justify the court making such an order mero motu." There were, he said, many considerations that may be relevant to the exercise of the court's discretion. He mentioned some including the personal hardship which such an order may cause and the availability of alternative accommodation. The fact that the occupation was illegal, prohibited by statute, and a criminal offence was not one of the relevant factors mentioned by him.'

In the result Mr Govender's appeal was upheld, but more significantly, the state's campaign to enforce the Group Areas Act in Johannesburg ground to a halt. Many of those of the 'wrong colour' remained in the premises they were occupying. This was in November 1986 during the state of emergency. In February 1990 a little more than three years later the process of dismantling apartheid began. Today, our Constitution, in language resonant of the judgment in Govender provides that 'no one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances.'

Yediot Ahronot has accused Justice Goldstone of going out of his way to sentence blacks to death, and as a judge taking the side of the racist policies of the apartheid regime. This attack was supported by the Israeli government whose foreign minister is reported to have instructed his office to send the information published in the newspaper to all of Israel's representatives in the world to be used in their PR activities. Taking up the allegations made in the article, the Speaker of the Israel Knesset is reported to have said that 'such a person should not be allowed to lecture a democratic state (presumably Israel) defending itself against terrorists, who are not subject to the criteria of international moral norms.' The attack was also taken up and elaborated upon by an American lawyer, Mr Alan Dershowitz, a strong supporter of Israel's policies, and a critic of the Gaza report. Equating Justice Goldstone with the Nazi Josef Mengele, a torturer notorious for his cruelty to prisoners in Auschwitz, he described Goldstone as a 'hanging judge' who allowed dozens of black persons who were unfairly tried to be executed under circumstances where whites would almost certainly have escaped the noose. This is a gratuitous and false statement made without any evidence to support it.

Editorial note
Readers are invited to respond to this article.

Richard Goldstone was never thought of as a hanging judge. On the contrary he was known to be a fair judge who did not favour the death sentence, and would avoid passing it if it was possible to do so. To the best of our knowledge he imposed only two death sentences as a judge of first instance. This, at a time when the death sentence was a mandatory punishment in convictions for murder where there were no extenuating circumstances. From 1989 until 1994 Richard Goldstone was a member of the Appellate Division where he would have heard appeals against death sentences in terms of an amendment to the Criminal Procedure Act passed in 1990. According to that amendment a death sentence could only be imposed on a person over 18 years old. The trial court had to be composed of a judge and two assessors. They were required to decide whether there were any mitigating or aggravating factors. The onus was on the State to prove beyond reasonable doubt the existence of aggravating factors, and to negative beyond reasonable doubt the presence of any mitigating factors relied on by the

accused.If there was doubt as to the age of the accused, the state had to prove beyond reasonable doubt that he or she was over 18. The 1990 amendment to Criminal Procedure Act allowed a full right of appeal to persons sentenced to death. If there were no appeal, the Appellate Division had to review the sentence and set it aside if it was of the opinion that it was not a 'proper sentence.'

The Appellate Division laid down that the death sentence should only be imposed in the most exceptional cases, where there was no reasonable prospect of reformation, and the objects of the punishment could not be properly achieved by any other sentence. Judgments on appeal or review, in which Goldstone may have participated, had to address this test. During this period the death sentence was confirmed only in cases of the most brutal murders. We do not know in how many cases Justice Goldstone was a member of a panel that confirmed a death sentence imposed by a lower court. However, from 1989 there was a de facto moratorium on the carrying out of death sentences. This became formal in 1992. From 1989 until 1995 when the Constitutional Court, acting under South Africa's post-apartheid constitution ruled that capital punishment was unconstitutional, death sentences were not carried out. When the Constitutional Court declared capital punishment to be unconstitutional, the death sentences were commuted and sentences of imprisonment were imposed. No one was executed after 1989.

Mr Dershowitz also accused Justice Goldstone of 'having affirmed sentences of physical torture - euphemistically called 'flogging' - for other blacks.' This is another distortion of the truth for which no evidence is offered. To the best of our knowledge Richard Goldstone never imposed a sentence of corporal punishment in a case in which he convicted an accused person of a criminal offence. We are aware of one case in which he dealt with the issue of corporal punishment on review. It was the case of *S v Ndaba* 1987 (1) SA 237 (T). It appears from the judgment that the circumstances were as follows. Justice Goldstone, as was his custom, visited a prison to see the conditions in which prisoners were being held and if they had any complaints. It came to his notice that prisoners in six cases had received sentences that included corporal punishment. At that time the imposition of strokes by a cane was a competent punishment in certain cases. The sentences had been imposed by regional magistrates, were not subject to review, and no appeal had been noted. Justice Goldstone, after speaking to the convicted persons, was concerned that the sentences might not be appropriate, and he exercised his power as a judge to direct that the proceedings be taken on review. He made arrangements for counsel to be appointed amicus curiae to represent the affected persons, for the trial records in the six cases to be referred to the Supreme Court, and for a full court to be convened to hear the reviews. He ultimately delivered the judgment of the court in which the sentences of strokes on the accused in four of the six cases were set aside. In two cases, the accused persons had been part of gangs, armed with knives, who had robbed complainants. In the light of established authority, the sentences were confirmed by the court on the basis that no grounds existed for an appeal court to interfere with them. In one the sentence was of three strokes, in the other it was of four strokes. In both cases the magistrates, in exercising their discretion to impose strokes, had said that if strokes had not been imposed, the convicted persons would have been sentenced to longer periods of imprisonment.

In conclusion we consider it appropriate in the light of the unprincipled attack upon his role as a judge in South Africa to place on record in *Advocate* aspects of his career mentioned by us in our previous statement to the media. He was the founding chairperson of Nicro an organisation to look after prisoners that have been released; he exercised his power as a judge (not often used by other judges) to visit prisoners in jail; he insisted on seeing political prisoners indefinitely detained to hear their complaints; to intervene for a doctor to be allowed to see them and where possible to make representations that their release be considered. After the release of Nelson Mandela he played an important role in persuading his colleagues on the Bench to accept the inevitable changes that were likely to take place in the political and judicial structures.

President De Klerk with the concurrence of the President of the African National Congress, Mr Nelson Mandela, appointed Judge Goldstone as the chairperson of the commission to investigate what became known as hit-squads or third force organisations within the army and the police force. His reports exposed high ranking officers who were obliged by President De Klerk to resign, and other members of the security forces, and he made findings that police officers had unlawfully shot at unarmed protestors, and recommended that they should be charged with murder. Threats to his life were made, and his name was on the hit list produced in court as part of the state case against the killers of Chris Hani. Some who have criticised him say that as a Jew he ought not to have accepted a mandate to enquire into the events in Gaza. We do not agree. Religion and ethnicity are irrelevant to the capacity to judging with integrity. Others ask why he has shown no concern about human rights violations that have been and are being committed elsewhere in the world. This was not part of his mandate as head of the fact finding mission. But his career, from the time he was chairman of the Wits SRC campaigning against the exclusion of black students, to the present time, shows a long commitment to the protection of human rights and a concern for their protection in all parts of the world.

He is a member of the boards of Physicians for Human Rights, the International Center for Transitional Justice, the Salzburg Global Seminar, and the Center for Economic and Social Rights. He is a director of the American Arbitration Association. He chairs the advisory boards of the Institute for Historical Justice and Reconciliation and the Brandeis University Center for Ethics, Justice and Public Life. In April 2004, he was appointed by the Secretary-General of the United Nations to the Independent International Committee, chaired by Paul Volcker, to investigate the Iraq Oil for Food program. He is co-chair of the Human Rights Institute of the International Bar Association.

He chaired a UN Committee to advise the United Nations on appropriate steps to preserve of the archives and legacy of the International Criminal Tribunals for the former Yugoslavia and Rwanda. From 15 August 1994 to September 1996 he served as the Chief Prosecutor of the United Nations International Criminal Tribunals for the former Yugoslavia and Rwanda, a post he accepted at the request of President Nelson Mandela, who considered it an important affirmation of the post apartheid South African judiciary. He was the chairperson of a high level group of international experts that met in Valencia, Spain, and drafted a Declaration of Human Duties and Responsibilities for the Director General of UNESCO (the Valencia Declaration). From August 1999 until December 2001 he was the chairperson of the International Independent Inquiry on Kosovo. He is a director of the American Arbitration Association. And from 1999 to 2003 he served as a member of the International Group of Advisers of the International Committee of the Red Cross. He has received many prestigious awards in recognition of his commitment to human rights and humanitarian law.

We who know him and his work as a judge and advocate for human rights cannot remain silent in the face of false allegations that have been made about him.