

The Goldstone Report

By David Kaye

Introduction



Justice Richard Goldstone has now formally presented to the Human Rights Council his Report of the United Nations Fact Finding Mission on the Gaza Conflict, which was released on September 15th.^[1] The Report, critical of both Hamas and Israel for actions related to the conflict that spanned three weeks from late December 2008 to mid-January 2009, was never likely

to influence Hamas' approach to international humanitarian law (IHL).^[2] By contrast, a report by Justice Goldstone – a long-time friend of Israel and highly respected in legal circles worldwide – might have played some role in encouraging Israel to rethink how it deals with armed groups operating in civilian areas in Gaza. While Justice Goldstone's credibility and the Report's findings have guaranteed that the Mission's conclusions are being heard, it is difficult to see how it will have a positive impact on Israeli thinking. Hamas has championed the Goldstone Report as vindication,^[3] while Israel has issued a response that challenges the Mission's core factual and legal conclusions.^[4]

This *Insight* does not purport to weigh the Report's factual findings against Israel's objections, nor to catalog the Report's strengths and weaknesses. Instead, it presents a general overview of its findings and some comments on what is surely a leading reason for Israel's denunciation of the Report: the rejection of its system of military justice and the call for other states and the International Criminal Court (ICC) to investigate and prosecute alleged Israeli offenders. The United States has echoed Israel's concern in its own reactions to the Report,^[5] while, conversely, Justice Goldstone himself has identified accountability as his main objective.^[6]

Background to the Mission

Justice Goldstone agreed to lead the investigation on April 3 only after the President of the Council restated the Mission's original mandate, which was widely seen as one-sided, in a more even-handed way: "to investigate all violations of international human rights law and international humanitarian

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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.”^[7]

Goldstone unsuccessfully sought Israeli participation and cooperation.^[8] Ultimately, no Israeli official cooperated with the investigative team. While Hamas offered cooperation, the Mission nonetheless faced barriers in Gaza. For instance, the Report notes that Palestinians were often “reluctant to speak about the presence of or conduct of hostilities by the Palestinian armed groups,” perhaps “stemm[ing] from a fear of reprisals.”^[9] While testimony from dozens of Gazans is often powerful and seemingly credible, the Report gives the sense that Hamas’ (or other groups’) responsibility for civilian casualties in specific incidents was difficult to demonstrate for reasons even beyond Israel’s absence.

Factual Findings and Legal Conclusions

Of the twenty-one chapters at the heart of the nearly 600-page document, sixteen deal with Israeli behavior, four deal with abuses by “armed groups in Gaza,” and one deals with allegations against the Palestinian Authority. In explaining this disparity, Justice Goldstone has noted that the issue of Hamas’ responsibility for rocket and mortar attacks on Israelis in southern Israel was not much in dispute, whereas Israeli responsibility in Gaza was “a lot more complicated.”^[10] The Mission did not make an effort to examine all allegations of IHL and human rights violations before, during or after Operation Cast Lead but instead addressed “illustrative” incidents. At its conclusion, the Report makes a number of recommendations to the parties and other actors in the international community.

With respect to Hamas and others operating in Gaza, the Report alleges their responsibility for failing to take precautions to protect civilians (Chapter VIII), the ongoing detention of Israeli soldier Gilad Shalit (Chapter XVIII), the targeting of Fatah associates by Hamas (Chapter XIX) and deliberately attacking civilians in southern Israel (Chapter XXIV). Israel’s absence from the fact-finding made it difficult for the Mission to assess Israeli arguments about the responsibility of armed groups. Consequently, the Report occasionally resorts to some variation of a phrase such as, “the Mission is unable to make a determination regarding the allegation” of Hamas’ or others’ responsibility.^[11] The Report recommends that Hamas and other armed groups “undertake forthwith to respect international humanitarian law, in particular by renouncing attacks on Israeli civilians and civilian objects, and take all feasible precautionary measures to avoid harm to Palestinian civilians during hostilities.”^[12]

The Report criticizes Israel for a range of acts, from abusive detentions (Chapters XIV, XV and XXI) to repression of dissent (Chapter XXV). Yet the core factual findings deal with thirty-six incidents, of which the vast majority constitute some form of allegation of Israeli attacks on civilians, whether by indiscriminate or disproportionate use of force or deliberate attacks on non-military objectives, including civilians. The Report includes several allegations of the use of Palestinian civilians as “human shields” during military operations, noting that such use is contrary to the Fourth Geneva Convention and that the Israeli Supreme Court and Israeli military policy

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prohibit such abuse.^[13] The Report concludes many of the factual reviews by finding a violation of IHL and the possible elements of a war crime.^[14]

Perhaps most disconcerting from the Israeli perspective is not the assessment of individual incidents, but the overarching claim that Operation Cast Lead was directed against “the people of Gaza as a whole” as part of “an overall policy aimed at punishing the Gaza population for its resilience and for its apparent support for Hamas.”^[15] The Gaza operation, the Mission alleges, involved not merely individual incidents of criminal behavior but was the result of a governmental policy of “massive and deliberate destruction”^[16] The Report concludes with a set of recommendations urging changes in Israeli policy.^[17]

Accountability

A short chapter seems to take as a given that Palestinian authorities are failing in their responsibility to investigate those responsible for violations (Chapter XXVII).^[18] In any event, the sections on accountability (Chapters XXVI – XXIX) hit Israel hardest, in light of its long-established system of military justice; the Report’s call for accountability (though directed toward both Palestinian authorities and Israel) is quite obviously toxic to Israeli officials responsible for the operation. What’s worse, from the Israeli perspective, is that the Report’s critique of Israel’s capacity to investigate violations of IHL is nearly categorical, rejecting as inadequate its system of military justice.^[19]

The Report then turns to alternatives to domestic justice, among them the following:

- *Security Council monitoring*: The Report recommends that the UN Security Council “establish an independent committee of experts . . . to monitor and report on any domestic legal or other proceedings undertaken by Israel” and assess whether Israel is pursuing accountability in good faith.^[20]
- *International Criminal Court (ICC) investigation*: First, if the Security Council finds a lack of good faith investigations after a period of monitoring, the Report recommends that it refer the situation to the ICC chief prosecutor for investigation (as it did with respect to Darfur, Sudan).^[21] Second, the Report notes that the “Government of Palestine” submitted a declaration to the ICC on January 21, 2009, recognizing the jurisdiction of the ICC for “acts committed in the territory of Palestine since 1 July 2002.”^[22] After setting out the relevant article of the Rome Statute (Article 12), the Report concludes that the chief prosecutor might open an investigation of the events in Gaza even without a Security Council referral on the basis of Article 12(3) of the Rome Statute.^[23]
- *Universal jurisdiction*: The Report takes the “increasing unwillingness on the part of Israel to open criminal investigations” as reason to “support[] the reliance on universal jurisdiction as an avenue for States to investigate” grave breaches of the Geneva Conventions.^[24]

Israel’s initial response argues that its system of investigations and prosecutions complies with international standards, that the Report overlooks

the levels of independent scrutiny in the Israeli system and ignores ongoing investigations.^[25] In a lengthy footnote in its response, Israel identifies generally the investigations it has conducted or is conducting, updating a public report it issued in July.^[26]

The Report's recommendations related to accountability pose serious problems to Israel and the international community.

First, Israel has long faced the risk of other states investigating its senior military and political officials, but the Report's documentation – and its broad claim that the operation as a whole followed an unlawful strategy – heightens that threat. The undeniable fact is that, even by Israel's assessment, a very high number of civilians were killed or injured and civilian infrastructure damaged or destroyed.^[27] Even if Israel is correct that the vast majority of these fatalities resulted from the lawful application of force, and that Hamas bears responsibility for allowing armed groups to operate amidst the civilian population, its failure to cooperate with the Mission has eliminated an important forum for making its case. It now risks the possibility that numerous prosecutors, particularly in Europe, will take the conclusions of the Report and initiate investigations under their domestic universal jurisdiction laws. It remains to be seen whether Israel's current approach – issuing statements and reports countering the Report's allegations – will succeed; it seems more likely that an independent domestic review would provide the kind of protection the Israeli Government desires, but the Government has already rejected such an idea.^[28]

Second, the recommendation that the Security Council establish an independent experts committee to monitor Israeli efforts to hold IHL violators accountable is novel – and almost certainly a non-starter, not only for the United States but other members of the Security Council. It's imaginable that the Human Rights Council would initiate such a monitoring system, but it would face the same constraints as those confronting the Goldstone Mission.

Third, the Report's recommendation favoring an ICC referral from the Security Council is certain to fail, as it is impossible to imagine the United States consenting to the referral of Israel to the ICC. Similarly, it would be surprising and highly controversial if the ICC were to accept the claim that Palestine may be a state for the purposes of ICC jurisdiction.^[29]

Conclusion

On the whole, despite much that deserves to be read in it, the Goldstone Report is having limited influence over Israel. Unlike past domestic Israeli investigations into military policy, no major internal movement to support the Report's conclusions appears likely, and the United States is not pushing – at least publicly – for Israel to take the Report's conclusions seriously.

With respect to the United States, it bears noting that the Report poses the first challenge to the Obama Administration since the United States officially joined the Human Rights Council in September. The United States is seeking support for a Council resolution that would encourage Israeli and Palestinian investigations into alleged violations of IHL, but others are pushing for Council approval of each of the Goldstone Report's recommendations.^[30] During the debate over the Report at the Council on

September 29th, the U.S. delegation was essentially isolated in its negative reactions to the Report.^[31] How, and how hard, the United States pushes for its preferred outcome in such an environment should say much about the future of U.S. membership on the Council.

About the Author

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Endnotes

[1] See U.N. Hum. Rts. Council, United Nations Fact Finding Mission on the Gaza Conflict, *Report: Human Rights in Palestine and Other Occupied Arab Territories*, U.N. Doc. A/HRC/12/48 (Sept. 15 2009), available at http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/docs/UNFFMGC_Report.pdf [hereinafter “Goldstone Report”].

[2] Human Rights Watch, for instance, has long called upon Hamas to alter its policy of attacking civilians. For a recent example, see Hum. Rts. Watch, *Rockets from Gaza: Harm to Civilians from Palestinian Armed Groups’ Rocket Attacks*, Aug. 6, 2009, available at <http://www.hrw.org/en/reports/2009/08/06/rockets-gaza-0>.

[3] See Ezzedein Al-Qassam Brigades, *UN Report Clear Proofs of Israel’s War Crimes*, Sept. 16, 2009, available at http://www.qassam.ps/news-1840-UN_report_clear_proofs_of_Israels_war_crimes.html.

[4] Israeli Ministry of Foreign Aff., *Initial Response to Report of the Fact Finding Mission on Gaza Established Pursuant to Resolution S-9/1 of the Human Rights Council*, Sept. 24, 2009, available at <http://www.mfa.gov.il/NR/rdonlyres/FC985702-61C4-41C9-8B72-E3876FEF0ACA/0/GoldstoneReportInitialResponse240909.pdf>.

[5] See Response to the Report of the United Nations Fact-Finding Mission on the Gaza Conflict (2009) (statement of Michael Posner, Assistant Sec’y of State for Democracy, Hum. Rts. and Labor), available at <http://geneva.usmission.gov/news/2009/09/29/gaza-conflict/>.

[6] Richard Goldstone, *Justice in Gaza*, N.Y. TIMES, Sept. 17, 2009, available at <http://www.nytimes.com/2009/09/17/opinion/17goldstone.html>.

[7] See Goldstone Report, ¶ 131, at 39. For the Human Rights Council resolution that established the Mission in January, see Res. S-9/1., 3-6, U.N. Doc. A/HRC/S-9/L.1 (Jan. 12, 2009), available at <http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/docs/A-HRC-S-9-2.doc>.

[8] See Goldstone Report, Annex II (exchange of letters between Goldstone and Israel’s ambassador in Geneva).

[9] *Id.* ¶ 438, at 134. The Report goes on to note that “the Mission requested a meeting with representatives of armed groups. However, the groups were not agreeable to such a meeting.” *Id.* ¶ 439, at 134-135.

[10] See *UN Finds Evidence of War Crimes in Gaza Fighting: Interview with Richard Goldstone*, NEWSHOUR WITH JIM LEHRER, Sept. 15, 2009, available at http://www.pbs.org/newshour/bb/middle_east/july-dec09/gaza_09-15.html.

[11] Goldstone Report, ¶ 463, at 142.

[12] *Id.* ¶ 1770, at 551. The Report also recommends release of Gilad Shalit on “humanitarian grounds” or recognition of his status as a prisoner of war. *Id.* The Report also encourages the Palestinian Authority to ensure better adherence to international human rights norms. *Id.* ¶ 1771.

[13] *Id.* ¶¶ 1094-1097, at 296-298.

[14] See, e.g., *id.* ¶ 934, at 260.

[15] *Id.* ¶¶ 1680-1681, at 523.

[16] *Id.* ¶ 1190, at 329. See also *id.* ¶ 1692, at 526 (“... the systematic and deliberate nature of the activities described in this report leave the Mission in no doubt that responsibility lies in the first place with those who designed, planned, ordered and oversaw the operations”).

[17] *Id.* ¶ 1769, at 549-551.

[18] See *id.* ¶ 1639, at 511. See also *id.* ¶ 1761, at 544 (“there is little potential for accountability . . . in Israel and even less in Gaza”).

[19] *Id.* ¶ 1620, at 506 (“the failure of Israel to open prompt, independent and impartial criminal investigations even after six months have elapsed constitute a violation of its obligation to genuinely investigate allegations of war crimes”); ¶ 1629, at 508 (“there are serious doubts about the willingness of Israel to carry out genuine investigations in an impartial, independent, prompt and effective way” and “the Israeli system presents inherently discriminatory features that have proven to make the pursuit of justice for Palestinian victims very difficult”).

[20] *Id.* ¶ 1766, at 546-547.

[21] *Id.*

[22] *Id.* ¶ 1630, at 508-509.

[23] *Id.* ¶ 1632, at 509 (“The Prosecutor may determine that for the purposes of Article 12, paragraph 3, under customary international law, Palestine qualifies as ‘a state’”). Article 12(3) of the Rome Statute provides, “[i]f the acceptance of a State which is not a Party to this Statute is required under paragraph 2 [for the Court to exercise jurisdiction], that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question.” Rome Statute of the

International Criminal Court art. 12(3), July 17, 1998, U.N. Doc. A/CONF.183/9 (1998), 37 I.L.M. 999 (1998), available at http://www2.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf.

[24] Goldstone Report, ¶ 1654, at 515.

[25] Israel's Initial Response, *supra* note 4, at 20-22.

[26] *Id.* at 21-22, n23. See also Ministry of Foreign Aff., *The Operation in Gaza, 27 December 2008 – 18 January 2009: Factual and Legal Aspects*, July 2009, available at <http://www.mfa.gov.il/NR/rdonlyres/E89E699D-A435-491B-B2D0-017675DAFEF7/0/GazaOperationwLinks.pdf>.

[27] See generally *The Operation in Gaza*, *supra* note 26. See also B'tselem, *B'Tselem's Investigation of Fatalities in Operation Cast Lead*, Sept. 9, 2009, available at http://www.btselem.org/English/Press_Releases/20090909.asp.

[28] See Isabel Kershner, *Israel Rejects Call for Gaza Inquiry*, N.Y. TIMES, Sept. 16, 2009, available at http://www.nytimes.com/2009/09/17/world/middleeast/17gaza.html?_r=1&em.

[29] For one view, see Kevin Jon Heller, *Would Moreno-Ocampo Actually Investigate Only an Israeli Officer?*, OPINION JURIS, available at <http://opiniojuris.org/2009/09/21/would-moreno-ocampo-be-dumb-enough-to-investigate-an-israeli-officer/>.

[30] See Press Release, U.N. Hum. Rts. Council, Human Rights Council Discusses Report of Fact-Finding Mission on the Gaza Conflict (Sept.29, 2009), available at <http://www.unhcr.ch/hurricane/hurricane.nsf/view01/9B6B224880B601B1C1257640004AA30B?opendocument>.

[31] *Id.*