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The Importance of the Goldstone Report: The Goldstone Report and the Modern Law of War

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THE GOLDSTONE REPORT AND THE MODERN LAW OF WAR

This panel was convened at 10:45 a.m., Thursday, March 25, by its moderator, Lucy Reed of the American Society of International Law and Freshfields Bruckhaus Deringer LLP, who introduced the panelists: Omar Dajani of the University of the Pacific, McGeorge School of Law; and Abraham Bell of the University of San Diego School of Law and the Bar Ilan University Faculty of Law.

INTRODUCTORY REMARKS BY LUCY REED*

Ms. Reed noted that the September 2009 report of the United Nations Fact Finding Mission on the Gaza Conflict—known as the “Goldstone Report,” after Mission head Justice Richard Goldstone—has been the catalyst of much international legal and political debate. Upon describing her instructions from Program Co-Chair Allen Weiner to lead a “thoughtful, moderated discussion” between two knowledgeable discussants who were bound to disagree on the basis and outcome of the Goldstone Report, Ms. Reed introduced the panelists. Their thoughtful, reasoned, and divergent analyses follow.

THE IMPORTANCE OF THE GOLDSTONE REPORT

By Omar Dajani[†]

I am very grateful to the American Society of International Law for initiating this discussion about the Report of the United Nations Fact-Finding Mission on the Gaza Conflict (“Goldstone Report” or “Report”) and for inviting me to participate in it. I think the Report raises questions ripe for consideration in a forum of this kind—questions not only about the conduct of the parties to the conflict in Gaza and southern Israel last winter, but also about the content of humanitarian law at a time when it has never been more relevant to U.S. foreign affairs. In my view, the Report’s answers to those questions have been obscured rather than illuminated by the storm of controversy that has attended its publication. For that reason, I am looking forward to having the opportunity here for a serious discussion about the Report’s central legal and factual findings. It is long overdue.

I want to begin my remarks by highlighting what I regard as the Goldstone Report’s most important contributions to the law of armed conflict and to efforts to promote compliance with the obligations it imposes. In the process, I will try to address some of the criticisms that have been leveled against the Report and the United Nations Fact-Finding Mission that produced it. I will conclude with a few words about the broader legal and historical context, for while I can understand the UN Mission’s decision not to stray from *jus in bello* into even more turbulent waters, we should not forget what the Palestinian-Israeli conflict, at its core, is about and why it will not be resolved by military force.

DISTINCTION AND PROPORTIONALITY

But let me start where humanitarian law does, with the principles of distinction and proportionality. Notwithstanding the controversy it has elicited, I submit that the Goldstone

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Report hews largely to an orthodox, civilian-centered vision of the humanitarian obligations of parties to an armed conflict. It rejects the radical redefinition of the principles of distinction and proportionality that has been urged by Israel and some other governments—including, on some occasions, our own. But it also avoids making either sweeping generalizations about the law or close calls regarding the facts. In both of these respects, it is a conservative document, despite what some of its critics allege. And I think that its conservatism—the unwillingness of the UN Mission to abide further erosion of the core principles of the law of armed conflict, even while avoiding second-guessing the judgment of military commanders in close cases—will come to be regarded as the Report’s most enduring substantive contribution.

That balance between faithfulness to principle and reasonable deference to military exigencies is reflected in several elements of the Report’s legal analysis:

First, the Report declines to treat what would normally be considered government infrastructure of a civilian character, such as parliamentary buildings, ministries, and prisons, as a legitimate military objective merely because that infrastructure is administered by officials affiliated with an enemy government or what has been characterized as a “terrorist organization.”¹ During the Gaza conflict, Israeli officials justified the massive destruction of such infrastructure on the grounds that it was a “‘ Hamas Government site’” or part of “‘ Hamas’ mechanism of control.”² (Although these rationales are new, operations of this kind are not. Even prior to Hamas’s takeover of Gaza, Israeli officials justified the destruction of the Palestinian Authority’s civilian infrastructure in Gaza as a means of retaliating against and deterring attacks by Hamas militants. For example, one official explained that the demolition of the civil airport in Gaza in January 2002 was intended “‘to show a glimpse of what can and will be done in the future if the situation worsens.’”³)

The Goldstone Report unequivocally rejects this line of thinking. Adhering to the principle articulated in Article 52 of the first Additional Protocol to the Geneva Conventions—that “‘military objectives are limited to those objects which by their nature, location, purpose or use make an *effective contribution to military action*”⁴—the Mission refuses to expand the concept of “‘effective contribution to military action”” to include routine, non-military functions of an enemy government.⁵ In other words, a ministry of health may not be targeted merely because the efficient administration of health care is likely to bolster an enemy government’s domestic popularity or because of the minister’s political affiliation. To allow such an interpretation would eviscerate the principle of distinction.

I should add that the fact that the entity controlling a government has been designated a “‘terrorist organization”” by other states does not alter the need to distinguish, for the purposes of humanitarian law, between the government’s civilian and military functions and infrastructure. Now let me be clear: I do not for a moment contest that some of Hamas’s so-called “‘military”” operations constitute illegal terrorism. But even before it entered government,

¹ UN Human Rights Council, Report of the United Nations Fact-Finding Mission on the Gaza Conflict, paras. 365–92, UN Doc. A/HRC/12/48 (Sept. 25, 2009), available at <http://www.un.org/Docs/journal/asp/ws.asp?m=A/HRC/12/48> [hereinafter Goldstone Report].

² *Id.* at paras. 372–73.

³ *Gaza Airport Runway Ripped Up by Israel*, GUARDIAN (Jan. 11, 2002), available at <http://www.guardian.co.uk/world/2002/jan/11/israel2>.

⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Art. 52(2), June 8, 1977, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1978) [hereinafter Additional Protocol I].

⁵ Goldstone Report, *supra* note 1, at paras. 384–87.

Hamas was also an important provider of social services, and it participated in the Palestinian legislative elections with Israel's blessing. I am uncomfortable with the view that a government or organization's commission of illegal acts "infects" all of its other functions and institutions, and I am unwilling to accept the notion that a state can sweep aside the principle of distinction simply by labeling its adversary "terrorist." Indeed, the potential for abuse of that label cannot have been lost on an anti-apartheid crusader like Justice Goldstone, who would have seen it wielded unscrupulously against the African National Congress.

That said, the Goldstone Report does *not* suggest that civilian institutions and infrastructure are always off limits. It acknowledges that "dual use" infrastructure may legitimately be targeted and that the use of civilian infrastructure by combatants may strip it of its immunity from direct attack.⁶ Moreover, it applies those caveats to Israel's benefit. For example, even though the Report notes the general rule that members of law enforcement agencies are considered civilians, it accepts the possibility that some of the members of the Gazan police may legitimately have been considered combatants on account of continuing involvement with armed groups,⁷ and it assesses the legality of Israel's attacks on police stations and a police graduation ceremony in terms of proportionality, rather than purely distinction.⁸

Second, the Goldstone Report reaffirms the presumption that, in cases of doubt, civilian objects are not to be treated as military objectives.⁹ The testimonies of Israeli soldiers who had been deployed in Gaza indicate that they had been instructed to turn this presumption on its head. One soldier described the orders he had been given as providing: "If you are not sure, shoot; if there is doubt, then there is no doubt."¹⁰ Another stated, "In urban warfare, anyone is your enemy. No innocents."¹¹ Expressing alarm regarding the apparent consequences of these kinds of instructions—i.e., the hundreds of Palestinian civilians killed by Israeli fire and the catastrophic destruction of civilian infrastructure—the Report concludes that Israeli forces' failure to exercise sufficient care in distinguishing between civilian objects and military objectives in a range of specific cases was reckless and unlawful.¹²

Again, however, it should be stressed that the UN Mission carefully avoided passing judgment with respect to close cases. There is a substantial gap between a soldier's accidental killing of a civilian in a crossfire in the heat of urban combat and firing upon civilians

⁶ *Id.* at para. 388.

⁷ *Id.* at para. 419.

⁸ *Id.* at para. 435. Of course, the Report's recognition that *some* of the members of Gaza's police force *may* have continued to be involved with armed groups like the al Qassam Brigades bears a striking contrast to the government of Israel's conflation of membership in Hamas with involvement in the Qassam Brigades, both of which it considered grounds for combatant status. See ISRAELI MINISTRY OF FOREIGN AFFAIRS, THE OPERATION IN GAZA: FACTUAL AND LEGAL ASPECTS, para. 247 (July 2009), available at http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Terrorism+and+Islamic+Fundamentalism-/Operation_in_Gaza-Factual_and_Legal_Aspects.htm. As the UN Mission concluded, the police officers' political affiliation with Hamas was not, alone, a valid basis for establishing combatant status. Goldstone Report, *supra* note 1, at para. 428. Past involvement was similarly inconclusive. *Id.* at 418. Indeed, the fact that some members of the police force had been members of armed groups years earlier is no more illuminating, with respect to establishing combatant status, than the fact that most (if not all) of the members of Israel's civilian police previously served in the Israel Defense Forces. And while some Palestinian armed groups appear not to have abided by their obligation to wear uniforms distinguishing them from the civilian population, it is difficult to see how this failure could justify air strikes against the uniformed civilian police during the first minutes of Operation Cast Lead. In view of the serious doubts regarding how many of the hundreds of policemen killed were or had ever been combatants, it is unsurprising that the UN Mission concluded that Israel's attacks on civilian police facilities in Gaza were disproportionate.

⁹ Goldstone Report, *supra* note 1, at para. 926 (quoting Additional Protocol I, Art. 52(3)).

¹⁰ *Id.* at para. 803 (quoting BREAKING THE SILENCE, SOLDIERS' TESTIMONIES FROM OPERATION CAST LEAD, GAZA 2009 (2009), available at http://www.shovrimshatika.org/UserFiles/File/ENGLISH_oferet.pdf).

¹¹ *Id.* at para. 804.

¹² *Id.* at paras. 704–885.

carrying white flags in open areas already pacified by the army. It was, for the most part, the latter kind of incident upon which the UN Mission focused, not the former; and this focus arose not from bias against Israel but, on the contrary, from deference to the judgment of Israeli military commanders.¹³ Indeed, critics who claim that the UN Mission failed to appreciate the challenges presented by urban warfare appear themselves not to appreciate that few of the violations the Mission highlighted arose in that context.

Third, the UN Mission's effort to hold the line against the assault on the bedrock principles of humanitarian law is also evident in its proportionality analysis. Quoting the report to the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in relation to the bombing of Yugoslavia by forces of the North Atlantic Treaty Organization (NATO), the Goldstone Report notes that commanders have the duty "to refrain from launching attacks which may be expected to cause disproportionate civilian casualties or civilian property damage."¹⁴ In a number of cases, the Mission found this duty to have been violated, including the firing during a four-hour period of multiple, extremely incendiary white phosphorous shells at the United Nations Relief and Works Agency (UNRWA) compound in Gaza City—a place where, with the Israel Defense Force's (IDF's) knowledge, hundreds of civilians were sheltering and a depot containing almost 170,000 liters of fuel was located.¹⁵ In this case and others like it, the UN Mission did not disregard Israel's military objectives. Instead, it found the gap between the apparent military advantage of the operation and the risk it presented to civilians unacceptably great.¹⁶ Indeed, with respect to many of the cases it addressed, the Mission found it difficult to discern any legitimate military advantage at all.¹⁷ Moreover, in the few circumstances where the Report did deal with genuinely complex or ambiguous facts—such as the attack on the police headquarters and the white phosphorous shelling of the Abu Halima house—the Mission stopped short of finding criminal liability.¹⁸

The principle of proportionality, moreover, implicates a broader and more worrisome trend. In the months leading up to the Gaza conflict, a chorus of influential Israeli political and military officials argued in public forums that the best means of restoring Israel's deterrent capacity was to respond to attacks by non-state actors with disproportionate force. Articulating what has come to be known as the "Dahiya Doctrine," Major General Gadi Eiskhenot stated in March 2008, "What happened in the Dahiya quarter of Beirut in 2006 will happen in every village from which Israel is fired on. We will apply disproportionate force on it and cause great damage and destruction there. From our perspective, these are not civilian villages, they are military bases."¹⁹ He then added, "This is not a recommendation. This is a plan. And it has been approved."²⁰ Similarly, Colonel (Res.) Gabriel Siboni argued in October 2008 that the IDF should act "with force that is disproportionate to the enemy's actions and

¹³ See *Bill Moyers Journal: Interview with Richard Goldstone* (PBS television broadcast Oct. 23, 2009), transcript available at <http://www.pbs.org/moyers/journal/10232009/transcript1.html>.

¹⁴ Goldstone Report, *supra* note 1, at para. 587 (quoting Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, para. 28(c), 39 ILM 1257 (2000)).

¹⁵ *Id.* at paras. 543–95.

¹⁶ *Id.* at paras. 593–95.

¹⁷ See, e.g., *id.* at paras. 623 (unprovoked attack on Al Quds Hospital), 742 (unprovoked attack on civilian), 769 (same), 786 (same), 837 (unprovoked attack on mosque), 878 (unprovoked attack on condolence tents), 929–30 (unprovoked attack on flour mill), 974 (unprovoked attack on wastewater treatment plant).

¹⁸ See *id.* at paras. 437–38, 810.

¹⁹ *Israel Warns Hezbollah War Would Invite Destruction*, REUTERS (Oct. 3, 2008), at <http://www.reuters.com/article/idUKTRE49231020081003>.

²⁰ *Id.*

the threat it imposes,” with the aim of “inflicting damage and meting out punishment to an extent that will demand long and expensive reconstruction processes.”²¹ Siboni concluded by noting that such an approach should be applied not just to Lebanon, but “to the Gaza Strip as well,” suggesting that “[t]he IDF should not be expected to stop the rocket and missile fire against the Israeli home front through attacks on the launchers themselves, but by means of imposing a ceasefire on the enemy.”²²

When read in light of the devastation visited upon the civilian infrastructure of the Gaza Strip during the winter of 2008–2009, what these statements—and similar ones by a range of other senior Israeli officials²³—suggest is that the use of disproportionate force was not an unintended consequence of Israel’s pursuit of other military objectives. Instead, disproportionality was, itself, an objective. The Goldstone Report makes clear that such a policy is plainly incompatible with humanitarian law; it considers the wanton destruction of civilian homes and businesses for the purpose of punishing or deterring rocket attacks from other locations to constitute an unlawful reprisal and a violation of the principle of proportionality.²⁴ One wonders what would remain of the principles of distinction and proportionality had it found otherwise.

The Government of Israel has argued that the legal standards employed by the Mission are unresponsive to the novel challenges presented by asymmetrical warfare between a state and a terrorist organization.²⁵ It submits that such standards would leave a state engaged in a war against terror defenseless. On these grounds, Prime Minister Benjamin Netanyahu asked his government after the Goldstone Report’s publication “to examine the facilitating of an international initiative to change the laws of war in keeping with the spread of terrorism throughout the world.”²⁶

In considering this view, it seems important to note that there is nothing new about asymmetrical conflict. As Kenneth Roth of Human Rights Watch has pointed out, such conflict was widespread in the years leading up to the adoption of the Geneva Conventions, “as illustrated by the militant Zionist group Irgun’s fight against the British colonial rule of what was then Palestine.”²⁷ Accordingly, it seems ahistorical to suggest that existing law was conceived without such conflict in mind. Before Prime Minister Netanyahu undertakes to revisit the core principles of humanitarian law, and the assumptions on which they are based, he should also be reminded that asymmetry presents challenges to both sides of a conflict. It seems safe to assume that Hamas would prefer not to be confronted by the one of the most powerful conventional armies in the world. But just as the world does not—and should not—countenance a relaxing of Hamas’s obligation not to target civilians on account

²¹ Gabriel Siboni, *Disproportionate Force: Israel’s Concept of Response in Light of the Second Lebanon War*, INSS INSIGHT 74 (Oct. 2, 2008), available at <http://www.inss.org.il/publications.php?cat=21&incat=&read=2222>.

²² *Id.*

²³ See Public Committee Against Torture, *No Second Thoughts: The Changes in the Israeli Defense Forces’ Combat Doctrine in Light of “Operation Cast Lead”* 20–28 (Nov. 2009), available at http://www.stoptorture.org.il/files/no%20second%20thoughts_ENG_WEB.pdf.

²⁴ Goldstone Report, *supra* note 1, para. 1216.

²⁵ See ISRAEL MINISTRY OF FOREIGN AFFAIRS, 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/MFA/Terrorism-+Obstacle+to+Peace/Hamas+war+against+Israel/Initial-response-goldstone-report-24-Sep-2009.htm>.

²⁶ See Kenneth Roth, *Geneva Conventions Still Hold Up*, FOREIGN POL’Y IN FOCUS (Dec. 30, 2009), available at <http://www.hrw.org/en/news/2009/12/30/geneva-conventions-still-hold-kenneth-roth>.

²⁷ *Id.*

of this asymmetry, it should not accept Israel's relaxing of its own obligations because they make combat with unconventional forces more difficult.

ACCOUNTABILITY

I would like to speak briefly about what I see as the second key contribution of the UN Mission, and that is the accountability framework it has helped to erect. What is notable—if not new—about this framework is its incorporation of multiple, mutually reinforcing processes for challenging the culture of impunity that has prevailed during Israel's long occupation of Palestinian territory. In addition to directing attention within intergovernmental forums like the UN General Assembly and Human Rights Council to violations of humanitarian law by the parties to the Gaza conflict, the Mission's investigation process and report have energized international, Israeli, and Palestinian NGOs, which both provided evidence to the Mission and have played a lead role in monitoring the parties' compliance with the Mission's recommendations, pressing governments to answer difficult questions not only about their conduct during the conflict, but also about their processes for investigating abuses. Moreover, the Report has offered a focus for discussion within foreign governmental institutions—from the European Parliament to the U.S. Congress—and may yet serve as a foundation for judicial inquiries pursuant to universal jurisdiction statutes.

Of course, some of this effort would have gone forward whether or not the Goldstone Report had been written. I believe, however, that the Mission's public fact-finding process and the dissemination of its report have given these efforts a degree of coherence, and perhaps also a degree of effectiveness, that they would not otherwise have achieved. Indeed, the shameful campaign to discredit the Israeli NGOs that testified before the Mission—and to disparage Justice Goldstone himself—is a testament to the power (and potential) of this kind of transnational and cross-institutional collaboration.

That said, while the Report has probably prompted more thorough investigations of abuses during the Gaza conflict than would otherwise have been forthcoming, the current round of investigations seems unlikely to touch the high-level officials who developed the policies implemented with such terrible effect in Gaza—and who seem intent on employing them again in the future.²⁸ If the international community is serious about promoting accountability and ending the cycle of escalating violence in the Middle East, the invocation of universal jurisdiction by courts in other countries to investigate officials responsible for the policies implemented in Gaza is a critical next step, particularly in view of the challenges involved in establishing the International Criminal Court's jurisdiction over the matter. For too long, the Israeli security establishment's modus operandi has been, in Aluf Benn's words, "[w]hat doesn't work with force will work with more force."²⁹ A realistic prospect of criminal liability for violations of humanitarian law may be what is needed to alter their calculation.

CONCLUSION

In sum, the Goldstone Report is neither a wide-eyed manifesto that sets forth unimplementable legal standards nor a slanderous attack against Israel. While it champions the rights of Palestinian and Israeli civilians zealously and unapologetically, it breaks little new ground

²⁸ Yaakov Katz, *Analysis: The Dahiya Doctrine vs. The Goldstone Report*, JERUSALEM POST, Jan. 25, 2010 ("The IDF does not plan on significantly changing the way it fights in future conflicts. On the contrary, it will continue to target civilian infrastructure that is used by terrorists.").

²⁹ Aluf Benn, *An Abiding Faith in Force*, HA'ARETZ, Oct. 9, 2003.

legally and confines its factual analysis to cases involving clear and egregious violations of humanitarian and human rights law. Once the furor surrounding its publication has subsided, and the report is judged on its merits, I am confident that it will be lauded for what it is: an effort, at once courageous and judicious, to ensure that even in the most polarizing of international conflicts, no one is above the law or outside its protection.

Whether that effort ultimately is successful will depend in part on our willingness, as international lawyers, to muster the courage of our convictions. While we must give due regard to military exigencies and show due compassion for soldiers in the field, we must not forget that humanitarian law's central mission is the protection of civilians, and the effective discharge of that mission requires a healthy skepticism about the justifications offered for military operations. After all, the law does more than allow us to question the judgment of military commanders; it obliges us to do so. Necessity and proportionality are not blank checks, and the consequences of an excess of deference are plain to see in the shattered streets of Gaza.

Perhaps the most pressing question arising from the Gaza conflict of 2008–2009 is one that is neither asked nor answered in the Goldstone Report—and that is not how the war between Palestinians and Israelis should be waged, but how it should be brought to an end. Humanitarian law has long recognized that cruelty and wanton destruction not only make war more horrible, they also make peace less likely.³⁰ This is a lesson that all of the parties to the Palestinian-Israeli conflict would do well to observe. For this conflict is not some Levantine front in the global war on terror. It is a struggle for national liberation. What is sought by the Palestinians of the Gaza Strip and West Bank is what international law has promised them for decades: the opportunity at last to determine their own political fate in an independent state and to live free from the restrictions and privations of Israeli military occupation. No use of force will do as much to establish peace and security and to protect civilians on both sides of the Green Line as making good on that promise.

A CRITIQUE OF THE GOLDSTONE REPORT AND ITS TREATMENT OF INTERNATIONAL HUMANITARIAN LAW

*By Abraham Bell**

The Human Rights Council-appointed United Nations Fact Finding Mission on the Gaza Conflict, popularly known as the Goldstone Mission, has been embroiled in controversy since it published its Report¹ in September 2009. Sadly, I believe that criticisms raised against the Report are well-founded and that the nearly five hundred page Goldstone Report failed in almost every respect.

Because I must focus on doctrinal international humanitarian law (IHL) issues, I must ignore many of the Goldstone Report's non-doctrinal deficiencies. For further investigation of such issues, I recommend beginning with the summary of a 2009 meeting at Chatham House on the Report's procedural failings. The meeting addressed the most serious charges: the "style and presentation in the Goldstone Report could raise criticisms about bias and prejudice." "Criticisms of Hamas in the Report are tentative . . . while the language employed

³⁰ See Instructions for the Government of Armies of the United States in the Field (Lieber Code), Art. 16 (Apr. 24, 1863), available at <http://www.icrc.org/ihl.nsf/FULL/1110?OpenDocument> ("military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult").

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¹ Goldstone Report, *supra* note 1.