A Critique of the Goldstone Report and Its Treatment of International Humanitarian Law

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Abstract:

This essay was prepared for a panel discussion on The Goldstone Report and the Modern Law of War at the 2010 Annual Meeting of the American Society of International Law.

The essay briefly examines the controversial Goldstone Report’s treatment of four legal issues: (1) collective punishment; (2) terrorism; (3) distinction and proportionality and (4) human shielding and perfidy.

The essay finds that the Goldstone Report’s treatment of these issues does not comport with commonly accepted understandings of the meanings of the doctrine. Specifically, on collective punishment, the Report expands the term to cover legal acts of retorsion such as economic and political sanctions. On terrorism, the Report rejects recent treaties and Security Council Resolutions and creates legal duties to support terrorist organizations and respect their alleged rights of free association. The Report erases the intent and anticipation components of distinction and proportionality, and also appears to find all collateral damage disproportionate. And the Report functionally grants some parties immunity from the rules of human shielding and perfidy by finding such acts unworthy of investigation or notice.

In addition, the essay highlights several problems in the Report’s treatment of evidence, as well as its decision to apply different legal standards to different parties.

I. Introduction

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 Report in September 2009. Sadly, I believe that criticisms raised against the Report are well founded and the nearly 500-page Goldstone Report failed in almost every respect.
Because I must focus on doctrinal International Humanitarian Law issues, I must ignore many of the Goldstone Report’s non-doctrinal deficiencies. For further investigation of such issues, I commend 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 regarding alleged Israeli violations is stronger and more condemnatory.” The “incidents ... are presented as factual narratives with little analysis[,] … hardly any documentary references” with “titles [that] appeared to disclose bias.” The Mandate adopted by the Human Rights Council was “aggressively biased against Israel” and “did not conform with the terms of the 1991 General Assembly declaration on fact-finding missions.” Christine Chinkin’s participation as one of the four members despite public comments regarding the conflict created a “perception of bias.” The Goldstone Mission gave “insufficient acknowledgement of the difficulty in obtaining information in a political environment dominated by Hamas” where witnesses were “prescreened and pre-selected” and “intimidated” by Hamas. Incidents selected by the Mission for investigation “appeared to have been selected for political effect” and it was unsatisfactory for the Mission to have declined to reveal the criteria for selection. The Mission used the incidents it selected to “to extrapolate an unbalanced account of what happened in Gaza.” The Mission “dissimissively rejected Israel’s extensive system of investigations of allegations of wrong-doing” despite its similarity to “review systems” employed throughout the world, including the US and UK.² While the meeting report failed to endorse many of these criticisms, I believe they are all well founded. Additionally, the meeting report was deliberately underinclusive. It consciously omitted all substantive criticism, and it left aside yet more procedural criticisms discussed by others.³

I now turn, as I must, to doctrine. The Goldstone Report’s interpretation and application of the law is no less defective; indeed, its doctrinal flaws alone are so extensive that I cannot possibly address them all in my brief remarks. I will therefore restrict myself to four subjects: (1) collective punishment; (2) terrorism; (3) distinction and proportionality, and (4) human shielding.

II. Collective Punishment

Begin with collective punishment. As the ICRC observes, the prohibition on collective punishment is an “application, in part, of [the] Rule [] that no one may be convicted of an offence except on the basis of individual criminal responsibility.” In other words, collective punishment is the imposition of penal and quasi-penal punishment on the basis of association rather than criminal guilt.

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⁴ JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME I: RULES 374 (2005), rule 103.
But according to the Goldstone Report, collective punishment consists of imposing economic and political sanctions, or engaging in lawful actions of war when motivated by lawful goals such as convincing the enemy to release hostages—though apparently only when carried out by Israel. Thus, for instance, the Report found Israel guilty of collective punishment for implementing a partial closure of its own border with Gaza, and in warning it might continue “economic and political isolation” of Gaza until Hamas releases the hostage Gilad Shalit.

The Report provided no precedent for this radical reinterpretation of “collective punishment.” It could not, since there is no such precedent. Economic and political sanctions and other forms of retorsion, are among the most basic tools of international relations. For example, the states of the Arab League and the Organization of the Islamic Conference have imposed economic and political sanctions on Israel for more than six decades without ever having been found in violation of the IHL rule of collective punishment. The Report justified neither its odd understanding of the law nor its application to only one party. Instead, the Report sufficed with the claim that the accusation is popular among Palestinians. In the words of the Report, “Israel ... has chosen to punish the whole Gaza Strip and the population in it with economic, political and military sanctions. This has been seen and felt by many people with whom the Mission spoke as a form of collective punishment inflicted on the Palestinians because of their political choices.”

III. Terrorism

This misclassification of economic sanctions as collective punishment is particularly striking in light of the Report’s apparent denial of the legal duties imposed on states to deny even passive support to terrorist organizations like Hamas. That Hamas is a terrorist organization cannot be seriously doubted. Hamas repeatedly commits acts defined as criminal by the International Convention for the Suppression of Terrorist Bombings, the International Convention for the Suppression of the Financing of Terrorism and the International Convention Against the Taking of Hostages. The United States, the European Union, Canada, Israel and Japan all classify

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6 Goldstone Report ¶ 78. The paragraph refers to an Israeli “blockade,” later defined in ¶ 311 as “the long process of economic and political isolation imposed on the Gaza Strip by Israel, which is generally described as a blockade.”

7 On the Goldstone Report’s attempt to expand the law of belligerent occupation to make Gaza territory “occupied” by Israel, see Bell & Shefi, The Mythical Post-2005 Israeli Occupation of the Gaza Strip, 16 ISRAEL AFFAIRS 268 (2010).

8 Goldstone Report ¶ 1330.


Hamas as a terrorist organization. Hamas’s terrorist acts are not accidental; Hamas was chartered in 1988 with the expressed aims of “obliterat[ing] Israel,” rejecting “so-called peaceful solutions” and “struggl[ing] against the Jews” until the Day of Judgment when the stones and the trees will help Muslims kill Jews. Security Council Resolution 1373, adopted under Chapter VII, requires states to forbid support, whether passive or active, to entities controlled by persons who commit terrorist acts. With Hamas in control of the government of the Gaza Strip, and numerous reports of Hamas diverting civilian aid in order to fill its own coffers, Resolution 1373 not only permits but requires Israel strictly to limit aid to the Gaza Strip.

Of course, one can plausibly argue that Resolution 1373 is quasi-legislative and therefore ultra vires. One can quibble about the scope of “passive support” and the other acts forbidden by 1373. One can ponder the interplay between 1373 and the limited IHL duties to permit passage of some kinds of aid. One can argue about the degree to which Hamas’s past theft of aid implies a future threat. But the Goldstone Report didn’t engage the arguments or even acknowledge the existence of international law concerning terrorist organizations. Nor did the Report acknowledge that Hamas is a terrorist organization. Rather, in a startling repudiation of the law, the Report concluded that the only relevant crime of terror is to be found in the Geneva Conventions, and, in an even more shocking renunciation of reality, that Israel and only Israel is guilty of terror.

Indeed the Report claimed legal protection for terrorist organizations: it posited that arresting Hamas members, refusing public appointment to Hamas and affiliates, and denying Hamas-affiliated organizations public support constitute illegal discrimination on the basis of political belief, a violation of freedom of association and even collective punishment.

IV. Distinction and Proportionality

The whitewashing of Hamas carries over to the Report’s problematic treatment of issues of distinction and proportionality. Examine, for instance, the Report’s lengthy claim that Israel violated the rule of distinction by targeting Hamas police. As you’ll recall, the rule of distinction requires combatants to aim their fire only at legitimate targets. This rule has two elements: legitimate targets and intent. Legitimate targets are objects that contribute to the war effort, or persons who are combatants. Set aside for the moment the problem that in non-international conflicts (a category which arguably fits the Gaza conflict) there is no definition of combatant, and let us agree that one may legitimately target only members of armed forces and those active

16 Goldstone Report ¶ 108, 884, 1164, 1171, 1328, 1494, 1893, 1921, 1927. The Report conceded that “continued [rocket] attacks” by “Palestinian armed groups” “caused terror” in Israel and it is “plausible” that “one of the primary purposes of” the attacks was “to spread terror.” Goldstone Report ¶¶ 1689, 1691, 1900, 1951.
17 Goldstone Report ¶¶ 91, 100-102, 1501, 1550-1561.
in hostilities. The element of intent specifies that the rule of distinction is violated only where one deliberately aims at illegitimate targets as such.

Were the police legitimate targets? According to Israel, the Gaza police were armed forces tasked with engaging in military and quasi-military operations. In addition, nearly all policemen were also active members of Hamas or other terrorist organizations, and as the Report noted, Israel defined “anyone who is involved with terrorism within Hamas [a]s a valid target.”

The Goldstone Report denied that the police were armed forces, notwithstanding that Hamas police spokesman Islam Shahwan himself had been quoted during the conflict confirming the police role in “facing the enemy,” relying instead on Shahwan’s later self-serving claim that the police had a purely civilian role. The Report acknowledged the truth of Israel’s second claim – that most or nearly all of the police were active Hamas members – but denied that an armed member of a terrorist organization should automatically be viewed as a member of an armed force. To understand just how revolutionary this is, consider a British soldier in Afghanistan stationed on traffic control duty. Would we really accept that the soldier was no longer a legitimate combat target solely because he had civilian governing functions during that particular period? Yet, according to the Goldstone Report, once terrorist groups seize control of an area, their armed members and leaders become presumptive civilians.

In any event, the Goldstone Mission stated that it did not know what percentage of targeted police fit the Report’s restrictive definition of combatant, and it did not matter since Israeli strikes killed several civilian passersby (according to the Report, in the incidents it investigated, 99 policemen and 9 civilians were killed). According to the Goldstone Report, this demonstrated that Israeli strikes violated the rule of proportionality.

Every civilian casualty is a tragedy. But proportionality permits such collateral casualties criminal unless military commanders anticipate excessive collateral losses in relation to the anticipated military advantage. Here too there are two elements: excessive damage to civilians (requiring a comparison of damage to civilians, military necessity and the proportion between the two) and anticipation of the excessiveness. The numbers of casualties—11 police to every civilian, with even the Goldstone Report acknowledging that most police were armed members of Hamas—seem of a scope that traditionally would not be viewed as excessive under the proportionality standard. Consider, for example, the opinion of the ICTY prosecutor on NATO bombings in Kosovo, where he ruled out a prosecution for disproportionate attacks where NATO forces killed 10-17 civilians in bombing a broadcast station and putting it out of commission for

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18 Goldstone Report ¶ 376.
19 Goldstone Report ¶ 416. On Shahwan’s general credibility as a witness, see Ali Waked, Hamas: Israel Distributes Libido-increasing Gum in Gaza, YNet News, July 13, 2009, http://www.ynetnews.com/articles/0,7340.L-3746017,00.html, where Shawan claimed to have intercepted libido-increasing chewing gum secretly distributed by Israeli intelligence operatives in the Gaza Strip in order to destroy the morals of Palestinian youth.
20 Goldstone Report ¶ 420.
21 Goldstone Report ¶ 424.
22 Goldstone Report ¶ 437.
only a few hours.\textsuperscript{23} The smallest percentage of civilian casualties I can find in a successful proportionality prosecution is the ICTY ruling in the Galić case,\textsuperscript{24} where the court ruled that an attack on a soccer pitch was disproportionate despite 50\% of the dead being soldiers. Note that the Goldstone Report fails this standard by more than a factor of five, and in the Galić case, the court suggested that the 50\% figure sufficed in Galić only due to special circumstances and would never suffice for a finding of disproportionality in ordinary circumstances. In any event, the Report never even attempted to demonstrate how it calculated proportionality. Additionally, the Goldstone Report presented no evidence of what Israeli mission planners anticipated. The clear implication is that the anticipation, numbers, proportion and military necessity are irrelevant. Israel, and only Israel, is subject to a different rule: it is guilty of a disproportionate attack whenever there is any collateral damage.

Just as it rewrote the meaning of legitimate targets and the rule of proportionality, the Goldstone Report rewrote the meaning of intent for the rule of distinction. Repeatedly, the Goldstone Report stated that Israeli criminal intent could be presumed since (a) civilians died and (b) Israel has precision weaponry at its disposal.\textsuperscript{25} QED. Therefore, pace Goldstone Report, it was unnecessary to investigate Hamas’s fighting practices, the rules of engagement actually given to Israeli forces, or any other facts that would shed light on Israeli intent. Instead, claimed the Report, “[t]he Israeli armed forces possess very advanced hardware ... Taking into account the ability to plan, the means to execute plans with the most developed technology available, and statements by the Israeli military that almost no errors occurred, the Mission finds that the incidents and patterns of events considered in the report are the result of deliberate planning and policy decisions.”\textsuperscript{26} Elsewhere, the Goldstone Report went further and found that even where Israel did err, it nevertheless acted intentionally. Thus, said the Report, Israel violated the intent requirement of the rule of distinction by mistakenly striking a civilian home rather than the intended target of a neighboring house storing weapons since even though the “consequence may have been unintended,” the “firing of the projectile was a deliberate act.”\textsuperscript{27} In other words, the Report irrebuttably presumed Israel to be guilty and to have the requisite criminal intent. The Goldstone Report even made this presumption of guilt explicit, stating that it did not find it necessary to grant a presumption of innocence since it was leveling charges against the entire state rather than accusing named individuals, and anyway, where the Goldstone Mission had evidence, it was insufficient to meet criminal standards of proof.\textsuperscript{28} Of course, the Mission presumed only Israel’s guilt; one cannot find a single instance where the Report concluded

\textsuperscript{23} Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, ¶¶ 71-79.

\textsuperscript{24} Prosecutor v. Stanislav Galic - Case No. IT-98-29-T (trial judgment, 5 December 2003), ¶¶ 372-387.

\textsuperscript{25} E.g., Goldstone Report ¶¶ 61, 1191.

\textsuperscript{26} Goldstone Report ¶ 61.

\textsuperscript{27} Goldstone Report ¶ 864.

\textsuperscript{28} Goldstone Report ¶¶ 25 and 172.
definitely that Hamas acted from criminal motives, nor where it presumed Hamas’s criminal intent.\textsuperscript{29}

No legal source or state practice supports denying armies with precision weaponry any collateral damage or errors. Nor do any recognized versions of distinction dispense with the element of proving specific intent to harm civilians as such or anticipation of excessive collateral damage, and instead find the rules violated by all attacks that after the fact are alleged to have harmed protected targets. And yet, this is precisely how the Goldstone Report applied the rules against Israel.

V. Human Shielding and Perfidy

Like the Goldstone Report, I have largely omitted discussion of Hamas’s many IHL violations. Numerous contemporary news reports described Hamas combatants operating out of hospitals,\textsuperscript{30} ambulances\textsuperscript{31} and schools,\textsuperscript{32} fighting in civilian dress,\textsuperscript{33} hiding behind civilians while fighting,\textsuperscript{34} and using mosques\textsuperscript{35} and other protected sites to store weapons. By sacrificing Palestinian civilians in this way, Hamas transformed many otherwise protected places into lawful targets, made many civilians legitimate collateral damage and caused enormous destruction of civilian property. In other words, Hamas’s actions were the primary cause of material destruction in Gaza and of many innocent Palestinian deaths. As well, Hamas’s actions violated IHL: its misuse of ambulances and civilian dress constituted perfidy, and its exploitation of civilians and civilian areas as cover constituted human shielding.

\textsuperscript{29}Compare Goldstone Report ¶¶ 1687-1691 (where the Report acknowledged “Palestinian armed groups, among them Hamas, have publicly expressed their intention to target Israel civilians” but ultimately refused to conclude that Hamas intentionally targeted civilians since it and other Palestinian groups “recently claimed that they do not intend to harm civilians.”)


\textsuperscript{32}E.g., Israel Hits Second U.N. School, Blasts Way Into Southern Gaza, FOXNEWS.COM, Jan. 6, 2009, available at \url{http://www.foxnews.com/story/0,2933,476664,00.html}.


The Report refused to acknowledge Hamas’s wrongdoing. It dismissed photographic evidence of Hamas’s guilt on the grounds that it “is not reasonably possible to determine whether those photographs show what is alleged.”[^36] The Report failed to acknowledge many contemporary news reports and dismissed others as unreliable,[^37] brushed aside Israeli complaints and declined to include even one incident of Hamas wrongdoing among the 36 investigated by the Mission. Of 1025 paragraphs in the report dealing with combat operations in Gaza,[^38] all but 60 dealt with Israel,[^39] and those 60 dealing with Hamas consisted primarily of the Mission dismissing Israeli grievances about Hamas. The Report offered no information about Hamas’s war aims, units deployed, combat tactics or combat missions. Indeed, the Mission was so uninterested in Hamas’s wrongdoing that it stated that “only one of the incidents it investigated clearly involved the presence of Palestinian combatants.”[^40]

While refusing to investigate Hamas, the Mission denied the credibility of evidence that reflected badly on Hamas or well on Israel. I searched for variations of the word “credible” in the Report and found 24 paragraphs[^41] in which the Report stated that it found Palestinian witnesses credible as well as 2 more where it found credible Palestinian claims jointly made with private Israelis that were critical of the state of Israel.[^42] I found no cases where the Report stated that Palestinian witnesses were not credible. By contrast, I found 4 paragraphs in which the Report found Israeli claims not credible,[^43] and not a single instance of an Israeli claim being deemed credible. Similarly, I searched for “reliable” and found 2 Israeli claims not “reliable”[^44] and none “reliable,” while 15 Palestinian claims[^45] (as well as 2 joint claims[^46]) were “reliable” and none not “reliable.” While this methodology is crude, I think it accurately reflects the double standard on evidence.

Having refused both to collect evidence adverse to Hamas and to believe it once received, the Report stated repeatedly that it “did not find any evidence to support the allegations made” that Hamas committed crimes of perfidy and human shielding.[^47] The Report added that the crime of human shielding is not established merely by moving civilians or taking up position near them; it requires the “specific intent of shielding the combatants from counter-attack.”[^48] Despite evidence

[^37]: E.g., Goldstone Report ¶ 614.
[^38]: Goldstone Report ¶¶ 311-1335.
[^40]: Goldstone Report ¶ 479.
[^41]: Goldstone Report ¶¶ 467, 483, 503, 551, 622, 645, 683, 723, 741, 752, 762, 768, 777, 798, 838, 922, 925, 1011, 1032, 1090, 1091, 1164, 1354 & 1366.
[^42]: Goldstone Report ¶¶ 1378 & 1591.
[^43]: Goldstone Report ¶¶ 41, 675, 690, 866.
[^44]: Goldstone Report ¶¶ 675 & 702.
[^46]: Goldstone Report ¶¶ 1378 & 1593.
[^47]: E.g., Goldstone Report ¶ 469.
[^48]: Goldstone Report ¶ 452.
of Hamas having called in the past for civilians to act as shields,\textsuperscript{49} the Report stated that it could not find the required criminal intent without “direct evidence on this question.”\textsuperscript{50} Thus the Report anchored Hamas’s impunity for its crimes.

By contrast, the Report devoted 75 paragraphs to finding Israel guilty of 4 instances of alleged human shielding.\textsuperscript{51} Interestingly, while the 75 paragraphs contained lengthy narratives of alleged acts in which Israeli troops forced Palestinians to accompany them, the Report cited no source other than testimony of the accusers, which the Report found credible despite admitted “inconsistencies.”\textsuperscript{52} Further, the Report offered no evidence showing any Israeli intent to exploit the movement of the Palestinian civilians as human shields. Rather, as in the case of distinction, the Report presumed criminal intent. Thus while the Report found past encouragement by Hamas of human shielding not incriminatory, it found Israeli rules of engagement forbidding such practices suspicious\textsuperscript{53} and allegations of Israeli human shielding not accepted by an Israeli court in 2002 were found incriminatory.\textsuperscript{54} To be sure, Israel recently charged two soldiers for forcing a Palestinian to open a suspicious bag during the Gaza conflict.\textsuperscript{55} Perhaps more such cases will come to light. But the disparity in the Report’s evidentiary and legal standards is striking.

VI. Conclusion

Some have wondered despairingly after the Goldstone Report whether states can defend themselves anymore against aggression by terrorist groups.\textsuperscript{56} If Israel really massively violated the laws of war even as British colonel Richard Kemp testified that “the Israeli Defence Forces did more to safeguard the rights of civilians in a combat zone than any other army in the history of warfare,”\textsuperscript{57} if terrorists can shield themselves with impunity behind hospitals and civilian neighborhoods, and if states must support terrorist groups financially and logistically, then there is no legal way to fight terrorists. But the law does not dictate these absurd conclusions. The Goldstone Report failed, not the law.

\textsuperscript{49} Goldstone Report ¶ 452. See also http://www.youtube.com/watch?v=ArJbn-lUCh4.

\textsuperscript{50} Goldstone Report ¶ 452.

\textsuperscript{51} Goldstone Report ¶¶ 1032-1106.

\textsuperscript{52} Goldstone Report ¶ 1091.

\textsuperscript{53} Goldstone Report ¶ 1101.

\textsuperscript{54} Goldstone Report ¶ 1098. See also Adalah v. Commander of the Central Region, HCJ 3799/02 (2005).

