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Report of an Expert Meeting which Assessed Procedural Criticisms made of the UN Fact- Finding Mission on the Gaza Conflict (The Goldstone Report)

The meeting took place at Chatham House on 27 November 2009.

The meeting was organized by Chatham House and the Sir Joseph Hotung Programme in Law, Human Rights and Peace Building in the Middle East, School of Oriental and African Studies, University of London.

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Participants:

Ms Elizabeth Wilmshurst (Chair); Professor Matthew Craven; Dr Catriona Drew; Professor Charles Garraway; Professor Steven Haines; Professor Francoise Hampson; and Professor Sir Nigel Rodley.

Introduction

This meeting was convened at Chatham House on 27 November 2009 to address some of the criticisms which have been directed against the Report of the United Nations Fact Finding Mission on the Gaza Conflict (UN Doc.A/HRC/12/48, 15 September 2009) [hereinafter the Goldstone Report]. The participants in the meeting were recognized experts in public international law who have specialized in human rights and/or international humanitarian law. The aim was that they should primarily address criticisms made regarding procedural aspects of the Goldstone Report rather than its substantive conclusions, since the participants had not had access to all the evidence collected by the Mission.

The Mandate of the Mission

The meeting considered this in response to the criticisms of the mandate under which the Mission was convened. These related primarily to the bias of resolution S-9/1 and its legal status, asserting that “as a matter of law, no statement by any individual, including the President of the Council, has the force to change the mandate of the Mission”.¹

¹ Ambassador Leshno-Yaar’s letter to Justice Goldstone, 2 July 2009, available at http://www.mfa.gov.il/MFA/Foreign+Relations/Israel+and+the+UN/Issues/Letter_from_Israel_Ambassador_Leshno-Yaar_to_Goldstone_2-Jul-2009.htm (last checked 10 December 2009)

The Fact-Finding Mission was created pursuant to Human Rights Council resolution S-9/1 (9 January 2009). Operative paragraph 14 of this resolution set out the original mandate of the Fact-Finding Mission. It provided that the HRC had decided:

to dispatch an urgent, independent fact-finding mission, to be appointed by the President of the Council, to investigate all violations of international human rights law and international humanitarian law by the occupying Power, Israel, against the Palestinian people throughout the Occupied Palestinian Territory, particularly in the occupied Gaza Strip, due to the current aggression, and calls upon Israel not to obstruct the process of investigation and to fully cooperate with the mission;...

The Mission was established by the President of the Human Rights Council on 3 April 2009 with an amended mandate:

to investigate all violations of international human rights law and international humanitarian law that might have been committed at any time in the context of the military operations that were conducted in Gaza during the period from 27 December 2008 and 18 January 2009, whether before, during, or after.

The first question the meeting addressed was the legal nature of the mandate of the Mission established under resolution S-9/1 and whether it was binding on the Mission.

The meeting considered that the legal status of resolutions of the Human Rights Council was a simple question: resolutions of such

political bodies as this are not binding, but they can have an institutional effect. Certainly, the Mission would not have existed if not for resolution S-9/1. The question is whether it is possible to have a Mission instigated by S-9/1 which does not comply with the terms of S-9/1. Can the constitutive effect of the resolution be separated or distinguished from the terms of reference it contains? The original mandate was set out in resolution S-9/1 which confined the attention of the Mission to Israel's acts, but the President of the Council was charged with appointing the Mission. He appointed it with a different mandate, since HRC S-9/1 was aggressively biased against Israel.

A related question is whether the mandate as originally drafted was the kind of mandate the Council should have produced. Operative paragraph 3 of General Assembly resolution 46/59 (9 December 1991), *Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security* provides "Fact-finding should be comprehensive, objective, impartial and timely".

The underlying question is whether Israel was entitled to state that an improper mandate had been given which as a legal matter invalidated the Mission. Israel attacked the process, which is normal diplomatic practice when one wants to avoid the facts but the Human Rights Council gave it grounds to do so by passing a biased resolution in the first place. Whether the Mission itself was capable of being impartial under its new mandate is a practical not a legal question, which can be answered by the way in which the Mission was conducted.

The meeting addressed a further criticism: that, by not examining Israel's right to self-defence, the Goldstone Mission "challenged Israel's democratic values and rule of law".² The meeting considered

² Israel Ministry of Foreign Affairs, *Israel's analysis and comments on the Gaza Fact-Finding Mission Report*, 15 September 2009, (under "General" category), available at http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Hamas+war+against+Israel/Israel_analysis_comments_Goldstone_Mission_15-Sep-2009.htm (last checked 10 December 2009).

this criticism to be without foundation: the right to self-defence is one enshrined in the *ius ad bellum* which governs the right to engage in a conflict; the mandate of the Mission concerned only the *ius in bello*, governing the conduct of participants in a conflict, whether or not they have a right to engage in it.

The meeting concluded that there were legal and UN constitutional problems with the original mandate which did not conform with the terms of the 1991 General Assembly declaration on fact-finding missions. It was necessary to adapt the mandate and it is important to note that the Human Rights Council had not objected to the new mandate.. However faulty the original mandate was, it did not affect the conduct of the Mission under the amended mandate; the conduct of the Mission must be assessed in terms of the mandate under which it operated.

The Range and Purposes of Fact-Finding Missions

The meeting then noted that the mandates of fact-finding missions differ according to their range and purpose. A fact-finding mission involves, first, an analysis of the law in order to determine what are relevant facts. These facts then need to be ascertained in so far as possible. Fact-finding missions are not criminal investigations and where criminal offences are revealed, it will be necessary for there to be subsequent separate investigations with a view to possible prosecution of individuals. But is the task of the mission simply to uncover the relevant facts and to produce a report for others to analyze and draw conclusions, or should the mission itself draw the conclusions?

A further point lies in the distinction between human rights and international humanitarian law investigations. Human rights investigations may be “easier” because specific rights are under

investigation and the finding of the facts leads to an inevitable conclusion as to whether or not the rights in question have been breached. Investigations involving international humanitarian law may be more difficult because the conduct of hostilities, and in particular individual targeting decisions, involves working out a balance between the anticipated civilian loss and damage, and the anticipated military advantage. This requires some knowledge of the intelligence available to the attacker and the operational circumstances in which the attack took place as seen by the attacker. Such investigations may therefore be very difficult without the cooperation of the attacker.

In one view, insufficient acknowledgement had been given in the Report to the difficulties in reaching conclusions about violations of the law on conduct of hostilities without the cooperation of the party concerned. On the other hand, it was noted that evidential problems can be overstated. In very few domestic criminal trials will all the evidence be volunteered to the court; investigations must proceed as best they can. However, there are few situations where the matter is so entirely dependent on facts known only to one party.

There is a further difficulty with international humanitarian law; the rules can be subject to different interpretations. A commission should tease out these legal issues and should make its view clear on the interpretation it favours. The Goldstone Report does not set out in detail its interpretation of the law in order to determine which facts are relevant to determine whether a target was legitimate or not. It did not need to express a definite view in the way that a court should, but merely needed to record that different interpretations exist on a given point, and indicate the facts which would be relevant to a tribunal.

The Composition of the Mission

The meeting addressed criticisms which had been made of the composition of the Mission, in particular relating to Professor Christine

Chinkin's participation. Before being appointed to the Mission, she had signed a public letter relating to the Gaza conflict. The meeting expressed its complete confidence in the personal integrity of Professor Chinkin, which had also been affirmed by Judge Goldstone, and that her participation would have had no detrimental impact on the impartiality of the Mission's conclusions.

However the meeting noted that fact-finding missions should avoid any perception of bias. An analogy was sought in the International Fact Finding Commission created by Article 90 of the 1977 Additional Protocol I to the Geneva Conventions. The Commission's internal regulations require its members not to act in a way that would damage their impartiality, and they therefore exercise great care when writing or speaking on international disputes that could potentially be subject to an investigation by the Commission³. This is perhaps a problem which is especially acute for academics who participate in fact-finding missions regarding conflicts or disputes on which they may have written in the past. The meeting considered that context was vital: whether a person should participate depended on the situation and the content and nature of the published work.

The Conduct of the Mission: Public Hearings

The meeting addressed the criticism that the Goldstone Mission had heard evidence in public in Gaza. Was this an inappropriate method of work for a fact-finding mission? Surely more information would have been obtained by taking evidence in confidence and teasing out the information rather than trying to do so in a public forum.

³ Article 3 of the International Humanitarian Fact-Finding Commission's regulations state that "During their term of office, Members shall not engage in any occupation or make any public statement that may cast a legitimate doubt on their morality and impartiality required by the Protocol."

The meeting noted that public hearings formed only a relatively small part of the Mission's activities and that most of the evidence heard in the hearings was irrelevant to its mandate and its conclusions. On the whole, the report is based on information gathered outside the hearings.

The conduct of public hearings was reminiscent of Truth and Reconciliation Commissions such as the South African one. In the context of Gaza, there could be a benefit for people in Israel being able to hear the experiences those in Gaza went through during the conflict, and equally for the latter to have heard from Israeli victims of rocket attacks. The Mission put forward a justification for the public hearings in the report on the basis that, "The aim of holding the hearings publicly was to give a voice to those who had direct experiences and expertise that related to the mandate of the Mission". While it was not part of the Mission's express mandate to perform the function of giving a voice to victims, it was a valuable spin-off.

A further aim of the public hearings may have been to obtain a broader contextual understanding which could aid the further discovery of information. Nevertheless if a mission receives information in this way, it must be aware of the constraints those testifying are under when giving information in public, be sensitive to the information obtained, and the reliance that can be placed upon it.

The Conduct of the Mission: Witnesses

The meeting addressed the criticism that the witnesses heard by the Goldstone Mission were prescreened and pre-selected, that the witnesses were intimidated and that none of the witnesses in the broadcast hearings were asked questions concerning "any Palestine terrorist activity or the location of weaponry and terrorists in civilian

areas”.⁴ It had further been alleged that these witnesses were part of an orchestrated political campaign.

One speaker stated that witnesses were not pre-screened or selected by Hamas but were coordinated by Palestinian civil society, local lawyers, and international organisations. However, while all witnesses would have felt able to talk freely about alleged Israeli abuses, it is true that some witnesses would have felt unable to criticise, or speak openly of alleged abuses by, Hamas. Some problems were mentioned in paragraphs 164-167 of the Goldstone Report but the Mission had given insufficient acknowledgement of the difficulty in obtaining information in a political environment dominated by Hamas.

The meeting observed that access to witnesses was a perennial problem for fact-finding commissions. One speaker commented that the problems in Gaza were similar to experiences encountered in Lebanon where people would not speak out against Hezbollah, and similar to the situation in Northern Ireland where communities would intimidate witnesses. It is a factor with which fact-finding commissions have to deal and which they have to take into account in assessing the evidence. This seemed to have been attempted by the Mission.

The Conduct of the Mission: Selection of Incidents

The meeting addressed the criticism that the incidents examined by the Goldstone Mission appeared to have been selected for political effect; for example that it did not investigate allegations that the Shifa

⁴ Israeli 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*, 24th September 2009, para 17, p 6, available at <http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Hamas+war+against+Israel/Initial-response-goldstone-report-24-Sep-2009.htm> (last checked December 2009).

Hospital in Gaza had been used as a command centre for Hamas fighters. The meeting noted the statement by the Mission that in view of the time frame it “necessarily had to be selective in the choice of issues and incidents for investigation.” (paragraph 157). Resolution S-9/1 called for the “urgent dispatch of the Mission” and as there had been an eleven week delay in its establishment, “the Mission agreed to be bound by a short time frame (about three months) to complete its work” (paragraph 135). In fact, this period was not abnormally short for a UN fact-finding mission (which must be contrasted with, for example, the EU-sponsored report into the conflict between Russia and Georgia which was given much more time to undertake its investigation and an extension to complete its report).

It was observed that if a fact-finding mission is put in place it needs the time and resources to do the job properly. While a selection of incidents was inevitable for the Goldstone Mission, the criteria employed should have been indicated: it was not satisfactory simply to refer to the timeframe imposed on the Mission’s work; other fact-finding reports are also subject to the pressure of time.

One speaker underlined that the official Israeli criticism had identified only one specific incident (the Shifa hospital) while making general allegations that mosques had been used for weapons storage and by Hamas fighters. Presumably no civilian deaths or injuries were associated with the Shifa hospital incident, and while the question of human shields could have been investigated, there might not have been witnesses willing to testify as the matter concerned Hamas. The investigation of such incidents could have been made possible by the intelligence Israel had in its possession.

While the meeting conceded that it did not have enough information on the incidents omitted to make any firm assessment, it noted that the Mission used information that was in the public domain, for instance in reports published by human rights NGOs, and noted that the time

constraints it was under meant that it could not provide a comprehensive account of the conflict. It presumably selected those incidents which were the most well-documented, where it would not have to rely on witnesses who would be unwilling to speak freely.

The real issue was whether it was a legitimate criticism that the incidents the Mission *did* choose to examine could be used to extrapolate an unbalanced account of what happened in Gaza. The meeting agreed that a relevant consideration was that Israel refused to co-operate with the Mission, and thus did not provide the valuable intelligence it had concerning, for example, the alleged use of civilian facilities by Hamas fighters. Israel's refusal to cooperate in relation to the choice of incidents that the Mission should investigate presented a particularly acute problem. On this and other issues, Israel appeared to be using its refusal to take part in the process as a basis for criticising the Report's findings or procedures.

The Mission's Assessment of Domestic Review Procedures

The meeting addressed the criticism that the report had dismissively rejected Israel's extensive system of investigations of allegations of wrong-doing. The meeting considered whether it was necessary to have full cooperation from the authority concerned in order to assess the adequacy of domestic review procedures, or whether it was possible to rely principally on external sources. The Goldstone Report had found that the system Israel employs to investigate and prosecute serious violations of human rights and humanitarian law contained major structural flaws that made it inconsistent with international standards. This finding had been criticised on the basis that it challenged the legitimacy of national legal systems, and exposed soldiers subject to this and similar review systems (such as those employed by the United States and United Kingdom) to foreign or international legal proceedings thus "hampering defensive operations throughout the world".

The meeting agreed that it is not necessary to have full cooperation from the relevant authorities before assessing domestic systems; the work of most justice systems is in the public domain.

The meeting noted that a major part of the Report's finding on this issue was that Israel relies on operational briefings and military enquiries before any criminal enquiries are held, and these briefings both delayed and impeded the criminal process. The meeting noted that armed forces generally conduct debriefings after military operations to learn what went right and what went wrong, but these did not have the same effect as the operational debriefings employed by Israel. Although the possibility of a criminal investigation can only arise once a possible offence has been identified, which might occur as the result of a debriefing, in the Israeli system the two cannot proceed simultaneously. In 2000, Israel adopted a policy that the operational debriefing must be held first: this effectively means that criminal proceedings can only be initiated six months after the incident under investigation took place. The Goldstone Report concludes that this delay can make criminal proceedings not feasible because evidence is no longer available. In other systems, the evidence is more likely to be preserved because both the debriefing and criminal investigations can be conducted at the same time.

It was pointed out that that there will always be practical difficulties of collecting evidence in time of conflict. Apart from the question of criminal proceedings, human rights law is also relevant. Human rights law requires that investigations be held into civilian deaths in order to determine that obligations regarding the right to life have not been breached. It may be extremely difficult to do this in a conflict situation, and as the level of violence rises so does the difficulty of investigating; but this does not justify ignoring the requirement to investigate. The established international standards in some respects may outstrip the

practice of other countries' systems of military investigation. But this does not excuse non-compliance with the international requirements.

In sum, if the system creates delays and impediments to criminal investigations, as seems to be case with Israel, the system needs to be reconsidered. Although the jurisprudence of Israel's Supreme Court is highly respected, that does not automatically give a clean bill of health to all of Israel's investigative system.

Style and Presentation of the Report

It was suggested that aspects of style and presentation in the Goldstone Report could raise criticisms about bias and prejudice on some issues. The criticisms of Hamas in the Report are tentative, for example in relation to the protection of civilians, while the language employed regarding alleged Israeli violations is stronger and more condemnatory. If the conclusions had been presented as *prima facie* findings rather than final conclusions, the Report would have been stronger. The incidents recounted in Chapters 9-11 are presented as factual narratives with little analysis. The titles appeared to disclose bias. There were hardly any documentary references. It was noted that such problems weakened the *impact* of the Report, not least by encouraging diversion from its substantive allegations which need to be addressed. But they did not substantively weaken the Report, and the criticisms made of it by the resolution adopted by the US House of Representatives⁵ could be described as being a mirror image of the original bias of the mandate agreed on by the Human Rights Council.

⁵ US House of Representatives Resolution Calling on the President and the Secretary of State to oppose unequivocally any endorsement or further consideration of the "Report of the United Nations Fact Finding Mission on the Gaza Conflict" in multilateral fora, H. Res. 867, 3 November 2009, available at <http://thomas.loc.gov/cgi-bin/query/D?c111:2:.temp/~c111u4cfJH::> (last checked 10 December 2009)

Concluding Observations on the Value of the Report

The meeting concluded by addressing the general force of the criticisms it had considered, and the extent to which they might invalidate the Report. In short, should the Report be taken seriously by the international community?

The meeting was of the view that the Report was very far from being invalidated by the criticisms. The Report raised extremely serious issues which had to be addressed. It contained compelling evidence on some incidents.

In conclusion it was agreed that one of the main problems caused to the mission was the non-cooperation of Israel and that this had had the effect of contributing to any perception of bias there might be. It was observed that common Article 1 of the 1949 Geneva Conventions places the obligation on States parties “to respect and ensure respect [for the Conventions] in all circumstances”. If a fact-finding or other commission produces allegations regarding a State’s conduct under the Conventions, is not that State under an obligation, in showing its respect for international humanitarian law, at least to respond to those questions? Further, the obligation to “ensure respect” is also placed on third States by common Article 1. This should lead EU and other States parties to reinforce their efforts to press both parties to respond and act, including by conducting an effective investigation.