

A Usurpation of National Sovereignty

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Israel fights back against a U.N. power grab.

Tel Aviv — The controversy sparked by the Sept. 15, 2009, publication of the Report of the United Nations Fact-Finding Mission on the Gaza Conflict, otherwise known as the Goldstone Report, may appear to exclusively concern the Israeli-Palestinian conflict. In fact, it involves a usurpation of national sovereignty by international law that has implications well beyond Israelis, Palestinians, and their neighborhood.

The latest round in this controversy got underway on January 29, when Israel delivered “[Gaza Operation Investigations: An Update](#)” to U.N. Secretary General Ban Ki-moon. The carefully crafted 46-page document affirmed Israel’s unequivocal commitment to the law of armed conflict, and it reported substantial progress in investigating allegations of unlawful conduct against Israel Defense Forces (IDF) soldiers and commanders arising from Operation Cast Lead.

Operation Cast Lead took place from Dec. 28, 2008, to Jan. 18, 2009. Israel carried out the operation because Hamas and other Palestinian armed groups had launched approximately 12,000 rocket and mortar attacks from the Gaza Strip since 2000 against civilian populations in southern Israel. Paradoxically, given that Hamas’s deliberate and premeditated attacks on Israeli civilian populations and its use of fellow Palestinians as human shields were flagrant war crimes, international ire has from the outset swirled around the alleged criminality of Israel’s operation.

It would be a mistake to think that Israel’s lawyerly self-defense is of purely legal interest. This battle reflects a continuation of war and politics by other means. Indeed, the battle is fraught with weighty implications for all liberal democracies struggling against transnational terrorists.

Israel’s update focuses on refuting one particular charge leveled by the Goldstone Report: that Israel’s system for investigating allegations of wrongdoing in military operations “does not comply” with the requirements of international law. Israel also argues that the Goldstone Report’s gravest accusations — that Israel systematically and deliberately targeted Palestinian civilians and civilian infrastructure — rest on unsubstantiated or demonstrably false claims.

In fact, over the course of 62 years of confronting asymmetric warfare, Israel has developed an exemplary system, combining military justice and civilian oversight, for enforcing the law of armed conflict. In July 2009, in “[The Operation in Gaza: Factual and Legal Aspects](#),” a 156-page paper published in anticipation of the Goldstone Report, Israel explained the system in detail. It also provided a provisional account of the IDF’s investigations of approximately 100 complaints, including 13 that had led to criminal investigations. Yet the publication did nothing to deter Team Goldstone from usurping Israel’s rights and responsibilities by producing and publishing at breakneck speed — it completed its mammoth 545-page report in five months — its own factual and legal findings.

Israel’s update underscores that its system for handling misconduct allegations is substantially similar to those in United Kingdom, the United States, Canada, and Australia. It also notes that to date the IDF has launched 150 investigations concerning the Gaza Operation, 36 of which have been referred for criminal investigation in which “criminal investigators have taken evidence from almost 100 Palestinian complainants and witnesses, along with approximately 500 IDF soldiers and commanders.” For every one of the 34 allegations of harm to civilians or damage to civilian property discussed at length in the Goldstone Report, the IDF has initiated an investigation — 22 of which the IDF pursued before the Goldstone Report’s publication, and 12 of which it promptly pursued after the report aired them.

The charge against Israel’s investigation system is an astonishing attempt to shift power from sovereign states to international institutions. Based on it, the Goldstone Report recommends that courts in countries around the world claim authority under “universal jurisdiction” to try Israeli soldiers, commanders, and civilian leadership, and that the International Criminal Court proceed with investigations and prosecutions.

This flies in the face of the standard presumption. As Israel observes, “Under international law, the responsibility to investigate and prosecute alleged violations of the Law of Armed Conflict by a state’s military forces falls first and foremost to that state.” Such investigations are inevitably difficult and time-consuming: They involve not tightly controlled crime scenes, well-preserved evidence, and eyewitness testimony delivered close in time to the alleged crime, but ever-changing battlefields, constantly deteriorating evidence, and witnesses whose testimony can only be obtained weeks or months after the event.

By arrogating to itself, under the cover of international law, lead responsibility for investigating alleged Israeli unlawful conduct, the Goldstone Report set an ominous precedent that jeopardizes the rights and responsibilities of national self-government. By the same token, the Bush-administration officials who established the detention facility at Guantanamo Bay, and the Obama-administration officials who chose to maintain it, could be exposed to the judgments of foreign courts and international tribunals.

The Goldstone Report's specific accusations of wrongdoing are also problematic. Much attention last week focused on the update's disclosure that the IDF had disciplined a brigadier general and a colonel for the unauthorized firing of explosive shells that landed in a populated area. Generally neglected, however, has been the update's evidence and analysis directly contradicting several more-dramatic Goldstone Report allegations of IDF criminal conduct.

For example, the Goldstone Report found that, in the absence of legitimate military objectives, Israel intentionally destroyed the Namar water-wells complex — including pumping machines, pipes, and civil-administration buildings — by air strikes to deprive Gaza's civilian population of clean drinking water. Israel's update, however, provides photographic evidence demonstrating that the Namar water wells were located inside the walls of a Hamas military compound.

The Goldstone Report found that Israel undertook a "deliberate and premeditated strike" to damage a vacated Gaza wastewater-treatment plant in the al-Sheikh Ejlin neighborhood to cause raw sewage to flow into and destroy farmland. Israel's update, however, reports that the damage to the plant did not stem from a deliberate IDF attack. The IDF may have damaged the plant inadvertently during a battle with Hamas fighters, or Hamas fighters themselves may have attacked the plant to set loose sewage to hamper the movements of Israeli tanks operating in the area. Whichever turns out to be the case, Israel's update stresses, "there was no physical evidence or eyewitness testimony to support the conclusion of the Human Rights Council Fact-Finding Report."

The Goldstone Report found that Israel conducted an aerial strike on the el-Bader flour mill to deny Gaza's civilian population the means of providing for their own sustenance and to render them more dependent on Israel. Israel's update, however, points out that the Goldstone Report contains no evidence that the flour mill was struck from the air, that "photographs of the mill following the incident do not show structural damage consistent with an air attack," and that the available evidence indicates the flour mill was struck by tank shells during combat operations.

And the Goldstone Report found that Israel destroyed the Abu-Askar family home despite its "unmistakably civilian nature." Israel's update, however, maintains that "due to its use as a large storage facility for weapons and ammunition, including Grad missiles, the house of Muhammad Abu-Askar was a legitimate military target." It also emphasizes that because the IDF issued warnings to the family to evacuate and delayed the attack until the night, when fewer civilians were present, no civilian casualties ensued.

At the Institute for National Security Studies in Tel Aviv, former head of the National Security Council Gen. (Res.) Giora Eiland told me bluntly that the Goldstone Report is a thoroughly and dangerously political document. "Its aim," he said, "is to undermine Israel's right to self-

defense, to create a situation in which it is helpless and has no alternative other than to rely on the goodwill of the international community.”

But concerning the most fundamental matters of self-government and self-defense, Israel and other liberal democracies struggling against transnational terror should not rely on the goodwill of the international community. The Goldstone Report’s severe flaws provide powerful evidence of that.

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