

## Due Process in UN Commissions of Inquiry: A Legal Analysis of the Procedures of Goldstone's Gaza Inquiry

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### Abstract

Throughout its history, the United Nations has resorted to large-scale ad hoc Commissions of Inquiry (UN COIs) to investigate serious international incidents. These UN COIs have often been highly political affairs, though their tasks and goals—including most recently investigating reports of war crimes or crimes against humanity the world over—are distinctly legal in nature. The result has been a focus on both the politics of such UN COIs—including most prominently whether their mandates or their Commissioners are biased—and on the merit of their legal-criminal findings. Yet it is the processes and procedures of UN COIs, and particularly their commitment to transparent due process, that are best able to form a bulwark against both political and legal attacks. Thus, it is their processes and procedures that should be the focus of much legal-academic work; unfortunately, to date this has not tended to be the case. By analyzing perhaps the most well-known and controversial recent UN COI, the 2009 *United Nations Fact Finding Mission on the Gaza Conflict*, and focusing on its due process and procedures rather than its politics or its correct application of international criminal or human rights law, this paper seeks to remedy this oversight. It seeks to identify the legal and procedural shortcomings—the failures of due process—of a well-resourced, well-staffed political inquiry to offer a representative example of how UN COIs tend to fall short, why they must be considered legal undertakings, and how future UN COIs might remedy these common shortcomings by focusing on the legality of their procedures.

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## A. Introduction

In the past 30-years, the world has seen a massive proliferation of large-scale human rights fact-finding missions, particularly ad hoc United Nations (UN) Commissions of Inquiry (COIs or Commissions).<sup>1</sup> Recently, the UN has turned to large-scale ad hoc COIs to investigate many of the most serious modern conflicts, including those in the former Yugoslavia,<sup>2</sup> Rwanda,<sup>3</sup> Darfur,<sup>4</sup> Gaza<sup>5</sup> and elsewhere.<sup>6</sup> International courts delegate some of their fact-finding duties to such Commissions and rely upon the names listed in COI reports or the evidence collected.<sup>7</sup> Nation states rely upon the information contained in such reports to

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<sup>1</sup> Philip Alston has noted that, “[o]ver the past decade, international monitoring has become almost a standard recommendation by human rights groups.” Philip Alston & William Abresch, *Can Human Rights Monitoring Halt Abuses in Sri Lanka?*, 31 FLETCHER F. WORLD AFF. 21, 22 (2007).

<sup>2</sup> U.N. Secretary-General, *The Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780*, U.N. Doc. S/1994/674 (May 27, 1994).

<sup>3</sup> U.N. Secretary-General, *Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda*, U.N. SCOR, U.N. Doc. S/1999/1257 (Dec. 15, 1999).

<sup>4</sup> *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004*, U.N. Doc. S/RES/1564 (Jan. 25, 2005).

<sup>5</sup> U.N. GAOR, *Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, U.N. Doc. A/HRC/12/48 (Sept. 25, 2009) [hereinafter *Goldstone Report*]; See also U.N. Hum. Rts. Council, *Report of the Detailed Findings of the Independent Commission of Inquiry Established Pursuant to Human Rights Council Resolution S-21/1*, U.N. Doc. A/HRC/29/CRP.4 (June 24, 2015) [hereinafter *Gaza 2015 Inquiry*].

<sup>6</sup> U.N. Office of the High Commissioner, Human Rights Council, *Report of the Mapping Exercise Documenting the Most Serious Violations of Human Rights and International Humanitarian Law Committed within the Territory of the Democratic Republic of the Congo between March 1992 and June 2003* (Aug. 2010) [hereinafter *DRC Mapping Exercise*]; *Report of the International Commission of Inquiry Mandated to Establish the Facts and Circumstances of the Events of 28 September 2009 in Guinea*, U.N. Doc. S/2009/693 (Dec. 18, 2009) [hereinafter *Guinea COI*]; *Report of the independent international commission of inquiry on the Syrian Arab Republic*, U.N. Doc. A/HRC/S-17/2/Add.1 (Nov. 23, 2011), <http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/17/docs/A-HRC-S-17-2-Add1.pdf> [hereinafter *Syria COI*].

<sup>7</sup> See, e.g., Simone Halink, *All Things Considered: How the International Court of Justice Delegated its Fact-Assessment to the United Nations in the Armed Activities Case*, 40 N.Y.U. J. INT’L L. & POL. 13 (2008); see also Ruth Teitelbaum, *Recent Fact-Finding Developments at the International Court of Justice*, 6 LAW & PRAC. INT’L CTS. & TRIBUNALS 119 (2007); Christopher M. Rassi, *Lessons Learned from the Iraqi High Tribunal: The Need for an International Independent Investigation*, 39 CASE W. RES. J. INT’L L. 215 (2006). The reports of UN fact-finding missions, COIs, and of truth commissions have been used extensively as of late in both international court and tribunal decisions. See Michael P Scharf, *The Case for a Permanent International Truth Commission*, 7 DUKE J. COMP. & INT’L L. 375, 380 (1997). See also Velasquez Rodriguez Case, Judgment of July 29, 1988, Inter-Am. Ct. H.R. (ser. C) No. 4 (1988); Anguelova v. Bulgaria, App. No. 38361/97, 2002-IV Eur. Ct. H.R. (2002). See generally RICHARD MAY & MARIEKE WIERDA, INTERNATIONAL CRIMINAL EVIDENCE 345 (2003); M. Cherif Bassiouni, *The United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, 88 AM. J. INT’L L. 784 (1994).

issue travel bans on identified political and/or military leaders, to freeze assets, or to levy sanctions against implicated parties.<sup>8</sup> Such inquiries are deemed to be vital to criminal accountability measures, transitional justice reforms of all kinds, and the political and economic development of many countries in the aftermath of systemic human rights abuses.

However, despite the importance and increasingly broad and demanding mandates of ad hoc UN COIs, there is relatively little detailed legal research that analyzes their processes and procedures.<sup>9</sup> This is a particularly troublesome oversight because the procedures of a COI can make or break the endeavor. It is also troublesome because media and public discussions, as we shall see, focus largely on UN COI processes while legal academic research tends to give such issues short shrift in favor of a focus on the substantive law—criminal or human rights—as applied by the COIs.<sup>10</sup> There is, in other words, a disconnect between much of the media and social commentary on UN COIs and the legal analysis. The literature concerning international relations and international law needs to remedy this disconnect—ideally by focusing from a legal due process perspective on the procedures of UN COIs.

This paper is an effort to start to bridge this gap. It will proceed by way of a case study of one of the most complex, controversial, and heavily criticized UN COIs in recent memory: *United Nations Fact Finding Mission on the Gaza Conflict*<sup>11</sup> (hereafter referred to as “the Gaza COI” when speaking of the particular Commission, and “the Goldstone Report” when referring to the actual report produced by the COI). This paper will proceed in the following manner. First, the present article will provide an explanation of why the Gaza COI is particularly salient and generalizable. Second, an overview of both the establishment of the Gaza COI and of the issuance of the Goldstone Report will be provided, followed by a brief

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<sup>8</sup> Given the inability of most states to conduct independent fact-finding missions, such decisions will invariably be based at least in part on the reports of other organizations, foremost among them UN reports. See generally Halink, *supra* note 7, at 26–27. Halink notes that the International Court of Justice has “attribute[d] greater weight to UN materials than to other secondary evidence such as NGO reports and press statements,” and “virtually conclusive,” as compared to the evidence offered by both Parties.

<sup>9</sup> For a call for greater study of UN COIs, see M. Cherif Bassiouni, *Appraising UN Justice-Related Fact-Finding Missions*, 5 WASH. U. J. L. & POL’Y 35, 41 (2001). As an example of an author who has started to do some of this work, though has tended to evaluate COIs from a purely practical rather than legal perspective, see generally Theo Boutruche, *Credible Fact-Finding and Allegations of International Humanitarian Law Violations: Challenges in Theory and Practice*, 16 J. CONFLICT & SECURITY STUD. 1 (2011). Boutruche also maintains a blog on the topic; see generally Theo Boutruche, THE ART OF FACTS: A LEGAL BLOG AND FACT-FINDING AND ARMED CONFLICT, [www.theartoffacts.org](http://www.theartoffacts.org). By contrast, a good example is the extensive legal review that truth commissions have received. See, e.g., MARK FREEMAN, TRUTH COMMISSIONS AND PROCEDURAL FAIRNESS (2006); PRISCILLA HAYNER, UNSPEAKABLE TRUTHS: FACING THE CHALLENGE OF TRUTH COMMISSIONS (2002).

<sup>10</sup> See, e.g., Abraham Bell, *A Critique of the Goldstone Report and Its Treatment of International Humanitarian Law* (Mar. 30, 2010) available at <http://ssrn.com/abstract=1581533>. For a good example of this dynamic in the context of the Gaza COI, see ADAM HOROWITZ, LIZZY RATNER, & PHILIP WEISS, THE GOLDSTONE REPORT: THE LEGACY OF THE LANDMARK INVESTIGATION OF THE GAZA CONFLICT (2011).

<sup>11</sup> *Goldstone Report*, *supra* note 5.

discussion of the response to the report by Israel, Palestinian Authorities, and Hamas. Third, it will discuss the idea of bias—both real and perceived—from a legal perspective. Bias will be discussed initially as it relates to the Gaza COI's original mandate and then with respect to the choice of commissioners and as it relates to the scope of the investigation and choice of incidents to investigate. Finally, this chapter will conclude with an analysis of two particularly important due process issues: (1) the methods and rules that the Gaza COI adopted as they relate to the gathering and corroboration of evidence; and, (2) the language of, and standard of proof adopted by, the Gaza COI. My goal is to identify clearly and in detail many of the problems inherent in the processes and procedures of contemporary ad hoc UN COIs, and suggest that, by looking at UN COIs through even the most simplified of legal lenses, we might start to see ways for future COIs to remedy some common shortcomings.

### **B. Why Study the Goldstone COI?**

The Gaza COI is arguably the paradigmatic case with respect to contemporary, large-scale ad hoc UN COIs. Like none before or arguably since, it encompassed all the hopes and objectives that the UN expects modern COIs to fulfill. However, due to the highly charged political environment in which it operated, the Gaza COI also clearly communicates the weaknesses of the large-scale UN COI including the failure to engage meaningfully with due process and the manifestation of bias that results from resorting to ad hoc procedures the interpretation of which fail to draw on legal foundations.

The Gaza COI had a similar mandate, criteria, and ultimate result as other contemporary ad hoc UN COIs. Like so many of its contemporaries, the Gaza COI was dubbed a post-conflict initiative, though a return to conflict was eminently foreseeable. The initiative was intended to address human rights and humanitarian law abuses on a large scale by assigning responsibility for wrongs committed, just as countless UN COIs had done before;<sup>12</sup> however, the Gaza COI also represented the culmination of a series of trends in international law and fact-finding toward holistic transitional justice inquiries—that is, inquiries which try to address all (or many) of the multifarious elements of transitional justice.<sup>13</sup> In the Gaza COI we can truly see an attempt to do virtually everything that transitional justice has evolved to include: to provide a history, a forum for telling tales perhaps to promote reconciliation, a broad contextual analysis of history and socio-economic factors that contributed to the violence, of both human rights abuses and assurances that impunity will not reign and criminal charges should follow.

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<sup>12</sup> See sources, *supra* notes 2–6.

<sup>13</sup> This would include, *inter alia*: promoting accountability for criminal wrongs; providing recommendations on institutional and legal reforms and/or reparations programs; providing an historical narrative of the conflict upon which to build a shared collective memory or “truth” about the past; and, offering a forum for witnesses to air their grievances, express their views and wishes and discuss their experiences.

Moreover, the Gaza COI provides perhaps the best—and most discussed—recent example of a contemporary ad hoc UN COI that was marred by powerful criticism related to a list of common procedural concerns often associated with large-scale UN COIs, thereby making it ripe for a procedural analysis.<sup>14</sup> In this regard, it is also the ‘hard case’ in that it operated within the context of the Israel-Palestinian dispute and, as a result, garnered a lot of attention and criticism from all sides. As such, it makes the issues and controversies confronted by such investigations more noteworthy than perhaps any other modern UN COI.

Further, like so many previous UN COIs, while the criticism of the Gaza COI relates to both the substantive law as applied by the COI as well as the COI’s procedural shortcomings, the legal-academic analysis that followed tended to focus on the substance of the COI’s report—that is, the law as applied by the COI—while public criticism centered in significant part upon the procedures of the COI.<sup>15</sup> With this in mind, this paper fills a gap not merely by focusing in more detail upon law as it applies to the processes of one particularly controversial UN COI, but it also links more closely the legal-academic discussion to that of the general public.

Finally, the Gaza COI is relevant not just at the macro level, concerning the future of UN COIs more broadly, but also at the micro level, concerning the Israeli-Palestinian conflict. In the summer of 2014 the world witnessed a repeat of the violence in Gaza, which led to another—albeit less ambitious and well-scrutinized—UN COI report in 2015, called the “Independent International Commission of Inquiry Established Pursuant to Human Rights Council Resolution S-21/1.”<sup>16</sup> In light of the long history of UN inquiries relating to Israel and Gaza, in addition to the seemingly interminable conflict in the region, it is safe and indisputably sad to say that there will undoubtedly be more UN COIs into subsequent conflicts.

### *I. The Goldstone Report: History and Context*

As most now know, a conflict has existed in the Middle East since at least 1947—almost a year before Israel declared its independence as a state on 15 May 1948—which centered

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<sup>14</sup> Looking at past UN COIs, one can see that UN they have been generally and consistently been criticized by academic and non-academic commentators alike with regard to: their biased mandates (partiality); the clarity of their mandate and purpose (transparency and consistency/clarity); a disproportionate focus on a particular country, region or conflict (a lack of representative participation, partiality); the selection of biased commissioners (partiality and independence); inflammatory language used in reports (partiality) and shifting standards of proof (transparency of rules and operating procedures); a misguided or biased review of the facts (partiality); the lack of clarity in or promulgation of their rules and methods of operation (transparency); the quality of their evidence used to indict and the quality, quantity and use of corroborating evidence (fairness, partiality, transparency of processes and rules of evidence); and, their approach to balancing interests in protecting witnesses while also providing full and prompt disclosure of legal findings to individuals and/or states concerned.

<sup>15</sup> For but a small example, see Bell and Horowitz, et. al., *supra* note 10.

<sup>16</sup> *Gaza 2015 Inquiry*, *supra* note 5.

upon Israel and the Palestinian Occupied Territories. A recapitulation of the causes and consequences of the Israeli-Palestinian/Arab conflict is well beyond the scope of this article.<sup>17</sup> Suffice it to say that as of about November 2008, yet another nominal truce, this one having existed since June 2008 between Israel and Hamas—the elected political power in the Gaza Strip at the time—had come to a de facto end. The truce broke down after a series of rockets were launched from Gaza into Israel, after incursions by Israel into Gaza territory, and after the solidifying of an Israeli blockade that was supposed to be eased by the terms of the truce.

By 27 December 2008, Israel unilaterally decided that the conflict had escalated to the point where, from its perspective, a large-scale military intervention was the only way to exercise its right to defend its civilian population against terrorism and the firing of rockets from Gaza territory into Israel, although Israel's military campaign itself had been prepared in advance of this date.<sup>18</sup> War was once again cast upon the region. Between 27 December 2008 and 17 January 2009, Israel conducted Operation Cast Lead—Israel's codename for the military intervention—against Hamas in the Gaza Strip. Media coverage of the conflict was intense; in particular, the military conduct of all parties evoked strong negative reactions internationally. During the conflict Hamas—at the time not only the elected political party in Gaza, but also a terrorist group as designated by the European Union, United States, and Canada—was criticized in the international press for sending rockets into Israeli towns,<sup>19</sup> targeting civilians (or at the very least failing to differentiate between civilians and combatants), and for its militants' dressing in civilian clothing while launching attacks within

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<sup>17</sup> For an accessible though lengthy review of the context and conflict, see MARK TESSLER, *A HISTORY OF THE ISRAELI-PALESTINIAN CONFLICT* (2009).

<sup>18</sup> For an article arguing why Israel did not have to "break the truce" and intervene militarily in order to protect its civilian population, see Henry Stiegman, *Discrediting Goldstone, Delegitimizing Israel*, in *THE GOLDSTONE REPORT: THE LEGACY OF THE LANDMARK INVESTIGATION OF THE GAZA CONFLICT* 390 (Horowitz, Ratner, & Weiss, eds. 2011). Stiegman asserts:

[Hamas] offered to extend the truce, but on condition that Israel end its blockade. Israel refused. It could have met its obligation to protect its citizens by agreeing to ease the blockade, but it didn't even try. It cannot be said, therefore, that Israel launched its assault to protect its citizens from rockets. It did so to protect the continuation of its strangulation of Gaza's population.

For an explanation of Israel's reasons for the intervention, see Rory McCarthy, *Our goals are near, says Israeli PM as Gaza fighting intensifies*, *THE GUARDIAN* (Jan. 11, 2009); Rory McCarthy, *Israel criticized after "shocking" discovery of exhausted children*, *THE GUARDIAN* (Jan. 8, 2009); and Clancy Chassay, *Cut to pieces: The Palestinian family drinking tea in their courtyard*, *THE GUARDIAN* (Mar. 23, 2009). The Guardian subsequently maintained an online section devoted to its investigations of claims of abuse and criminality—see the Guardian's "war crimes investigation" page online: <http://www.guardian.co.uk/world/series/gaza-war-crimes-investigation>.

<sup>19</sup> See, e.g., *Rockets from Gaza: Harm to Civilians from Palestinian Armed Groups' Rocket Attacks*, HUMAN RIGHTS WATCH (Aug. 6, 2009) [www.hrw.org/en/reports/2009/08/06/rockets-gaza-0](http://www.hrw.org/en/reports/2009/08/06/rockets-gaza-0).

populated areas.<sup>20</sup> Reports of an Israeli bombing of a UN school<sup>21</sup> and attacks on civilians who were waving white flags,<sup>22</sup> the use of civilians as human shields,<sup>23</sup> the targeting of civilian infrastructure,<sup>24</sup> as well as the use of white phosphorous on civilians<sup>25</sup> resulted in criticism of Israel.<sup>26</sup>

Those outside of Israel/Gaza were deeply divided as to what had really happened and whether it was legally justifiable under the laws of war. This factual uncertainty played a major role in the international debate concerning how or whether the international community should respond to the conflict. In the end, with a perceived need for an independent, impartial inquiry into the conflict, the Human Rights Council acceded to its increasingly reflexive response in such situations: an ad hoc UN COI.<sup>27</sup> Thus, Resolution S-9/1 was brought forward by the Human Rights Council on 12 January 2009 to consider “the grave violations of human rights in the Occupied Territory, particularly due to the recent Israeli military attacks against the occupied Gaza Strip.”<sup>28</sup>

The wording of this initial resolution created an initial problem for the Gaza COI that would subsequently be established: The resolution presupposed the “grave violations” of human rights and focused on Israeli actions without reference to Hamas. The original mandate similarly presupposed the outcome. It stated that the Human Rights Council was:

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,*

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<sup>20</sup> Azmi Keshawi, Martin Fletcher, & Sheera Frenkel, *Gaza's tunnels, traps and martyrs: the Hamas strategy to defeat Israel*, THE TIMES (Jan. 12, 2009). Political violence was also seen as prevalent with respect to Hamas. See generally *Under Cover of War: Hamas Political Violence in Gaza*, HUMAN RIGHTS WATCH (Apr. 19, 2009), <https://www.hrw.org/sites/default/files/reports/iopt0409webwcover.pdf>.

<sup>21</sup> *Rain of Fire: Israel's Unlawful Use of White Phosphorus in Gaza*, HUMAN RIGHTS WATCH ch. IV (Mar. 25, 2009).

<sup>22</sup> For an overview of the issue, see *White Flag Deaths: Killings of Palestinian Civilians during Operation Cast Lead*, HUMAN RIGHTS WATCH (Aug. 13, 2009).

<sup>23</sup> Clancy Chassay & Julian Border, *Guardian Investigation Uncovers Evidence of Alleged Israeli War Crimes in Gaza*, THE GUARDIAN (Mar. 24, 2009), [www.guardian.co.uk/world/2009/mar/23/israel-gaza-war-crimes-guardian/](http://www.guardian.co.uk/world/2009/mar/23/israel-gaza-war-crimes-guardian/).

<sup>24</sup> *Id.*

<sup>25</sup> See generally *Rain of Fire*, *supra* note 21.

<sup>26</sup> For an example of an article offering such criticism, see McCarthy, *Our goals are near*, *supra* note 18.

<sup>27</sup> For example, Israel denied the use of white phosphorus in inhabited areas and the bombing of the UN school, while Hamas denied the use of human shields.

<sup>28</sup> *Goldstone Report*, *supra* note 5, at 37 ¶ 131.

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 . . . .<sup>29</sup>

Clearly the mandate was one-sided as it focused only on violations by the aggressor Israel. As a result, first Mary Robinson, former UN High Commissioner for Human Rights,<sup>30</sup> and then Justice Goldstone rejected the mandate and offers to head the Gaza COI. Israel continues to present the mandate of the Gaza COI as biased because it treats this formulation as the “formal mandate” of the COI, despite the subsequent amendment to the mandate as requested by the eventual chief commissioner, Justice Richard Goldstone (as discussed below).<sup>31</sup> Of note, the 2015 Gaza COI was better, though it was couched within a Human Rights Council Resolution that presupposes the conclusions for which the COI was established to seek.<sup>32</sup> Historically, the fact that only the founding Resolution and not also the mandate pre-supposed a specific conclusion is better than to be expected when it comes

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<sup>29</sup> Human Rights Council Res. S-9/1, 9<sup>th</sup> U.N. Doc. A/HRC/S-9/L.1 (Jan. 9, 2009). [Emphasis added.]

<sup>30</sup> See *Letter of Ambassador Aharon Leshno-Yaar, Permanent Representative of Israel to the U.N. Human Rights Council* (July 6, 2009) in *Goldstone Report*, *supra* note 5 [hereinafter *Letter of Ambassador Aharon Leshno-Yaar*].

<sup>31</sup> 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* 3–4, ¶¶ 10–13 (Sept. 24, 2009) [hereinafter *Initial Israeli Response to Gaza COI*].

<sup>32</sup> See, e.g., Human Rights Council Res. S-21/1, U.N. Doc. A/HRC/RES/S-21/1 ¶ 2 (July 24, 2014) [hereinafter *Res. S-21/1*]:

Condemns in the strongest terms the widespread, systematic and gross violations of international human rights and fundamental freedoms arising from the Israeli military operations” which have involved disproportionate and indiscriminate attacks, including aerial bombardment of civilian areas, the targeting of civilians and civilian properties in collective punishment contrary to international law . . . .

The Resolution does also condemn the killing of two Israeli civilians though the language is much more limited and, in any event, presupposing conclusions on both sides hardly vitiates bias.



to UN COIs into Israeli actions<sup>33</sup> and, all too often, UN COIs more generally,<sup>34</sup> which have tended to exhibit strong signs of bias.<sup>35</sup>

In the context of the Goldstone Inquiry, Goldstone managed to mitigate the mandate problem to a degree. Before the beginning of the COI's investigations, sixteen experienced investigators and judges wrote to an open letter presented to UN Secretary-General Ban Ki-moon. The open letter canned for Secretary-General Ban Ki-moon open a full investigation into the alleged abuses.<sup>36</sup> Specifically, the letter called for "a prompt, independent and impartial investigation" of "serious violations of international humanitarian law committed by all parties to the conflict," which would "provide recommendations as to the appropriate prosecution of those responsible for gross violations of international law."<sup>37</sup> Eventually, after a meeting with Goldstone and an agreed amendment to the mandate,<sup>38</sup> the President of the

<sup>33</sup> See, e.g., Human Rights Council, U.N. Doc. A/HRC/3/2 (Nov. 23, 2006). Resolution S-2/1, which gave the COI its mandate, was entitled, *The grave situation of human rights in Lebanon caused by Israeli military operations*. In addition to pre-determining causation, Resolution S-2/1 pre-determined the COI's outcome by, "[c]ondemning Israeli military operations in Lebanon, which constitute gross and systematic human rights violations of the Lebanese people". See Res. S-2/1, *supra* note 32, at Annex I. For another recent example of a U.N. HRC COI dealing with Israel, see *The Human Rights Inquiry Commission to Investigate Violations of Human Rights and Humanitarian Law in the Occupied Palestinian Territories after 28 September 2000*, U.N. Doc. E/CN.4/2001/121 (Mar. 16, 2001), established pursuant to Commission on Human Rights Res. S-5/1, (Oct. 19, 2000), later endorsed by the Economic and Social Council decision 2000/311 (Nov. 22, 2000). See also *Report of the Secretary-General Prepared Pursuant to General Assembly Resolution ES-10/10 on Illegal Israeli Actions in Occupied East Jerusalem and the Rest of the Occupied Palestinian Territory*, U.N. Doc. A/ES-10/L14 (Aug. 1, 2002). After issuing his report, Goldstone himself stated: "I had hoped that our inquiry into all aspects of the Gaza conflict would begin a new era of even-handedness at the UN Human Rights Council, whose history of bias against Israel cannot be doubted." Richard Goldstone, *Reconsidering the Goldstone Report on Israel and War Crimes*, WASHINGTON POST (Apr. 2, 2011) [hereinafter *Goldstone Recantation*].

<sup>34</sup> As but one commentator stated: Many UN reports, "were not in general dressed up in the restrained language of traditional diplomacy, and the reader cannot feel confident that a complete and balanced picture has been presented." See Sydney D. Bailey, *UN Fact-Finding and Human Rights Complaints* 48 INT'L. AFF. 250, 258 (1972).

<sup>35</sup> Res. S-21/1, *supra* note 32, at ¶ 13. At least in this case the decisive paragraph (13), the Resolution is neutral as to whom the COI should focus on and whom is guilty, though it does presuppose that there were "crimes perpetrated."

<sup>36</sup> The open letter was published in newspapers and on Amnesty International's website in March 2009. See *Gaza Investigators Call for War Crimes Inquiry*, AMNESTY INTERNATIONAL (Mar. 16, 2009). Those signing the letter included Justice Goldstone, Hina Jilani, Desmond Travers—each of the eventual COI—as well as notables such as Alex Boraine, Archbishop Desmond Tutu, Mary Robinson, William A Schabas, and Antonio Cassese.

<sup>37</sup> *Id.*

<sup>38</sup> In *Letter of Justice Goldstone to the Israeli Permanent Representative to the U.N. Human Rights Council, Ambassador Aharon Leshno-Yaar* (Apr. 8, 2009) [hereinafter *Goldstone Letter to Israeli Ambassador*] at Annex II to the *Goldstone Report*, *supra* note 5, Goldstone stated:

I wished personally to assure you that prior to considering the invitation to lead the Mission, I satisfied myself that it would be given unbiased and even-handed terms of reference. In particular, it seemed to me that it was crucial, in order to assess the military actions

Human Rights Council was able to negotiate the passing of a resolution establishing the Gaza COI on 3 April 2009. The understanding was that the mandate would thereafter read that the COI was:

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.*<sup>39</sup>

Formally, however, the mandate was never amended by way of a subsequent Human Rights Council resolution. So, while the above wording made its way into the Gaza COI's final report and was taken to be the applicable mandate by the Commissioners, Resolution S-9/1 technically stands as the UN document calling for the establishment of the inquiry—thereby establishing the foundation for claims of bias with regard to the formal mandate of the Gaza COI.

While the Israeli presence in Gaza formally ended on 18 January 2009, it was not until 4 May 2009 that the Gaza COI first convened in Geneva.<sup>40</sup> Given the delay, the Gaza COI, "agreed to be bound by a short time frame (about three months) to complete its work and report to the Council at the earliest opportunity."<sup>41</sup> As has become standard practice for such UN COIs, a secretariat providing logistical and research support was established by the Office of the United Nations High Commissioner for Human Rights (OHCHR) to aid the work of the Commissioners.<sup>42</sup>

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conducted by Israel, and in particular to investigate the effects on Israeli citizens of the rocket attacks that emanated from Gaza . . . . As a completely independent body, the *Mission will now be determining its own terms of reference*. I would hope that I could consult with the Government of Israel and take into account its views with regard to the terms of reference. Your advice in this regard would be much appreciated. [Emphasis added.]

<sup>39</sup> *Goldstone Report*, *supra* note 5, ¶ 1, at 13. See also *Goldstone Letter to Israeli Ambassador*, *supra* note 38, where Goldstone reiterated his intention to proceed "independently and impartially." [Emphasis added.]

<sup>40</sup> *Goldstone Report*, *supra* note 5, ¶ 5, at 13.

<sup>41</sup> *Id.* ¶ 134, at 37. To give a sense for how short a time-frame this is, contrast to the two to three years that many truth commissions are given to investigate and report, or even longer for an international court to prosecute but one case.

<sup>42</sup> *Goldstone Report*, *supra* note 5, ¶ 3, at 3.

The 452-page Goldstone Report produced by the Gaza COI, entitled “Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict,” was released on 25 September 2009.<sup>43</sup>

With respect to Operation Cast Lead, the Goldstone Report found that between 1387 and 1417 Palestinians were killed during the twenty-two day military operation.<sup>44</sup> By contrast, Gaza authorities reported 1444 fatalities, and the Government of Israel reported 1166.<sup>45</sup> The Government of Israel indicated that there were also four Israeli fatalities in southern Israel—three civilians and one soldier—killed by rocket and mortar attacks, and an additional nine Israeli soldiers killed during the fighting, four of whom were killed by friendly fire.<sup>46</sup>

Of the Goldstone Report’s twenty-one chapters on substantive violations of international law (excluding the Goldstone Report’s analysis of the subsequent judicial responses by all parties), sixteen address Israeli actions, four concern abuses by “Palestinian armed groups,” and one explains allegations against the Palestinian Authority. The Goldstone Report concluded that serious violations of international human rights and humanitarian law were committed by both Israel and by Palestinian armed groups, and actions taken by both sides were found to amount to war crimes and, in a very few instances, possibly to crimes against humanity. For its part, Israel was found, *inter alia*, to have: intentionally targeted civilians and civilian objects, in some cases with the intention of spreading terror among the civilian population; committed grave breaches of the Fourth Geneva Convention, including willful killing and extensive destruction of property not justified by military necessity; violated the right of Gaza’s population to maintain an adequate standard of living, including access to adequate and safe food, water, and housing; denied freedom of movement to Palestinians living in the Gaza Strip and West Bank; denied the right to enter and leave their own territory, and limited their access to an effective remedy, which it was said could amount to persecution, a crime against humanity.<sup>47</sup> The core violations stemmed from investigations into thirty-six incidents.<sup>48</sup>

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.* ¶ 30, at 17.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* ¶¶ 30–31, at 17.

<sup>47</sup> *Goldstone Report*, *supra* note 5, at 413–19.

<sup>48</sup> As is evident, these core incidents related primarily to allegations of indiscriminate or disproportionate Israeli attacks on civilians. However, there are certainly other claims made, including in relation to the repression of dissent in Israel (*Goldstone Report*, *supra* note 5, ch. XXV) and abusive detentions (*Goldstone Report*, *supra* note 5, at ch. XIV, XV and XXI).

Palestinian armed groups were said to have committed indiscriminate attacks against Israeli citizens and violated the principle of distinction as between civilians and combatants by virtue of launching rocket and mortar attacks into civilian areas. This course of action was said to amount to war crimes and possibly a broader crime against humanity. Palestinian armed groups were also criticized for failing to distinguish themselves consistently from the civilian population in an adequate manner and for having unnecessarily exposed civilians to danger by launching mortar and rocket attacks from sites close to civilian buildings. However, in neither case was there sufficient evidence for the Goldstone Report to claim a violation of international law. Moreover, no evidence was said to have been uncovered with regard to the use by Palestinian armed groups of civilians as human shields, or with respect to the armed groups' use of hospitals or ambulances for combat purposes.<sup>49</sup>

The Goldstone Report concluded that neither side to the conflict conducted credible investigations into alleged criminal violations committed during the 22-day offensive. The Report also recommended that its findings be made available to the UN Security Council, and that a committee of experts be established to monitor domestic proceedings related to violations of international human rights and humanitarian law and report back on any investigations carried out domestically. Referral to the ICC or national courts on the basis of universal jurisdiction over the prosecution of serious international crimes was also recommended in the event that the parties failed to carry out credible investigations and prosecutions.

After the Report's release in September 2009, the Human Rights Council subsequently endorsed the Goldstone Report on 16 October 2009 in a resolution that also condemned Israel but made no mention of Hamas or Palestinian armed groups.<sup>50</sup>

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<sup>49</sup> *Goldstone Report*, *supra* note 5, at 419–22.

<sup>50</sup> Press Release, United Nations, Human Rights Council Endorses Recommendations in Report of Fact-Finding Mission Led by Justice Goldstone and Calls for their Implementation (Oct. 16, 2009). *See also* Human Rights Council Res. A/HRC/S-12/L.1 (Oct. 14, 2009). This endorsement took place after some significant procedural and political wrangling. The resolution to endorse the Goldstone Report was initially delayed on 2 October 2009 when the Palestinian delegation dropped its support for the Goldstone Report, purportedly under heavy political from, *inter alia*, the United States. *See* Rory McCarthy, *UN Delays Action on Gaza War Report*, THE GUARDIAN (Oct. 2, 2009). However, on 11 October 2009, President of the Palestinian Authority, Mahmoud Abbas, called on the Human Rights Council to hold a special session to debate the Goldstone Report, which was then held on 15 November 2009.

*Deeply concerned at the actions by Israel undermining the sanctity and inviolability of religious sites in the Occupied Palestinian Territory including East Jerusalem . . . (1) Strongly condemns all policies and measures taken by Israel, the occupying Power, including those limiting access of Palestinians to their properties and holy sites particularly in Occupied East Jerusalem, on the basis of national origin, religion, sex, age or any other discriminatory ground, which are in grave violation of the Palestinian People's civil, political, economic, social and cultural rights[.]*<sup>51</sup>

Unsurprisingly, Western nations voted against the resolution.<sup>52</sup> Nevertheless, the Human Rights Council requested periodic updates on the implementation of the Goldstone Report's recommendations, and suggested that the UN General Assembly consider the findings and recommendations.

Despite protests by both Israel and the United States, the UN General Assembly adopted a non-binding resolution whereby it endorsed the Goldstone Report<sup>53</sup> and called for credible follow-up investigations.<sup>54</sup> The General Assembly also requested that the UN Secretary-General send the Goldstone Report to the Security Council for its consideration.<sup>55</sup> Additionally, Navi Pillay, the United Nations High Commissioner for Human Rights, said that she concurred with the recommendations of the Goldstone Report and, in particular, supported its plea for "urgent action to counter impunity."<sup>56</sup> Similarly, UN Secretary-General

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<sup>51</sup> See Human Rights Council Res. A/HRC/RES/S-12/L.1, *id.* Emphasis in original.

<sup>52</sup> The final vote was 25 in favor, 5 opposed, with 11 abstentions. Five nations also declined to vote by being absent, including the United Kingdom and France. *Id.*

<sup>53</sup> See Press Release, General Assembly, By Recorded Vote, General Assembly Urges Israel, Palestinians to Conduct Credible, Independent Investigations into Alleged War Crimes in Gaza, U.N. Press Release GA/10883 (Nov. 5, 2009) [hereinafter *Press Release GA/10883*]; see also American Society of International Law, International Law in Brief, United Nations General Assembly Resolution on the 2008 Gaza Conflict" ( Nov. 14 2009). The Resolution was adopted by a recorded vote of 114 in favor, 18 against, and 44 abstentions. Notable votes against the resolution included Australia, Canada, Germany, Israel, Italy, Netherlands, and the United States. Many European Union countries abstained.

<sup>54</sup> The majority of supporters of the resolution were "developing" countries. Canada's speaker "said his delegation had voted against the resolution because it was concerned about the imbalanced nature of the Goldstone Report . . ." In addition to Canada, Australia, the Czech Republic, Germany Hungary, Israel, Italy, the Netherlands, Poland, Slovakia, and the United States, among others, voted against the resolutions. Notable abstentions included Denmark, Austria, Japan, New Zealand, Norway, Republic of Korea, Russian Federation, Spain, Sweden and the United Kingdom. See G.A. Res. 64/254, (Feb. 26, 2010) (requesting an update on the steps taken to implement the Goldstone Report).

<sup>55</sup> *Id.*

<sup>56</sup> Sharon Otterman, *UN Rights Official Backs Gaza Report*, NEW YORK TIMES (Oct. 16, 2009).

Ban Ki-Moon urged credible and immediate follow-up investigations by both sides of the dispute, as did American, British, and French UN representatives.<sup>57</sup>

Given the political and legal backdrop to the Goldstone Report and the controversial nature of the issues at hand, it is perhaps unsurprising that the release of the Report evoked strong, often emotional, reactions worldwide. Virtually all aspects of the Goldstone Report—from the choice of commissioners, to the scope of the inquiry, to the legal and factual findings—have been criticized, some commentators more sympathetic than others.<sup>58</sup> In addition to newspapers, bloggers, and academics, non-governmental organizations (NGOs) and governments also weighed in on the merits and demerits of the Goldstone Report, including,

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<sup>57</sup> *Allies Push Israel for Gaza Probe*, BBC NEWS (Oct. 15, 2009), [http://news.bbc.co.uk/2/hi/middle\\_east/8308367.stm](http://news.bbc.co.uk/2/hi/middle_east/8308367.stm).

<sup>58</sup> One critique generally viewed as particularly thoughtful was Moshe Halbertal, *The Goldstone Illusion: What the UN report gets wrong about Gaza—and War*, THE NEW REPUBLIC (Nov. 6, 2009), [www.tnr.com/print/article/world/the-goldstone-illusion](http://www.tnr.com/print/article/world/the-goldstone-illusion) [hereinafter Halbertal, *The Goldstone Illusion*]. Alan Dershowitz, a persistent critic of the Human Rights Council and those who criticize Israel, stated that the Goldstone Report:

is much worse than most of its detractors (and supporters) believe. It is far more accusatory of Israel, far less balanced in its criticism of Hamas, far less honest in its evaluation of the evidence, far less responsible in drawing its conclusions, far more biased against Israeli than Palestinian witnesses, and far more willing to draw adverse inferences of intentionality from Israeli conduct and statements than from comparable Palestinian conduct and statements.

See Alan Dershowitz, *The Case Against the Goldstone Report: A Study in Evidentiary Bias*, Harvard Public Law Working Paper No. 10-26, at 1, available at <http://ssrn.com/abstract=1542897>.

respectively, Amnesty International,<sup>59</sup> Human Rights Watch,<sup>60</sup> the United States House of Representatives<sup>61</sup> and State Department,<sup>62</sup> and the European Parliament.<sup>63</sup>

## *II. Follow-up Reactions to the Goldstone Report: Israel, Hamas and the Palestinian Authority*

From the Gaza COI's inception, Israel refused to cooperate with the Commission or grant it access to Israeli territory, claiming in justification that the "grossly politicized" Human Rights Council resolution constituting the Gaza COI was biased and one-sided.<sup>64</sup> Israel noted that the original resolution (S-9/1) determined, "at the outset that Israel has perpetrated grave violations of human rights" and implied that Israel, "deliberately targeted civilians and medical facilities, and systematically destroyed the cultural heritage of the Palestinian people."<sup>65</sup> The Israeli government's concern was that the legal basis of the Gaza COI, regardless of Goldstone's assurances about using a revised understanding of its terms, was biased.

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<sup>59</sup> Amnesty International supported the Goldstone Report's findings and argued that the UN should ensure that its recommendations are implemented because they offered, "the best hope for justice and accountability." See *UN Must Ensure Goldstone Inquiry Recommendations are Implemented*, AMNESTY INTERNATIONAL (Sept. 15, 2009). Amnesty International further noted that, "[t]he report's findings are consistent with those of Amnesty International's own field investigation into the 22-day conflict . . ." *Id.*

<sup>60</sup> Human Rights Watch noted that the Goldstone Report's findings "closely correspond[ed]" to its findings and those of "other independent groups [NGOs]." See *UN: US, EU Undermine Justice for Gaza Conflict: Goldstone Report Offers Chance to End Impunity*, HUMAN RIGHTS WATCH (Sept. 30, 2009), [www.hrw.org/en/news/2009/09/30/un-us-eu-undermine-justice-gaza-conflict](http://www.hrw.org/en/news/2009/09/30/un-us-eu-undermine-justice-gaza-conflict)?. See also *Letter to Prime Minister Haniya*, HUMAN RIGHTS WATCH (Oct. 20, 2009), [www.hrw.org/en/news/2009/10/20/letter-prime-minister-haniya?print](http://www.hrw.org/en/news/2009/10/20/letter-prime-minister-haniya?print); *Letter to Ban Ki-moon on the General Assembly Resolution of Post-fact Finding Investigations in Gaza*, HUMAN RIGHTS WATCH (Nov. 23, 2009), [www.hrw.org/en/news/2009/11/23/letter-ban-ki-moon-general-assembly-resolution-post-fact-finding-investigations-gaza](http://www.hrw.org/en/news/2009/11/23/letter-ban-ki-moon-general-assembly-resolution-post-fact-finding-investigations-gaza)?; *Israel/Gaza: Implement Goldstone Recommendations on Gaza*, HUMAN RIGHTS WATCH (Sept. 16, 2009), <http://www.hrw.org/en/news/2009/09/16/israelgaza-implement-goldstone-recommendations-gaza>.

<sup>61</sup> H.R. Res. 867, 111th Cong. (2009) [hereinafter *H.R. Res. 867*].

<sup>62</sup> The United States Department of State officially condemned the Goldstone Report as "deeply flawed" and disagreed with both its methodology and many of its recommendations. *Statement by Michael Posner, UN Assistant Secretary of State for Democracy*, U.S. State Dep't (Sept. 2009), <http://geneva.usmission.gov/2009/09/29/gaza-conflict> [Posner State Department Response]. See also U.S. State Dep't, *2009 Human Rights Report: Israel and the Occupied Territories* (Mar. 11, 2010), [www.state.gov/g/drl/rls/hrrpt/2009/nea/136070.htm](http://www.state.gov/g/drl/rls/hrrpt/2009/nea/136070.htm).

<sup>63</sup> Despite being divided, with many European Union (EU) countries voting against the UN General Assembly and Human Rights Council resolutions on the Goldstone Report, outside the UN context the EU parliament nevertheless offered its (non-binding) endorsement of the Goldstone Report by majority vote. See Leigh Phillips, *Despite Heavy Lobbying, EU Parliament Endorses Goldstone Report*, EU OBSERVER (Mar. 10, 2010), <http://euobserver.com/24/29650?prng=1>. The vote in the parliament was 335-287.

<sup>64</sup> *Letter of Ambassador Aharon Leshno-Yaar*, *supra* note 30.

<sup>65</sup> *Id.*

In a pre-emptive move against the Goldstone Report, in July 2009, Israel released its own 157-page report entitled “The Operation in Gaza: Factual and Legal Aspects,” which addressed many of the controversial incidents, the applicable legal framework, and offered its own context for Operation Cast Lead.<sup>66</sup> This report concluded that the operation was “a necessary and a proportionate response to Hamas’ attacks,” directed solely against military objectives.<sup>67</sup> Israel also prepared an initial 32-point response to the Goldstone Report on 24 September 2009.<sup>68</sup> This response claimed that the Gaza COI was “instigated as part of a political campaign, [representing] a political assault directed against Israel . . . .”<sup>69</sup> Israel’s response also asserted that the Goldstone Report “repeatedly adopts evidentiary double standards, attributing credibility to every anti-Israel allegation, and invariably dismissing evidence that indicates any wrongdoing by Hamas.”<sup>70</sup> Moreover, the Israel response posited that the Goldstone Report was “highly judicial in nature, reaching conclusive judicial determinations of guilt”<sup>71</sup> and that the Report went “far beyond its mandate as a fact-finding mission, making legal and judicial determinations of criminal wrongdoing, even in the absence of crucial information.”<sup>72</sup>

Israel’s updated response came in the form of a report delivered to the UN in January of 2010. In this response, Israel focused primarily on its follow-up investigations and claimed that 150 incidents had been or were being investigated, 36 of which were referred for criminal investigation.<sup>73</sup> The January 2010 response revealed only one criminal conviction of an Israeli soldier in relation to the war: The soldier was jailed for seven and a half months for stealing a credit card from a Palestinian home.<sup>74</sup> Israel also chose to review four incidents detailed by the Goldstone Report,<sup>75</sup> and has maintained a governmental website dedicated

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<sup>66</sup> Israel Ministry of Foreign Affairs, *The Operation in Gaza: Factual and Legal Aspects* (July 2009). See also Israel Ministry of Foreign Affairs, *FAQ: The Operation in Gaza—Factual and Legal Aspects* (Aug. 16, 2009).

<sup>67</sup> *Id.*, *The Operation in Gaza: Factual and Legal Aspects*, at 1.

<sup>68</sup> *Initial Israeli Response to Gaza COI*, *supra* note 31.

<sup>69</sup> *Id.*, ¶ 1, at 1.

<sup>70</sup> *Id.*, ¶ 4, at 2.

<sup>71</sup> *Id.*, ¶ 23, at 17.

<sup>72</sup> *Id.*, ¶ 5, at 2.

<sup>73</sup> Israel Ministry of Foreign Affairs, *Gaza Operation Investigations: An Update* (Jan. 29, 2010) [hereinafter *Israeli Investigations Update*].

<sup>74</sup> See Rory McCarthy, *Israel Denies Gaza War Crimes in Report to UN*, THE GUARDIAN (Jan. 31, 2010).

<sup>75</sup> *Israeli Investigations Update*, *supra* note 73, at 36–45.



to responding to the Goldstone Report and updating Israeli governmental responses and other subsequent actions.<sup>76</sup>

Subsequent to Israel's report of January 2010, Israel continued to investigate its actions.<sup>77</sup> However, on 10 April 2010 Human Rights Watch issued a report stating that investigations by both Israel and Hamas since the issuance of the Goldstone Report had fallen far short of international legal standards.<sup>78</sup> Shortly thereafter, Israel's government issued a second response on 19 July 2010 to the Goldstone Report—Israel's third report overall—which focused on the follow-up actions of the government and military, some of which had come after the issuance of the Human Rights Watch Report.<sup>79</sup> In a September 2010 report to the Human Rights Council, a UN Committee of Independent Experts—created to monitor any follow-up investigations<sup>80</sup> and headed by eminent international jurist Christian Tomuschat—responded to all three Israeli reports. The Committee of Independent Experts report found that Israel had failed to investigate credibly at least some of the crimes committed during

<sup>76</sup> See generally Israeli Ministry of Foreign Affairs, <http://www.mfa.gov.il/gazafacts>.

<sup>77</sup> See Israeli Ministry of Foreign Affairs, *IDF Military Advocate General Indicts Soldiers for Incidents During Operation Cast Lead* (July 6, 2010), [http://www.mfa.gov.il/MFA/Government/Communiques/2010/Military\\_Advocate\\_General\\_indicts\\_IDF\\_soldiers\\_Operation\\_Cast\\_Lead\\_6\\_Jul\\_2010.htm](http://www.mfa.gov.il/MFA/Government/Communiques/2010/Military_Advocate_General_indicts_IDF_soldiers_Operation_Cast_Lead_6_Jul_2010.htm); Israeli Ministry of Foreign Affairs, *Military Prosecution Indicts Two IDF Staff Sergeants for Unauthorized Conduct During Operation Cast Lead* (Mar. 11, 2010), [http://www.mfa.gov.il/MFA/Government/Communiques/2010/Military\\_Prosecution\\_indicts\\_sergeants\\_Operation\\_Cast\\_Lead\\_11-Mar-2010.htm](http://www.mfa.gov.il/MFA/Government/Communiques/2010/Military_Prosecution_indicts_sergeants_Operation_Cast_Lead_11-Mar-2010.htm). See, for example, the BBC News reported in 10 March 2010 that the "Israeli military has charged two of its soldiers with endangering the life of a Palestinian boy during Israel's offensive . . . " *Israel Charges of Human Shield*, BBC NEWS (Mar. 12, 2010); see also *Israeli Sniper Faces Gaza Manslaughter Charges*, BBC NEWS (July 6, 2010), [http://news.bbc.co.uk/2/hi/world/middle\\_east/10526541.stm](http://news.bbc.co.uk/2/hi/world/middle_east/10526541.stm); Isabel Kershner, *Indictments in Gaza War Are Announced*, NEW YORK TIMES (July 6, 2010). See also *Israeli Soldier Shot Two Women as They Waved a White Flag*, THE TELEGRAPH (July 6, 2010), <http://www.telegraph.co.uk/news/worldnews/middleeast/israel/7875702/Israeli-soldier-shot-two-women-as-they-waved-white-flag.html>

<sup>78</sup> See *Turning a Blind Eye: Impunity for Laws-of-War Violations During the Gaza War*, HUMAN RIGHTS WATCH (Apr. 10, 2010), <http://www.hrw.org/node/89575>.

<sup>79</sup> See Israel Ministry of Foreign Affairs, *Gaza Operation Investigations: Second Update*, (July 2010) <http://www.mfa.gov.il/NR/rdonlyres/1483B296-7439-4217-933C-653CD19CE859/0/GazaUpdateJuly2010.pdf> [hereinafter *Israeli Second Updated Response*].

<sup>80</sup> See Follow-up to the Report of the United Nations Independent International Fact-Finding Mission on the Gaza Conflict, Human Rights Council Res. A/HRC/RES/13/9, art. 9 (Apr. 14, 2010):

*Decides*, in the context of the follow-up to the report of the Independent International Fact-Finding Mission, to establish a committee of independent experts in international humanitarian and human rights laws to monitor and assess any domestic, legal or other proceedings undertaken by both the Government of Israel and the Palestinian side, in the light of General Assembly resolution 64/254, including the independence, effectiveness, genuineness of these investigations and their conformity with international standards . . . . [Emphasis in original.]

the Gaza offensive. However, the Committee's report did note a number of positive procedural developments implemented by Israel—such as the nomination of a humanitarian officer for all fighting battalions—that have come about in response to the Goldstone Report.<sup>81</sup> It should be noted that the Committee of Independent Experts relied on publicly available information (primarily the three Israeli reports issued in response to the Goldstone Report) because the government of Israel was unwilling to cooperate with the Committee. This lack of cooperation led the Human Rights Council Committee to find that its

bases of information [on Israeli investigations] [were] insufficient for a definitive assessment. Consequently, the Committee is not in a position to establish whether the investigations carried out by Israel met international standards of independence, impartiality, thoroughness, effectiveness and promptness.<sup>82</sup>

At the same time, the Committee of Independent Experts report also concluded that Israel had failed to investigate credibly at least several incidents, focusing on only a few relatively low-ranking officials and ignoring those responsible for planning the war; the report thus concluded that the impartiality of the investigative processes could be put into question as a result.<sup>83</sup>

The Committee of Independent Experts' founding mandate was renewed subsequent to the September 2010 report and new commissioners were appointed.<sup>84</sup> The second Committee of Independent Experts report was issued on 18 March 2011.<sup>85</sup> This time, the report noted that Israel had "dedicated significant resources to investigate over 400 allegations of operations misconduct in Gaza reported by the [Goldstone Report] and others,"<sup>86</sup> including 52 criminal investigations.<sup>87</sup> The March 2011 report noted that much was left to be done in terms of continued investigations; that investigations had proceeded at a very slow pace, which could undermine investigated efforts; but that "[g]iven the scale of this undertaking,

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<sup>81</sup> Human Rights Council Res. 15/50, ¶¶ 42–43, 46 (Sept. 21, 2010), [http://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.50\\_AEV.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.50_AEV.pdf). The report also noted examples of "serious attempt[s] on the part of Israeli investigators to explain what happened . . ." *Id.* at ¶ 46.

<sup>82</sup> H.R.C. Res. 15/50, *supra* note 81, ¶¶ 44–50.

<sup>83</sup> *Id.*

<sup>84</sup> Human Rights Council Res. 15/6, U.N. Doc. A/HRC/RES/15/6 (Oct. 6, 2010). New commissioners were appointed because the previous commissioners had other obligations that prevented them from continuing in the position.

<sup>85</sup> Human Rights Council Res. 16/21, U.N. Doc. A/HRC/16/21 (Mar. 18, 2011).

<sup>86</sup> *Id.* at ¶ 77.

<sup>87</sup> *Id.* at ¶ 24.

it is unsurprising that in 2011, much remains to be accomplished.”<sup>88</sup> However, it was again reiterated that, “there is no indication that Israel has opened investigations into the actions of those who designed, planned, ordered and oversaw Operation Cast Lead.”<sup>89</sup> Moreover, it was clear that not all incidents mentioned in the Goldstone Report had been investigated and that the number of criminal convictions remained very low.

According to an op-ed by Justice Goldstone in the Washington Post, this second Committee of Independent Experts report caused Goldstone to “reconsider” his own report,<sup>90</sup> a development which was accompanied by Israel seeking the retraction of the Goldstone Report at the UN.<sup>91</sup> What Goldstone actually said was that, had Israel cooperated with the Gaza COI and provided him with the information that Israel had since made available in internal investigations and prosecutions, some of that evidence “probably would have influenced [the COI’s] findings about intentionality and war crimes.”<sup>92</sup> Goldstone’s assertion seemed to apply only to a reconsideration of one incident (of the thirty-six investigated) that spoke in part to one broad charge leveled against Israel by the Goldstone Report – the charge that Israel had a high level plan to target intentionally civilians – although he seemed to imply that as a general matter he no longer believed that Israel had a high-level plan to target civilians. His basis for such an about-face was ambiguous.<sup>93</sup> The three other Gaza COI commissioners, in contrast, made clear that they did not share his view and that subsequent revelations had changed little.<sup>94</sup>

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<sup>88</sup> *Id.* at ¶ 77.

<sup>89</sup> *Id.* at ¶ 79.

<sup>90</sup> *Goldstone Recantation*, *supra* note 33.

<sup>91</sup> *Israel Seeks Retraction of Damaging UN Report*, THE GLOBE AND MAIL (3 April, 2011). *See also Judge Goldstone to Visit Israel, Says Minister*, THE GUARDIAN (Apr. 5, 2011).

<sup>92</sup> *Goldstone Recantation*, *supra* note 33. Goldstone seemed to be speaking in particular about one notorious case where he found that Israel appeared to intentionally target civilians, though he seemed to generalize at times by stating that there was not an intentional policy of targeting civilians in general. In his “recanting” of this, he stated: “While the investigations published by the Israeli military and recognized in the UN committee’s report have established the validity of some incidents that we investigated in cases involving individual soldiers, they also indicate that civilians were not intentionally targeted as a matter of policy.” He then uses as the example the shelling of the al-Simouni home.

<sup>93</sup> For a discussion of how bizarre Goldstone’s reconsideration may have seemed, see Roger Cohen, *The Goldstone Chronicles*, NEW YORK TIMES (Apr. 7, 2011); John Dugard, *Where Now for the Goldstone Report*, NEW STATESMAN BLOG (Apr. 6, 2011).

<sup>94</sup> *See* Hina Jilani, Christine Chinkin & Desmond Travers, *Goldstone Report: Statement Issued by Members of UN Mission on Gaza War*, THE GUARDIAN (Apr. 14, 2011); Ed Pilkington & Conal Urquhart, *Goldstone’s Gaza Report Stands, UN Insists*, THE GUARDIAN (Apr. 5, 2011). *See also Member of UN Fact Finding Mission on Gaza Conflict Insists Report Stands Unchanged*, MIDDLE EAST MONITOR (Apr. 4, 2011).

In contrast to Israel, Hamas initially saw the Goldstone Report as a vindication of its position, though it continued to deny the charges against it<sup>95</sup> and has since exhibited little interest in investigating alleged wrongdoings that took place during the war or holding those responsible accountable for its actions. Hamas did release a report in response to the Goldstone Report—though it did not initially submit it to the UN—and rejected the Goldstone Report’s charges of war crimes.<sup>96</sup> The Human Rights Watch Report on the post-Gaza invasion investigations of Israel and Hamas found once again that Hamas made no credible attempts to investigate and/or prosecute, as did the first of the Committee of Independent Experts reports, which had noted that two “investigative” reports had been submitted to the Committee, though one was not really an investigation at all.<sup>97</sup> The second Committee of Independent Experts report noted that some “efforts” had been made with respect to criminal investigations into human rights violations, although no investigations had commenced into the launching of rockets and mortars into Israeli territory.<sup>98</sup>

The Palestinian Authorities in the West Bank established a high-level, four-member commission to investigate the Goldstone Report’s findings.<sup>99</sup> The first Committee of Independent Experts report also reviewed the Palestinian Authorities’ high-level commission’s report and found “that the [Palestinian Authority’s] Independent Investigation Commission undertook independent and impartial investigations in a comprehensive

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<sup>95</sup> See Ezzedeem Al-Qassam Brigades, *UN Report Clear Proof of Israel’s War Crimes* (Sept. 16, 2009), [www.gassam.ps/news-1840-UN\\_report\\_clear\\_proofs\\_of\\_Israels\\_war\\_crimes.html](http://www.gassam.ps/news-1840-UN_report_clear_proofs_of_Israels_war_crimes.html). Hamas initially rejected some of the findings—those related to its actions, of course—but evidently determined it was better to promote world-wide acceptance of the Goldstone Report.

<sup>96</sup> *UN Receives Goldstone Responses*, BBC NEWS (Jan. 29, 2010), [http://news.bbc.co.uk/1/hi/middle\\_east/8487301.stm](http://news.bbc.co.uk/1/hi/middle_east/8487301.stm). See “Case of applying recommendations of the United Nations Fact-Finding Mission report in relation to the Israeli aggression against Gaza (December 2008 to January 2009)”, prepared by the Government Committee for Follow-up to the Implementation of the United Nations Fact-Finding Mission Report of the de facto Gaza authorities

<sup>97</sup> *Turning a Blind Eye*, *supra* note 78, at 6. The report stated:

In Gaza, Hamas has taken no meaningful steps to investigate and punish those who violated the laws of war. After rejecting criticism of its conduct during the war, Hamas established a commission headed by the Gaza Minister of Justice to look at the allegations in the Goldstone report. In January 2010 it released the commission’s findings that Hamas’s armed wing...and other Palestinian armed groups had fired rockets only at Israeli military targets, and civilian casualties from those attacks were mistakes, due to the weapons’ technological limitations. The claim ignores the fact that the rockets fired into Israel that did not land in open terrain mostly struck in civilian populated areas...far from any legitimate military target . . .

<sup>98</sup> H.R.C. Res. 15/50, *supra* note 81, ¶¶ 88–90.

<sup>99</sup> See *Report of the Palestinian Independent Investigation Commission Established Pursuant to the Goldstone Report*, U.N. Doc. A/64/890 (Aug. 2010).

manner that squarely addressed the allegations in the [Goldstone] report.”<sup>100</sup> However, the same Human Rights Council Committee of Independent Experts report also noted that, “it is unclear to what extent [the Palestinian Authority’s Independent Investigation Commission’s] report will lead to criminal investigations and prosecutions,”<sup>101</sup> and that “investigations are only the first step to achieving accountability . . . and that the prosecution of perpetrators . . . should follow promptly.”<sup>102</sup> The second Committee of Independent Experts report detailed a number of subsequent institutional advancements, including the creation of a Palestinian Constitutional Court, the transfer of cases from military to civilian jurisdiction, and the appointment of a General Prosecutor to conduct investigations.<sup>103</sup> However, the second Committee of Independent Experts report again noted that the “criminal accountability mechanisms have not yet been duly activated in relation to any of the allegations of serious violations in the [Goldstone Report].”<sup>104</sup>

Let us now delve a little more deeply into some of the criticisms of the Goldstone COI, proceeding in general in the temporal order in which such criticisms were raised.

### C. Bias and the Law

#### I. *Bias and the Original Mandate*

As noted, the original mandate for what was to become the Gaza COI was undoubtedly one-sided as against Israel. The mandate focused only on Israeli actions, and presupposed their criminality. Justice Goldstone managed to change the language and the focus of the inquiry to ensure that all sides would be investigated, but criticism remained that the “official” mandate was biased. Justice Goldstone and his fellow commissioners clearly were governed, at least in practice, by the updated mandate and viewed it as the Gaza COI’s legally constituting instrument.<sup>105</sup> But Israel managed to bring the credibility of the mandate—and thus the credibility of the Goldstone Report and its findings—into question by focusing on the original, biased mandate rather than the revised version. The United States House of Representatives apparently concurred with Israel’s assessment and, in a non-binding resolution, noted *inter alia* that Gaza COI’s original mandate was biased and asserted that

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<sup>100</sup> H.R.C. Res. 15/50, *supra* note 81, ¶ 70.

<sup>101</sup> *Id.* at ¶ 73.

<sup>102</sup> *Id.* at ¶ 5.

<sup>103</sup> H.R.C. Res. 16/21, *supra* note 85, ¶¶ 84–97.

<sup>104</sup> H.R.C. Res. 16/21, *supra* note 85, at ¶ 87.

<sup>105</sup> See *supra* note 38 and accompanying text.

this original mandate remained applicable to the Gaza COI, having never formally been overturned by a subsequent Human Rights Council resolution.<sup>106</sup>

For Israel and the United States House of Representatives, the argument that the mandate was biased could be added to a laundry list of other procedural concerns, which were then used to impugn the credibility of the Goldstone Report's findings. At least some of the subsequent debate was therefore redirected from an analysis of human rights abuses to a discussion of the biased mandate.

Israel's reaction to the Goldstone Report was not merely a spurious attempt to distract from its substance by disingenuously locating bias in the very foundation of the inquiry; rather, Israel's reaction to the original so-called biased mandate should be seen in context. This context includes the specific complaints as regards the Commission on Human Rights, and now the Human Rights Council, long viewed as focusing disproportionately on Israel, as well as the perception of those reports, COI's and fact-finding missions that came before the Gaza COI.<sup>107</sup> Based on Israel's history with the Human Rights Council and its COIs, for Israel it came

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<sup>106</sup> H.R. Res. 867.

<sup>107</sup> The United States statement noted, *inter alia*, that between the creation of the Human Rights Council in 2006 and the issuance of the Goldstone Report, "[the Human Rights Council] ha[d] passed 20 resolutions on Israel, more than the number of resolutions for all 191 other UN members combined. The Council also ha[d] held 11 special sessions, 5 focused exclusively on Israel." See *Posner State Department Response*, *supra* note 62. The US is not the only one to assert that the UN has a long history of focusing disproportionately on Israel, or at least on the Israeli-Palestinian conflict, with primarily Middle Eastern and African nations forcing the issue. From the General Assembly to the UN's various human rights reporting instruments, historically no conflict is or has been more scrutinized. Many observers have noted the statistics related to the majority focus on Israel as opposed to other situations. See Theodoor van Boven, *Fact-Finding in the Field of Human Rights*, 3 *Isr. Y.B. HUM. RTS.* 93, 116 (1973): "It is no doubt true that the active and close concern of the United Nations for human rights and fundamental freedoms is almost exclusively concentrated on Southern Africa and the Middle East; the prevailing political climate in the United Nations is certainly the reason for this." For a more recent example with respect to the Human Rights Council (*i.e.* since April 2006) is the Freedom House Report, *The UN Human Rights Council Report Card: 2007–2009*, (Sept. 10, 2009), [http://www.freedomhouse.org/sites/default/files/inline\\_images/UNHRC%20Council%20Report%202007-2009.pdf](http://www.freedomhouse.org/sites/default/files/inline_images/UNHRC%20Council%20Report%202007-2009.pdf). The report states:

The Council's performance with regard to special sessions remains disappointing in terms of addressing urgent human rights issues, but has decidedly improved since the first year of the Council, when three of the first four special sessions focused on Israel. Of the seven special sessions held since June 2007, two focused on Israel and the other five focused on Burma, the world food crisis, the Democratic Republic of Congo, the economic and financial crisis, and Sri Lanka.

*Id.* at 8. The report also had the following to say:

Israel remained the target of an inordinate number of both condemnatory resolutions and special sessions. Israel was the target of 10 out of 18 condemnatory resolutions passed during the period of this report (and 19 out of 31 since the first session of the Council), the language of which is consistently one-sided, assigning sole responsibility to Israel for the violations of human rights in the Occupied Palestinian Territories. Israel was also the target of three of the

as no surprise that the intention behind calling for an inquiry was to criticize Israel in particular. Whatever subsequent actions were taken would have to overcome the fact that history seemed to be repeating itself and, once again, Israel was the focus of condemnation and inquiry where other parties to the conflict—namely Hamas—were not explicitly named. Given such a history and the intention of the Human Rights Council in calling for the inquiry to perpetuate the history, little independence or impartiality could be expected from Israel's perspective. According to Israel, the legitimacy of the Gaza COI was wholly undermined; merely changing the wording of the mandate did not change the intention of Human Rights Council members who first called for the inquiry.<sup>108</sup>

Of course, Justice Goldstone was neither a representative of a member-state of the Human Rights Council that called for the inquiry, nor was he responsible for the original mandate. In actuality, he condemned it. So the counter-argument goes that Goldstone, and the other members of the Gaza COI, were not tainted by this institutional bias. The impartiality of the commissioners as well as their independence from the “tainted” Human Rights Council was therefore vital to ensuring the legitimacy of the report.

In this regard, the Gaza COI experienced difficulties from the very beginning because it was not so clear that the other members of the Gaza COI were indeed untainted by the perception of bias—the very thing that the Gaza COI relied upon to prove its independence from the original mandate. The obvious conclusion is that an unbiased mandate is critical to the legitimacy of a UN COI and thus the credibility of its ultimate report. However, the history and credibility of the institution creating the mandate can also affect the perceived legitimacy of the UN COI, and thus the credibility of its report.

### *II. Bias, Impartiality, and the Gaza COI's Commissioners*

As has historically been the case with UN COIs, criticisms of the Goldstone Report related to its findings and in particular to the reliability, credibility, and impartiality of the Goldstone Report as reflected by its operating principles and procedures. These working principles and procedures, in turn, depend upon and are inter-connected with the purpose ultimately assigned to a UN COI. One of the first concerns raised with regard to the Gaza COI was related to the extent to which the COI should be viewed as a legal undertaking: To what extent did the Goldstone COI have a legal-judicial purpose and follow legal procedures as a result? Now, the disputed—and shifting interpretations of—the legality of the Gaza COI

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four first special sessions called by the Council and was the target of two of the seven special sessions that took place during this reporting period.

*Id.* at 9. See also Freedom House, *The UN Human Rights Council Report Card 2009–2010*, 2 (Sept. 15, 2010), [http://www.freedomhouse.org/sites/default/files/inline\\_images/UNHRC%20Report%202009-2010.pdf](http://www.freedomhouse.org/sites/default/files/inline_images/UNHRC%20Report%202009-2010.pdf).

<sup>108</sup> See, e.g., *Initial Israeli Response to Gaza COI*, *supra* note 31.

caused several additional problems, including allegations of potential bias of the commissioners themselves.

Like many other COIs, both national and international, the Gaza COI was led by a strong personality who had an extensive background in both international law and human rights law: The President of the Human Rights Council appointed Justice Richard Goldstone lead commissioner of the Gaza COI. Goldstone was inarguable well-qualified for the position, as he is a former judge of the Constitutional Court of South Africa; he chaired the Goldstone Commission into the illegal activities of the apartheid state; he is a former chief prosecutor at the International Criminal Tribunal for the former Yugoslavia; and, Justice Goldstone is a professor of law.

Three other members were also appointed to the Gaza COI, including Ms. Hina Jilani,<sup>109</sup> Colonel Desmond Travers,<sup>110</sup> and Professor Christine Chinkin, whose addition was particularly controversial. Christine Chinkin is a professor of international law and has had previous experience as a member of the UN Human Rights Council's high-level fact-finding mission to Beit Hanoun (2008).<sup>111</sup> She was thus naturally considered an expert in international law and fact-finding, and considered to be someone with experience in the region. However, while a professor of international law at the London School of Economics and before the Gaza COI had started work, she was a signatory to a public letter on the Gaza conflict. The letter was also signed by over two dozen prominent academics who all agreed that "the rocket attacks on Israel by Hamas [did] not amount to an armed attack entitling Israel to rely on self-defense."<sup>112</sup> The title of the public letter has also drawn criticism: "Israel's Bombardment of Gaza is Not Self-Defense—It's a War Crime."<sup>113</sup> The letter posited that "the blockade of humanitarian relief, the destruction of civilian infrastructure, and [the prevention of] access to basic necessities such as food and fuel, are [all] prima facie war crimes."<sup>114</sup> As a result of this letter numerous commentators, including the Government of

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<sup>109</sup> At the time, she was an Advocate of the Supreme Court of Pakistan, and had formerly been a Special Representative of the Secretary-General on the situation of human rights defenders. She was also a member of the International Commission of Inquiry on Darfur in 2004.

<sup>110</sup> Colonel Travers is a former Officer in Ireland's Defense Forces as well as a member of the Board of Directors of the Institute for International Criminal Investigations. *Goldstone Report*, *supra* note 5, ¶¶ 2, 132.

<sup>111</sup> See Human Rights Council, *Human Rights Situation in Palestine and Other Occupied Arab Territories: Report of the High-level Fact-finding Mission to Beit Hanoun Established under Council Resolution S-3/1*, U.N. Doc. A/HRC/9/26 (Sept. 1, 2008).

<sup>112</sup> Christine Chinkin, et. al., *Israel's Bombardment of Gaza Is Not Self-defense—It's a War Crime*, SUNDAY TIMES at 16 (Jan. 11, 2009).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*



Israel and the United States House of Representatives,<sup>115</sup> questioned professor Chinkin's impartiality as a commissioner.<sup>116</sup> Rarely is it noted, however, that the letter also condemns "the firing of rockets by Hamas into Israel and suicide bombings which [were] also contrary to international humanitarian law and are war crimes."<sup>117</sup> Perhaps the fact that Professor Chinkin seemed to have pre-determined prima facie criminality on both sides, as opposed to only with respect to one party, is a non sequitur in that the concern, seen in its best light, was really with respect to Chinkin having predetermined criminality. Whether she had prejudged one or both sides was of lesser significance.

In any event, it has been argued that her appointment created a suspicion of bias. As a result, there were several requests that she recuse herself from the Gaza COI, including a direct, formal petition by UN Watch (a pro-Israeli NGO) to Justice Goldstone that she be disqualified.<sup>118</sup> Arguably a judge on a domestic COI would have been disqualified in similar circumstances; however, in rejecting the petition to disqualify Professor Chinkin, Justice Goldstone stated that bias did not apply as it would in a court or administrative law setting because the Gaza COI was neither "judicial" nor even "quasi-judicial" in nature:<sup>119</sup> "Ours wasn't an investigation, it was a fact-finding mission . . . We made that clear . . . [i]f this was a court of law, there would have been nothing proven."<sup>120</sup>

Goldstone recommended that independent criminal investigations and, if necessary, prosecutions be undertaken either by the parties to the conflict, the International Criminal Court, or by way of the exercise of universal jurisdiction because he viewed the COI as a fact-finding mission, rather than a criminal or legal undertaking.<sup>121</sup> This is to say that Justice Goldstone saw his role as purely investigatory, whereby the issues are brought into the

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<sup>115</sup> See generally H.R. Res. 867, *supra* note 61.

<sup>116</sup> See *Letter of Ambassador Aharon Leshno-Yaar*, *supra* note 30. See also *Initial Israeli Response to COI*, *supra* note 31, ¶ 17.

<sup>117</sup> Chinkin, et. al., *supra* note 112.

<sup>118</sup> See U.N. Watch, *Request to Disqualify Prof. Christine Chinkin from UN Fact Finding Mission on the Gaza Conflict*, (Aug. 20, 2009).

<sup>119</sup> U.N. Watch, *UN Goldstone Inquiry Rejects 'so-called' Petition of UN Watch; Denies Mission is Quasi-judicial*, (Aug. 30, 2009), <http://blog.unwatch.org/?p=451>. See also Justice Goldstone's talk at Brandeis University, available at <http://www.brandeis.edu/now/2009/november/gazaforumcoverage.html>; and *Goldstone Walks a Fine Line in an Ancient War Zone*, BUSINESS DAY (Apr. 8, 2009), [www.businessday.co.za/articles/Content.aspx?id-77618](http://www.businessday.co.za/articles/Content.aspx?id-77618). See also Gal Beckerman, *Goldstone: 'If This Was a Court of Law, There Would Have Been Nothing Proven'*, JEWISH DAILY FORWARD (Oct. 16, 2009), [www.forward.com/articles/116269](http://www.forward.com/articles/116269).

<sup>120</sup> See Beckerman, *supra* note 119.

<sup>121</sup> *Goldstone Report*, *supra* note 5, ¶ 1968.

public domain and the legal and criminal work are left to be accomplished by courts of law.<sup>122</sup> Subsequent to the Gaza COI, Justice Goldstone has described the purpose of UN COIs as offering a “roadmap” for future prosecutors (and presumably others) to use to aid in deciding on what incidents or types of offences might usefully be investigated.<sup>123</sup> Under this understanding, it would seem that criminal courts could not rely on the Goldstone Report’s findings.<sup>124</sup> In this regard, Alan Dershowitz has stated, “[i]f [Chinkin’s] bias would have been a ground for judicial disqualification, then surely her conclusions should not be credited by quasi-judicial bodies, such as the International Criminal Court, the Human Rights Council, and other governmental and non-governmental bodies.”<sup>125</sup>

However, Goldstone’s assertion in rejecting the petition to disqualify Chinkin that the Gaza COI was completely non-judicial in nature seems difficult to reconcile with his other assertion that the Gaza COI itself was necessarily impartial and independent.<sup>126</sup> In reviewing Israel’s duty to investigate allegations of serious violations of international law, the Goldstone Report explicitly stated that inquiries were required to observe “the universal principles of independence, effectiveness, promptness and impartiality (*sic*).”<sup>127</sup> Elsewhere in the Goldstone Report, it was made clear that the Gaza COI was itself *bound* by what was called “international investigative standards developed by the UN.”<sup>128</sup> However, it is unclear

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<sup>122</sup> Goldstone has asserted since the report that: “Some have charged that the process we followed did not live up to judicial standards. To be clear: Our mission was in no way a judicial or even quasi-judicial proceeding. We did not investigate criminal conduct on the part of any individual in Israel, Gaza or the West Bank.” *Goldstone Recantation*, *supra* note 33.

<sup>123</sup> Goldstone subsequently addressed the purpose of large-scale UN COIs, such as that in Gaza, in an interview:

When he began working [as chief prosecutor of the ICTY], Goldstone was presented with a report commissioned by the U.N. Security Council based on what he said was a fact-finding mission similar to...Gaza. “We couldn’t use that report as evidence at all,” Goldstone said. “But it was a useful roadmap for our investigators, for me as chief prosecutor, to decide where we should investigate. And that’s the purpose of this sort of report.”

[Emphasis added]. See Gal Beckerman, *supra* note 119.

<sup>124</sup> *Id.*

<sup>125</sup> Dershowitz, *supra* note 58, at 5.

<sup>126</sup> According to Goldstone, in the Executive Summary of the Goldstone COI, published by the European Human Rights Law Review, “the Mission adhered to an impartial and independent analysis of the parties’ compliance with their obligations under general international law, the Charter of the United Nations, international humanitarian law, international human rights law and international criminal law.” Goldstone, et. al., *Report on UN Fact Finding Mission on the Gaza Conflict*, 2 EUR. HUM. RTS. L. REV. 125, 125 (2010).

<sup>127</sup> *Goldstone Report*, *supra* note 5, ¶ 1814.

<sup>128</sup> *Id.* at ¶¶ 158, 161: “The methods adopted to gather and verify information and reach conclusions were for the most part guided by best practice methodology in the context of United Nations investigations.”

what independence and impartiality might mean—and how these principles should be interpreted—if legal or quasi-legal standards are removed from the equation so that, for example, the appearance of bias does not affect the COI's independence or impartiality. As the first follow-up to the Goldstone Report by the Human Rights Council Committee of Independent Experts stated with regard to its review of the investigations into their own conduct during the 22-day conflict by Israel and Hamas:

*impartiality refers to the question of whether an investigator is or is likely to be biased.* The [UN] Human Rights Committee has stated that “judges must not harbor preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties”. *Similar considerations apply to investigators.*<sup>129</sup>

In any event, it is a choice whether or not we treat such COIs as legal responses to mass atrocities or, rather, design them as simply something akin to a human rights fact-finding mission of the sort that a NGO might conduct. The latter approach would support Goldstone's assertion that the Gaza COI was neither judicial nor quasi-judicial,<sup>130</sup> in that he seems to assert that no or very limited formal legal rules apply, at least as concerns issues of bias or the choice of commissioners. However, such a position is inapposite with the reality of what contemporary UN COIs do, how they are designed, and what is needed from them. Law is inextricably linked to COI processes. Ad hoc UN COIs are legally constituted through formal resolutions, conduct administrative-legal inquiries akin to COIs in domestic settings. The COIs also apply interpretations of international laws, make pronouncements on criminal guilt or the possibility thereof, and their findings result in—or are intended to support—legal consequences, such as being used by legal bodies such as courts to found legal actions. Thus, it is hard to see how impartiality and independence can both be required by universal principles but not subject to either a judicial or quasi-judicial legal interpretation. Law is infused throughout the UN COI and legality must necessarily play a role in the interpretation of independence and impartiality in this case, particularly with respect to issues of real or perceived bias.

Moreover, the effectiveness and legitimacy of UN COIs depend on their ability to produce impartial, independent reports for political bodies that could not likely do so themselves. A review of the perceptions of UN COI commissioners, reports, academic commentators, as well as the ever-increasing set of applicable rules and guidelines reveals that the legitimacy of UN COIs is inexorably linked to their ability to complete their fact-finding task not just in a thorough fashion, but in an open, impartial, reliable and independent manner.

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<sup>129</sup> H.R.C. Res. 15/50, *supra* note 81, ¶ 23 [Emphasis added.]

<sup>130</sup> Goldstone reiterated his assertion that the Gaza COI was not to live up to judicial standards: “Some have charged that the process we followed did not live up to judicial standards. To be clear: *Our mission was in no way a judicial or even quasi-judicial proceeding.*” [Emphasis added.] *Goldstone Recantation*, *supra* note 33.

Theoretically, because of the impartiality and independence of UN COIs, their factual findings and recommendations can be relied upon in a way that the findings, assertions, and recommendations of UN political organs cannot. Regardless of whether or not a particular UN COI perceives itself to be “extra-” or “quasi-judicial”—or something else entirely—and regardless of a particular purpose ascribed to a UN COI, its benefits derive from the fact that it is able to act, to a greater or lesser degree, “legally”, even in otherwise highly political contexts. In other words, the benefit of UN COIs has always been their ability to bring legal legitimacy—the sort that follows from transparent efforts for reasoned objectivity—to political conflicts.

The parallels between Justice Goldstone’s assertions in 2009 and the more recent 2015 Gaza inquiry are striking. Before being appointed as chairman of the commission of investigation, Professor William Schabas called for the indictment of Israeli Prime Minister Benjamin Netanyahu, asserting that there was *prima facie* evidence of Israeli disproportionality in its attacks on Gaza—tantamount to saying war crimes were *prima facie* committed (*prima facie* being arguably as far as a COI could go in its findings).<sup>131</sup> Israel’s response to the appointment, as it had been to Chinkin’s appointment in 2007, was to assert that Schabas was “a vocally biased critic of Israel,” meaning that Israel would not get “a fair hearing” from the UN commission.<sup>132</sup> In a series of events very similar to what had transpired years earlier with Professor Chinkin, Schabas was called upon by Israel and others (including Canada) to step down for the perception of bias, something he eventually reluctantly did.<sup>133</sup> Tellingly, in his resignation letter to the UN, Professor Schabas stated: “In early August 2014, when I was asked if I would accept a nomination to the Commission of Inquiry, I was not requested to provide any details on any of my past statements and other activities concerning Palestine and Israel.”<sup>134</sup>

The point here is not to take a position on whether Professors Schabas or Chinkin were biased in a meaningful sense. Rather, the idea is that bias and the perception thereof matter with respect to UN COIs and particularly their commissioners; the investigations and ultimate reports need to be credible and reliable if they are to have any hope of making an

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<sup>131</sup> Israel Ministry of Foreign Affairs, *Behind the Headlines: The Human Rights Council Commission of Inquiry on Gaza*, (Sept. 7, 2014), <http://mfa.gov.il/MFA/ForeignPolicy/Issues/Pages/The-Human-Rights-Council-commission-of-inquiry-on-Gaza.aspx>. See also Irwin Cotler, *The Fatal Flaws of the Schabas Inquiry*, THE JERUSALEM POST (Sept. 11, 2014), <http://www.jpost.com/Opinion/The-fatal-flaws-of-the-Schabas-Inquiry-375139>.

<sup>132</sup> *Behind the Headlines*, *supra* note 131.

<sup>133</sup> See United Nations Human Rights Office of the High Commissioner, Press Statement on the Resignation of the Chairperson of the Commission of Inquiry on the 2014 Gaza Conflict, (Feb. 3, 2015), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15535&LangID=E>. The final report was due on March 23 of that year, though because of the resignation it was released on 29 June 2015.

<sup>134</sup> William Schabas, *Letter to HE Joachim Rucker President*, (Feb. 2, 2015), <http://blog.unwatch.org/wp-content/uploads/r%C3%BCcker.schabas.2.2.15.resignation-letter.pdf>.

impact. When a commissioner is viewed as biased, particularly by one of the parties to whom the report is arguably targeted, the COI's report loses its legitimacy and thus its effectiveness. The lesson was not learned after the Gaza COI and one can only hope that, moving forward, UN COIs will take greater note of their "judicial" or "quasi-judicial" nature, to use Justice Goldstone's terms, when it comes to the appearance of impartiality of the commissioners.

In order to gain insight into what constitutes prejudice in the context of ad hoc UN COIs and their commissioners, the most obvious improvement to be made is that questions of bias should be confronted directly, first by the UN body constituting the COI and then, if necessary, by the commission itself. Allegations of bias supported by documentation must not be dismissed as inapplicable or as allegations to be confronted only in courtrooms – as though non-courtroom bodies are not also legal in meaningful ways. Decisions must be viewed as fair and impartial in the context; the COI cannot have it both ways. It cannot on the one hand promote criminal accountability<sup>135</sup> by claiming the same legitimacy, reliability and credibility that domestic-level COIs (for example, Canadian, British or Australian COIs) generally claim, and then, on the other hand, act non-judicially and avoid these tricky legal and procedural processes and principles in favor of those utilized by some other non-legal fact-finding missions (NGOs for example).<sup>136</sup> It is insufficient to simply dismiss claims of bias when the perception of bias is at issue. With respect to the same conflict, we have now seen twice the negative consequences that conduce to COI reports where claims of bias are not taken with the seriousness that they deserve. When the issue is raised, some legal analysis is required before a commissioner who has made her views known and taken a public position on a particular issue of direct relevance to the COI is determined to be suitable or unsuitable for the post of commissioner. The often outraged response to Professor Chinkin's appointment as a commissioner to the Gaza COI (and Professor Schabas' appointment to a subsequent Gaza UN COI) demonstrates that perhaps the more polarized the conflict confronted by UN COIs, the greater the necessity for fidelity to the legal principles of independence and impartiality. A commitment to these principles would likely have required the recusal of Professor Chinkin from the Gaza COI, just as Professor Schabas eventually stepped aside in the more recent Gaza COI of 2015.

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<sup>135</sup> The Goldstone Report ends with: "[t]he Mission is of the view that the prosecution of persons responsible for serious violations of international humanitarian law would contribute to ending such violations, to the protection of civilians and to the restoration and maintenance of peace." See *Goldstone Report*, *supra* note 5, ¶ 1966. Goldstone himself has since repeated that this was the primary purpose of the COI. See Richard Goldstone, *Justice in Gaza*, *NEW YORK TIMES* (Sept. 17, 2009), [www.nytimes.com/2009/09/17/opinion/17goldstone.html](http://www.nytimes.com/2009/09/17/opinion/17goldstone.html).

<sup>136</sup> Indeed, many good NGOs will adopt legal or quasi-legal standards with respect to impartiality in order to ensure the legitimacy and reliability of their reports. For without credibility, neither NGO nor UN inquiries are of much value (except, perhaps, as unreliable political tools). Thus, though I distinguish here between NGO COIs and UN COIs, there is no reason why an NGO inquiry could not be seen as legalistic, nor is there any reason why it will or should not exhibit a fidelity to legality.

A commitment to legality, however, also surely requires a commitment to independence, and in the case of UN COIs, it is important that commissioners not be subject to arbitrary dismissal. Rules as to discharging a commissioner are necessary, easy to promulgate, and there are numerous options available. Unfortunately none of these options are binding upon UN COIs. For example, though the ideal outcome would be for a commissioner to recuse herself in situations in which she is unable to be impartial and independent, the dismissal of a commissioner by unanimous vote of the other commissioners is one possible option.

In terms of determining with precision what is required for a commissioner to maintain impartiality and independence, reference to the specific mandate, the purpose, and overarching goals of the UN COI will be necessary. Legal decisions of this nature are very fact specific: What legality might require—that is, what it means to be impartial and the degree to which one must be impartial—depends upon the position of the commissioner, the investigation, and some understanding of the parties' concerns. This does not mean, however, that the mandate and purpose of the COI have to be so specific that they speak directly to the issue of bias; such a specific mandate could be impractical and unwarranted. But it does mean that the applicable law must be clear and accessible so that interpretations of what constitutes prejudice and independence can be reasonably evaluated and, if necessary, critiqued. In other words, had either of the Gaza COI's mandates been more transparent with respect to their goals and the means by which those goals might be achieved by a Commission, we would likely have a better understanding of the appropriate standards of impartiality and independence in that particular situation. Generally, it might be said that the more formal and criminal-esque the investigation, the greater fidelity future large-scale UN COIs should evince with respect to due process of law and impartiality.

### *III. Bias and the Scope of the Gaza COI's Investigation*

The Human Rights Council did not strictly circumscribe the temporal and geographic confines of the Gaza COI in its mandate. It was thus left to the Gaza COI's commissioners to determine the scope of the inquiry.<sup>137</sup> This gap—left by the Human Rights Council—created a pair of problems. First, the Gaza COI invited claims of bias by broadening the temporal scope of its investigation beyond the 22-day conflict and by offering its own perception of the relevant history to the conflict. In so doing the Gaza COI exposed itself to claims that it harbored historical biases, which could be said to permeate the Goldstone Report and influence its subsequent legal analysis.<sup>138</sup> In this way, some of the substantive legal and

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<sup>137</sup> Truth Commissions, or even international courts, generally circumscribe the timeline that is to be considered.

<sup>138</sup> Moshe Halbertal, for example, has stated with respect to the historical review conducted by the Goldstone Report:

The honest reader of these sections cannot avoid the impression that their objective is to prepare a general indictment of Israel as a predatory state that is geared toward violating human rights all the time. It will naturally follow from such a premise that the Gaza operation

factual analyses of the Gaza COI was side-tracked by discussions of the Goldstone Report's arguably less relevant and less important historical narrative. Second, the Gaza COI could be seen as biased for broadening the geographic scope of the investigation to include the West Bank, an area that was not part of the military conflict at the time.

The Gaza COI saw its mandate as extending, at least in part, well beyond the scope of the 22-day conflict. In justifying the inclusion of an historical narrative to lead-off the Goldstone Report, the report asserted that "[a] review of the historical, political and military developments between the Six-Day War in 1967 and the announcement of the 'period of calm' . . . in June 2008, and of Israeli policies towards the Occupied Palestinian Territory is necessary to consider and understand the events that fall more directly within the scope of the Mission's mandate."<sup>139</sup> The Goldstone Report's subsequent historical analysis might generally be broken into three important sections found in chapters II and III.<sup>140</sup>

First, chapter II, part A, of the Goldstone Report provided about six pages on the history of the conflict between Israel and Palestine, dating back to the Six-Day War of June 1967 when the West Bank, including East Jerusalem as well as the Gaza Strip, were first captured by Israel.<sup>141</sup> However, it is not clear how much of this historical narrative is directly relevant or necessary to understanding "the events that fall more directly within the scope of the . . . mandate," which presumably includes the military activities that occurred during Operation Cast Lead and ultimately led to allegations of war crimes, crimes against humanity, and other serious human rights violations. For example, the Goldstone Report deigns to note little of the events between 1967 and 1977, other than the fact that "[m]ilitary orders' were used to rule the civil affairs of the Palestinian population" in the West Bank and Gaza Strip during this time, and that all of Jerusalem was annexed to the capital of Israel in 1980—an action

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was yet another instance of Israel's general wicked behaviour [sic]. These long sections are the weakest, the most biased, and the most outrageous in this long document. They are nothing if not political.

See Halbertal, *supra* note 58.

<sup>139</sup> *Goldstone Report*, *supra* note 5, ¶¶ 176–97.

<sup>140</sup> Although there are certainly other chapters in the Goldstone Report that provide historical background, these other chapters tend to be issue-centric in that they are focused on the relationship between specific policies or issues, such as the Israeli blockade of the Gaza Strip, and the subsequent military activity, rather than on offering a more broad, general historical contextualization of the conflict. Foremost among these other sections might be chapter XVII on "The Impact of the Blockade and of the Military Operations on the People of Gaza and their Human Rights." *Goldstone Report*, *supra* note 5, ¶¶ 1217–335. In general, these issue specific resorts to history provide more of the type of information and context that is necessary to understand the scope of the alleged human rights abuses found in the Goldstone Report than the broader historical contextualization offers.

<sup>141</sup> *Id.* at ¶¶ 177–97.

condemned by the UN.<sup>142</sup> This essentially brings us to 1977 when, as the Goldstone Report notes, the Likud Party was elected in Israel and the expropriation of Palestinian land was accelerated through the development of settlements, which, in turn, led to “growing tension and violence.”<sup>143</sup>

Temporally, the next event mentioned is the 1987 Palestinian intifada, which was neither contextualized nor explained in depth other than to say that it was “forcefully repressed by the Israeli security forces but lasted until 1993 . . . .”<sup>144</sup> The Oslo Accords are also briefly discussed, though little history or context is provided before it is mentioned that “[a] second popular uprising erupted in September 2000, after the then opposition leader Ariel Sharon conducted a controversial visit to the Temple Mount/al-Haram al-Sharif in Jerusalem. This second intifada set off an unprecedented cycle of violence.”<sup>145</sup> The Goldstone Report’s discussion of the violence that followed the second intifada is the first time in the historical review that one gets a sense of what it was like to live in the region at the time, or how much animosity and death had become a part of day-to-day life. Even then, the most relevant context is expressed simply by noting the number of deaths caused by suicide bombings or military conflict.<sup>146</sup> Otherwise, the Goldstone Report simply notes several major newsworthy events that took place in the 2000s, such as the construction of the “separation Wall,”<sup>147</sup> and the 2002 “road map to peace” proposed by the United States, European Union, Russia and the UN.<sup>148</sup> In fact, pre-2004, most of the information provided by the Goldstone is piecemeal, highly selective, and provides little context or detailed analysis that would help those unfamiliar with the dispute in attempting to understand the conflict in any meaningful way.

This trend does change slightly when the Goldstone Report offered its discussion of the “disengagement plan”, which took place in 2004 and provided for the “unilateral removal from the Gaza Strip of Israeli security forces”, though Israel maintained its control over borders, telecommunications, water, electricity, and several other aspects of day-to-day life.<sup>149</sup> Hamas is then mentioned for the first time,<sup>150</sup> though subsequent violence against

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<sup>142</sup> *Id.* at ¶ 177.

<sup>143</sup> *Id.* at ¶ 178.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at ¶ 180.

<sup>146</sup> *Goldstone Report, supra* note 5, ¶¶ 181–83.

<sup>147</sup> *Id.* at ¶ 185.

<sup>148</sup> *Id.* at ¶ 186.

<sup>149</sup> *Id.* at ¶ 187.

<sup>150</sup> *Id.* at ¶ 188.



Israel is associated with other groups like the al-Qassam Brigades or Israel as against Hamas. The Goldstone Report then makes note of Israel's imposition of economic sanctions on the Hamas-led Palestinian Authority, but no mention is made of why Israel thought this necessary. Rather, the general focus of the report's discussion of the period between 2004 and 2006 seems to be on Hamas' split from the Palestinian Authority and Fatah, as well as its subsequent democratic election. Finally, part A of chapter II of the Goldstone Reports concludes by mentioning several "Israeli military operations in Gaza and the West Bank" which occurred prior Operation Cast Lead,<sup>151</sup> and then by detailing the post-2006 violence between Israel and "Palestinian militants," reverting again to a form that basically lists several events and the number of deaths.

Second, in chapter II, part B, the Goldstone Report offered an historical overview of Israel's "pattern of policies and conduct relevant to the Occupied Palestinian Territory"<sup>152</sup> and a discussion of the "relevant political and administrative structures in the Gaza Strip and West Bank" which contributed to the conflict.<sup>153</sup> This discussion focused primarily on the settlements and the separation Wall built by Israel, the demolition of Palestinian homes and the evacuation of Palestinians, the Israeli policy of "closure," (which closes off certain areas and restricts the movement of goods and people) and, finally, various Israeli laws that treat differently Palestinians and "persons of Jewish race or descendency"—and provide benefits to the latter people.<sup>154</sup>

Third, chapter III of the Goldstone Report considered the events occurring between the "ceasefire" of 19 June 2008 and the commencement of military operations on 27 December 2008, and included a discussion of the right to self-determination and of various human rights, humanitarian and international criminal laws as they apply to the law of occupation.<sup>155</sup> Though there are a few hints of how the movement of goods and services into Gaza were restricted during this period, and the consequent economic and humanitarian impact, much of chapter III is nevertheless concerned with documenting the various violent acts perpetrated by all parties after the ceasefire and the number killed by this violence. Lists of events and tallies of the number of people killed stands in place of historical or contextual analysis.

The Goldstone Report's review of all of these particular facts that took place before the 27 December 2008 date—articulated by the Gaza COI's mandate as the day the hostilities

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<sup>151</sup> *Id.* at ¶¶ 193–4.

<sup>152</sup> *Id.* at ¶¶ 198–209.

<sup>153</sup> *Id.* at ¶¶ 210–22.

<sup>154</sup> *Goldstone Report*, *supra* note 5, ¶ 206.

<sup>155</sup> *Id.* at ¶¶ 223–310.

commenced—was necessarily bound to be a controversial exercise. In offering a thoughtful critique of the Goldstone Report, Moshe Halbertal argued:

The [C]ommission should not have dealt with the context leading to the war; it should have concentrated on its mandate, which concerned only the Gaza operation. By setting its findings about the Gaza war in a greatly distorted description of the larger historical context, it makes it difficult for Israelis—even of the left, where I include myself—to take its findings seriously.<sup>156</sup>

The historical context to which Halbertal is referring, in addition to the causes and instigations of the conflict between Israel and Palestinians, has been in dispute since at least 1947. Historical overviews by their very nature tend to provide an ideal terrain for locating partiality, particularly where the incentive exists for one or all of the subjects of the historical overview to find bias wherever it might exist. But the problem was not merely that the historical overview could be controverted; rather, the problem, according to Halbertal, was that the articulation of any perceived historical inaccuracies could taint the entirety of the Goldstone Report with allegations of bias and thus affect the credibility of all of its findings, especially those of specific violations of international law.

In offering the historical overview, certain choices were made by the Report's authors in terms of what period to use to commence the story, and what events to focus on. One can be sympathetic to the commissioners here in terms of the choices made. The Goldstone Report began its historical review with the Six Day war of 1967, which makes sense as a starting point given that the war marked the time when the Gaza Strip and West Bank, the geographical foci of the investigation, came under Israeli authority.

But the "relationship" did not necessarily begin at this time. One could have gone back to 1947 or to the 1949 Armistice demarcation where the "Green Line" was drawn between Israel and the Gaza Strip, administered until 1967 by Egypt, and the West Bank, administered during that same period by Jordan. By one account, the events that took place after the 2005 Israeli withdrawal from the Gaza Strip represent all the history that is "necessary" to understand the political and legal backdrop to Operation Cast Lead: "Operation Cast Lead cannot be understood, either legally or politically, in a historical vacuum. Thus, Section III [of the article] will sketch *the necessary backdrop to the recent fighting, beginning with Israel's 2005 withdrawal* of troops and settlers from the Gaza Strip . . . ."<sup>157</sup>

Note also that both the Goldstone Report and the above account strongly assert the need for an historical review in order to understand the legal context, but do not directly justify

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<sup>156</sup> See Halbertal, *supra* note 58.

<sup>157</sup> George E. Bisharat, et. al., *Israel's Invasion of Gaza in International Law*, 38 DENV. J. INT'L L. & POL'Y 41, 45 (2009).

this assertion – historical reviews of armed conflicts have become such an entrenched part of modern human rights fact-finding and the transitional justice movement that it is no longer necessary to justify resort to them. But this presumption should not stand. The assertion that an historical inquiry is necessary in order to understand the legal context of any conflict is contingent upon additional, largely unstated, presumptions, including the precise legal context one is analyzing. For example, it is hard to see how an historical context dating back 40-years is necessary to determine whether the use of white phosphorus in the vicinity of a school during Operation Cast Lead amounted to a war crime; here, the context of the deployment of the weapon could be a consideration, but surely whether or not the use of white phosphorus in that context amounts to a war crime does not depend upon the historic process of establishing settlements in the West Bank, or indeed on anything beyond the timeframe of the 22-day conflict.<sup>158</sup>

In terms of the specific problems that resulted from the broad historicizing undertaken in the Goldstone Report, the choice of which historical events to include and which to exclude led to a great deal of controversy and criticism. For example, the Goldstone Report's focus on the annexation of Jerusalem and the establishment of settlements in the 1970s and 1980s was not met with any similar focus on the formation of the Palestine Liberation Organization (PLO).<sup>159</sup> Indeed, the PLO was first mentioned as the leaders of a "widespread popular uprising—the intifada" which was "forcefully repressed by the Israeli security forces," while the settlements were described as having "continued unabated to this day."<sup>160</sup> It is worth noting here, however, that the Goldstone Report did make special note of the fact that, according to Israel, "154 suicide bomb attacks against Israeli civilians and military personnel took place between 1993 and 2007,"<sup>161</sup> and that "[t]he firing of rockets and mortars from Gaza into Israel began in 2001" with Israel reporting that "as many as 3,455 rockets and 3,742 mortar shells were fired into Israel from Gaza until mid-June 2008."<sup>162</sup>

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<sup>158</sup> This is not to say that the historical context is not relevant in the case of the Gaza COI or any other UN COI, only that the extent of its relevance and what time-frame is relevant are contextual decisions to be made contingent on other factors. The relevance of any history must be maintained by reference to what precisely that history is legally and politically relevant to demonstrating. Thus, the extent of the historical inquiry will necessarily depend on at least: (1) the extent to which the inquiry is about providing political, as opposed to legal, context in order to, for example, understand the broader dispute and potential solutions thereto; and, (2) the determination made as to the scope of the applicable law—meaning that if the COI is limited to considerations of war crimes then historical context may play a smaller role, while a COI that considers the purported breach of social and economic rights may need to resort to some greater degree to historical context in order to situate those breaches.

<sup>159</sup> *Goldstone Report*, *supra* note 5, ¶¶ 177–78.

<sup>160</sup> *Id.* at ¶ 178.

<sup>161</sup> *Id.* at ¶ 182.

<sup>162</sup> *Id.* at ¶¶ 183, 185, 201–03. The language used in such historical narratives can also be used to support claims of bias. For example, the Goldstone Report refers to the construction of the "Wall" starting in June 2002, which the Israelis prefer to call a barrier or fence. At the same time, there is no discussion of the controversy surrounding the purposes and actions of Hamas. As Halbertal notes, "[i]n the supposed context that the report analyzes, there is no

Perhaps more damning from the Israeli perspective is chapter II, part B, concerning “Israel’s pattern of policies and conduct relevant to the Occupied Palestinian Territory,” which goes into detail about Israel’s breach of the Geneva Conventions (particularly as concerns the Occupied Territory),<sup>163</sup> its building of settlements<sup>164</sup> and destruction of Palestinian-owned edifices,<sup>165</sup> and on the policy of “closure” described as “closures of entire areas and restrictions on the movement for goods and people on the basis of alleged security threats to Israel.”<sup>166</sup> No equivalent section concerning the PLO, Fatah, Hamas, or the Palestinian Authority’s “policies and conduct relevant to the situation in Gaza [or in Israel]” is included in the Goldstone Report. Yet, to Israel, years of terrorist conduct and “asymmetrical warfare” are certainly relevant to the evaluation of, for example, Hamas’ denials to the Gaza COI that it engaged in various forms of non-traditional and criminal methods of warfare during the 22-day conflict.

Of course, this being history, it might also be said that the Goldstone Report’s historical review benefitted Israel in some ways by omitting certain salient discussions. For example, despite Israel’s justifications for Operation Cast Lead, Henry Stiegman has argued that, after an initial breach of the ceasefire, Hamas:

offered to extend the truce, but on condition that Israel end its blockade. Israel refused. It could have met its obligation to protect its citizens by agreeing to ease the blockade, but it didn’t even try. It cannot be said, therefore, that Israel launched its assault to protect its citizens from rockets.<sup>167</sup>

It should also be noted that a relatively brief historical inquiry was sufficient to attract a high level of criticism. In the context of the Goldstone Report as a whole, the historical inquiry was highly circumscribed and, as is evident from the above overview of the relevant historical sections, did not purport to be comprehensive. Fewer than twenty pages were primarily devoted to an historical overview and, for the most part, discussion was restricted to the immediate past because the commissioners decided, “to focus primarily on events,

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mention of Hamas’s role and its ideology as reflected in its extraordinary charter, which calls for the destruction of Israel and the genocidal killing of Jews.” See Halbertal, *supra* note 58, at 355.

<sup>163</sup> *Goldstone Report*, *supra* note 5, ¶¶ 198, 206.

<sup>164</sup> *Id.* at ¶¶ 198–99.

<sup>165</sup> *Id.* at ¶ 200.

<sup>166</sup> *Id.* at ¶ 204.

<sup>167</sup> See Stiegman, *supra* note 18, at 390.

actions or circumstances occurring since 19 June 2008, when a ceasefire was agreed between the Government of Israel and Hamas.”<sup>168</sup>

On the one hand, it seems that due to the indeterminacy of the mandate, decisions were made by the commissioners as to the contents of the report that exposed them (and, by extension, their findings and recommendations) to claims of bias in light of the extraordinarily heightened controversy that surrounds the history of the region. On the other hand, perhaps the commissioners and the Goldstone Report would have been subject to such scrutiny and controversy regardless of the mandate; certainly it was the case that a relatively short historical review resulted in a great deal of controversy. Either way, it is pertinent to ask whether this level of historicizing is in fact necessary for a UN COI such as this one and to what extent historical reviews can or do contribute to controversy and detract from COIs’ fact-finding.<sup>169</sup>

For its part, after offering an historical background to the conflict, the Gaza COI noted that its mandate was not primarily historical but, to repeat, was “to focus primarily on events, actions or circumstances that had occurred since 19 June 2008, when a ceasefire was agreed between the Government of Israel and Hamas.”<sup>170</sup> If this is accurate and the Gaza COI was not about a transitional justice-inspired search for some broader, historical truth, then it would seem that the commissioners unnecessarily exposed themselves and the Goldstone Report to conflict and allegations of bias, thereby detracting from their legal work and findings. The commissioners were themselves directly implicated in the purported bias not only because they provided the historical overview, but also because they thought it necessary to provide such an overview in the first place. Had the mandate explicitly required such an overview, the commissioners could have at the very least claimed that it was not their decision as to whether or not they considered the controversial history. In future inquiries, if such historical background is necessary, perhaps it is better to explicitly address this issue at the outset of the COI and to specify the temporal scope of the inquiry clearly and openly in the mandate so that the commissioners are not negatively associated with potential allegations of bias relating to the temporal scope of the investigation.

The appropriateness of the approach taken by the Gaza COI depends upon one’s understanding of the general purposes of such large-scale COIs and of what specific purpose(s) the Gaza COI might realistically be able to achieve, which will also influence the appropriate scope of the COI and what legal violations should be considered. Publicly, as represented by NGO and media reports from the time around Operation Cast Lead, the

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<sup>168</sup> *Goldstone Report*, *supra* note 5, at ¶¶ 12, 153, 223.

<sup>169</sup> A distinction might be drawn here between a war crimes COI and a truth commission. For a discussion of the distinction between COIs and truth commissions. See generally HAYNER, *supra* note 9; and FREEMAN, *supra* note 9.

<sup>170</sup> *Goldstone Report*, *supra* note 5, at ¶¶ 12, 153, 223.

primary main-stream concern regarding the conflict was about the conduct of the parties during Operation Cast Lead, with the larger ongoing conflict looming in the background. While it may have been that the military actions were seen as the final straw, as the culmination of a long series of events that produced the need for a consideration of the modern policies and practices of all parties starting at some prescribed period decades ago, it is unclear whether such historicizing is what was desired or needed by the large-scale Gaza COI. It is even less clear whether the Gaza COI, constituted as it was without the involvement of the parties, was capable of effectively undertaking such an historical task. The Goldstone Report acknowledged this limitation when it noted that the Report focused primarily on post-19 June 2008 events, despite the “broad mandate”: “[W]hile the Gaza events must be seen in the context of the overall conflict and situation in the Occupied Palestinian Territory, in view of the limited time and resources available, it would be beyond its abilities to focus on conduct or actions that took place long before the military operation of December-January.”<sup>171</sup>

Moreover, as was noted above, the geographic scope of the Gaza COI was also left open to interpretation. As a result, the Gaza COI did not limit itself to an investigation solely of the Gaza Strip, but considered that its mandate required that it extend its inquiry beyond Gaza to “include restrictions on human rights and fundamental freedoms related to the strategies and actions of Israel in the context of its military operations.”<sup>172</sup> According to the Goldstone Report, “[d]evelopments in Gaza and the West Bank are closely interrelated [and] an analysis of both is necessary to reach an informed understanding of and to report on issues within the Mission’s mandate.”<sup>173</sup> Specifically, the Gaza COI considered as relevant the Israeli strategies related to the West Bank (including east Jerusalem), which included detention of Palestinians in Israeli prisons, violations of the right to free movement, and restrictions upon freedom of assembly and expression by the Palestinian Authority. A more precise mandate would have assured greater clarity with respect to the scope of the investigation and whether it was to include the West Bank, which is geographically separated from the Gaza Strip by Israel and which was not invaded during the December 2008–January 2009 military incursion.

Geographically expanding the scope of the inquiry brings into question whether the Gaza COI process was only or primarily about the 22-day military offensive and the crimes committed during that time—whether it was about accountability and ending impunity in the context of military conflict—or whether the Gaza COI was part of a larger transitional justice-

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<sup>171</sup> *Id.* at ¶ 153. Further, the COI also took “into consideration matters occurring after the end of military operations that constitute continuing human rights and international humanitarian law violations related to or as a consequence of the military operations, up to 31 July 2009”. *Id.* at ¶¶ 12, 153.

<sup>172</sup> *Goldstone Report*, *supra* note 5, ¶ 1373.

<sup>173</sup> *Id.* at ¶ 1374.

inspired project to contextualize and historicize the situation and elaborate a more comprehensive picture of both the historical conflict and the breaches of international human rights and humanitarian law.<sup>174</sup> Either way, the approach taken by the Gaza COI and the international community led to deeper Israeli disengagement from and consternation towards the Gaza COI and, perhaps, the Middle East peace process.<sup>175</sup>

#### *IV. Bias and the Choice of Incidents to Investigate*

The Gaza COI invited further claims of bias by focusing only on select incidents it deemed as representative of patterns of abuse without providing much justification for the selection of said incidents. According to the Goldstone Report, relevant incidents “committed in the context of the . . . military operations” were considered, including a review of “restrictions on human rights and fundamental freedoms relating to Israel’s strategies and actions . . . .”<sup>176</sup> While the Goldstone Report did “not purport to be exhaustive in documenting the very high number of relevant incidents that occurred in the period covered by the Mission’s mandate . . . the Mission consider[ed] that the report [was] illustrative of the main patterns of violations.”<sup>177</sup>

However, the Goldstone Report did not explain how the incidents reviewed within the Report were determined to be “illustrative” of a broader pattern of conduct, or how it chose as between incidents of a similar “type”.<sup>178</sup> Furthermore, the Gaza COI did not explain how it ensured that the incidents that it chose to investigate that otherwise seemed to be illustrative of a general pattern of behavior would be representative in terms of the ultimate legal findings (*i.e.*, in terms of whether or not a criminal wrong was likely committed). So, for example, while two incidents might look similar—they both involve an attack on a

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<sup>174</sup> One important purpose of truth commissions is to create a shared sense of history, community and belonging, to provide a history that can be relied upon as a source for understanding and for confronting problems that are better understood in their historical context. A corollary to this objective is to create a shared (though potentially disputed) understanding of the history that has plagued the nation or region and offer a cathartic outlet for the dispute, which flows from knowing the truth and dealing with the past, which it is said allows the nation to move productively toward its future. Arguable, the political and social circumstances that obtain in the Middle East at this time are not conducive to accomplishing such an objective. In any event, it was unclear that this was indeed the objective.

<sup>175</sup> As was noted, Israel did not grant access to the West Bank. See, *e.g.*, *Goldstone Report*, *supra* note 5, ¶ 1376.

<sup>176</sup> *Goldstone Report*, *supra* note 5, ¶ 14.

<sup>177</sup> *Id.* at para. 16.

<sup>178</sup> So, for example, the Goldstone Report notes that the “Israeli Government alleges that ‘ Hamas abused the protection accorded to places of worship, making a practice of storing weapons in mosques’”. But then the report only notes the investigation of one Mosque, investigated seemingly because it was attacked by Israel, and notes that “the Mission was not able to investigate the allegation of the use of mosques generally by Palestinian groups for forming weapons.” No explanation is given as to why one of the most serious and prevalent of Israeli accusations was not further investigated. See *Goldstone Report*, *supra* note 9 at paras. 464–65.

hospital, for example—one incident may have resulted by accident while the other resulted from a criminal intent to harm civilians. As concerns these two incidents, one might well be “illustrative” of the other in terms of appearances, but the criminal findings cannot necessarily be generalized from one to the other. For the purposes of a UN COI, it is necessary that the incidents chosen not only fit a pattern of behavior, but also that they are likely to offer generalizable findings; it is not clear if or how this was done in the Goldstone Report. By contrast, Human Rights Watch generally notes in its reports how the incidents investigated came to the organization’s attention and how the incidents were subsequently chosen to be included in a specific report, as it did with respect to its investigations into Operation Cast Lead.<sup>179</sup>

As a result of the uncertainty surrounding how the Gaza COI chose the incidents to investigate that it did, hardline critics such as Dershowitz were able reasonably to ask why the use of the Shifa hospital, which Israel contends served as a main base of Hamas’ military operations, was not investigated as a possible war crime while investigations took place regarding other hospitals.<sup>180</sup> Or how the Gaza COI was unable to conclude whether mosques were used for military purposes when it only investigated one mosque alleged by Israel to be used by Hamas for such purposes?<sup>181</sup> Such criticism is enhanced by the fact that, unlike the Goldstone Report, Human Rights Watch did in fact find that “[d]uring the IDF offensive in Gaza, Hamas and other Palestinian armed groups used civilian structures to engage Israeli forces and to store arms . . . . They also booby-trapped and dug tunnels under civilian structures.”<sup>182</sup> In other words, the Goldstone Report’s selectivity may have caused it to come to findings contrary to those of Human Rights Watch.

It appears that the incidents involving hospitals and mosques that were investigated by the Gaza COI were selected for inclusion in the Goldstone Report because Israel—rather than Palestinian forces—was responsible for the bombings. As such, the Gaza COI was able to “double up” by investigating incidents where allegedly crimes were committed by both sides. However, this does not explain why other mosques or hospitals claimed by Israel to hold Palestinian arms or armed combatants were not also investigated. Thus, the Gaza COI’s approach to choosing which incidents to investigate combined with the Commission’s failure to explain transparently how this process took place gave Israel ammunition to condemn the Goldstone Report for its “political”—that is, its biased and/or arbitrary—selection of incidents,<sup>183</sup> and to label the Report as contrary to the preponderance of evidence as

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<sup>179</sup> *Rain of Fire*, *supra* note 21, at 6.

<sup>180</sup> Dershowitz, *supra* note 58, at 39.

<sup>181</sup> *Id.* (citing the *Goldstone Report*, *supra* note 5, ¶ 465).

<sup>182</sup> See *I Lost Everything*, HUMAN RIGHTS WATCH 5 (May 13, 2010), <http://www.hrw.org/en/node/90317/section/1>.

<sup>183</sup> See, e.g., *Initial Israeli Response to Gaza COI*, *supra* note 31, ¶ 18.



established by other sources such as third-party news reports and the aforementioned Human Rights Watch findings.

Israel's concern to the Gaza COI's choice of incidents was that the Gaza COI seemed to be making the type of discretionary decisions commonly associated with the administrative state, meaning the type of decisions that are based upon discretionary determinations of what would be the most efficacious approach to investigating. This discretionary approach can be contrasted with the type of decision-making ordinarily associated with law or legality, specifically, where the decision-makers act with reference to clear, transparent rules and/or principles with the intention of offering a fair, impartial and fully reasoned legal solution. Israel's argument supposes that discretionary decisions are necessarily political and thus rely on the biases of the decision-makers (commissioners); to Israel, in the context of a war crimes inquiry, the exercise of such discretion without reference to rules or offering justificatory explanations for its actions undermines the legitimacy of the Gaza COI's process and the quality of its findings.

Moreover, such criticisms speak to the useful purpose that UN COIs might play. Given the short timeframe allotted to the Gaza COI to complete its mission—and indeed to most UN COIs to complete their missions—as well as the mandate requiring the “urgent dispatch” of the Gaza COI and most other UN COIs, some selection will be necessary in terms of including analysis of some incidents and excluding others. Presumably this explains why the Gaza COI investigated incidents that might speak to legal wrongs committed by both sides in the case of the hospital and mosque investigations. The time and resources do not exist to investigate all allegations of abuse in such situations and thus UN COIs cannot, in similar situations, hope to offer a comprehensive historical overview of a conflict or displace other transitional justice tools that might offer a greater opportunity for witnesses and victims to tell their stories.

Acknowledging the need to choose between incidents and that the effort was made to provide a picture of the pattern of abuses that occurred is a good first step toward ensuring a fair, transparent process. However, providing a precise explanation as to the process behind such decision-making promotes clarity and transparency, and, by extension, the overall appearance of the decision-making process seems considerably less political. Furthermore, the process of debating rules—in this case with respect to the selection of incidents— leads to better outcomes. An open debate and articulation of the rules of operation requires an engagement with the standards, principles that might be applied, and any available alternatives, a process which tends to require that reasoned argument determine the chosen standard.

#### D. Due Process Considerations in Relation to the Goldstone Report

Criticism of the Goldstone Report extended beyond issues of bias and into issues of due process as well. Indeed, it should go without saying that fundamental to determining whether any UN COI report is viewed as legitimate (impartial, credible and reliable) is how it deals with issues of due process. Unfortunately, UN COIs have long been criticized for their general failure to meet sufficient standards of due process.<sup>184</sup> Two sections of the Goldstone Report—those relating to evidence-gathering and the corroboration of evidence—are particularly relevant to the discussion of due process and legitimacy of UN COI reports, and these sections also indicate where some of these problems lie and how they might be overcome in the future.

##### I. Evidence-Gathering and Corroboration of Evidence

The Gaza COI viewed its approach to information-gathering as “inclusive”<sup>185</sup> and based on “international investigative standards developed by the United Nations.”<sup>186</sup> These methods of information gathering included:

(a) a review of reports from different sources; (b) interviews with victims, witnesses and other persons having relevant information; (c) site visits to specific locations in Gaza where incidents had occurred; (d) the analysis of video and photographic images, including satellite imagery; (e) the review of medical reports about injuries to victims; (f) the forensic analysis of weapons and ammunition remnants collected at incident sites; (g) meetings with a variety of interlocutors; (h) invitations to provide information relating to the Mission’s investigation requirements; (i) the wide circulation of a public call for written submissions; [and] (j) public hearings in Gaza and in Geneva.<sup>187</sup>

Three field visits were conducted between the end of May and the beginning of July 2009—two to the Gaza Strip and one to Amman. These visits included investigations of thirty-six incident sites in the Gaza Strip.<sup>188</sup> In addition, several members of the Gaza COI’s secretariat

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<sup>184</sup> See, e.g., Thomas M. Franck & H. Scott Fairley, *Procedural Due Process in Human Rights Fact-Finding by International Agencies*, 74 AM. J. INT’L L. 408 (1980).

<sup>185</sup> *Goldstone Report*, *supra* note 5, at 15, ¶ 18.

<sup>186</sup> *Id.* at ¶ 158. See also *Goldstone Report*, ¶ 161 (“The methods adopted to gather and verify information and reach conclusions were for the most part guided by best practice methodology developed in the context of United Nations investigations.”).

<sup>187</sup> *Id.* at ¶ 18.

<sup>188</sup> *Id.* at ¶¶ 21, 139, 159(b).

staff were present in Gaza during that same timeframe to conduct additional field investigations.<sup>189</sup> A total of 188 individual interviews were conducted,<sup>190</sup> primarily in person, when possible, or alternatively by telephone.<sup>191</sup> The Gaza COI also met with a number of civil society organizations (including women's organizations, NGOs, bar associations) in addition to meeting with military analysts, journalists, UN representatives, the Head of the United Nations Board of Inquiry into incidents in Gaza, and diplomatic representatives.<sup>192</sup>

A call for submissions was also sent to "all interested persons and organizations"<sup>193</sup> and "notes verbales" were sent to "all United Nations organs and bodies and Member States of the United Nations."<sup>194</sup> The two public hearings held by the Gaza COI took place over two days in Geneva during June and July 2009.<sup>195</sup> The Gaza COI reviewed over 300 reports, submissions, and other documents, 30 videos, and 1,200 photographs.<sup>196</sup>

The Goldstone Report noted that the purpose of the public hearings "was to enable victims, witnesses and experts from all sides to the conflict to speak directly to as many people as possible in the region as well as in the international community."<sup>197</sup> The hearings were broadcast live, and priority was given to victims and other "affected" communities.<sup>198</sup> The content of the hearings included the discovery of facts in addition to "legal and military matters."<sup>199</sup>

In terms of the Goldstone Report itself, in theory primary (otherwise termed "first-hand" or "direct") evidence was given priority to establish the Commission's findings: "In establishing its findings, the Mission sought to rely primarily and whenever possible on information it gathered first-hand."<sup>200</sup> Secondary evidence gathered by those other than the Gaza COI

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<sup>189</sup> *Id.* at ¶¶ 5, 133, 139.

<sup>190</sup> *Id.* at ¶¶ 19; 159(b).

<sup>191</sup> *Id.* at ¶ 159(b).

<sup>192</sup> For a complete list see *Goldstone Report*, *supra* note 5, ¶ 137.

<sup>193</sup> *Id.* at ¶¶ 6; 140.

<sup>194</sup> *Goldstone Report*, *supra* note 5, ¶ 140.

<sup>195</sup> *Id.* at ¶¶ 7, 141.

<sup>196</sup> *Id.* at ¶¶ 19, 160. The 300-plus reports amounted to over 10,000 pages according to the Goldstone Report.

<sup>197</sup> *Id.* at ¶ 22.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Goldstone Report*, *supra* note 5, ¶¶ 23, 168.

team, including media and interest group reports and affidavits, was used in the Goldstone Report, in theory at least, “primarily as corroboration.”<sup>201</sup>

Accessing primary evidence was often difficult for the Gaza COI. As has been noted, Israel did not cooperate with the Gaza COI<sup>202</sup> and, “[b]y refusing to cooperate with the Mission, the Government of Israel prevented it from meeting Israeli Government officials, but also from travelling to Israel to meet Israeli victims and to the West Bank to meet Palestinian Authority representatives and Palestinian victims.”<sup>203</sup> Consequently, “denial of access to Israel and the West Bank resulted in the decision to hold hearings of participants from Israel and the West Bank in Geneva.”<sup>204</sup> The Palestinian Authority and the Permanent Observer Mission of Palestine to the United Nations did offer cooperation and support,<sup>205</sup> and access to the Gaza Strip was granted by Egypt.<sup>206</sup> Still, representatives of the implicated Palestinian armed groups were not agreeable to meeting.<sup>207</sup>

The Gaza COI submitted “comprehensive lists of questions to the Government of Israel, the Palestinian Authority and the Gaza authorities in advance of completing its analysis and findings”, but did not receive a reply from Israel.<sup>208</sup> No note is made of whether an opportunity to respond to the Gaza COI’s specific findings was given to the parties before the final version of the Goldstone Report was released to the public.

Thus, despite the extensive research undertaken by the Gaza COI and its attempts to access relevant information and to acknowledge the interests of a variety of interested groups by way of interviews or site inspections, there was nevertheless an issue with accessing information that might have been provided at the state level, namely by Israel.

Despite the fact that Israel chose not to participate or make its people available for interviews or its territory available for inspection, one criticism of the Goldstone Report was that: “The testimonies in the Goldstone Report are Palestinian testimonies . . . . This commission that describes its mission as fact-finding treats the missing Israeli testimonies as if they are Israel’s problem, rather than a methodological and empirical shortcoming in the

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<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at ¶¶ 8, 20.

<sup>203</sup> *Id.* at ¶ 20.

<sup>204</sup> *Id.* at ¶ 22.

<sup>205</sup> *Goldstone Report*, *supra* note 5, ¶¶ 9, 145.

<sup>206</sup> *Id.* at ¶ 144.

<sup>207</sup> *Id.* at ¶ 441.

<sup>208</sup> *Id.* at ¶ 26.

report itself.”<sup>209</sup> As Sydney D. Bailey noted with regard to the totality of the first 25-years of UN human rights fact-finding: “The vicious circle is familiar. UN bodies are not granted facilities for impartial fact-finding. As a consequence, their reports are one-sided. The one-sided nature of UN reports is then given as a reason for denying UN bodies the facilities for performing the tasks entrusted to them.”<sup>210</sup> Thirty-five years after Bailey first noted this “vicious circle”, it appears that it continues to go round. When UN COIs are denied territorial access, the respective COI reports will necessarily be less comprehensive. By extension, the nation that has refused territorial access may be expected to attempt to impugn the credibility and reliability of the respective report. Depending upon what the UN COI is attempting to prove, the uncooperative state might even have a legitimate reason for doing so—although, of course the uncooperative nation contributed to the situation.

In any event, with regard to the information it was able to receive, the Goldstone Report asserted that its “final conclusions on the reliability of the information received were based on its own assessment of the credibility and reliability of the witnesses it met” in addition to, “verifying the sources and methodology used in the reports and documents” received, and “cross-referencing” received information.<sup>211</sup> In evaluating the probity and reliability of the evidence, the Gaza COI considered “the demeanour of witnesses, the plausibility of their accounts and the consistency of these accounts with the circumstances observed by it and with other testimonies.”<sup>212</sup> It also attempted, insofar as possible, “to speak with the authors of the documents in order to ascertain the methodologies used and to clarify any doubts or problems.”<sup>213</sup>

This approach raises long-standing and in many ways still unanswered questions regarding what COIs should or could use as corroborating material, and how much verification or cross-referencing is necessary. The Goldstone Report did not go far in shedding light on how the corroboration and verification of information received by UN COIs was properly and effectively achieved. Instead, the Goldstone Report simply noted that, “the [secondary material] it reviewed and to which it refers are credible and based on sound methodologies.”<sup>214</sup> What makes a sound methodology, however, is not explicated to allow others to scrutinize the veracity of this claim. Virtually all of the reports and secondary sources produced by NGOs and the press that were mentioned in the Goldstone Report were

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<sup>209</sup> See generally Halbertal, *supra* note 58.

<sup>210</sup> Bailey, *supra* note 34, at 266.

<sup>211</sup> *Goldstone Report*, *supra* note 5, ¶ 24.

<sup>212</sup> *Id.* at ¶ 170.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at ¶ 1378.

found by Gaza COI to be fully credible and reliable.<sup>215</sup> Astonishingly, the Goldstone Report also reached the same conclusion regarding everyone the Commission interviewed as a witness and whose testimony was included in the final report. Thus, one might reasonably ask whether the Gaza COI only selected the reliable reports and witnesses for inclusion and whether it excluded information that the Commission found to be unreliable—or rather whether it was leaving out reports that offered assertions contrary to the Goldstone Report's findings?

Moreover, many (perhaps most) of the statistics and documentation contained in the Goldstone Report are traced to a single source—either a report or an interview with a witness.<sup>216</sup> Although the Goldstone Report asserted that secondary materials were used mostly to corroborate primary (first-hand) evidence, chapter VII, for example, is one of several chapters that rely on a great variety of the secondary materials to substantiate findings of fact, usually in the absence of direct evidence. These secondary materials came from other UN bodies, such as the Office for the Coordination of Humanitarian Affairs, as well as from the Israeli humanitarian NGO B'Tselem and various press releases, though some information also came from other NGO reports and sources. In the chapters that focus on the West Bank (chapters XX-XXIII), most factual assertions that were supported by secondary materials referred to only one external report, or possibly, in fewer circumstances, two; rarely were more than two sources cited to substantiate a factual assertion, and generally multiple sources meant reference to multiple press stories—that is, to multiple unverified secondary sources. This is, of course, explained by the fact that the Gaza COI was not able to visit the West Bank.<sup>217</sup> But, again, one must then question whether it was worth extending the geographic scope of the Gaza COI if it lessened the overall quality and veracity of the findings and enabled the Goldstone Report's detractors to question the evidentiary standards of the findings based, at least in part, on its peripheral review of events in the West Bank.

Human Rights Watch generally looks for three independent witnesses to corroborate its findings of fact.<sup>218</sup> The UN's Democratic Republic of Congo (DRC) Mapping Exercise—a UN COI by another name—required at least two independent sources to corroborate each of

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<sup>215</sup> The one exception being that the Palestinian armed groups' websites were found unreliable in that they exaggerated the commission of their own crimes or their "successes" as against Israel. In other words, the exception is not a third party report, but a finding that one of the parties to the dispute was unreliable in its *admissions* that it had committed a crime. *Id.* at ¶ 458.

<sup>216</sup> See, e.g., *Goldstone Report*, *supra* note 5, n.257–64.

<sup>217</sup> Chapter VIII of the Goldstone Report also relied on secondary sources to a greater extent than elsewhere in the report because it could not find first-hand witnesses to interview in many cases. *Id.* at ¶ 141.

<sup>218</sup> See, e.g., *Rain of Fire*, *supra* note 21, at 6.

the over 600 violent incidents listed with at least one being a primary source.<sup>219</sup> The DRC's report stated, "[i]ncidents not corroborated by a second independent source have not been included in this report, even in cases where the information came from a reliable source. Such incidents are, however, recorded in the database."<sup>220</sup> In contrast, it is unclear what level of corroboration was required by the Gaza COI, both in terms of how much corroboration, and if it mattered whether it was primary evidence like witness testimony or a secondary report. This is not to say that further corroboration was required to make the information communicated in the Goldstone Report reliable, or that it was practicably possible to maintain a higher standard; rather, the Goldstone Report did not consistently make clear its standards for verifying the reliability of evidence received.

In general these concerns represent a problem that is broader than just the issues raised by the Gaza COI's practices. There is a need in the academic literature for a discussion of what is possible, typical, or ideal in terms of human rights fact-finding in such circumstances. For example, Diane Orentlicher notes that, "[t]ypically . . . careful NGOs do not cite press accounts unless their research staff have reason to credit the report."<sup>221</sup> It would seem, then, that UN COIs should follow a similar rule, or at least engage in a discussion of why or why not such a standard was followed. Other relevant questions were not even posed by the Goldstone Report, let alone answered directly or implicitly, including: Is there a necessary difference between UN reports and other reports in terms of credibility? Should the UN COI be prepared to defend a report upon which it relies should questions arise, or should it take the proactive step of identifying in its report why secondary materials explicitly relied upon by the COI were found to be credible? Answers to these questions would not only help assess the credibility of future reports, but also possibly help determine the scope of the inquiry.

Such questions are particularly salient in the context of large-scale UN COI reports because such reports are widely circulated and read in the halls of international power. If foreign offices or other international bodies are relying upon UN COI reports to support sanctions regimes or initiate possible criminal investigations, it should be asked to what extent these foreign offices or other bodies are relying on the commissioners of UN COI reports to have already verified the secondary materials used to substantiate findings. If foreign offices are

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<sup>219</sup> The DRC's report states: "each reported incident had to be corroborated by at least one independent source in addition to the primary source in order to confirm its authenticity." See *DRC Mapping Exercise*, *supra* note 6, ¶¶ 117, 10. Further, the Panel of Experts in Angola required direct evidence were it to name a responsible political official of wrongdoing (violation of sanctions) and corroborating evidence by at least two sources for it to be deemed credible. See Luciana T. Ricart, *Due Process of Law in the Fact-Finding Work of the Security Council's Panels of Experts: An Analysis in Terms of Global Administrative Law*, 4 *Inst. Int'l L. & Just. Emerging Scholars Paper* 8 (2008), <http://www.iilj.org/wp-content/uploads/2016/08/Ricart-Due-Process-of-Law-in-the-Fact-Finding-work-of-the-Security-Council%E2%80%99s-Panels-of-Experts-2008.pdf>.

<sup>220</sup> *DRC Mapping Exercise*, *supra* note 6, ¶ 106.

<sup>221</sup> D. Orentlicher, *Bearing Witness: The Art and Science of Human Rights Fact-Finding*, 3 *HARV. HUM. RTS. J.* 83, 130 (1990).

taking the UN COI reports at face value and not offering deeper scrutiny into their findings or the sources supporting their findings (which is likely the case based on this author's discussions with diplomats in Canada and elsewhere), this presents an opportunity to inform foreign offices that they should be giving greater scrutiny to secondary materials used to buttress UN COI conclusions. Alternatively, the UN COI reports themselves should provide an explanation as to why, in particular, the secondary materials used to make findings or corroborate evidence are credible and reliable.

The tendency in the Goldstone Report was to assert that the various sources of evidence that it relied upon were "credible and reliable" without fully explaining what these terms might mean or how they were to be contextually interpreted. Instead, generally the Goldstone Report either simply asserted reliability and credibility, or explained that the Commission relied on its understanding of applicable UN standards to guide it in making its determinations. Yet these UN standards are not consistently identified or—at least— not pinpointed in the Goldstone Report. It follows that little discussion or argument is available extrapolating how rules and principles found in UN standards were interpreted in the context at hand to make determinations regarding the inclusion or exclusion of evidence. It is hard to imagine any report viewed through a legal lens—such as the lens of an administrative lawyer—that would fail to clearly identify the standards upon which its decisions rest and grapple with how to apply those standards to the context at hand.

Finally, the Goldstone Report failed to explain several other issues with respect to the integrity of the evidence used to substantiate its findings, including: did the process of verifying forensic or other evidence involve scientific testing that might be scrutinized? How many commissioners had to concur to come to a legal finding? And finally, were records kept of the processes used and information gathered? Answers to such questions are necessary before one can gauge the reliability and credibility of a UN COI report. The Goldstone Report should have provided these answers, as should future UN COIs. Once again, if UN COIs are to be viewed as legal endeavors—as being infused with and legitimized by adherence to basic legal principles—the Commissions should, at the very least, provide a reminder of the benefit of offering transparent justifications for its findings and the evidentiary bases upon which these findings rested.

## *II. Language, Precision and the Standard of Proof*

While no formal standard of proof was identified by the Goldstone Report and the informational verification and cross-referencing processes were not explained, the Gaza COI did explain that it did not "pretend to reach the standard of proof applicable in criminal trials,"<sup>222</sup> and that, instead, the aforementioned processes of verification and cross-

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<sup>222</sup> *Goldstone Report*, *supra* note 5, ¶¶ 25, 172. Goldstone has also "emphasized that his conclusion that war crimes had been committed was always intended as conditional." *See also* Beckerman, *supra* note 119.



examination were used to establish a “sufficient” level of credibility and reliability.<sup>223</sup> The Darfur COI established the standard of “reasonable suspicion,”<sup>224</sup> which is now often used by UN COIs including the 2010 DRC COI Mapping Exercise,<sup>225</sup> the 2011 Syrian COI,<sup>226</sup> and the 2015 Gaza COI.<sup>227</sup> Interestingly, Goldstone Report commissioner Hina Jilani also served as a commissioner on the Darfur COI, but has not explained why she supported the application of two different standards at the two COIs.

The phrase “reasonable suspicion” as used by the Darfur COI has at least two advantages over “sufficiently credible and reliable” as used by the Goldstone Commission. First, because the reasonable suspicion standard now has a history of use in UN COIs, it can be more readily understood and interpreted by reference to past practice. It is understood as a term of art employed by UN COIs to signal a tentative finding of fact. Second, the Darfur COI’s approach to the standard of proof is qualified by the term “suspicion,” which is necessarily tentative. In contrast, a “sufficient” level of reliability and credibility begs several questions, including what it is sufficient for, and how one knows when evidence has become “sufficiently” credible and reliable.<sup>228</sup> Moreover, the Goldstone Report did not clarify any of the shortcomings inherent in the terminology employed. As a result, the lack of specificity as to what constitutes “sufficient” in the Goldstone Report, and the lack of subsequent engagement with how the term was being interpreted, could be seen as problematic, particularly given the fact that the Gaza COI purported to make legal findings on international human rights and more specifically humanitarian and criminal law, and that it recommended criminal investigations.

Also problematic is the fact that although the Goldstone Report claimed that it did not use a “beyond a reasonable doubt” standard of proof, the language of the Goldstone Report

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<sup>223</sup> See generally Beckerman, *supra* note 119. See also *Goldstone Report*, *supra* note 5, ¶ 171.

<sup>224</sup> Note also that it may be seen to be taken from NATO military parlance. This has its advantages and disadvantages, but it suggests that military personnel – often associated with UN war crimes COIs at various levels and to various degrees—not only understand the standard of proof, at least at some level, but also do not relate it to a criminal standard as used by courts of law.

<sup>225</sup> See *DRC Mapping Exercise*, *supra* note 6, ¶ 7 (“The level of evidence required was naturally lesser than would be expected from a case brought before a criminal court. The question was therefore not one of being satisfied beyond [a] reasonable doubt that a violation was committed but rather of *reasonably suspecting* that the incident did occur.” [Emphasis added.]) See also *DRC Mapping Exercise*, *supra* note 6, ¶ 101.

<sup>226</sup> See *Syria COI*, *supra* note 6, ¶ 5. See generally U.N. Doc. S/RES/1564, *supra* note 4.

<sup>227</sup> *Gaza 2015 COI*, *supra* note 5, ¶ 19. Helpfully, the COI went on to explain this in a little more detail: “This means that the commission, on the basis of reliable and consistent information, was satisfied that a reasonable and ordinarily prudent person would have reason to believe that such an incident or pattern of conduct had occurred.”

<sup>228</sup> In this way it raises the question: When did the available evidence become sufficient to prove the case? When it was sufficient!

often tells a different story: “In many cases . . . acts entailing individual criminal responsibility *have been* committed. In all of these cases the Mission *has found* that there is *sufficient information to establish the objective elements of the crimes in question.*”<sup>229</sup> The Goldstone Report’s tendency to imply that its findings were definitive was particularly true with respect to its recapitulation of the inquiry’s legal findings, found in the concluding chapter XXX.<sup>230</sup> To take but one example: “The [Israeli] operations *were* in furtherance of an overall policy aimed at punishing the Gaza population for its resilience and for its apparent support for Hamas, and possibly with the intent of forcing a change in such support. The Mission considers this position to be *firmly based in fact* . . . .”<sup>231</sup> The Report of an Expert Meeting on the Gaza COI, organized by Chatham House, noted that had the Goldstone Report’s conclusions been “presented as *prima facie* findings rather than final conclusions, the Report would have been stronger.”<sup>232</sup>

The language of the Goldstone Report muddies the standard of proof in other ways. The Gaza COI made no hard findings relating to many of the crimes purportedly perpetrated by Hamas. Even on the most obvious of Hamas’ alleged crimes, the Goldstone Report often used tentative and noncommittal language such as “were” Hamas to, for example, launch rockets and mortars at the population of southern Israel, this action “would” constitute a war crime as a failure to distinguish between military targets and civilians.<sup>233</sup> Such semantics have caused some confusion amongst scholars given the Commission’s uneven application of such language in the Goldstone Report. As some commentators have noted, Israel was found to “have” committed certain crimes, whereas Hamas “would” be responsible.<sup>234</sup> The

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<sup>229</sup> *Goldstone Report*, *supra* note 5, ¶¶ 25, 172. [Emphasis Added.] “Statements by political and military leaders prior to and during the military operations in Gaza leave little doubt that disproportionate destruction and violence against civilians were part of a deliberate policy.” *Id.* at ¶ 1215. As but one example, the *mens rea* of recklessness was met in regard to the Israeli shelling of the UNRWA field office due to the fact that shelling continued after the Israeli forces were made aware of the existence of the compound, the hazardous (explosive material) contained in it. *Id.* at ¶ 594. The *mens rea* was not associated with any particular individual.

<sup>230</sup> *Id.* at ¶¶ 1919, 1921–23, 1927–29, 1930.

<sup>231</sup> *Goldstone Report*, *supra* note 5, ¶ 1884. [Emphasis added.]

<sup>232</sup> *Report of an Expert Meeting which Assessed Procedural Criticisms made of the UN Fact-Finding Mission on the Gaza Conflict (The Goldstone Report)*, CHATHAM HOUSE 13 (Nov. 27, 2009), [www.chathamhouse.org.uk/files/15572\\_il271109summary.pdf](http://www.chathamhouse.org.uk/files/15572_il271109summary.pdf) [hereinafter *Chatham House Report*].

<sup>233</sup> *Goldstone Report*, *supra* note 5, ¶ 496.

<sup>234</sup> Note that the Gaza COI did find Hamas responsible for further breaches of international law. For example, with respect to its targeting of Fatah affiliates, the Goldstone Report states that Hamas committed “serious violations of human rights”, in particular with respect to article 3 (right to life, liberty and security of the person), article 5 (freedom from torture and cruel, inhuman or degrading treatment or punishment), article 9 (no one shall be subjected to arbitrary arrest or detention), articles 10 and 11 (right to fair and impartial legal proceedings), and article 19 (regarding freedom of opinion and expression) of the Universal Declaration of Human Rights. *Id.* at ¶ 1372.

difference, generally, is the findings of fact upon which the legal analyses are based. With respect to many purported crimes by Hamas, the Gaza COI was unable to make a factual determination as to intent and thus had to speculate regarding the law. The same was not generally true with respect to Israel.<sup>235</sup> Moreover, there are certainly instances where the Goldstone Report found that, “Israel *would* be responsible under international law” for acts that were actually found to have happened.<sup>236</sup> However, the previous quote above is obscured in the Goldstone Report by the fact that a mere paragraph later, the Goldstone Report states that, “the direct targeting and arbitrary killing of Palestinian civilians *is* a violation by the Israeli armed forces of the right to life as provided in article 6 of the International Covenant on Civil and Political Rights.”<sup>237</sup>

It is also the case that unequivocal language was generally used with respect to purported Israeli violations,<sup>238</sup> while equivocations were generally used when describing Hamas’ purported violations. The Report of an Expert Meeting on Gaza organized by Chatham House said that: “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.”<sup>239</sup>

It was not always clear why there was a difference in tenor as between the findings, or why some facts seemed to support strong findings and others tentative conclusions. For example, the findings of legal violations against Israel in chapter IX (concerning Israeli obligations to protect civilians) are based on the same type of press reports and other secondary reports as various other findings with respect to Hamas in chapter VIII on Hamas’ obligations to protect civilians where the Gaza COI was unable to come to a legal conclusion.<sup>240</sup> So, one

<sup>235</sup> Why this was the case is another question. This of course created its own set of problems. It has been asserted that intent was regularly imputed to Israeli operations, but was not similarly—and under similar circumstances—imputed to Palestinian actions. More shall be offered on this argument below.

<sup>236</sup> *Goldstone Report*, *supra* note 5, ¶¶ 814, 815, 1173–75. Both the equivocal and certain are used in a particularly confusing manner in paragraph 1175 (“The Mission considers that the severe beatings, constant humiliating and degrading treatment and detention in foul conditions *allegedly* suffered by individuals in the Gaza Strip . . . *would* constitute torture, and a grave breach under article 147 of the Fourth Geneva Convention . . . . Such violations also *constitute* war crimes.” [Emphasis added.]

<sup>237</sup> *Goldstone Report*, *supra* note 5, ¶ 816. There are numerous examples of such contradictions throughout the Goldstone Report, including sometimes in the same paragraph. *See, e.g.*, ¶ 1587. In one convoluted paragraph, it was said that ill-treatment during arrest and detention by Hamas, “*raise[d] concerns and warrant[ed] proper investigation*,” while arrests and detentions of political affiliations were “legally unacceptable” and “*would* violate the right not to be arbitrarily detained.” [Emphasis added.]

<sup>238</sup> *Id.* at ¶ 595.

<sup>239</sup> *Chatham House Report*, *supra* note 232, at 13.

<sup>240</sup> In similar wording to the sections on Israel, where first-hand accounts were difficult to gather, in Chapter VIII the Goldstone Report states: “To gather first-hand information on the matter, the Mission requested a meeting with representatives of armed groups. However, the groups were not agreeable to such a meeting. *The Mission*,

might reasonably ask why the language is more equivocal in chapter VIII (Hamas) than that in chapter IX (Israel) when analyzing the same legal obligation (the protection of civilians) with resort to similar second-hand accounts.<sup>241</sup> This harkens back to the discussion about corroboration of evidence in the Goldstone Report: What was it about the secondary reports, or the crimes, or the findings of fact that enabled the Gaza COI to make determinative conclusions in some chapters based primarily on secondary material, but not, for example, in section VIII with respect to Hamas?<sup>242</sup>

A further example relates to the Goldstone Report's imputation of criminal intent as it pertained to certain actors—particularly Israeli actors—who were said by the Goldstone Report to be intentionally “targeting” civilians as a matter of high-level policy. In the Goldstone Report, the *mens rea* of intention is generally spoken of in unequivocally certain terms, at least as it relates to Israel.<sup>243</sup> For example: “The Mission finds that the attack on the abd al-Dayem family condolence tents *constitutes an intentional attack* against the civilian population and civilian objects, willful killing and the willful infliction of suffering.”<sup>244</sup>

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*consequently, had little option but to rely upon indirect sources to a greater extent than for other parts of its investigation.* [Emphasis added.] *Goldstone Report, supra* note 5, ¶ 441.

<sup>241</sup> *Id.* at ¶¶ 449–52. See particularly para 452:

In view of the information communicated to it and the material it was able to review, the Mission believes that there are *indications that Palestinian armed groups launched rockets from urban areas*. In those instances in which Palestinian armed groups did indeed fire rockets or mortars from urban areas the question remains whether this was done with the specific intent of shielding the combatants from counter-attack. The Mission *has not been able to obtain any direct evidence on this question; nor do reports from other observers provide a clear answer*. [Emphasis added.]

The Goldstone Report then cites the International Crisis Group as finding from separate interviews that the intent was there and was not there, respectively (see ¶ 453). Why the Goldstone Report did not indicate that *sometimes* the intent seemed present and others not, is not addressed. Of course, to make out the crime, one instance of intent is sufficient.

<sup>242</sup> See, e.g., *Goldstone Report, supra* note 5, ¶ 1581 (“Reports that the Palestinian Authority interfered with the work of journalists and the media *give rise to the concern that the right to freedom of opinion and expression has been interfered with.*” [Emphasis added]).

<sup>243</sup> *Id.* at ¶¶ 894, 389, 778. See also ¶ 1890 (“[The outcome and modalities] were also to a large degree aimed at destroying or incapacitating civilian property and the means of subsistence of the civilian population.”); and ¶ 1891 (“It is clear from evidence gathered by the Mission that the destruction of food supply installations, water sanitation systems, concrete factories and residential houses was the result of a *deliberate and systematic policy* by the Israeli armed forces.” [Emphasis added]). Compare this with the *mens rea* of recklessness, which is often accompanied by equivocating language such as “it appears.” There are some cases, however, where the certainty of the language appears higher (see *id.* at ¶¶ 594, 838, 1433). For example: “The Mission finds that the Israeli armed forces *were systematically reckless* in determining to use white phosphorous in built-up areas and in particular in and around areas of particular importance to civilian health and safety.” [Emphasis added.] *Id.* at ¶ 894.

<sup>244</sup> *Id.* at ¶¶ 883–84. [Emphasis added.]

Moreover, in some cases intention is drawn purely from the circumstances of the case at hand: “The fact that [Muhammad Hekmat Abu Halima and Matar Abu Halima] were hit in the chest and the abdomen, respectively, indicates that the intention was to kill them.”<sup>245</sup> As but another example, the Gaza COI found that an Israeli attack on a Palestinian prison was intentional because Israel stated that 99% of its strikes were accurate and Israel did not offer an alternative explanation as to why the complex was bombed.<sup>246</sup>

This last example in particular is reminiscent of a criticism of the Goldstone Report that we saw earlier, which asserted that the Goldstone Report did not treat the absence of Israeli testimony as a methodological shortcoming of the Goldstone Report itself. Rather, at least with respect to the intentional targeting of civilians, the Goldstone Report treated the lack of Israeli cooperation as, at worst, leading to a reverse onus situation whereby it was incumbent on Israel to justify its military actions lest they necessarily be found both intentional and sufficient to amount to international crimes, or, at best, as giving rise to a shifting burden of proof. Once facts were found by the Report, the burden then shifted to Israel to justify its actions. The absence of Israeli cooperation and testimony—or, in the alternative, at least a commission-appointed advocate for Israel<sup>247</sup>—meant that, whether by shifting burden or reverse onus, invariably there would be no defense offered. The Gaza COI then had two options: (1) it could make a presumptive finding against Israel, treating Israel as responsible for not mounting a defense; or, (2) it could treat the absence of evidence as to intention as a methodological shortcoming of the Goldstone Report and make tentative findings of fact that “might” or “could” amount to war crimes and crimes against humanity for intentionally targeting civilians. In either case, it would have been incumbent on the Gaza COI to gather enough circumstantial and other evidence so as to be reasonably justified in generalizing from specific incidents to broader claims about high-level, intentional policy, specifically, that crimes took place on such a widespread and systematic scale that they could not but have been the result of an intentional, high-level policy.

As previously discussed, the latter approach was generally not followed,<sup>248</sup> and, to a degree, it came back to haunt the Gaza COI. In particular, the problem with the former approach (1)

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<sup>245</sup> *Id.* at ¶ 800.

<sup>246</sup> *Id.* at ¶ 370. The result that seems to be implied is that if fighting takes place in a city—as it usually does today—then any bombing in that city will be a crime so long as the bombing party does not offer an explanation. In modern warfare, this is tantamount to saying that so long as one does not participate in a UN COI, one will be found guilty of war crimes.

<sup>247</sup> Unlike judges in common law systems, UN COI commissioners have not traditionally had the assistance of prosecution and defense attorneys—though such attorneys are often present to aid commissioners in domestic common law COIs, for example in Canada and the UK. UN COI commissioners are therefore responsible for making the case, which includes acting as prosecution, defense and judge.

<sup>248</sup> Before continuing it should be noted that this was not always the case; at times, the Gaza COI did indeed resort to option (2) above. In other words, the Goldstone Report did at times treat the lack of information and territorial

was laid bare by Justice Goldstone's controversial recantation—or, in his words, “reconsideration”—of the Goldstone Report, in which he claimed that, had he had the information available to him that Israel made public subsequent to the publication of the Goldstone Report, certain findings of the Goldstone Report would likely have been influenced, particularly with respect to the policy of intentionally targeting civilians (chapter XI).<sup>249</sup> Some observers interpreted this statement as an admission that the Goldstone Report was erroneous in its findings, at least as they concern the intentional targeting of civilians by Israel. Now, it is unclear that this is even what Goldstone was suggesting, though the larger point is that there need not even have been a debate had the language in the Goldstone Report been more tentative—had it consistently chosen the second, latter approach described above.

Let us discuss Goldstone's reconsideration in slightly more detail in order to illustrate this point. The Goldstone Report investigated “[eleven] incidents in which serious allegations of direct attacks with lethal outcome were made against civilians” and found that, “[t]here appears to have been no justifiable military objective pursued in any of them.”<sup>250</sup> The Goldstone Report went on to explain “that, on the basis of the facts it was able to ascertain, in none of the cases reviewed were there any grounds which could have reasonably induced the Israeli armed forces to assume that the civilians attacked were in fact taking a direct part in the hostilities . . . .”<sup>251</sup> As a result, the Goldstone Report found that “the Israeli armed forces [had] violated the prohibition under customary international law . . . that the civilian population as such will not be the object of attacks.”<sup>252</sup> A high standard of proof appears to

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access as a methodological shortcoming. As but one example, with respect to the death of Muhammad Hajji, killed in his living room by errant fire during the military invasion, the Goldstone Report stated:

On the *basis of the information before it*, the Mission can neither make a statement as to what type of weapon killed him, *nor as to whether he was the intended target of a direct attack*. The *circumstances of his death suggest*, however, that he was killed by fire from the Israeli armed forces while at home in a room with his children.” [Emphasis added.] *Goldstone Report, supra* note 5, at ¶ 753.

However, more than anything the fact that the Goldstone Report sometimes opted for option (2) highlighted the extent to which it did not always do so.

<sup>249</sup> His strongest statement was: “If I had known then what I know now, the Goldstone Report would have been a different document.” See *Goldstone Recantation, supra* note 33.

<sup>250</sup> *Goldstone Report, supra* note 5, ¶ 705. [Emphasis added.]

<sup>251</sup> *Id.* at ¶ 811. [Emphasis added.]

<sup>252</sup> *Id.* at ¶ 812. [Emphasis added.] In a slightly less clear finding shortly thereafter, the Goldstone Report states: “From the facts ascertained, the Mission finds that the conduct of the Israeli armed forces in these cases *would* constitute grave breaches of the Fourth Geneva Convention in respect of willful killings and willfully causing great suffering to protected persons and *as such give rise to individual criminal responsibility*.” [Emphasis added.] *Id.* at ¶ 816.

have been met in finding that there existed an intention to target civilians. However, on the facts presented in the Goldstone Report there is little direct evidence of a high-level intention to target civilians and there are certainly instances where it appears that civilians were intentionally not targeted. The Goldstone Report's case seems to rest on circumstantial evidence in eleven isolated cases coupled with a lack of evidence demonstrating that what took place was not intentional – a clear instantiation of the first approach.

Goldstone's reconsideration of the finding that Israel intentionally targeted civilians then cited only one of the eleven incidents investigated by the Gaza COI, that of the bombing of the al-Samouni family. The al-Samouni neighborhood of South Gaza (Zeytoun)—given its name by its primary inhabitants, the al-Samouni family—saw shooting on the night of 3–4 January 2009, though witnesses denied seeing Palestinian fighters in the area.<sup>253</sup> By 4 January many members of the extended al-Samouni family had been told by Israeli soldiers to gather in the home of Wa-el; several attempts to evacuate the family members were made on 4 January, including by the International Committee of the Red Cross, but no such efforts were successful.<sup>254</sup> On the morning of 5 January, five members of the family exited the house to gather firewood and saw Israeli soldiers stationed on the roofs of nearby homes. At that time, a “projectile struck next to the five men,” killing two. Within five minutes, “two or three more projectiles had struck the house directly.”<sup>255</sup> Wa-el and another member of the extended family, Saleh al-Samouni, testified at a Gaza COI public hearing that the missiles were launched from Apache helicopters.<sup>256</sup> According to the Goldstone Report, twenty-one members of the al-Samouni family were killed by the missile strikes; nineteen other members of the family were also injured in the incident.<sup>257</sup> The home of Wa-el al-Samouni, a mosque, and most other homes in the area were eventually demolished.<sup>258</sup> The Goldstone Report also made the following factual finding in supporting its conclusion that this was a deliberate attack against civilians:

the fact that a first projectile struck next to the five men soon after they had left the house (at a time at which there was no combat in the area) and two or three projectiles struck the house after the survivors had retreated into the house, indicates that the weaponry used allowed a high

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<sup>253</sup> *Id.* at ¶ 708.

<sup>254</sup> *Goldstone Report*, *supra* note 5, ¶¶ 717–22.

<sup>255</sup> *Id.* at ¶ 714.

<sup>256</sup> *Id.*

<sup>257</sup> *Id.* at ¶¶ 706–35 (see specifically ¶ 715).

<sup>258</sup> *Id.* at ¶ 722.

degree of precision with a short response time and that the five men and then the house were the intended targets of the attack.<sup>259</sup>

In his reconsideration, Justice Goldstone stated that the information that subsequently came to light through Israeli internal investigations and “recognized in the U.N. [second Independent] committee’s report . . . indicate[d] that civilians were not intentionally targeted as a matter of policy”, though the second Committee of Independent Experts report recognized no such thing: the report did imply that the al-Samouni bombing was the result of a mistaken interpretation of a drone image,<sup>260</sup> as Justice Goldstone specifically claimed in his reconsideration. However, the report also “reiterate[d] the conclusion of its previous report that there [was] no indication that Israel [had] opened investigations into the actions of those who designed, planned, ordered[,] and oversaw Operation Cast Lead.”<sup>261</sup>

Had the Goldstone Report (and perhaps Justice Goldstone’s reconsideration) been clearer in explaining its standard of proof, better engaged with this standard of proof, and utilized more tentative language, its findings would have been more precise and compelling and therefore less amenable to attack. For example, the Goldstone Report could have used tentative language such that “should” an Israeli court or another criminal court investigate these incidents it “would” be incumbent upon Israel to explain how these events were not a result of intent, recklessness, or negligence, lest it be found guilty of attacking civilians. If the Report had consistently used tentative language to clearly signify that each finding was not, in fact, final, then the evidence that Justice Goldstone later claimed to be exculpatory would not have made any difference to the validity of the Goldstone Report.<sup>262</sup> In other words, the Goldstone Report would nevertheless have been correct in asserting the need to investigate the relevant incidents, and that it was possible that they might amount to crimes. No reconsideration would have been necessary.<sup>263</sup>

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<sup>259</sup> *Id.* at ¶ 730.

<sup>260</sup> H.R.C. Res. 15/6, *supra* note 85, ¶ 27.

<sup>261</sup> H.R.C. Res. 15/6, *supra* note 85, ¶ 79.

<sup>262</sup> It must be said that Justice Goldstone’s reading of the Human Rights Council Committee of Independent Experts report finds exculpatory evidence in this regard that is otherwise hard to see. Put another way, it is hard to find evidence in the Report of an intentional high-level policy to target civilians based on the facts found in the Goldstone Report. At the same time, it is likewise hard to find evidence that there was not an intentional policy in the Committee of Independent Experts report reviewing subsequent Israeli investigations.

<sup>263</sup> In part, this seems to be what the other three Gaza COI commissioners were asserting in their response to Goldstone’s reconsideration. See Hina Jilani, Christine Chinkin & Desmond Travers, *Goldstone Report: Statement Issued by Members of UN Mission on Gaza War*, THE GUARDIAN (Apr. 14, 2011) (“The mission and the report are part of a truth-seeking process that could lead to effective judicial processes. Like all reports of similar missions of the UN, it provided the basis for parties to conduct investigations for gathering of evidence, as required by international law, and, if so warranted, prosecution of individuals who ordered, planned or carried out international crimes.”)



Human Rights Watch reports<sup>264</sup> and both of the reports released by the Human Rights Council Committees of Independent Experts repeatedly used equivocal language when discussing conclusions that were influenced by the dearth of available information caused by a lack of Israeli cooperation. In contrast to the Goldstone Report, such language was *consistently* maintained both in the substantive analyses and conclusions of the reports.

This is all to say that it is important for UN COIs to be particularly vigilant with respect to criminal intent. *Mens rea* attaches to a specific person (or persons): An individual person forms the requisite *mens rea*, be it recklessness, negligence, or intent. Without consideration of a person's purpose, circumstances, and individual action, it is difficult to see how a *mens rea* can be found to exist with any high degree of certainty; the language and standard of proof of the UN COI report must reflect these circumstances. When intention is found with certainty, or the appearance thereof, then the finding can be proven wrong with certainty, which Justice Goldstone seems to have admitted happened in one case.<sup>265</sup>

Human Rights Watch highlights yet another problem with regard to the Goldstone Report's findings regarding Israel's purportedly intentional high-level policy to target civilians:

In his [Washington Post] article, [Justice] Goldstone backed away from a particularly controversial charge in the report—the allegation that Israel had an apparent high-level policy to target civilians. He now says that information from Israeli investigations indicates “that civilians were not intentionally targeted as a matter of policy.” [Justice] Goldstone was right to make that amendment. Human Rights Watch also investigated some of the cases in which Israeli troops fired at and killed Palestinian civilians . . . *Deeply troubling as these cases were, they were too isolated for us to conclude that the misconduct of individual soldiers reflected a wider policy decision to target civilians.*<sup>266</sup>

This statement speaks to the tendency in the Goldstone Report to make (or appear to make) general conclusions as to policy—and on the *mens rea* of intent—based on the investigation of isolated or specific events without explaining how such incidents are generalizable or reflect a broader pattern or policy, as was discussed earlier in this article. If an incident appears to evince an intention to target civilians, then that would also appear to be an

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<sup>264</sup> See, e.g., *White Flag Deaths*, *supra* note 22.

<sup>265</sup> Again, from the publicly available information at the time of Goldstone's reconsideration, the result is not so clear.

<sup>266</sup> Kenneth Roth, *Gaza: The Stain Remains on Israel's War Record: Richard Goldstone's Partial Retraction of His Own Report Doesn't Excuse the Conduct of Israel's War in Gaza*, THE GUARDIAN (Apr. 5, 2011). [Emphasis added.]

isolated crime. But that isolated crime does not necessarily speak to whether a general, high-level policy to target civilians existed; further justification or documentation is needed, and this justification should also include an explanation of situations that might tend to demonstrate the absence of a high-level policy. Justice Goldstone seemed to make a similar mistake in generalizing from a specific incident in his reconsideration. If the al-Simouni case was proven to be the result of “an Israeli commander’s erroneous interpretation of a drone image,” as Justice Goldstone’s reconsideration claims and the second Committee of Independent Experts report seems to suggest,<sup>267</sup> and not the result of a high-level policy. This still does not speak to the other ten cases investigated by the Goldstone Report or disprove, more generally, the existence a high-level policy to target civilians.

None of this is to claim that the Goldstone Report was biased or, as a whole, a poor report, at least relative to other international inquiries. It is simply to note that the implications for UN COIs regarding standard of proof and the consistency and precision of the language used with respect to crimes are not simply legal—relating to an objective legal standard or legal discussions of bias—but also social whereby the legitimacy and credibility of the report depends on the perceived impartiality of the COI’s work. The language used by such UN COI reports and the precision and consistency of the language very much matters; and other important examples exist in the Goldstone Report to drive home this point.

One such interesting and particularly stark example of the Goldstone Report’s inconsistency in its language and applicable standard of proof is exposed with respect to crimes against humanity as analyzed in the Goldstone Report. For example, with regard to the crime of persecution as it relates to the Israeli blockade of goods into the Gaza Strip, the Goldstone Report concludes: “From the facts available to [the Commission], the Mission is of the view that some of the actions of the Government of Israel *might* justify a competent court finding that crimes against humanity have been committed.”<sup>268</sup> Interestingly, the Gaza COI is very precise in its language here and intentionally equivocates in its finding. It is not that persecution *has* been committed, or *has on the facts found* been committed, or even that the Gaza COI *believes on the facts the crime has been committed*—all variants of the usual nomenclature used throughout the Goldstone Report. Rather, here the facts *might* justify *another body* coming to a legal conclusion. We must ask what the difference is between *might* and the usual finding, which is simply that a violation occurred. Is there less certainty here, or is it the complexity of the charge that led to the greater equivocation?

Arguably, the Gaza COI was reluctant to take a strong position on the crime of persecution because the finding relates in this rare case to a crime against humanity as opposed to a war crime or human rights violation. In other words, this finding is different from the majority of others. However, it is not immediately clear why this distinction between crimes against

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<sup>267</sup> H.R.C. Res. 16/21, *supra* note 85, ¶ 8.

<sup>268</sup> *Goldstone Report*, *supra* note 5, ¶ 1335. [Emphasis added.]

humanity on the one hand and war crimes or human rights abuses on the other would lead to a difference in language or legal certainty. The Goldstone Report's equivocation is on the legal side, not the factual side of things. So, if the facts are equally conclusive as between crimes, why the need to equivocate with regard to the law as it relates to crimes against humanity and not war crimes? Whatever the reason, the Goldstone Report consistently equivocates with regard to the few purported crimes against humanity,<sup>269</sup> unlike the majority of the time where it is unequivocal with regard to its findings that war crimes have, in fact, been committed.

It is also interesting that, in this case and for the only time in the Goldstone Report, the report equivocates with respect to whether a court would make out the legal elements of the crime. But a court did not have to come to a conclusion on the crime of persecution, not yet at least. Rather, the Goldstone Report had been tasked with coming to this conclusion, and it refused to do so. The Goldstone Report seems to be particularly hesitant here about coming to a legal conclusion, instead making it clear that criminality is a decision for a court to make, and the outcome is yet to be decided. This is the only reminder in the substantive chapters of the Goldstone Report that a court has not yet rendered a verdict.

Compounding the problem relating to the standard of proof is the fact that many chapters in the Goldstone Report have different sections for "factual analysis", "legal analysis", and, finally, "conclusions". The "conclusions" are generally where conclusions are drawn about legal violations in relation to the factual analysis, as tends to be the case in common law court judgments. The legal analysis is, in theory, where one would find an analysis of the applicable law, perhaps how it was or could be applied. However, rarely is a comprehensive analysis—or anything approaching this standard—of the law offered. The Chatham House Report of an Expert Meeting on the Goldstone Report, mentioned above, has asserted that, because the rules of international humanitarian law are difficult to interpret from the facts,

[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 is legitimate or not. It did not need to express a definite view in the way that a court should, but

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<sup>269</sup> *Id.* at ¶ 1691:

From the facts available, the Mission finds that the rocket and mortars attacks, launched by Palestinian armed groups in Gaza, have caused terror in the affected communities of southern Israel and in Israel as a whole . . . . *This indicates the commission of an indiscriminate attack on the civilian population of southern Israel, a war crime, and may amount to crimes against humanity.* [Emphasis added.]

merely needed to record that different interpretations exist on a given point, and indicate the facts which would be relevant to a tribunal.<sup>270</sup>

A good example is the Goldstone Report's chapter on rocket and mortar attacks on Israel (XXIV). The legal analysis and conclusions section offer no definitive conclusions and amounts, essentially, to a page of noting the applicable law without an analysis of how that particular law is to be interpreted. As is common throughout the document, the Goldstone Report notes that the duty to protect and respect civilians forms part of customary international law, though it neither sources this legal conclusion nor explicates what "protect and respect" might mean in the specific context.<sup>271</sup> The subsequent "findings" section in Chapter XXIV (this is the only chapter with a "findings" section) takes note of the facts that amount to breaches of international law. However, these facts are not explicitly associated with any specific legal requirements found in international law documents. In other words, the "findings" are somehow different than "conclusions," but do no more than implicitly draw upon the legal analysis rather than explicitly tie the facts to provisions of law.<sup>272</sup> Associating the findings with specific breaches of provisions within international human rights and humanitarian law, and sourcing the interpretations of these provisions, would not only be useful; it would go a long way to helping third parties fully understand and debate the Goldstone Report's findings (and the credibility of the legal findings).<sup>273</sup>

A perfunctory review of the law, while potentially in keeping with the practice of many fact-finding missions, does not conduce to basic requirements of legality in the context of UN COIs—or most COIs that engage the law, whether national or international. Clarity and reasoned justifications are clearly necessary. Furthermore, those implicated by the findings are, as autonomous agents, deserving of open, detailed explanations of how the legal findings were made, how the law was applied, and what facts were relied upon to finalize the decision. It might also be added that instantiating a "culture of justification"—whereby it becomes the culture with respect to COIs to rationally defend all decisions—not only encourages such behavior in future UN COI reports, but also promotes the development of a standard practice as to how the law and various rules are to be applied and interpreted in various UN COI contexts. This, in turn, will make the applicable rules more transparent and more familiar to those to whom the rules may apply in the future. Future UN COI reports

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<sup>270</sup> See generally, *Chatham House Report*, *supra* note 232.

<sup>271</sup> *Goldstone Report*, *supra* note 5, ¶ 1683. Another example is the Goldstone Report's reference to the prohibition of indiscriminate attacks in Article 51(4) of Additional Protocol I to the Geneva Conventions, without a corresponding explanation of what indiscriminate might mean in the context, and how it can and has been interpreted in international law.

<sup>272</sup> One salient exception to this proposition is the section of the Report on Accountability and Judicial Remedies. See, e.g., *Goldstone Report*, *supra* note 5, at 388–90.

<sup>273</sup> *Id.* at ¶ 1950. Note that the conclusions do no better in amalgamating the legal and factual findings with the relevant provisions of international law.

will be better, and its reasoning stronger, with a more comprehensive review of the law in relation to the facts.

### **E. Conclusion**

Operating in the context of a highly controversial and politicized dispute, the Gaza COI was subjected to harsh criticism but also lauded for completing a difficult task. While both the criticism and praise may have been heightened given the highly political context of the dispute, the targets for criticism were fairly typical in the context of UN COIs. In particular, the Gaza COI was criticized for: being the product of the Human Rights Council, an institution with a history of focusing disproportionately on Israel and, arguably, establishing biased inquiries; its biased mandate and commissioner(s); its indeterminate mandate as exemplified by the mandate's failure to circumscribe strictly the temporal and geographic scope of the inquiry; its failure to articulate the method utilized to determine which incidents to investigate; its methods of gathering and corroborating evidence and its failure to articulate transparently the rules that governed this process; and for various due process issues including the definitiveness of its conclusions and language particularly pertaining to Israel as well as the seemingly inconsistent application of its hazy standard of proof.

The Goldstone Report provides fertile ground for analyzing how many of these issues might be addressed simply by learning from past mistakes and taking care to be precise in language, engage with problems, and justify the ultimate decisions taken. In order to execute these tasks well UN COIs must recognize the role that law plays in the work of such bodies; not just in that they make legal findings with reference to international human rights and humanitarian law, but also that their processes are "quasi-judicial" in nature, that they depend for their legitimization and success on the credibility and reliability that attends legal processes that evince transparency, their accountability, and overarching notions of fairness. For UN COIs procedure is substance, and good law in one does not come without good legal practice in the other.

