

Reconsidering the Goldstone Report on Israel and war crimes

By Richard Goldstone, Friday, April 1, 8:42 PM

We know a lot more today about what happened in the Gaza war of 2008-09 than we did when I chaired the fact-finding mission appointed by the U.N. Human Rights Council that produced what has come to be known as the Goldstone Report. If I had known then what I know now, the Goldstone Report would have been a different document.

The final report by the U.N. committee of independent experts — chaired by former New York judge Mary McGowan Davis — that followed up on the recommendations of the Goldstone Report has found that “Israel has dedicated significant resources to investigate over 400 allegations of operational misconduct in Gaza” while “the de facto authorities (i.e., Hamas) have not conducted any investigations into the launching of rocket and mortar attacks against Israel.”

Our report found evidence of potential war crimes and “possibly crimes against humanity” by both Israel and Hamas. That the crimes allegedly committed by Hamas were intentional goes without saying — its rockets were purposefully and indiscriminately aimed at civilian targets.

The allegations of intentionality by Israel were based on the deaths of and injuries to civilians in situations where our fact-finding mission had no evidence on which to draw any other reasonable conclusion. While the investigations published by the Israeli military and recognized in the U.N. 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.

For example, the most serious attack the Goldstone Report focused on was the killing of some 29 members of the al-Simouni family in their home. The shelling of the home was apparently the consequence of an Israeli commander’s erroneous interpretation of a drone image, and an Israeli officer is under investigation for having ordered the attack. While the length of this investigation is frustrating, it appears that an appropriate process is underway, and I am confident that if the officer is found to have been negligent, Israel will respond accordingly. The purpose of these investigations, as I have always said, is to ensure accountability for improper actions, not to second-guess, with the benefit of hindsight, commanders making difficult battlefield decisions.

While I welcome Israel’s investigations into allegations, I share the concerns reflected in the McGowan Davis report that few of Israel’s inquiries have been concluded and believe that the proceedings should have been held in a public forum. Although the Israeli evidence that has emerged since publication of our report doesn’t negate the tragic loss of civilian life, I regret that our fact-finding mission did not have such evidence explaining the circumstances in which we said civilians in Gaza were targeted, because it probably would have influenced our findings about intentionality and war crimes.

Israel’s lack of cooperation with our investigation meant that we were not able to corroborate how many Gazans killed were civilians and how many were combatants. The Israeli military’s numbers have turned out to be similar to those recently furnished by Hamas (although Hamas may have reason to inflate the number of its combatants).

As I indicated from the very beginning, I would have welcomed Israel's cooperation. The purpose of the Goldstone Report was never to prove a foregone conclusion against Israel. I insisted on changing the original mandate adopted by the Human Rights Council, which was skewed against Israel. I have always been clear that Israel, like any other sovereign nation, has the right and obligation to defend itself and its citizens against attacks from abroad and within. Something that has not been recognized often enough is the fact that our report marked the first time illegal acts of terrorism from Hamas were being investigated and condemned by the United Nations. I had hoped that our inquiry into all aspects of the Gaza conflict would begin a new era of evenhandedness at the U.N. Human Rights Council, whose history of bias against Israel cannot be doubted.

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. We made our recommendations based on the record before us, which unfortunately did not include any evidence provided by the Israeli government. Indeed, our main recommendation was for each party to investigate, transparently and in good faith, the incidents referred to in our report. McGowan Davis has found that Israel has done this to a significant degree; Hamas has done nothing.

Some have suggested that it was absurd to expect Hamas, an organization that has a policy to destroy the state of Israel, to investigate what we said were serious war crimes. It was my hope, even if unrealistic, that Hamas would do so, especially if Israel conducted its own investigations. At minimum I hoped that in the face of a clear finding that its members were committing serious war crimes, Hamas would curtail its attacks. Sadly, that has not been the case. Hundreds more rockets and mortar rounds have been directed at civilian targets in southern Israel. That comparatively few Israelis have been killed by the unlawful rocket and mortar attacks from Gaza in no way minimizes the criminality. The U.N. Human Rights Council should condemn these heinous acts in the strongest terms.

In the end, asking Hamas to investigate may have been a mistaken enterprise. So, too, the Human Rights Council should condemn the inexcusable and cold-blooded recent slaughter of a young Israeli couple and three of their small children in their beds.

I continue to believe in the cause of establishing and applying international law to protracted and deadly conflicts. Our report has led to numerous "lessons learned" and policy changes, including the adoption of new Israel Defense Forces procedures for protecting civilians in cases of urban warfare and limiting the use of white phosphorus in civilian areas. The Palestinian Authority established an independent inquiry into our allegations of human rights abuses — assassinations, torture and illegal detentions — perpetrated by Fatah in the West Bank, especially against members of Hamas. Most of those allegations were confirmed by this inquiry. Regrettably, there has been no effort by Hamas in Gaza to investigate the allegations of its war crimes and possible crimes against humanity.

Simply put, the laws of armed conflict apply no less to non-state actors such as Hamas than they do to national armies. Ensuring that non-state actors respect these principles, and are investigated when they fail to do so, is one of the most significant challenges facing the law of armed conflict. Only if all parties to armed conflicts are held to these standards will we be able to protect civilians who, through no choice of their own, are caught up in war.

The writer, a retired justice of the Constitutional Court of South Africa and former chief prosecutor of the U.N. International Criminal Tribunals for the former Yugoslavia and Rwanda, chaired the U.N. fact-finding mission on the Gaza conflict.