

A Survey on the Follow-up to the Goldstone Report

By Sharon Weill¹

The Goldstone Fact-Finding Mission report has raised serious allegations of war crimes and crimes against humanity committed by Israel in Gaza during December 2008-January 2009. In order to ensure accountability, these grave allegations require further investigation, and when appropriate, prosecutions. As the Goldstone report cannot serve in itself as an evidence before a tribunal, its follow-up is of major importance. Earlier fact-finding missions have led to prosecutions by international tribunals, as in the case of Darfur that was referred by the UN Security Council to the International Criminal Court (ICC) following the fact-finding mission headed by Judge Cassese in 2004, or the establishment of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the aftermath of the fact-finding mission on the Balkans headed by Judge Bassiouni in 1992.

According to the Goldstone report's recommendations, the follow-up may be exercised by three channels: (1) Israeli institutions; (2) the ICC; and (3) third states through the exercise of universal jurisdiction. The following survey highlights the latest developments in each of these three tracks.

I. Israeli investigations and prosecution

"The responsibility to investigate violations of international human rights and humanitarian law, prosecute if appropriate and try perpetrators belongs in the first place to domestic authorities."²

UN monitoring of Israeli domestic investigations

In September 2009, the Goldstone mission required Israel to launch domestic investigations within three months, and to inform the Security Council on the actions taken within an additional three months. In parallel, the mission recommended that the Security Council establish an independent committee of experts to monitor the investigations and report on its findings to the Security Council. By the end of the six-month period, "in the absence of good-faith investigations that are independent and in conformity with international standards," the Security Council should refer the situation in Gaza to the Prosecutor of the International Criminal Court.³

Nine months later, the Security Council still has not taken any steps. Instead, in November 2009, the UN General Assembly called upon the UN Secretary General to report within three months on the investigations undertaken by both sides.⁴ Thus the recommendation to establish an independent expert committee was ignored and the role of assessing the status of domestic investigations was conferred on the Secretary General, who is subject to political pressure. Three months later, on February 2010, the Secretary General submitted a laconic report to the General Assembly; he stated that Israel held some investigations but had not completed them, so he could not yet assess them,⁵ and that the Palestinians had only just appointed a commission of inquiry. The General Assembly responded with a second resolution, in which it required both sides to conduct independent and credible investigations and

requested the Secretary General to report back by July 2010, and to assess the investigations and the necessity of taking further action by different UN organs including the Security Council. In the first resolution the majority of EU states abstained, none voted in favor and some voted against. In the second resolution, the vote was markedly different: several EU states voted for, many abstained and none voted against.⁶ Israel, the US, and Canada voted against the resolution but these states were almost completely isolated.

In parallel to the GA resolutions adopted in New York, the UN Human Rights Council based in Geneva decided in a follow up resolution on March 2010 to establish the independent experts committee to monitor the domestic investigations and proceedings undertaken by both Israel and the Palestinians and to assess their independence, effectiveness, genuineness and conformity with international standards.⁷ The committee, announced by the UN High Commissioner for Human Rights (HCHR) on 14 June 2010, is composed of Professor Christian Tomuschat, Law Professor Emeritus at Humboldt University Berlin; Judge Mary McGowan Davis, Acting Justice of the Supreme Court of the State of New York and a federal prosecutor; and Mr. Param Cumaraswamy, a human rights expert who served as UN Special Rapporteur on the independence of judges and lawyers.⁸ This committee should present its report to the Human Rights Council at its 15th session during September-October 2010. Some experts have expressed disappointment that this committee would be reporting only after the Secretary General reported to the GA in July.

Progress of Israeli domestic investigations: From allegations of war crimes and crimes against humanity to a single conviction for stealing a credit card

Most of the investigations conducted by the Israeli military system consist of internal "command investigations,"⁹ and only very few inquiries are criminal. Since both types of investigations are being conducted by the army, they structurally lack the independence and impartiality required by the rule of law and the principle of separation of powers, as was observed by the HCHR in her report to the Human Rights Council in March 2010:

"[N]either criminal nor command investigations are adequate to investigate whether policies, rules of engagement or orders that guided ISF during Operation Cast Lead were in violation of international law, or the responsibility of relevant senior officials – military or civilian. An independent inquiry into these matters is required."¹⁰

Generally, most investigations undertaken by the army fail to lead to the filing of indictments and criminal prosecutions. The Israeli NGO Yesh Din reveals that only 6% of criminal investigations yielded indictments against soldiers.¹¹ Criminal prosecutions are pursued only in very exceptional cases against soldiers who act wrongly on their own account. The low number of criminal investigations is related to the military's use of command investigations as a tool to avoid criminal accountability. As the Goldstone report established:

"With military 'operational debriefings' at the core of the system, there is no effective and impartial investigation mechanism ... such investigations, being internal to the Israeli military authority, do not comply with international standards of independence and impartiality."¹²

International law requires the investigation of high ranking political leaders and military officers in the chain of command.¹³ These investigations must be independent, effective, prompt and impartial. Yet Israel has not investigated any of the Goldstone mission's allegations at the command level. Israel has persistently claimed that these military orders and decisions were made in accordance with international law,¹⁴ while tragically, some mistakes occurred.¹⁵ Since Operation Cast Lead, Israel has published four official reports that disclose the following information on the domestic investigations that have been conducted:¹⁶

- Five *special command investigations* were undertaken.¹⁷ These investigations were closed in April 2009. According to the Goldstone report, these investigations "appear to have relied exclusively on interviews with Israeli officers and soldiers. As such, these investigations did not comply with required legal standards."¹⁸
- A sixth *special command investigation* was initiated on November 2009 following the Goldstone report.¹⁹ Its outcome is unknown.
- 150 investigations on specific cases were opened, of which 36 are criminal (mainly allegations of theft of property, use of Palestinian civilians as human shields, and inhuman treatment of detainees). By January 2010, approximately half of them (18) have been closed without charges.

All of the above investigations and the basis of their conclusions lack transparency. At the same time, in its January 2010 report, Israel noted the one concrete result of its efforts: A single soldier was prosecuted and convicted for stealing a credit card.²⁰

In March 2010, *Haaretz* reported that two soldiers have been indicted for forcing nine-year old Palestinian boy to open bags suspected of being booby-trapped.²¹ On 16 June 2010 *Haaretz* reported that the army will charge a soldier for shooting and killing two Palestinian women, a case that was mentioned in the Goldstone report; yet, more than a year and a half after the killings, the nature of the charges have not been determined.²²

II. The International Criminal Court (ICC)

"...where domestic authorities are unable or unwilling to comply with this obligation, international justice mechanisms must be activated to prevent impunity."²³

In addition to the recommendation that the Security Council refer the case to the ICC if Israel is unwilling to investigate and prosecute the war crimes allegations, the Goldstone report also recommended that the ICC Prosecutor determine whether the Palestinian government is competent to recognize the jurisdiction of the ICC under article 12(3) of the Rome Statute as expeditiously as possible.²⁴

Following this recommendation, on 12 January 2010, the Office of the ICC Prosecutor sent an letter to the office of the High Commissioner stating that different legal opinions submitted to the prosecutor's office have been considered and that the matter is still under examination.²⁵ Of special interest is the expert opinion submitted by Professor Alain Pellet, a distinguished

French expert on international law, member and former chairman of the International Law Commission of the UN.²⁶ His opinion supports the view that Palestine - the West Bank and Gaza - is a state for the purpose of Article 12(3) of the Rome Statute and he concludes that the PA declaration grants jurisdiction to the ICC over war crimes committed in its territory since 2002, including the allegations raised in the Goldstone report.

In a similar matter, on 8 October 2008, a request for an Advisory Opinion was transmitted to the International Court Justice (ICJ) on the "Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo." While not directly linked, it is nevertheless interesting to see how two different international tribunals will treat two questions of statehood, where the political interests involved are quite different.²⁷

III. Universal Jurisdiction (UJ)

The Goldstone report recommended that the international community investigate and prosecute war crimes allegations on the basis of universal jurisdiction as required by the Geneva Conventions, to which all states are bound²⁸.

In April 2010, nineteen Israeli Knesset members proposed a bill to outlaw Israeli NGOs, if "there are reasonable grounds to conclude that the association is providing information to foreign entities or is involved in legal proceedings abroad against senior Israeli government officials or IDF officers, for war crimes."²⁹ The explanatory notes to the bill stated:

"In many countries, such as England, there are a growing number of voices calling for the arrest of senior Israeli government officials and IDF officers on suspicion of war crimes against the Palestinians... It is very troubling that at this time, when we must be united against these baseless accusations we find that Israeli NGOs and associations, through passing of information (mostly incorrect and even fraudulent) to foreign authorities who are our enemies and through public agreement or approval that Israel is guilty of war crimes. Sometimes they even provide significant legal assistance in phrasing the legal claims".³⁰

The UJ case in Spain – a follow up

One ongoing UJ case is being conducted in Spain.³¹ On 13 April 2010, the Spanish Supreme Court decided to close the investigation against seven high-ranking Israeli officials into the Al Daraj attack of June 2002 (the targeted killing of Salah Schehadeh), which should have been opened following the first instance court decision in January 2009. According to the Spanish Supreme Court, the Spanish jurisdiction is prevented from exercising its competence based on universal jurisdiction as the "Israeli authorities had launched a substantive and genuine investigation into the bombing." Eight years after the attack, the "genuine" Israeli investigation has not yet concluded its preliminary decision whether or not to open a criminal investigation. As a response to long-running litigation initiated in 2003, the Israeli Supreme Court avoided ruling on this highly sensitive question, and delegated the decision to an *independent* committee. This committee was appointed by the government in January 2008 and originally constituted three members, all ex-security officials. After over a year of doing very little, the

Chair of the Committee, Zvi Inbar, died, leaving Committee virtually moribund to this day, despite the reported appointment in February 2010 of a new Chair, former Supreme Court Justice Tovah Strassberg-Cohen.³²

The case is now on appeal to the highest Spanish court, the Constitutional Court. While the Spanish Supreme Court has always been restrained in dealing with universal jurisdiction cases from around the world, the Constitutional Court is far more active than the Supreme Court in the application of universal jurisdiction, so the case is not yet concluded.

Whether or not the appeal to the Spanish Constitutional Court will succeed cannot be predicted, but it may put pressure on the Israeli committee in the Al Daraj case, and more generally on the so-called domestic investigations in Israel. As the UN follow-up is currently concentrating on the latter issue, such domestic investigations are now under scrutiny by the international community in the wake of the Goldstone report of September 2009 into the Gaza conflict.

ENDNOTES

¹ Sharon Weill is a PhD Candidate at the University of Geneva and researcher at the Geneva Academy of International Humanitarian Law and Human Rights. She also lectures at Tel Aviv and Paris II Universities. Email: s_weill@hotmail.com

² The Report of the UN Fact-Finding Mission on the Gaza Conflict (the Goldstone report), 25 September 2009, A/HRC/12/48, para. 1963. Available at, <http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf>

³ Ibid. para. 1969(c).

⁴ GA Res A/64/10. Adopted by the General Assembly at its 39th plenary meeting, 5 November 2009. The resolution was adopted by a vote of 114 in favour and 18 against. The majority of EU states abstained and some voted against. None voted in favour. The resolution is available at, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/462/43/PDF/N0946243.pdf?OpenElement>

⁵ A few days earlier, Israel published a report entitled, "Gaza Operation Investigations: Update", 29 January 2010, which describes Israel's procedures for investigation and ongoing investigations relating to Cast Lead. Available at, http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Hamas+war+against+Israel/Gaza_Operation_Investigations_Update_Jan_2010.htm.

See also, Israeli Ministry of Foreign Affairs' official statement: "Israel responds to UN Secretary-General report on implementing recommendations of the Goldstone report", 5 February 2010. Available at, http://www.mfa.gov.il/MFA/About+the+Ministry/MFA+Spokesman/2010/Israel_responds_UNSecy-Gen_report_implement_recommendations_Goldstone_report_5-Feb-2010.htm

⁶ In addition the European Parliament endorsed the Goldstone Report on 10 March 2010. The full text of the resolution is available at, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2010-0054+0+DOC+XML+V0//EN&language=EN>

⁷ HRC's Resolution, "Follow-up to the report of the United Nations Independent International Fact-Finding Mission on the Gaza Conflict", 25 March 2010, A/HRC/RES/13/9. Available at, <http://domino.un.org/UNISPAL.NSF/0/7d3f137e67d203ab8525770d005b7996?OpenDocument>

⁸ See, HRC's report, "Progress Report of the High Commissioner on the Follow-Up to the Report of the United Nations Independent International Fact-Finding Mission on the Gaza Conflict", 14 June 2010, A/HRC/14/CRP.4. Available at, [http://www.adalah.org/eng/docs/june10/HRC14.Report.OHCHR.ExpertsGroup\[1\].pdf](http://www.adalah.org/eng/docs/june10/HRC14.Report.OHCHR.ExpertsGroup[1].pdf)

⁹ The law defines a command investigation as "a procedure held by the army, according to the army orders and regulations, with respect to an incident that has taken place during a training or a military operation or with connection to them." They have the following characteristics: (1) All testimonies heard and their

conclusions remain confidential and are inadmissible before a court; (2) If the Military Advocate General finds that there is a basis to open a criminal investigation, he can do so only after consulting a Major General. As the materials of the inquiry remain confidential, if the MAG decides to open a criminal investigation, it will start from the beginning.

¹⁰ See, the Report of the United Nations High Commissioner for Human Rights, "Human Rights Situation in Palestine and other Occupied Arab Territories: The grave violations of human rights in the Occupied Palestinian Territory, particularly due to the recent Israeli military attacks against the occupied Gaza Strip", 17 March 2010, A/HRC/13/54. Available at, http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A.HRC.13.54_AEV.pdf

¹¹ From the beginning of the second Intifada until the end of 2009 only 13 investigations into events in which Palestinian civilians were killed led to indictments. In only four Palestinian civilian death cases were soldiers convicted. See, Yesh Din's report, "Data Sheet- IDF Investigations of IDF offenses against Palestinians: Figures for 2000-2009" (February 2010). Available at, <http://www.yesh-din.org/sys/images/File/2000-2009%20Investigations%20and%20Indictments%20-%20Datashet,%20Feb%202010%20%5BEnglish%5D.pdf>. See also, Yesh Din's report, "Exceptions -

Prosecution of IDF soldiers during and after the Second Intifada, 2000-2007" (2008). Available at, <http://www.yesh-din.org/sys/images/File/Exceptions%5BEng%5D%5B1%5D.pdf>

¹² See, the Goldstone report, 25 September 2009, para. 1959. Available at, <http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf>

¹³ The Geneva Conventions require states to investigate persons alleged to have committed or ordered to have committed war crimes, Art. 146 of the Fourth Geneva Convention.

¹⁴ See, for example Israel's response to the allegations raised on the legality of the rules of engagement and use of weapons: "While the IDF's rules of engagement were fully consistent with international law, the IDF demonstrated its commitment to protecting civilians by issuing new instructions and orders in the course of the operation designed to further enhance and clarify these protections"; "The IDF uses only weapons and munitions defined as legal under international law and authorized as such by the relevant IDF authorities, including MAG officers." (Israel's report, "The Operation in Gaza: Factual and Legal Aspects", July 2009, paras. 222 and 405. Available at, <http://www.mfa.gov.il/NR/rdonlyres/E89E699D-A435-491B-B2D0-017675DAFEF7/0/GazaOperationwLinks.pdf>)

¹⁵ See, for example: "The IDF is examining how the unfortunate operational error occurred, in order to reinforce safeguards and to prevent its recurrence. Israel deeply regrets the tragic outcome. This is the kind of mistake that can occur during intensive fighting in a crowded environment." (Israel's report, "The Operation in Gaza: Factual and Legal Aspects", July 2009, para. 387. Available at, <http://www.mfa.gov.il/NR/rdonlyres/E89E699D-A435-491B-B2D0-017675DAFEF7/0/GazaOperationwLinks.pdf>); "Tragic results, including civilian death and damage to property do not necessarily mean that violations of international law have occurred."; "The special investigations revealed some instances of intelligence and operational errors... The special command investigations also uncovered some instances where IDF soldiers and officers violated the rules of engagement." (Israel's Report, "Gaza Operation Investigations: An Update", January 2010 para.4 and paras. 99-100. Available at, <http://www.mfa.gov.il/NR/rdonlyres/8E841A98-1755-413D-A1D2-8B30F64022BE/0/GazaOperationInvestigationsUpdate.pdf>).

¹⁶ Israel's four reports are; (1) "Conclusion of investigations into Central Claims and Issues in Operation Cast Lead", April 2009. Available at, http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Hamas+war+against+Israel/IDF_Conclusion_of_investigations_Operation_Cast_Lead_Part1_22-Apr-2009.htm; (2) "The Operation in Gaza: Factual and Legal Aspects", July 2009. Available at, <http://www.mfa.gov.il/NR/rdonlyres/E89E699D-A435-491B-B2D0-017675DAFEF7/0/GazaOperationwLinks.pdf>; (3) "Initial Response to the Fact-Finding Mission on Gaza pursuant to Resolution S-9/1 of the Human Rights Council", September 2009. Available at, <http://www.mfa.gov.il/NR/rdonlyres/FC985702-61C4-41C9-8B72-E3876FEF0ACA/0/GoldstoneReportInitialResponse240909.pdf>; and (4) "Gaza Operation Investigations: An Update", January 2010. Available at, <http://www.mfa.gov.il/NR/rdonlyres/8E841A98-1755-413D-A1D2-8B30F64022BE/0/GazaOperationInvestigationsUpdate.pdf>.

¹⁷ The five investigations are the following: (1) Incidents where UN and international facilities were fired upon. (2) Incidents involving shooting at medical facilities, buildings, vehicles and crews. (3) Incidents in which many civilians were harmed. (4) The use of weaponry containing phosphorous. (5) Damage to infrastructure and destruction of buildings by ground forces. See, Israel's report, "Conclusion of investigations into central claims and issues in Operation Cast Lead", April 2009. Available at, http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Hamas+war+against+Israel/IDF_Conclusion_of_investigations_Operation_Cast_Lead_Part1_22-Apr-2009.htm.htm

¹⁸ See, the Goldstone report, 25 September 2009, para. 1819. Available at, <http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf>

¹⁹ "The additional special command investigation focuses on three sets of allegations from the Human Rights Council Fact-Finding Report. One set relates to the Al-Samouni residence, where an IDF attack allegedly caused the injury and death of several dozen civilians who were seeking shelter there. Another set of allegations under review relates to claims that the IDF mistreated Palestinians detainees. A third set of allegations under review relates to an alleged attack on the Al-Maquadme Mosque". See, Israel's report, "Gaza Operation Investigations: An Update", January 2010, para.125. Available at, <http://www.mfa.gov.il/NR/rdonlyres/8E841A98-1755-413D-A1D2-8B30F64022BE/0/GazaOperationInvestigationsUpdate.pdf>.

²⁰ Ibid. para. 137.

²¹ See, Haaretz, "Two IDF soldiers charged with using 9-year-old 'human shield' in Gaza war", 11 March 2010. Available at, <http://www.haaretz.com/news/two-idf-soldiers-charged-with-using-9-year-old-human-shield-in-gaza-war-1.264652>

²² See, Haaretz, "IDF to charge soldier with killing two Palestinian women during Gaza war", 16 June 2010. Available at, <http://www.haaretz.com/news/diplomacy-defense/idf-to-charge-soldier-with-killing-two-palestinian-women-during-gaza-war-1.296500?localLinksEnabled=false>

²³ See, the Goldstone report, 25 September 2009, para. 1963 . Available at, <http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf>

²⁴ Para. 1970 of the Goldstone report. States which are not party to the Rome Statute may accept the Court's jurisdiction on an *ad hoc* basis by lodging a declaration to that effect with the Registrar in accordance with article 12 (3) of the Rome Statute. On 22 January 2009, the Palestinian National Authority lodged a declaration by hand recognizing the jurisdiction of the ICC with respect to acts committed on the territory of Palestine since 1 July 2002. The declaration is available at, <http://www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279777/20090122PalestinianDeclaration2.pdf>

²⁵ The letter from the Office of the ICC Prosecutor to the office of the High Commissioner is available at, <http://www.icc-cpi.int/NR/rdonlyres/FF55CC8D-3E63-4D3F-B502-1DB2BC4D45FF/281439/LettertoUNHC1.pdf>

²⁶ Alain Pellet, "The Effects of Palestine's Recognition of the International Criminal Court's Jurisdiction", 18 February 2010. Available at, <http://www.icc-cpi.int/NR/rdonlyres/D3C77FA6-9DEE-45B1-ACCO-B41706BB41E5/281927/PelletENGCLEAN.pdf>

²⁷ GA RES/63/3 (A/63/L.2). Adopted by the General Assembly at its 22nd plenary meeting, 8 October 2008. Available at, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/470/97/PDF/N0847097.pdf?OpenElement>

²⁸ See, the Goldstone report, 25 September 2009, para. 1975 . Available at, <http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf>

²⁹ See *Adalah's Newsletter*, April 2010, available at <http://www.adalah.org/newsletter/eng/apr10/bill.pdf>

³⁰ Ibid.

³¹ Sharon Weill, "Israel's culture of impunity," *Le Monde Diplomatique* (English edition online), September 2009. Available at, <http://mondediplo.com/2009/09/13israelimpunity>. For other attempts to enforce the principle of universal jurisdiction, see "The Principle and Practice of Universal Jurisdiction," the Palestinian Centre for Human Rights, April 2010. Available at, http://pchr.org/files/Reports/English/pdf_spec/PCHR-UJ-BOOK.pdf

³² See, The Jerusalem Post, "Analysis: Goldstone fire far from", 12 February 2010, available at: <http://www.jpost.com/Israel/Article.aspx?id=168514>