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CONGRESS OF THE UNITED STATES
COMMITTEE ON FOREIGN AFFAIRS
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON, DC 20515

TELEPHONE: (202) 225-5021
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November 2, 2009

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Chairmen's Response to Justice Goldstone

Dear Colleague:

Last week, Justice Richard Goldstone sent us and other Members a memorandum outlining his "strong reservations about the text of the resolution" (H.Res.867) that will be voted upon by the House tomorrow. We have the utmost respect for Justice Goldstone, but we disagree with his criticisms of H.Res.867. Our primary concerns are as follows:

--The mandate of the commission Justice Goldstone chaired ("The United Nations Fact-Finding Mission on the Gaza Conflict") was one-sided and biased, and, even though Justice Goldstone made earnest efforts to alter the mandate, he did not fully succeed, as we indicate below. We intend to alter the resolution to take account of Justice Goldstone's effort.

--The commission's report lacks context. It does not take account of the nature of Israel's enemy – operating from the midst of civilian populations, committed to Israel's destruction, and fully supported by state actors Iran and Syria. (In fact, it is rather dismissive of claims that Hamas operated from amidst civilian populations.) The report generally gives short shrift to Hamas' relentless rocket attacks on Israeli civilians, over a period of eight years, which precipitated the war.


--The report does not take into account the extent to which witnesses from Gaza were likely intimidated by Hamas.

--In general, the report is credulous of Hamas claims but skeptical of Israeli claims.

We would like to share with you, below, my point-by-point analysis of Justice Goldstone's comments.

Sincerely,


HOWARD BERMAN, Chairman
Committee on Foreign Affairs


GARY L. ACKERMAN, Chairman
Subcommittee on the Middle East and
South Asia

Letter and Response

[Note: Justice Goldstone counts the descriptive paragraph as Paragraph 1. Therefore, "Paragraph 3" refers to Whereas 2 (and accordingly throughout his text).]

[Goldstone:]

"MEMORANDUM

FROM: RICHARD GOLDSTONE
TO: INTERESTED PERSONS
RE: HR 867

"Here are some comments on this resolution in an effort to correct factual errors:

"1. Paragraph 3:

That is why I and others refused the original mandate - it only called for an investigation into violations committed by Israel. The mandate given to and accepted by me and under which we worked and reported reads as follows:

' . . .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.'

"That mandate clearly included rocket and mortar attacks on Israel and as the report makes clear was so interpreted and implemented. It was the report with that mandate that was adopted by the Human Rights Council and that included the serious findings made against Hamas and other militant Palestinian groups."

Response: The broadened mandate Justice Goldstone sought was discussed, but not voted on, at a UNHRC plenary session. It was then announced via a press release in an altered formulation, more restrictive than the formulation envisioned by Justice Goldstone. The UNHRC did not create a new mandate. The only relevant mandate remained the one which includes operational paragraph 14 of UNHRC resolution A/HRC/S-9/L.1, as was accepted by the Council on January 12, 2009. The January 12 mandate was also the only mandate referenced in the October 16 UNHRC resolution that adopted the Report.

This whereas clause focuses on the mandate. Of course, the far more important issue is the Report itself, which makes only limited mention of the rocket attacks on Israel.

[Goldstone:] “2. Paragraph 4:

This is factually incorrect. Chapter XXIV of the Report considers in detail the relentless rocket attacks from Gaza on Israel and the terror it caused to the people living within their range. The finding is made that they constituted serious war crimes and possibly crimes against humanity.”

Response: Paragraph 4 [Whereas #3] of H.Res.867 is addressing the mandate, not the Report. It reads as follows: “Whereas the mandate of the “fact-finding mission” makes no mention of the relentless rocket and mortar attacks, which numbered in the thousands and spanned a period of eight years, by Hamas and other violent militant groups in Gaza against civilian targets in Israel, that necessitated Israel’s defensive measures”. That statement is an accurate characterization of both the formal mandate, as passed by the UNHRC, and of the broadened mandate requested by Justice Goldstone.

[Goldstone:] “3. Paragraph 5:

The member concerned, Professor Christine Chinkin of the London School of Economics, in the same letter, together with other leading international lawyers, also condemned as war crimes the Hamas rockets fired into Israel.”

Response: The letter Professor Chinkin signed, which was published in the British press in mid-January, did indeed accuse Hamas of war crimes. But it also accused Israel of war crimes, months before the investigation began, clearly prejudging the outcome of the investigation regarding both parties. In my view, Professor Chinkin should have been disqualified from serving on the commission, based on her having signed the letter. The UN watchdog *UN Watch* notes that Justice Goldstone himself admitted in an August interview that the signature “would have been grounds for disqualification” if the commission had constituted a formal judicial inquiry.

[Goldstone:] “4. Paragraph 6:

The mandate that was given to the Mission was certainly not opposed by all or even a

majority of the States to which reference is made. That is factually incorrect. I am happy to provide further details if necessary.”

Response: H.Res.867 uses the phrase “refused to support,” not “opposed by,” as Justice Goldstone suggests. The language of H.Res.867 was carefully chosen to include those nations who voted no, those who abstained, and those who chose not to vote at all, i.e., all those who “refused to support.”

[Goldstone:] “5. Paragraph 7:

This too is factually incorrect. The mandate that had been rejected was the one I rejected. Mary Robinson, for example, has written in support of the mandate given to and accepted by me.”

Response: As indicated above, the formal mandate is that contained in the UNHRC Resolution A/HRC/S-9/L.1.

[Goldstone:] “6. Paragraph 9:

The words quoted relate to the decision we made that it would have been unfair to investigate and make finding on situations where decisions had been made by Israeli soldiers ‘in the fog of battle’. This was a decision made in favor and not against the interests of Israel.

“I do not consider that it is fair or just to label the findings as ‘sweeping and unsubstantiated determinations’.”

Response: When summarizing the results of investigations into alleged Israeli attacks on Palestinian civilians, the Report states that “the Mission found in every case [except one] that the Israeli armed forces had carried out direct intentional strikes against civilians” and that “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...”

The assertion regarding “intentional strikes” is particularly mystifying. The Report does not take into account that Israeli soldiers were operating under fire, in an extremely volatile and dangerous environment, in which the enemy was hiding amongst a civilian population.

Nor does the Report generally take into account that testimony from Gazans was given under the watchful eye of Hamas officials. Moreover, the commission heard, at best, only one side of the story, since Israel, despairing of the biased mandate, chose not to participate. Whatever the wisdom of that Israeli decision – and, as indicated below, I do find it understandable – the Report at least should have acknowledged that Israeli non-participation limited the commission’s ability to reach firm conclusions.

[Goldstone:] “7. Paragraph 11:

What I had explained to The Forward was that the Report itself would not constitute evidence admissible in court of law and that investigators would have to investigate which allegations they considered relevant. That, too, was why we recommended domestic investigations into the allegations. The remark as quoted is both inaccurate and taken completely out of context.”

Response: Here is the relevant quote, as well as the passages that directly precede and follow it, taken directly from the article in the *Jewish Daily Forward*:

“Goldstone defended the report’s reliance on eyewitness accounts, noting his mission had cross-checked those accounts against each other and sought corroboration from photos, satellite photos, contemporaneous reports, forensic evidence and the mission’s own inspections of the sites in question.

For all that gathered information, though, he said, “We had to do the best we could with the material we had. If this was a court of law, there would have been nothing proven.”

Goldstone emphasized that his conclusion that war crimes had been committed was always intended as conditional. He still hopes that independent investigations carried out by Israel and the Palestinians will use the allegations as, he said, “a useful road map.””

<http://www.forward.com/articles/116269/>

We consider the quote in the whereas to be fully in context.

[Goldstone:] “8. Paragraph 12:

It is again factually incorrect to state that the Report denied Israel the right of self-defense. The Report examined how that right was implemented by the standards of international law. What is commonly called *ius ad bellum*, the right to use military force was not considered to fall within our mandate. Israel’s right to use military force was not questioned.”

Response: We use the phrase “in effect” in our clause because the Report does not explore why Israel has the right to defend itself against terrorist aggression perpetrated by a non-state actor. Justice Goldstone says that “the right to use military force was not considered to fall within our mandate.” Yet, he went beyond his mandate in several other areas of the Report, including discussion of Israel’s policies throughout the occupied territories (including the West Bank) and recommendations that were not called for by the UNHRC resolution that established the mandate. An acknowledgement of Israel’s right of self-defense would have provided vital context to the issues raised in the Report.

[Goldstone:] “9. Paragraph 13:

This is the first suggestion that I have come across to the effect that we should have investigated the provenance of the rockets. It was simply not on the agenda, and in any event, we would not have had the facilities or capability of investigating these allegations. If the Government of Israel has requested us to investigate that issue I have no doubt that we have done our best to do so.”

Response: As noted, Justice Goldstone’s Report went beyond its mandate in several respects; looking at the roles of Iran and Syria in assisting Hamas certainly would have provided critical context to the Report. Iran and Syria enable Hamas’ terrorism. The assistance Hamas receives from outside actors allows the Hamas terrorist organization to attack Israel incessantly, certain in the knowledge that its arsenals will be replenished.

Hamas’ support by state actors makes it a formidable foe. The report should have considered that geopolitical context.

[Goldstone:] “10. Paragraph 14:

This is a sweeping and unfair characterization of the Report. I hope that the Report will be read by those tasked with considering the resolution.”

Response: The Report uncritically attributes numerous statements to “Gaza Authorities” (meaning, Hamas), while often casting doubt on information derived from the international and Israeli press and from non-government-affiliated Israelis.

For example, the Report criticizes the fact that an Israeli Government web-post cites a *Newsweek* article reporting on Hamas depredations against its own population and casts doubt on the accuracy of the article. According to the Report, the citing of the *Newsweek* article, far from being an effort to invoke a neutral source, is merely evidence that Israel itself finds the *Newsweek* report unconvincing, since Israel does not adduce evidence from its own internal sources (p.143 paragraphs 612-614). This is an odd criticism, since intelligence information, no matter how compelling, is only rarely disclosed to the public.

Perhaps most tellingly, the Report appears only to cite Israeli statements when it finds such statements a useful basis for criticizing Israel. For example:

Section 41 – “The Mission examined the mortar shelling of al-Fakhura junction in Jabaliyah next to a UNRWA school, which, at the time, was sheltering more than 1,300 people (chap. X). The Israeli armed forces launched at least four mortar shells. One landed in the courtyard of a family home, killing 11 people assembled there. Three other shells landed on al-Fakhura Street, killing at least a further 24 people and injuring as many as 40. The Mission examined in detail statements by Israeli Government representatives alleging that the attack was launched in response to a mortar attack from an armed Palestinian group. While the Mission does not exclude

that this may have been the case, it considers the credibility of Israel's position damaged by the series of inconsistencies, contradictions and factual inaccuracies in the statements justifying the attack."

Section 702 – "The Mission views as being unreliable the versions given by the Israeli authorities. The confusion as to what was hit, the erroneous allegations of who was specifically hit and where the armed groups were firing from, the indication that Israeli surveillance watched the scene but nonetheless could not detect where the strikes occurred, all combine to give the impression of either profound confusion or obfuscation."

By contrast, the Report is far more forgiving when discussing contradictions in Palestinian evidence:

Section 1092 - "There are some minor inconsistencies, which are not, in the opinion of the Mission, sufficiently weighty to cast doubt on the general reliability of Majdi Abd Rabbo. There are also, not surprisingly, some elements of the long account which appear in some versions and not in others. The Mission finds that these inconsistencies do not undermine the credibility of Majdi Abd Rabbo's account."

[Goldstone:] "11. Paragraph 16:

Again, this is an unfair and selective quotation taken out of context."

Response: Our whereas clause reads as follows: "Whereas in one notable instance, the report stated that it did not consider the admission of a Hamas official that Hamas often "created a human shield of women, children, the elderly and the mujahideen, against [the Israeli military]" specifically to "constitute evidence that Hamas forced Palestinian civilians to shield military objectives against attack."

This quote was not taken out of context, and it can be found in Sections 477 and 478 of the Report, as follows:

"The Mission is also aware of the public statement by Mr. Fathi Hammad, a Hamas member of the Palestinian Legislative Council, on 29 February 2009, which is adduced as evidence of Hamas' use of human shields. Mr. Hammad reportedly stated that:

...the Palestinian people has developed its [methods] of death seeking. For the Palestinian people, death became an industry, at which women excel and so do all people on this land: the elderly excel, the mujahideen excel and the children excel. Accordingly, [Hamas] created a human shield of women, children, the elderly and the mujahideen, against the Zionist bombing machine.

478. Although the Mission finds this statement morally repugnant, it does not consider it to constitute evidence that Hamas forced Palestinian

civilians to shield military objectives against attack. The Government of Israel has not identified any such cases.

The Report also displays numerous examples of credulousness regarding Hamas behavior. For example:

p. 117: “While, in the light of the above reports, the Mission does not discount the use of booby traps by the Palestinian armed groups, it has no basis to conclude that civilian lives were put at risk, as none of the reports record the presence of civilians in or near the houses in which booby traps are alleged to have been set.”

p. 117: “Although the Mission was not able to investigate the allegation of the use of mosques generally by Palestinian groups for storing weapons, it did investigate the incident of a missile attack by the Israeli armed forces against al-Maqadmah mosque on the outskirts of Jabaliyah camp, in which at least 15 people were killed and 40 injured on 3 January 2009 (see chap. XI). The Mission found no evidence that this mosque was used for the storage of weapons or any military activity by Palestinian armed groups. As far as this mosque is concerned, therefore, the Mission found no basis for such an allegation. However, the Mission is unable to make a determination regarding the allegation in general nor with respect to any other mosque that was attacked by the Israeli armed forces during the military operations.”

p. 121: “On the basis of the information it gathered, the Mission finds that there are indications that Palestinian armed groups launched rockets from urban areas. The mission has not been able to obtain any direct evidence that this was done with the specific intent of shielding the rocket launchers from counterattacks by the Israeli armed forces.”

p. 121: “The Mission finds that the presence of Palestinian armed fighters in urban residential areas during the military operations is established. On the basis of the information it gathered, the Mission is unable to form an opinion on the exact nature or the intensity of their combat activities in urban residential areas that would have placed the civilian population and civilian objects at risk of attack. While reports reviewed by the Mission credibly indicate that members of Palestinian armed groups were not always dressed in a way that distinguished them from civilians, the Mission found no evidence that Palestinian combatants mingled with the civilian population with the intention of shielding themselves from attack.”

[Goldstone:] “12. Paragraph 17:

That Hamas was able to shape the findings or that it pre-screened the witnesses is devoid of truth and I challenge anyone to produce evidence in support of it.”

Response: The evidence is within the Report itself. Page 111 of the Report reads as follows: “In its efforts to gather more direct information on the subject, during its investigations in Gaza and in interviews with victims and witnesses of incidents and other informed individuals, the Mission raised questions regarding the conduct of

Palestinian armed groups during the hostilities in Gaza. The Mission notes that those interviewed in Gaza appeared reluctant to speak about the presence of or conduct of hostilities by the Palestinian armed groups. Whatever the reasons for their reluctance, the Mission does not discount that the interviewees' reluctance may have stemmed from a fear of reprisals."

Hamas is in full control of Gaza, and this "fear of reprisals" significantly helped Hamas shape the findings. See, for example, an Amnesty International publication that reports on how Hamas murdered its rivals while operation Cast Lead was ongoing: <http://www.amnesty.org/en/news-and-updates/report/hamas-waged-deadly-campaign-war-devastated-gaza-20090212>.

Furthermore, the commission conducted some of its proceedings through holding televised open hearings in Gaza. Given its total control of Gaza and its ability to intimidate, Hamas almost certainly would have been able to control the access and message of each witness attending a televised open hearing. What is beyond doubt is that witnesses were keenly aware that Hamas was monitoring the televised proceedings and likely to inflict reprisals for any unwelcome testimony.

[Goldstone:] "Finally, I note that there is not a word to record that notwithstanding repeated pleas to the Government of Israel, it refused all cooperation with the Mission. Amongst others, I requested the views of Israel with regard to the implementation of the mandate and details of any issues that the Government of Israel might wish us to investigate."

Response: Justice Goldstone is correct. The Government of Israel decided not to cooperate with the Mission, based on its biased mandate, as well as the UNHRC's long history of anti-Israel bias. I find that position, at the least, understandable.

11/29/09