What to Make of the UN's Special Commission Report on Gaza?

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[The UN Human Rights Council’s Independent Commission of Inquiry report](http://www.ohchr.org/EN/HRBodies/HRC/CoIGazaConflict/Pages/ReportCoIGaza.aspx#report) on the 2014 Gaza war, released Monday, is a bad piece of work—bad in almost entirely predictable and boring ways, but no less bad for being bad and predictable. It is also no less important for being boring. Even if one has no great interest in the Israeli-Palestinian conflict, the standards and approaches the UN is embracing will not remain confined to that conflict. Israel is, as always, the canary in the IHL coal mine. Approaches that begin as a way of constraining Israeli military action quickly migrate to constraining U.S. military action. The effort by the Special Commission to find war crimes in civilian deaths in urban targeting situations in which non-uniformed fighters exploit civilians for combat cover is thus worth some attention.

Let’s start with a basic fact: the commission’s job here was impossible. It is impossible rigorously to analyze whether a given strike or set of strikes complies with IHL without a detailed investigation of what the operators and commanders in the moment knew and why they decided to act as they did. It is always tempting to look at large numbers of dead civilians and assume that the fact of the bodies implicates a targeting decision. But that’s rarely right. Without knowing who the target was, what calculations as to civilian deaths commanders made, and what the expected military advantage of the strike was, a rigorous investigation simply can’t be done.

It is thus not simply an inconvenience but a debilitation that the commission got no cooperation from Israel, got no access to Gaza from Israel or Egypt, and did not have key questions answered by Hamas. That the commission received cooperation from Palestinian authorities—who do not control Gaza, in fact—is not much help.

The instinct of both Hamas and the Israelis to decline the privilege of addressing the commission’s concerns is understandable, though for different reasons. Hamas, having an entire strategy built around violation of IHL, cannot answer questions about its conduct without implicating itself. Israel, meanwhile, has a deep and well-founded suspicion of UN activity, particularly activity of the Human Rights Council. And there was reason to expect this commission to be worse than earlier ones, not better. The result was that the commission was left making judgments based on a combination of the public record and interviews with victims about matters the merits of which centrally depend on the viewpoints of commanders and operators. There’s no way to do this well.

There are a lot of ways, however, to do it badly.

The Israeli calculation was wrong in one key respect. The report is not worse than prior UN efforts. It’s better. It actually lacks the overt bias of prior UN investigations. It makes some notional effort at evenhandedness, finding information “pointing to serious violations of international humanitarian law and international human rights law by Israel and by Palestinian armed groups,” violations that “may amount to war crimes.” It criticizes the “inherently indiscriminate nature of most of the projectiles directed towards Israel by [these armed] groups and to the targeting of Israeli civilians.” And it spends a fair bit of space analyzing Palestinian conduct.

There are two major oddities, however, in the commission’s discussion of this conduct. The first is the degree to which the commission gives the benefit of the doubt to armed groups that made no secret about their intentional targeting of civilians. On page 18, for example, the commission introduces the subject of rocket attacks into Israel by describing Hamas’s military wing as focused chiefly on attacking military targets. “Security experts have noted that while the Al Qassam Brigades may have targeted civilians in the past as part of its military strategy, in 2014 its declared official policy was ‘to focus on military or semi-military targets and to avoid other targets, especially civilians.’”

If this does not sound like your memory of the Gaza war, we feel your pain. And It doesn’t take too many pages before the reality catches up with the wishful thinking. On page 21, for example, the commission notes a Qassam Brigades statement that it had launched rockets at the city of Dimona. Three pages later, it notes the announcement that the group had mortared Kibbutz Nirim and other communities. On page 25, the commission cites Israeli government statistics that 4,000 or 4,500 rockets and mortars were aimed at Israeli cities, towns and communities, and about half of the rest landed in Gaza. Yet the commission keeps coming back to uncertainty as to Hamas’s targeting aims and practices, despite at the same time repeatedly citing statements by Hamas that they were targeting Israeli cities and civilians (see pp. 26-27, in particular).

Ultimately, the commission comes down more or less in right place on this matter, albeit a bit tentatively so:

While the commission cannot know what the intended target of each rocket attack was, statements made by Palestinian armed groups with regard to the firing of rockets indicate intent to direct those attacks against civilians. In addition, international tribunals have ruled that in certain circumstances, indiscriminate attacks may qualify as direct attacks against civilians. The launching of rockets by Palestinian armed groups may therefore amount to war crimes.

But the road to this conclusion is a peculiar one, and it does not confront adequately the fundamental incompatibility between the laws of war and the entire modus operandi of one side of the Gaza conflict.

The treatment of Hamas’s tactics is not merely too pat in the commission’s evaluation of Hamas’s own behavior, it causes a fundamental error in the evaluation of much Israeli conduct too. The commission spends remarkably little ink evaluating the impact of Hamas’s tactics on Israeli targeting decisions. Yet the two are intricately connected. The reason, after all, that Israeli strikes kill so many civilians is, at least in significant part, because Hamas uses civilian infrastructure as both base and hiding place. Yet just as Hamas’s targeting practices are treated as a matter of some doubt, the commission also lets the group’s defensive practices shift the responsibility for civilian death from Hamas’s own behavior to Israeli targeting decisions.

There are 667 paragraphs in the commission’s report, yet only 18 of them deal with the use of civilian infrastructure by Hamas for military purposes—starting with paragraph 466 (on page 123). That’s not because the commission concludes that Hamas did not, in fact, launch attacks from houses, schools, mosques, and the like. To the contrary, while it finds that it was unable to verify the extensive Israeli allegations of such behavior because of both “Israel’s denying the commission access to Gaza” and “Palestinian witnesses’ fear of reprisal by armed groups and the local authorities if they provided information,” the commission did verify “certain patterns of behavior.” These included firing rockets from downtown Gaza, placing command and control centers and tunnel entrances in civilian buildings, and firing from close proximity to hospitals, shelters, religious sites, and school. As the commission notes, “the obligation to avoid to the maximum extent possible locating military objectives within densely populated areas was not always complied with.”

This sentence appears on page 127, and that actually says a lot. The conduct of Hamas does not in any way shape the report’s evaluation of Israeli targeting or alter the way the authors look at Israeli conduct. When the commission describes a residence as “prima facie” not a valid military target, which it does repeatedly in assuming that attacks on houses that kill civilians are presumptively failures of discrimination, that is hard to justify in the context of a conflict in which—as the commission finally admits—Hamas often used civilian protected objects for military purposes and “it does not appear that this behavior was simply a consequence of the normal course of military operations.”

In a more rigorous report, Hamas’s tactics would be the fundamental lens through which Israeli conduct got analyzed. When one side systematically violates the rules designed to protect civilians, after all, and a lot of civilians then get killed, those systematic violations have to be central to the inquiry into the reasons for those civilian deaths. In this report, those systematic violations are an afterthought. And somewhat shockingly—and very tellingly—they are also entirely absent from the report’s “conclusions and recommendations.”

The report’s main act, by contrast, is the evaluation of Israeli targeting decisions, evaluated in almost total isolation from the context of Hamas’s behavior—indeed, the discussion appears in the report before any real discussion of Hamas’s defensive practices—and without any input from the commanders in question.

What’s more, the commission, in paragraph 215, invents an obligation on the part of the Israeli military to publicly release proof that a given target was a legitimate one:

In many of the cases examined by the commission, as well as in incidents reported by local and international organizations, there is little or no information as to how residential buildings, which are prima facie civilian objects immune from attack, came to be regarded as legitimate military objectives. The commission recognizes the dilemma Israel faces in releasing information that would disclose the precise target of military strikes, as this information might be classified and jeopardize intelligence sources. In relation to “evidence of military use”, official Israeli sources indicated that: “In the context of wide-scale military operations, it is often extremely difficult to provide evidence demonstrating exactly why certain structures were damaged. While the IDF targets only military objectives, forensic evidence that a particular site was used for military purposes is rarely available after an attack. Such evidence is usually destroyed in the attack or, if time allows, removed by the terrorist organisations who exploited the site in the first place. It is therefore unsurprising that forensic evidence of military use cannot usually be traced following attacks. As is the case with most militaries, the IDF unfortunately cannot publicize detailed reasoning behind every attack without endangering intelligence sources and methods. The Law of Armed Conflict does not include any requirement or obligation to publicize such information.” However, in the commission’s view, accepting that logic would undermine any efforts to ensure accountability.

Pause a minute over this. The commission here is saying that in the absence of evidence that a target was legitimate, it will assume that it was not and therefore that a strike against a residential building was presumptively a war crime. In this formulation, a state must either release information or face condemnation. It is a kind of grafting of FOIA onto IHL, and the commission could not be more explicit about it: “the onus is on Israel to make available information about [its military] objectives [in each attack] and explain how attacking them contributed to military action.”

Having put the burden on Israel to prove every attack legitimate and having no access to Israeli decisionmaking, it is no wonder that the commission regularly finds that many of the strikes it examines may have been war crimes.

Indeed, although the Commission repeatedly expresses regret over the lack of Israeli participation, it also repeatedly proves willing to plunge ahead without key information. Take, for instance, page 60, where the commission concludes “that a reasonable commander must have been aware” [emphasis added] that many of 15 investigated airstrikes were “likely to result in a high number of civilian casualties as well as in considerable destruction.” In turn, this conclusion offers “strong indications that these attacks could be disproportionate, and therefore amount to a war crime.”

The basis for these rather damning conclusions are pretty limited: that large numbers of civilians died, that targeted buildings were “residential in nature” and “located in densely populated areas,” that many of the attacks were carried out “in the evening” “or at dawn” “or during the night,” and that “large weapons” were used. That’s really it. But in “the absence of information suggesting in each case that the anticipated military advantage at the time of the attack” exceeded anticipated civilian damage, this proves enough for the Commission to draws its conclusions.

There’s a bit of CYA work on the commission’s part, mostly linguistic, to protect against this sort of criticism. The commission never specifically finds any incident a war crime. But the veil is thin and the modesty cosmetic. Despite the frequent appearance of hedging phrases like “there are strong indications that” or that conduct “may amount to war crimes,” the report is in the business of drawing conclusions.

The inability to hear from Israeli commanders is a particular problem when the report delves into specific examples. For instance, in its description of events in the Shuja’iya neighborhood, the report goes into detail about the quantity of Israeli shelling and the civilian deaths that it produced. But in the close to 50 paragraphs the report devotes to stories of civilian death and suffering over a 48 hour period in the neighborhood, the report includes barely six sentences about a possible reason for the heavy Israeli heavy fire:

On 20 July at approximately 1.30 a.m., an explosive device was detonated on an IDF armoured vehicle, causing the death of seven soldiers.  At the same time, in other areas of Shuja’iya, IDF soldiers came under attack from Palestinian armed groups, ultimately resulting in the death of another 6 IDF soldiers... the IDF then sought to retrieve the bodies of the dead soldiers and the destroyed armoured vehicle, evacuate the injured soldiers and respond to the Palestinian armed groups’ counter-offensive. At the time not all of the soldiers were accounted for, raising fear of a possible abduction.

The report offers no details, and no insight into the thinking of the soldiers who were struggling to extricate themselves and their comrades from a populated, urban battlefield of their enemies’ choosing. The reader thus has no idea what weapons the Israeli soldiers had at their disposal and no sense of how much fire was directed at them, for how long, or from what location or direction. In the absence of that information, determinations that Israel “violated the prohibition of treating several distinct individual military objectives in a densely populated area as one single military objective” and did “not conform[] to the principle of proportionality” seem at a minimum premature. (One might also ask the Commission what it is they would have suggested the relevant soldiers and commanders done in such a situation.)

Or take the Commission’s deeply disturbing allegations of “willful killing” of noncombatants and prevention of civilians from fleeing. After reviewing video and hearing testimony about the killing of Salem Shamaly, the Commission concludes that he was “targeted in violation of the principle of distinction.” That the Commission was able to do so without knowing who shot him or under what circumstances seems rather puzzling. Was he shot by Israel or Hamas? Could he have been taken for a militant? Can we even be sure he wasn’t a militant? The report does not even pose these questions.

A similar logic applies to the Commission’s condemnation of Israel for preventing civilians from fleeing Khuza during operations (“The commission,” readers are told, “does not see any military consideration that could have justified” this.) Here again, the absence of the soldiers’ voices is fatal. The reader has no sense of what the soldiers who turned back fleeing civilians were thinking (Was there reason to suspect the approaching Palestinians were something other than civilians? In what direction were they fleeing, and what was happening in there?), or even whether events really happened as Palestinian witnesses describe.

Ironically, the effect sometimes gets worse when the Commission purports to consider materials published by Israel. Take for instance, the widely reported incident of four Palestinian children killed in an airstrike on a Gaza beach. Here, the Commission accepted just enough of the IDF Military Advocate General’s report to indict it—but dismissed the rest.

In its report, the Commission “found strong indications that the IDF failed in its obligations to take all feasible measures to avoid or at least minimize incidental harm to civilians.” This conclusion is based on an acceptance of the MAG’s conclusion that the victims were targeted based on aerial surveillance and three additional facts: (a) “the boys were aged between 9 and 11 years, and were therefore small in stature in comparison to the size of an average adult;” (b) “there were no IDF soldiers in the area… nor were there any other persons in imminent danger, thus calling into question the urgency of launching the strike;” and (c) “the [targeted] compound was located in the centre of a city of almost 550,000 residents, between a public beach and an area regularly used by fishermen.” Given these facts, the Commission concluded that the IDF could not have reasonably ruled out that civilians might be present, and that the IDF impermissibly assumed that the figures present in the compound were militants.

The IDF MAG report, however, adds in a few more details: (a) the targeted compound “had long been known” to both Israel and locals “as a compound belonging to Hamas's Naval Police and Naval Force... utilized exclusively by militants;” (b) the same compound was “closed off by a fence and clearly separated from the beach serving the civilian population;” (c) an intelligence assessment from shortly before the incident indicated that “operatives from Hamas' Naval Forces would gather in the military compound in order to prepare for military activity against the IDF;” (d) “under the circumstances in question, it would not have been possible for the operational entities involved to have identified these figures, via aerial surveillance, as children.” Although the UNHRC report purports to acknowledge the MAG report, it actually engages with none of these specific details. Nevertheless, it concludes that the officer who ordered the strike had violated his obligation to “exhaustively verif[y]” that those targeted were “taking a direct part in the hostilities or were members of armed groups with a continuous combat function.”

Perhaps most frustratingly, even the IDF’s efforts to protect civilians are apparently grounds for incrimination. On page 63, the Commission notes that “according to official Israeli sources, the IDF abandoned air strikes when the presence of civilians was detected.” This Israeli claim is taken at face value, but not for the purposes one might think. Rather than reflecting a policy of minimizing civilian casualties, for the Commission, this information simply demonstrates that “the IDF had the capacity to determine the civilian nature” of its targets and victims. And given the number of civilian deaths, the Commission’s conclusion was that Israel had frequently and unjustifiably failed to deploy this capacity—thus violating its obligation to use all “feasible” means to reduce civilian damage.

Our point here is not to defend Israeli conduct in any of these specific situations. It is merely to suggest that the commission has drawn a set of conclusions it cannot possibly draw with rigor, and it has done so using standards that are very difficult to defend.

But don’t take our word for it. The commission all but admits that it lacked the information to draw the conclusions it drew. In an [interview](http://www.haaretz.com/news/diplomacy-defense/.premium-1.662603)with Haaretz’s Barak Ravid, the Commission’s chairperson Mary McGowan Davis had this to say:

I certainly think it would have been different if Israel had cooperated… We could have met with Israeli victims and seen where rockets landed, talked with commanders, watched videos and visited Gaza. We talked to a lot of witnesses but of course an investigation needs to be as close to the scene as possible and it would have looked different.

McGowan Davis clearly intended this comment as a criticism of the Israeli government’s non-cooperation with the investigation. But she’s actually admitting, apparently unawares, that the material with which the Commission was working was simply insufficient to its task.

What does one say about a report whose author forthrightly admits that, had she had real information, “it would have looked different”?