Reflections on the UN Commission of Inquiry Gaza Report, Part I: The Historical Narrative

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On Friday, July 3rd, the UN's Human Rights Council (HRC) voted to adopt [a resolution](http://daccess-dds-ny.un.org/doc/UNDOC/LTD/G15/141/03/PDF/G1514103.pdf?OpenElement) which “welcomes” the [Report of the Independent Commission of Inquiry on the 2014 Gaza Conflict](http://www.ohchr.org/EN/HRBodies/HRC/CoIGazaConflict/Pages/ReportCoIGaza.aspx#report) (COI) and calls  for “all duty bearers and United Nations bodies to pursue the implementation of all recommendations contained in the report.” Nearly two months have passed since the release of the original report. Tempers have cooled (a bit) and the media has moved on (for now), so it’s a good time to step back and assess this whole episode, what it means and what its larger importance really is.

The resolution, in my judgment anyway, did not receive quite the attention it deserved. Despite the fact that its text pointedly focused on Israel alone and refrained from pointing any fingers at Hamas or any other Palestinian groups involved in the 2014 conflict, it received nearly unanimous support in the council. Forty-one of the 47 state members of the HRC nevertheless voted to accept it; the sole negative vote came from the United States, while the five abstentions came from India, Kenya, Ethiopia, Paraguay and Macedonia.

Remarkably, several of the countries which eventually voted to support the resolution, such as the United Kingdom, Germany and France, [reportedly acknowledged](http://www.haaretz.com/news/diplomacy-defense/.premium-1.664316) the fact that the resolution was one-sided and misrepresented the more even-handed tone of the COI's Report. They nevertheless decided to support the Resolution because it was an improvement over earlier drafts. Given that the resolution was drafted by bastions of human rights such as Cuba, Nicaragua, Pakistan, Venezuela and Tunisia, the fact that initial versions were much worse should not come as much of a surprise.

But the question remains: Why would such western countries decide to raise their hands in support of an admittedly one-sided resolution?

Putting aside the machinations and standard wheeling and dealings of international politics, I am quite confident that, in addition to the fact that no one really takes the HRC that seriously, one of the reasons for this decision is that the COI report appears to many to be much more balanced than previous similar UN interventions, especially when compared to the 2009 Report of the International Fact Finding Mission headed by Justice Richard Goldstone. Just for the sake of comparison, when the HRC voted to adopt the Goldstone Report in October 2009, the vote was 25 in favor, 11 abstentions and five no-shows.

Having witnessed and participated in international negotiations first-hand, I can personally attest that this repeating theme of “if it's better than previous versions, then it’s OK to support it” is not by any means unique to the Israeli-Palestinian context. But that only begs the question: Is the COI Report truly “better” than previous reports, as many people (and apparently many countries) seem to believe?

Several well-written and thought-out critiques of the COI report have already been published—including by [Laurie Blank](https://www.lawfareblog.com/un-gaza-report-heads-i-win-tails-you-lose) and [Benjamin Wittes and Yishai Schwartz](https://www.lawfareblog.com/what-make-uns-special-commission-report-gaza) here on Lawfare. In this series of posts, I do not mean to review the numerous questionable factual and legal conclusions which permeate it. I want, rather, to focus on three specific elements of the report which maintain a clandestine “dialogue” with more far-reaching (and resultantly, more important) international processes and disputes. In effect, I want to shed some light on the role the COI report may play in the “big picture” of things to come.

The first aspect I wish to address relates to the “historical” narrative presented by the COI, as background to its conclusions. Were you to ask any Israeli why the 2014 conflict in Gaza broke out, the story you would hear would most probably be the same, irrespective of the political views of your interlocutor.

On 12 June 2014, Hamas terrorists from the West Bank kidnapped three Israeli teenagers who were waiting at a road junction. In response, Israel launched a wide-spread military operation throughout the West Bank in an attempt to recover the three boys. Only later would it be discovered that the terrorists had murdered the three soon after the kidnapping. Hamas leadership in Gaza, declaring support for its West Bank operatives, commenced firing long-range rockets and mortars from the Gaza Strip at Israeli towns and cities, demanding that Israel cease the operation immediately.

Israel initially decided not to retaliate against the Hamas attacks. However, as the shelling continued, Israel responded with sporadic air-strikes, combined with calls to avoid escalation. As the shelling from Gaza intensified (in spite of numerous Israeli public proposals of cease-fires, all rejected by Hamas) so did the Israeli response. Following the discovery that Hamas had dug numerous underground attack-tunnels into Israel, including under Israeli villages and kibbutzim (the discovery came about as a result of a well-coordinated attack which sprung out of one of the tunnels), and given the fact that the air strikes were unsuccessful in decreasing the number of launches towards Israel, the Israeli government finally decided to launch a major ground campaign into Gaza, with the purpose of stopping the shelling and discovering the locations of the tunnels.

Reading the COI report, however, the narrative comes out quite differently. In paragraphs 53-57 of the Report, the COI presents its version of the context for the fighting, beginning as follows:

53. The hostilities of 2014 erupted in the context of the protracted occupation of the West Bank, including East Jerusalem, and the Gaza Strip, and of the increasing number of rocket attacks on Israel. In the preceding months, there were few, if any, political prospects for reaching a solution to the conflict that would achieve peace and security for Palestinians and Israelis and realize the right to self-determination of the Palestinian people.

54. The blockade of Gaza by Israel, fully implemented since 2007 and described by the Secretary-General as “a continuing collective penalty against the population in Gaza” (A/HRC/28/45, para. 70), was strangling the economy in Gaza and imposed severe restrictions on the rights of the Palestinians. Two previous rounds of hostilities in the Strip since 2008 had not only led to loss of life and injury but also weakened an already fragile infrastructure. Palestinians have demonstrated extraordinary resilience in recent years, living in an environment scarred by physical destruction and psychological trauma. In the West Bank, including East Jerusalem, settlement-related activities and settler violence continued to be at the core of most of the human rights violations against Palestinians. In the absence of any progress on the political front, the risk of a flare-up of the situation was evident.

Now why did the writers of the COI report feel it important to stress the existence of the Israeli occupation of the West bank and Gaza and the naval blockade of Gaza before reaching the tragic events of June 12, which—in spite of being the obvious "trigger" for the unfortunate chain of events which led to the 2014 Gaza war—would first be mentioned only in paragraph 57 of the Report?

I can think of several reasons. First, placing the primary emphasis on the occupation and blockade and recognizing the “extraordinary resilience” exhibited by the Palestinians when faced with such Israeli aggression, the COI is subtly attempting to convince the readers of the report that the events of June 12 should be somehow understood as a form of poor man’s response to Israel's overwhelming military superiority. Furthermore, by presenting the sequence of events in this fashion, the COI obviates the need to deal with the question of whether Israel was a victim of Hamas violence and entitled to defend itself and its citizens. Rather, by portraying Israel as the instigator of a chain of events which "forced" Hamas to commit such acts, the COI is able to avoid placing the emphasis of its Report on Hamas’s activities, which would otherwise be the obvious course of action. Needless to say, such a presentation choice obviously also resonates with the membership of the HRC, most of whose members are not, to say the least, supporters of Israel.

However, putting aside the Real Politik aspects of this choice by the COI drafters, there is an even deeper (and in my opinion, more dangerous) legal aspect to this issue. Before they even start addressing the facts of the 2014 Gaza War, the writers of the Report dedicate several pages to presenting the legal background for their work. In this context, paragraphs 25-30 of the Report focus on explaining why the drafters are convinced that, from an international law perspective, the Gaza strip is still occupied by Israel (notwithstanding the fact that all Israeli forces and civilians undisputedly left the region some 10 years ago). Due to the importance of this issue, I quote the COI's words in full:

25. The 1907 Hague Regulations, along with the Fourth Geneva Convention of 1949 and customary international humanitarian law contain the rules applicable to Israel’s occupation of the West Bank, including East Jerusalem and the Gaza strip. Israel has stated that while it de facto applies the humanitarian provisions of the Fourth Geneva Convention of 1949, it does not recognize its de jure application to the occupied Palestinian territory. This position was rejected by the International Court of Justice, which confirmed the de jure applicability of the Fourth Geneva Convention to the Occupied Palestinian Territory.

26. The Occupied Palestinian Territory is comprised of the West Bank, including East-Jerusalem and the Gaza strip. The Government of Israel adopts the position that since it withdrew its troops and settlers from Gaza in 2005 during the “disengagement,” it no longer has effective control over what happens in Gaza and thus can no longer be considered as an occupying power under international law. The commission agrees that the exercise of ‘effective control’ test is the correct standard to use in determining whether a State is the occupying power over a given territory, but notes that the continuous presence of soldiers on the ground is only one criterion to be used in determining effective control.

27. International law does not require the continuous presence of troops of the occupying forces in all areas of a territory, in order for it to be considered as being occupied. In the Naletelic case, the ICTY held that the law of occupation also applies in areas where a state possesses the “capacity to send troops within a reasonable time to make its power felt.” The size of Gaza and the fact that it is almost completely surrounded by Israel facilitates the ability for Israel to make its presence felt. This principle was confirmed by the United States Military Tribunal at Nuremberg which stated: "It is clear that the German Armed Forces were able to maintain control of Greece and Yugoslavia until they evacuated them in the fall of 1944. While it is true that the partisans were able to control sections of these countries at various times, it is established that the Germans could at any time they desired assume physical control of any part of the country. The control of the resistance forces was temporary only and not such as would deprive the German Armed Forces of its status of an occupant."

28. This analysis also applies to the Occupied Palestinian Territory which is considered a single territorial unit by the international community, and by Israel in the Interim Agreement on the West Bank and Gaza, which recognized the West Bank and Gaza as a single territorial unit.

29. In addition to its capacity to send troops to make its presence felt, Israel continues to exercise effective control of the Gaza Strip through other means. According to the Interim agreement on the West Bank and the Gaza Strip, Israel maintains the control of Gaza’s airspace and maritime areas, and any activity in these areas is subject to the approval of Israel. The facts since the 2005 disengagement, among them the continuous patrolling of the territorial sea adjacent to Gaza by the Israeli Navy and constant surveillance flights of IDF aircraft, in particular remotely piloted aircraft, demonstrate the continued exclusive control by Israel of Gaza’s airspace and maritime areas which—with the exception of limited fishing activities—Palestinians are not allowed to use. Since 2000, the IDF has also continuously enforced a no-go zone of varying width inside Gaza along the Green Line fence. Even in periods during which no active hostilities are occurring, the IDF regularly conducts operations in that zone, such as land levelling. Israel regulates the local monetary market, which is based on the Israeli currency and has controls on the custom duties Under the Gaza Reconstruction Mechanism, Israel continues to exert a high degree of control over the construction industry in Gaza. Drawings of large scale public and private sector projects, as well as the planned quantities of construction material required, must be approved by the Government of Israel. Israel also controls the Palestinian population registry, which is common to both the West Bank and Gaza, and Palestinian ID-cards can only be issued or modified with Israeli approval. Israel also regulates all crossings allowing access to and from Gaza. While it is true that the Rafah crossing is governed by Egypt, Israel still exercises a large degree of control, as only Palestinians holding passports are allowed to cross, and passports can only be issued to people featuring on the Israeli generated population registry.

30. The commission concludes that Israel has maintained effective control of the Gaza Strip within the meaning of Article 42 of the 1907 Hague Regulations. The assessment that Gaza continues to be occupied by Israel is shared by the international community as articulated by the General Assembly and has been reaffirmed by the International Committee of the Red Cross (ICRC) and the Prosecutor of the International Criminal Court (ICC)."

I have a lot to say about this legal argument. Mostly, I have questions for the people who wrote this.

I might begin by asking how the COI writers could so confidently state that “International law does not require the continuous presence of troops of the occupying forces in all areas of a territory, in order for it to be considered as being occupied.” All international lawyers, in fact, know that this issue is much more complicated than as presented by the COI. Just as an example, only ten days before the publication of the COI report, the European Court of Human Rights, the highest human rights court in Europe, ruled exactly the opposite in the case of [Sargysyan v. Azerbaijan](file:///C%3A%5CUsers%5Cbenjaminwittes%5CDownloads%5C003-5110587-6301084.pdf), stating: “According to widespread expert opinion physical presence of foreign troops is a sine qua non requirement of occupation, i.e. occupation is not conceivable without ‘boots on the ground’ therefore forces exercising naval or air control through a naval or air blockade do not suffice."

Interestingly, the European Court's primary references for this decision appear to be very similar to the sources allegedly used by the COI drafters, although with strikingly different results.

I might also ask the COI drafters how they can claim that Israel has “effective control” over the Gaza Strip if it needed to launch a large-scale  land operation into this region in an offensive which was severely contested by Hamas forces throughout in order to try to stop the recurring rocket, mortar and tunnel attacks against it. Doesn't the very fact that Israel needed to launch a full scale military offensive indicate that it does not have “effective control?” I also seem to recall that when I was taught international law some 33 years ago, one of the fundamental characteristics of “effective control” was that the occupier could project force relatively uncontested, which was obviously not the case here. Why are these issues not even mentioned in the COI Report?

Most importantly, why did the drafters think it so important to reach such an unambiguous and non-nuanced answer on something which all international law experts agree is, at best, a very difficult and complex issue?

Perhaps the answer to this question can be found in the short reference, in paragraph 25 of the Report, to the International Court of Justice (ICJ). In July 2004, the ICJ published its advisory opinion on the '[Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory](http://www.icj-cij.org/docket/files/131/1671.pdf)' (the "Wall Case"). In this widely-criticized and problematic opinion, the ICJ reached the conclusions that: (a) Israel was the occupier of the West Bank and the Gaza Strip (see paragraphs 70-79 of the ICJ Opinion); and (b) that the construction of Israel's security fence in the West bank violated its international law obligations as an Occupying Power.

However, in order to reach the conclusion that erecting the security fence in order to stop Palestinian suicide bombers was a violation of international law, the ICJ needed to find some way to overcome the obvious Israeli claim that its actions were prompted by considerations of self defense. In what is widely viewed in international law circles as one of the weakest (not to say worst) pieces of legal writing ever generated by any international court, the ICJ dedicated only two short paragraphs (paragraphs 138 and 139 of its advisory opinion) to this issue, and without bringing any precedents or references, ruled that Israel could not invoke the right of self defense because: (a)  the alleged attacks were not initiated by a State; and (b) no right of self defense exists when facing a threat from territory which is occupied by the country being attacked. In other words, the ICJ ruled, in 2004, only three years after 9/11, that the right of self defense, as embodied in the UN Charter, cannot apply to attacks initiated by non-state entities.

However, it is the second half of this incredible ruling which I feel is important for our current discussion. The ICJ, eager to find Israel in violation of international law, invented a new rule in 2004 especially for the Israeli context (no self defense against threats originating from occupied territory). The problem (from the perspective of the COI drafters) is that this ICJ ruling came out a year before the final Israeli unilateral withdrawal from Gaza in 2005. A withdrawal which, at the very least, placed Israel's continued occupation of Gaza in question. How best to overcome this difficulty? By dedicating a portion of the COI report to this issue, and reaching the conclusion that Gaza remains occupied by Israel.

And thus, without any need to spell any of this out in the Report, the circle is closed. If Gaza remains occupied by Israel (as the COI report maintains) then, due to the ICJ opinion from 2004, Israel cannot invoke the right of self defense against Hamas rocket and mortar attacks from Gaza. So, not only is Israel not the victim but rather the aggressor in this story, thus losing the moral high ground, but also it cannot claim to have full legal justification for its actions. Quod erat demonstrandum.