

International Justice and the Prevention of Atrocities

Case Study: Goldstone and After – Judicial Intervention and the Quest for Peace in the Middle East by Anthony Dworkin

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In December 2008 Israel launched a three-week military operation against Hamas in Gaza, primarily in response to a surge in rocket attacks in the preceding weeks. While estimates of the numbers of Palestinians killed and the proportion of these who were civilians vary widely, it is widely agreed that non-combatants bore the brunt of the fighting and that damage to Gaza's infrastructure was extensive.² As one military historian put it, "Palestinian civilians suffered far more than either the IDF or Hamas, and... images of civilian deaths and suffering were seen throughout the world for some three weeks."³ In response the UN Human Rights Council authorized the deployment of a fact-finding mission; the mission, headed by Justice Richard Goldstone of South Africa, issued its report in September 2009.

The Goldstone Report attracted enormous controversy, to put it mildly. Much of this may be attributed to the polarization that inevitably attaches to international discussion of Israel, as well as to some conclusions in the Report that have been heavily disputed. These questions lie beyond the scope of this paper. But the Goldstone Report was also significant because it brought the question of the application of international criminal law into the Israeli-Palestinian conflict in a way that had not happened before. It raised a series of issues about the possible place of international justice and accountability in the long-running and tortuous Middle East peace process that forced both the parties to the conflict and outside powers to define their position on peace and justice, and which have continued to reverberate in an evolving way ever since.

¹ This paper was prepared as part of a project of the European Council on Foreign Relations to compare the experience of different situations where international responses to crises involving mass atrocities have faced the dilemma of seeking accountability while trying to bring the crisis to an end. Please cite fully in the event of reference or quotation.

² According to B'Tselem, Israel killed at least 758 Palestinian civilians not taking part in hostilities, of whom 318 were minors, and destroyed more than 3,500 houses. See Jessica Montell, "Beyond Goldstone: A truer discussion about Israel, Hamas and the Gaza conflict", Washington Post, 6 April 2011, available at http://www.washingtonpost.com/opinions/beyond-goldstone-a-truer-discussion-about-israel-hamas-and-the-gaza-conflict/2011/04/05/AFsP7PIC_story.html.

³ Anthony Cordesman, "The 'Gaza War': A Strategic Analysis", Center for Strategic and International Studies, 2 February 2009, available at http://csis.org/files/media/csis/pubs/090202_gaza_war.pdf.

The Goldstone Report concluded that there was evidence indicating that both Israel and Palestinian armed groups had committed war crimes and possibly crimes against humanity. It also recommended that the UN Security Council should refer the situation in Gaza to the International Criminal Court unless both parties conducted credible and independent investigations into possible crimes within six months. Presenting his report to the Human Rights Council, Goldstone argued that “the ongoing lack of justice is undermining any hope for a successful peace process and reinforcing an environment that fosters violence.”⁴ Endorsing the report, the High Commissioner for Human Rights, Navi Pillay, said that “holding war criminals accountable and respect for human rights are not obstacles to peace but rather the preconditions on which trust and, ultimately, a durable peace can be built.”⁵

For its part, and aside from its substantial criticisms of the Report itself, Israel asserted that international attention to the Goldstone Report represented a distraction from the more important objective of seeking peace in the Middle East. Israel’s ambassador told the UN Security Council during a discussion of the Middle East situation that “instead of encouraging the parties to move towards peace and resume negotiations, the debate in this Council has been shifted to discussing a narrative that is destructive to the peace process”.⁶

The reaction of Western states combined an emphasis on the importance of accountability with an evident reluctance to take any steps that would establish international criminal jurisdiction over Israel or Palestinian armed groups, on the basis that this would undermine the building of confidence and trust between the parties. The US Deputy Permanent Representative to the UN, Alejandro Wolff, told the General Assembly, “The United States strongly supports accountability for any human rights and humanitarian law violations in relation to the Gaza conflict,” but continued, “Our goal in this regard remains to have domestic authorities carry out thorough, independent, and credible investigations of allegations of such violations.” He added that the United States continued to believe that the Goldstone Report was “deeply flawed” and that the best solution to the suffering of Palestinians and Israelis would be peace, so that “we must safeguard the ongoing efforts to restart Permanent Status negotiations between Israel and the Palestinians.”⁷

⁴ “Head of UN Fact Finding Mission on the Gaza Conflict urges accountability for war crimes; insists impunity undermines peace process and encourages violence”, United Nations Fact Finding Mission on the Gaza Conflict, 29 September 2009.

⁵ Shlomo Shamir and agencies, “UN human rights chief endorses Goldstone Gaza report”, Haaretz, 14 October 2009, available at <http://www.haaretz.com/news/un-human-rights-chief-endorses-goldstone-gaza-report-1.6116>.

⁶ “Statement by Ambassador Shalev to the UN Security Council”, Israel Ministry of Foreign Affairs, 14 October 2009, available at http://mfa.gov.il/MFA/InternatOrgs/Speeches/Pages/Statement_Amb_Shalev_UN_Security_Council_14-Oct-2009.aspx.

⁷ Statement by Ambassador Alejandro D. Wolff, U.S. Deputy Permanent Representative to the United Nations, UN General Assembly, 26 February 2010, available at <http://usun.state.gov/briefing/statements/2010/137331.htm>.

Another US diplomat had earlier told the Human Rights Council, "Countries need and deserve the space to work through what processes will be most effective, and this cannot be dictated from outside."⁸ Similarly the UK Ambassador to the UN said "the concerns raised in the report cannot be ignored" and the French representative urged all parties to conduct "independent inquiries in line with international standards."⁹ But these and other European governments continued to oppose any move to send the Report to the UN Security Council for action or to have its recommendations taken up there.

Despite the lack of any international follow-up, it is arguable that the Goldstone Report had a significant effect at least on Israeli policy. Prime Minister Benjamin Netanyahu famously said in December 2009 that Israel faced "three primary threats... the nuclear threat, the missile threat and what I call the Goldstone threat", in other words "the attempt to negate the legitimacy of [Israel's] right to self-defence."¹⁰ Israel did not cooperate with a follow-up investigation mandated by the Human Rights Council to report on whether the parties to the Gaza conflict had implemented the fact-finding mission's recommendations. The implementation report found that Israel had "dedicated significant resources to investigate over 400 allegations of operational misconduct in Gaza reported by the Fact-Finding Mission and others" but that "much remains to be accomplished".¹¹ In particular it noted the failure to investigate those who planned and oversaw Operation Cast Lead and criticised the length of time that investigations were taking. The investigation also found that the de facto authorities in Gaza had not conducted any investigations into the launching of rocket and mortar attacks against Israel.

A year later, the Israeli human rights organisation B'Tselem (which was itself critical of some aspects of the Goldstone Report) issued a scathing critique of Israeli investigations into Cast Lead, arguing that "the Israeli military's argument against independent investigation of its conduct during the operation has proven to be hollow". B'Tselem complained that only isolated incidents had been investigated, and even then only at a very late stage, and concluded, "The military has completely failed to investigate itself, regarding both policy choices and the conduct of the forces in the field in particular cases."¹²

Nevertheless many analysts believe that the Goldstone Report and the attention it attracted – as well as lessons drawn from the experience of Cast Lead more broadly – did lead to

⁸ Shamir, "UN human rights chief".

⁹ Shamir, "UN human rights chief".

¹⁰ Benjamin Netanyahu, Speech at the Knesset Special Session, 23 December 2009, available at <http://mfa.gov.il/MFA/PressRoom/2009/Pages/PM-Netanyahu-addresses-%20Knesset-Special-Session-23-Dec-2009.aspx>.

¹¹ Report of the Committee of independent experts in international humanitarian and human rights law established pursuant to Council resolution 13/9, Human Rights Council, 18 March 2011, pp. 21-22, available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A.HRC.16.24_AUV.pdf.

¹² "Three years since Operation Cast Lead: Israeli military utterly failed to investigate itself", B'Tselem, 18 January 2012, available at http://www.btselem.org/gaza_strip/20120118_3_years_after_cast_lead.

meaningful changes in Israeli military policy. Eight months after the Report was issued, the Israel Defence Forces issued new rules of engagement for combat in areas of civilian population, including greater efforts to evacuate civilians from zones of hostilities. In addition, according to a report in Haaretz, “The discourse in the IDF following the Goldstone report... led to extending international law studies and rules of engagement in advanced officers' courses and in the chief of staff's decision to appoint military legal advisers in combat divisions.”¹³

The second report of the Turkel Commission (set up by Israel after the Gaza flotilla incident of May 2010), which explored the IDF's procedures for investigating alleged wrongdoing during armed conflict and recommended a number of improvements, has also been widely interpreted as an indirect response to Goldstone's allegations. In addition, the conduct of the Pillar of Defence military operation in Gaza in November 2012 seemed to many observers to reflect a determination to learn the lessons of Cast Lead, including a greater effort to avoid civilian casualties.

Meanwhile the question of whether the ICC might gain jurisdiction over potential crimes committed in the Occupied Palestinian Territories, deflected by the Security Council's failure to take up Goldstone's recommendations, re-emerged in 2012 as the Palestinian Authority launched a diplomatic campaign to upgrade the Palestinians' standing at the United Nations. In November 2012 the UN General Assembly voted to grant Palestine the status of a non-member observer state, raising the possibility that Palestine might seek to become a state party to the ICC or accept the Court's jurisdiction as a non-party state under Article 12 of the Rome Statute. (An earlier application by the Palestinian Authority to accept the Court's jurisdiction over Operation Cast Lead had been rejected by the ICC on the grounds that the Authority did not represent a state.)

The United States campaigned strongly against giving Palestine an upgraded status, warning that one consequence could be participation in the ICC and urging both parties to “avoid provocative one-sided actions that could undermine trust or otherwise distract from the pursuit of peace”.¹⁴ The US voted against the resolution. EU member states were divided on the vote, but many expressed the view that any Palestinian move to accept the ICC's jurisdiction would be counterproductive. The United Kingdom in particular sought to obtain a commitment from Palestinian officials that they would not avail themselves of the option of joining the ICC or accepting its jurisdiction as a condition for supporting an upgraded status. “Our country is a strong supporter across all parties of international justice and the International Criminal Court,” said British foreign secretary William Hague. “However we judge that if the Palestinians were to

¹³ Anshel Pfeiffer, “IDF outlines rules of engagement in populated areas”, Haaretz, 28 May 2010, available at <http://www.haaretz.com/print-edition/news/idf-outlines-rules-of-engagement-in-populated-areas-1.292674>.

¹⁴ Harriet Sherwood, “US warns European governments against supporting Palestinians at UN”, Guardian, 1 October 2012, available at <http://www.theguardian.com/world/2012/oct/01/us-warns-europe-palestinians-un>.

build on this resolution by pursuing ICC jurisdiction over the Occupied Territories at this stage, it could make a return to negotiations impossible.”¹⁵ When no commitments were forthcoming, the UK abstained.

Despite the Palestinian Authority’s refusal to forswear its right to pursue any claim of accountability for international crimes committed on its territory, it has in practice made no attempt since gaining an upgraded status to renew its quest for ICC jurisdiction. Indeed there are suggestions that Palestinian Officials have given at least a tacit indication that they will stay away from the ICC as a discretionary confidence-building measure while the current round of negotiations continue.

Two provisional conclusions can be drawn from this review of the place of international justice and accountability in the Israeli-Palestinian conflict. First, it is striking that Western countries that often emphasise the links between peace and justice have so clearly taken the position that seeking justice would constitute an obstacle to peace. In this respect the case of Israel and the Occupied Palestinian Territories is a notable exception to the general trend of statements on this subject. The difference may reflect Israel’s status as an important ally of the United States and European countries, as well as its unique international position. But it is also possible that the Western conviction that international judicial involvement would be counterproductive reflects in part an awareness of the asymmetric relationship between Israel and the Palestinians: since Israel enters peace talks as a militarily dominant occupying power, it may be in a position to walk away from negotiations if it fears prosecutions against its service members or officials.

Secondly, the Israeli-Palestinian case suggests clearly that in this instance the threat of international judicial oversight has been able to achieve a significant impact both on the military conduct of at least one party, and on international diplomacy surrounding the resumption of negotiations.

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¹⁵ William Hague MP, Statement to the House of Commons on the Palestinian resolution at the UN General Assembly, 28 November 2012, available at <https://www.gov.uk/government/news/foreign-secretary-statement-to-the-house-of-commons-on-the-palestinian-resolution-at-the-un-general-assembly>.