

WHY THE GOLDSTONE REPORT MATTERS (IX/19/2009)

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“So why did the Israeli government boycott the commission? The real answer is quite simple: they knew full well that the commission, any commission, would have to reach the conclusions it did reach.”

Uri Avnery (Israeli peace activist, and former Knesset member), “On the Goldstone Report” 19 Sept 2009

Richard Goldstone, former judge of South Africa’s Constitutional Court, the first prosecutor at The Hague on behalf of the International Criminal Court for Former Yugoslavia, and anti-apartheid campaigner reports that he was most reluctant to take on the job of chairing the UN fact-finding mission charged with investigating allegations of war crimes committed by Israel and Hamas during the three week Gaza War of last winter. Goldstone explains that his reluctance was due to the issue being “deeply charged and politically loaded,” and was overcome because he and his fellow commissioners were “professionals committed to an objective, fact-based investigation,” adding that “above all, I accepted because I believe deeply in the rule of law and the laws of war,” as well as the duty to protect civilians to the extent possible in combat zones. The four-person fact-finding mission was composed of widely respected and highly qualified individuals, including the distinguished international law scholar, Christine Chinkin, a professor at the London School of Economics. Undoubtedly adding complexity to Goldstone’s decision is the fact that he is Jewish, with deep emotional and family ties to Israel and Zionism, bonds solidified by his long association with several organizations active in Israel.

Despite the impeccable credentials of the commission members, and the worldwide reputation of Richard Goldstone as a person of integrity and political balance, Israel refused cooperation from the outset. It did not even allow the UN undertaking to enter Israel or the Palestinian Territories, forcing reliance on the Egyptian government to facilitate entry at Rafah to Gaza. As Uri Avnery observes, however much Israel may attack the commission report as one-sided and unfair, the only plausible explanation of its refusal to cooperate with fact-finding and taking the opportunity to tell its side of the story was that it had nothing to tell that could hope to overcome the overwhelming evidence of the Israeli failure to carry out its attacks on Gaza last winter in accordance with the international law of war. No credible international commission could reach any set of conclusions other than those reached by the Goldstone Report on the central allegations.

In substantive respects the Goldstone Report adds nothing new. Its main contribution is to confirm widely reported and analyzed Israeli military practices during the Gaza War. There had been several reliable reports already issued,

condemning Israel's tactics as violations of the laws of war and international humanitarian law, including by Amnesty International, Human Rights Watch, and a variety of respected Israeli human rights groups. Journalists and senior United Nations civil servants had reached similar conclusions. Perhaps, most damning of all the material available before the Goldstone Report was the publication of a document entitled "Breaking the Silence," containing commentaries by thirty members of the Israel Defense Forces who had taken part in Operation Cast Lead (the Israeli official name for the Gaza War). These soldiers spoke movingly about the loose rules of engagement issued by their commanders that explains why so little care was taken to avoid civilian casualties. The sense emerges from what these IDF soldiers who were in no sense critical of Israel or even of the Gaza War as such, that Israeli policy emerged out of a combination of efforts 'to teach the people of Gaza a lesson for their support of Hamas' and to keep IDF casualties as close to zero as possible even if meant massive death and destruction for innocent Palestinians.

Given this background of a prior international consensus on the unlawfulness of Operation Cast Lead, we must first wonder why this massive report of 575 pages has been greeted with such alarm by Israel and given so much attention in the world media. It added little to what was previously known. Arguably, it was more sensitive to Israel's contentions that Hamas was guilty of war crimes by firing rockets into its territory than earlier reports had been. And in many ways the Goldstone Report endorses the misleading main line of the Israeli narrative by assuming that Israel was acting in self-defense against a terrorist adversary. The report focuses its criticism on Israel's excessive and indiscriminate uses of force. It does this by examining the evidence surrounding a series of incidents involving attacks on civilians and non-military targets. The report also does draw attention to the unlawful blockade that has restricted the flow of food, fuel, and medical supplies to subsistence levels in Gaza before, during, and since Operation Cast Lead. Such a blockade is a flagrant instance of collective punishment, explicitly prohibited by Article 33 of the Fourth Geneva Convention setting forth the legal duties of an occupying power.

All along Israel had rejected international criticism of its conduct of military operations in the Gaza War, claiming that the IDF was the most moral fighting force on the face of the earth. The IDF conducted some nominal investigations of alleged unlawful behavior that consistently vindicated the military tactics relied upon and steadfastly promised to protect any Israeli military officer or political leader internationally accused of war crimes. In view of this extensive background of confirmed allegation and angry Israeli rejection, why has the Goldstone Report been treated in Tel Aviv as a bombshell that is deeply threatening to Israel's stature as a sovereign state? Israel's president, Shimon Peres, calling the report "a mockery of history" that "fails to distinguish the aggressor and a state exercising the right of self-defense," insisting that it "legitimizes terrorist activity, the pursuit of murder and death." More commonly Israel's zealous defenders condemned the report as one-sided, biased, reaching foregone conclusions, and emanating from the supposedly bastion of anti-Israeli attitudes at the UN's Human Rights Council. This

line of response to any criticism of Israel's behavior in occupied Palestine, especially if it comes from the UN or human rights NGOs is to cry "foul play!" and avoid any real look at the substance of the charges. It is an example of what I call 'the politics of deflection,' attempting to shift the attention of an audience away from the message to the messenger. The more damning the criticism, the more ferocious the response. From this perspective, the Goldstone Report obviously hit the bullseye!

Considered more carefully, there are some good reasons for Israel's panicked reaction to this damning report. First, it does come with the backing of an eminent international personality who cannot credibly be accused of anti-Israel bias, making it harder to deflect attention from the findings no matter how loud the screaming of 'foul play.' Any fair reading of the report would show that it was balanced, was eminently mindful of Israel's arguments relating to security, and indeed gave Israel the benefit of the doubt on some key issues. Secondly, the unsurprising findings are coupled with strong recommendations that do go well beyond previous reports. Two are likely causing the Israeli leadership great worry: the report recommends strongly that if Israel and Hamas do not themselves within six months engage in an investigation and followup action meeting international standards of objectivity with respect to these violations of the law of war, then the Security Council should be brought into the picture, being encouraged to consider referring the whole issue of Israeli and Hamas accountability to the prosecutor of the International Criminal Court in The Hague. Even if Israel is spared this indignity by the diplomatic muscle of the United States, and possibly some European governments, the negative public relations implications of a failure to abide by this report could be severe.

Thirdly, whatever happens in the UN System, and at the Human Rights Council in Geneva, the weight of the report will be felt by world public opinion. Ever since the Gaza War the solidity of Jewish support for Israel has been fraying at the edges, and this will likely now fray much further. More globally, a very robust boycott and divestment movement was gaining momentum ever since the Gaza War, and the Goldstone Report can only lend added support to such initiatives. There is a growing sense around the world that the only chance for the Palestinians to achieve some kind of just peace depends on the outcome over the symbols of legitimacy, what I have called the Legitimacy War. Increasingly, the Palestinians have been winning this second non-military war. Such a war fought on a global political battlefield is what eventually and unexpectedly undermined the apartheid regime in South Africa, and has become much more threatening to the Israeli sense of security than has armed Palestinian resistance.

A fourth reason for Israeli worry stemming from the report, is the green light given to national courts throughout the world to enforce international criminal law against Israelis suspects should they travel abroad and be detained for prosecution or extradition in some third country. Such individuals could be charged with war crimes arising from their involvement in the Gaza War. The report in this

way encourages somewhat controversial reliance on what is known among lawyers as ‘universal jurisdiction,’ that is, the authority of courts in any country to detain for extradition or to prosecute individuals for violations of international criminal law regardless of where the alleged offenses took place. Reaction in the Israeli media reveals that Israeli citizens are already anxious about being apprehended during foreign travel. As one law commentator put it in the Israeli press, “From now on, not only soldiers should be careful when they travel abroad, but also ministers and legal advisers.” It is well to recall that Article 1 of the Geneva Conventions calls on states throughout the world “to respect and ensure respect” for international humanitarian law “in all circumstances.” Remembering the efforts in 1998 of several European courts to prosecute Augusto Pinochet for crimes committed while he was head of state in Chile, is a reminder that national courts can be used to prosecute political and military leaders for crimes committed elsewhere than in the territory of the prosecuting state.

Of course, Israel will fight back. It has already launched a media and diplomatic blitz designed to portray the report as so one-sided as to be unworthy of serious attention. The United States Government has already disappointingly appeared to endorse this view, and repudiate the central recommendation in the Goldstone Report that the Security Council be assigned the task of implementing its findings. The American Ambassador to the UN, Susan Rice, evidently told a closed session of the Security Council on September 16, just a day after the report was issued, that “[w]e have serious concerns about many recommendations in the report.” Elaborating on this, Ambassador Rice indicated that the UN Human Rights Council, which has no implementing authority, is the *only* proper venue for any action to be taken on the basis of the report. The initial struggle will likely be whether to follow the recommendation of the report to have the Security Council refer the issues of accountability to the International Criminal Court, which could be blocked by a veto from the United States or other permanent members.

There are reasons to applaud the forthrightness and comprehensiveness of the report, its care, and scrupulous willingness to conclude that both Israel and Hamas seem responsible for behavior that appears to constitute war crimes, if not crimes against humanity. Although Israel has succeeded in having the issue of one-sidedness focus on fairness to Israel, there are also some reasons to insist that the report falls short of Palestinian hopes. For one thing, the report takes for granted, the dubious proposition that Israel was entitled to act against Gaza in self-defense, thereby excluding inquiry into whether crimes against the peace in the form of aggression had taken place by the launching of the attack. In this respect, the report takes no notice of the temporary ceasefire that had cut the rocket fire directed at Israel practically to zero in the months preceding the attacks, nor of Hamas’ repeated efforts to extend the ceasefire indefinitely provided Israel lifted its unlawful blockade of Gaza. Further it was Israel that had seemed to provoke the breakdown of the ceasefire when it launched a lethal attack on Hamas militants in Gaza on November 4 2008. Israel disregarded this seemingly available diplomatic alternative to war to achieve security on its borders. Recourse to war, even if the

facts justify self-defense, is according to international law, a *last* resort. By ignoring Israel's initiation of a one-sided war the Goldstone Report accepts the dubious central premise of Operation Cast Lead, and avoids making a finding of aggression.

Also, disappointing was the failure of the report to comment upon the Israeli denial of a refugee option to the civilian population trapped in the tiny, crowded combat zone that constitutes the Gaza Strip. Israel closed all crossings during the period of the Gaza War, allowing only Gaza residents with foreign passports to leave. It is rare in modern warfare that civilians are not given the option to become refugees. Although there is no specific provision of the laws of war requiring a state at war to allow civilians to leave the combat zone, it seems like an elementary humanitarian requirement, and should at least have been mentioned either as part of customary international law or as a gap in the law that should be filled. The importance of this issue is reinforced by many accounts of the widespread post-traumatic stress experienced by the civilians in Gaza, especially children that comprise 53% of the population. One might also notice that the report accords considerable attention to Gilad Shalit, the one IDF prisoner held by Hamas in Gaza, recommending his release on humanitarian grounds, while making no comparable suggestion to Israel although it is holding thousands of Palestinians under conditions of harsh detention.

In the end, the Goldstone Report is unlikely to break the inter-governmental refusal to challenge the Israeli blockade of Gaza or to induce the United Nations to challenge Israeli impunity in any meaningful way. Depending on backroom diplomacy, the United States may or may not be able to avoid playing a public role of shielding Israel from accountability for its behavior during the Gaza War or its continuing refusal to abide by international humanitarian law by lifting the blockade that continues to impinge daily upon the health of the entire population of Gaza.

Despite these limitations, the report is an historic contribution to the Palestinian struggle for justice, an impeccable documentation of a crucial chapter in their victimization under occupation. Its impact will be felt most impressively on the growing civil society movement throughout the world to impose cultural, sporting, and academic boycotts, as well as to discourage investment, trade, and tourism with Israel. It may yet be the case that as in the anti-apartheid struggle the shift in the relation of forces in the Palestinian favor will occur not through diplomacy or as a result of armed resistance, but on the symbolic battlefield of legitimacy that has become global in scope, what might be described as the new political relevance of moral and legal globalization.