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Is Israel Responsible for War Crimes directed against the Palestinian Population of Gaza?

Justice Goldstone's Bogus Test of War Crime Culpability

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Wikileaks has once again brought attention to the question of Israel's war crime culpability in the military "Operation Cast Lead" it conducted from 27th Dec 2008 – 18th Jan 2009, a period of twenty three days, against the Palestinian population living in the Gaza Strip. The American Ambassador to the United Nations, Susan Rice, unsuccessfully tried to prevent a commission of inquiry into this war because of an obvious finding of culpability. (*http://www.jpost.com/DiplomacyAndPolitics/Article.aspx?id=217170*)

Now, more that one and a half years later, Justice Goldstone, the head of that UN Commission seeks to introduce a peculiar twist into his original findings by raising the question of Israel's intentions with respect to the killing of Palestinian civilians during that war.
(http://www.washingtonpost.com/opinions/reconsidering-the-goldstone-report-on-israel-and-war-crimes/2011/04/01/Afg111JC_story.html)

Approximately 1,417 Palestinian civilians and 9 Israeli soldiers were killed by Israeli fire, whilst one soldier and three civilians were killed by Palestinians. The Israeli war machine also caused massive material loss, damage and destruction in Gaz, estimated at a cost of 2 billion dollars, while Israel suffered almost no damage. Justice Goldstone informs the reader that now he would write a different report with respect to Israel, but not to the Palestinians, in which he would seriously minimize its culpability. So how does he come to such a conclusion?

Let me quote him in his own words:

> "The final report by the U.N. committee of independent experts — chaired by former New York judge Mary McGowan Davis — that followed up on the recommendations of the Goldstone Report has found that "Israel has dedicated significant resources to investigate over 400 allegations of operational misconduct in Gaza" while "the de facto authorities (i.e., Hamas) have not conducted any investigations into the launching of rocket and mortar attacks against Israel.
>
> Our report found evidence of potential war crimes and "possibly crimes against humanity" by both Israel and Hamas. That the crimes allegedly committed by Hamas were intentional goes without saying — its rockets were purposefully and indiscriminately aimed at civilian targets.

> The allegations of intentionality by Israel were based on the deaths of and injuries to civilians in situations where our fact-finding mission had no evidence on which to draw any other reasonable conclusion. While the investigations published by the Israeli military and recognized in the U.N. committee's report have established the validity of some incidents that we investigated in cases involving individual soldiers, they also indicate that civilians were not intentionally targeted as a matter of policy.

His new position does not rest on any new facts about that war, but rather on the notion of Israel's intentionality or lack thereof. According to him, the fact that Israel set up investigating committees to find out whether or how war crimes and crimes against humanity occurred, or could have occurred, indicates, a priori, that the Israeli government had no intention of committing such crimes, even if it found that some had been committed. These crimes occurred therefore, either unintentionally or by some "bad apples" in the army, who would be brought to trial. Therefore, no culpability may be laid upon the Israeli government. It might be apposite to highlight the fact that more than two years after that war, no-one in Israel has been brought to trial for a war crime or a crime against humanity. On the other hand, Justice Goldstone excoriates Hamas, unhesitatingly and incontrovertibly attributing to this group an "intention" to kill civilians, because they did not set up commissions to investigate the intentions of their resistance fighters. The fact that they have neither money, nor resources, nor the obligation to do so, was not mentioned.

In this essay I shall concentrate on two issues:

1) the speciousness of the parity equation between the sovereign state of Israel and the besieged and imprisoned Palestinian population confined to the military-occupied Gaza Strip and

2) the legal defects of the "intentionality" argument.

To begin with I shall compare and contrast both the legal status and factual states of affairs of the two adversaries which will permit me to to contextualize Justice Goldstone's conclusions. Then I shall compare and contrast the use and application of the technical legal term "intention" in private law and municipal public law and then in the laws of war. Finally, in a section on the subject of resistance, I hope to highlight the actual legal framework of the Israeli-Palestinian confrontation, and its implications. Finally I hope to demonstrate that both positions of the Justice are legally incorrect and contradict normal understandings of justice and fairness, with the implication that injustice can never lead to a peaceful solution of any conflict.

I. The presumption of parity between Israel and the Occupied Territories of Palestine

It is a sine qua non of all legal systems worthy of that name, that for justice to prevail, equals must be treated equally. But its corollary is just as essential: unequal parties or situations may not be treated equally, but rather appropriately or in adequatio. Inequality in real life, as a principle of non-identity, is not merely recognized in law, but is integral to it where it is appropriate, in order for law to be administered in a just and fair manner. For example, the legal definition of a minor recognizes the incompetence of young children to bear the same responsibility or liability that is imposed upon an adult. Therefore when a child or young person commits a crime, the laws and procedures are different from those for an adult. The element of intentionality itself reflects different applications of the law for

what, ostensibly are the same facts. For instance, if a person is found dead and forensic examination determines that the person was killed, it is often impossible to know from the actual death, the circumstances of the death and the motivations of the person who might have killed the victim. It is only after the trial of an accused, in which all the evidence is brought to bear, that it may be determined whether the death was a murder, manslaughter, a mistake, the result of self-defense, or simply committed by someone else, because the accused had an alibi. The question of the particular legal matrix of an occurrence is essential to the application of the law. Without preserving such distinctions, the law becomes either nonsense or a weapon of the rich and powerful.

However, this understanding and practice has often been undermined by the demand of even-handedness in dealing with two or more opponents. This is a formal model and presumes no moral content, its purported aim being the achievement of neutrality, itself taken to be an indication of fairness and lack of prejudice. One is advised to hear "both sides out" working on the presumption of equality of opponents, although this equality is not spelled out. There also seems to be a presumption that a surface explanation is sufficient, without need for background and/or historical information. Father Albert Nolan op, a South African liberation theologian whose main work was done during the apartheid regime, wrote an article called "Taking Sides" in which he maintains that the demand for treating equally the two opposing sides of a political conflict is based on three misunderstandings.
(
http://www.scarboromissions.ca/Scarboro_missions_magazine/Issues/1990/February/taking_sides.php).

The first assumes that a consensus can (always) be reached, the second that neutrality is essential, and the third that a conflict is worse than the oppression which gives rise to it. He argues that if one adopts any one of these positions, the result will favor the oppressor rather than the oppressed, the strong over the the weak, and possibly injustice over justice. In contrast, he argues that it is precisely to avoid unfairness, prejudice, deception and falsehood, that one may not treat equally that which is not equal. One cannot equate an oppressor with the oppressed, nor an aggressor with a victim. In the particular case of apartheid South Africa, it was a travesty of justice to equate apartheid, a legal system which enshrined racism and inequality, with the values of liberty, equality and fraternity. The demands of morality re4quired that sides be taken in that struggle.

In Jewish law, or Halacha, prejudice invalidates automatically a legal opinion. The term "prejudice" which etymologically means to pre-judge, is recognized as an irremediable fault. The Hebrew expression is maso panim, the "lifting up of the face". It refers to the fact that those who appeared in court were required to lie down facing the ground so that the judge could not identify any of the parties. Such anonymity necessarily requires the judge to base his decision solely upon the facts and the law, without respect to the persons involved. The example given in Jewish law is that favor may not be shown to the rich man over the poor man, because of their obvious inequality of status, means and ability to protect themselves. In other words, steps must be taken to compensate for existing inequalities, much in the manner that affirmative action was introduced into US law.

This brings us back to the question of legal and moral parity with respect to Israel and the Gaza Strip. Here is a very brief overview of the comparative strengths and weakness of these opponents.

Israel is an independent sovereign state the population of which can be distinguished into military personnel and civilians. It boasts one of the best-equipped armies in the world; it has the 24th largest economy and is ranked 15th among 169 world nations on the UN's Human Development Index, placing it in the category of a "Very Highly Developed" nation. Among the world's most economically developed nations, its economy ranks 17th, according to IMD's World Competitiveness Yearbook rankings. The median household income per annum is $37,000 for 2009. The size of Israel is 20,700 sq km and the population density is 292 per sq km.

The Gaza Strip, on the other hand, is not a sovereign state and enjoys no independence. Because it has no army all its inhabitants fall into the civilian category, although strictly speaking their status resembles more that of a prisoner of war status, because it does not enjoy peace. The area is a sealed military-occupied and controlled territory, the population of which is not only forbidden to raise an army, but has no money to do. It cannot be ranked on the list of world nations, nor is it mentioned on the UN's Human Development Index. Its median household income per annum does not appear on the CIA list, but it is incorporated with the figures for the West Bank where the standard of living is somewhat higher. I am of the opinion that the statistics are so bad that it is not in the interests of the US to make them available. Seventy per cent of the population lives under the poverty line, and over 80% lives on humanitarian aid. Its economy is at the bottom of the ladder ranking at 175. Nearly 70% of its population has refugee status. Its total area is 360 sq km and its population density is just under 9,700 people per sq km. Hamas, an acronym for the Islamic Resistance Movement, has been put under sanctions by the West with no financial aid being sent by Western governments.

There is a further question to be raised concerning parity touching on questions of prejudice and good faith. It is the question of the treatment of the the realm of the ius ad bellum – the laws governing the resort to armed force. The Goldstone report ignored completely the exponentially huge differentials in power between the parties, and the total subservience of the Palestinians in Gaza to Israeli might and force. Here is a blatant instance of a mala fide equalization of that which is not equal, and it is clear that it was used in order to relieve Israel of the charge of opening a war of aggression. This would have led to the conclusion that Operation Cast Lead was a war of aggression and therefore a crime against the peace. Furthermore, because Israel is responsible in international law for the well-being of the Gazans as the military occupier of that territory, the actual deliberate bombings, shootings and shellings could be interpreted as an intended massacre. In this context the home-made rockets cannot be classified in any category of military hardware!

II. Intentionality and the framework of law

Any action of an individual is an exercise of power. We all must act, and therefore we all exercise power. The underlying rationale of all law is to limit the exercise of power, particularly in its raw form of violence. This applies to both individuals and states, because the exercise of power has the potential to be destructive by hurting, maiming or killing people, or depriving them of their livelihood or property. When exercised by a state it can cause massive death and destruction. The law seeks to contain and restrict the use of power in the interests of the well-being of the population. A priori it is assumed that when damage has been caused, avenues must be provided for reparations of some sort. The law makes various provisions for an understanding and application of the intent to harm, in the interests of either stopping the use of power, or apportioning liability with the intent of restoring a status quo ante or paying damages for the loss and harm caused.

Intentionality with respect to individuals in private law

Intention is a subjective necessary element required in the many areas of the law in order to establish first responsibility and then, depending on the circumstances, culpability and then liability where a breach of the law has caused damage. It is one of the main elements required in order to assign responsibility, because the intention of an agent indicates both his foreseeing the outcome of his actions and his desiring that outcome. The proven absence of intention may relieve a person of responsibility, culpability and liability. The element of intention appears in both civil and criminal laws. A breach of certain civil laws or the commission of most crimes gives rise to a presumptiones hominis vel facti, which is a presumption of fact that an agent/person acted intentionally. This presumption however is not conclusive and can be rebutted by factual evidence. The main categories which provide a defense against the presumption of intention include mistake, misrepresentation, exploitation and legal or mental incompetency in the civil law. In the criminal law the defenses are widened to include self-defense, alibi, fraud, necessity, duress, justification, and mental illness. The laws of evidence of the civil and criminal laws require different standards of proof, but for the purposes of this essay, they are irrelevant. There is a category of liability known as “strict liability” according to which there is no evidence which can be brought to defray either culpability or liability. This would be the case in the trial of a spy, whose intentions are conclusively imputed because of the acts of spying he has carried out. The act of spying is a reflection of the intention to spy. Similarly if treason is found to have been committed, then the intention to betray may be conclusively imputed.

Intentionality in public law as it pertains to government in its various branches

The question of intention in public law, which is almost identical in all western legal systems, is quite different from that in private law. First of all, it is obvious that the powers of government must be closely regulated and limited because the power it wields is exponentially greater than that wielded by individuals, and therefore there is a far greater potential for harm. The strictures and constraints placed upon government are expressed in the presumptions which govern its actions. They are called presumptio de iuris et de iure and are presumed to prevail at all times and are irrebutable, or irrefutable. This means that any and all government activity takes place under the conditions of these presumption. These include the presumptions of legality, intentionality, rationality, morality and honesty, fairness and good faith. It also includes the presumption that all government activity is for the benefit of the population. When a statutory body acts outside of the powers given to it, it can be held to have acted ultra vires, and its actions may be deprived of validity or it may be required to restore a status quo ante or to pay damages. This is the doctrine of limited power within administrative law and provides a legal avenue to sue the government.

There is no possibility for a statutory body to defend itself by arguing that here was a lack of intentionality on the part of that body. Similarly there is no defense of illegality, or bad faith or ignorance of the law. In fact, such arguments are prima facie absurd. Consequently, the government can never be relieved of its responsibility and/or culpability and its consequent liability by “proving” that it did not intend the particular harm resulting from the actions of one of its branches, even if that might be the case in fact. Rather, such an argument would be taken to reflect government incompetency, and depending on its severity, could lead to its fall.

General government responsibility does not automatically disqualify a particular official from being found responsible for the harm caused by the government. This principle of

responsibility and liability of a government is most clearly seen in ministerial responsibility, which does not include any element of intentionality at all. It does not even require knowledge on the part of the Minister. Thus, even if the minister himself might have had nothing to do with the breach of the law and the subsequent damage caused by his ministry, he is often required to resign in recognition of his personal responsibility as chief office holder. This occurred in Israel after the invasion into Lebanon 1982, when Ariel Sharon was found culpable for the Sabra and Shatilla massacres – not personally, but as the Minister of Defense and when Dan Halutz, the chief of staff stepped down after the Lebanese war of 2006 as a result of the findings of a lack of preparedness of the Israeli army by a commission of inquiry.

Intentionality presumed for government actions entailing government responsibility

The reasons for this state of affairs should be fairly obvious, but they bear explication. When a government acts, it does not just "do something it wants to do". Its power has been delegated to it by the citizenry and all government actions consist in the wielding of power in order to serve that citizenry. This is why governments need to explain, or more often, justify their decisions. They must act in order to bring about those ends for which they were delegated power in order to legitimize their power. The power delegated through elections is given for very specific purposes, and it imposes upon the government the duty and obligation of exercising its power for the administration of goods and services of the population and for its protection. One of the breakdowns in the Western legal systems is that governments no longer do respond adequately to the wishes of their populations. The dismantling of the English welfare system and the wars conducted by the USA are not actions supported by the vast majority of their populations.

Intentionality and the conduct of an army

The army is a branch of government governed by both the presumptio de iuris et de iure as well as by the the laws of war which have been developed over centuries in order to restrict the use of violence and not merely power. In a sense, these laws operate similarly to the ultra vires doctrine in peace time. The army is guilty of war crimes when it violates the laws of war. The two main categories qualifying the exercise of violent force are proportionality, which relates to the amount of force used and discrimination, the manner in which it is exercised. These categories are incorporated into the three basic principles governing warfare: the principle of necessity, or military necessity, the principle of humanity and the principle of chivalry. Except for the special case of Geneva Convention on Genocide of 1948, where certain acts of killing and destruction are taken to be acts of genocide if it is found that a government intended to commit genocide, none of the laws of war deal with intent.

Not all acts of war fall into the categories of crimes against the peace, war crimes or crimes against humanity. These crimes have been delineated and described in the laws of war and the manner of evaluating an army's actions is objective according to its actual activity and the actual state of affairs it has caused. The intention of the army is quite irrelevant. This ought to be apparent in that it is obvious that an army conducts warfare, its business is to kill and destroy, its weapons and tactics and strategies are all developed with this in mind. An army is simply the killing machine of the state. Therefore to ask what it intends to do when it engages in warfare, is absurd.

When a government wants to protest its culpability it may argue that it carried out the acts

of war in self-defense It cannot argue that it did not intend to kill or destroy. If an inhabited area is bombed and shelled, once again, it is absurd to argue that the killing and maiming and property destruction that resulted was not intended! Therefore, the logic of the self-defense argument is a confirmation that acts of war were carried out, death and destruction resulted, but, and here it is stressed, all these actions were acts of defense. They were acts carried out in response to aggression and therefore justified. This is the essence of the "Just War" theory. This is the main defense against the charge that the opening of hostilities is a crime against the peace. Similarly this is the argument for the actual conduct of the war itself. An army or government may not, however, use the defense of "military necessity" to justify a breach of the laws of war, because the laws themselves have taken into consideration such "military necessity" when they were formulated and applied.

The original Goldstone report found that "potential war crimes" had been committed by Israel. I am not sure what he meant. Could he have meant that objectively speaking, Israel could plausibly use, or have used, the argument of self-defense to clear it of the charges of war crimes and crimes against humanity, as well as the crime against the peace by beginning the war? Could he have meant that Israel was threatened by the huge and overpowering army of Hamas, by its overwhelming fire power? By its fighter bomber capacities, its hundreds of tanks and shells, its navy warships, its infantry and land to land missiles? And that in the face of such threats and previous attacks, Israel had to respond to the dangers Hamas posed to its safety and security? Or did he expect that Israel would or could argue that it began Operation Cast Lead as a "pre-emptive war" in order to paralyze the huge military arsenal of the Palestinian government and army in the Gaza Strip?

The state of Israel wishes to relieve itself of any culpability by transferring the culpability of the state, over to individuals, when it sets up its investigating committees. What Justice Goldstone has chosen to either overlook or not understand, is that such individual culpability occurs in addition to, but not in the alternative, that is, it does not in come place of state culpability. Even if particular persons are found to be guilty in specific instances, the overall responsibility always lies the government which conducted the war, and it remains liable for its actions and the damages these actions incurred. It is on these grounds that reparations are demanded from a country, and not from those who might have been found guilty for war crimes or crimes against humanity.

In the light of what I have written, Justice Goldstone's retraction has no basis in the laws of war. I would go further and argue that Israel did not commit "potential war crimes" but is in violation of all the three categories of the laws of war.

III. Resistance and self-defense: heroism and legality

There is one outstanding question and issue which Justice Goldstone chose not to address: neither in the original commission nor in his retraction. This is the question of the right of a people to resist an aggressor and/or an oppressor, and the legitimacy of such resistance. I would argue that according to international law today, Israel has no rights to or in the Occupied territories of Palestine. According to the same international law, the occupation ought to have ceased one year after its beginning, that is by June 1968. The United Nations Security Council passed a resolution requiring Israel to withdraw from all occupied territories, Resolution 242 in November 1967.

I would contend that the continuing presence of Israel in these occupied territories, its building of settlements and the transfer of a huge Jewish population into it, and an

infrastructure built from Palestinian assets to serve those settlements, its control over the use of land and water, and its continuing oppression of the indigenous population, should be classified as a colonialist venture. From the Palestinian point of view, the Israeli policies and practices are formulated and executed for the destruction of Palestinian society, private and public life, and their material assets.

In this situation of continuing oppression, dispossession, detention, killing and destruction of social frameworks, are Palestinians not permitted to resist all or any of this? If Israel is a colonizing power over and above its status as Military Occupier, precisely because of its settlement activity and control of the resources of the territory in Occupied Palestine then it would seem that the Declaration on Granting Independence to Colonial Countries and Peoples, 1960 General Assembly Resolution 1514 (XV), December 14, 1960 applies to Palestinians today. I quote two relevant articles.

1. The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co- operation.

All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Above and beyond the basic right of all human beings to resist their being killed and harmed, and a society to take armed actions to protect itself, this document legitimizes also national liberation struggles, including, at this time in history, most particularly, the Palestinian people's struggle for its own freedom. It is this right which legitimizes all Palestinian attempts to lift the yoke of Israeli oppression from Palestine, including all the actions taken by the Palestinians during Operation Cast Lead.

And is not the right to resist oppression universal? Does this right not justify the American Revolution and then the French Revolution and the wars of liberation in the 1950's and 1960's. Nelson Mandela is a hero because of his resistance to, not because of his subservience to apartheid repression. And the Warsaw Ghetto uprising by the Jewish population against the Nazi repression is a beacon of pride in modern Jewish history. it is also a fact that Jews who joined the resistance, say in Poland or other places under Nazi occupation, are heroes for the Jewish people. I would contend that one cannot deny that right of resistance to Palestinians which the Jews appropriated to themselves, and which is the right of all peoples living under military occupation and/or colonialist regimes.

That Israel is not innocent of the crimes which he has bent over backwards to whitewash, can be found in this article in the leading Hebrew newspaper, Haaretz.
(http://www.haaretz.com/weekend/magazine/mean-street-1.357617)

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