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## A MISSED OPPORTUNITY: the Goldstone Report on Gaza and its consequences in Israel

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When Israel started its offensive against the Hamas-ruled Gaza Strip in December 2008 it had four manifest objectives: First, to stop rockets being fired into the Northern Negev; second, to weaken the military and security infrastructure of Hamas in Gaza; third, to restore the deterrence it had lost after the years of rocket attacks against its territory, fourth, to secure release of caporal Gilad Shalit, kidnapped by Hamas in 2006. According to most international analysts, the war successfully achieved the first three goals. Nevertheless the international debate that followed the United Nations Human Rights Commission (UNHRC) fact-finding mission on the violation of Human Rights during the conflict, had three additional unintended results: (1) it widened the differences between Israel and International Organisations, further undermining their credibility vis-à-vis Israeli society, (2) it further isolated Israeli NGOs peace activists and critics from the rest of the national political debate, (3) it slowed the efforts to relaunch the peace process. We will analyse these three consequences.

### The facts

The Israeli military offensive derives from a long sequence of events whose milestones might be identified as follows: (1) September 2005, with the Israeli withdrawal from Gaza, (2) January 2006 with the elections won by Hamas, and (3) January 2007 with the eruption of civil war between Hamas and Fatah that brought Hamas into full control on the Strip and its subsequent blockading by Israel.

Operation Cast Lead started on 27 December 2008, when Israel began a wave of air-strikes on the Gaza Strip. The strikes followed Hamas' decision to end a six-month ceasefire. With the ceasefire over, Hamas intensified its rocket and mortar attacks against Israel, targeting for the first time major Israeli cities such as Beersheba and Ashdod, and virtually threatening the whole population of the Northern Negev of 700.000. The ground invasion of Gaza begun on January 3rd. Israel declared a unilateral ceasefire on January 18, completing its withdrawal on January 21. Between 1,166 (source: Israel Defence Forces) and 1,417 (source: Palestinian Ministry of Health in Gaza) Palestinians and 13 Israelis were killed, thousands more were injured and lost their homes, Gaza's infrastructure was annihilated.

### The United Nations Human Rights Council's biased record

The United Nations Human Rights Council was set up on 15 March 2006 taking the place of a previous council, criticised for including among its members countries with poor human rights records. But the new body quickly came in for strong criticism and was accused of being controlled by a bloc of Muslim states, backed by China and Russia<sup>1</sup> and for its alleged anti-Israel bias. During 2006-2007 - its first

1. <http://www.reuters.com/article/idUSTRE4BB67820081212>

year of existence- 9 UNHRC resolutions targeted the Jewish State, Israel was the only country specifically condemned for human rights abuses.

Moreover, in June of the same year the Council voted to make its review of human rights in Israel a permanent feature of every Council session, Israel was thus the only country to undergo a permanent review. Moreover, during the following years of activity, almost half of the Council resolutions involved Israel. On occasions when the resolution related to the July 2006 war against Hezbollah, several member states and NGOs objected that by targeting exclusively Israel and failing to address Hezbollah attacks on Israeli civilians, the Council risked damaging its credibility. UN Secretary General Kofi Annan criticised the Human Rights Council for *disproportionate focus on violations by Israel* while neglecting other parts of the world such as Darfur, which had what he called graver crises. In 2007 the new UN Secretary General Ban

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Ki-moon issued a similar statement expressing his disappointment *at the Council's decision to single out only one specific regional item given the range and scope of allegations of human rights violations throughout the world.* Even Justice Goldstone, the former South African Constitutional Court Judge who served as chief prosecutor of the United Nation International Criminal Tribunals for both ex-Yugoslavia and Rwanda, wrote in an October 2009 open letter that he was aware and had frequently spoken out against the unfair and exceptional treatment of Israel by the UN and especially by the HRC.

### **The UNHRC Fact Finding Mission and its composition**

On February 27 2009 the UNHRC decided *to dispatch an urgent, independent international fact-finding mission, to be appointed by the President of the Council, to investigate all violations of international human rights law and international humanitarian law by the occupying Power, Israel, against the Palestinian people throughout the Occupied Palestinian Territory, particularly in the occupied Gaza Strip, due to the current aggression, and calls upon Israel not to obstruct the process of investigation and to fully cooperate with the mission*<sup>2</sup>.

Former United Nation High Commissioner for Human Rights Mary Robinson was appointed to lead the Mission; but she refused the post, claiming that the mission was severely biased and inherently anti-Israel. She stated that the resolution adopted by the UNHRC was one-sided and *guided not by human rights but by politics*. In her place, the UNHRC proposed the name of Justice Richard Goldstone, who also initially refused arguing that the mandate was *biased and uneven-handed*. Judge Goldstone refusal proved the scope of the mission to be reinterpreted and extended to include all violations committed in the context of military operations, whether before, during, or after the war in Gaza.

The mission was finally set up on 3 April 2009 and its members included Professor Christine Chinkin of the United Kingdom, Supreme Court Advocate Hina Jilani of Pakistan and the Irish Colonel Desmond Trevers. South African Constitutional Judge Richard Goldstone was appointed to

head the mission. Justice Goldstone's high reputation seemed appropriate to the post. Kenneth Roth, president of NGO Human Rights Watch, who approved his selection to head the mission, stated that *Justice Goldstone's reputation for fairness and integrity is unmatched, and his investigation provides the best opportunity to address alleged violation by both Hamas and Israel.* Mary Robinson herself, applaud-

ing Goldstone's appointment, defined him a dedicate and unimpeachable human rights lawyer and advocate able to work to secure an agreement that would permit the mandate to be interpreted in such a way as to allow his team to address the actions taken by both parties to the conflict.

### **The Goldstone Report: Israel and the International Community**

From the outset, Israel refused to assist the fact-finding mission, as it considered it flawed and inherently anti-Israel. Not only did Israel not cooperate with the investigators, but it also did not provide any data covering Israeli casualties, nor did it allow the Commission's members to enter Israel or Gaza from Israeli borders. The mission members carried out two visits, entering Gaza from the Egyptian border. As reported by Justice Goldstone, they conducted 188 interviews, reviewed 100.000 pages of documents and inspected 1200 pictures.

The mission's final report was released 15 September 2009. It accused both Israeli Defence Forces and unspecified Palestinian authorities of war crimes and potential crimes against humanity. It recommended that the two parties openly investigate their own conduct and, should they fail to do so, that the allegations be brought to the International Criminal Court. Allegations against Israel included deliberate targeting of civilians as well as their use as human shields.

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2. A/HRC/S-9/L.1/Rev.2.12 January 2009

The report provoked mixed reactions. Critics argued that the report was severely flawed and motivated by anti-Israel bias in the UNHRC. Supporters claimed that Justice Goldstone's reputation and credentials are unshakable and the recommendations of the report should be implemented. A more diplomatic third group, including many European governments and Israeli pacifist NGOs, chose to take the approach that the report was flawed but its allegations should not be ignored. In-depth analyses by the Israeli government and some pro-Israel organizations argued that the report contained numerous falsehoods, legal errors, methodological flaws and double standards.

Although Israeli diplomats received the inquiry with a certain concern, religious Right Shas' Deputy Prime Minister and Minister of Internal Affairs Eli Yishai, labelled the UNCHR as *an anti-Israeli* body inviting to simply ignore its recommendations. On the other hand, Prime Minister Neta-

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niahu went on the diplomatic offensive to persuade allies to avoid a vote at the General Assembly. Defence Minister Ehud Barak joined the fight and offered to his counterparts two main arguments: a Report blaming Israel would constitute an incentive to terrorism, as it would represent a precedent according to which whether Americans in Iraq, nor NATO in Afghanistan or Russians in Chechnya would be in a position to legitimately fight terrorism without risking being accused of war crimes. The second more incisive argument would specify that, should an anti-Israel Report be approved by the General Assembly, any further territorial concession to the Palestinian would be much harder, as the disputed facts had been actually triggered by the Israeli withdrawal from the Gaza Strip.

On 16 October 2009, the UNHRC passed a resolution endorsing the report. The USA and several EU countries (Italy, Hungary, the Netherlands and Slovakia) voted against the resolution, other EU members of the UNHRC either abstained (Belgium or Slovenia) or were absent (among others, UK and France). Eventually, out of 47 countries, 25 voted yes, 6 no, 11 abstained and 5 didn't participate in the vote.

The resolution was then submitted to a vote. On 4 November, the United Nations General Assembly passed a (non-binding) resolution calling for independent investigations to be conducted by both parties on allegations of war crimes described in the report. In this second vote a number of European countries including Italy, the Netherlands, Poland and Czech Republic joined the voting against the resolution. As expected, the European Union was split, with Britain and France abstaining. In any case, any initiative for a

hard resolution against Israel, such as idea of submitting the Goldstone report to the International Criminal Court, would have been torpedoed by a United States veto. On the other hand, the favourable votes of Egypt and Jordan, the two sole Arabic countries with which Israel signed a peace treaty, underlined the obstacles the Report would offer to the peace process, a situation made even worse by the vote in favour of both China and Russia.

The Report even surprised those experienced Israeli diplomats who had expected an inquiry by the United Nations Human Rights Council, which they believed would inevitably be deeply biased against Israel. They expected the military operation to be condemned as hugely disproportionate and Israel to be blamed for not taking sufficient care to avoid civilian casualties. Yet they did not imagine that the Report would accuse them of intentionally targeting civilians.

Although most Western countries did not endorse the Report, public opinion generally supported its theses. This attitude has been worsened by Israel's total isolation, its refusal to allow any independent investigation, and the strict ban enforced on international press entering Gaza during

the strikes. In Israel, some pacifist NGOs argued that it was necessary to further investigate the issue, although they pointed out the Report was severely flawed. The renowned pacifist movement Gush Shalom even bought a space in the newspaper Haaretz to outline that Israel "*must investigate eventual war crimes in Gaza. Not because of the UN, not for Goldstone, but for our self-respect and for the future of Israel*".

Several months after the Report's release, the debate on its consequences is still very alive in the Israeli media. Speaking at a conference at the beginning of January, former Israeli Supreme Court President Aharon Barak said Israel would benefit from participating in international justice organisations as the International Criminal Court. Such position would allow Israel to defend its rights and to *place the Country among enlightened nations*, as underlined by a Haaretz op-ed. Following his argument, Justice Barak suggested that the government should have collaborated with the Goldstone Commission, as its outright refusal further isolated Israel from the international community.

This standpoint is certainly not within the mainstream in Israel. Justice Barak's position is generally considered elitist, idealist or even *pure folly*, as remarked by Professor Gerard Steinberg of 'NGO-Watch' in a recent interview. The mainstream thesis states that nondemocratic and Arab nations are dominant in international organisations, and the politicisation of these bodies would not guarantee justice when it comes to Israel. In Steinberg's words, *in such morally corrupt frameworks*, international law and human rights would become political weapons, disconnected from legitimate judicial processes and legal systems in democratic societies.

But in Israel Judge Goldstone was accused of double standards and labelled a self-hating Jew, a traditional criticism levelled at Jewish and Israeli critical voices. Indeed, it is quite plausible the UNHRC choice to invest Justice Goldstone was due to both his very high reputation and his being Jewish. In theory, this should have avoided charges of anti-Semitism that might have awaited a gentile accusing Israel. What the Council apparently did not consider is the fact that any statement favourable to Israel by Justice Goldstone would have certainly been targeted by opponents as due to his being Jewish.

In this context, one should bear in mind that the average citizen does not distinguish between the UN and its commissions. In Israel the accusations towards the UNHRC are easily translated into a general feeling of isolation, due to perceived anti-Israeli policies, or even anti-Semitism by the international community at large. Again, reality in Israel is jeopardized by these perceptions, and any evidence coming from facts is secondary to the commitment to defend the survival of the state from its enemies.

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### **The role of the EU: a lesson to be learned**

From this standpoint, anti-Semitism - be it real or perceived - constitutes a growing fence that isolates Israel from the International community, particularly Europe. On the one hand, Israelis feel that anti-Semitism is growing and influencing European public opinion on Israeli policy matters, on the other Europeans increasingly blame Israelis for abusing anti-Semitism in order to defend an aggressive and morally inhuman foreign policy.

In this framework, the role of the European Union could have played in mediating between Israel and the international community has been dramatically weak, appearing at the same time fragile, contradictory and influential. Not only were EU votes scattered both at the Council and the General Assembly, but its leaders' opinions released to international media were diverse and often contradictory. Tensions peaked during the Swedish EU Presidency, when the Swedish Foreign Minister, became *persona non grata* in Israel in part due to failure of his government to condemn the prominent Swedish newspaper *Alftonbladet's* for publishing an article that accused Israeli soldiers of selling Palestinian victims' organs.

According to the majority of local media, Israelis tend to trust cooperation with individual European countries and governments, particularly those of the major countries - UK, France, Germany and Italy. Yet, they don't trust the EU

as an institution which is perceived as the "Mother of the Human Rights rhetoric", and funds NGOs which are very critical of Israel's human rights policies. On the other hand, statistics shows that while Israelis' trust in the USA is decreasing, influenced by the election of Barack Obama (from 78% in 2007 to 71% in 2009) and in the UN is vanishing (38% to 29%), trust in the EU is surprisingly on the rise: 49% in 2007 and 57% in 2009<sup>3</sup>.

In this peculiar situation a set of new ideas and initiatives might offer a chance to rebuild a serious cultural dialogue between the EU and Israel. Among them are the arrival of a new EU ambassador in Tel Aviv, the Spanish rotating EU presidency, a new European Parliament and Commission. Israeli media welcomed the Spanish turn as a chance to "start afresh". Both *The Jerusalem Post* and *Haaretz* pointed out in several occasions that Foreign Minister Moratinos has spent many years in the region, including a period as the EU's special peace envoy during the Oslo period, *and has learned to distinguish between slogans and reality*<sup>4</sup>.

This approach could be summarised by the need for absolute transparency in cooperation schemes and for taking into account that NGOs activities will be perceived in Israel under a considerably less benevolent eyes than they enjoy in the EU. In fact, the EU is undergoing a set of serious

allegations about its NGOs funding policies in Israel and Palestine that recently reached the Court of Strasbourg. This process is heavily undermining the activities of both internal and international civil society in Israel; for instance, obtaining a visa to operate in the Territories is harder than ever for an NGO activist today.

### **Conclusions: Denial, Doubt and the Consequences for Open Debate**

Israel's opposition to the Goldstone Report may contain multiple layers of denial. An extensive set of interviews conducted by the author in Israeli universities with graduate students during January 2010 offered a wide range of attitudes which can be categorised on three levels: denial of facts, denial of their meaning and denial of the possibility of alternatives. Perceptions range between the belief that facts reported by the Goldstone Report never happened, the conviction that although they did happen, Israel had no alternative in order to protect its citizen's security. Moreover, respondents expressed doubts about the possibility that an international commission might be able to investigate better than the Israel Defence Forces, about the recognition of any international law that would also be valid in the Territories,

3. <http://pewglobal.org>

4. *Jerusalem Post*, 11.1.2010

and the refusal to recognise the authenticity of images and videos that were seen worldwide, but censured in Israel. Finally, those interviewed found it difficult to recognise the clash between collective punishment and the enforcement of Human Rights.

In this context, it is worth remembering that the enforcement of human rights is a controversial process, vulnerable to misunderstanding and abuse.

Yet, even in this very complex scenario some questions could have been asked by an adequate intervention of the International Community in the Gaza Conflict. That the media were not allowed into Gaza during the Israeli intervention did not help. Following David Landau of the New York Times<sup>5</sup>: *When does negligence become recklessness? When does recklessness slip into wanton callousness, and then into deliberate disregard for innocent human life?* This perhaps should have been the main focus of a rigorous investigation of the Gaza facts. This would have perhaps brought Israel to face up to this essential point. Furthermore, are widespread civilian casualties –at a ratio of 1 x 100- inevitable when a modern army pounds targets in a heavily populated area with smart weaponry? Are they acceptable? Does the enemy's deployment in the heart of the civilian area shift the line between right and wrong, in morality and in law? These were precisely the questions that Israeli politicians and generals wrestled with in Gaza.

Many Israelis received the official figures on the Gaza destruction with profound concern, even though the great majority supported Israel's right to respond to rocket and mortar attacks from across their borders. The shock caused by the war's casualty figures could have triggered an extensive debate, able to create a common ground of discussion *with Israel, within Israel and concerning Israel*. But the Report and its fundamental premises enlarged in fact the virtual *security fence* to separate "us" from "them", "right" from "wrong", "aggressor" from "victim". No constructive debate can spring out such premises.

The Goldstone Report could have finally opened a debate and prompted reflection in Israel. Instead, it has achieved the opposite.

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5. The New York Times, 20.9.2009