Is There a Court for Gaza?

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Editors

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A Test Bench for International Justice

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Foreword

Palestine first surfaced as a subject of international litigation in the second contentious case before the Permanent Court of International Justice. The matter concerned certain legal consequences of the British mandate and was not unrelated to London's encouragement of the establishment of a Jewish state in Palestine, although the precise dispute is far from issues of contemporary concern.[1] Indeed, for about eighty years subsequent to the Permanent Court's decision, in 1924, the Palestine issue remained far from the docket of international courts and tribunals. Only very recently there has been any serious prospect of the Israeli occupation and its consequences being addressed through the mechanisms of international justice and international courts. To some extent this is because the institutions themselves did not previously exist or were not available. But it is also the result of an increasingly robust use of international law as a means to deal with international disputes.

Some have dismissed this as 'lawfare'. Recently, the term has been used to attack the Advisory Opinion of the International Court of Justice on the Wall and the Report of the Fact-Finding Mission presided over by Richard Goldstone. 'Lawfare' was apparently coined by General Charles Dunlap, an American military lawyer, in a lecture at Harvard University in November 2001. He said it was a practice whereby 'the rule of law is … hijacked into just another way of fighting (lawfare), to the detriment of humanitarian values as well as the law itself'. Dunlap said 'the use of law as a weapon of war, is the newest feature of twentyfirst century combat'.[2]

Were not the British, French and Russians using 'lawfare' in 1915 when they said that Ottoman leaders would be prosecuted for 'new crimes of Turkey against humanity and civilization', what we call today the Armenian genocide? What of

[1] *Mavrommatis Palestine Concession* (*Greece v. United Kingdom*), P.C.I.J., Series A, No. 2, 30 August 1924.

[2] Charles J Dunlap, 'Law and Military Interventions: Preserving Humanitarian Values in 21st Conflicts', Humanitarian Challenges in Military Intervention Conference, Carr Center for Human Rights Policy, Harvard University, 29 November 2001.

the Americans, the British and the Soviets who, in October 1943, spoke of 'evidence of atrocities, massacres and cold-blooded mass executions which are being perpetrated by Hitlerite forces in many of the countries they have overrun and from which they are now being steadily expelled'? The Allies said they would 'pursue them to the uttermost ends of the earth and will deliver them to their accusers in order that justice may be done'. The Nazis were doing the same, accusing their adversaries of war crimes in the fire-bombing of cities, for example.

The 'lawfare' libel is nothing more than frustrated resistance to the availability of new mechanisms and institutions whereby international law can be applied to present conflicts, including those involving Israel and Palestine. For decades, international law was a largely theoretical proposition, something invoked by academics and activists, and in debates within political bodies of the United Nations. Now, there is a realistic prospect that the great conflicts of our time can actually be brought to court.

This volume asks: 'Is There a Court for Gaza?' The answer is a resounding yes. Indeed, there are at least two courts capable of addressing the armed conflict in Gaza that took place in December 2008 and January 2009: the International Court of Justice and the International Criminal Court. But neither of them has jurisdiction *prima facie*. The challenge, then, is to resolve the difficulties in establishing jurisdiction. Once this is done, the merits, which have only partially been addressed in the Goldstone report, can be litigated. Even then, there are limits to the subject-matter jurisdiction that are likely to confine the judicial debate.

The International Court of Justice is the more challenging of the two. Israel could consent to jurisdiction of the Court, in accordance with Article 36 of the Statute. But it is not likely to do so. Even if it did, it would be necessary to identify a dispute with another State, and one that was prepared to submit an application to the Court. The Advisory Opinion procedure is also available, as the 2004 ruling shows. But considerable creativity would be required to develop a question immune to the complaint that it amounts to blatant misuse and a disguised attempt to litigate a contentious matter. Although the Goldstone Commission Report cited the 2004 Advisory Opinion in several places, it did not even contemplate the possibility that the violations of international law it had identified be addressed in that forum.

A far more promising prospect is the International Criminal Court. It was the forum seriously considered by the Goldstone Report. As a general principle, the International Criminal Court may exercise jurisdiction over virtually any violation of its Statute committed anywhere in the world. This is a direct consequence of Article 12(3) of the Rome Statute by which any State may make a declaration accepting the exercise of jurisdiction by the Court, regardless of whether it has ratified or acceded to the Statute. The only significant restrictions on this result from other jurisdictional provisions: the alleged crime must fall within the subject-matter jurisdiction of the Court and the act must have been perpetrated subsequent to the entry into force of the Statute, on 1 July 2002. Neither of these criteria poses a problem with respect to the recent Gaza conflict.

Several years ago, in *An Introduction to the International Criminal Court*, I suggested that the Palestinian Authority might make a declaration to the effect that when Palestine becomes a state, it pledged to give the Court jurisdiction over crimes committed on its territory in the past by means of a declaration in accordance with Article 12(3). I did not then think seriously about the argument that it is already a state for the purposes of Article 12(3), although I now acknowledge the strength of the arguments to that effect. At the time, there were already two cases in which the provision had been relied upon, but they concerned Member States of the United Nations, Côte d'Ivoire and Uganda, whose claim to be 'a State' within the meaning of Article 12(3) could not reasonably be in dispute. My thesis then was that such a measure by the Palestinian Authority would at the very least sound a warning, and that this might generate a deterrent effect. Perhaps the proposal was superfluous. International lawyers working for Israel have analyzed the details of the Rome Statute and already appreciated the possibility that everything carried out on Palestinian territory since 1 July 2002 is potentially subject to the Court's jurisdiction.

By the time this book is published, Palestine's existence as a State may be established beyond dispute. This important development may eliminate a significant portion of the debate with which the contributions in this volume are concerned. Then our attention will be focused principally on the substantive charges rather than on the jurisdictional issues. That a State may give jurisdiction retroactively pursuant to Article 12(3) is unquestionable, as the Côte d'Ivoire and Uganda declarations demonstrate. After all, retroactive application is precisely the purpose of the provision. Israel may nevertheless argue that a state of Palestine cannot employ Article 12(3) to give jurisdiction over its territory for a period in the past when it may not have been a state. There is no convenient precedent to provide an answer to this argument. However, the consequence of such a claim leads to an absurdity, or at least to a proposition that defies the object and purpose of the Rome Statute. It would mean that one portion of the globe, due to the fact that it was occupied illegally by a foreign power, would become more or less permanently insulated from the International Criminal Court. The judges of the Court are exceedingly unlikely to accept such an interpretation.

The Fact-Finding Mission chaired by Richard Goldstone documented a large number of violations of international humanitarian law and international human rights law. There has been much noise about a subsequent statement of Richard Goldstone expressing hesitation with respect to some of the conclusions. The extent of his remarks has often been exaggerated, as they only dealt with one set of the alleged violations concerning intentional targeting of civilians during combat operations. Judge Goldstone said that he doubted whether the evidence showed this had taken place as a matter of policy. Careful reading of the Report indicates that the Fact-Finding Mission never made such a claim in any case. That individual soldiers may have targeted civilians is a separate question from whether they did so as a matter of policy. It can only adequately be addressed with detailed analysis of specific incidents, and it is virtually impossible to reach an accurate conclusion

on such matters without hearing both sides. In any case, the issue of intentional attacks on civilians does not get to the heart of the matter. The core of the Goldstone Report dealt with the planned destruction of the entire infrastructure of a community, aimed at punishing Palestinians in Gaza for their support of Hamas. That this was Israeli policy seems to have been admitted. It was a strategy that had already been used in Lebanon in 2006. No member of the Fact-Finding Mission has repudiated the conclusions on this important point.

The Fact-Finding Mission found that war crimes may have been perpetrated by both sides in the conflict. This is a source of satisfaction to many in the human rights movement, who cherish the neutrality of such a perspective. Others, including Richard Falk in this volume, contend that the critique of Hamas introduces a distortion into the analysis. And from the other side, supporters of Israel claim that essentially all of the acts perpetrated by the Israeli Defence Forces were a legitimate response to the Hamas rockets. These quarrels bring us to the heart of the real challenge in finding a court for Gaza. If the International Criminal Court were to proceed on the basis of the referral by the Palestinian Authority, whom would the Prosecutor target? What crimes would be addressed? Would he deal with Hamas and the Israeli Defence Forces equally, or with only one to the exclusion of the other? If he were to pursue both sides, what would be the proportions of such prosecutorial alchemy?

The question of even-handed prosecution has dogged international criminal justice since its beginnings, when the victors of the First World War included punishment provisions in the Treaty of Versailles. The great trials at Nuremberg and Tokyo have been constantly criticized because they only dealt with violations on one side of the conflict. The more recent *ad hoc* tribunals are purportedly more balanced in that they are established not by the victors but by the United Nations Security Council. The prosecutors of the *ad hoc* tribunals are not appointed by one side in the conflict, as was the case at Nuremberg and Tokyo, and the jurisdictional framework makes prosecution of all parties a possibility. However, the Yugoslavia, Rwanda and Sierra Leone tribunals have all required decisions to be made about the selection of defendants. In each, there has been controversy, demonstrating that the alleged shortcomings of Nuremberg and Tokyo have not been solved.

Nor has the International Criminal Court yet to provide the answer. To date, the Prosecutor has selected situations for prosecution that are confined to a group of contiguous states in Africa. He has achieved this by either exercising his *proprio motu* power to choose situations, pursuant to Article 15 of the Rome Statute, or by his concurrence with such decisions when they are initially made by either the Security Council or a State Party (in accordance with Articles 13(b) and 14, respectively). The Prosecutor has located the activity of the Court within the comfort zone of the United States and other prominent 'western' powers. This is not 'victors' justice' in the institutional sense, as was the case at Nuremberg and Tokyo, but the result is about the same.

Ultimately, if prosecutions concerning Gaza are to proceed, the Prosecutor will have to agree. A declaration under Article 12(3) does not trigger jurisdiction.

An additional step is required. This can come from the Security Council (improbable), a State Party or the Prosecutor himself. But in all cases, the Prosecutor must concur both with the decision to investigate and with the choice of the accused. To the extent that there is any anxiety about operating close to an exposed nerve of the United States, a positive decision by the Prosecutor would seem unlikely, no matter how solid the legal arguments for jurisdiction may be. The biggest hurdle is not convincing the Prosecutor that he may exercise jurisdiction but rather convincing him that he should. Moreover, even if he were to proceed, his choice of individual targets for prosecution may generate a narrative of the conflict with which many will disagree.

At present, the subject-matter jurisdiction of the International Criminal Court is confined to genocide, crimes against humanity and war crimes. The Fact-Finding Mission quite correctly ignored the occasional demagogic invocation of the 'g-word' and focused its attention on crimes against humanity and war crimes. In the context of international humanitarian law, these might be categorized as the *jus in bello*. They concern the conduct of hostilities rather than their legality. This is perhaps one of the great conundrums of bringing law to bear on the Gaza conflict. The general public does not properly understand the distinction between *jus in bello* and *jus ad bellum*. Many undoubtedly believe that there should be prosecutions with respect to the Gaza conflict because Israel is responsible for the occupation, for the blockade and for the initiation of the recent conflict. These are matters that cannot at present be addressed directly in proceedings before the International Criminal Court.

The famous statement signed by the late Ian Brownlie and several other prominent academics, including a member of the Fact-Finding Mission, published in *The Sunday Times* in January 2009, criticized Israel not only for the conduct of hostilities but also for waging the war in the first place. A focus solely on the battlefield as such leads us toward the more balanced position whereby both sides bear responsibility for violations. It implies that the root cause of the conflict as a secondary matter, and is premised on the apparent neutrality of the *jus in bello* perspective. We search for solutions that involve punishment of individual soldiers rather than turning to the only real answer, which is full affirmation of the right of the Palestinian people to self-determination.

Palestine's entitlement to a sovereign state within fair borders reflecting its historic territory is an agenda that international litigation may help to advance, but probably not one for which the International Criminal Court is particularly suited. In 2017, the Court may be able to exercise jurisdiction over the crime of aggression. But this will not be possible retroactively, even if the new provisions were to be applicable to an armed attack like the one made by Israel in 2008.

In the past, theorizing about using international law in order to resolve the conflict in the Middle East was an interesting exercise but one whose significance was essentially hortatory. There was no court capable of providing a forum for the debate. That no longer is the case. Over the past decade, both the International Court of Justice and the International Criminal Court have been confronted with

aspects of the crisis. Neither institution provides an adequate remedy. But nor should the contributions that both can make to the debate be gainsaid. The legal arguments are inexorably intertwined with advocacy strategies, which they nourish, assist and orient.

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