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Searching for Accountability in Gaza

By Richard Bennet and Nicholas Quin

As Israeli troops complete their withdrawal from Gaza after more than three weeks of violent conflict, calls for war crimes investigations have mounted. But what is the best way to hold both sides accountable? Prosecuting war crimes in this situation will not necessarily bring about the desired effect of greater transparency. Rather, a lengthy process of investigations risks further political polarization without guaranteeing to lift the fog of war.

Palestinian estimates for the death toll of the 22-day war have topped 1,300, with 40 percent women and children. Israeli figures put the civilian count at 25 percent. Incidents like last week's shelling of the UN Relief and Works Agency have drawn heavy condemnation from international observers, sparking fresh calls for a formal investigation into Israeli Defense Force tactics. While Israeli investigations into unlawful the use of White Phosphorus are welcome, international involvement would lend greater credibility.

Israelis are quick to point out the indiscriminate nature of over 3,200 rockets and mortar shells fired into southern Israel by Hamas in 2008, attacks providing the *casus belli* for the recent IDF action. Almost 800 more have been fired since the previous ceasefire was formally ended in December, killing several Israelis, wounding hundreds more. In response to Israeli ground forces moving into Gaza, the use of Palestinians as civilian shields has become commonplace, with Hamas organizing their actions from basements of civilian hospitals and schools.

Those in defense of Israel's actions too often conflate concerns surrounding tactics with questions of Israel's greater case for defending itself. While there has been criticism of Israel's response in terms of "proportionality", Israel's right to defend itself must be taken separately from its code of conduct on Gaza's streets.

The 2006 war in Lebanon has shown that public opinion can be the difference between victory and defeat.

To that end, Israel will be reluctant to entertain any allegations of war crimes. But the lack of transparency in the tactics of both sides, compounded by differing body counts and skewed statistics, threatens the already fragile support of Israel amongst some of its neighbors and allies. Accountability is critical to the success or failure of the public relations battle this conflict has ignited.

There are several reasons why war crimes prosecutions are not the answer to this lack of transparency.

The International Criminal Court is unlikely ever to have jurisdiction over the case. Not only could the crimes fall under the ICC's threshold of severity, but Israel is not a party to the treaty. Prosecutor Luis Moreno-Ocampo must gain authorization from the Security Council or Israel itself to commence any investigation.

Similarly, the creation of an ad-hoc body like the Special Tribunal for Lebanon would rely on the acquiescence of the United States. As a staunch ally of Israel, the U.S. is unlikely to support either of these approaches.

Even if such problems were surmounted there remain drawbacks.

Any war crimes prosecutor would be dealing with a mere snapshot of the greater Arab-Israeli conflict. In judging this snapshot, the ICC would inevitably ignore extensive historical evidence, risking inflaming political sensitivities still further. As the current ceasefire is a unilateral measure on the part of Israel -- without exchange of prisoners or international monitoring -- it is unlikely that the last rocket has been fired into Southern Israel.

Yet international law can still play a valuable role. The elder statesman of Hague courts, the International Court of Justice (ICJ), can be mandated to issue advisory opinions on matters of international law. Once referred by the General Assembly or the Security Council, an authoritative legal opinion could dispel the hyperbolic accusations surrounding IDF conduct while identifying those in most need of redress.

Although Israel reacted sharply to the 2004 opinion on the legality of the wall it planned to build in Palestinian territories, this does not preclude it from accepting future opinions of the court. Submitting to an ICJ opinion would carry no binding legal consequences for either side, and by accepting such a course of action Israel could pre-empt attempts in other countries to assert Universal Jurisdiction over its officials.

Unlike the ICJ's previous decisions, any opinion on the latest conflict is likely to support Israel's original resort to force and unveil important facts about the fighting in Gaza. It stands to shore up Israel's position in the current media storm by anchoring facts to law. For those seeking accountability of action, any apolitical measure is certain to be deemed insufficient. But greater transparency grounded in international legal norms can be beneficial to all sides willing to stand behind the reason of their actions.

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