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The Goldstone Report on the Gaza Conflict: An Agora

Introduction

Tom Farer

By concluding that, in its assault on Gaza under the rubric of self-defense, Israel had targeted the civilian infrastructure and consciously "punished" the civilian population and demonstrated indifference to the suffering of noncombatants and engaged in other acts in violation of the laws of war, behaviors that possibly constituted in their totality crimes against humanity, the Goldstone Report became almost as controversial as the events precipitating it. In this agora, four eminent international lawyers, a mix of scholars and practitioners, assess from their distinctive perspectives the report's methodology, its compliance with fact-finding norms, and the overall quality of its effort to apply norms of international law to a bloody event in the ongoing multidecade conflict between Jews and Arabs over the governance and division of the former British-controlled Palestinian Mandate. Dialectically, they help to structure future debates over UN-sponsored fact-finding and also the normative parameters of the use of force by powerful states engaged in asymmetrical conflicts. *KEYWORDS: Israel; Goldstone Report; asymmetric conflicts; Palestinian-Israeli conflict; crimes against humanity; Israel and human rights; Hamas; Hamas and violations of human rights; UN fact-finding; human rights at the UN*

IF MATERIAL resources alone governed the allocation of power, security, wealth, and other goods, national governments would invest far less time and energy in efforts to influence the activities of the various organs of the United Nations. Hence the substantial size of their investment attests to the importance imputed by governing elites (and many scholarly students of international relations) to nonmaterial resources; in particular, the generation, clarification, and application of norms. It seems clear that political strategists attribute material consequences to norms because norms reflect popular and governmental perceptions of what behavior is or will generally be deemed permissible and what behavior will evoke fear or revulsion. Their human capital investment in the UN coincidentally confirms the conviction of governments and other important actors in the field of international relations that UN organs and activities contribute abundantly to the normative process.

One form that contribution assumes is the reports stemming from inquiries commissioned by various UN organs that are carried out by individual rapporteurs, commissions, and committees. Although the focus may be on the facts of a particular case or a set of cases, the authors of those reports need to invoke law in order to determine what facts are relevant and what conclusions to draw and, often, what sorts of recommendations to make. Many of the reports concern human rights, which is a bit ironical in that in its early years the principal organ of the United Nations concerned with human rights, the Human Rights Commission, strove mightily to evade reporting on facts;[1] above all, facts related to noncompliance with human rights norms and with the overlapping norms of the laws of war or *international humanitarian law* as that body of laws is often called today. But fact-finding and the resulting reports have been prominent in other areas; for instance, with respect to alleged violations of norms governing the proliferation of weapons of mass destruction.

I believe that the UN's potential for clarifying norms and exposing violations far exceeds its present output. The UN will be able to tap more deeply into its potential to clarify and particularly to persuasively expose gaps between norms (whether treaty or custom based) and their effective application if its reports meet widely accepted standards of fairness, accuracy, historical depth, and contextual sophistication and if they are noticed and disseminated. My coeditor, Tim Sisk, and I believe that one useful function of a journal devoted to global governance is to foster critical appraisal of the reporting function as well as to disseminate knowledge of reports that, by their subject and quality, can contribute positively to public appreciation of controversial issues and thereby influence national and transnational public opinion and ultimately the behavior of states in relation to enforcing compliance with international norms.

The "Report of the United Nations Factfinding Mission on the Gaza Conflict,"[2] the so-called Goldstone Report named after the mission's chair, Richard Goldstone, has penetrated public consciousness like few other reports and elicited a remarkable degree of abuse from public and private sources. That in itself seemed sufficient reason to ask experts whom we respect to join in reflecting on the report and the reactions to it and to use our first "agora" as a vehicle for the dissemination of their views. But this was only a secondary reason. A more important reason was that the Israeli operation in Gaza focused issues of central importance to international peace and security about the use of force in asymmetric conflicts, the sort of conflicts that are the norm today. Yet a third reason was our concern with the symbolic resonance of the Israeli-Palestinian conflict; in particular, its iconic role in the jihadi narrative that justifies employment of mass casualty terrorism directed against Western targets (and persons and institutions deemed collaborative with the West) as acts of self-defense against pitiless opponents.

Experts are also human beings who cannot avoid carrying about moral, political, ideological, and group-identity commitments that are bound to influence

their judgments about the relevance of facts, the reliability of evidence concerning those facts, and the identification, interpretation, and application of relevant legal and moral norms. So in seeking participants in this agora, we certainly tried to find scholars and practitioners knowledgeable about international law and human rights (and about the problematic of fact-finding in highly conflictual settings). Other criteria were that they be sufficiently concerned about the conflict between Israel and the Palestinians, and be well acquainted with the historical setting and of predictably different points of view and sympathies, but with a common commitment to bona fides in the expression of their views and a readiness to respect the bona fides of persons with other points of view. Finding people who met all of these criteria and were willing to write about the report and to adhere to our rather strict time limits was not altogether easy. But I feel that we have been successful and that the essays of Dinah PoKempner, Ed Morgan, Richard Falk, and Nigel S. Rodley will collectively contribute to a more rational and structured discussion of the Goldstone Report and of the issues it raised (or should have raised).

I use the future tense in the previous sentence and the paragraphs that follow because, as I am writing this Introduction, I have not yet seen the final drafts. At this point, I simply want to underscore several issues that I think these authors should address.[3]

One is whether normative restraints on the means a government may legitimately employ in seeking to reduce domestic threats to public order are greater than the restraints it faces in confronting a transborder threat.[4] More specifically, must it choose means that minimize the risk of injury to innocent persons ("collateral damage")? My own view is that governments should be deemed subject to greater restraints in confronting domestic threats in part because a government normally has more options in avoiding and preempting domestic threats (except in the context of large-scale civil war) to public order and reducing their causes than it does with respect to threats originating in another sovereign state. Not only does a government have more options but, in addition, it is legally restrained by the doctrine of national sovereignty and by collective concern for international peace and security from directly addressing the grievances in foreign jurisdictions that give rise to the threat or preventively disabling threats that are incubating beyond its borders. In addition, the widely (but, by no means, universally) recognized Responsibility to Protect[5] applies to governments in relation to their own citizens. This responsibility, I believe, has two dimensions. One is protecting innocents from criminal assault. The other is avoiding to the greatest extent possible means of law enforcement that are virtually certain to injure innocents. Furthermore, by ratifying the International Covenant on Civil and Political Rights, as virtually every government has, each state assumes special positive responsibilities in relation to persons residing *within its jurisdiction*. A ratifying state does not assume an obligation to rectify violations of due process and other rights in other jurisdictions.

The issue as I have framed it is relevant to the Gaza conflict but, of course, only if Gaza is deemed to be a territory within Israel's de facto frontiers. Elsewhere I have defended the conclusion that Gaza is analogous to a sprawling prison camp from which, on the basis of a simple cost-benefit analysis, the guards have been removed to the periphery from which point they continue to control the lives of the prison inmates to the extent that it serves the interests of the Israeli government. In this connection, I note continued Israeli control over Gaza's airspace and seacoast and its claim of right to enter the territory at any time to seize or kill persons deemed to be plotting against Israeli public order. In short, Israel does not act as if, in moving forces (and settlers) out of Gaza, it has thereby recognized Gaza as a sovereign state.

A second related issue that I hope the authors will address is when and whether states are prohibited from employing violent means certain to cause collateral damage if the same result can be achieved by other means, and whether other means were available in this instance. It is alleged, for instance, that before the attack on Gaza began, Hamas had offered a mutual cease-fire if Israel would promise to cease seizing or killing Hamas militants. Assuming that Hamas had done so, was Israel obligated to accept that offer rather than launch an assault which, by any count, killed hundreds of civilians? Could it be more narrowly argued that Israel had an obligation to make concessions only if the actions demanded were, in any event, required by international law? An example might be releasing Palestinian prisoners who had been held for months or years without charge or trial or had been tried by special military tribunals failing to meet universal due process standards (which is a normal incident of military trials other than courts-martial exercising jurisdiction over one's own troops).

A third issue concerns the legality of what appears to be Israel's declarative reprisal policy of disproportionate response to illegal acts, a response designed to optimize deterrence. Aside from the question of whether reprisals need to be proportional to the injury suffered, there is the related question of whether reprisal can include attacks on civilian infrastructure at least in part to create popular demands on political leaders to avoid provoking Israel.

Finally, I hope that one or more of the writers will discuss the methods employed by the Goldstone Mission in its efforts to ascertain the facts. Did they correspond to best practices as developed by well-established and prestigious investigative bodies like the Inter-American Commission on Human Rights of the Organization of American States?[6] ⊕

Notes

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1. See Tom Farer and Felice Gaer, "The UN and Human Rights: At the End of the Beginning," in Adam Roberts and Benedict Kingsbury, eds., *United Nations, Divided World: The UN's roles in International Relations,* 2nd ed. (Oxford, England: Clarendon Press, 1993), pp. 272–278.

2. UN General Assembly, "Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact-finding Mission on the Gaza Conflict," 2009 (Goldstone Report), available at www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/FactFindingMission.htm.

3. Although they were given broad guidelines, we felt obliged to also give them broad discretion about how to best utilize the spatial limits that we had to impose.

4. See my Huffington Post blogs as follows: "Israel in Gaza: Self Defense or Slaughter," 5 January 2009; "Gaza and 'Crimes' of Status," 22 March 2009; and "A Question of Proportionality: Israel's Excessive Airstrikes," 23 March 2009, available at www.huffingtonpost.com/tom-farer.

5. See International Commission on Intervention and State Sovereignty report, *The Responsibility to Protect* (Ottawa, ON: International Commission on Intervention and State Sovereignty, 2001), available at www.responsibilitytoprotect.org/index.php/publications/core-rtop-documents; see also Gareth Evans and Mohamed Sahnoun, "The Responsibility to Protect," *Foreign Affairs* 81, no. 6 (Nov.–Dec. 2002): 99–110.

6. See Tom Farer, "The Rise of the Inter-American Human Rights Regime: No Longer a Unicorn, Not Yet an Ox," *Human Rights Quarterly* 19, no. 3 (1997): 510–546.

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Valuing the Goldstone Report

Dinah PoKempner

THE GOLDSTONE REPORT had a politicized and emotional reception that has colored its evaluation to date. There have been so many attacks on the report, both before and after its release, that the campaign took on a life and logic of its own. Most of the attacks allege bias in some way without seriously contesting the actual findings of the report. Given that Justice Richard Goldstone revised the mission's mandate to apply equally to all sides, and found serious crimes on the part of both Hamas and Israel, these attacks are ill-founded at best and sometimes just efforts to change the subject. But calls of bias strongly resonate, given Israel's sense of continual siege and the mission's sponsorship by the UN Human Rights Council, hardly a neutral broker in the conflict. Another frequent contention is that the report passes judgment on Israel's right to defend itself, or pronounces standards that make effective self-defense impossible. This angle plays into both Jewish anxiety over the threat to the existence of Israel, and Western worries about fighting asymmetrical war. The few critiques that go to real substance tend to rely on the inadequately documented assertions of Israeli officials or reflect disagreements on the proper legal standards to apply to the conflict. So far, there has been virtually no well-sourced, transparent response by either side to the report's very serious allegations.

The scuffling obscures a longer perspective: will the report accomplish its mission; namely, to impel the parties in conflict to examine their conduct and hold those responsible for violations to account? A functional assessment of the report on its own terms, compliance with human rights and international humanitarian law (IHL), is most relevant to those who suffered violations and to the development of law, practices, and institutions in this area.[1] From this vantage point, there is a mixed picture, with some success.

As an example of UN fact-finding, the mission followed the best UN efforts, and its findings are consistent with that of other independent analysts. Although it might have been more explicit as to the evidentiary standards it employed, the mission did consider facts on each side and explained how it discounted or credited evidence. Its legal analysis follows current international legal interpretation while opening new questions to debate and development. The report provided a detailed template against which to judge progress in investigation and accountability.

However, action by the Security Council on the report remains blocked, and Israel has so far rejected an independent commission of inquiry. The mission doubtless prompted more visible efforts by the Israel Defense Forces (IDF) to investigate itself, and more discussion on whether the IDF's investigations and legal oversight of military operations are adequate. It is unclear whether

Hamas, despite its cooperation with the inquiry, will take any action against those responsible on its side, but at least there is now some pressure in the endorsement by the Human Rights Council of a report that holds it to account. While this is still far from the accountability that the report called for, it is at least a step in the right direction.

The Context of the Controversy

By any measure, the civilian toll of Operation Cast Lead (OCL) was severe. Casualties on the Palestinian side were in the neighborhood of 1,400 lives, with the Israeli human rights group B'Tselem estimating more than half of these civilian deaths, even excluding the killing of police.[2] The IDF inflicted enormous destruction of the civilian infrastructure on top of the deprivations already produced from Israel's blockade, resulting in tens of thousands of persons displaced, approximately 4,000 residences destroyed and 3,000 seriously damaged,[3] in addition to tremendous damage to farms, factories, and water and sanitation works. Reconstruction is largely at a standstill due to Israel's refusal to allow cement and iron through its blockade. On the Israeli side, in contrast, the war is widely assessed as having accomplished its purpose—halting the rocket attacks against an increasing circle of civilian areas within range from Gaza. The children of Sderot can sleep better, and the economies of the Israeli communities nearest Gaza are reviving.[4] The military operation produced few casualties on the Israeli side,[5] and was overwhelmingly supported by the Israeli public.

The operation, though "successful" in terms of Israeli government objectives, was perceived as disproportionate and punitive by many other nations. The Human Rights Council mandated a one-sided investigation into the humanitarian law and human rights violations of Israel, a mandate Justice Goldstone initially rejected and then revised to extend to violations on all sides of the conflict, which was approved by the president of the council. Goldstone indeed found war crimes and possible crimes against humanity on the part of both Israel and Hamas. He urged that thorough legal investigations be taken up in timely fashion by both sides and, if not, then by the international community, including possible referral to the International Criminal Court.

Israel chose not to cooperate with the investigation. This was an opportunity missed, as it had in Justice Goldstone an exceptionally experienced and eminent jurist and investigator with personal ties to Israel who was committed to ensuring a fair hearing. As it had done on the occasion of the International Court of Justice's consideration of the legality of the "separation barrier," the Israeli government refused to provide information or otherwise cooperate, and then condemned the outcome as uninformed and biased.[6] Although this maneuver is hardly unique to Israel, it is both damaging to the international system and the uncooperative state's reputation. It suggested that Israel had something to hide and did not want a credible investigation.

The Goldstone Report, standing as a rebuke to what was otherwise a politically popular course of action in Israel, became the object onto which the Benjamin Netanyahu government and its supporters sought to displace criticism. Indeed, Netanyahu, in his year-end address to the Knesset, cited what he dubbed "the Goldstone threat" as one of the principal challenges to the nation, on par with the threat posed by Iran's missile and nuclear capability.[7] A strenuous campaign of delegitimation of the report ensued, and continues to this day.

The Arguments of Delegitimation

The report's legitimacy has been questioned even by critics of Israel's government because it was mandated by the Human Rights Council, a body that has shown an extreme institutional bias against Israel to the detriment of its focus on serious human rights problems elsewhere. It is hard to say whether one investigation, however well conducted, could reverse the ways of the council, but some have condemned Goldstone for even trying.[8]

The argument usually follows a sort of "original sin" theme, portraying the report as destined for bias, dismissing as futile the effort to gather credible evidence from Palestinians living under Hamas control and taking official Israeli denials at face value. Israel's ambassador to the UN gave typical remarks in this vein:

> The report before you was conceived in hate and executed in sin. From its inception in a one-sided mandate, the Gaza fact-finding mission was a politicized body with predetermined conclusions. . . . The report makes sweeping judicial determinations of criminal wrongdoing in the absence of crucial information. It makes explosive charges against Israel yet the evidence provided to support such accusations is at best uncorroborated, and at worst false.[9]

The ambassador's government, of course, had yet to provide the "crucial information" that would enable others to objectively evaluate the mission's findings, nor did it cooperate in any way despite Goldstone's repeated entreaties. At its basest form, this sort of rhetoric took the form of lurid caricatures of Goldstone himself as a self-hating Jew collaborating in his people's destruction.[10] Some of the character assassination is no doubt a response to a factor that supports the report's credibility: Goldstone's own impeccable reputation in the field of international justice and human rights, and the fact that he is Jewish, with ties to Israel, which according to Goldstone, led at least one Hamas leader to reject the mission.[11]

The widespread criticism of Operation Cast Lead as an act of aggression by Israel in violation of the UN Charter led to further attacks on the Goldstone effort as predetermined. The inclusion of Professor Christine Chinkin on the UN team caused concern, as she had signed a letter accusing Israel of the war

crime of aggression prior to her appointment. Goldstone defended her inclusion on the grounds that the mission was not looking into issues of *jus ad bellum* (the overarching legality of Israel's intervention), but the distinct issues of *jus in bello* (the evaluation of specific military actions under IHL). But the suspicion that, having pronounced on one issue of international criminal law against Israel, Chinkin would be disposed to find fault on others was not easily dispelled.

Both the Israeli and US governments rejected the Goldstone Report on the claim that it undermined Israel's right of self-defense. The self-defense argument is tricky because there are two very different issues that can come packaged this way: first, whether the Goldstone Report in fact condemns Israel for aggression and, second, whether its reading of international humanitarian law puts states confronting terrorism at an impossible disadvantage. Neither argument has merit, but they are easily and often confused.

The inquiry into OCL was framed in terms of IHL and human rights, and there is no finding on whether the war was an act of aggression; moreover, Goldstone has said that the mission took Israel's right to defend its own citizens as a given.[12] While the jus ad bellum argument could be dismissed as a straw man, it deserves more examination. The report's lengthy examination of Israel's actions against Gaza leading up to the incursion, and the findings on Israeli government policy to respond with disproportionate force sound much like a prelude to judgment on the aggression issue, although they are also plainly relevant to questions of IHL and human rights. The key confusion stems from the charge that Israel used disproportionate force in responding to attacks.

The issue of proportionality straddles the two bodies of law, although it is used in a different sense in each.[13] Self-defense is only lawful if both necessary and proportionate as a response to an attack or an accumulation of incidents that amount to an attack. Proportionality here is a restraint on defense slipping into sheer conquest; the attack is measured with reference to what whole course of action is required to remove the threat to the defender's security. In jus in bello, a given military attack is unlawful if it causes or threatens disproportionate civilian harm relative to the military advantage anticipated. The interests at the heart of the two legal regimes are completely different. One could have a party that mounted a necessary and proportionate self-defense in which it inflicted disproportionate harm to civilians in particular military actions. Similarly, one could imagine a disproportionate military response to attack that avoided inflicting disproportionate harm to civilians. A considerable overlap between the two senses of proportionality is possible too, and it is this double sense—that the overall strategy and goals of the military engagement, as well as particular attacks, involved disproportionate force—that is implicit in much ambiguous criticism. Goldstone, however, has never questioned whether Israel's resort to force was necessary, and is quite clear that assessments were under jus in bello only. Why, then, does this critique persist?

Israel's supporters, with historical memory, are deeply concerned about threats to its existence, and this consideration sometimes overwhelms other ways that its conduct of military operations might be viewed. But just as the principle of proportionality evolved separately in two distinct bodies of law, there also is no hierarchy of laws that would absolve a lawful self-defender from violations of IHL. The rationale for this firm separation is fairly obvious: since every party to a conflict invariably casts itself as a lawful self-defender, such a rule could sweep away all deference to civilian protection. For the same reason, the enemy's perceived contempt for IHL does not justify the opponent in compromising civilian protection—in the fear and anger of conflict, spiraling and terrible consequences for enemy civilians are too easy to rationalize as a way to end the fighting more quickly.

This lay of the law is a problem for those who might wish to encourage a policy of punishing retaliation with lots of civilian damage as a deterrent to Hamas attacking Israeli civilians. It is exactly this approach that Goldstone took as evidence of intent to commit war crimes. And so, like other governments accused of unlawful behavior, the Netanyahu administration now argues the law should change. The contention that "terrorists" and asymmetric warfare pose challenges unheard of at the time the Geneva Conventions were adopted is a largely empty one, at least in the context of Operation Cast Lead. States have been fighting popular insurgencies since before the Hague Conventions and, while Hamas and Hezbollah conduct targeted attacks against Israeli civilians, this does not make the conflicts in Gaza or Lebanon any less in the pattern of prior insurgencies. The disregard of these groups for the safety of civilians, with whom they seek to blend in, poses strategic challenges for Israel. But these challenges are neither unique nor insurmountable, though they may require Israel to accept more risk for its soldiers. As Israel's own High Court said in rejecting coercive interrogation of terrorists, "Sometimes, a democracy must fight with one hand tied behind its back. Nonetheless, it has the upper hand."[14]

Yet another argument mustered for delegitimation is that Israel has a strong history of self-investigation of wartime misconduct, so the Goldstone Report is both unnecessary and a political assault because it recommends international investigation and prosecution should the parties prove themselves not up to the task. Israel does have a history of self-investigation, in stark contrast to its opponents. Unfortunately, it also has a record of enabling high-level impunity for serious violations. The 2006 Winograd Commission, for example, made no findings on violations of IHL, nor was it followed by independent inquiries to investigate violations and assign personal responsibility; indeed, the IDF exonerated itself for its massive use of cluster munitions in the last three days of the war.[15] Since 2000, the IDF has relied on "operational" or "field" investigations, primarily intended to be a debriefing method to learn from soldiers' battlefield experiences as a means of determining if the killing of civilians in

any given incident warrants criminal investigation. This approach to identifying potential war crimes is hardly independent, omits the accounts of victims and witnesses, and delays criminal investigation until the evidence is cold.

On top of the systemic flaws, Israel's reflexive habit of denial when accused of violation does not encourage other nations to assume it is serious about self-investigation.[16] Take, for example, the IDF denial that it fired white phosphorous in Gaza until confronted with visual evidence.[17] Then the line came that critics were wrong; it was a substance *like* white phosphorous. After that came the mantra that white phosphorous is not a banned weapon, though no one said it was—the allegation is that it was used in an unlawful manner. After an investigation, the IDF concluded its use was probably proportionate because it had not ascertained any civilians had *died* from its effects or that physicians could be trusted to identify white phosphorous burns.[18] Though recent practice has been deficient, there is no doubt that Israel is capable of putting together a credible and independent investigation, and the Goldstone Report could provide it an incentive to do so.

The Goldstone Report as a UN Fact-finding Mission

Fact-finding occurs all over the UN system, but the full-fledged investigation into violations of IHL and human rights in the course of armed conflict is more rare, taking place more often under the mandate of the Security Council. The purpose of such fact-finding is usually to document whether there is evidence of crimes and recommend measures for accountability. Further action is expected on the completion of the report, in the nature of Security Council resolutions, establishment of tribunals, or criminal investigations.[19] Fact-finding missions are not adjudicatory in force, but they do typically set out a legal framework and legal conclusions. Moreover, fact-finding with respect to ongoing or recent armed conflicts presents particular challenges; among them, access to the battlefield; the need for forensic, ballistic, and other technical evaluations; issues of security, credibility, and partiality of witnesses; and the obtainment of sensitive internal information that is relevant to weighing the lawfulness of attacks such as anticipated military advantage, intelligence on opposing forces, or command-level knowledge or authorization of unlawful attacks. Some missions founder for lack of state cooperation, and all struggle with this aspect.

The most comprehensive exercise remains the Commission of Experts for the conflict in former Yugoslavia, headed by Cherif Bassiouni, which in its two-year investigation conducted thirty-five field visits and produced evidence on more than a thousand cases and identified an additional 4,500 victims.[20] It interviewed persons from all sides of the conflict, and received information from nongovernmental organizations (NGOs), diplomatic sources, documentary sources, forensic experts, and more. Its mandate was to present "conclusions on the evidence of grave breaches of the Geneva Conventions and other violations

of international humanitarian law."[21] Its investigations not only presented conclusions on the commission of crimes and where individual responsibility lay, but also gave a road map to the crimes that Justice Goldstone used as chief prosecutor of the International Criminal Tribunal for former Yugoslavia. The commission also took on extensive analysis and interpretation of the relevant law, and set out the case for consideration of rape as an international crime.[22]

Similarly, the International Inquiry on Darfur, headed by Antonio Cassesse and including a future member of the Goldstone team (Hina Jilani), was mandated to investigate violations of international humanitarian and human rights law, determine whether acts of genocide had taken place, identify perpetrators, and suggest means of ensuring accountability. The inquiry visited the region several times over three months and interviewed a wide range of sources on all sides, including secondary sources such as NGOs, diplomats, and other experts. It concluded that the government of Sudan and the Janjaweed were responsible for a wide range of international crimes and identified perpetrators for competent judicial authorities to investigate, but did not release their names publicly. The report made extensive recommendations to both Sudan and the international community, including recommending the exercise of universal jurisdiction. The report also noted the degree of cooperation with its mission on the part of both government and rebels, and the fact that in some situations witnesses may have been under pressure or planted.[23]

Set against these precedents, the OCL inquiry was broadly comparable. The revised mandate[24] did not require conclusions explicitly, but reporting on conclusions is implicit in an investigation of international crimes. Unlike the Bassiouni and Cassesse missions, the Goldstone inquiry did not identify particular perpetrators, but it did draw conclusions on the culpability of each side for particular offenses based on available evidence. The team drew on a wide range of sources, including 188 individual interviews, field visits to Gaza, satellite and other images, and medical and forensic evaluations. And it relied primarily on information it gathered firsthand.[25]

In terms of its methods, the mission used experienced investigators and professional procedures. Goldstone rejected Israel's allegations that Hamas referred witnesses or eavesdropped on their statements, explaining the mission conducted private interviews in UN Relief and Works Agency for the Palestinian Refugees in the Near East (UNWRA) offices in Gaza. "We obviously didn't take at face value answers we got—we checked to the extent we could on the information we got."[26] The report noted "a certain reluctance by the persons it interviewed in Gaza to discuss the activities of the armed groups,"[27] and is also forthright as to the many sorts of evidence it could not obtain because of Israeli noncooperation. The report emphasized its findings do not "pretend to reach the standard of proof applicable in criminal trials."[28] Goldstone remarked to *The Forward* that "I wouldn't consider it in any way embarrassing if many of the allegations turn out to be disproved."[29]

Despite the disclaimer of any judicial character, some of the report's determinations are framed emphatically, others more tentatively.[30] While this has been cited as evidence of bias, the more dispassionate question is what evidentiary standard was assumed before conclusions were drawn, and whether it was consistently applied. On this, the report could be more transparent, a flaw shared by other UN fact-finding reports.[31] Justice Goldstone, in an interview given after the report's release, stated: "We didn't make our findings according to the criminal standard of proof beyond a reasonable doubt. We didn't adopt any formal standard, but I would say it was a prima facie case, reasonableness on weighing up the evidence. And in most of the incidents we had a look at, the evidence went all one way."[32]

The Cassesse report on Darfur, which also operated under serious time constraints and government resistance, describes its evidentiary threshold in somewhat clearer terms: in view of the limitations inherent in its powers, the commission decided that it could not comply with the standards normally adopted by criminal courts (proof of facts beyond a reasonable doubt), or with that used by international prosecutors and judges for the purpose of confirming indictments (that there must be a prima facie case). It concluded that the most appropriate standard was that of requiring a reliable body of material consistent with other verified circumstances, which tends to show that a person may reasonably be suspected of being involved in the commission of a crime.[33]

Understood in these terms, the Goldstone Report's voice would square more easily with its disclaimers. Since the OCL mission did not assign personal responsibility, it is likely that the operative standard of the inquiry was to report where it found enough reliable evidence that tended to show that a party to the conflict would reasonably be suspected of commission of a crime.

Closely related to the question of evidentiary standards is that of sufficiency of investigation. What is the responsibility of the fact finder in locating evidence when one or more of the parties refuses to cooperate? A thorough and impartial fact finder should consider evidence favoring an uncooperative party that is in the public domain and inquire further, as time and resources allow. The OCL inquiry did consider such material, but often found it wanting in verifiability or weight.[34] Israel's continuing failure to put forth detailed evidence through an independent and transparent process tends to undercut its complaints that the mission's judgment on evidentiary sufficiency was wrong.

Contested Findings

The actual findings that have been most disputed are a mix. Some present difficult issues that are open to debate. Although the NGOs that tried to investigate the operation often avoided these, Goldstone took them on, and the report's conclusions, while not beyond debate, are at least reasonable in view of the law. One such issue is the status of the Gaza police who were targeted and killed at

the outset in great numbers in a premeditated strategy. Israel argues that, under Hamas, many members of the civilian police were drawn from military units and asserted, based on Hamas statements, that the civilian police would assume military functions in the course of the conflict.[35] The Palestinian narrative was quite different: while some of the police had been drawn from the ranks of resistance fighters and others had non-Hamas affiliations, their function was civilian law and order, even in the event of Israeli ground attack. Faced with this conflict, the report found Israel's evidence insufficient to conclude that the police generally were part of the armed forces or supporting combat, or that enough of them played a dual role to justify attacking the whole corps. This was a factual call, involving analysis of evidence and credibility. The thrust of the law, however, is to resolve doubts in favor of a presumption of civilian status for people and objects that normally would be so classified, and this appears to have guided the determination.[36]

Another such issue is the analysis of IDF "roof knocking," whereby light explosives are fired against the corners of buildings to persuade civilians on the roof to flee houses that will be destroyed. The IDF argued it is better to do this than kill recalcitrant civilians who have ignored prior warnings and may be acting as spotters or shields. The report notes the ambiguity of the situation and the lack of evidence (Did civilians receive other warnings? Were additional warnings not feasible?). What seems to decide the point in the report, however, is the damage to the law's interpretation and precedent were an attack, however limited, considered to be a valid "warning."[37]

Other issues, although disputed, are less gray. Many have praised the lengths to which Israel goes to give warnings to Palestinians of impending attacks, and the IDF routinely invokes this fact in defense of its observance of IHL. While it is true that the numbers of leaflets and telephone calls were massive, many of these were legally flawed in that they were ineffective, giving no indication of the place of impending attack, the time, or genuinely safe areas.[38] Enormous effort put into vague warnings can raise just the opposite inference: perhaps they were aimed at intensifying panic among civilians who faced closed borders all around Gaza, or delimiting areas where the IDF might take action freely on the presumption that only combatants remained. IDF cooperation with Goldstone might have shed light to dispel such conjectures. After the UN inquiry began, it was reported the IDF would improve warnings to Palestinians by giving timetables for attacks and escape routes.[39]

A red herring is the contention that the Goldstone Report failed to find Hamas using the civilian population to "shield" itself. The war crime of "shielding" is quite different from a vernacular understanding of shielding, the latter apparently the sense of most critics. Hamas fighters positioned themselves and their munitions in civilian areas, and this might be a violation of IHL if alternatives and precautions were feasible.[40] However, it is not enough to establish the war crime of shielding, which requires evidence of a deliberate intent to use the

presence of civilians to shield military objectives.[41] The mission noted Israel produced no concrete examples of this practice from OCL, and the Palestinians who were questioned did not give explanations of why they failed to evacuate that would corroborate such an intent on the part of nearby fighters.[42] Urban warfare is difficult to conduct lawfully if the state tolerates no risk to its soldiers. But that does not mean the law makes it impossible to attack guerrillas in urban settings, so long as feasible precautions to avoid civilian harm are taken and the harm posed to civilians is proportionate to the anticipated military advantage.

Then there are the many shocking cases that have not been seriously contested factually, other than by opaque assurances that the IDF is investigating, or has investigated and concluded that most are "baseless" and the rest are "mistakes."[43] These include allegations of extensive and intentional destruction of civilian infrastructure without a convincing military rationale, the use of Palestinian civilians to search houses and shield IDF forces from possible fire, deliberate firing on civilians carrying white flags in circumstances that did not present serious military risk, and the deployment of white phosphorous, an incendiary that burns to the bone, in densely populated areas when other obscurants could have been used. Some of these incidents were also extensively investigated by Human Rights Watch and other groups, with findings generally consistent with the Goldstone Report. The IDF appears to have repeatedly investigated and exonerated itself of at least some of these charges, without making the evidence public. As of this writing, one soldier has been found guilty of using a stolen credit card, and no other case of criminal wrongdoing was substantiated through military investigation.[44] Such a record is unlikely to deflect calls for international prosecution.

Needless to say, Israel's defenders have not taken issue with the findings on Hamas violations, other than to complain they are not set out at the same length and in the same tone as those on Israel. It is hardly surprising that discussion is fairly brief because there is little factual dispute about whether the Gaza authorities tolerated firing of rockets onto Israel's civilian areas, and no legal ambiguity to discuss. The report does spend considerable time discussing the impact of shelling on communities such as Sderot, and discusses the continuing captivity of Gilad Shalit, whose father testified at one of the mission's public hearings. The mission interpreted its scope expansively and dealt with a wide range of issues, from targeted killings of civilians, to the blockade of Gaza, to West Bank violations, to Israel's treatment of domestic protesters and human rights observers. Without criticizing the substance, it is reasonable to wonder if such a wide-angle lens was the most effective way to convey the most acute violations that demand accountability. At the same time, certain incidents of obvious importance to Israel, such as the allegations that the al-Shifa hospital was used as a military base, were not investigated.[45]

There are also striking instances where official statements relating to the intentions of Hamas seem to be evaluated more leniently in comparison to

statements reflecting Israel's intentions. For example, while the report notes the "morally repugnant" statement of legislator Fathi Hammad to the effect that Hamas "created a human shield of women, children, the elderly and the mujahideen," it did not consider it evidence of Hamas using human shields (or any other violation of IHL).[46] Not considered probative was the statement of police spokesperson Islam Shahwan to the effect that police had clear orders "to face the enemy" in case Gaza was invaded, with the mission accepting uncritically his clarification that this meant carrying on civilian policing duties.[47] In contrast, an entire section of the report is devoted to analyzing statements of a wide variety of Israeli military and civilian leaders that might lend some credence to the finding of a strategy of massive civilian destruction in response to Hamas attacks.[48]

The conclusion that Israel had a policy to deliberately inflict pain on the civilian population of Gaza is probably the most damning of the report, and supported by a great deal of other evidence such as the pattern of attacks, the surrounding circumstances, Israel's extensive intelligence and military dominance over the area, not to mention the policies of blockade. Had Israel engaged with the inquiry, it might have given input that would have mitigated or reversed such a conclusion. Yet while the report's evaluations of Israeli and Hamas statements may be defensible in their particular context, the way they are presented leave the impression that the Israeli speakers are more harshly judged, and that the worst statements of Israeli leaders and not the worst of Hamas were showcased. This is unfortunate because it alienates even Israelis who are willing to criticize their government and open to hearing accounts of abuses against Palestinians.

The Report's Impact

The report as a fact-finding exercise followed appropriate standards and produced a voluminous account of serious crimes, no small accomplishment given the six-month period from the inception of the mission to the publication of its report. As an account, it suffers from the lack of input from Israel, but it cannot be faulted for that, or for refusing to keep silent or omit issues because the alleged offender withheld cooperation. It is still within Israel's power to put forward to the public facts that would change the conclusions.

But does the report do what it is supposed to do—impel the parties to investigate violations and hold perpetrators responsible? Its immediate history is discouraging. The United States kept silent for a few days following the report's release, and then pronounced it "unfair" without contesting its findings, leaving the impression of a political decision, not a legal or intelligence assessment. The US House of Representatives passed a resolution condemning the report that was as one-sided in its own way as the original Human Rights Council mandate. The Human Rights Council endorsed the report on October 15, 2009,

and the final version of the resolution was revised to explicitly call on both sides to rectify violations, a small victory for Goldstone and his effort to make his mandate a fair one. The General Assembly overwhelmingly endorsed the report and called on both sides to mount credible investigations. The Security Council has discussed the report, but is not expected to make a resolution, given US determination to keep the issue confined to the Human Rights Council and the General Assembly.

While momentum seems to have fizzled at the UN, the issue of international prosecution is still alive, with Israel pressuring the UK to change its laws that allow private parties to initiate arrest warrants for foreign officials accused of war crimes. The Goldstone Report also recommends that the Security Council set a six-month deadline for referral to the International Criminal Court (ICC) should the parties not make good-faith efforts to investigate cases and hold individuals to account. There are reports that the IDF has completed its second tier of investigations into allegations of criminal conduct, this time interviewing Palestinian witnesses, and has concluded there is no basis to any of the incidents brought to its attention.[49]

The IDF investigations may be intended to avoid a domestic committee of investigation. If true, reports that the investigations found all criminal allegations without merit is cause for concern. One of the few encouraging signs is that the IDF has also required its officers to consult legal advisers during operations rather than only in preparation, and is enhancing officer training on the laws of war.[50]

The depressing assessment on impunity so far must be counterbalanced by the useful impact of the report in giving a standard against which both Israel and Hamas will be measured by the world in the years to come. The delegitimation campaign almost, but not quite, obscured the huge coverage and debate that the report caused globally. The report seems to have goaded further IDF efforts to investigate, as well as a pledge from Hamas that it too would examine the report's allegations. And it has given space for Palestinian human rights groups to urge Hamas to allow independent investigations into its own alleged war crimes, including deliberate attacks on Israeli civilians.[51]

There are no perfect fact-finding exercises, and this one operated under heavy constraints due to Israel's noncooperation. Many of the report's shortcomings derive from this, but the mission cannot be faulted for setting forth conclusions from an incomplete picture. To empower noncooperating parties would be to defeat international fact-finding entirely. Justice Goldstone created an alternate narrative to those of the governments of the region. His introduction of public sessions to showcase the impact of the conflict on victims on each side, a technique borrowed from South Africa's Truth and Reconciliation Commission, presented the rare opportunity for the opposing communities to hear each other, and may become a useful feature of future exercises. Some acknowledgment of crimes committed on each side will be needed if there is

ever to be a mutual reconciliation. The report may yet produce that acknowledgment and impel justice, the cornerstone of peace. ⊕

Notes

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1. Some have questioned whether the report furthered the cause of peace in the region. While this is an interesting question (particularly in view of the already stalled peace process), it is not the direct object of fact-finding in UN human rights processes, though it may be an indirect product. The effect of human rights accountability on fostering short- and long-term peace is a topic unto itself and will not be addressed in this essay.

2. B'Tselem, "B'Tselem's Investigation of Fatalities in Operation Cast Lead," available at www.btselem.org/Download/20090909_Cast_Lead_Fatalities_Eng.pdf. The Israel Defense Forces put the overall death toll somewhat lower, and counted more than 200 fewer casualties among women and children.

3. Internal Displacement Monitoring Centre and Norwegian Refugee Council, *Occupied Palestinian Territory: Gaza Offensive Adds to Scale of Displacement,* report of 30 December 2009, available at www.internal-displacement.org/8025708F004BE3B1/(httpInfoFiles)/D40639B05526A2D4C125769C00408166/$file/Occupied+Palestinian+Territory+-+December+2009.pdf.

4. Ilene R. Prusher, "In Israel, Embattled Sderot Comes Back to Life After Rocket Barrages of Gaza War," *Christian Science Monitor,* 31 December 2009, available at www.csmonitor.com/World/Middle-East/2009/1231/In-Israel-embattled-Sderot-comes-back-to-life-after-rocket-barrages-of-Gaza-war.

5. The death count includes three civilians, six members of security forces, and four soldiers killed by friendly fire. B'Tselem, "B'Tselem's Investigation."

6. For a comprehensive statement of the Israeli position, see Israel Ministry of Foreign Affairs, *Israel's Analysis and Comments on the Gaza Fact-finding Mission Report,* 15 September 2009 (under General category), available at www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Hamas+war+against+Israel/Israel_analysis_comments_Goldstone_Mission_15-Sep-2009.htm (accessed 10 December 2009).

7. israel.jpost.com Staff, "PM: Israel Faces the 'Goldstone Threat,'" 23 December 2009, available at www.jpost.com/servlet/Satellite?pagename=JPost%2FJPArticle%2FShowFull&cid=1261364484274.

8. See, for example, Irwin Cotler, "The Goldstone Mission—Tainted to the Core," *Jerusalem Post,* 17 and 19 August 2009, p. 15; compare Ken Roth, "Right of Reply—Don't Smear the Messenger," *Jerusalem Post,* 25 August 2009, p. 14.

9. Shlomo Shamir, "Israel's UN Ambassador: Goldstone Report Was Born of Hate, Executed in Sin," *Haaretz.com,* 4 November 2009.

10. Take, for example, Finance Minister Yuval Steinitz, "Just as a non-Jew can be anti-Semitic, a Jew can also be anti-Semitic and discriminate against our people and despise and hate our people," in Stewart Ain, "Breaking News: Israel Finance Minister: Goldstone Is 'Anti-Semite,'" *Jewish Week,* 15 September 2009, available at www.thejewishweek.com/viewArticle/c40_a16771/News/Israel.html. Israel's president told the president of Brazil, "Goldstone is a small man, devoid of any sense of justice . . . on a one-sided mission to hurt Israel. . . . If anyone should be investigated, it should be him," in Shuki Sadeh, "Peres: Goldstone Is a Small Man Out to Hurt Israel," *Haaretz,* 11 December 2009, available at www.haaretz.com/hasen/spages/1127695.html. Or consider Anne Bayefsky who declared to the Human Rights Council, "At its core, the Goldstone

Report repeats the ancient blood libel against the Jewish people the allegation of blood-thirsty Jews intent on butchering the innocent," in Tovah Lazaroff, "UN Report a 21st Century Blood Libel, Scholar Says in Geneva," *Jerusalem Post,* 30 September 2009, available at www.jpost.com/servlet/Satellite?cid=1254163545966&pagename=JPost%2FJPArticle%2FShowFull. -

11. Rabbi Brant Rosen, "The Goldstone Interview: Now Go and Study. . . ." 22 October 2009, available at http://rabbibrant.com/2009/10/22/the-goldstone-interview-now-go-and-study/.

12. *Bill Moyers Journal,* transcript of interview with Justice Richard Goldstone of 23 October 2009, available at www.pbs.org/moyers/journal/10232009/transcript1.html.

13. The International Court of Justice underscored the independence of these distinct bodies of law in its 1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons: "A use of force that is proportionate under the law of self-defence, must, in order to be lawful, also meet the requirements of the law applicable in armed conflict which comprise in particular the principles and rules of humanitarian law" (p. 3); Provisions of the Charter relating to the threat or use of force, pars. 37–50, available at www.un.org/law/icjsum/9623.htm.

14. H.C. 5100/94, Pub. Comm. Against Torture in *Isr. v. Gov't of Israel,* 53(4) P.D. 817, 845.

15. Government of Israel, "The Commission of Inquiry into the Events of Military Engagement in Lebanon" (the Winograd Commission), 2006.

16. This observation is not insensible to the conditions that formed the habit; Israel has been under political as well as physical attack from its neighbors since its creation. Nevertheless, at this point in history, the reflex is damaging.

17. The IDF, confronted with allegations as early as 5 January, denied that white phosphorous was used in Gaza up through 13 January, despite the visual identification of the weapon by observers. See Human Rights Watch, *Rain of Fire,* sec. V and notes 65–75 and accompanying text, 25 March 2009, available at www.hrw.org/en/node/81726/section/6. However, the IDF notes in its report on investigations of complaints related to OCL that, as of 7 January, Lt. Gen. Ashkenazi had ordered that no further exploding munitions containing white phosphorous be used. State of Israel, *The Operation in Gaza: Factual and Legal Aspects* (hereinafter *Operation in Gaza*), July 2009, par. 408, available at http://dover.idf.il/NR/rdonlyres/14998311-6477-422B-B5EE-50C2F1B31D03/0/FINALDRAFTwithclearance.pdf.

18. *Operation in Gaza,* par. 426 and footnote 281.

19. M. Cherif Bassiouni, "Appraising UN Justice-Related Fact-finding Missions," *Washington University Journal of Law and Policy* 35, no. 5 (2001): 35–49, conference version available at http://law.wustl.edu/HIGLS/Papers/Unconfpapers/p_35_Bassiouni.pdf.

20. Ibid.

21. "Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780" (1992), 2 May 1994, available at http://www.his.com/~twarrick/commxyu1.htm.

22. See Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992) (hereinafter Bassiouni Report), UN SCOR, Annex, UN Doc. S/1994/674 (1994).

23. International Inquiry on Darfur, *Report to the Secretary-General,* 25 January 2005 (hereinafter Cassesse Report), available at www.un.org/News/dh/sudan/com_inq_darfur.pdf.

24. "To investigate all violations of international human rights law and international humanitarian law that might have been committed at any time in the context of

the military operations that were conducted in Gaza during the period from 27 December 2008 and 18 January 2009, whether before, during or after." *Human Rights Council Press Release,* 3 April 2009, available at www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=8469&LangID=E.

25. UN General Assembly, "Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact-finding Mission on the Gaza Conflict," 2009 (Goldstone Report), pars. 18–23, available at http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/FactFindingMission.htm., pars. 18–23.

26. Rosen, "Goldstone Interview." The mission also provided occasions for public testimony, not primarily as a means of fact-finding, but to give opportunities for each side to hear firsthand accounts from those who suffered from violations, in the manner of South Africa's Truth and Reconciliation Commission.

27. Goldstone Report, par. 35.

28. Ibid., par. 25.

29. Gal Beckerman, "Goldstone: If This Was a Court of Law, There Would Have Been Nothing Proven," *The Forward,* 16 October 2009, available at www.forward.com/articles/116269/.

30. For example, compare Goldstone Report, paragraphs 452, 455 (fairly tentative conclusions that there are "indications" or in "some cases" that Palestinian armed groups operated from residential areas) with paragraph 1027 ("The facts ascertained by the Mission indicate that there was a deliberate and systematic policy on the part of the Israeli armed forces to target industrial sites and water installations.")

31. For example, although the Bassiouni interim report discusses modalities of interviewing, procedures for the commissioners arriving at views, and sources, it does not discuss evidentiary standards. See Interim Report for the Commission of Experts Established by Security Council Resolution 780 S/25274, 26 January 1993, Annex I on Rules of Procedure, available at http://digitalcase.case.edu:9000/fedora/get/ksl:mps17-interimreport000001/mps17-interimreport000001.pdf.

32. Rosen, "Goldstone Interview."

33. Cassesse Report, par. 15 (notes omitted).

34. See, for example, Goldstone Report, paragraph 702 (detailing reasons the mission viewed as unreliable and contradictory Israeli versions of the attacks on the al-Fakhura area of the Jabaliyah camp), paragraph 832 (Israeli denial of attack on the al-Maqadmah mosque contains apparent contradictions and does not in any way indicate the nature of the inquiry, sources, or reliability and credibility of sources), and paragraph 860 (Israeli explanation that the attack on the house was an "operational error" lacked explanatory detail and coherence).

35. State of Israel, *The Operation in Gaza: 27 December 2008–19 January 2009, Factual and Legal Aspects,* June 2009, pars. 242, 244, 245, available at www.mfa.gov.il/NR/rdonlyres/E89E699D-A435-491B-B2D0-017675DAFEF7/0/GazaOperation.pdf.

36. See Protocol I, Articles 50(1) and 52(3) as well as Article 50(3) (presence of individuals not of a civilian character in the population does not deprive the population of its civilian character).

37. Goldstone Report, pars. 530–533.

38. Ibid., pars. 498–503, 505–521.

39. Hanan Greenberg, "IDF to Give Better Warnings Before Attacks," Ynet, 29 July 2009, available at www.ynetnews.com/articles/0,7340,L-3753851,00.html.

40. Additional Protocol I, Article 58(b) and (c) articulate the norm generally accepted as a statement of customary international law.

41. Additional Protocol I, Article 51(7) is an articulation of the norm that is generally accepted as a statement of customary international law; see also Article 8(2)(b)(xxii)

of the Rome Statute of the International Criminal Court. Due to intent being a requisite element of the war crime of "shielding," most cases concerning this crime involve instances where the military has forced civilians to protect its personnel rather than the relatively rare and hard-to-prove circumstance of the military deliberately interposing willing civilians as a shield.

42. Goldstone Report, pars. 475–481. Compare pars. 1029–1102 on the Israeli use of Palestinian civilians as shields and Israeli military rules and law banning such practices.

43. Yaakov Katz, "IDF Nearly Done with Goldstone Counter-Report," *Jerusalem Post,* 11 January 2010, available at http://fr.jpost.com/servlet/Satellite?pagename=JPost/JPArticle/ShowFull&cid=1263147861491.

44. Amir Buhbot, "Israel Will Distribute an Investigation Report Into the Events of 'Cast Lead,'" *Maariv,* 12 January 2010, available at www.nrg.co.il/online/1/ART2/038/915.html.

45. Goldstone Report, par. 466. The evidence that Israel had put into the public domain—an interview with a Hamas source in Israeli custody and an Italian news article based on a single anonymous source—was thin.

46. Goldstone Report, par. 475.

47. Ibid., par. 414.

48. Ibid., pars. 1191–1195, 1200–1202, 1205, 1208.

49. Buhbot, "Israel Will Distribute an Investigation Report."

50. Anshei Pfeffer, "IDF to Seek Legal Advice During Future Conflicts," 6 January 2010, available at www.haaretz.com/hasen/spages/1140292.html.

51. Amira Hass and Tomer Zarchin, "Palestinian Activists Urge Hamas to Investigate Own War Crimes," *Haaretz,* 18 January 2010, available at www.haaretz.com/hasen/spages/1143330.html.

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The UN's Book of Judges

Ed Morgan

> And the borders of the Canaanites went . . . until Gaza.
>
> —Genesis 10:19

GAZA HAS historically been on the border of the Middle East conflict, a Palestinian hinterland and a footnote in the larger dispute between Israel and its neighbors. The publication in September 2009 of the report of Justice Richard Goldstone's fact-finding mission on the Gaza conflict changed all that for international lawyers. This essay examines the legal discourse about the armed confrontation between Israel and Hamas as it moved from the periphery to the core of debate in the United Nations, using the opportunity to theorize about the nature of international judging. It concludes that, although there are important legal issues raised by the Gaza conflict—including the status of the conflict as a domestic or international one, the legal assessment of Hamas's attacks on Israeli civilians, and the proportionality of Israel's military response—international law has gone beyond the point of usefulness. In a peculiar parallel to the ancient world, the law has matured to where it is the primary discipline for international governance, yet its content has decayed to where it provides few objective constraints on the self-serving positions taken by its judges.

A Time of Judging

In November 2009, Farukh Amil, the deputy permanent representative of Pakistan, speaking on behalf of the Organization of the Islamic Conference, introduced General Assembly Resolution 64/10 endorsing the Goldstone Report. In his speech, the Pakistani delegate condemned Israeli forces for war crimes and stressed "the urgent need to ensure accountability."[1] His colleague A. K. Abdul Momen, the representative of Bangladesh, concurred, pronouncing his country's verdict that Israel had "committed systematic violations against Palestinian people."[2] In the result, the General Assembly affirmed the conclusion reached the previous month by UN Human Rights Council (UNHRC) Resolution S-12/1, which the Kuwaiti representative to the council, Dharar Abdul-Razzak Razzooqi, summarized by declaring Israel guilty of being "an occupying power, which instead of defending civilians, is destroying the Geneva Convention."[3]

The Kuwaiti assessment reflects the premise of previous Human Rights Council missions that Gaza is still an occupied territory by virtue of Israel's control of all entry and exit points; overlooking, of course, the doorway from

Egypt through which Justice Goldstone himself entered and left at the beginning and end of his mission.[4] This premise is a crucial element in the Goldstone analysis and the judgments that flow from it because it forms the basis of the view that Israel owes a higher duty of care to its domestic Gaza population than it would to a foreign nation. On the other hand, it goes against Palestinian legal positioning, which has elsewhere claimed that the Palestinian Authority is in full control of its territory and should therefore enjoy the judicial immunities of an already established sovereign state.[5] Given Hamas's domestic governance of the Gaza Strip, the conclusion that Israel's belligerent occupation continues also seems at odds with the classical formulation of that status; that is, where the occupier "exercises governmental authority to the exclusion of the established government (of the occupied)."[6] Little wonder, then, that Secretary-General Ban Ki-moon demurred when asked for his institution's best judgment about whether Gaza is still under occupation, stating that he is "not in a position to say on these legal matters."[7]

The *sui generis* nature of Gaza's legal status found no place for discussion in the polarized UN considerations of the Goldstone Report. Israel rested its case on its own Supreme Court ruling that the Gaza conflict is a strictly international one,[8] arguing that the country's inherent right of self-defense includes dictating how the airspace, seacoast, and armed forces of its neighbor can be used. The Palestinians, on the other hand, echoed the rhetorical salvo issued by legislator Hanan Ashrawi that the Israelis were "re-invading occupied territory,"[9] as if there were nothing unusual about a military occupier that is so absent from the territory that it has to reenter to establish its presence. None of this, however, gave any pause to the Human Rights Council, which finished the Goldstone episode the same way that it started it: "strongly condemning the ongoing Israeli military operation carried out in the Occupied Palestinian Territory, particularly in the occupied Gaza Strip."[10]

On the other side of the coin, there were some dissenters from the pronouncement of Israel's guilt. Sweden's ambassador to the UN, Anders Lidén, speaking on behalf of the European Union, opined that Palestinians must cease and desist from rocket attacks and release captive Israeli soldier Gilad Shalit.[11] For her part Miranda Brown, Australia's deputy permanent representative to the UN Security Council, held that the situation was more complex, and less one-sided, than portrayed by the Arab League, which had originally sponsored the General Assembly resolution.[12] Canada's representative, Keith Morrill, reasoned that the General Assembly had erred in "assuming that Israel was wholly culpable" and in leaving out any mention of Hamas.[13] Playing the supposedly impartial role as mediator of the General Assembly session, Egyptian Ambassador Maged Abdelazziz retorted that Hamas is a cooperative and democratically elected government, and called for prosecution of "all those responsible for crimes against the civilian population of the Gaza Strip."[14] Given the centrality of international institutions in creating modern international law, there

is nothing like a UN transcript and its related legal opinions to make one crave the Deuteronomic injunction: "You shall not pervert justice. You shall not show partiality" (Deut. 16:19).

The Goldstone Report's final appeal lies at the Security Council on referral by the Secretary-General. Russia and China went on record in advance opposing consideration of the report altogether, while the Permanent Five, led by the United States, announced their position against the report before the hearing was even scheduled. On the other hand, the report was favorably introduced by rotating member Libya and prejudged as meritorious by the Security Council's then newest member, Turkey. It is trite to say that the United Nations, whose organs can turn soft norms into hard rules, provides the genesis for much contemporary international law; indeed, it is the sturdy roof under which international legal discourse is now housed. Nevertheless, there is something unseemly about the process of it all. UN instruments, of which the formal resolutions flowing from the Goldstone Report are but a prominent example, hardly seem to have been created "in the days when judges judged" (Ruth 1:1).

Or were they? It is commonplace to say that public international law is horizontal in structure. States enjoy ultimate legal authority by virtue of their sovereignty, and the international legal system is, as a consequence, based on consent. Whether those consensual actions are evidenced by treaty or by customary practice, the international system is grounded in the enlightened self-interest of states in forming and obeying its laws. Such a system by definition lacks hierarchical institutions and authority. As legal scholar Lassa Oppenheim said in his early twentieth-century treatise on international law, "for the existence of law neither a law-giving authority nor courts of justice are essential."[15] Nevertheless, the international system has, without giving up much of its nonhierarchical structure, moved from a paucity of institutions in Oppenheim's day to a wide variety of quasi-judicial, dispute resolution, reporting, committee review, and other institutional processes to which states now routinely answer.

The United Nations, whose Charter is a multilateral treaty, and the International Court of Justice (ICJ), whose statute and "compulsory jurisdiction" are entered on a voluntary opt-in basis by sovereign litigants only (Article 36), provide the contemporary system's best examples. The Security Council, with its Chapter VII mandate to implement binding rulings addressing international peace and security, and the General Assembly, Human Rights Council, and other UN bodies, with their mandates to enter formal resolutions reflecting the normative consensus or majority votes of their members, all play a similar role in the legal structure. States are not bound to obey a superior body of law in the way that citizens of a state are bound to obey the acts of a legislature or court; rather, states assess each other's conduct in a process of mutual self-judging where the players and the judges are one and the same. Every state might agree, for example, that proportionality is crucial to the use of armed force, but each

gets to judge its neighbor in accordance with its own perception of the battle. Are two Israeli missiles that hit their target proportionate to a thousand Hamas rockets where all but two miss their mark? If Israeli attacks result in many civilian deaths that are collateral to their objective, and Hamas attacks result in only a few civilian deaths but are themselves the intentional objective, which actions are the disproportionate ones? In a system where the judges are all participants, none reflects strictly nonpartisan authority.

While the system of participant-judges seems at odds with the modern judicial function, one finds a surprisingly similar process put forth in the ancient world. The Book of Judges itself unfolds not so much as a set of reasoned judgments but as a series of action tales. The Judges stories convey law neither in the direct, positive, and unqualified sense of the Ten Commandments, nor in the reasoned, qualified, and condition-specific interpretative sense of the covenant code (Exod. 21–23). Instead, these narratives are a series of tales about judicial heroes. They form a historical bridge between the death of Joshua without a successor just after the twelfth-century B.C.E entry of nomadic Israelite tribes into Canaan (Judg. 1:1), and the tenth-century BCE establishment of the unified monarchy under Saul—a development that only transpired following the tribal elders' beseeching of Samuel, last of the judges, to "make us a king to judge us like all the nations" (1 Sam. 8:5). The judges were battlefield commanders: from Othniel, a Judean leader who delivered the people from reconquest by an oppressive Mesopotamian ruler, through Deborah, the woman judge who liberated Israelites from their own apostasy and defeated a cruel general leading a well-equipped Canaanite army, through Samson of the tribe of Dan, who partially overcame the coastal Philistines with muscle-bound feats. They also include the leaders of intertribal conflict among the Israelite confederation culminating with the massacre of the tribe of Benjamin at the battle of Gibeah, putting an end to the judges' era.

The key to understanding the book of Judges is in the essential disunity of people existing under a single normative umbrella. The judges are a strikingly realistic combination of fearlessness, frailties, virtues, faults, cleverness, and faith,[16] whose character traits are less passive adjudicators than they are warrior leaders of a tribal society struggling to attain equilibrium among adversarial and violent partners. Despite the Sinai Covenant of a previous generation, the nation continuously turned away from its suzerain who, in turn, inflicted "thorns in the side" and foreign gods as "snares" for the increasingly fractious confederation (Judg. 2:3). While each of the judges is portrayed as answering the collective deity's calling, the societal dynamic is such that they engage in a process of reciprocal and horizontal self-assessment and confrontation. Their followers march into battle, or sue for peace, not so much under a single monotheistic sovereignty as they had done when they defeated the hosts of Egypt (Exod. 1–15), but rather in an attempt to vanquish their mutual moral and spiritual corruption and to thereby regain physical liberty.

In the ancient biblical and modern international order, judges serve what legal theorists have called a *dedoublement fonctionnel*[17] (i.e., they are statesmen making as many executive decisions as adjudicative ones). When times are good they have, in words coined by Chief Justice John Marshall in 1812 in *The Schooner Exchange*, a "common interest compelling them to mutual intercourse."[18] When times are bad they keep, as the International Court of Justice put it in the *Corfu Channel* case, "a jealous guard" on their territory and interests, with a legal vigilance "sometimes going so far as to involve the use of force."[19]

Accordingly, Justice Goldstone could observe in an interview after publication of his report that "if this had been a court of law, there would have been nothing proven."[20] At the same time, Libyan representative Ahmed H. M. Gebreel could with confidence opine to the sixty-fourth session of the General Assembly that Israel was guilty of "ongoing practices and violations [that] are inhumane and illegal."[21] Since evidence is assessed in the eye of the beholder, Gaza can be both abandoned and occupied by Israel, and Israeli force can be far less and far greater than the Hamas threat. Israel may look back to the legislated word at Sinai or the UN Charter, or look forward to a kingdom of reasoned law, but at the moment international society and its judges are little more than the sum of the world's tribal parts.

Ambiguities and Reversals

The lead-off biblical judge is also, on the surface at least, the most straightforward. Othniel, son of Kenaz, is connected to illustrious lineage through his uncle Caleb, one of the spies that Moses sent from the wilderness to inspect the promised land. Since the generation of people who knew Moses had all but died out by the time the Israelites entered Canaan, this personal link with the lawgiver is charged with significance for the first warrior judge. Othniel's battles reflect the politics of the moment, but at the same time they carry the covenant forward.

The first judge's story begins with a dark period. Roughly thirty years after the conquest of Jericho and the death of Joshua, the Israelites "forgot the Lord their God, and served the [pagan gods] Baals and the Asheroth" (Judg. 3:7). In anger, God allowed them to fall under the oppressive rule of a Mesopotamian king who reigned over them for eight years. Upon hearing the people cry out for salvation, God raised a leader in Othniel, who had already proven himself in local battle. Othniel conquered the foreign ruler's stronghold at Kiryat Sepher, driving the oppressors out and delivering the Israelite tribes into a period of forty peaceful years.

The State of Israel is also, of course, closely connected with its society's lawgiver, having been conceived with General Assembly Resolution 181 dividing the

British Mandate for Palestine into a Jewish and an Arab state. In addition, like Othniel, whose name alternatively means "strength of God" (Judg. 2:10) or, according to Talmudic interpretation, "word of God" (Terumah 15B–16A), Israel is a product of its own deeds as much as it is of legal words. When compared with its stillborn Palestinian twin, the fait accompli of the Jewish state's creation seems more important than the General Assembly's resolution. On the other hand, the new state's de facto existence was recognized as de jure by its admission to the UN by General Assembly Resolution 273 of 1949. That same year, in the ICJ's *Reparations* case, Israel was made to pay compensation for the death of a UN diplomat in West Jerusalem, effectively acknowledging Israeli sovereignty over all the territory it controlled, including that not ceded to the Jewish state in the General Assembly's partition resolution. The words of international governance and the deeds of the governed combine in the law to form an inseparable pair.

Othniel's nexus to the word of God and his executing of God's partisan battle together make for an equally ambiguous message about legal sources. In Judges, as in much of the Hebrew Bible, God plays two simultaneous roles. On one hand, the Israelite nation is unified under a theological covenant, whose breach is punished as in the beginning of the Othniel tale. On the other hand, divine intervention into politics is often done on a partisan basis—salvaging all Israel when it is convenient to do so, and preferring Judah above the other tribes by making Othniel, the one Judean judge, the first and most straightforwardly successful. It is as if God is at once the house and one of the competing residents.

An analogous role is played by the United Nations. The *Reparations* case, as indicated, validated Israeli sovereignty, but is best known for its statement of the UN's rights. The doctrinal issue that most occupied the court is whether the United Nations, which had lost one of its diplomats, had standing to bring an ICJ claim equivalent to that enjoyed by any sovereign state. In finding that the international community has "equipped that center with organs,"[22] the court effectively held that the state signatories to the UN Charter have created a state-like institution in their own image (Gen. 1:27). Since under the Statute of the ICJ only a state may commence a formal claim, authorizing the UN to bring an action makes the institution both the field of play and a player with interests of its own.

This ambiguity in the nature of God is replicated as an ambiguity in the nature of law. Othniel liberated Kiryat Sepher (literally, "town of the book"), which in turn was renamed Devir ("oracle") after the deliverance (Judg. 1:11). To put it another way, the book only became an oracle of the law once it was acted on by man; prior to that, even God's own book is just an abstraction. Likewise, the lofty ideals of the UN Charter—the prohibition on force (Article 2[4]) and the right of self-defense (Article 50)—are mere abstractions until given meaning and interpreted by self-interested state practice.

Even within the confines of the international judiciary, the partisanship is unremitting. Thus, Egyptian judge Nabil Elaraby could sit in judgment of Israel in the *Legal Consequences of the Construction of a Wall* case (hereinafter *Legal Consequences* case) shortly after having served as a diplomat in his government's Middle East confrontations. US judge Thomas Buergenthal could then call him out for having two months previously condemned Israel in the press for "the atrocities perpetrated on Palestinian civilian populations,"[23] all without upsetting the equilibrium of the international judicial institution or disqualifying the biased judge. Likewise, the Goldstone Mission could include Professor Christine Chinkin, who prior to her appointment had already passed judgment in the *Sunday Times* that "Israel's actions amount to aggression, not self-defence."[24] The judges on international panels, like the diplomats in the Security Council and General Assembly, the representatives at the Human Rights Council, and tribal leaders everywhere, are simultaneously judges and warriors, adjudicators and partisans, courts and litigants. They can reverse roles at the drop of a writ.

It requires no elaborate literary archeology to unearth in the book of Judges that the ambiguities of the law are also coupled with thematic, and dramatic, reversals. One of the central tales of liberation is the story of Deborah, "a prophetess" (Judg. 4:4) who ruled in an ancient society that valued militaristic, masculine character traits above all leadership criteria. To bring the gender reversals even closer to the surface, the story opens with Deborah's order to Barak, the commandant of her forces, to attack the enemy led by the notorious General Sisera and his 900 iron chariots. Barak's response is more like a child to his mother than a military man to the commander in chief: "If you go with me I will go, but if you will not I will not go" (Judg. 4:8). The reversals are immediately embraced by the highest authority as Deborah, whose name translates as "honey bee," issues a stinging, but accurate prediction: "The Lord will sell Sisera by the hand of a woman!" (Judg. 4:8).

Reversals are as dramatic, but often not as superficially apparent, in international legal forums. As an example, Resolution 2002/8 of the now defunct UN Commission on Human Rights (UNCHR), enacted on 15 April 2002, affirmed in the first paragraph of its final draft "the legitimate right of the Palestinian people to resist the Israeli occupation." The session leading to the resolution took place in the aftermath of the Israeli-Palestinian battle in the West Bank town of Jenin, which was itself an immediate response to the Passover 2002 bombing of the Park Hotel in Netanya at the height of the second *intifada*. The first draft of the commission's resolution supported Palestinian resistance "by all available means,"[25] which was taken to endorse violence against civilians as in the Park Hotel attack. The subsequent draft removed the four words that had been inserted by the resolution's sponsors (Syria, Saudi Arabia, and the Arab League) and which were protested by the resolution's opponents (Spain, Ireland, and the European Union). The final draft of the resolution found compromise wording

by affirming the Palestinian struggle without the four problematic words, and by recalling the obscure General Assembly Resolution 37/43 of 1982, which had itself authorized Palestinian resistance "by all available means, including armed struggle."

The UNCHR resolution did more, however, than to surreptitiously introduce a contentious phrase. It endorsed violence in a way that reversed the prohibition on the use of armed force except in self-defense that was previously thought to lie at the heart of the UN Charter. Indeed, in the *Legal Consequences* case, the ICJ deemed the ban on force so stringent that even the building of a stationary structure like a fence or wall could be deemed a form of prohibited military action rather than an act of self-defense. Accordingly, as between the Palestinians and the Israelis, it has become impossible to know what tactic is legitimate and what is legally taboo. If a security fence between combatants is for the ICJ an act of aggression, then an assault on Hamas rockets hidden in Gaza qualifies as a disproportionate military campaign. And if Palestinian armed incursions into downtown Netanya are for the UNCHR a permissible shield, then rocket attacks on the town of Sderot qualify as a proportionate defense. In a world where an unmovable wall becomes an unstoppable force and vice versa, little of meaning can be said about the proportionality of violence.

Moreover, as indicated at the outset of this essay, the question of proportionality in the use of force turns on whether the Israeli-Palestinian conflict is a domestic or international one, and the conclusions in this regard have been reversible at the whim of whoever happens to be pronouncing the law. The fact of occupation, for example, was deemed by the ICJ to bring the Palestinian territory within Israel to the extent that "the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory,"[26] leaving Israel with no international right of self-defense. At the same time the ICJ found that "the Fourth Geneva Convention is applicable in any occupied territory arising between two or more High Contracting Parties"[27] (for which Israel and Jordan qualify), thus making the West Bank an international rather than a domestic conflict. International judges may aspire, as Justice Roslyn Higgins said in her separate concurrence, to "provide a balanced opinion," but they seem structurally incapable of doing so.[28]

In a world of surprising reversals, Deborah's prescient statement that the enemy would be defeated by a woman did more than to turn the Bible's gender tides. It foreshadowed the fact that Sisera, the opposing general who served the Canaanite king Jabin, would meet his demise not only at the hands of a female adversary, but a non-Israelite one at that. In fleeing the losing battle, Sisera entered the tent of Heber the Kenite, a member of a local group with which Jabin had struck a peace treaty. Sisera then had Heber's wife, Yael, prepare him a drink, a bed, and, presumably, herself, for his pleasure. But when the malevolent general fell asleep, Yael took the peg of the tent in one hand and a mallet in the other and pounded the peg into his head until it sunk into the ground.

When Barak, the Israelite commander of Deborah's forces, arrived in pursuit of his nemesis, he found Sisera had already met his demise at the hands of the foreign woman.

In the final verse of the Deborah story, the narrator relates: "On that day God subdued Jabin, king of Canaan, before the Israelites" (Judg. 4:23). It was not the nation that defeated the national enemy because it was a non-national that struck the fatal blow. Putting the victory in God's hands, however, takes the ambiguities about the biblical deity—being both a universal force and a bearer of particular interests—and makes for a final reversal of the usual expectations. God's intervention this time has little to do with the politics of the battle, as Yael is not a partisan in the fight. Rather, the victory over the Canaanites and their charioteers transforms Deborah's conquest into a statement of morality for all to follow. The very army defeated by women had been portrayed all along as rapists and abusers. Even Sisera's mother, in pondering her son's late return from battle, assumes that the Canaanite boys will be boys: "Are they not looting/dividing the spoil? One or two girls/for each man" (Judg. 5:30). Deborah's victory is not so much for the nation she leads, but for the gender, and moral superiority, she represents.

Just as a set of ancient tales about warring nations can be transformed into a lesson in transnational norms, so a set of modern cases about principles of international justice can be transformed into a lesson in partisanship. Because it is ambiguous as to whether the UN and its judicial arm reflect the sovereignty of the law or the sovereignty of their members, the interests of each can be reversed to suit the moment's need. In the biblical world of warring nations and in the modern world of warring nations, judges can serve the law or the law can serve the judges; apparently, either way will do.

A Time of Decay

There is little doubt that the January 2009 conflict in Gaza was a show of immense Israeli power that followed a sequence of Hamas provocations. The Goldstone Mission took note of the long string of rocket attacks on the Israeli town of Sderot and surroundings, and then described how these mostly non-lethal, but illegal attacks, had tempted Israel into unleashing its military might. As it is written: "Samson went to Gaza, saw a prostitute there" (Judg. 16:1); seduced into battle, he eventually rained destruction down on Philistia: "Those whom he killed at his death were more than he had killed in his lifetime" (Judg. 16:29).

The fact-finding mission led by Justice Goldstone was not, of course, the first such UN initiative in Gaza. There have been numerous reports issued by the Human Rights Council's permanent office investigating the situation in the Palestinian Territories. The series of reports prior to the outbreak of fighting in January 2009 was authored by special rapporteur John Dugard, commencing

in 1993 and continuing through 2008. These documents for the most part focused on Israel's sealing of its border with Gaza, labeling this closure a form of "collective punishment." Among their other disquieting features, the Dugard Reports failed to explain how the sealing of a border—one of the badges of legal sovereignty—is a violation of international law. In fact, the special rapporteur did not condemn Egypt for the closure of its own border with Gaza, nor did any Human Rights Council report ever condemn Syria, Lebanon, or any other country for the closure of their borders with Israel since 1948. Justice Louise Arbour, as human rights commissioner, also entered the pre-Goldstone legal fray, extolling the right to food and medicine for the Gaza population and, by an extension previously unknown to humanitarian law, thereby condemning Israel's border closure for Gaza's shortage of electricity and gasoline.[29]

In addition, the Council's special rapporteur redefined terrorism for the Israeli-Palestinian conflict. Thus, the Dugard Report of January 2008 opined that a "distinction must be drawn between acts of mindless terror, such as acts committed by Al Qaeda, and acts committed in the course of a war of national liberation against colonialism, apartheid or military occupation."[30] The pronouncement was directly contrary to prior international law instruments, including Security Council Resolution 1566 of October 2004, which had declared that terrorist acts "are under no circumstances justifiable." Nevertheless, the Human Rights Council embraced the report and opened yet another special session on the situation in the occupied Palestinian Territories on 23 January 2008. It is against this background that one must assess Israel's decision not to cooperate with the UNHRC's Goldstone Mission. When Goldstone commenced his work in mid-2009, international law as pronounced by the council, its special rapporteur, and its predecessor commission, was well along in its race to the normative bottom.

By the time Samson's brothers brought his corpse from the ruined Philistine temple to the tomb of his father, "he had judged Israel twenty years" (Judg. 16:31). Despite this substantial reign, Samson was in many respects the most unusual of judges. He had been God's Nazirite—taking a vow not to cut his hair in return for great physical strength—but he lacked strength of character. He fell for the Philistines' Delilah whose very name means temptress, or the one who makes you weak after having spent an entire career lusting after women of all varieties. He was a lone figure, performing heroics without ever leading a tribe or uniting the nation, and eventually committed treason against his vow to God in giving away his secret and allowing his hair to be cut. His victory in demolishing the crowded Philistine temple was both a heroic feat of strength and a taboo suicide bombing: "Then said Samson, 'Let me die with the Philistines!' and pushed with all his might" (Judg. 16:29).

Ultimately, Samson's victory was only a partial one. It was not until the reign of David, hundreds of years after Samson's death, that the Philistines, who had invaded Canaan by sea several decades after the Israelite arrival,

were finally cleared from the land leaving only their name for posterity. Not only that, but Samson's moral legacy is mixed at best. Despite his great strength and achievements in battle, his overriding characteristics are lust, treason against his sworn principles, failure to lead, and success only in inflicting numerous deaths without achieving national salvation. Although later lessons have attempted to place Samson in a line of leaders who "through faith conquered kingdoms, administered justice" (Heb. 11:33), the text of Judges presents the Israelite nation during Samson's time as being in a process of political and spiritual decay. From Othniel's simple victory over darkness, to Deborah's complex turning of both military and thematic tides, to Samson's corrupt and partial victory, things had gone from bad to worse. After Samson, it will take no time at all for civil war to break out among the tribes, for one of them to be all but annihilated, and for a cry for a unifying monarchy to arise. There is still a monotheistic covenant league when Samson's demise leads to the final Judges stories, but it has badly deteriorated.

The same can be said of the United Nations in the twenty-first century. Israel's noncooperation with a legal investigation appointed by the UNHRC cannot be read adversely; rather, it represented an attempt to ignore a spent force. The Goldstone Report ends with a call to "involve Israeli and Palestinian civil society in devising sustainable peace agreements based on respect for international law."[31] However, it is clear from the drafting of the report, the special rapporteurs and resolutions that came before it, and the alternate viewpoints, judgments, and resolutions that follow on its heels that the law of nations itself has badly decayed.

From an institutional setting that once could take charge of repromising the land when the British Mandate for it ended, UN resolutions and reports have been rent with divisive contradiction. The legal discourse has seen a parallel shift from the original concoction of objective norms from subjective action to an entirely self-serving process of rule creation. Thus, Israel's troop and settler withdrawal from Gaza was commended as compliance with the law by Secretary-General Kofi Anan in September 2005,[32] and condemned in 2009 by the Goldstone Report as an inconsequential "so-called disengagement."[33]

UN instruments, it turns out, are now composed of the very raw politics that law is supposed to rise above. Justice Goldstone and his colleagues may not have intended to have done "evil in the eyes of God and served Baal" (Judg. 2:11), but they certainly fell short of their articulated desire for "an independent and impartial analysis of . . . international human rights and humanitarian law."[34] As the dust settles on the multiple resolutions issuing out of the Goldstone Report, there is still a United Nations, but it is in a state of deterioration. One day it will be written that the world body, as a society of judges, entered a time of decay some six and a half decades after its institutional birth. In those days, as the book of Judges relates, there was no sovereign principle, and "everyone did what was right in his own eyes" (Judg. 21:25).

Notes

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The Goldstone Report: Ordinary Text, Extraordinary Event

Richard Falk

I WISH to draw a fundamental distinction between (1) the Goldstone Report as *a text* to be considered from the perspective of international law and world politics; and (2) the Goldstone Report as *an event* that has achieved remarkable salience given its nature as a rather tediously detailed account, covering 575 pages, of the investigation of the four-person fact-finding mission. This mission was established by the Human Rights Council of the United Nations on 12 January 2009.[1] On the one side, the text of the report has the quality of ordinariness that makes it somewhat reminiscent of Hannah Arendt's famous characterization of Adolph Eichmann's criminality as "the banality of evil."[2] Such banality if attributed to a UN report usually means its total neglect, which makes it particularly intriguing that on this occasion the Goldstone Report attracted worldwide attention and scrutiny, generated controversy, and made the distinguished international jurist, Richard Goldstone, a lightning rod for praise and calumny. Despite this prominence, I suspect that there have been few close readers of the report, with most commentary deriving from casual perusals of the rather lengthy Executive Summary and Recommendations section of the report.

A first challenge, then, for any interpretation of the Goldstone Report is to make sense of why this particular report touched the raw nerve of global moral and political consciousness. On this basis, some attempt will be made to evaluate substantively the harshly critical responses of Israel and the United States, followed by a more detached assessment as to whether the recommendations of the Goldstone Report that seem entirely reasonable from *liberal legalist perspectives* are practical given the *geopolitical realities* of the situation. In light of this posited tension between the imperatives of international criminal law and the constraints of geopolitics, it seems unlikely that the sound and fury generated by the release of the Goldstone Report will lead to the implementation of its principal recommendations on an intergovernmental level or in the form of enforcement initiatives on the part of the United Nations, much less the International Criminal Court. Such an outcome does raise questions as to whether international law and the UN system are capable of upholding the rights of the weak under circumstances where an offending state enjoys the protection of the strong. In line with this view, the burden of implementation shifts our focus to the potentialities of global civil society as an arena of implementation for the Goldstone recommendations, and reminds us of the relevance of "legitimacy wars" of the sort waged by the antiapartheid campaign during the

1980s that so significantly and, at the time unexpectedly, contributed to the transformation of the racist regime in South Africa.

Why the Goldstone Report Broke the Sound Barrier

Strong global expectations. The Goldstone Report was commissioned in the aftermath of the major attacks launched by Israel on 27 December 2008, and continued until 18 January 2009. These attacks by an advanced military power on an adversary with no relevant means of self-defense or meaningful retaliatory capability were a shocking instance of one-sided warfare. This impression was accentuated by widespread media coverage of the events, by eyewitness accounts of the deliberate targeting of civilians and the destruction of targets protected by international humanitarian law (including medical facilities, educational institutions, UN buildings, and civilian infrastructure), and, perhaps most of all, by the ratio of casualties (more than 1,400 Palestinians killed compared to 13 Israelis of whom only 3 were civilians). This one-sidedness made most commentators reluctant to call the attacks an example of "war." Critics tended to call it a "massacre" while supporters relied on the anodyne language of "military operation," or avoided the problem of naming it by using the Israeli official designation, Operation Cast Lead.

Indicative of this perception of the Gaza attacks were the urgent calls for some kind of response by the United Nations. High UN officials, including the Secretary-General and the high commissioner for human rights, both expressed concern about the military action involving the commission of war crimes, and called for some kind of investigation. Such calls, although without much political prospect of implementation, did give rise to special sessions of both the General Assembly and the Human Rights Council, the latter producing the resolution establishing the Goldstone Commission. This kind of initiative, normally a low-profile kind of initiative unnoticed by the media, here seemed responsive to the acute sense of frustration and outrage about the Israeli attacks that was prevalent around the world and at the United Nations, although much less so in the United States. Given this mood, there existed in the weeks following the attacks on Gaza a rather unrealistic expectation on the part of those who supported the Palestinian struggle that this effort would finally exert serious external pressure on Israel after years of frustration. At the very least, it was believed that the continuing daily ordeal of the Gazan population associated with the blockade could be brought to an end. It was deeply troubling that Israel had not ended the blockade of Gaza at the same time as the 18 January 2009 cease-fire took effect. In fact, Israel has continued the blockade, with significant Egyptian cooperation, a policy in flagrant, ongoing, and massive violation of Article 33 of the fourth Geneva Convention that prohibits collective punishment.[3] The cumulative impact of the blockade has been described as a form of "slow genocide," and would certainly seem to qualify as a crime against humanity.[4]

It was also believed that a report identified with such a distinguished and impeccably qualified chair of the mission would be both authoritative and difficult to discredit or ignore. After all, Richard Goldstone was not only widely known and respected in international circles, but was also a prominent Zionist with continuing personal and professional ties to Israel. In this respect, those who were critical of Israel's occupation policies believed that it might be possible to bring meaningful international pressure to bear by way of the UN system, especially because Israel seemed intentionally to attack UN facilities during the Gaza attacks.[5] Due to Justice Goldstone's experience in relation to international criminal law and reputation for integrity as well as the prior consensus as to the criminality of the Israeli tactics in carrying out the attacks, it was generally assumed that the report would find Israel guilty of war crimes.[6] In this sense, the findings of the Goldstone Report did live up to the strong expectations that it would confirm prior allegations of criminality, and it even went beyond these expectations by setting forth a series of recommendations that presupposed that the United Nations could and should implement the international rule of law even in the face of anticipated well-organized geopolitical opposition. The fact that Hamas was also found to have pursued tactics that violated international humanitarian law gave an appropriate balance to the report, but did not seem to avoid the assessment that the importance of the report resulted from its conclusions critical of Israel. An added weight of these conclusions arose from the seeming caution of the mission expressed by its careful investigatory methodology, its reluctance to rely on speculation, and its insistence on providing detailed explanations for any allegation of criminality.

Touching an Israeli raw nerve. Interest in the Goldstone Report was undoubtedly enhanced by the high-profile angry responses by Israeli political leaders, and the outraged tone struck in the Israeli media. The supposedly more peace-minded Shimon Peres, president of Israel and Labor Party leader, called the report "a mockery of history" that somehow lent legitimacy to terrorism.[7] Prime Minister Benjamin Netanyahu devoted a portion of his 2009 speech in the General Assembly to a denunciation of the report that adopted the sort of inflammatory rhetoric that President George W. Bush deployed after the September 11 attacks. Netanyahu declared that "Israel justly defended itself against terror. This biased and unjust report is a clear-cut test for all governments. Will you stand with Israel or will you stand with the terrorists?" He went on, "We must know the answer to that question now. Now and not later. Because if Israel is again asked to take more risks for peace, we must know today that you will stand with us tomorrow."[8] The contrary logic of the Goldstone Report can also be formulated as a question to the United Nations: Will you confer impunity upon Israel and its leaders or will you stand behind this call for the implementation of international humanitarian and criminal law?

The Israeli defense minister, Ehud Barak, echoed the sentiments of Netanyahu, calling the report "false, distorted and promotes terror." He added that

"adopting the report will cripple" the capacity of governments in democratic countries "to deal with terror organizations, and terror in general."[9] Even putting aside the rest of the problematic character of such statements, they seem to suggest that, if the adversary can be characterized as terrorist, then there should be no operative legal limitations on the use of force. Here, it also seems diversionary to attach the label of "terrorist" to a democratically elected political grouping that has repeatedly called for a long-term cease-fire and diplomatic solution to the underlying conflict, and was a de facto governmental actor representing the people of the Gaza Strip. In addition, Hamas had repeatedly proposed a cease-fire of long-term duration provided that Israel lift the blockade and open the crossings, and peaceful coexistence up to fifty years if Israel were to implement Security Council Resolution 242 and withdraw to 1967 borders. Note that the condition of the cease-fire was limited to the demand that Israel terminate its unlawful blockade, what was legally and morally required in any event. Of course, Hamas was in effect proposing to stop firing rockets into Israel, which was an unlawful form of resistance regardless of Israel's provocation. In effect, the cease-fire would have restored a semblance of legality to the regime of occupation.

The main point here is not so much a substantive rebuttal of the Israeli response, but a need to interpret this unprecedented intensity of response at leadership levels in Tel Aviv. It is necessary to base our understanding on circumstantial considerations because the actual reasons for such a posture of defiance is unlikely to be ever honestly disclosed by any government? What, then, is the most plausible explanation of why Israel reacted with such hostile intensity to the Goldstone Report? One plausible reason was to counteract the high expectations of those who had applauded the outcome of the Goldstone Mission, compounded by the difficulty of discrediting someone of Goldstone's stature and known Israeli sympathies. Furthermore, the implications of repudiating Israel's claim that its antiterrorist Gaza operation was legitimate struck directly at the main rationale for the extent and severity of Israeli violence throughout the occupied Palestinian Territories, and not just in the Gaza Strip. The Goldstone Report also directly rejected the Israeli claim that international humanitarian law must be adjusted to accommodate counterterrorist tactics even if directed at targets with heavy civilian components and, as the reactions of Israeli leaders made clear, this obviously agitated Israeli sensitivities. Finally, the conclusion that Israeli leaders and military personnel were potentially guilty of war crimes, possibly even crimes against humanity, seemed to disturb the government in Tel Aviv for a combination of symbolic, substantive, and practical reasons. Symbolically, there was a subtle resonance with the Nazi past where Jews were massively victimized. Substantively, there was the sense that the failure of Israel to act in accordance with the Geneva Conventions was not just wrongful, but criminal. And practically, there was anxiety that Israeli political and military leaders could be detained and charged with international crimes either by

recourse to some international mechanism or through a national procedure relying on the authority of "universal jurisdiction."[10]

Undoubtedly, the great interest in the Goldstone Report was increased as a result of this furious response by the highest levels of Israeli officialdom. This response departed dramatically from the past Israeli treatment of external criticism, especially emanating from the United Nations, and particularly from the Human Rights Council, which had long been demonized by Israel and the United States as being obsessively anti-Israeli. Habitually, Israel would simply blow off such criticism and adverse policy directives with a curt government statement of dismissal. It did this routinely and effortlessly, almost always with the backing of the United States. A clear instance of this pattern is illustrated by Israel's rejection without making any special effort to provide a legal rationale of the near unanimous conclusions of the International Court of Justice that the construction of a separation wall on occupied Palestinian territory was unlawful, that the wall should be dismantled, and Palestinians who had been harmed should be compensated.[11] What is surprising with respect to the Goldstone Report is that Israel greeted the release of the report as if shocked and taken by surprise whereas the general contours of the outcome should have been anticipated, given the similarity of conclusions reached by other prior respected inquiries under liberal auspices and even by a group of testimonies of participating soldiers from the Israel Defense Forces (IDF).[12] In fact, Israel's refusal to cooperate with the Goldstone Mission, even to the extent of denying entry to Gaza by way of Israel, was widely interpreted as a kind of preemptive repudiation of the report, fully expecting that the allegations of war crimes would be confirmed.[13] That the Goldstone Report so ruffled Israeli feathers was itself a surprising public relations success for the UN initiative, although this publicity victory could easily morph into disillusionment in the event that Israel succeeds in discouraging implementing moves at the UN.

Conclusions and recommendations of the Goldstone Report. As indicated above, the conclusions of the Goldstone Report were mainly confirmatory of prior reports that were already sufficiently authoritative to convey an impression to worldwide public opinion that Israel's attacks at the end of 2008 on Gaza involved the widespread commission of war crimes, if not crimes against humanity. I consider only three aspects of the conclusions in the report to be of sufficient note to warrant mention. The first involves the degree to which the attacks were declared to be applications of the so-called Dahiya doctrine that had explicitly endorsed the use of "disproportionate force and the causing of great damage and destruction to civilian property and infrastructure, and suffering to the civilian population." In damning language, the Goldstone Report says that the Dahiya doctrine "appears to have been precisely what was put into practice" in Operation Cast Lead.[14] Such a conclusion comes close to raising the issue as to whether waging a one-sided war against an essentially defenseless civilian population can ever be reconciled with international humanitarian

law or the customary international law of war.[15] I believe this issue needs to be addressed more comprehensively by the International Committee of the Red Cross in hosting an international negotiating conference tasked with the job of producing a protocol criminalizing such one-sided warfare, the Dahiya doctrine, with possible allowance of limited force applied to strictly military targets. There admittedly are complexities because alleged adversary forces using violence could hide weapons and personnel in protected civilian structures. Again allowances could be made, but what would be prohibited unconditionally are attacks that are deliberately disproportionate and designed to inflict punitive damage on the civilian infrastructure as an avowed objective.[16]

Second, "in the context of increasing unwillingness of Israel to open criminal investigations that comply with international standards," the report explicitly encourages reliance on universal jurisdiction "as an avenue for States to investigate violations of the provisions of the Geneva Conventions of 1949, prevent impunity and promote international accountability."[17] A recommendation at the end of the Goldstone Report is more directive as it

> recommends that States Parties to the Geneva Conventions of 1949 start criminal investigations in national courts, using universal jurisdiction, where there is sufficient evidence of the commission of grave breaches. Where so warranted following investigation, alleged perpetrators should be arrested and prosecuted in accordance with internationally recognized standards of justice.[18]

This is an important reminder that states can use their national criminal law systems to reinforce claims of international criminal law in the event that the state fails to act responsibly in relation to its own accused nationals. At present, universal jurisdiction for serious crimes of states exists mainly in several Western European countries, and is under great pressure from Israel and the United States to renounce such legal authority. It was reported recently that Tzipi Livni, head of the Israeli opposition and foreign minister during the Gaza attacks, cancelled a speaking engagement in London after being informed that an arrest warrant had been issued by a British magistrate. The warrant was withdrawn after it was known that she had cancelled her plans for the visit.[19] What seems evident is that the threat of detention on the basis of universal jurisdiction is likely to inhibit travel of high Israeli political and military officials prominently associated with Operation Cast Lead. It is also quite possible that legislation empowering national courts to exert universal jurisdiction may spread to other countries, especially if such a result becomes one tactic of the Palestinian solidarity movement.

And finally, the recommendations of the Goldstone Report break some new ground by suggesting that their findings as to war crimes allegations require the establishment of an accountability mechanism. Their principal call is for the UN Security Council to insist that Israel conduct its own investigation

of allegations in a manner that is "independent and meet international standards," with the process to be completed within six months. The Executive Summary "concludes that there are serious doubts about the willingness of Israel to carry out genuine investigations . . . as required by international law."[20] More significant than the call for investigation is the report's recommendation that, if such an investigation and implementation of accountability are not carried out in a satisfactory fashion after six months, the Security Council should "refer the situation in Gaza to the Prosecutor of the International Criminal Court pursuant to Article 13(b) of the Statute."[21] It seems unlikely that Israel will mount a sufficiently credible investigation to satisfy the United Nations because it seems so far to be relying on self-investigations by the IDF and has not made any moves to undertake a process of assessment independent of the government. The Secretary-General of the UN was supposed to report to the General Assembly on 5 February 2010 about Israeli and Hamas developments in response to the recommended investigative procedures proposed by the Goldstone Report.[22] Nevertheless, the Israeli military advocate-general seems to believe that, as soon as the IDF published its findings showing nominal responsiveness to the call for an investigation, pressure from the UN would decline.[23] His assessment may have assumed quite realistically that an ebbing of international concern after some nominal Israeli effort at investigation, reinforced by the assured diplomatic support of the United States and some European governments, would effectively discourage any additional UN efforts to implement the accountability recommendations in the Goldstone Report.

There are a number of other recommendations, the acceptance of which would substantially close part of the gap between the legal obligations of Israel as the occupying power and the present occupation policies being pursued. Of particular importance is the recommendation that Israel review its rules of engagement and operating practices to ensure conformity in the future with "the principles of proportionality, distinction, precaution and non-discrimination" in a manner that protects Palestinian rights and avoids "affronts to human dignity."[24] There has been a rather elaborate debate about whether Israel is acting properly when it shifts risks of harm to enemy civilians that might be normally unacceptable in order to uphold the security of its conscripted citizen soldiers. This debate is mainly conducted by supporters of Israel, and in terms of the ethics of violence in the context of Israeli security and combat engagement rather than adherence to the requirements of international humanitarian law.[25] There are a series of other important recommendations, including upholding "the inviolability of UN premises and personnel," release of Palestinians being held in detention by Israel, and establishment of freedom of movement for Palestinians throughout occupied Palestinian Territories. And perhaps most significant of all is a recommendation "that Israel immediately cease the border closures" to the Gaza Strip and "allow passage of goods necessary and sufficient to meet the needs of the population," including what is required in Gaza

to repair the extensive damage done by Operation Cast Lead and to enable the resumption of "meaningful economic activity" in Gaza.[26]

A Polarized Debate: Liberal Legality and Geopolitical Reality

On one level, the inflamed debate engendered by the release of the Goldstone Report was mindlessly driven by excessive defensiveness on the part of Israel, which was seconded by the United States. The attack on the report as biased and distorted as well as obsessively critical of Israel carried to an extreme "the politics of deflection" consistently practiced by Israel in response to external criticism.[27] Instead of focusing on refuting the substance of any charges by contesting the persuasiveness of the evidence or on the practicality and reasonableness of the conclusions and recommendations, Israeli officials typically do their best to shift international attention to the alleged bias of the auspices or the critics. As argued earlier, here such efforts at deflection, often successful in the past, faced higher hurdles than usual due to the impressive credentials and exceptional credibility of Goldstone as the chair and voice of the mission. As would have been expected, given the composition of the mission and the expectation that any conclusions critical of Israel would be bitterly contested, the report was prepared with scrupulous care, seeking out all available evidence from all viewpoints and giving every benefit of the doubt to Israeli concerns despite their refusal to cooperate with the investigation. Without the slightest pretense of evidence, the harshest critics of the report even alleged anti-Semitic motivations, insisting that the Human Rights Council was a contaminated sponsoring agency and Goldstone was at best serving its ends by playing the role of useful idiot.[28] Embarrassingly, the US House of Representatives by a vote of 344–336 condemned the report on 3 November 2009, along the same lines as biased and one-sided, and instructed President Barack Obama and Secretary of State Hillary Rodham Clinton to use the authority of the US government to "oppose unequivocally any endorsement," or even "the further consideration" of the report at the United Nations, and to exert all possible diplomatic influence to block its implementation.[29] Such vitriolic attacks on the Goldstone Report seem completely without merit. Contrary to the criticism, the report is an excellent example of an international inquiry mandated by the UN in adhering to the highest standards of liberal legality given the circumstances of Israeli noncooperation and the overall problems associated with "the fog of war."[30] The report applies the positive law associated with the Geneva Conventions and international customary law of war with due caution in an exemplary manner.

Indeed, it is the Palestinians who have the stronger case that the report is deficient in failing to take greater account of their legal concerns in the following respects: the report accepts without analysis the Israeli claim that given

the relevant circumstances it was fully entitled to use force defensively, thus failing to take any account of the success of the cease-fire that has been in effect and was working well since mid-1980 until disrupted by an Israeli incursion on 4 November 2009. This favorable experience with the cease-fire was further reinforced by a Hamas offer repeated several times prior to the Gaza attacks of an indefinite extension of the cease-fire provided that Israel lift its unlawful blockade. The report also fails to condemn, or even mention, the Israeli refusal to allow Palestinian civilians to leave the Gaza Strip during the attacks, thus depriving all Gazans of a refugee option, which seems to fall afoul of the international customary law prohibition on cruel and inhumane tactics or conduct during wartime, a duty that should be interpreted even more stringently in this case where Israel is an occupying power with obligations to protect the civilian population. The report also neglects to examine whether there was any sufficient connection between the stated belligerent objective of terminating the rocket attacks and the reliance on a generalized onslaught directed at Gaza in the spirit of the Dahiya doctrine; neither does it consider whether Israel as the occupying power is legally entitled to claim a right of self-defense. There are some grounds for claiming an anti-Palestinian bias because the report appropriately expresses its concern about the psychological trauma caused inside Israel by the Hamas rocket attacks, but completely ignores the far more intense and pervasive trauma caused to the whole population of Gaza by the rigors of a coercive occupation that has lasted since 1967 as well as by the blockade, frequent military incursions, nightly sonic booms, and, most dramatically, by Operation Cast Lead.[31] It is a sign of the extent of Israeli and US media dominance that the totality of attention given to criticisms of the report has been discussed exclusively from an Israeli outlook. It is also an indicator of the weakness and co-opted nature of the Palestinian Authority that its officials have limited their responses to an endorsement of the report and, only when pushed from below and without, a call for the immediate implementation of its recommendations.[32]

The more substantive criticisms of the debate by Israeli leaders concerned the argument that its tactics were reasonable and responsible in view of the nature of the security threat posed by Hamas. Here, the argument rests on the double validity of (1) treating Hamas as an illegitimate political actor (a terrorist organization); and (2) regarding the Israeli tactics and rules of engagement as responsive to terror, even if not strictly within the four corners of the international law of war. Such a rationale for Operation Cast Lead resembles the manner in which the Bush administration attempted to justify its approach to detention and interrogation after September 11.[33] The abstractions associated with the supposed need to suspend adherence to the international law of war to be effective in counterterrorist security are suspect when not connected with the specifics of the situation. In this instance, unless state terrorism is endorsed (i.e., war waged against the civilian population as a means of inhibiting

violent resistance to occupation), the case for laxity in interpreting and applying the law is not persuasive. The Goldstone Report characterizes Operation Cast Lead as directed at the population as such and thus does not suspend or qualify the operation of the law of war with respect to the sanctity of civilians and the duty to avoid deliberate attacks on protected targets, although it does give credence to factual conditions in which Israel had some reason to believe that protected targets were harboring Hamas militants or weaponry and ammunition. If such a legal assessment were not made, and certain operational practices not condemned, it would enable a government to claim a counterterrorist freedom of action that would be tantamount to the validation of genocidal warfare, even if such counterterrorist tactics lacked the proof of specific criminal intent needed to establish the crime of genocide in a court of law.[34] In my view, the Goldstone Report is a model of appropriate assessment of contested military operations from the perspective of liberal legality, or what jurists tend to call "legal positivism." It is also fully compatible with the continued validity of legal restrictions on the use force that were reaffirmed by President Obama in his Nobel acceptance speech, seemingly intended in part to legitimize the US-led NATO war in Afghanistan.[35] The Goldstone Report is also consistent with *jus in bello* dimensions of the just war doctrine, although less so with jus ad bello due to its failure to assess whether Israel had a valid underlying claim of "self-defense."[36]

At issue is whether normal notions of self-defense apply to the circumstances of the Gaza Strip. Israel contends that it has not occupied Gaza since its "disengagement" in 2005, which involved withdrawing IDF forces and dismantling the Israeli settlements. This claim has been widely rejected due to the persistence of Israeli effective control in Gaza, including total control of entry and exit. Under these circumstances of persisting occupation, Israel has a fiduciary relationship to the Gazan civilian population that it imposes more restrictions than if it could be viewed as a foreign political entity. Dean Tom Farer has instructively argued that, at the very least, Israel cannot legally claim defensive force until it tests whether Hamas would cease its violence if Israel ended its unlawful blockade.[37]

What is less clear is whether the accountability recommendations of the Goldstone Report can be reconciled with the geopolitical realities of world politics and, if not, should these recommendations have been made.[38] I am assuming that these geopolitical realities will short-circuit efforts at implementation by either the UN or intergovernmental action. At the same time, these accountability recommendations of the Goldstone Report are of great importance for carrying on the legitimacy of war, giving a foundation of legality to the call for boycott, divestment, and sanctions (the so-called BDS campaign) that has been gathering momentum since Operation Cast Lead was launched. As such, there is a normative dilemma posed: if the UN system is likely to be further discredited in the eyes of many governments by its likely unwillingness

to implement the accountability recommendations, should it have been more circumspect at the outset and never have authorized the Goldstone fact-finding mission? Or, alternatively, should the Goldstone Report, despite being established by intergovernmental consensus at the Human Rights Council, have regarded its most significant audience to be activist elements in global civil society and, hence, appropriately formulated recommendations that take account of the political limits that exist within the UN system, and called for civil society implementing initiatives? Put differently, is the cost of nonimplementation by the UN, as reinforced by the indifference or worse at the governmental level, greater than the gain achieved by giving added strength to the nonviolent, yet coercive, legitimacy struggle on behalf of Palestinian rights? There is no evidence that the authors of the Goldstone Report wrestled with or were even conscious of this dilemma or, if they had been, whether it would have been practicable or advisable to have articulated the difficulties of following the logic of liberal legality all the way to its end point through recommending investigations of allegations followed, as appropriate, by prosecution and possible conviction and punishment. On balance, I am glad that this dilemma was not resolved in favor of deference to geopolitical realities, and that the cause of global justice was promoted by a set of recommendations that stimulate civil society actors to carry on the fight that governments in this sort of political setting cannot do.[39] It was undoubtedly too much to expect that the Goldstone Report would lend support to nonviolent resistance by Palestinians subject to an unlawful and oppressive occupation or encourage civil society actors to mount a legitimacy war seeking justice for the Palestinians.

International Law and the Peace Process

One of the most significant recommendations of the Goldstone Report that has received virtually no attention is its call to "states involved in peace negotiations between Israel and representatives of the Palestinian people, especially the Quartet," to "ensure that respect for the rule of law, international law and human rights assume a central role in internationally sponsored peace initiatives."[40] This lack of attention is partly due to the general understanding that the mandate of the mission was shaped by the widespread allegations of war crimes associated with the twenty-two-day assault on the Gaza Strip, and not related to the broader relationship of international law to the peace process. Yet such recommended emphasis on international law should be welcome, although it will probably leave an invisible footprint with respect to future efforts at conflict resolution. There is a little known consensus on the part of those supportive of the Palestinian struggle for justice that peace with Israel cannot be achieved unless it becomes responsive to Palestinian rights under international law.[41] Part of this consensus is that past unresponsiveness to Palestinian rights under international law has contributed to the failure of past negotiations. Israel

has effectively used its diplomatic muscle, with US backing, to exclude from the diplomatic framework of negotiations any consideration of international law on such salient issues as borders, settlements, refugees, water, and the status of Jerusalem.[42] Every initiative since Oslo has been based on a bilateral political bargaining process that treats "facts on the ground," regardless of their legal status, as deserving considerable respect while any reference to the denial of Palestinian rights under international law is dismissed as disruptive of "the peace process."

As with achieving accountability in the face of geopolitical resistance, there exists a seeming dilemma of ignoring international law claims in deference to the geopolitical realities or accentuating these claims so as to lend further legitimacy to the Palestinian struggle for self-determination in accordance with international law. The realist approach believes that history mainly moves forward through the prudent management of power by dominant political actors while a normative approach believes that the march of history depends on resistance from below and popular forces that are guided by a sense of justice. Put differently, the opposite of war is not peace, but justice.

Conclusion

I argue essentially that the Goldstone Report is not as significant as it seems in relation to either establishing the criminality of Operation Cast Lead or in creating prospects that those Israelis (or Hamas officials) will be held accountable for their gross departures from the law of war, which the report described as war crimes and possibly crimes against humanity.[43] The enduring significance of the Goldstone Report concerns the weakening of the state system and the United Nations to uphold basic human rights, the rise of global civil society, and the essential connections between peace and justice. Specifically, the Goldstone Report has stoked a storm of controversy in the United States and Israel while contributing a validating pat on the back to those engaged in the legitimacy war that the Palestinians are winning on a symbolic global battlefield, and increasingly pinning their hopes on. This legitimacy war has become the leading moral struggle of our time, a sequel to the antiapartheid campaign waged so effectively throughout the world in the late 1980s. Whether it ends in the sort of political victory that unexpectedly and nonviolently transformed South Africa from a racist regime to a multiracial constitutional democracy cannot be foretold. Peoples can prevail in legitimacy wars, as have the Tibetans and the democratic forces in Myanmar, and still remain politically frustrated and, to varying degrees, oppressed. It is my central contention that, unless this multifaceted relevance of the Goldstone Report is acknowledged, neither its limits nor its contributions can be properly appreciated, and it is then likely to be misremembered as a failed yet valiant challenge to the impunity of the strong. My hope is that, through dialogue and experience, the Goldstone Report will

eventually be appropriately appreciated for its contribution to the struggles of the weak and oppressed, specifically of the Palestinians, and become integrated into a growing confidence in the transformative impact of the theory and practice of nonviolence.

Notes

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1. UN Human Rights Council Resolution S-9/1 (12 January 2009).

2. Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil,* rev. ed. (New York: Viking Press, 1964).

3. The motivations for this blockade have been variously described as punishment of the Gazan population for its show of support for Hamas in the January 2006 elections; a response to the Hamas forcible takeover of Gazan governance in July 2007; a strategy of undermining Hamas by making the life of the civilian population both unbearable and highly unfavorable as compared to life in the West Bank under the Palestinian Authority; and a bargaining tactic to secure the return of the single captured Israeli soldier, Gilad Shalit. Because nothing is acknowledged, such explanations are obviously speculative. What is not speculative, and yet significant, is that the blockade has little if anything to do with Israeli concerns about the Qassam rockets fired from Gaza in the direction of Israeli towns. The rocket fire virtually disappeared during a cease-fire, and Hamas frequently offered to extend the cease-fire even for a period of ten years, an offer ignored by Israel.

4. See column by Nadia Hijab, "When Does It Become Genocide?" *Agence Global,* 30 December 2009, available at www.agenceglobal.com/article.asp?id=2225.

5. A summary of a comprehensive report prepared by the UN Board of Inquiry details damage to UN facilities, and concludes that Israel deliberately targeted such facilities despite knowing their identity and that they were being used as a shelter for Gazan civilians. The full report has been treated as an internal document and never made public, although a rather extensive Executive Summary is available that includes a recommendation that compensation be sought from Israel for damage done. See "Transcript of Press Conference by Secretary-General Ban Ki-moon, UN Headquarters" (SG/SM/12224) (5 May 2009). For commentary emphasizing Israel's reaction, see Abraham Rabinovich, "Israel Savages UN Report on Gaza Attacks," *The Australian,* 7 May 2009, available at http://www.theaustralian.com.au/news/israel-savages-un-report-on-gaza-war/story-e6frg6tx-1225710427434.

6. It was at Justice Goldstone's insistence that the Human Rights Council's original mandate be expanded to include inquiry into the conduct of Hamas. For Goldstone's own reflections on his involvement in this inquiry, see "Justice in Gaza," *New York Times,* 17 September 2009, available at http://www.nytimes.com/2009/09/17/opinion/17goldstone.html; see also for his underlying orientation, Richard Goldstone, *For Humanity: Reflections of a War Crimes Investigator* (New Haven, CT: Yale University Press, 2000).

7. Shimon Peres even mounted an entirely inappropriate and ill-fitting personal attack on Goldstone calling him "a small man, devoid of any sense of justice, a technocrat

with no real understanding of jurisprudence" who led "a one-sided mission to hurt Israel." As quoted in Shuki Sadeh, "Peres: Goldstone a Small Man, Out to Hurt Israel," *Haaretz,* 12 November 2009, available at http://www.haaretz.com/hasen/spages/1127695.html; see also Tomer Zarchin, "Goldstone to Haaretz: U.S. does not have to protect Israel blindly," *Haaretz,* 13 November 2009, available at http://www.haaretz.com/hasen/spages/1127942.html.

8. For text of speech, 25 September 2009; compare President George W. Bush, "Address to a Joint Session of Congress and the American People," Washington, DC, 20 September 2001.

9. "Israel Urges World: Reject Goldstone Report on Gaza," *Haaretz,* 14 October 2009, available at http://www.haaretz.com/hasen/spages/1121036.html.

10. For exploration of and support for universal jurisdiction, see various contributions to Stephen Macedo, *Universal Jurisdiction* (Philadelphia: University of Pennsylvania Press, 2004).

11. See *Legal Consequences of the Construction of a Wall on Occupied Palestinian Territory,* I.C.J. Advisory Opinion (9 July 2004); the fact that it was an advisory opinion should not make it less authoritative, especially given the acceptance of the conclusions by a formal resolution passed in the General Assembly.

12. "Breaking the Silence," collecting the testimony of thirty IDF soldiers.

13. An internationally respected Israeli activist and former member of the Knesset, Uri Avnery, expresses this facet: "People around the world know that it is as honest a report as could be expected after our government's decision to boycott the investigation." Uri Avnery, "Cast Lead 2," *Dissident Voice* (26 December 2009), available at http://dissidentvoice.org/2009/12/cast-lead-2/. Avnery earlier had written, "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."

14. UN General Assembly, "Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact-finding Mission on the Gaza Conflict," 2009 (Goldstone Report), sec. 62, available at http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/FactFindingMission.htm. The Goldstone Report also notes that these same elements were present in the Israeli tactics during the Lebanon war of 2006, almost equally a one-sided war in terms of damage and casualties. For a range of critical assessments, see Nubar Hovsepian, ed., *The War of Lebanon: A Reader* (New York: Olive Branch Press, 2008); on the Dahiya doctrine, see discussion in Jennifer Barnette, "The Goldstone Report: Combating Israeli Impunity in the International Legal System" (master's thesis, University of California, Santa Barbara, 2010), pp. 15–20 (on file with the author). The essence of the Dahiya doctrine was expressed by Maj. Gen. Gadi Eisenkot, Israeli Northern Command chief, in October 2008: "What happened in the Dahiya quarter of Beirut in 2006 will happen in every village from which Israel is fired on. . . . We will apply disproportionate force on it and cause great damage and destruction there. From our standpoint, these are not civilian villages, they are military bases. . . . This is not a recommendation. This is a plan. And it has been approved." Ynet, "Israel Warns Hizbullah War Would Invite Destruction," 3 October 2008, available at www.ynet.co.is/english/articles/0,7340,L-3604893,00.html; also see Col. (Res.) Gabriel Siboni, "Disproportionate Force: Israel's Concept of Response in Light of the Second Lebanon War," *INSS Insight,* no. 74, 2 October 2008, available at http://www.inss.org.il/publications.php?cat=21&incat=&read=2222.

15. I have argued elsewhere, without a focus on the Gaza attacks, that such one-sided war resembles "torture" more than "war," wondering why the former disturbs liberal sensibilities so much more than in a war setting. See Richard Falk, "War and

Torture," in Marjorie Cohn, ed., *Essays on Torture* (Albany, NY: SUNY Press, forthcoming).

16. For insightful discussion of "disproportion" in the setting of air strikes by Israel, see Tom Farer, "A Question of Proportionality: Israel's Excessive Airstrikes," *Huffington Post,* 23 March 2009.

17. Goldstone Report, Executive Summary, sec. 127; also chap. 28.

18. Goldstone Report, par. 1772, Recommendations section.

19. See Ian Black and Ian Cobain, "British Court Issued Gaza Arrest Warrant for Former Israeli Minister Tzipi Livni," *The Guardian,* 14 December 2009, available at http://www.guardian.co.uk/world/2009/dec/14/tzipi-livni-israel-gaza-arrest.

20. Goldstone Report, sec. 122.

21. Goldstone Report, par. 1766, 3; also, 2 and no. 1767.

22. See BBC report of eleven Palestinian human rights organizations directing an identical letter to Palestinian Authority president Mahmoud Abbas and Hamas prime minister Ismail Haniya urging the initiation of investigations of allegations made against Hamas and Palestinian forces during the Israeli "military offensive" in Gaza that took place between 27 December 2008 and 18 January 2009. See BBC, "Palestinians Urged on Gaza Crimes," available at http://news.bbc.co.uk/2/hi/middle_east/8465486.stm.

23. See Dan Izenberg, "A Real Threat of ICC Prosecution," *Jerusalem Post,* 1 January 2009, available at http://www.jpost.com/Home/Article.aspx?id=164912; in the same article, there was speculation as to whether the International Criminal Court might investigate a complaint filed by the Palestinian Authority.

24. Goldstone Report, para. 1769, point 4.

25. See especially, the discussion carried on in several issues of the *New York Review of Books,* anchored in criticism by Michael Walzer and Avishai Margalit of an influential article by two Israelis, Asa Kasher (a retired ethics professor who advises the IDF) and Amos Yadlin (a general, currently head of Israeli military intelligence) who are believed to have altered IDF thinking and policy by their article, "Assassination and Preventive Killing," *SAIS Review* 25, no. 1 (2005): 41–57; Margalit and Walzer change the focus from targeted assassination to the rules of engagement in the Gaza attacks, concentrating on the central question posed by Kasher and Yadlin: "What priority should be given to the duty to minimize casualties among combatants of the state when they are engaged in combat . . . against terror?" Quoted in Margalit and Walzer, "Israel: Civilians & Combatants," *New York Review of Books* 56, no. 8 (14 May 2009); for exchange of views, see "Israel & the Rules of War," *New York Review of Books* 56, no. 10 (11 June 2009), available at: http://www.nybooks.com/articles/22664.

26. Goldstone Report, par. 1769.

27. Although at an official level the politics of deflection seems largely tactical, there is some reason to believe that many Israelis believe that Israel is held to higher standards than other nations or that Israel is genuinely in danger of being engulfed by a new surge of global anti-Semitism. See the perceptive article on the tensions between public anxieties and governmental policies, Tom Segev, "Israel & Palestine: Eternal Enmity," *New York Review of Books* (14 January 2010): 47–48.

28. Among the most extreme statements along these lines was that made by Anne Bayevsky, a researcher at the Hudson Institute as reported by Tovah Lazaroff, "UN Report a 21st Century Blood Libel, Scholar Says in Geneva," *Jerusalem Post,* 30 September 2009, available at: http://www.jpost.com/Israel/Article.aspx?id=156240. On numerous occasions, Justice Goldstone has defended the right, even insisting on the duty, of Jews to speak out against injustice as well as violations of human rights and of international law.

29. "Calling on the President and the Secretary of State to Oppose Unequivocally Any Endorsement or Further Consideration of the 'Report of the United Nations Fact Finding Mission on the Gaza Conflict' in Multilateral Fora," HR 867, 111th Cong., 1st sess., 23 October 2009. The resolution refers to the Goldstone Report in its first operative paragraph as "irredeemably biased and unworthy of further consideration or legitimacy." The long preamble of "whereas" paragraphs in the resolution contained much innuendo and many inaccuracies, which Goldstone attempted to refute point by point in a careful letter to the drafters of the resolution that was completely ignored. See Spencer Ackerman, "Goldstone Tells Congress That Resolution Misrepresents His Gaza Report," *Washington Independent,* 30 October 2009, available at http://washington independent.com/65926/goldstone-tells-congress-that-resolution-misrepresents-his-gaza-report. For a general assessment, see Natasha Mozgovaya and Barak Ravid, "U.S. House Backs Resolution to Condemn Goldstone Gaza Report," *Haaretz,* 5 November 2009, available at http://www.haaretz.com/hasen/spages/1125593.html. The vituperative language of the resolution in relation to the sobriety and professionalism of the Goldstone Report confirms the impression of the extreme responsiveness of Congress to the Israel lobby, and casts further doubt on the capacity of the US government to play a constructive role as intermediary in the conflict.

30. The only technical objection with any merit at all is the contention that one of the four members of the mission was already on the public record in the form of a jointly signed published letter to the editor of a British newspaper, and should have been disqualified. For text of the letter, see "Israel's Bombardment of Gaza Is Not Self-defense—It's a War Crime," *Sunday Times,* 11 January 2009, available at http://www .timesonline.co.uk/tol/comment/letters/article5488380.ece. For a critical assessment of the Israeli claim to be acting defensively, see Victor Kattan, "Israel, Gaza, and Operation Cast Lead: Use of Force Discourse and *Jus ad Bellum* Controversies," http://jurist.law .pitt.edu/forumy/2009/01/gaza-not-war-of-self-defense.php. Goldstone made the argument that, if the mission had the task of reaching binding judgments adverse to Israel, then Chinkin would have been disqualified. In fact, Chinkin has a deserved reputation of professional integrity, and was particularly qualified to be a member of such a mission by virtue of her familiarity with Israel-Palestine conflict and her expert knowledge of international law.

31. Goldstone Report, Executive Summary, sec. 105.

32. On 1 October 2009, the Palestinian Liberation Organization announced that it supported a move by the Palestinian Authority, under pressure from Israel and the United States, to defer the vote on a resolution calling for endorsement and implementation until March 2010, suggesting a postponement for several months of any consideration given to the report. Revealingly, there was such a populist backlash that the Palestinian Authority reversed course and led the effort to have the Goldstone Report endorsed and implemented; see Neil MacFarquar, "Palestinians Halt Push on War Report," *New York Times,* 2 October 2009, available at http://www.nytimes.com/2009/10/02/world/middleeast/02mideast.html. For helpful discussion, see Barnette, "The Goldstone Report: Combating Israeli Impunity," pp. 48–53. It has been subsequently reported in an Israeli newspaper that the Palestinian president Mahmoud Abbas requested the postponement of any vote in the Human Rights Council on the Goldstone Report only after he was threatened by Yuval Diskin, the head of Shin Bet, with "a second Gaza" in the West Bank along with some other threats. See Akiva Eldar, "Diskin to Abbas: Defer UN Vote on Goldstone or Face 'Second Gaza,'" *Haaretz,* 17 January 2010, available at http://www.haaretz.com/asen/spages/1143038.html.

33. There is a large literature on this issue. The two sides are clearly articulated by John Yoo, *War by Other Means: An Insider's Account of the War on Terror* (New York:

Atlantic Monthly Press, 2006); Jordan J. Paust, *Beyond the Law: The Bush Administration's Unlawful Responses in the "War" on Terror* (Cambridge: Cambridge University Press, 2007); for a sophisticated presentation of a case for departing from strict legalism in addressing terrorist threats, see Benjamin Wittes, *Law and the Long War: The Future of Justice in the Age of Terror* (New York: Penguin Press, 2008).

34. See an insightful discussion of this delicate issue in Hijab, "When Does It Become Genocide?" The word genocide possesses a strong emotive resonance, especially for Israelis, hearkening back to its initial usage by Rafael Lemkin in reaction to the Holocaust. I draw a distinction between moral, political, and legal conceptualizations of the word "genocide." For the most authoritative legal treatment, see judgment of the International Court of Justice in the Bosnian case: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia Herzegovina v. Serbia and Montenegro) (ICJ Judgment, 11 July 1996).

35. For text, see White House website, 10 December 2009. The Nobel speech is notable for its incoherence, relying on a vague invocation of justice to uphold counterterrorist uses of force while reaffirming the US dedication to the conduct rules contained in the Geneva Conventions and the law of war. From this perspective, it is hard to grasp the logic, aside from submitting to Israeli pressures, relied on to condemn the Goldstone Report or to back Israel in relation to Operation Cast Lead.

36. See Kattan, "Israel, Gaza, and Operation Cast Lead."

37. For his views on this rarely analyzed point, see Farer, "A Question of Proportionality;" see also Kattan, "Israel, Gaza, and Operation Cast Lead."

38. For a classic argument against pushing international law beyond these geopolitical realities, see Hedley Bull, "The Grotian Conception of International Society," in Herbert Butterfield and Martin Wight, eds., *Diplomatic Investigations: Essays in the Theory of International Politics* (Cambridge, MA: Harvard University Press, 1966), pp. 51–73.

39. In other settings, accountability for the losing side or vulnerable individuals is consistent with geopolitical realities, even an instrument of the powerful and victorious. From the Nuremberg and Tokyo point of departure, this problem of double standards has haunted the quest for extending criminal responsibility to those who act on behalf of the state. The ebb and flow of support for universal jurisdiction is one theater of this encounter, as was the somewhat unexpected establishment in 2002 of the International Criminal Court. These latter developments are gestures in the direction of extending the rule of law to the domain of accountability, but the pushback on efforts to pursue well-documented allegations against Donald Rumsfeld, Henry Kissinger, and Israeli officials is indicative of the continued robustness of geopolitics. The detention of Augusto Pinochet, the prosecutions of Slobodan Milosevic and Saddam Hussein, and the ICC indictment of President Bashir of the Sudan are not exceptions to the reach of geopolitics, but further illustrations of its continued sway.

40. Goldstone Report, secs. 1772 and 1774.

41. See Elazar Barkan, "Facts, Rights, and Remedies: Implementing International Law in the Israel/Palestine Conflict," *Hastings International and Comparative Law Review* 28, no. 3 (Spring 2005): 331–348; see also conclusion of Victor Kattan's excellent historical presentation of the conflict in *From Coexistence to Conquest: International Law and the Origins of the Arab-Israeli Conflict* (London: Pluto, 2009), especially p. 261.

42. For a focus on this aspect of the relevance of international law, see Richard Falk, "International Law and the Peace Process," in Hastings Symposium, note 33, pp. 331–348.

43. The report implicitly regards the potential criminality of Israel and Hamas as more or less symmetrical. I reject this view. Whether measured in terms of the harm

caused or the responsibility for the one-sided violence of the Gaza attacks, Israeli political and military leaders bear the brunt of responsibility. This is consistent with the underlying view that both sides in the encounter should have their activities assessed from the perspective of international criminal law. But it is a mistake to treat the two sides as equally culpable in the Gaza context. It is a still greater mistake to claim, as have both Israeli and US officials, that a deficiency of the Goldstone Report is its tendency to treat a democratic government such as Israel as being subject to the same restraints as are applicable to an alleged terrorist actor. When measured by the death of innocent civilians or by reference to the Dahiya doctrine of deliberate disproportion, the magnitude of responsibility on the side of Israel seems far greater than that of Hamas.

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Assessing the Goldstone Report

Nigel S. Rodley

ANY ATTEMPT at evaluating the quality of a product should be clear about the criteria being applied. Regrettably, the United Nations has not provided comprehensive criteria for the guidance of fact-finding missions to be carried out under its auspices. The Economic and Social Council and the General Assembly have adopted the sparest of pointers[1] while the Human Rights Council has adopted a code for its Special Procedures that includes limited provisions with respect to fact-finding visits.[2]

Better guidance is available from the International Law Association (ILA). At its fifty-ninth (biennial) conference, held in Belgrade in 1980, it adopted the Belgrade Minimal Rules of Procedure for International Human Rights Fact-finding Missions (hereinafter the Belgrade Rules).[3] There are twenty-five rules, several of which will be referred to in what follows because they represent a distillation of the thinking about fairness and legitimacy in human rights fact-finding of a geographically representative range of distinguished international legal opinion.

The focus on human rights needs to be noted. The Goldstone Report is about an investigation involving issues under not only international human rights law (primarily concerned with the responsibility of states), but also international humanitarian law (concerning especially matters of individual responsibility for war crimes). There is no comparable set of rules for humanitarian law investigations.[4]

The Belgrade Rules were foreshadowed by a comprehensive study of the question by Thomas Franck (who chaired the ILA subcommittee that drafted the rules) and Scott Fairley.[5] Under the heading "Indicators of Impartiality," the authors identify five "key indicators of procedural probity: (1) choice of subject; (2) choice of fact-finders; (3) terms of reference; (4) procedures for investigation; and (5) utilization of product." What follows will be structured according to these same headings. The relevant ILA rules will be highlighted and the Goldstone Report—and criticisms of it—will be assessed in the light of the rules.

Choice of Subject

This is not an issue addressed by the Belgrade Rules. Yet political selectivity in the choice of situations to be examined, according to Franck and Fairley, "has a negative effect on the credibility of investigations that do go forward,"[6] and "fact-finding is likely to gain in credibility when it occurs within a broader matrix."[7] When the UN Commission on Human Rights belatedly abandoned its

refusal to consider allegations of human rights violations in specific countries in the late 1960s, the situations it focused on were those of South Africa under its apartheid regime and that of the post-1967-war occupied territories of the Middle East. From then on, the human rights situation in the occupied territories was a separate item on the agenda of the Commission on Human Rights until its replacement by the Human Rights Council in 2006. The same has been the case for the council. Indeed, six of the ten special sessions of the council on specific country situations have had to do with the Israeli Occupied Territories and the 2006 conflict with Lebanon. It was one of these that led to the mandating of the Goldstone inquiry.[8] Even allowing for legitimate international frustration with a seemingly endless occupation involving the constant expansion of a settlement program whose morality or legality only Israel persists in defending, this is disproportionate attention in the light of the numerous situations around the world involving mass victimization that receive no comparable level of scrutiny.[9] Inevitably, this permits Israel to complain that, again in the words of Franck and Fairley, "the investigating institution is not serious about enforcing a uniform standard."[10]

Choice of Fact-finders

Things have improved since the days when the General Assembly in 1968 established its Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories (Special Committee of Three), composed of three representatives of states, two of which had no diplomatic relations with Israel (Yugoslavia and Somalia, each of which considered itself at war with Israel) and one (Ceylon—now Sri Lanka) whose government soon thereafter suspended diplomatic relations between itself and Israel.[11]

According to Rule 4 of the Belgrade Rules, a "fact-finding mission should be composed of persons who are respected for their integrity, impartiality, competence and objectivity and who are serving in their individual capacities." Obviously, this should automatically exclude representatives of states, as with the Special Committee of Three. The Goldstone Mission, however, was composed of individuals acting in their personal capacities. There is no question that they all met each and every element to the highest standard.[12] While these could have no imputation of *actual* bias in any of the members, there was regrettably a basis for questioning the *appearance* of bias as a result of a public letter signed by one member, Christine Chinkin. The signatories to that letter affirmed that some of Israel's actions amounted to "prima facie war crimes" as well as finding the "invasion and bombardment themselves as contrary to international humanitarian and human rights law."[13] If such a statement were made by a member of a standing fact-finding body, it could be expected that such a member would move to recuse himself or herself from the hearing of

the issues. In the case of ad hoc investigations, it is not always so easy to select prominent people with the relevant expertise who nevertheless have a clean slate in terms of their public utterances on the issues.

In this connection, Rule 6 is pertinent: "Any person appointed by a member of the fact-finding mission should not be removed from membership except for reasons of incapacity or gross misbehaviour." This is a strict standard and one might have envisaged, without risk of undermining the rule, a further exception: this would contemplate a situation where information subsequently becomes available that calls into question the original qualifications for appointment. Indeed, if only to avoid giving at least a debating point to those who would wish to discredit the eventual report, it might have been wise for recusal to have been pursued.

Rule 5 further stipulates that "the government . . . concerned, whenever possible, should be consulted in regard to the composition of the mission." Whatever the merits of this rule, adopted when such missions were in their infancy, it is indeed common for the affected government to be consulted, informally and behind the scenes, about the composition of the missions. It is not clear whether such consultation took place and, in light of Israel's firm refusal to cooperate with the mission, it might have been redundant to attempt the consultation. Israeli complaints have not been on this point.

The fact remains that there was not even the hint of a blemish on the qualifications of three of the four mission members to undertake the mandate, and there remains no doubt *in practice* that the composition of the mission was wholly consistent with an expectation of a reputable investigation and report.

Terms of Reference

According to the first two Belgrade Rules, "1. The organ of an organization establishing a fact-finding mission should set forth objective terms of reference which do not prejudice the issues to be investigated . . . 2. The resolution authorizing the mission should not prejudge the mission's findings."

No two principles have been more consistently ignored than with respect to issues surrounding Israeli practices in the Occupied Territories. The General Assembly resolution authorizing the establishment of the Special Committee of Three had affirmed "that Israel was in breach of its international obligations" and expressed its "grave concern at the violation of human rights" in the Occupied Territories.[14] The Commission on Human Rights resolution the following year establishing a special working group of experts "to investigate allegations concerning Israel's violation of the (Fourth) Geneva Convention" also spoke of "Israel's continued violations of human rights in the occupied territories."[15] Thus, both bodies were setting up inquiries not just to investigate allegations of violation, but actual violations. This is prejudicial language and it was invoked by Israel to refuse cooperation with either the special committee or the special

working group. The pattern of prejudicial resolution and refusal of cooperation has continued over four decades.

Few such resolutions contained as arrantly prejudicial language as that setting up the Goldstone Mission. It "strongly condemns" the military operation that "has resulted in massive violations of the human rights of the Palestinian people" and it "demands that . . . Israel stop the targeting of civilians and medical facilities and staff and the systematic destruction of the cultural heritage of the Palestinian people." Indeed, as usual, the specific terms of reference of the mission are to "investigate all violations of international human rights law and international humanitarian law by the occupying Power, Israel, against the Palestinian people."[16]

While piously calling on Israel "not to obstruct the process of investigation and to fully cooperate with the mission," it is as though the resolution were drafted with the purpose of maintaining the traditional minuet of "investigation" of what is already accompanied by noncooperation from Israel. The absence of any reference to violations by Hamas, despite its notorious campaign of launching missiles toward areas populated by Israeli civilians, was inevitably perceived as particularly noxious in terms of impartial concern for human rights.

In fact, the council president, acting on the prompting of Judge Richard Goldstone whom the former had approached to chair the mission, agreed to a mission mandate that was not prejudicial ("all violations of international human rights law and international humanitarian law that *might have been* committed") and which could be as it was interpreted to cover all parties, not just Israel.[17]

It was not and would not be sufficient to appease Israel and secure its cooperation. For Israel the resolution had irretrievably vitiated the exercise, but the change did allow others, including states that had voted against the resolution because of its manifest bias, to give the mission a fair wind. This then brings us to the core issue of the mission's methodology, as Israel has been no less vehement in its criticism of the report than it was of the mandate giving rise to it.

Procedures for Investigation

Ten of the twenty-five Belgrade Rules relate to the collection of evidence. Most need not be spelled out in detail. They require openness to the receipt of material from all relevant sources, including states and nongovernmental organizations (NGOs) as well as groups of individuals (Rules 9, 11, and 13). The state concerned should have an opportunity to comment on material so obtained (Rule 12). All of these were complied with scrupulously by the mission, and the government of Israel does not seem to have claimed otherwise.

Rule 14 is of particular interest: "Petitions ought ordinarily to be heard by the fact-finding mission in public session with an opportunity for questioning by the states concerned." While the injunction in the latter clause raises problems

of plausibility (suggesting a superficial equality of arms that would in fact be unequal), the fact is that the mission held public hearings. Israel's complaint was that it should not have done so at all. Its concern was the "unprecedented decision to hold live broadcast public hearings."[18] The complaint seems to be that "raw evidence, perhaps of questionable authenticity, is directly broadcast into the public arena. Moreover, such a trial by public opinion can of necessity give no weight to confidential or sensitive information."[19]

Given Israel's noncooperation, the latter concern is palpably spurious. As far as the charge of trial by public opinion is concerned, that would be an argument for never holding public hearings of proceedings in court or commissions of inquiry at least unless the potentially responsible parties chose to be present to put questions themselves. One suspects that, had the mission been allowed into southern Israel and the inhabitants of Sderot had been allowed to testify publicly in the region before the mission, the criticism might have been more muted. As it was, such witnesses and witnesses from the West Bank had to testify in public hearings held in Geneva. According to the mission, the opportunity to speak publicly about their experiences was appreciated by "participants, as well as members of the affected communities" (par. 167). Or perhaps the complaint is not so much about the public hearings, but their being broadcast. In any event, Israel has hardly demonstrated the well-foundedness of its criticism.

Three further rules deal with (very limited) specifics of an on-site investigation that are not pertinent to the Goldstone Mission, especially insofar as they are predicated on the mission in question taking place inside a state with the agreement of the state.

However, there is one dimension of the mission, which has attracted the brunt of Israel's stated objections, that is not directly covered by the language of the Belgrade Rules, albeit it underlies them. In fact, the relevant principle, that of impartiality, is one contained not in a document specifically on human rights fact-finding, but in the General Assembly Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security. It affirms that "fact-finding should be comprehensive, objective, impartial and timely."[20] The declaration also specifically requires fact-finding missions "to perform their task in an impartial way."

There is not space here to tackle all the criticisms leveled by Israel. Some are palpably off target, such as the complaint that the report does not recognize the state's right to exercise self-defense. This is an issue relating to the legitimacy of the use of force at all (*jus ad bellum*), not to the mission's mandate that concerns the manner in which force is used (*jus in bello*), which is the subject matter of international humanitarian law and human rights law. Also, no doubt if they had taken this on, the mission would have felt obliged to follow with the view of the International Court of Justice which, incomprehensibly, decided that the right to self-defense does not arise in the case of an armed

attack not launched by another state.[21] This too would doubtless have been offered by Israel as evidence of bias.

Other criticisms recall the person who kills his parents and then claims sympathy because of his orphan status. This is the case with regard to apparent "misstatements" of fact and law: two of each, neither central to the issues.[22] Specifically and summarily on issues of *fact,* Israel denied the report's charge of discriminating against its non-Jewish citizens by not providing shelters to protect Arab towns and villages in southern Israel from rocket attacks (pars. 1709, 1711). In fact, the charge was with respect to "unrecognized" Arab settlements; in any event, Israel claimed it had offered to pay for such shelters in the relevant area. The report is also chastised for referring to an earlier (2008) rocket attack on Israel that, according to the report, had resulted in "light injuries" to a person, but nevertheless led to Israel's "Operation Hot Winter" (par. 196). In fact, the person had later died from serious injuries. Operation Hot Winter brought the deaths in Gaza of 202 Palestinians and 2 Israelis. As to the *legal* issues, one criticism is that the report refers to a pre-2004 military courts appeal process (pars. 1599–1600) that is no longer in force; the criticism does not explain how the newer system is an improvement. The second is a challenge to the report's statement that "the international community continues to recognize Israel as the occupying Power" (par. 277) and its footnoted reference to Security Council Resolution 1860 (2009) as one of the authorities for the proposition. Indeed, what this resolution actually says is that "the Gaza Strip constitutes an integral part of the territories occupied by Israel in 1967." To this extent, the criticism is clearly accurate, though its significance in terms of the major issues addressed by the report is unexplained. Needless to say, all of these criticisms could have been taken account of if (as would probably have happened in the case of Israel having cooperated) the draft text had been submitted to Israel in advance of publication.

Other criticisms seem at first glance to come closer to the mark. This applies to the complaint that the mission was selective in its choice of incidents. Thus, despite accusations that the Southern Command Centre of Hamas leader Ismail Haniyeh had been located in the al-Shifa hospital in Gaza, the mission did not investigate it. The only reason it gave explicitly was the limited time available. This is a weak explanation. The probability is that the circumstances in Gaza (and the authoritarian nature of Hamas) were such that it would have been difficult for the mission to elicit the requisite information.

This hypothesis is consistent with the position taken by the mission with respect to a witness not interviewed by the mission. Israel complained that it did not interview British colonel Richard Kemp, "a recognized expert in the field of warfare in conditions similar to that of Gaza."[23] The mission responded that it "did not deal with . . . issues . . . regarding the problems of conducting military operations in civilian areas and second-guessing decisions

made . . . 'in the fog of war.' *We avoided having to do so in the incidents we decided to investigate.*"[24]

Clearly, for Israel, this response spoke for itself as evidence that the mission had "*deliberately selected* incidents so as to evade the complex dilemmas of confronting threats in civilian areas."[25] The Israeli response seems to imply that concentrating on incidents where facts are relatively clear, rather than on those where they may not be, is somehow reprehensible. It is not evident that this is such a sin. If a criminal has killed a number of people, some in cold blood and some in a shoot-out, the police may well be expected to concentrate their investigative efforts on the former, rather than pursue the latter with all the evidentiary problems of determining whether or not there was a self-defense justification for them.

The Israeli complaint is best understood in the context of its overall argument that Hamas used civilians, even hospitals, to shield its own forces from Israeli attack or counterattack. To the extent that the Israeli assertion of Hamas behavior is accurate, it reflects serious violations of humanitarian law that were within the mandate of the mission. Here criticisms of the mission's report carry weight.

The allegations were the subject of a chapter of the report. The chapter evinces a level of scrupulousness in its analysis and conclusions that would be appropriate for assessing accusations of individual criminal responsibility, but seem unduly tentative with regard to possible responsibility of the Hamas "authorities." Here the mission relies on NGO reports, as persons interviewed in Gaza "appeared reluctant to speak about the presence of or conduct of hostilities by the 'Palestinian armed groups,'" and the armed groups themselves were "not agreeable" to a meeting as requested by the mission (pars. 438–439). Interestingly, there is no comment on this manifestation of noncooperation by the Gaza authorities that the report earlier described as "full" (par. 145). In any event, the information from NGOs such as Amnesty International, Human Rights Watch, and the International Crisis Group was irresistible, that is, that rockets were indeed launched from civilian areas. However, the mission could not conclude that this was done "with the specific intent of shielding the combatants from counter-attack" (par. 450). As will be noted below, the report is not so scrupulous with respect to some allegations of Israeli misbehavior (including acts of a potentially criminal nature).

As to the use of mosques, the mission investigated only one incident (where it found that the mosque had not been used, but had nevertheless been the object of a missile attack leading to fifteen deaths and forty injuries). It did not investigate others; however, it points out that only one was brought to its attention and the specific mosque was not identified. It may well be that the climate in Gaza would not have yielded any useful information, but one might have expected some explanation beyond the mere statement that "the Mission

was not able to investigate the allegation of the use of mosques generally by Palestinian groups for storing weapons" (par. 463).

As to hospitals, the mission investigated attacks on two, and found there were no combatants at the premises *at the time of the attack(s)* (par. 465). This seems somewhat ingenuous: given that it could not know of Hamas movements, partly because of possible inhibitions about fingering Hamas and partly because of possibly limited knowledge of the witnesses, convincing as the latter may have been, the mission does not hesitate to infer deliberate intent on the part of the Israelis. Again, it did not investigate the alleged use of the al-Shifa hospital as a Hamas military base. The same reasons as conjectured above may be speculated, but the mission offers no such justification, merely the mentioned restrictions of time.

While on the facts available to it, the mission's inability to conclude that mosques and hospitals were used as cover for combatants may be justified, the tentativeness of its findings regarding the use of civilian areas for launching attacks seem hypercautious (lack of evidence of specific intent). And the legal characterization uses a most delicate conditional form: "In cases where this occurred, the Palestinian armed groups would have unnecessarily exposed the civilian population of Gaza to the inherent dangers of the military operations taking place around them. This would have constituted a violation of international humanitarian law" (par. 494). As the Israeli response points out, the report is not at all so coy in inferring the relevant intent from Israeli actions,[26] albeit the mission was not without evidence of a policy on the ground that could amount to recklessness in the use of force where there was any perceived threat to the Israeli forces.[27] The report does, on the other hand, address in the clearest terms the flagrantly illegal rocket attacks on southern Israel that precipitated the Israeli counterattack. It finds this to indicate "the commission of an indiscriminate attack on the civilian population of southern Israel, a war crime and may amount to crimes [*sic*] against humanity"[28] (par. 1724). Of course, anything less could only have redounded to the fatal discredit of the mission.

In one particularly unconvincing section, the report finds Israel guilty of killing civilians who were police officers. The Israeli response quite properly excoriates the report's determination that, despite various official Hamas statements to the effect that the police were part of the resistance to "the enemy," not all of them were combatants and indiscriminate force had been used because of failure to identify which police were combatants and which were civilians.[29] Exactly how the Israel Defense Forces were expected to exercise this exquisite level of discernment is unexplained.[30]

One Israeli criticism that deserves mention, if only to dismiss it, is that the report's approach to the Israeli legal system means that Israel has been "treated as a banana republic" (an aspersion unlikely to ingratiate the state with any banana republics on the council). The argument seems to be that Israel has a

good legal system, as good as anywhere in the world, and so the mission was wrong to be critical of its capacity to investigate war crimes and other breaches of international humanitarian law.[31] What is more, that system is investigating many of the cases documented by the mission.

In fact, the report points to a specific problem in the form of a policy introduced in 2000 that operational debriefings may be undertaken "with respect to an incident that has taken place" and the debriefing entails the dropping of any criminal investigations. Only after a period of months can investigations of lawbreaking take place or be reopened (chap. XXIV, pars. 1591–1594). One does not have to be an expert to know that, after a delay of several months, the possibilities of discovering the facts for forensic purposes are substantially reduced. Yet the Israeli response complains that the mission is objecting to the existence of operational debriefing, when in fact the criticism is of the phasing, with its substantial gap between the phases.

As to the investigations under way, the responses for the most part do not specify the incidents where this is the case. Certainly, anyone who has had occasion to consider allegations of violations of international humanitarian or human rights law in Israel, as in many countries (not just banana republics), knows how difficult in practice it is to find cases being brought in situations of grave national emergency and mobilization. Indeed, overwhelming evidence of torture and ill-treatment perpetrated by the Israeli General Security Service (GSS) has resulted in not one criminal case being brought against GSS interrogators in the ten years since the Supreme Court of Israel decided that certain interrogation practices amount to prohibited torture or ill treatment.[32] In any event, the mission's recommendations are only to move toward further international investigations and possible prosecutions after the Israeli investigations have been given a further six months to produce results.

Utilization of the Product

The main concern under this heading in the Franck and Fairley piece was that the report should be made public. Interestingly, the Belgrade Rules do not go that far, confining themselves to requiring that, in the case of a decision to go public, the report "should be published in its entirety."[33] There was never any question of this not being the case for the Goldstone Report to the Human Rights Council. This may be contrasted with the report of the UN board of inquiry set up by Secretary-General Ban Ki-moon to look into "certain incidents in the Gaza Strip" affecting UN premises. Only a summary was made public, albeit the board concluded that Israel was responsible for a number of deaths and injuries as well as substantial property damage to various UN (mainly the UN Relief and Works Agency for Palestine Refugees in the Near East) premises including schools and hospitals.[34]

General Overview

This is a report of over 550 pages that painstakingly documents a large number of incidents, mainly in Gaza but also on the West Bank, including violations by the Hamas authority and the Palestinian Authority as well as by Israel. Much of it deals with incidents involving loss of life. The overwhelming majority of the lives lost were Palestinian lives at the hands of Israeli forces[35] and the report inevitably and properly reflects that priority in the attention that it gives to the various matters within the mission's mandate.

Chapters IX to XI form the centerpiece of the report documenting apparent failures to protect the civilian population, indiscriminate attacks resulting in loss of life or injury, and even deliberate attacks against the civilian population. Not all the allegations are sustained, but many are, and they are disturbing because of the strength of the evidence carefully marshaled. Chapter XIII is particularly salient. It produces a substantial amount of evidence of the destruction of civilian infrastructure, especially of housing and in the construction industry. The report correctly draws attention to "the context where external supplies are entirely controlled by Israel," which makes it "a matter not only of economic importance but arguably one of human necessity to satisfy the basic need for shelter" (pars. 1011–1012). This inevitably recalls previous deployments of such force in Lebanon in 1982 and 2006.

It is regrettable that the Human Rights Council resolution initiating the mission was blatantly political in tone and content and irremediably prejudicial, but that does not deprive the report responding to the nonprejudicial mandate given by the council president of its intrinsic value. Neither does the technical eyebrow raiser of one mission member's public letter. The occasional tilt against Israel and blind eye to the Hamas-created situation in Gaza, with its consequential limitations on the investigative capacity of the mission, is hardly helpful but equally not fatal. It is nevertheless regrettable that these elements have facilitated the perpetuation of Israel's decades-long practice of diverting attention from the substance to process.

The fact remains that the concerns about substance are real and the report's identification of them deserve study. Chapter XI, in particular, describes incidents that cry out for clarification. They relate to certain neighborhoods in which persons identified by the Israelis as noncombatants, mainly women and children, are given conflicting instructions about where to go and then find themselves the object of shooting by Israeli forces. In one case, a (handcuffed) individual was shot, family members were prevented from assisting him, and all attempts to get Palestinian Red Crescent or International Committee of the Red Cross assistance to him were rejected. He bled to death. Behind the arguments about process and balance are disturbing questions of very real flesh and very real blood, questions that the Israeli government will hopefully sooner rather than later address in a way that serves truth and justice. ⊕

Notes

Sir Nigel S. Rodley is professor of law and chair of the Human Rights Centre at the University of Essex. He is grateful to Chatham House and the colleagues who participated in the 27 November 2009 expert meeting on the Goldstone Report, "Report of an Expert Meeting Which Assessed Procedural Criticisms Made of the UN Fact-finding Mission on the Gaza Conflict" (the Goldstone Report), available at www.chathamhouse.org.uk/publications/papers/view/-/id/817/.

1. In 1974, the UN Commission on Human Rights presented to the Economic and Social Council (ECOSOC) draft model rules of procedure for UN bodies dealing with violations of human rights drafted by a working group (UN Doc. E/CN.4/34, Annex). ECOSOC merely took note of the working group's reports and brought them to the attention of relevant UN bodies; see ECOSOC Res. 1870 (LVI) (1974). The General Assembly has adopted a Declaration on Fact-finding by the United Nations in the Field of Maintenance of International Peace and Security, UN Doc. A/RES/46/59 (1991).

2. Human Rights Council Res. 5/2, Annex (2007).

3. International Law Association, report of the fifty-ninth conference, Belgrade, 1980, p. 86; reproduced in *American Journal of International Law* 75, no. 1 (January 1981): 163–164.

4. Not even the Rules of Procedure of the International Fact-finding Commission, established under Article 90 of the 1977 Additional Protocol I to the Geneva Conventions of 1949 are particularly helpful.

5. Thomas M. Franck and H. Scott Fairley, "Procedural Due Process in Human Rights Fact-finding by International Agencies," *American Journal of International Law* 74, no. 2 (January 1980): 308–345.

6. Ibid., p. 312.

7. Ibid.

8. Human Rights Council Res. S-9/1 (2009): Report of the Ninth Special Session of the Human Rights Council, UN Doc. A/HRC/S-9/2.

9. An (unpromising) departure was the special session on Sri Lanka that proceeded to adopt a largely self-congratulatory resolution presented by Sri Lanka: Human Rights Council Res. S-11/1 (2009), Report of the Eleventh Special Session of the Human Rights Council, UN Doc. S-11/2.

10. Franck and Fairley, "Procedural Due Process in Human Rights Fact-finding by International Agencies," p. 312.

11. Nigel S. Rodley, "The United Nations and Human Rights in the Middle East," *Social Research* 38, no. 2 (Summer 1971): 217–240.

12. The internationally respected former South African judge and former prosecutor of the International Criminal Tribunals for the former Yugoslavia and for Rwanda, Richard Goldstone; Christine Chinkin of the London School of Economics; Hina Jilani, former Commission on Human Rights special representative on human rights defenders; and Irish colonel Desmond Travers. The first three are personally well known to me, and I am certain of their total dedication to human rights and fairness and impartiality in their pursuit. I make the point, conscious of the shameful *ad personam* venom that some Israeli politicians and "supporters" of Israel have hurled toward mission members.

13. *Sunday Times* (London), "Israel's Bombardment of Gaza Is Not Self-Defence—It's a War Crime," Letters Page, 11 January 2009, available at http://www.timesonline.co.uk/tol/comment/letters/article5488380.ece (accessed March 8, 2010).

14. General Assembly Res. 2443 (GA session XXIII) (1968).

15. Commission on Human Rights Res. 6 (CHR session XXV) (1969).

16. Human Rights Council Res. S-9/1.

17. UN Human Rights Council, "Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact-finding Mission on the Gaza Conflict," UN Doc. A/HRC/12/48 (15 September 2009), par. 151 (emphasis added).

18. "Initial Response to the Report of the Fact-finding Mission Established Pursuant to Resolution S-9/1 of the Human Rights Council," 24 September 2009, available at www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Hamas+war+against+Israel/Initial-response-goldstone-report-24-Sep-2009.htm, par. 17 (hereinafter "Initial Response").

19. Ibid.

20. See Human Rights Council Res. 5/2, Annex (2007). Oddly, this was quoted by Israel with respect to the quality of the original mandate.

21. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion), [2004] I.C.J. Rep. 136, par. 139

22. "Initial Response," par. 20.

23. Ibid., par. 18.

24. Ibid. (emphasis added by Israel).

25. Ibid. (emphasis in original).

26. Ibid., par. 19.

27. See, for example, pars. 800–881.

28. The anodyne title of Chapter XXIV, in which this statement is found is "The Impact on Civilians of Rocket and Mortar Attacks by Palestinian Armed Groups on Southern Israel," which is typical of the generally nonjudgmental titles of chapters on Palestinian misbehavior. This is in contrast to the typically highly judgmental chapter headings concerned with Israeli actions; for example, "Indiscriminate Attacks by Israeli Armed Forces Resulting in Loss of Life and Injury to Civilians" (chap. X) or "Deliberate Attacks against the Civilian Population" (chap. XI).

29. "Initial Response," par. 19.

30. Ibid., pars. 410–436.

31. Ibid., pars. 26–28.

32. See, for example, "Concluding Observations of the Committee Against Torture on the Fourth Periodic Report of Israel Under the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment," UN Doc. CAT/C/ISR/CO/4 (2009), par. 19.

33. International Law Association, report of the fifty-ninth conference, p. 86.

34. Letter dated 4 May 2009 from the Secretary-General to the president of the Security Council, UN Doc. A/63/855-S/2009/250 (2009). Several of the incidents were also investigated by the Goldstone Mission that reached similar conclusions. The board was chaired by Ian Martin, former secretary general of Amnesty International, whose unimpeachable record and credentials did not prevent the Israeli government from resorting to its standard practice of impugning the report as biased.

35. Over 1,400 Palestinians were killed according to Palestinian NGOs (the respected Israeli NGO, B'Tselem Israeli, logged 1,387) or 1,166 Palestinians according to Israeli official figures, of whom the number of children was over 300 (according to NGOs) or 89 (according to the Israelis); as compared with 13 Israelis, 3 of whom were civilians and 10 soldiers (4 killed by friendly fire). There is much discrepancy as to the proportion of Palestinians who were combatants, though even the relatively low Israeli figure allows 295 "uninvolved Palestinians" killed: Goldstone Report, pars. 350–362.

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Concluding Remarks

Tom Farer

IN CONJUCTION with the Academic Council on the United Nations System (ACUNS), the editors of *Global Governance* have created a moderated online discussion forum, where we invite the four contributors to this agora, and the broader scholarly community, to comment on the articles, to take account of the anticipated Israeli government's responses to the evidence of violations of humanitarian and human rights law marshaled in the Goldstone Report, and to respond to letters to the editors. This online conversation should enrich the contribution of the agora to public appreciation of the Goldstone Report and the issues it raises. Whatever the follow-on discussion, and whatever my possible disagreement with one or another point in these four articles, I believe the articles set an example of reasoned discourse about a controversial effort to interpret the law applicable to asymmetric armed conflicts, and to apply that law dispassionately under strenuously difficult conditions.

I see no need to attempt a summary of the essays. They are not long, they are clearly written, and they speak sufficiently for themselves. But like any texts, much less those concerning matters that engage powerful emotions, they are still subject to interpretation that will vary with each interpreter's viewpoint. In other words, neither I nor anyone else can achieve a definitive summary of the essays or the judgments they embody.

What I think I might be able to contribute in these concluding paragraphs is an appreciation of one particularly controversial feature of this very controversial report, a feature that seems to me insufficiently addressed by the essayists either individually or collectively. That feature is the report's inclusion of observations about Israel's behavior in all of the Occupied Territories (a description, to be sure, the government of Israel rejects[1]) and of Israeli policy more generally in responding to asymmetrical threats. Since Goldstone's mandate was to inquire into alleged violations of human rights and humanitarian law *in the Gaza conflict,* inclusion of observations about anything else was said to be gratuitous and, because gratuitous, evidence of a desire to cast Israel in the worst light possible and to advance the Palestinian political agenda. I believe this criticism is unjustified and is based on a failure to comprehend the methodological difficulties that a commission of inquiry like the Goldstone one faces in the aftermath of an armed conflict, particularly where one party refuses to cooperate.

I approach this issue from the experience acquired during the eight years that I served as a member of the Inter-American Commission on Human Rights of the Organization of American States.[2] During those years (1976–1983), the commission conducted on-site inquiries into the general condition of human

rights in Latin American countries marked by various levels of insurgent action against the established governments, many of which were highly repressive. In the case of Nicaragua, we arrived within days of the Somoza government's violent suppression of uprisings in almost all of the country's urban areas. Under pressure from the United States and other Western Hemisphere governments, the Somoza regime notionally allowed us to try to collect evidence in any way we desired. But it did not conceal its hostility and we had no hope of securing access, for example, to evidence of the rules of engagement actually employed by government forces, much less communications between officers in the field and the head of state. Neither did we have a realistic chance of securing candid and freely volunteered testimony from military officers or other government officials. The same difficulties attended our visits to countries like Argentina, Guatemala, and El Salvador.

As a result we, like the Goldstone Mission, had to rely on the testimony of victims, of nongovernmental organizations (NGOs), occasionally of independent religious personnel like the Jesuits, diplomats from reliable countries, and, occasionally, representatives of intergovernmental organizations. They were not under oath. In the end our conclusions rested on circumstantial evidence, importantly including historical circumstances and our assessment of the credibility of people with whom we spoke, including government officials rigorously denying or rationalizing the alleged violations, none of whom were subject to cross-examination by an adverse party.[3] In other words, our reports rarely rested on evidence that would have sufficed to support conviction in an ordinary criminal trial. Yet in retrospect, it is clear that our findings of summary execution, torture, and other grave crimes committed as a matter of high policy by officials of the relevant governments were accurate, as impartial observers generally perceived them to be at the time.

Among the circumstances we took into account was the particular regime's general pattern of behavior over time. For instance, in a case like Guatemala, a society in which police and military were conspicuously present everywhere but particularly in the capital, the government's consistent failure to identify, much less punish, the perpetrators of numerous atrocities committed against political dissidents would have led any reasonable person to believe that government officials were themselves the perpetrators. And so when looking into recent atrocities, it was reasonable to assume regime delinquency unless and until the government demonstrated that, for once, it was not responsible.

Prior behavior is generally not admitted into ordinarily criminal proceedings in developed countries, not because it is logically irrelevant, but on the contrary because it is so highly persuasive. Its exclusion reflects a policy of favoring the criminal defendant confronted with the immensity of state power. In other words, it is a way of executing the presumption of innocence. The reason for (or one might say the value behind) that presumption does not apply where the state is, as it were, in the dock because the state has ample power to

rebut erroneous charges. Its accusers, the members of investigative commissions or human rights NGOs without the authority to compel the production of evidence, are in fact the relatively weak party. Their credibility lies in the persuasiveness of their reports. And in order to be credible in the face of their weakness vis-à-vis the governments they are investigating, they must deploy all of the evidence that could persuade reasonable people.

Hence, had I been a member of the Goldstone Mission trying to decide whether it was more likely than not that at best the Israeli military showed a callous disregard for the lives and postattack well-being of Palestinian noncombatants, I would certainly have looked to previous instances of Israeli retaliation for violent acts by nongovernmental groups against Israeli soldiers or civilians. Such acts include the 2006 devastation of Shia neighborhoods in Beirut and even much earlier cases like the 1953 retaliatory mission against the Jordanian border village of Qibya where a unit of the Israel Defense Forces (IDF), executing an order from the government to undertake "'destruction and maximum killing,' moved methodically through the village firing blindly through windows and doorways and blowing up houses."[4] Faced with international outrage, even from the United States, Prime Minister Ben Gurion called the attribution of responsibility to the IDF "absurd and fantastic" and insisted that a rigorous investigation had established that no unit of the force had left its base on the night of the attack, and further declared that the atrocity had been carried out by settlers furious over attacks on them by Palestinians operating out of Jordan.[5] And of course, I would invoke the 1982 insertion of Christian militia (notable for their brutality) into Palestinian refugee camps where they rampaged while Israeli forces under Gen. Ariel Sharon controlled the perimeter.

I would also point to an Israeli elite attitude toward Palestinian nationalism that has remained impressively constant for more than a century. Before Israel was founded, Vladimir Jabotinsky, the ideological forebear of the present Likud Party, wrote that the Palestinian Arab's "instinctive patriotism . . . cannot be bought . . . it can only be cured by . . . *force majeure*."[6] In 2003, the IDF's then chief of staff, Lt. Gen. Moshe Ya'alon, spoke of the need to "seer deep into the consciousness of Palestinians that they are a defeated people."

In addition, I would not overlook the means employed by the Israeli government to repress the first intifada in which most young Palestinians resisted occupation with stones, not bombs and guns. At an early point in this first large-scale resistance to the occupation, the distinguished Israeli author, Amos Alon, wrote:

> More than ninety Palestinians have died so far. . . . Most were shot; twenty-one are said to have died by asphyxiation by tear gas (including three babies less than seven months old, a boy of twelve, and one man a hundred years old). Seven are said to have died as a result of beatings (including one fourteen year-old boy and a man aged 60). . . . Hundreds have been wounded and beaten up by truncheon-yielding troops who follow orders that are at best

> confused and at worst downright brutal. . . . The hospitals in Gaza and elsewhere are filled with youngsters suffering from broken arms or legs, or both. . . . Yet in three months of uprising the rioters have not fired a single shot.[7]

That was in 1988. By 1991, more than 700 Palestinians had been killed and many thousands wounded. Of those killed, close to 150 were age sixteen or younger. Amnesty International USA reported that about 35 were less than twelve years old.[8]

Finally, I would have noted that the uniform historical consequence of colonial occupation is the brutalization of the occupier and the elaboration of a justificatory narrative that includes the dangerousness and barbarism of the dominated. Progressive brutalization is equally an incident of prolonged counterinsurgency campaigns.

I would then have concluded that the pattern of Israeli behavior, doctrine, and strategic thought over the years, together with the universal phenomenon of colonial brutalization, in conjunction with the testimony gathered by the Goldstone Mission and the observed ruins of nonmilitary targets like hospitals, schools, Gaza's only flour mill, and other parts of the essential civilian infrastructure, combined with the large number of noncombatant casualties compared to the handful of casualties among the Israeli forces that entered Gaza (implying a command decision to use standoff force—artillery, mortars, rockets, and bombs—wherever possible and free-fire zones to minimize casualties to those forces), justified a presumption both of intent to punish the civilian population and of ruthless indifference to civilian casualties.

Israel could overcome that presumption by establishing an independent commission of its own, a commission that at least includes internationally distinguished figures in the defense of human rights, with the power to compel testimony, with full access to communications between government officials and between senior commanders and junior officers in the field. After scrupulously investigating the various incidents detailed by the Goldstone Mission, such an Israeli commission might possibly conclude that the mayhem experienced by the civilian population of Gaza was reasonably incidental to operations against military targets of sufficient importance to justify their secondary effects.

However, exculpation of Israeli behavior would also have to answer convincingly two claims: The first, developed by Richard Falk in his essay, is that the rocket attacks could have been ended without recourse to intense violence by ending the blockade of Gaza and entering into a formal truce with Hamas. And second, is that lethal force is an absolute last resort where the threat to law and order, in this case the rockets from Gaza, occurs within territory under the government's de facto control. If you conclude, as I do, that Gaza remains the equivalent of a prison camp from which, for reasons of efficiency, the guards have withdrawn to the periphery, then the last-resort rule would apply in this case.

Debate, often virulent, about the Gaza conflict and the Goldstone Report will doubtless continue.

Notes

1. For a brief discussion of the Israeli government's position, see Tom Farer, *Confronting Global Terrorism and American Neo-conservatism: The Framework of a Liberal Grand Strategy* (New York: Oxford University Press, 2006), pp. 196–198.

2. During two of those years, I served as its president.

3. We, of course, examined individuals and circumstantial evidence as critically as possible.

4. Benny Morris, *Righteous Victims* (New York: Alfred A. Knopf, 1999), p. 278.

5. Ibid., p. 279.

6. Ibid., p. 108.

7. Amos Elon, "From the Uprising," *New York Review of Books,* 14 April 1988, p. 1.

8. See Tom Farer, "Israel's Unlawful Occupation," *Foreign Policy,* no. 82 (Spring 1991): 37, 44–47.