



## REVIEW ESSAY

# THE GOLDSTONE REPORT WITHOUT GOLDSTONE

RICHARD FALK

**The Goldstone Report: The Legacy of the Landmark Investigation of the Gaza Conflict**, edited by Adam Horowitz, Lizzy Ratner, and Philip Weiss. New York: Nation Books, 2011. vii + 426 pages. Index to p. 449. \$18.95 paper.

FINALLY, the reading public has been provided with an edited text that makes possible a comprehensive understanding of the Goldstone Report (GR)—the investigation commissioned by the United Nations Human Rights Council (UNHRC) into war crimes allegations arising from the Gaza war (2008–09)—and the controversy that followed its release. Given the near certainty that no further official action will result from the report, without such a book the GR could well be removed to the vast graveyard of excellent UN reports prepared at great expense and effort, but which rarely see the light of day unless one is prepared to embark on a digital journey of frustration and discovery to track down the text and its necessary context online. Yet the GR, however discredited thanks to the tireless efforts of Israel and the United States, is a milestone in a number of ways, not least because its authoritative demonstration of the lawlessness of Israel's behavior in these attacks helps us understand why, at this stage of the conflict, the Palestinian struggle needs to rely on non-violent soft power coercion, as by way of the Boycott, Divestment, and Sanctions.

The present volume, edited by Adam Horowitz, Lizzy Ratner, and Philip Weiss, offers not only substantial excerpts of the main body of the report, but also eleven solicited essays by expert commentators holding a range of views as well as an illuminating timeline of relevant events. All in all, the editors of *The Goldstone Report* have made an exemplary contribution to the ideal of an informed citizenship so crucial to the responsible functioning of a democratic society.

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### THE FRAMING OF THE GOLDSTONE REPORT

After media coverage of the Gaza carnage made Palestinian vulnerability visible to the world, widespread allegations of Israeli wrongdoing, accompanied by calls for investigations and accountability, created pressures on the United Nations to act. Like other international initiatives with potentially detrimental consequences for Israel, the inquiry into Israeli conduct in Gaza was opposed by Western nations and supported by most of the rest of the world. This should not be surprising: the establishment of Israel never enjoyed much support in the non-Western world. Israel was seen as a colonial project that led to the massive dispossession of its resident population, an undertaking radically at odds with the overall ethos of self-determination that gradually came to dominate global public reason in the aftermath of World War II. The victimization of the Jewish people under Nazi rule, climaxing in the Holocaust, was and is regarded in the non-Western world as a European problem that should have been resolved in Europe rather than via a kind of geopolitical outsourcing that shifted a burden of immense suffering to the Arab population of historic Palestine. Despite the passage of time, this historical backdrop for the Israel/Palestine conflict has never been forgotten by much of the world, though it has been mostly ignored by Europe and North America. In recent years, however, the pro-Israel consensus in the West has become subject to increasing criticism both from political realists worried about the adverse foreign policy consequences for the United States arising from its unconditional support for Israel and its regional priorities, and from a younger generation of Jewish Americans appalled by Israel's treatment of the Palestinians.<sup>1</sup>

Particularly in the last decade, Israel further alienated world opinion by its stubborn refusal to end its occupation of the Palestinian territories it captured during the 1967 war. Over time, Israel's unwillingness to comply with the UN Security Council's unanimous Resolution 242 calling for its withdrawal and the countless follow-up resolutions, its relentless expansion of unlawful settlements, and its various refusals to implement the Oslo framework have raised serious doubts as to whether the United States has the capability, or even the will, to produce a peaceful and just outcome to the conflict. In his perceptive essay in this volume, Rashid Khalidi insists that the public perception of the conflict is changing in the United States, and that growing sympathy with the Palestinian people explains both the GR's commissioning and reception. "The Goldstone Report could not have been written, and would have had little effect, as recently as a decade ago," he writes. "The fact that it had such an impact reflects how the report is both a product of an evolving consciousness and a vital contribution to it."<sup>2</sup>

The buildup of international antagonism toward Israel intensified in response to two major events during the last five years: Israel's indiscriminate bombing of Lebanese villages and southern Beirut from 12 July to 14 August 2006 (referred to approvingly by then-U.S. secretary of state Condoleezza

Rice as signaling “the birth pangs of a new Middle East”), and its massive land, sea, and air attacks on a helpless Gaza from 27 December 2008 to 18 January 2009, codenamed Operation Cast Lead (OCL) by the Israeli Ministry of Defense.<sup>3</sup>

The GR was a response to the UN’s broadly endorsed call for an investigation into the allegations of war crimes committed by the Israel Defense Forces (IDF) against Gaza’s civilian population during the three-week-long OCL. The UN fact-finding mission was authorized on 12 January 2009, while the Gaza attacks were still ongoing, but it was not until 3 April 2009 that the president of the UNHRC was able officially to announce its formation. The delay of almost three months was caused by the difficulty in finding someone to chair the mission who was not only sufficiently well known, qualified, and eminent, but also willing to accept an assignment likely to provoke the barrage of denunciations that is Israel’s habitual response to criticisms of its conduct. Some of those approached for the job initially expressed willingness to accept, but later withdrew after intense Israeli and U.S. pressure.

To his credit, Richard Goldstone was not intimidated by Israel’s open hostility to the investigation, including its defiant refusal to cooperate (in keeping with its obligations as a UN member). Goldstone refused to accept the role of chair unless the mission’s original mandate as set forth by the UNHRC was broadened to allow investigation of allegations against Hamas as well.<sup>4</sup> The demand seemed consistent with best practices relative to internationally credible war crimes investigations, but given the extreme one-sidedness of the warfare in the Gaza instance, as evidenced by the lopsided (100:1) casualty totals, other considerations could have been contemplated. For instance, it would seem to follow from this one-sidedness that a similar lack of symmetry in assigning responsibility for criminal wrongdoing might be the only fair way to process allegations against the parties.<sup>5</sup>

### PERSONALIZING THE GOLDSTONE REPORT

Throughout his notable international career as a jurist involved in the prosecution of war crimes, Goldstone had always exhibited sensitivity to the political dimensions of international criminal law.<sup>6</sup> This quality was especially visible when he served as the first prosecutor of the ad hoc International Criminal Tribunal for Former Yugoslavia (1994–96), and it seems safe to assume that he believed his reputation for looking at the crimes of both sides, as exemplified in his insistence on including Hamas within the mission’s purview, together with his long record of ideological and personal attachments to the State of Israel, would insulate him somewhat from incurring Israel’s wrath when the report, with its predictably severe criticisms of Israeli practices during OCL, was finally released. If this was indeed his expectation, he was sadly mistaken.

There was always something rather disturbing about identifying the UNHRC fact-finding mission on the Gaza war so exclusively with its chair.

One reason for this identification was probably that the typically opaque and cumbersome official UN name, *Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, was unusable in public discourse. More importantly, however, the degree of attention paid to the person of Goldstone reflected the media's unwillingness to resist the temptation of utilizing his known identity as a prominent Jew and an eminent international jurist to draw attention to a high-profile inquiry into controversial Israeli practices. Critics of Israel also seized upon Goldstone's long history as a Zionist and friend of Israel to lend additional credibility to the findings of the report, which, as seemed inevitable, would be highly critical.

As it turned out, personalizing the report cut both ways. Identifying the mission's findings as the "Goldstone Report" undoubtedly increased its notoriety, but for that very reason it also raised Israeli fury to unprecedented heights of denunciation and damage control the minute the report was officially released on 24 September 2009. Indeed, within twenty-four hours Israel issued a lengthy "initial response" to the massive (more than 2,000-page) document. None of the damning reports of Israeli military conduct during the attacks from the perspective of international humanitarian law issued in the meantime by such respected organizations as Human Rights Watch, Amnesty International, B'Tselem, the Association for Civil Rights in Israel, and others (including an excellent comprehensive report commissioned by the Arab League produced by a fact-finding team led by the jurist John Dugard) had merited more than passing protest.

The "initial response," amplified in the final response issued by Israel, excoriated the mission as politically motivated, one-sided, intended to instigate a campaign against Israel, having engaged in inappropriate conduct during the investigation, and so on; Goldstone himself, accused of partisanship, figured prominently in the denunciation. Yuval Diskin, the head of Shin Bet, reportedly warned Palestinian Authority president Mahmud Abbas that if he did not support the U.S.-led move to defer the UNHRC's consideration of the report to a later time, the West Bank would face a "second Gaza."<sup>7</sup> Israeli prime minister Benjamin Netanyahu exhibited another variant of rhetorical overkill when he told the Knesset, "There are three primary threats facing us today: the nuclear threat, the missile threat, and what I call the Goldstone threat."<sup>8</sup>

So we must ask ourselves, "What's in a name?" The answer in this case is: quite a lot. Goldstone had earlier chaired the Independent International Commission on Kosovo. The policy debate at that time focused on NATO's role and tactics in the Kosovo war, and notably whether force should be used to protect a vulnerable population from severe abuse without authorization from the UN Security Council. In the Kosovo case, however, there was no motivation within the international community to devote special attention

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to the chair as a way to avoid responding to the substance of the report, and its findings were known simply as *The Kosovo Report*. The treatment of the GR, by contrast, is the poster child of a tactical process I have called “the politics of deflection,” which Israel has long practiced with skill and intensity and which consists of shifting attention from the substance of criticism to the person of the critic or the supposed bias of the auspices. Known in Hebrew as *hasbara*, in this instance it has had the intended effect of focusing most mainstream commentary on the vilification of Goldstone and the arguments mounted in his defense, rather than on the well-supported principal allegations relating to IDF attacks on civilian targets and infrastructure and prohibited use of weapons.

One of the contributions to the volume under review is relevant here. The American feminist Letty Cottin Pogrebin, observing that “the attack dogs couldn’t kill the messenger but they could tear him to pieces,” responds to the attacks on Goldstone’s person from a sophisticated Jewish perspective. After reciting the long list of his professional achievements and positive connections to the State of Israel, she treats him as “not just any Jew,” but “an exemplary one.” The main burden of her essay is to argue that “the smear campaign against Goldstone, appalling enough in human terms, should be condemned on specifically *Jewish* grounds,” which she then goes on to do herself with knowledge and insight.<sup>9</sup>

At this point, one cannot help wondering whether the smear campaign did not achieve some of its goals by inducing Goldstone to publish his partial retraction in a stand-alone journalistic piece. Such a result is clearly a personal tragedy for such a distinguished international civil servant, especially as the retraction is not persuasive on its merits, and, as might have been predicted, deeply disappointed his supporters while failing to satisfy his critics.

### THE GOLDSTONE RETRACTION

More than eighteen months after the GR was released—and after Israel and the United States had already largely succeeded in making its recommendations on accountability inoperative—Goldstone, in a startling move, directly contributed to the campaign to discredit the report of which he was the lead author. On 1 April 2011, he published an op-ed in the *Washington Post* explaining that he no longer supported his mission’s finding that Israel had deliberately struck at civilian targets.<sup>10</sup> Not surprisingly, Goldstone’s partial retraction was immediately seized upon by Congress to repudiate the “libelous report” in its totality, demanding that it be declared null and void by UN action. Another resolution several days later instructed the White House to arrange for the UN to denounce the GR or face a defunding backlash in Congress, which indeed has come to pass.

For the U.S. media and Congress, to associate a retraction made by Goldstone alone with the mission he headed as a whole was even more disingenuous than the initial confusion between Goldstone and the report. After



all, these were collective undertakings: the UNHRC had appointed three other members of equal standing to Goldstone as qualified experts to the mission and authors of the report. Goldstone himself fed the flames of the misapprehension by stating at the beginning of his retraction, “If I had known then what I know now, the Goldstone Report would have been a different document,” which seems to imply that he dictated the final contents—a dubious claim that at best cannot be confirmed. Goldstone went on to explain that new information not available during the investigations made him question the central finding that Israel had intentionally targeted Palestinian civilians during the Gaza attacks. Did he share this new information with his coauthors? Did he somehow imagine that he was speaking for them as well, or that he could delegate to himself such authority? Did he solicit their opinions or seek their support for the retraction?

It is not necessary to question Goldstone’s sincerity or motivations to note that his opinion about a report once officially released has no formal weight. In this instance, it cast no additional serious doubt on the GR’s conclusions and recommendations, although it did give some fresh red meat to the original detractors of the report while stiffening the will of its supporters throughout the world to pursue the issue of accountability as strenuously as possible outside the geopolitically controlled corridors of diplomacy, including at the United Nations.

Whatever considerations may have impelled him to write his retraction, the posture Goldstone struck was definitely weakened for everyone but pro-Israeli partisans by its tone, and even more by the refusal of his colleagues to join him in this acrobatic maneuver to distance himself from the report. It was irresponsible of Goldstone not to make clear to readers that he was speaking for himself alone. In fact, none of the other three members of the fact-finding mission found whatever subsequent information may have come their way sufficiently relevant to make them believe that their earlier findings and recommendations rested on misleading evidence and should now be repudiated. Instead of calling the GR into question, they issued the rather extraordinary joint statement reaffirming that “there is no justification for any demand or expectation for reconsideration of the report as nothing of substance has appeared that would in any way change the context, findings, or conclusions of the report with respect to any of the parties to the Gaza conflict.”<sup>11</sup> It is indicative of U.S. mainstream media bias that the challenge to the Goldstone retraction received no comparable coverage (and mostly none at all), while the obviously flawed retraction had been widely and misleadingly interpreted in that same media as an authoritative repudiation of the report. Of course, had Goldstone framed his retraction in personal terms indicating its limited relevance to the report as issued, it would not have served the cause of Israel support groups nearly as well.

As noted above, well before the Goldstone retraction, the geopolitical muscle of the U.S. government had already succeeded in neutralizing efforts within UN circles to push for the implementation of the report’s central

recommendation that if Israel and Hamas failed to take sufficient action on their own to investigate allegations and punish perpetrators, the UN via the Security Council should turn the case over to the prosecutor of the International Criminal Court for further action. If this failed, the GR encouraged national criminal courts to rely on the principles of universal jurisdiction to prosecute alleged high-profile perpetrators of war crimes during OCL. The realities of UN politics are presently such that although Israel and its supporters often cannot prevent the UN from launching investigations of serious allegations of international law violations (such as arose in connection with OCL or the 2010 flotilla incident), up to now they have been able to stymie any implementation involving the establishment and activation of accountability mechanisms.

#### COMMENTARY ON THE GOLDSTONE REPORT

The eleven essays by expert commentators—which constitute approximately one-third of the Horowitz, Ratner, and Weiss edited volume—appraise the GR, discuss strategies of implementation, and (though written before Goldstone’s retraction) consider the controversy the report generated. The range of views is intended to fall within the domain of responsible debate, and thereby excludes apologists for Israel of the Dershowitz ilk. By prefacing the text of *The Goldstone Report* with partisan introductory statements by Archbishop Desmond Tutu and Naomi Klein, the editors clearly align themselves with the findings of the report and its supporters.<sup>12</sup> Tutu, long a venerable critic of Israel with exemplary moral credentials, calls the GR “a solemn attempt” to get at truth with respect to the war crimes allegations, and correctly identifies as “its most important recommendation” the call for accountability of those credibly alleged to be responsible for the commission of war crimes and crimes against humanity. “It is only through accountability, and its attendant promise, justice,” he writes, “that we can begin moving toward a future in which both the violence of the invaders and the violence of resistance come to an end.”<sup>13</sup> In a similar vein, Naomi Klein, a fearless and knowledgeable voice of progressive opinion on a wide range of public issues, calls the GR “a serious, fair-minded, and extremely disturbing document—which is precisely why the Israeli strategy since its publication has been to talk about pretty much everything except the substance of the report.”<sup>14</sup>

Placed after the documentary materials, the commentaries in this volume for the most part are critical both of Israel’s conduct during the war and its response to the GR. With one exception, they are generally sympathetic with the GR’s conclusions and recommendations, although they tend to approach it as unremarkable in its substantive analysis and findings. This sentiment is most clearly articulated by Jules Lobel near the beginning of his chapter: “The Goldstone Report’s conclusions are neither new nor surprising, and echo those reached by numerous other human rights investigations into the Gaza war.”<sup>15</sup>



Most of the criticisms of the GR, by contrast, have come from those who support Israel both in the conflict and generally. I believe that some of these are worth serious discussion, but in a broader setting where Palestinian reservations about the GR are also given the serious attention I believe they deserve, but rarely receive. Even the writings in this volume, and indeed of almost all supporters of the GR, ignore the weaknesses and oversights of the report from a Palestinian perspective. The Israeli propaganda offensive has been so strong in its impacts that all energy by those sympathetic to the Palestinian position is devoted to defending the report, and few dare to make arguments to the effect that the GR is unfair in several serious respects to the Palestinian side.

For example, I believe the report fell short conceptually by its failure to examine more critically Israel's central claim that OCL should be understood as an exercise of Israel's right to defend itself.<sup>16</sup> The GR never examines the general validity of such a claim in relation either to Gaza or to the overall context in which the attacks occurred. This includes a cease-fire option as an alternative to war, which the GR does not consider even though a cease-fire had been effectively in place for several months until provocatively broken by Israel six weeks before it launched its all-out assault on Gaza.

Israel also refused to respond to Hamas offers of a long-term cease-fire in exchange for lifting the unlawful siege of Gaza imposed in mid-2007.<sup>17</sup> Here I agree completely with Henry Siegman, former director of the American Jewish Congress, who, alone in his brief but scathing essay in this volume, writes dismissively of Israel's self-defense claim: "It [Israel] could have met its obligation to protect its citizens by agreeing to ease the blockade, but it didn't even try. It cannot be said, therefore, that Israel launched its assault to protect its citizens from rockets. It did so to protect the continuation of its stranglehold of Gaza's population."<sup>18</sup> The GR never even raises the issue of whether Israeli security could not have been safeguarded by lifting the blockade. Also ignored is an appraisal of Tel Aviv's questionable contention that because Gaza was governed by a terrorist organization, diplomacy could have no role. Finally, the GR never explores—nor do any of the commentaries in this volume except for Siegman's brief aside—the issue of a legal entitlement to claim self-defense in relation to a territory subject to the rules of belligerent occupation.<sup>19</sup>

The one chapter in this volume that is harshly critical of the GR is by Moshe Halbertal, an Israeli philosopher, who considers the report "a terrible document" that leaves a society with no lawful means to defend itself effectively against a terrorist adversary. Halbertal's essay—though it sidesteps the issue both of whether OCL was an appropriate and necessary response in the concrete circumstances existing in December 2008 and whether there were less sanguinary alternatives—goes to the heart of the relevance of international law to what think tanks are now calling "asymmetrical warfare," that is, warfare between the military establishment of a sovereign state and the combatant resistance of a non-state adversary. In addressing the issue of the



legal balance to be struck in combat situations between respect for civilian innocence and military effectiveness, the GR established that the Israeli military tactics relied upon in OCL did not take reasonable steps to avoid targeting civilians and non-military sites. In other words, the GR finding, which confirms the prior NGO consensus, is that the discretion given to participants in warfare to use force in a manner reflecting “military necessity” (i.e., the use of capabilities needed to prevail on the battlefield) was grossly exceeded in OCL. The GR also concluded that the Hamas’s tactic of firing rockets at civilians and urban centers is intrinsically unlawful and criminal in that it served no acceptable military purpose.

Halbertal poses, from an Israeli perspective, issues grounded in the notion that hard power threats to Israeli security have shifted in recent years from the military establishments of Arab states to paramilitary organizations such as Hamas and Hizballah. The argument is significant from the perspective of the law of war. The general question he raises is how this form of “asymmetrical war” affects traditional law-of-war distinctions based on principles of proportionality and, especially, discrimination (as between military and non-military targets). His basic contention is that the goal of Hamas (and kindred entities) is to achieve a “momentous transformation” of the conflict “to create a war of all against all and everywhere.” Referring to Hamas’s launch of rockets from urban centers in Gaza to strike civilian populated areas in Israel,<sup>20</sup> he delimits the problem—which, he informs readers, he has addressed in his capacity as a consultant to the IDF—“as one of rules of engagement under these conditions.” He posits as the proper goal how Israel can “win the war while setting proper moral limits that have to be met while legitimately securing its citizens,” concluding that, given the way Hamas operates, the IDF’s only failures in OCL were of carelessness, not criminality. In effect, he is arguing for broadening the scope of permissible targeting, given combat conditions, in the name of military necessity.<sup>21</sup>

It is on the basis of this reasoning that Halbertal mounts his attack on the GR. He alleges that the report situated its findings “in a greatly distorted historical context, [making] it difficult for Israelis—even of the left, where I include myself—to take its findings seriously.” His main criticism revolves around the GR’s contention that the IDF deliberately targeted Gazan civilians in OCL (which incidentally is the conclusion that Goldstone repudiated in his retraction). In Halbertal’s carefully chosen words: “[T]here is a huge moral difference between the accusation that Israel did not do enough to minimize collateral civilian death and the claim that Israel targeted civilians intentionally.” He acknowledges that Israel should have responded to the allegations in a way that clarified the relevance of law in such conflicts so as to “establish the legitimacy of its self-defense in the next round.”<sup>22</sup> I believe Halbertal is on firm ground in seeking to contextualize the debate in light of the nature of the conflict, but on weak ground when he looks at “asymmetrical warfare” from the perspective of only one side of the barrier. In any event, it is unfortunate that the GR does not address the issues he raises so forcefully relating

to rules of engagement appropriate for violent conflicts between state and non-state actors.

Other issues that should have been addressed in the GR include the asymmetry of weaponry and whether an occupied people can be placed under siege, locked into a war zone during a period of intense combat operations, and attacked with modern weapons in such a massive and one-sided manner. Palestinian civilians, including women, children, and the disabled, were not allowed to leave Gaza during OCL, and the GR's failure to deal with such issues makes any discussion of reshaping Israeli rules of engagement unbalanced. What are the rights of armed resistance in the event of severe and sustained abuses by a belligerent occupier? Should there not be a legal obligation in international humanitarian law to provide civilians living under occupation with a place of sanctuary outside the war zone in a period of active combat?

I agree with Halbertal that it is artificial to analyze the legal issues without taking into better account the changing nature of warfare, but is it not equally artificial to analyze the rights of the parties without examining the context as it pertains to *both* sides in such a conflict? Are not today's paramilitary tactics, in part, a reaction to a kind of asymmetric warfare that long preceded the contemporary sense of state versus non-state? World War II was a war between states, but the use of the atomic bomb highlights the possibilities of gross asymmetries arising from technological superiority affecting the lawfulness of tactics in a supposedly *symmetrical* war. Its relevance here is to show, by vivid analogy, that compromises in lawful targeting in response to militias situating themselves in civilian areas must be accompanied by consideration of the way states claim the legal right to use violence against vulnerable civilian targets.

The GR can be faulted for failing to give sufficient attention to the serious daily plight of the Gazan people resulting from Israel's blockade of the Strip, which constitutes collective punishment violating Article 33 of the Fourth Geneva Convention. This, together with the report's failure, already mentioned, to take proper account of the 2008 cease-fire that cut cross-border violence almost to zero before being violated by Israel, suggests two remarks. First, that a diplomatic alternative to war apparently acceptable to Hamas might have existed by way of a renewed cease-fire coupled with ending the unlawful blockade. Second, that this cease-fire option was never explored by Israel prior to launching its attack, which meant that Israel resorted to war *before* all plausible peaceful alternatives had been tried, a requirement of the UN Charter; it bears emphasis that international law prohibits unilateral resort to force in all situations except self-defense against an armed attack across borders. In this regard, the GR also failed to consider whether a self-defense claim is ever appropriate for an occupying power charged by international humanitarian law to protect, as a primary duty, the occupied civilian population. Such a duty should have at least reinforced the general obligation to exhaust all peaceful alternatives before resorting to force.



## THE GOLDSTONE REPORT AND THE ROLE OF CIVIL SOCIETY

When Netanyahu invoked “the Goldstone threat” in his December 2009 Knesset speech, he probably had in mind Israel’s losing battle in the ongoing legitimacy war that increasingly dominates the latest phase of the Palestinian struggle.<sup>23</sup> Indeed, the PA itself has been losing out to Palestinian activists and NGOs in the competition to represent and wage the Palestinian struggle. Fueled by the deterioration in Israel’s public image that served as background to the GR, the trend has since continued, notably with Israel’s brutal attacks in international waters on the six ships, known as the Freedom Flotilla, carrying humanitarian assistance to Gaza on 31 May 2010. The attack, which resulted in the death of nine activists on the lead ship, the Turkish *Mavi Marmara*, led to a diplomatic confrontation with Turkey, the only state in the region that had genuinely befriended Israel in the past. Israel’s unlawful blockade of Gaza again became world news in July 2011 when frantic Israeli strong-arm tactics, supported by the U.S. government and the UN secretary-general, succeeded in preventing the Freedom Flotilla 2, consisting of twelve vessels flying the flags of many European countries, from ever leaving their ports.

These developments, along with the Arab Spring, have had a profound impact both on the global Palestinian Solidarity Movement (PSM) and on the Palestinian struggle more generally. Above all, there has been a sea change

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from a focus on intergovernmental channels of statecraft to the activist potentialities of global civil society. A principal expression of this shift was that the previously rather inconsequential Boycott, Divestment, and Sanctions Campaign (BDS)—whose central tenet is the pursuit of coercive nonviolent actions harmful to Israel until Palestinian rights are realized and Israel complies with international law—suddenly took off.

It has since become a robust challenge worldwide to the legitimacy of Israeli policies toward Palestinian concerns, primarily in relation to the occupation but more broadly with regard to denying Palestinian rights under international law, including with regard to the refugee issue. This new face of the Palestinian struggle has given new prominence to the symbolic battlefields of legitimacy in terms of the moral and legal high ground in the conflict.

One of the themes of the volume, most directly addressed in the excellent essay by Ali Abunimah, is precisely the extent to which the GR’s political and moral impact should be understood primarily as a reinforcement of civil society militancy on behalf of the Palestinian struggle. In effect, though the GR was issued by the UN—which essentially, as an organization of sovereign states, is subject to geopolitical constraints—its implementation to the extent that it occurs depends on an enhanced BDS campaign and on the mobilization of humanitarian activists engaged in initiatives such as the Freedom Flotillas. Naomi Klein also considers the GR to be “a powerful tool” for the BDS movement.



Beyond this, as several of the contributors make clear, the GR is important in the central battlefield of the legitimacy war being waged by the PSM for the realization of Palestinian rights under international law. Noam Sheizaf, an Israeli journalist, provides an illuminating sketch of Israeli political reactions to the GR in his essay, "Israel's Siege Mentality." In passing, it is worth noting the irony that while Israel imposes a cruel behavioral siege on the people of Gaza, its own people feel victimized by a psychological siege arising from the sense of encirclement by hostile states. According to Sheizaf, Israeli responses to the GR have become signifiers of loyalty: "Reject it [the GR], and you are with us, listen to it, acknowledge it, and you are against us. . . . That's all that matters now." Summarizing the dominant forces in Israel, Sheizaf writes: "Realizing that they are unable to win over international public opinion, they direct their anger and frustration against human rights organizations, peace activists, and members of the Palestinian minority. More and more often, criticism of government policy is perceived as an attack on Zionism, and even as pure anti-Semitism."<sup>24</sup>

According to Israeli polls, 90 percent of the Jewish public thought the GR was biased, and 80 percent believed that "there were no war crimes in Gaza." From this perspective, it is not surprising that Israel's right-wing politics turned hostile attention to its own domestic human rights organizations, despite their scrupulous efforts to give Israel the benefit of the doubt on issues of intentionality and their self-imposed limitation of assessing only the *conduct* of hostilities without ever questioning the decision to launch the hostilities. In the eyes of the Israeli mainstream, the main offense of the Israeli NGOs (B'Tselem, Breaking the Silence, the Association for Civil Rights in Israel) was providing some of the factual underpinnings for the GR's findings through their careful collection and assembling of data. Underlying this response to the GR is the rightward drift of Israeli politics and the rising influence of extremist religious parties in the country.

A major objective of the campaign by the Israeli government and its civil society supporters (spearheaded by Human Rights Monitor) is to discredit and disempower these human rights NGOs by challenging the propriety of their international funding and seeking to make such funding unlawful. The U.S.-based New Israel Fund was a target, especially since it was seen as providing support to those Israeli NGOs that the GR relied upon for facts and evidence. Ironically, both the New Israel Fund and the most respected of these human rights NGOs are staunch opponents of the BDS campaign on the (unpersuasive) grounds that BDS (supposedly in a manner equivalent to violent Palestinian resistance) is politically ineffective and inflammatory. Given the circumstances of prolonged occupation, documenting human rights and international law violations by the IDF while at the same time recommending Palestinian passivity in the face of Israeli lawlessness amounts to prescribing the surrender of fundamental Palestinian rights. It is a politically incoherent liberal display of conscience. While the work of these Israeli human rights NGOs is admirable, they should also be criticized for opposing the few

nonviolent opportunities available to the Palestinians to carry on their just struggle and justifiable resistance.

### THE LEGACY OF THE GOLDSTONE REPORT

The notable testimonies and assessments are what make this volume so valuable for anyone seriously interested in the substantive issues associated with Israeli accountability, the extraordinary controversy generated by the GR, and the impact—past, present, and future—of its findings and recommendations. I found each chapter well worth reading and pondering. The volume also constitutes an excellent teaching tool for undergraduate courses in disciplines concerned with the relations between law, morality, and war.

In continuing their commitment to broadening understanding of the issues touched upon in the book, two of the editors, Weiss and Horowitz, have made impressive use of their high quality blog designed to encourage lively civil discourse pertaining to all aspects of the Israel/Palestine conflict, including an obvious effort to keep the GR alive as part of their engagement with its legacy. The volume, together with the blog, makes the GR into a process of reflection on the evolving complex character of the Israel/Palestine conflict, and not just as an event frozen in time.

As is often the case with serious books, the real rationale of this publication is disclosed in the subtitle: “The Legacy of the Landmark Investigation of the Gaza Conflict.” As to depicting the legacy of the GR, I believe a tentative answer is now possible. Despite the feverish and largely effective efforts by Israel and the United States to sideline the GR, allegedly so that the so-called peace process could move forward, the hope for a quick burial was disappointed because the GR provides a vital tool for the deepening campaign in global civil society to challenge the legitimacy of Israeli policies.<sup>25</sup> It is this challenge that apparently now worries Israeli leaders more than armed Palestinian resistance and helps explain why, after the report was released, Goldstone was perceived in Zionist circles more like a traitor than just another hostile critic or politically supine civil servant coddling irresponsible UN majorities. Goldstone’s main “crime” in Israeli eyes was to give ammunition to the growing legion of Israel’s delegitimizers. Meanwhile, the UN is likely to remain gridlocked, with no further notable steps toward implementation of the report’s recommendations; Israel will continue to seek punitive responses against those seen as enemies in the legitimacy war. As for global civil society, as constituted by BDS, the Freedom Flotillas, and other initiatives, it will view the GR as an enduring vindication of nonviolent transnational activism in support of the Palestinian struggle for self-determination and rights under international law.

Do the editors claim too much by calling the GR a “landmark investigation”? I think not. It will remain for years to come a reference point for any UN-initiated investigation of war crimes, both as an indication of the political potential of such a credible confirmation of allegations, and as a stimulus for



unleashing vicious propaganda assaults. In this sense, part of the GR's significance is as a precedent for international challenges directed at wartime tactics, including those relied upon by a state like Israel that enjoys powerful geopolitical backing. The legacy could have been even greater had the GR ventured into the problematic terrain associated with Israel's claims to act defensively and the overall contention that the constraints of international humanitarian law must be relaxed with regard to state parties in the context of asymmetric urban warfare.

Finally, the GR illustrates the recent prominence of "lawfare" in Israel's legitimacy war, both as a major resource for the side compelled by its military inferiority to rely on soft-power tactics, and as an irritant to the militarily superior side bent on resolving the conflict violently on the conventional military battlefields where it possesses a decisive advantage.<sup>26</sup> Lawfare is best known for its role in right-wing pro-Israel responses to what is depicted as the delegitimization campaign against Israel, of which the GR is the most prominent example to date.<sup>27</sup> If considered more neutrally, lawfare in recent political discourse has been employed both positively and negatively as a complaint about, and as a tactic in, the conduct of a legitimacy war. As a complaint, it refers to efforts by a militarily weak side to disable the strong side's reliance on force through allegations of war crimes and threats of recourse to tribunals. As a tactic, it refers to the strategic use of law to delegitimize the behavior and claims of an opponent, which is one way of understanding the GR as a UN initiative. The GR's recommendation that national courts entertain claims based on universal jurisdiction in the event that criminal accountability for accused Israeli officials is not achieved by self-enforcement within Israel or by recourse to the International Criminal Court is another use of this tactic.

## ENDNOTES

1. For the realist critique, see John Mearsheimer and Steven Walt, *The Israel Lobby and U.S. Foreign Policy* (New York: Farrar, Straus and Giroux, 2007); for the moralist critique, see Peter Beinart, "The Failure of the American Jewish Establishment," *New York Review of Books*, 10 June 2010, <http://www.nybooks.com/articles/archives/2010/jun/10/failure-american-jewish-establishment/?pagination=false&printpage=true>.

2. Rashid Khalidi, "Palestinian Dispossession and the U.S. Public Sphere," in *The Goldstone Report: The Legacy of the Landmark Investigation of the Gaza Conflict*, ed. Adam Horowitz, Lizzy Ratner, and Philip Weiss (New York: Nations Books, 2011), p. 376.

3. The terminology used to describe the Gaza attacks was highly contested. The book sidesteps the issue by referring to "the Gaza conflict," the anodyne term used as a title for the report itself. Other critics bristled at the use of "conflict" or "war" for such an unequal engagement, preferring words such as "massacre" or "onslaught." "Operation Cast Lead," the Israeli military code name, was used by both Israeli sources and critics. The most elaborate effort at legal rationalization is that of Alan Dershowitz, "The Case Against the Goldstone Report: A Study in Evidentiary Bias," <http://www.alandershowitz.com/goldstone.pdf>. For additional citations of apologists for Israel's conduct and harsh critics of the GR, see Jerome Slater's chapter in this volume,

"The Attack on the Goldstone Report" pp. 360–68, especially note 2.

4. Mary Robinson, former high commissioner for human rights and president of Ireland, declined the invitation to head the commission on these very grounds, but did not, as did Goldstone, seek a broadening of its mandate.

5. See Raji Sourani's "The Right to Live in Dignity" in *The Goldstone Report* pp. 329–30 for an accurate enumeration of the casualties. The generally accepted figures on deaths put the Palestinian total at 1,419 (of which 82 percent are estimated to have been civilians by accepted definitions) and the Israeli total at thirteen (of which six were as a result of friendly fire). Even these comparisons understate Palestinian losses, as the number of wounded and traumatized is not included, nor is the large amount of property damage and the devastation of Gaza's infrastructure. See also casualty figures in timeline entry for 17 January 2009 in *The Goldstone Report* pp. xxviii–xxix.

6. A citizen of South Africa, Goldstone, after seventeen years as a commercial lawyer, was appointed by his government as a judge of the Transvaal Supreme Courts (1980–89), as a judge on the Appellate Division of the Supreme Court of South Africa (1990–94), and finally in 1994 as a member of South Africa's highest court in the post-apartheid era, the Constitutional Court of South Africa, where he remained until retiring in 2003. As a member of the Independent International Commission on Kosovo, I had firsthand experience of Goldstone's keen awareness of and pragmatic response to the political sensitivities involved in that setting.

7. Akiva Eldar, "Diskin to Abbas: Defer UN Vote on Goldstone or Face 'Second Gaza,'" *Ha'Aretz*, 17 January 2010, <http://www.haaretz.com/print-edition/news/diskin-to-abbas-defer-un-vote-on-goldstone-or-face-second-gaza-1.261541>.

8. Benjamin Netanyahu, Excerpts from PM Netanyahu's speech at the Knesset Special Session, Israel Ministry of Foreign Affairs, 23 December 2009. <http://www.mfa.gov.il/MFA/Government/Speeches+by+Israeli+leaders/2009/PM-Netanyahu-addresses-%20Knesset-Special-Session-23-Dec-2009>.

9. Letty Cottin Pogrebin, "The Unholy Assault on Richard Goldstone,"

in Horowitz, Ratner, and Weiss, *The Goldstone Report*, pp. 409–416.

10. Richard Goldstone, "Reconsidering the Goldstone Report on Israel and War Crimes," *Washington Post*, 1 April 2011, [http://www.washingtonpost.com/opinions/reconsidering-the-goldstone-report-on-israel-and-war-crimes/2011/04/01/AFg111JC\\_story.html](http://www.washingtonpost.com/opinions/reconsidering-the-goldstone-report-on-israel-and-war-crimes/2011/04/01/AFg111JC_story.html).

11. Hina Jilani, Christine Chinkin, and Desmond Travers, "Goldstone Report: Statement Issued by Members of UN Mission on Gaza War," *Guardian*, 14 April 2011.

12. Two of the editors, Philip Weiss and Adam Horowitz, have a blog that, in their words, is "devoted to covering American foreign policy in the Middle East, chiefly from a progressive Jewish perspective," and supports implementation of the GR. <http://mondoweiss.net/about-mondoweiss>.

13. Desmond Tutu, "A Call to the Community of Conscience," in Horowitz, Ratner, and Weiss, *The Goldstone Report*, pp. viii–ix.

14. Naomi Klein, "The End of Israeli Exceptionalism," in Horowitz, Ratner, and Weiss, *The Goldstone Report*, p. xiii.

15. Jules Lobel, "International Law and the Goldstone Report," in Horowitz, Ratner, and Weiss, *The Goldstone Report*, p. 337.

16. The GR uncritically accepts Israel's major premise of defensive necessity and devotes its attention to issues of proportionality and discrimination in the conduct of hostilities. Also unexamined is whether massive attacks on urban communities are the most effective way to address the alleged threat to security posed by the rocket attacks.

17. For a summary of these developments relating to a cease-fire, see relevant entries in the timeline in *The Goldstone Report* p. xxviii.

18. Henry Siegman, "Discrediting Goldstone, Delegitimizing Israel," in Horowitz, Ratner, and Weiss, *The Goldstone Report*, p. 390.

19. Although Jules Lobel discusses Israeli practices during the attacks in his contribution, he does not broach the legal arguments surrounding the *initiation* of the attack. See Lobel, "International Law and the Goldstone Report," p. 337.

20. There is an important irony here. Halbertal argues that Israel is inhibited

by international humanitarian law from responding to Hamas militants launching their rockets from sites embedded in civilian urban space, but ignores the other side of the retaliatory reality revealed by the 100:1 casualty ratio—namely, that Israel could decide how much death to inflict without fearing retaliation. Israel could have killed ten times more Palestinians without any adverse material consequences had it so desired, though the political backlash might have been greater. Thus, Halbertal's critique addresses only Israel's concerns and ignores Palestinian vulnerabilities as apparently irrelevant.

21. Moshe Halbertal, "The Goldstone Illusion," in Horowitz, Ratner, and Weiss, *The Goldstone Report*, pp. 347–48.

22. Halbertal, "The Goldstone Illusion," pp. 356, 359.

23. I have used the terminology "legitimacy war" to designate a political struggle in which the weaker side *militarily* seeks to prevail *politically* by relying, in varying degrees, on militant tactics designed to gain the moral and legal high ground, to influence public opinion, and to demoralize the opponent. Gandhi's movement against the British Empire in India is an exemplary instance, as is, more recently, the anti-apartheid campaign in South Africa.

24. Noam Sheizaf, "Israel's Siege Mentality," in Horowitz, Ratner, and Weiss, *The Goldstone Report*, p. 407.

25. This challenge is clearly expressed in several reports of the influential Israeli

think tank, the Reut Institute, closely connected to the government. See the Reut Web site at <http://reut-institute.org> and specifically, for example, "Eroding Israel's Legitimacy in the International Arena," 28 January 2010.

26. For an example of hostility to reliance on international criminal law from an ardent apologist for Israel, consider this comment by William Jacobson: "This is one of the legacies of the Goldstone Report. Allegations of war crimes simply have become a tool in the arsenal of the enemies of Israel, providing both international pressure and military advantage." The comment is revealing because it considers "law" to be purely a neutral "tool" of conflict without considering whether or not charges of unlawfulness are justified—a shocking outlook for anyone who believes that adherence to international law is a necessary precondition for a humane framework of global governance. See William A. Jacobson, "Richard Goldstone Confirms He Was a Useful Idiot," *Leg-al In-sur-rection* (blog), 2 April 2011, <http://legalinsurrection.com/2011/04/richard-goldstone-confirms-he-was-a-useful-idiot/>.

27. A typical Israeli critique of lawfare can be found in Anne Herzberg, "NGO 'Lawfare': Exploitation of Courts in the Israeli-Arab Conflict," 2nd Expanded ed., NGO Monitor Monograph Series 3, 9 December 2010, [http://www.ngomonitor.org/article/ngo\\_lawfare\\_exploitation\\_of\\_courts\\_in\\_the\\_israeli\\_arab\\_conflict](http://www.ngomonitor.org/article/ngo_lawfare_exploitation_of_courts_in_the_israeli_arab_conflict).



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