The Goldstone Report and International Law

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The march of politics under the banner of law

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The controversy over the "Report of the United Nations Fact Finding Mission on the Gaza Conflict"[1] (September 15, 2009), more commonly known as the Goldstone Report, seems to have died down. But its larger significance has yet to be appreciated. For the most part, the controversy has swirled around the reliability of the Goldstone Report's factual findings and the validity of its legal findings concerning Operation Cast Lead, which Israel launched on December 27, 2008, and concluded on January 18, 2009. But another and more far-reaching issue, which should be of great significance to those who take seriously the claims of international law to govern the conduct of war, has scarcely been noticed. And that pertains to the disregarding of fundamental norms and principles of international law by the United Nations Human Rights Council (hrc), which authorized the Goldstone Mission; by the Mission members, who produced the Goldstone Report; and by the hrc and the United Nations General Assembly (of which the hrc is a subsidiary organ), which endorsed the report's recommendations. Their conduct combines an exaltation of, and disrespect for, international law. It is driven by an ambition to shift authority over critical judgments about the conduct of war from states to international institutions. Among the most serious political consequences of this shift is the impairment of the ability of liberal democracies to deal lawfully and effectively with the complex and multifarious threats presented by transnational terrorists.

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Notwithstanding a veneer of equal interest in the unlawful conduct of both Israel and the Palestinians, the Goldstone Report — informally named after the head of the un Mission, Richard Goldstone, former judge of the Constitutional Court of South Africa and former prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda — overwhelmingly focused on allegations that in Operation Cast Lead Israel committed war crimes and crimes against humanity. The purpose of Israel's three-week operation was to substantially reduce the rocket and mortar fire that Hamas, long recognized by the United States and the European Union as a terrorist organization, had been unlawfully raining down upon civilian targets in southern Israel for eight years, and which Hamas had intensified after its bloody takeover of Gaza from the Palestinian Authority in 2007. While the Goldstone Report indicated that here and there Palestinian armed groups may have committed war crimes, it purported to find substantial evidence — based primarily on the testimony of Palestinians either affiliated with, or subject to, Hamas — that Israel had repeatedly violated international law by using disproportionate force. At its most incendiary, the Goldstone

Report purported to find solid evidence that Israel had committed crimes against humanity — among the gravest breaches of international law — by implementing a deliberate policy of terrorizing Palestinian civilians, both by targeting civilian noncombatants and destroying civilian infrastructure.

Israel has provided three major responses to the Goldstone Report. The most recent came from the Intelligence and Terrorism Information Center (itic), an Israeli ngo that works closely with the Israel Defense Forces (idf). In March 2010, the itic published and posted online a 349-page study, "Hamas and the Terrorist Threat from the Gaza Strip: The Main Findings of the Goldstone Report Versus the Factual Findings."[2] Like the two previously published accounts by the Israeli government of the country's continuing investigations of allegations of unlawful conduct committed by its armed forces during the three weeks of Operation Cast Lead — "The Operation in Gaza: Factual and Legal Aspects"[3] (July 29, 2009), and "Gaza Operation Investigations: An Update"[4] (January 29, 2010) — it garnered next to no attention in the press, from international human rights organizations, from the hrc, or from the General Assembly. Nor have the Goldstone Report's champions in the international human rights community or Judge Goldstone and his colleagues dealt seriously with the incisive criticisms published by scholars and journalists concerning both the report's factual findings[5] and legal findings.[6]

But the deeper issue for international law concerns the right and the responsibility of states to make lawful judgments, under the international law of armed conflict, about the conduct of war, including the crucial judgments in asymmetric warfare concerning what constitutes a proportional use of force. That issue cannot be resolved by showing that the Goldstone Report's findings of fact about the Gaza operation are severely biased, or by demonstrating that the report misapplied or misunderstood the test for determining whether Israel exercised force in a proportional manner, although such showings and demonstrations are highly relevant. Nor can it be resolved by bringing to light how the Goldstone Mission itself — as conceived and authorized by the Human Rights Council, carried out by Goldstone and his colleagues, and endorsed by the United Nations General Assembly — disregarded basic norms and principles of international law, even though this multifarious disregard of law is of great significance. In the end, whether nation-states or international authorities should have primary responsibility for enforcing the lawful conduct of war turns on conflicting opinions about armed conflict, politics, and justice. Even those many conservatives and progressives who share a commitment to the freedom and dignity of the individual may come to different conclusions grounded in conflicting opinions about the best means for securing individual rights while maintaining international order.

Authoritative sources in international law assign primary responsibility for judgments about whether war has been conducted in accordance with the law of armed conflict to the judicial and other relevant organs of nation-states. That assignment is rooted in the larger liberal tradition's teaching that nation-states — particularly those based on the consent of the governed and devoted to securing individual rights — are the best and most legitimate

means of securing peace, exercising authority over the individual, and preserving political freedom. That teaching is bound up with the view that states are likely to be more sober in assessing the actions of other states than international organizations because states must bear the burden of any proposed reform or rule. In contrast, the Goldstone Report and its supporters appear to be animated by the conviction that judgments about the lawful conduct of war are best and primarily vindicated by international institutions, because of their superior objectivity, impartiality, and expertise. And they have shown themselves willing to disregard international law as it is in order to remake it as they believe it should be. One reason to prefer the allocation of responsibilities in international law as it currently stands to the Goldstone Report's efforts to transform it are the report's stunning defects. They illustrate that those who are responsible for the operation of international institutions are no less subject to the passions and prejudices that thwart the impartial and objective administration of law than the government officials in civilized nations, and in some cases may be more subject to such passions and prejudices.

Israel's critique of the Goldstone Report

In july 2009, the Israeli foreign ministry published and posted online an analysis of the Gaza operation that was designed to rebut in advance the Goldstone Report's main charges, which would not be released until mid-September of that year. Prepared while Israel was still conducting preliminary field investigations into allegations of unlawful conduct by the idf, "The Operation in Gaza: Factual and Legal Aspects" covered numerous issues. The 159-page document emphasized Israel's right and obligation under international law to use military force to stop Hamas's bombardment of civilian targets in southern Israel with rockets and mortar shells — approximately 12,000 since 2000 and 3,000 in 2008 alone. It reported that by late 2008 Hamas had put one million Israeli civilians in range of its weapons and had assembled armed forces of more than 20,000. It described the considerable efforts Israel undertook, in accordance with the un Charter, to bring international pressure to bear on Hamas, "including urgent appeals to the un Secretary General and successive Presidents of the Security Council to take determined action, and diplomatic overtures, directly and through intermediaries, to stop the violence." It reaffirmed Israel's adherence to the law of armed conflict and human rights law and explained that, under a proper understanding of both as well as of Hamas's systematic use of human shields and relentless blurring of the distinction between civilians and combatants, Israel's military operation in Gaza was a proportionate response. It provided clear evidence, including photographs and video, that, in flagrant violation of international law, Hamas deliberately engaged in "the launching of rocket attacks from within densely populated areas near schools and protected un facilities, the commandeering of hospitals as bases of operations and ambulances for transport, the storage of weapons in mosques, and the booby-trapping of entire civilian neighbourhoods so that an attack on one structure would devastate many others." It reviewed the extensive and unprecedented precautions the idf took to minimize noncombatant casualties — including making hundreds of thousands of phone calls to Gaza residents to warn of impending air

strikes — against an adversary that placed civilians in the line of fire as part of a coldly calculated military strategy. It summarized the steps the idf took during the three-week conflict to ensure the daily delivery of humanitarian supplies to the civilian population. It acknowledged that "the Gaza Operation resulted in many civilian deaths and injuries and significant damage to public and private property in Gaza." And it reported that the idf was conducting field investigations into accusations of unlawful conduct; detailed Israel's extensive and well-established system of military justice of which those investigations were the first stage; and reaffirmed Israel's right and responsibility under international law to investigate accusations that its military had acted unlawfully and, where appropriate, prosecute and punish.

"The Operation in Gaza: Factual and Legal Aspects" fell on deaf ears, including those of the Goldstone Mission. While complaining that the Israeli government refused to cooperate with its investigation, the Goldstone Report virtually ignored Israel's 159-page official statement, packed with critical facts and pertinent legal analysis and available online to all the world.[7]

The second major official statement by the Israeli government, "Gaza Operation Investigations: An Update" (January 29, 2010), was prepared in response to a request from un Secretary General Ban Ki-Moon.[8] A good part of the 46-page document sketched Israel's military justice system and the role of the Attorney General's Office and the Supreme Court in overseeing it; how complaints of unlawful conduct in war in Israel are brought; the role of the military advocate general in screening, reviewing, and referring cases; the conduct of command investigations, which evaluate the performance of forces in the field and which yield information relevant to unlawful conduct; the mechanics of criminal investigations and prosecutions; and the substantial similarity of Israel's multilayered system to those of the United Kingdom, United States, Australia, and Canada.[9] In passing, the update noted that "Under international law, the responsibility to investigate and prosecute alleged violations of the Law of Armed Conflict by a state's military forces falls first and foremost to that state."

In addition, the update indicated that the idf had launched 150 investigations arising out of the Gaza operation, 36 of which had been referred for criminal investigation in which "criminal investigators have taken evidence from almost 100 Palestinian complainants and witnesses, along with approximately 500 idf soldiers and commanders." For every one of the 34 allegations of harm to civilians or damage to civilian property discussed at length in the Goldstone Report, the idf had initiated an investigation — 22 of which the idf pursued before the report's publication, and twelve of which it promptly pursued after the report aired them.

While no judicial system is perfect, given the substantial similarity of Israel's system for investigating and prosecuting unlawful conduct in war to those of the United Kingdom, United States, Australia, and Canada, it is hard to see how any existing judicial system would be able to pass muster if Israel's were judged inadequate. Yet the Goldstone Report found Israel's inherently inadequate:

After reviewing Israel's system of investigation and prosecution of serious violations of human rights and humanitarian law, in particular of suspected war crimes and crimes against humanity, the Mission found major structural flaws that in its view make the system inconsistent with international standards.

The Goldstone Report reached this extraordinary conclusion without comparing the Israeli system with others, and well before Israel could possibly have made substantial progress in undertaking the investigations — involving not roped-off and locked-down crime scenes but in many cases battlefields in enemy territory — of the allegations that arose out of Operation Cast Lead.

The report's radical judgment might make sense on the supposition that since states are interested parties, their judicial systems should not be assigned responsibility by international law to investigate and prosecute war crimes, which involves them serving as judges in their own cause. In that case, however, the Goldstone Report's critique should have been directed not at Israel but at international law itself which, as it currently stands, primarily imposes that responsibility on states.

Instead, the Goldstone Report cultivates the appearance of applying international law while actually rejecting its imperatives and replacing them with its own. But it does not do so in an evenhanded fashion. Compounding its disregard for law, it evinces little interest in the capability or willingness of Hamas, the governing authority in Gaza, to enforce the law of armed conflict. Suffice it to say that Hamas has made no discernible progress in investigating and punishing war crimes connected to the Gaza conflict, which should not be a surprise since Hamas has no discernible system of military justice for discharging its obligation to do so. And, undermining their claims to be impartial and objective upholders of international law, neither the hrc nor the General Assembly nor the greater international human rights community seems particularly troubled by this additional failure on the part of Hamas to comply with its legal obligations.

Israel's January 2010 document also provided striking rebuttals of Goldstone Report factual findings:

- The Goldstone Report found that, in the absence of legitimate military objectives, Israel intentionally destroyed the Namar water-wells complex — including pumping machines, pipes, and civil-administration buildings — by air strikes to deprive Gaza's civilian population of clean drinking water. Israel's update, however, furnished photographic evidence demonstrating that the Namar water wells were located inside the walls of a Hamas military compound.

- The Goldstone Report found that Israel undertook a “deliberate and premeditated strike” to damage a vacated Gaza wastewater-treatment plant in the al-Sheikh Ejlin neighborhood to cause raw sewage to flow into and destroy farmland. Israel’s update, however, reported that the damage to the plant did not stem from a deliberate idf attack. The idf may have damaged the plant inadvertently during a battle with Hamas fighters, or Hamas fighters themselves may have attacked the plant to set loose sewage to hamper the movements of Israeli tanks operating in the area. But “there was no physical evidence or eyewitness testimony to support the conclusion of the Human Rights Council Fact-Finding Report.”
- The Goldstone Report found that Israel conducted an aerial strike on the el-Bader flour mill to deny Gaza’s civilian population the means of providing for their own sustenance and to render them more dependent on Israel. Israel’s update, however, pointed out that the Goldstone Report contains no evidence that the flour mill was struck from the air, that “photographs of the mill following the incident do not show structural damage consistent with an air attack,” and that the available evidence indicates the flour mill was struck by tank shells during combat operations.
- The Goldstone Report found that Israel destroyed the Abu-Askar family home despite its “unmistakably civilian nature.” Israel’s update, however, maintained that “due to its use as a large storage facility for weapons and ammunition, including Grad missiles, the house of Muhammad Abu-Askar was a legitimate military target.” It also emphasizes that because the idf issued warnings to the family to evacuate and delayed the attack until the night, when fewer civilians were present, no civilian casualties ensued.

These are by no means the only examples of Goldstone Report factual findings whose bases in fact are doubtful. Even a few such, however, call into the most serious question the reliability of all Goldstone Report factual findings.

And the unreliability of the report’s factual findings undercuts the validity of its legal findings. That’s because the factual findings are critical to judgments about the central legal questions addressed by the Goldstone Report, which concern whether Israel honored the master concepts of the law of armed conflict, the principle of distinction, and the principle of proportionality. The principle of distinction requires parties to a conflict to distinguish between civilian populations and combatants. The principle of proportionality restricts the use of force in armed conflict to the achievement of legitimate military objectives and requires that the force used be reasonably expected not to cause injury to civilians or damage to civilian objects that would be clearly excessive in relation to the anticipated military advantage. What constitutes a legitimate military objective, what constitutes reasonable expectations, and what constitutes clearly excessive injury to civilians or damage to civilian objects in relation to anticipated military advantage — indeed, what constitutes a civilian or civilian object in an age of asymmetric warfare — are intensely context-sensitive questions. They turn not only on the facts but on difficult military judgments about strategy and tactics. Whether Hamas

used water-wells, sewage treatment plants, flour mills, and residential homes, along with mosques, hospitals, and police officers, as part of its combat operations are factual questions bound up with questions about Hamas's strategy and tactics. Answering them accurately is crucial to determining whether Israel crafted a strategy and adopted tactics consistent with the principles of distinction and proportionality. To the extent that the Goldstone Report got the facts wrong and mischaracterized or downplayed Hamas's strategy and tactics — and the evidence is that it did this to an egregious extent — its legal findings must be rejected.

To be sure, in "Gaza Operation Investigations: An Update," the Israeli government sought to present its judicial system and wartime conduct in the best light, and to set forth the facts and read international law in a manner most favorable to its interests. Therefore, its accounts should be subject to intense public and professional scrutiny. Regrettably, the update has largely been ignored.

The March 2010 Intelligence and Terrorism Information Center study, "Hamas and the Terrorist Threat from the Gaza Strip," focuses on the comprehensive failure of the Goldstone Report to deal with Hamas as the governing authority of the Gaza Strip and as the main agent in Gaza undertaking terrorist operations against Israel. Indeed, except as a target of Israeli or Palestinian Authority violence, the Goldstone Report renders invisible Hamas and the other terrorist organizations operating in Gaza:

The Report does not refer to them as terrorist organizations, but rather calls them "Palestinian armed groups." By using such terminology, the Report ignores or at least obscures and minimizes the terrorist nature of the organizations which fire rockets at Israeli civilians (defined by the Report as a "war crime"). In fact, the Report does not deal with the nature of Hamas and the other terrorist organizations in the Gaza Strip at all. It does not mention Hamas' ideology (for example, the Hamas Charter, which advocates the destruction of the State of Israel), its overall strategy (the employment of terrorism and its consistent resistance to the peace process), the military infrastructure it constructed in the Gaza Strip, its radical Islamic nature, its use of force and occasional brutality in dealing with opponents (particularly Fatah), the process of enforced Islamization of the Gaza Strip, and the direction and support it receives from its headquarters in Damascus. The Report does not refer to Hamas and other organizations in the Gaza Strip as terrorist organizations, in complete contradiction to not only the Israeli but also the American and European Union positions, all of which have designated them, both their political and military wings, as terrorist organizations.

It is no surprise then that the Goldstone Report ignores or denies a host of related facts about Hamas crucial to the evaluation of the lawfulness of Israel's conduct in Operation Cast Lead. Among these are Hamas's systematic integration of its political administration and its

armed forces; Hamas's massive military buildup following Israel's total evacuation from the Gaza Strip in 2005, including Hamas's substantial increase in the number, range, and destructive power of its rockets; and the funding and arming of Hamas by Syria and Iran.

The Goldstone Report omits these facts critical to understanding Israel's operation while uncritically accepting Hamas's narrative about the cause of the conflict and Hamas's version of specific events during Operation Cast Lead. Indeed, the Goldstone Report goes so far as to assert that "In the framing of Israeli military objectives with regard to the Gaza operations, the concept of Hamas's 'supporting infrastructure' is particularly worrying as it appears to transform civilians and civilian objects into legitimate targets." That is a perverse inversion: The unlawful transformation of civilians and civilian objects into supporting infrastructure for violent jihad against Israel is, as the itic study shows at great length and with massive supporting evidence, a documentable and essential feature of Hamas's strategy.

Israel's lengthy preliminary July 2009 statement on the factual and legal aspects of Operation Cast Lead, its January 2009 update, and the extensively documented March 2010 itic study on Hamas terrorism discredit the Goldstone Report's factual and legal findings. But there is a larger and more fundamental problem. Under prevailing international law, the very Goldstone Mission lacked proper legal foundations.

Flawed legal foundations

The undertaking assigned to Goldstone and his colleagues by the United Nations Human Rights Council, the manner in which the Goldstone team carried out its mandate, and the General Assembly's endorsement of the Goldstone Report contravened underlying norms and explicit provisions of existing international law.

According to the Goldstone Report, the Goldstone Mission was established on April 3, 2009, by the president of the Human Rights Council

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.

This mandate laid the foundations for an improper arrogation of power in two respects. First, it led to the trampling not only by the Goldstone Report but also by the Human Rights Council and the General Assembly on the primary responsibility assigned by the un Charter to the Security Council: to deal with international peace and security. Second, it paved the way for the infringement not only by the Goldstone Report but, again, by the Human Rights Council and the General Assembly of the primary responsibility that multiple sources of international law accord to nation-states to investigate, prosecute, and punish unlawful

conduct in war. Both arrogations of power hindered the exercise by Israel of its right and impaired its ability to discharge its responsibility under international law to pursue war crimes allegations against its armed forces.

Consider first how the General Assembly, by means of the Goldstone Report and the Human Rights Council, subverted the division of powers established by the un Charter between it and the Security Council. In Article 24, the un Charter specifies that the Security Council has "primary responsibility for the maintenance of international peace and security." At the same time, the un Charter also reserves a limited role for the General Assembly in matters pertaining to international peace and security. Article 10 gives it generally wide latitude to discuss and make recommendations while also establishing a crucial limitation: "The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matter." Article 12 states the limitation clearly: "While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests."

Not all actions undertaken by the General Assembly in connection to the Gaza conflict contravened the UN Charter.

On January 8, 2009, in the midst of Operation Cast Lead, the Security Council, consistent with Article 24 of the un Charter, seized itself of the Gaza conflict. The Security Council, which continued to be seized of the Gaza Operation, never asked the General Assembly for its recommendations. Yet the Goldstone Report, authorized by the Human Rights Council and thus by its parent body, the General Assembly, not only presented factual findings and legal findings but also offered recommendations to members of the United Nations and the Security Council. And both the Human Rights Council and the General Assembly endorsed those recommendations. In doing so, they directly contravened Article 12 of the un Charter.

Not all actions undertaken by the General Assembly in connection to the Gaza conflict contravened the un Charter. For example, while the battle still raged, and after the Security Council seized itself of the conflict, the General Assembly seized itself of the matter, too. The full General Assembly urged the parties to heed Security Council resolution 1860 (the U.S. abstained), which called for ceasing of hostilities. No interference with Security Council primacy occurred, because the General Assembly made no recommendations; it simply affirmed the Security Council's resolution.

The same cannot be said of the Human Rights Council's initial intervention, which also took place while the battle still raged. Despite the absence of a request from the Security Council, the Human Rights Council, which as a creature of the General Assembly is, according to

well-established principles of international law, bound by the same rules as its parent, made definite recommendations in Resolution s-9/1 (January 12, 2009).[10] Among other things, it "Call[ed] for the immediate cessation of Israeli military attacks"; "Demand[ed] that the occupying Power, Israel, immediately withdraw its military forces from the occupied Gaza Strip"; "Demand[ed] that the occupying Power, Israel, stop the targeting of civilians and medical facilities and staff and the systematic destruction of the cultural heritage of the Palestinian people"; and, not least, "Decide[d] to dispatch an urgent, independent international fact-finding mission, to be appointed by the President of the Council, to investigate all violations of international human rights law and international humanitarian law by the occupying Power, Israel, against the Palestinian people throughout the Occupied Palestinian Territory, particularly in the occupied Gaza Strip, due to the current aggression, and calls upon Israel not to obstruct the process of investigation and to fully cooperate with the mission."[11] All of the Human Rights Council's demands for action by, and against, Israel conflicted with Article [12] of the un Charter.

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Other conflicts followed. In September 2009, the Goldstone Report itself contravened Article 12 with ten pages of aggressive recommendations. Among other things, it called for changes in Israel policy in the West Bank, in East Jerusalem, and in the detention of Palestinians; urged the un secretary general to submit the report to the Security Council; recommended that the Human Rights Council submit the report to the International Criminal Court (icc); and advised states around the world to invoke universal jurisdiction to initiate criminal investigations in their domestic courts. In its report of October 21, 2009, the Human Rights Council disregarded Article 12 by endorsing the Goldstone Report recommendations. And in its Resolution 64/10 of December 1, 2009, the General Assembly disregarded Article 12 by endorsing the hrc's endorsement of the Goldstone Report recommendations.[13]

Judge Goldstone has contended that the report avoided trespassing on Security Council prerogatives by declining to address the legality of Israel's decision to undertake the Gaza operation (jus ad bellum) and instead dealing only with the legality of the conduct of the operation (jus in bello). But concerning the central legal question that arises in asymmetric warfare, Judge Goldstone's distinction can't be sustained. That's because, as the failings of the Goldstone Report make abundantly clear, it is often impossible to properly assess the proportionality of any particular exercise of force in asymmetric warfare absent an understanding of the complex circumstances that justified the use of force in the first place.

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Admittedly, the division of powers established by the un Charter does not appear to have had much impact in recent years on General Assembly practice. The General Assembly and its subsidiaries routinely make recommendations regarding matters of which the Security Council has declared itself seized but concerning which the Security Council has not requested General Assembly recommendations. Accordingly, one might argue that the Security Council's failure to protest arrogation by the General Assembly and its subsidiaries of its prerogatives has rendered Article 12 a dead letter. Indeed, according to the International Court of Justice's (icj) advisory opinion, "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory" (2004), the "interpretation of Article 12 has evolved," and "the accepted practice of the General Assembly, as it has evolved, is consistent with Article 12, paragraph 1, of the Charter."[14] The icj opinion also notes, "It is often the case that, while the Security Council has tended to focus on the aspects of such matters related to international peace and security, the General Assembly has taken a broader view, considering also their humanitarian, social and economic aspects."

Even if the icj opinion were sound, it could not be fairly said that the Goldstone Report restricted itself to the "humanitarian, social and economic" aspects of Israel's Gaza Operation. Indeed, its mandate directed it not only "to investigate all violations of international human rights" but also all violations of "international humanitarian law," an unfortunately confusing term for the international law of armed conflict. A further problem with this line of argument is that with a little ingenuity and a lot of brazenness all of the conduct of war can be subsumed under its humanitarian, social, and economic aspects. This was illustrated by the president of the General Assembly's 63rd session, on January 15, 2009. In opening the 32nd Plenary Meeting of the 10th Emergency Special Session on the "Illegal Israeli Actions in Occupied East Jerusalem and the Rest of the Occupied Palestinian Territory," he contended that because Security Council resolution 1860 failed to address the humanitarian and economic crises brought about by the Gaza fighting and border restrictions it was incumbent upon the General Assembly to achieve a ceasefire and unimpeded humanitarian access.[15] Under such a theory, since in war civilians inevitably suffer humanitarian, social, and economic harms, even where entirely unintended, the General Assembly will always have the prerogative to intervene in matters of international peace and security regardless of Security Council actions or requests.

To the extent that Security Council acquiescence to General Assembly usurpation has rendered Article 12 irrelevant, and the icj and the General Assembly have redefined war in terms of its humanitarian, social, and economic aspects, the Security Council's role as the international body with "primary responsibility for the maintenance of international peace and security" has been significantly diminished. Indeed, these changes threaten to leave the system of collective security established by the un Charter dysfunctional.

National courts can be found disinclined or incompetent to carry out their duties under international law.

Even if the Human Rights Council and the General Assembly were not barred by the division of powers established by the un Charter from making recommendations about the Gaza conflict while the Security Council was seized of it and absent a request from the Security Council, there would still be sufficient reason to conclude that the Goldstone Report conflicted with the requirements of international law. The second set of reasons flows out of a principle of deference to national courts that is inscribed in a variety of authoritative international law sources. According to this principle of deference, or presumption of competence, in the first instance it is the responsibility of nation-states themselves to carry out investigations concerning allegations of war crimes and to prosecute and punish where warranted. Of course deference is not a blank check and the presumption is rebuttable: National courts can be found disinclined or incompetent to carry out their responsibilities under international law. Nevertheless, the principle of deference, rooted in the United Nations Charter, the Geneva Conventions and customary international law, and the statute governing the iccnbsp;creates a substantial protected sphere for the operation of domestic legal systems. The Goldstone Mission contravened the principle of deference.

Article 2 of the un Charter declares:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

One of the critical matters that international law places within the domestic jurisdiction of states is primary responsibility for the investigation and prosecution of war crimes. Article 146 of the Fourth Geneva Convention is a key legal source for this right and responsibility:

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

In all circumstances, the accused persons shall benefit by safeguards of proper trial and defense, which shall not be less favourable than those provided by Article 105 and those

following of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949.[16]
To be sure, Article 146 articulates a general obligation binding on all High Contracting Parties, not just on parties to a conflict. But it was understood at the time of the drafting and has been recognized in foreign relations law since that priority goes to the states accused and the states aggrieved. This is in line with common sense: Those accused of grave breaches, particularly members of standing armed forces, are most likely to be in the territory of an accused or aggrieved state.

This understanding comports with International Committee of the Red Cross (icrc) commentary on Article 146:

The obligation on the High Contracting Parties to search for persons accused to have committed grave breaches imposes an active duty on them. As soon as a Contracting Party realizes that there is on its territory a person who has committed such a breach, its duty is to ensure that the person concerned is arrested and prosecuted with all speed. The necessary police action should be taken spontaneously, therefore, not merely in pursuance of a request from another State. The court proceedings should be carried out in a uniform manner whatever the nationality of the accused. Nationals, friends, enemies, all should be subject to the same rules of procedure and judged by the same courts. There is therefore no question of setting up special tribunals to try war criminals of enemy nationality.[17]
States' active duty to search for war crimes perpetrators on their territory confirms the special role that accused and aggrieved states have under Article 146 to launch investigations, pursue suspects, make arrests, undertake prosecutions, and impose punishments.

Yet in the Gaza conflict, the General Assembly and its subsidiary, the Human Rights Council, showed no deference to Israel's right and responsibility to deal with war crimes. Indeed, by prematurely authorizing an investigation even before the guns fell silent in Gaza, the Human Rights Council cast dark aspersions on Israel's system of military justice and civilian oversight. And then well before Israel could reasonably have completed preliminary investigations of war crimes allegations, let alone initiated criminal trials, the Goldstone Report produced factual and legal findings that all but pronounced idf commanders and soldiers guilty of war crimes and crimes against humanity. This struck at the independence of Israel's judicial system and interfered with its ability to discharge its Article 146 active duty. For how could the Israeli system provide a fair trial to defendants who, thanks to the Goldstone Report and its swift endorsement by the Human Rights Council and the General Assembly, were already convicted in the court of international public opinion?

Furthermore, the Goldstone Report's recommendation that the Security Council refer Israel to the International Criminal Court in the event that Israel did not comply with the report's specific demands showed a misunderstanding of the icc's role. That misunderstanding is of special interest because it revolves around the very principle of deference to national courts over which the Goldstone Report rides roughshod.

The Rome Statute, which established the icc, confirms the primacy that international law assigns to states to handle war crimes accusations. Article 17 lays out what has come to be called the “complementarity principle.” It provides that a condition for the admissibility of a case is that “the State is unwilling or unable genuinely to carry out the investigation or prosecution.”[18] The principle of deference is also built into the severe restrictions on the crimes that the icc is authorized to handle. The icc does not exist to prosecute every crime that happens in wartime. It is reserved only for the most heinous and enormous, the kind of crimes, that is, whose very commission implies that state courts are unable or unwilling to investigate or prosecute.

The Human Rights Council cast dark aspersions on Israel’s system of military justice and civilian oversight.

In a February 2006 letter explaining his decision to decline the many requests to investigate war crimes allegations against coalition troops in Iraq, icc prosecutor Luis Moreno-Ocampo stressed that the scale of the alleged crimes was critical.[19] tiate an investigation a case must meet both a specific and general gravity standard. The specific standard involves crimes committed “as part of a plan or policy or as part of a large-scale commission of such crimes.” The general standard requires that the magnitude of the crime be of surpassing scale. Ocampo found no evidence that the alleged crimes committed by coalition forces in Iraq were part of any plan or policy, so they failed to meet the specific gravity standard. He further observed that the cases the icc had accepted involved the willful killing of hundreds of thousands of people, large-scale sexual violence and abductions, and the displacement of millions. The alleged misconduct in Iraq did not belong in the same class: “The number of potential victims of crimes within the jurisdiction of the Court in this situation — 4< to 12 victims of willful killing and a limited number of victims of inhuman treatment — was of a different order than the number of victims found in other situations under investigation or analysis by the Office.” Thus the criminal allegations concerning coalition forces in Iraq didn’t meet the general gravity standard either. Therefore, Ocampo concluded that the charges were inadmissible for prosecution by the icc.

Like the principle of complementarity, the gravity standard reflects the primacy international law attaches to the right and responsibility of states to investigate and prosecute war crimes. It does this by creating an exceedingly high hurdle for icc intervention. The case that the Goldstone Report makes against Israel does not come close to clearing it. The report does accuse Israel of deliberately seeking to terrorize the Palestinian population — which, if true, would meet the specific gravity standard for admissibility. However, even if the Goldstone Report had not relied on a few stray remarks from Israeli officials, none of whom had responsibility for the idf’s strategy or tactics, and even if the report had not failed to examine the actual rules of engagement given by Israeli commanders to their troops, and had somehow met the specific gravity standard, it would still not have met the span class="smallcaps">icc’s general gravity standard. What is decisive is that while the number of civilian deaths for which the Goldstone Report found Israel responsible was considerably

larger — in the hundreds — than the number involved in the complaints against coalition forces in Iraq, the number of deaths was nevertheless of a different order than those, as Ocampo explained in his letter on military operations in Iraq, that are necessary to meet the icc's general gravity standard.

Because the allegations against Israel failed to meet the icc's general gravity standard, the Goldstone Report's recommendation that the Security Council refer the matter to the icc was without merit. In pressing those recommendations, the report not only displayed an ignorance or indifference to the law under which the icc operates. It also, and again, demonstrated its obliviousness to the right and responsibility of states to deal, in the first instance, with war crimes accusations.

Ocampo's reasoning in his Iraq letter about the narrow limits within which the icc was designed to operate is in line with his general views about the presumption in international law that states are the appropriate initial authority for handling most criminal investigations and prosecutions. In his statement at his swearing in on June 16, 2003, he emphasized the principle of deference to national courts:

The Court is complementary to national systems. This means that whenever there is genuine State action, the Court cannot and will not intervene.

But States not only have the right, but also the primary responsibility to prevent, control and prosecute atrocities. Complementarity protects national sovereignty and at the same time promotes state action.

The effectiveness of the International Criminal Court should not be measured by the number of cases that reach it. On the contrary, complementarity implies that the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success.

For this reason, the first task of the Office of the Prosecutor will be to establish links with prosecutors and judges from all over the world.

They continue to bear primary responsibility for investigating and prosecuting the crimes within the jurisdiction of the Court, and we are confident that they will make every effort to carry out their duties.

We wish to interact with them in order to establish a network of national and international prosecutors who will co-operate with each other and develop the ability to function together.[20]

One could hardly wish for a clearer statement from a better positioned authority affirming the primacy that international law accords to states to investigate and prosecute, unlawful conduct in war committed on their territory. By failing to appreciate this primacy, the

Goldstone Mission infringed on Israel's rights, interfered with its responsibilities, and contravened fundamental norms and principles of international law.

The only relevant cases where international authorities were given the power to preempt local prosecutions were the ad hoc tribunals for the former Yugoslavia and Rwanda, established in the 1990s in the midst of internal conflict and civic breakdown under conditions in which the normal presumption in favor of domestic accountability may seem to have been reversed. But those tribunals, for which Judge Goldstone served as prosecutor, are better seen as clarifying the limits to the deference international law grants to national courts. The International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda dealt with situations in which civil war and massive killing either overwhelmed the ability or demonstrated the unwillingness of national governments to undertake the impartial, independent, and diligent investigations and prosecutions of war crimes prescribed by international law. But in contrast to war-torn former Yugoslavia and genocide-ravaged Rwanda, Israel possesses a judicial system, as any impartial and objective review would show, that compares favorably to the most admired judicial systems in the world.

The report's recommendation that the Security Council refer the matter to the ICC was without merit.

The flawed legal foundations of the Goldstone Report do not imply that international institutions were obliged to sit on the sidelines until Israel had completed its investigations and prosecutions arising out of Operation Cast Lead. For example, the icrc's contribution respected Israel's rights and responsibilities as a sovereign state. In the summer of 2009, the icrc submitted a confidential report to the government of Israel — it involved no recommendations to other international bodies and neither sought nor had any impact on international public opinion. It was not intended to accomplish anything other than to provide information to enable Israel to better carry out its active duty under international law to investigate and prosecute war crimes connected to the Gaza operation.

Had it proceeded in the spirit of the icrc, the Human Rights Council too might have played a lawful and constructive role in the months following the conclusion of the Gaza conflict. It might have, for example, appointed a task force to review the complex and multi-layered judicial system that Israel has established for the investigation and prosecution of war crimes. A competent review would have included a comparison of Israel's system with that of other nations. And a lawful review would have involved submission of a confidential report to Israel that identified where the country's judicial system fell short of international standards as reflected in best practices around the world — as opposed to failing to live up to an entirely idealized system of international criminal justice. This would have respected Israel's rights, and aided Israel in complying with its responsibilities, under international law.

How little the majority of members of the Human Rights Council actually care about the impartial and objective application of international law and the protection of human rights was shown in May 2009, less than two months after the hrchad authorized the Goldstone Mission. Sri Lanka had just defeated the Tamil Tigers in their 25-year war. un officials estimated that in its advance into the Tamil north the Sri Lankan army killed more than 10,000 civilians, with some estimates at the time going as high as 20,000 and current estimates reaching 30,000. Credible reports indicated that government forces herded civilians into a “no fire” zone in the north and then shelled it. Cell phone video, which the top un envoy in Sri Lanka considered genuine, showed government forces executing naked and bound captives. The government was directly linked to hundreds of disappearances, and held approximately 300,000 civilians in poor conditions in detention camps. Nevertheless, the Human Rights Council rejected a draft resolution that deplored the actions of both sides, and which called for an independent investigation. Instead, on May 28, 2009, less than two months after authorizing the Goldstone Report, the Human Rights Council passed resolution s-11/1, which “reaffirm[ed]” the un Charter’s “principle of non-interference in matters that are essentially within the domestic jurisdiction of States.”[21] The only condemnation the resolution offered was directed at the defeated Tamil Tigers. The Sri Lankan government received nothing but encouragement from the Human Rights Council for its conduct. Eight months later, in January of 2010, after being reelected as president of Sri Lanka (with votes primarily from those of his own ethnicity), President Mahinda Rajapaksa declared that his victory proved that his government had committed no war crimes, and that no investigation, internal or otherwise, was needed. The United Nations Human Rights Council could see no reason to disagree.[22]

Who judges?

The united nations Human Rights Council is a travesty. A majority of its members appear to take only the most cynical view of international law, conceiving of it as a tool for punishing their enemies and rewarding their friends, and regarding Israel as the most odious of their enemies and the principal threat to international order.

But it would be a mistake to conclude from the hrc’s abuse of Israel and the flawed legal foundations of the Goldstone Report that the Western international human rights lawyers, professors of law, and intellectuals who have uncritically championed the Goldstone Report’s findings and endorsed its recommendations hold a cynical view of international law. On the contrary, many supporters of the Goldstone Report are animated by an idealized understanding of international law according to which it crystallizes humanity’s considered judgments about morality and war, and an idealized understanding of international institutions according to which the men and women who operate them embody a form of transnational or global governance that operates above the fray of nation-state power politics. To advance the cause of international peace and global justice, they therefore

maintain, critical judgments about the lawful conduct of war — including the crucial question in asymmetric warfare of what constitutes a proportional use of force — should be taken out of the hands of nation-states and placed in those of international institutions.

Many are blinded to the Goldstone Report's grave flaws by the higher cause they believe it serves.

These men and women are blinded to the Goldstone Report's grave flaws by the higher cause they believe it serves. Indeed, the scandal of the Goldstone Report — which includes both its grave flaws and the blindness to them of many international human rights lawyers — gives good reasons, certainly for liberal democracies with well-developed judicial systems, to wish to preserve the right and primary responsibility of states, inscribed in authoritative sources of international law, to adjudicate the difficult questions that arise under the international law of armed conflict.

The worthy ambition to hold perpetrators accountable for unlawful conduct in war must not be allowed to obscure the obstacles to designing international institutions capable of impartially and objectively crafting, adjudicating, and enforcing the law of armed conflict. These include the emergence of a transnational elite with interests and ambitions of its own; the lack among international organizations' officials and staff of the benefits of democratic accountability and national security responsibility for the rules they seek to make and implement governing the conduct of war; the domination of the General Assembly by authoritarian states; and the absence in many cases of agreed upon authority for adjudicating and enforcing international law. Until these obstacles are overcome — and we are a long way off — justice will be better served by preserving the right and primary responsibility of states to vindicate, through their judicial systems, the international law of armed conflict, especially when those states are established liberal democracies. International institutions should be reserved, as the principle of deference implies, as a judicial system of last resort.

Indeed, the revolution in international law that the Goldstone Report seeks to advance affects directly only a small number of countries, all liberal democracies. Russia, China, Iran, and the host of lesser authoritarian regimes around the globe pay little more than lip service to human rights and their obligations under the laws of armed conflict. Transnational terrorists openly scoff at such rights and obligations. Meanwhile, a substantial majority of the world's liberal democracies, whose commitments to individual freedom and human equality inculcate respect for human rights and the principles that undergird the international law of armed conflict, seldom take up arms. Few liberal democracies depend on a daily basis on their armed forces to defend their way of life. And paradoxically, while no armies in the history of warfare have devoted greater attention or energy than those of Israel and the United States to distinguishing and protecting civilians in warfare and ensuring that the force

they use in armed conflict is proportional to the threat faced, no armies today come under greater worldwide attack for violating the laws of war and human rights than those of Israel and the United States.

Few liberal democracies depend on a daily basis on their armed forces to defend their way of life.

Although Israel and the U.S. confront a common enemy, their strategic situations differ dramatically. Israel is tiny and faces an array of adversaries — to the immediate north Iran-sponsored Hizbullah and Iran-sponsored Syria; to the immediate south and immediate east Iran-sponsored Hamas; and a thousand miles to the east, but within Shahab III ballistic missile range, the Islamic Republic of Iran itself — that seek its destruction through violent jihad. It therefore maintains the region's most powerful military and a nuclear deterrent. Meanwhile, the United States remains the world's sole superpower and the only nation capable of projecting force anywhere in the world promptly and decisively. It is surrounded by friendly neighbors and vast oceans while shouldering responsibility for keeping open the world's sea lanes, ensuring safety in the skies, and generally serving as the chief law enforcement officer for the international political and economic order. And notwithstanding the Obama administration's awkward equivocations, the U.S. remains engaged in a protracted transnational struggle with the same forces of Islamic extremism that menace Israel.

Despite their common enemy, Israel and the U.S. stand in different relationships to the project, of which the Goldstone Report is one initiative, to expand the authority of international institutions to take primary responsibility for critical judgments about the lawful conduct of war. It is obviously in Israel's interest to oppose such a transfer of power to international bodies, which are stacked against it. And while Washington has provided indispensable support over the decades for Israel's security interests, it is just as easy to understand why the U.S., whose wealth, power, and Security Council veto insulate it from the machinations of the General Assembly and its subsidiary organs, might wish to downplay the matter.

But that is shortsighted. There is a danger that the spread of practices among international bodies and an accumulation of precedents concerning international law will weigh down the United States in the struggle that it shares with Israel and others to combat, in accordance with the law of armed conflict, transnational Islamic terrorism. Of course that will only happen if the U.S. recognizes such practices and precedents as authoritative. Encouragement to do so comes from powerful trends in American universities and law schools, where professors for going on a generation have been cultivating in their students the view, which animates the Goldstone Report, that critical judgments about the lawful conduct of war are indeed properly and in the first instance the province of international institutions.

That view is suited to a world in which all nation-states incline to peace and govern themselves in accordance with liberal and democratic principles. Unfortunately, that is not the world in which we live. Nor is it a world we can expect to emerge anytime soon.

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[1] Available at http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/docs/UNFFMGC_Report.pdf (this and all subsequent web links accessed July 19, 2010).

[2] Available at http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/pdf/g_report_e1.pdf

[3] Available at http://www.mfa.gov.il/NR/rdonlyres/E89E699D-A435-491B-B2D0-017675DAFEF7/0/GazaOperation.pdf

[4] Available at http://www.mfa.gov.il/NR/rdonlyres/8E841A98-1755-413D-A1D2-8B30F64022BE/0/GazaOperationInvestigationsUpdate.pdf

[5] See, for example, Alan Dershowitz, "The Case Against the Goldstone Report: A Study in Evidentiary Bias," available at http://www.alandershowitz.com/goldstone.pdf; Moshe Halbertal, "The Goldstone Illusion: What the un report gets wrong about Gaza — and war," New Republic (November 6, 2009), available at http://www.tnr.com/article/world/the-goldstone-illusion; "Opportunity Missed," Economist (September 17, 2009), available at http://goldstonereport.org/pro-and-con/critics/308-the-economist-opportunity-missed; Joshua Muravchik, "Goldstone; An Exegesis," World Affairs (May/June 2010), available at http://www.worldaffairsjournal.org/articles/2010-MayJune/full-Muravchik-Traub-MJ-2010.html; and Richard Landes "Goldstone's Gaza Report: Part One: A Failure of Intelligence," and "Goldstone Gaza Report: Part Two: A Miscarriage of Human Rights," Meria (December 2009), available at http://www.gloria-center.org/meria/2009/12/landes1.html and http://www.gloria-center.org/meria/2009/12/landes2.html.

[6] See, for example, Laurie R. Blank, "The Application of ihl in the Goldstone Report: A Critical Commentary," Yearbook of International Humanitarian Law 12 (2009), "Emory Public Law Research Paper No. 10-96," available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1596214; Asa Kasher, "Operation Cast Lead and the Ethics of Just War," available at http://www.goldstonereport.org/procedural-flaws/legal-reason-ing/378-asa-kasher-operation-cast-lead-and-the-ethics-of-just-war-azure; and Keith Pavlischek, "Proportionality in Warfare," New Atlantis (Spring 2010), available at http://www.thenewatlantis.com/publications/proportionality-in-warfare.

[7] Judge Goldstone contended that Israel's refusal to cooperate with his mission was the cause of "any omission" of "information and evidence" concerning "actions by Hamas or other Palestinians groups in Gaza." See his letter of October 29, 2009 (http://price.house.gov/news/pdf/Goldstone_letter.pdf), to Representative Howard Berman, chairman of the House Committee on Foreign Affairs, and Representative Ileana Ros-Lehtinen, ranking member of the House Committee on Foreign Affairs, in response to a U.S. House of Representatives draft resolution condemning the Goldstone Report (the Resolution was passed by a large majority on November 3). Judge Goldstone's contention is unpersuasive. Besides ignoring Israel's publicly available account, which detailed "actions by Hamas or other Palestinian groups in Gaza," Judge Goldstone and his colleagues also neglected publicly available material published by Hamas concerning its unlawful political ambitions and unlawful methods of war. Indeed, they are not a closely guarded secret. A good place to start is Hamas's 1988 Charter, also readily available online, http://avalon.law.yale.edu/20th_century/hamas.asp. It declares, among other things, that Hamas "strives" to "raise the banner of Allah over every inch of Palestine" (Article 6); "Allah is its target, the Prophet is its model, the Koran its constitution: Jihad is its path and death for the sake of Allah is the loftiest of its wishes" (Article 8); and "There is no solution for the Palestinian question except through Jihad" (Article 13)."

[8] The discussion of this document draws on Peter Berkowitz, "A Usurpation of National Sovereignty," National Review Online (February 10, 2010), available at http://article.nationalreview.com/424501/a-usurpation-of-national-sovereignty/peter-berkowitz.

[9] See "Gaza Operation Investigations: An Update."

[10] Available at http://domino.un.org/unispal.nsf/0/404e93e166533f828525754e00559e30.

[11] Mary Robinson, former president of Ireland and noted human rights champion, declined an early invitation to head such a Human Rights Council mission on the grounds that the hrc mandate referred only to violations by Israel and not also by Palestinians. Judge Goldstone frequently points out that he successfully sought a mandate that also included instructions to investigate unlawful conduct by Palestinians. Yet the evidence indicates that he and his colleagues carried out their investigation in the spirit of the original mandate.

[12] Available at http://domino.un.org/unispal.nsf/0/93c22cea660fa96e85257657004cf8e6.

[13] Available at http://domino.un.org/unispal.nsf/0/9cc062414581d038852576c10055b066.

[14] Available at http://www.icj-cij.org/docket/files/131/1677.pdf.

[15] Available at http://www.un.org/ga/president/63/statements/onpalestine150109.shtml.

[16] Available at http://www.icrc.org/ihl.nsf/9ac284404d38ed2bc1256311002afd89/6f96ee4c7d1e72cac12563cd0051c63a!OpenDocument.

[17] See the icrc commentary "Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949," available at http://www.icrc.org/ihl.nsf/COM/380-600168?OpenDocument.

[18] Available at http://untreaty.un.org/cod/icc/statute/romefra.htm.

[19] Available at http://www.icc-cpi.int/NR/rdonlyres/F596D08D-D810-43A2-99BB-B899B9C5BCD2/277422/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf.

[20] Available at http://www.iccnow.org/documents/MorenoOcampo16June03.pdf.

[21] Available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/11specialsession/S-11-1-Final- E.doc.

[22] On June 3, 2010, and more than a year since the hrc had formally pronounced its satisfaction with Sri Lanka's conduct, Philip Alston, special rapporteur on extrajudicial, summary, or arbitrary executions for the hrc, in presenting his annual report, called for an "independent international inquiry" into "allegations that as many as 30,000 persons were killed in Sri Lanka in the closing months of the conflict and that grave violations of human rights and humanitarian law were committed." At the same time, Alston called for an "independent international inquiry" into Israel's "attack on the humanitarian flotilla off Gaza," an attack that occurred only days before and in which Israeli commandos, in self defense, killed nine militants who were part of a mission to break Israel's lawful maritime blockade of Gaza.