

# The Goldstone Mess

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Peter Berkowitz on The Goldstone Report: The Legacy of the Landmark Investigation of the Gaza Conflict edited by Adam Horowitz, Lizzy Ratner, and Philip Weiss.

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Adam Horowitz, Lizzy Ratner, and Philip Weiss, editors. The Goldstone Report: The Legacy of the Landmark Investigation of the Gaza Conflict. Nation Books. 449 pages. \$18.95.

In the foreword, Desmond Tutu, archbishop emeritus of Cape Town, South Africa, declares that “The document at the center of this book, the report of the United Nations Fact-Finding Mission on the Gaza Conflict, better known as the Goldstone Report, is an historic attempt at seeking and speaking the truth.” According to Tutu, the Goldstone Report achieves this distinction through its impartial and intrepid examination of allegations of criminality arising out of Israel’s December 2008-January 2009 Gaza operation:

It takes on one of today’s most difficult conflicts, and does not blink but delves beneath the rubble of the three-week war to find evidence of human rights abuses. No side escapes the report’s censure. But the documented evidence of Israeli misconduct — of reckless, perhaps even deliberate, destruction of life and property — creates a portrait of stunning aggression. For these acts of aggression, the report accuses Israel of likely war crimes and crimes against humanity, and calls on it to look deep into the actions of its military and undertake its own investigation. It also accuses Hamas, the party governing Gaza, of likely war crimes and possible crimes against humanity for firing rockets into southern Israel, and urges it to investigate its actions as well.

Contrary to Tutu, however, even a cursory glance gives reason to believe that the Goldstone Report is more interested in taking sides than discovering the truth. While no side escapes the report’s censure and it does abound in evidence of destruction “of life and property” in Gaza, the report overwhelmingly focuses on allegations of Israeli unlawfulness; the “documented evidence of Israeli misconduct” — as opposed to victims’ testimony and unsubstantiated speculations about Israeli war aims and conduct of the war — is thin; and its urging of Hamas, which respects neither rights nor the rule of law, to undertake investigations of war crimes allegations is a risible indulgence.

Naomi Klein’s Introduction echoes Tutu’s Foreword and effectively conveys the book’s overall message. A columnist for the Nation and bestselling author of *The Shock Doctrine: The Rise of Disaster Capitalism*, Klein displays in her opening paragraph a crucial misconception on which that message, as well as the report, relies:

A sprawling crime scene. That is what Gaza felt like when I visited in the summer of 2009, six months after the Israeli attack. Evidence of criminality was everywhere — the homes and schools that lay in rubble, the walls burned pitch black by white phosphorous, the children’s bodies still unhealed for lack of medical care. But where were the police? Who was documenting these crimes, interviewing the witnesses, protecting the evidence from tampering? [emphasis added]

Before investigation — Israel was far from completing its own, the Goldstone Report had not yet been issued, and nobody seriously expected that Hamas would undertake a reputable investigation — Klein concluded from casual observation during a visit that took place six months after hostilities ended that Israel had committed war crimes.

Although she treats it as offering conclusive proof, the scene she confronted did not obviously present evidence of crime. Evidence of violence, destruction, and war, yes. Evidence of civilian suffering, to be sure. Evidence of human tragedy, no doubt. But evidence of crime?

To conclude on the basis of what she saw on her visit to Gaza that Israel had committed crimes, Klein would have had to equate violence, destruction, war, civilian suffering, and human tragedy with criminal conduct. And, to assign guilt to Israel prior to investigation, she would have had to assume that fault for harm to civilians and civilian infrastructure automatically falls upon the invading army rather than, say, on fighters dressed in civilian clothes who take up positions in densely populated urban areas. There is, however, no foundation for such an equation or such an assumption in either international human rights law, which sets forth what is owed individuals in times of peace, or international humanitarian law (also known as the law of armed conflict), which deals with the protection in wartime of civilians as well as of soldiers no longer able to fight. Unfortunately, the Goldstone Report encourages Klein’s false equation and specious assumption.

Indeed, the false equation of harm to civilians in war with criminal conduct and the specious assumption that legal liability for the death and destruction in Gaza falls automatically on Israel lie at the heart of the book, edited by journalists Adam Horowitz, Lizzy Ratner, and Philip Weiss, two of whom — Horowitz and Weiss — edit Mondoweiss.net, an online “news website devoted to covering American foreign policy in the Middle East, chiefly from a progressive Jewish perspective.” In addition to Tutu’s Foreword, Klein’s Introduction, an Editor’s Note, and the bulk of the 500-plus page Goldstone Report, the book contains eleven essays, all but one of which fail to take issue with the report’s damning factual and legal findings about Israel. And, like the Goldstone Report itself, ten of the eleven essays tread lightly concerning allegations of unlawful conduct by Hamas and the Palestinians.

The report’s central and gravest finding, the takeaway heard around the world, was that Israel’s conduct of the Gaza operation was in itself unlawful. The report did not deny the legitimacy of Israel’s overall purpose in Operation Cast Lead, which was to stop the more than 12,000 rockets and missiles — every one a war crime — that Palestinian fighters

directed at civilian targets in southern Israel over the previous eight years. Nevertheless, the report found that Israel launched “a deliberately disproportionate attack designed to punish, humiliate and terrorize a civilian population, radically diminish its local economic capacity both to work and to provide for itself, and to force upon it an ever increasing sense of dependency and vulnerability” (paragraph 1690).

Justice Goldstone himself acknowledged in an interview in the *Forward* in October 2009, a month after the United Nation’s Human Rights Council published the report over which he presided, “If this was a court of law, there would have been nothing proven.” But that’s not how the Goldstone Report reads, or was read, certainly not by editors Horowitz, Ratner, and Weiss, not by Archbishop Tutu, not by Naomi Klein, not by ten of the eleven commentators assembled by the editors, and not by the vast majority of international human rights lawyers and progressive intellectuals throughout the West.

In the book, for example, Raji Sourani, a human rights lawyer based in Gaza City and director of the Palestinian Center for Human Rights, contends that in Israel’s operation, “Public and private infrastructure throughout the Gaza Strip was extensively, and deliberately, targeted and destroyed.” Jules Lobel, a law professor at the University of Pittsburgh School of Law and vice president for the Center for Constitutional Rights, asserts that it is “neither new nor surprising” that “the overwhelming thrust of the Goldstone Report is that Israel attacked the civilian population during the Gaza war, including destroying the basic means of sustaining life (from clean water wells to poultry farms), and that these attacks violate two central bodies of international law: international humanitarian law and international human rights law.” Jerome Slater, a former professor of political science at suny/Buffalo and now University Research Scholar there, declares that the Goldstone Report is “extraordinarily detailed, and fully sourced.” Former Congressman Brian Baird can not see any cause for controversy: “I read the entire Goldstone Report, front to back, and I read it critically. And after all the flak it had taken, I thought, Well, what am I missing here? I didn’t have any beef with it at all.” And in an essay distinguished by the vitriol it directs against those who view the world differently, Rashid Khalidi, the Edward Said Professor of Arab Studies at Columbia University, maintains that the Goldstone Report “clinically documents the humiliations of Palestinians during the war on Gaza.”

Only one essay, that of Moshe Halbertal, a professor of philosophy at the Hebrew University of Jerusalem and the Gruss Professor at New York University School of Law, registers a dissent. To the credit of the volume’s editors, it is a powerful dissent. Originally appearing in November 2009 in the *New Republic*, “The Goldstone Illusion” highlights the report’s obscuring of Hamas’s deliberate strategy “to erase two basic features of war: the front and the uniform.” According to Halbertal,

In addressing this vexing issue, the Goldstone Report uses a rather strange formulation: “While reports reviewed by the Mission credibly indicate that members of the Palestinian armed groups were not always dressed in a way that distinguished them from the civilians, the Mission found no evidence that Palestinian combatants mingled with the civilian population with the intention of shielding themselves from the attack.” The reader of such a sentence might well wonder what its author means. Did Hamas militants not wear their uniforms because they were inconveniently at the laundry? What other reasons for wearing civilian clothes could they have had, if not for deliberately sheltering them among the civilians.

As for the new “front” in asymmetrical warfare, we read in another passage, which is typical of the report’s overall biased tone, that “[on] the basis of the information it gathered, the Mission finds that there are indications that Palestinian armed groups launched rockets from urban areas. The Mission has not been able to obtain any direct evidence that this was done with the specific intent of shielding the rocket launchers from counterstrikes by the Israeli armed forces.” What reason could there possibly be for launching rockets from urban centers, if not shielding those rockets from counterattack? And what is the moral distinction that is purportedly being established here?

The moral, or immoral, distinction is between Hamas, whose cause the report treats with kid gloves, and Israel, for whose rights and interests it shows little sympathy. Tutu’s Foreword, Klein’s Introduction, the Editor’s Note, and all the other essays embrace that distinction.

The report obscures Hamas’s erasure of the difference between combatants and noncombatants and prefers Hamas’s cause to Israel’s rights and interests in several ways. First, Goldstone and his team collected and presented evidence in an improper manner. The report relied largely on Palestinian testimony, even though Palestinians in Gaza live under the rule of an authoritarian power well known to punish viciously the expression of dissenting opinion. In addition, the report made many findings of law that turned on factual findings about the intentions in battle of Israeli commanders and soldiers. But since Israel refused to cooperate with the Goldstone Mission — it had no obligation under international law to do so, and plenty of reason, amply confirmed by the Goldstone Report, to suspect any undertaking initiated by the incurably compromised United Nations Human Rights Council — those legal findings were inherently defective. The report was certainly forbidden by principles of international law to infer that absence of evidence concerning Israeli understandings and intentions constituted evidence concerning the substance of those understandings and intentions.

Second, the Goldstone Report failed to accurately characterize Hamas. Although the U.S. and the eu for good reason regard it — both its civil and political wings — as a terrorist organization, the report refrains from so referring to it. Indeed, the report ignores or barely discusses Hamas’s ideology and Charter, which call for Israel’s destruction; Hamas’s overall terrorist strategy, including the military infrastructure it constructed throughout Gaza’s

residential neighborhoods; its enforced Islamization of the Palestinian population of Gaza; and the flow from Iran through Egypt's Sinai Peninsula into Gaza of rockets and missiles for attacking Israeli civilian populations.

The report misconceives proportionality, which requires that parties refrain from attacks in which expected civilian casualties and damage to civilian objects will be excessive in relation to the anticipated military advantage.

And, third, as Emory law school professor Laurie Blank shows in considerable detail in an excellent article, "The Application of ihl in the Goldstone Report: A Critical Commentary," the Goldstone Report misapplies the principles of distinction and proportionality, the very cornerstones of international humanitarian law.

The principle of distinction requires combatants to distinguish fighters and military objects from civilians and civilian objects, and to target only fighters and military objects. It also requires combatants to distinguish themselves from innocent civilians — by wearing uniforms, by carrying their arms openly, by not conducting military operations from within civilian areas — so that the other side can uphold its obligations. Israeli commanders and soldiers faced extremely difficult targeting decisions because Hamas fighters, in violation of the law of armed conflict, dressed as civilians; hid ammunition, rockets, and missiles in civilian buildings, including schools, hospitals, and mosques; and booby-trapped neighborhoods. The report concludes that much of the damage caused by Israeli military operations to civilians and ostensibly civilian objects in Gaza involved criminal conduct on Israel's part, but it does not apply the proper legal test. The proper legal test asks whether a reasonable commander in the actual circumstances under scrutiny would believe that the target is being used to make an effective contribution to military actions. Since the Goldstone Report neither obtained information about the understanding and intent of Israeli commanders nor investigated Hamas's systematic use of ostensibly civilian objects for military purposes — which causes those objects to lose their immunity — its many legal findings that Israel failed to properly distinguish civilian objects are inherently invalid.

The report similarly misconceives the fundamental principle of proportionality, which requires that parties refrain from attacks in which expected civilian casualties and damage to civilian objects will be excessive in relation to the anticipated military advantage. Civilian casualties and damage to civilian infrastructure in warfare are not in themselves unlawful or evidence of criminality. Moreover, the standard "excessive" is highly context sensitive, while the legal test of proportionality of which it forms a part involves, as with the test associated with the principle of distinction, reasonableness. Under international humanitarian law, a determination of whether the exercise of force was proportional depends on factual findings about what the commander and his soldiers knew and intended, on complex calculations about tactics and strategy, on the care with which decisions were made, on the prudential

steps and precautions taken, and on the propriety of sometimes instant judgments in life and death situations. Suffice it to say that the Goldstone Report routinely ignores such legally essential considerations, which vitiates its sensational legal findings.

The goldstone report is a deeply flawed document. If left uncontested and uncorrected, its errors will increase the dangers to which civilians and lawful fighters are exposed in an age of transnational terror.

Without so stating, the report sets aside, or seeks to rewrite, international humanitarian law. It effectively shifts responsibility for civilian losses away from terrorists who deliberately violate the law of armed conflict by operating in civilian areas and onto the states fighting them. The result is to reward those who, in gross violation of the laws of war, strive to obscure the distinction between civilian and military objects and, in the case of liberal democracies such as Israel and the United States, to punish those who seek to uphold it. And because rewarding behavior encourages more of it, the Goldstone Report — and the Horowitz, Ratner, and Weiss volume designed to honor it — will cause more terrorists to operate within densely populated urban areas.

If the report's approach prevails, then, in the fight against transnational terrorists, liberal democracies will face a political and legal climate that all but criminalizes the exercise of their right to self-defense. In the short term, that may lead liberal democracies to increase the dangers to which they expose their own soldiers and civilians. In the long term, it risks impelling them to abandon international humanitarian law as hopelessly impractical, thereby undermining their own soldiers' sense of justice and honor and increasing the peril to the other sides' civilians.

In the Editor's Note, Horowitz, Ratner, and Weiss state their "hope that this book will keep the report alive and its findings relevant." Indeed, memory of the Goldstone Report should be preserved, but not for the reasons that the editors intend. The report should serve as a potent reminder that, like other actors, international human rights lawyers and international bodies have passions and interests, biases and blind spots; they are capable of manipulating the facts and distorting the law; they often lack the expertise in military affairs that is necessary to responsibly apply international humanitarian law to the complex circumstances of asymmetric warfare; and their judgment is unconstrained by the discipline of democratic accountability and national security responsibility.

The international law governing armed conflict — in Article 2 of the UN Charter, Article 146 of the Fourth Geneva Convention, Article 17 of the Rome Statute creating the International Criminal Court — assigns to states with functioning judicial systems, which in particular means liberal democracies, the right and primary responsibility to investigate allegations of war crimes. The many and varied failings of the Goldstone Report illuminate the wisdom of this critical feature of international law.

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