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GAZA, GOLDSTONE, AND

*William A. Schabas**

The term ‘lawfare’ is being used abusively to attack critics who invoke the illegality of the behaviour of certain military forces, including those of Israel and the United States. The Goldstone Report on Operation Cast Lead points to disproportionate use of force by Israel as a means of punishing Palestinians for their support of Hamas. Quibbling about certain aspects of the Report seems aimed at undermining the important contribution it makes to the promotion of human rights, the enforcement of international humanitarian law and the pursuit of peace in the Middle East.

In her contribution to the Cleveland symposium, Laurie Blank charges that the “Goldstone Report contributes to—even puts a stamp of approval on—the use of lawfare.”¹ She argues that the Report of the United Nations Fact Finding Mission on the Gaza Conflict,² which was mandated by a resolution of the Human Rights Council³ and chaired by Richard Goldstone, “exacerbates the manipulation of [international humanitarian law] by insurgents and terrorists, who use the law, and Western militaries’ adherence to the law, as a tool of war in today’s conflicts.”⁴ She also says that if the approach to international law adopted in the Goldstone Report is fol-

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¹ Laurie R. Blank, *Finding Facts but Missing the Law: The Goldstone Report, Gaza, and Lawfare*, 43 CASE W. RES. J. INT’L L. 279, 281–82. (2010).

² Human Rights in Palestine and Other Occupied Arab Territories, Human Rights Council, 12th Sess., Sept. 14–Oct. 2, 2009, U.N. Doc. A/HRC/12/48 (Sept. 25, 2009).

³ See Permanent Rep. of Egypt to the U.N., Letter dated Jan. 6, 2009 from the Permanent Rep. of Egypt to the United Nations Office at Geneva addressed to the President of the Human Rights Council, U.N. Doc. A/HRC/S-9/1 (Jan. 8, 2009) (letter on behalf of the Arab Group, the African Group, the Organization of the Islamic Conference, and the Non-Aligned Movement requesting that the United Nations Human Rights Council hold a Special Session to address “[t]he [g]rave [v]iolations of [h]uman [r]ights in the [o]ccupied Palestinian Territory including the recent aggression of the occupied Gaza Strip.”).

⁴ Blank, *supra* note 1.

lowed, it will “facilitate and encourage such manipulation of the law and, rather than leading to greater protection for civilians, actually produce conflict scenarios where civilians are at ever greater risk.”⁵

These strong statements sit among attacks upon the Report that are often characterized both by hyperbole and hysteria. The Symposium program itself contained a provocative citation from Israeli Prime Minister Netanyahu: “We face three major strategic challenges. The Iranian nuclear program, rockets aimed at our civilians and Goldstone.”⁶ If one had to think of the single individual most likely to threaten the survival of Israel, surely Netanyahu himself would be a better candidate. He pushes his country closer and closer to the brink by pandering to extremists, even defying the U.S. government, which has insisted that the illegal policy of settlements in occupied territories be halted.⁷ A conference at Fordham Law School held earlier in 2010, sponsored by the American Association of Jewish Lawyers and Jurists together with various other Jewish organizations, describes in its publicity material:

In particular, the semblance of authenticity and the cloak of legal language surrounding the Goldstone Report have given it an undeserved legitimacy and inspired a plethora of further mechanisms intended to demonize and delegitimize the state of Israel. The report and the lawfare strategy it embodies, erode the legitimacy of international law and pose a clear and present danger to the right of all democratic states, including the United States, to defend themselves.⁸

The word “lawfare” has never been part of my vocabulary. Prior to the symposium held at Case Western Reserve School of Law, in September 2010, I never had occasion to use the term. It appears to have no useful or practical purpose. I would not rule out employing it in a Scrabble game, although were I to do so, my usual partner would no doubt object. She would challenge me to look it up in the Scrabble dictionary where, of course, it is nowhere to be found.⁹ I might then try and bluff by pointing to

⁵ *Id.*

⁶ Ethan Bronner, *Israel Poised to Challenge a U.N. Report on Gaza*, N.Y. TIMES, Jan. 24, 2010, at A6, available at http://www.nytimes.com/2010/01/24/world/middleeast/24goldstone.html?_r=1.

⁷ The President’s Words of Warning: ‘Things Must Change in the Middle East,’ N.Y. TIMES, June 25, 2002, at A10, available at <http://www.nytimes.com/2002/06/25/world/mideast-turmoil-president-s-words-warning-things-must-change-middle-east.html> (President stating in his Rose Garden Address that “Israeli settlement activity in the occupied territories must stop.”).

⁸ Conference “*The Goldstone Report: Lawfare & The Threat to Israeli and American National Security in the Age of Terrorism*,” AM. ASS’N OF JEWISH LAWYERS AND JURISTS (Apr. 8, 2010), http://www.jewishlawyers.org/comment.asp?x_id=134#top.

⁹ *The Official Scrabble Players Dictionary*, 4th ed., Springfield, MA: Mirriam Webster, 2005, p. 310.

its use on various blogs and websites, and in the proceedings of the Cleveland symposium. Inevitably, I would be asked, “what does it mean?” My answer, based upon what I learned at the conference and in preparation for it, would be something along the following lines: “A word coined within the United States military and subsequently adopted by right-wing ideologues as a way of stigmatizing legitimate recourse to legal remedies, particularly within an international law context.”

As a term, it was apparently used for the first time by Major General Charles Dunlap, an American military lawyer, in a lecture at Harvard University in November 2001. He said lawfare was a practice whereby “the rule of law is . . . hijacked into just another way of fighting [lawfare], to the detriment of humanitarian values as well as the law itself.”¹⁰ Dunlap said that “the use of law as a weapon of war, is the [newest] feature of twenty-first century combat.”¹¹ Several years later, he said that the term should be used to describe “the exploitation of real, perceived, or even orchestrated incidents of law-of-war violations being employed as an unconventional means of confronting a superior military power,”¹² and most recently posited the “refined” definition as “the strategy of using—or misusing—law as a substitute for traditional military means to achieve an operational objective.”¹³

What is actually new about alleging that one or another side in an armed conflict is violating international law was not apparent to me before the Cleveland symposium, and I am no more enlightened after hearing those who use the term. Were not the British, French, and Russians using “lawfare” in 1915 when they said that Ottoman leaders would be prosecuted for “new crimes of Turkey against humanity and civilization,”¹⁴ what we today

¹⁰ Charles J. Dunlap, Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts* (Carr Center for Human Rights, John F. Kennedy Sch. of Gov’t, Harvard U., Working Paper, 2001), available at <http://www.hks.harvard.edu/cchrp/Web%20Working%20Papers/Use%20of%20Force/Dunlap2001.pdf>.

¹¹ *Id.* at 5.

¹² Charles J. Dunlap, Jr., Op-Ed., *Lawfare Amid Warfare*, WASH. TIMES, Aug. 3, 2007, at A19, available at <http://www.washingtontimes.com/news/2007/aug/03/lawfare-amid-warfare/?page=1>.

¹³ Charles J. Dunlap, Jr., *Lawfare Today: A Perspective*, 3 YALE J. INT’L AFF. 146, 146 (2008).

¹⁴ U.S. DEP’T. OF STATE, PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES 1915: SUPPLEMENT: THE WORLD WAR 981(1928), available at <http://digicoll.library.wisc.edu/cgi-bin/FRUS/FRUS-idx?id=FRUS.FRUS1915Supp> (the U.S. Ambassador to France transmitting a telegram from Paris notifying the U.S. Secretary of State in Washington D.C. that the Ambassador “just received [a Foreign Office note that] transmits a communication requesting that it be notified urgently to Ottoman Government.” The communication was an announcement from the Allied governments that the “Ottoman Government” will be held “personally responsible” for “these new crimes of Turkey . . .”).

call the Armenian genocide?¹⁵ What of the Americans, the British, and the Soviets who, in October 1943, spoke of “evidence of atrocities, massacres, and cold-blooded mass executions which are being perpetrated by Hitlerite forces in many of the countries they have overrun and from which they are now being steadily expelled?”¹⁶ The Allies said that they would “pursue them to the uttermost ends of the earth and will deliver them to their accusers in order that justice may be done.”¹⁷ The Nazis were doing the same, accusing their adversaries of war crimes in the fire-bombing of cities, for example.¹⁸

Before charging Richard Goldstone and the Commission he chaired with “lawfare,” critics might first explain the “operational objective” he was pursuing, and why he turned to the law “as a substitute for traditional military means.”¹⁹ Of course, those who attack the Goldstone report are not using the term with the precision proposed by General Dunlap. In practice, it seems to be little more than a rhetorical gambit to attack challenges to the legality of the behavior of the military forces of Israel or the U.S. According to those who invoke the term, accusing President Bashir of Sudan with “genocide” as did President George W. Bush and Secretary-of-State Colin Powell in 2004, does not seem to qualify as “lawfare,” but charging Israel with disproportionate use of force in Gaza in 2009 does.²⁰ What of the acts of torture and cruel, inhuman, and degrading treatment perpetrated by American soldiers at Abu Ghraib prison?²¹ Does one avoid the charge of lawfare by remaining silent and failing to condemn these as violations of the Geneva Conventions and of human rights obligations?

Some acknowledgement of the difficulties faced by Richard Goldstone and the other three commissioners due to Israel’s refusal to cooperate

¹⁵ Hilmar Kaiser, *Genocide at the Twilight of the Ottoman Empire* in THE OXFORD HANDBOOK OF GENOCIDE STUDIES 365–385 (Donald Bloxham & A. Dirk Moses, eds., Oxford Univ. Press 2010); DONALD BLOXHAM, *THE GREAT GAME OF GENOCIDE: IMPERIALISM, NATIONALISM, AND THE DESTRUCTION OF THE OTTOMAN ARMENIANS* (Oxford Univ. Press, 2005).

¹⁶ U.S. DEP’T OF STATE, *A DECADE OF AMERICAN FOREIGN POLICY: BASIC DOCUMENTS 1941–49*, at 14 (rev. ed. 1985).

¹⁷ *Id.* at 15.

¹⁸ ALBRED M. DE ZAYAS, *THE WEHRMACHT WAR CRIMES BUREAU, 1939–1945* (Lincoln and London, University of Nebraska Press, 1980).

¹⁹ Dunlap, *supra* note 13, at 146.

²⁰ See Steven Weisman, *Powell Says Rapes and Killings in Sudan are Genocide*, N.Y. TIMES, Sept. 10, 2004 (discussing the United States’ first recognition of the situation in Darfur as “genocide”); Richard Cravatts, ‘Lawfare’: *Another Weapon in the Jihad Against Israel*, AMERICAN CHRONICLE, Jan. 11, 2009 (discussing the use of lawfare in “hobbling Israel”).

²¹ See James Risen, *The Struggle for Iraq: Treatment of Prisoners; G.I.’s Are Accused of Abusing Iraqi Captives*, N.Y. TIMES, April 29, 2004.

with the investigation might be acknowledged.²² In a debate about proportionality, it is helpful to hear both sides of the story. Like the defendant who chooses to invoke the right to silence and let the jury decide based upon the prosecution's evidence alone, Israel has only itself to blame for this. It could hardly claim that a judge with impeccable credentials and a reputation for integrity, a man of Jewish origin who sees himself as a friend of Israel, would have an axe to grind.²³ If any side might have had a complaint with the choice of Goldstone, it would have been the Palestinians.

The bulk of Ms. Blank's presentation concerns what she says is an erroneous assessment of proportionality in the Goldstone Report.²⁴ This is far removed from lawfare. It is really just a debate about the application of law. It seems that if we conclude Israel acted proportionately, then it is not "lawfare," whereas if we say the opposite, it is. In her conclusions, Ms. Blank concedes that over a thousand Palestinians died during the 2008–2009 conflict, and that "[p]roperty damage and destruction left most of Gaza in ruins."²⁵ I would have expressed this damning admission about the proportionality of the conflict rather more sharply: The war was an attack on the people of Gaza, ostensibly provoked by missile attacks that had resulted in the loss of a handful of civilian lives over the years, but in reality aimed at the punishment of an entire civilian population for its political support of Hamas. In fact, 1,409 Palestinians lost their lives, of whom 1,172 were civilians, a figure that includes 342 children.²⁶ It also bears mention that only thirteen Israelis lost their lives, ten of them combatants, of whom four were killed by their own comrades.²⁷

It has often been explained that there is a distinction between the proportionality of the use of force by Israel against Gaza (*jus ad bellum*) and the proportionality of the specific engagements within the conflict (*jus in bello*).²⁸ International humanitarian law claims to deal only with the latter.²⁹

²² See Letter from Richard Goldstein, Head, United Nations Fact Finding Mission on Gaza, to Howard Berman, Chairman, House Comm. on Foreign Aff., and Ileana Ros-Lehtinen, Ranking Member, House Comm. on Foreign Aff. (Oct. 29, 2009), available at http://price.house.gov/news/pdf/Goldstone_letter.pdf.

²³ See Ian Williams, *The NS Interview: Richard Goldstone*, NEWSTATESMAN, Dec. 30, 2009, <http://www.newstatesman.com/middle-east/2010/01/interview-israel-law>.

²⁴ Laurie R. Blank, *The Application of IHL in the Goldstone Report: A Critical Commentary*, 12 Y.B. INT'L HUMANITARIAN AFF. 347, 367 (2009).

²⁵ *Id.* at 401.

²⁶ Al-Haq, *'Operation Cast Lead': A Statistical Analysis* (Aug. 2009).

²⁷ Rep. of the United Nations Fact Finding Mission on the Gaza Conflict: Human Rights in Palestine and Other Occupied Arab Territories, Hum. Rts. Council, 12th Sess., para. 31, U.N. Doc. A/HRC/12/48 (Sept. 15, 2009) [hereinafter "Goldstone Report"].

²⁸ Avril McDonald, *Operation Cast Lead: Drawing the Battle Lines of the Legal Dispute*, 16 HUM. RTS. BR. 25–26 (2009).

²⁹ *Id.* at 25.

But in reality, these two issues cannot be entirely untangled, as the war in Gaza shows us. It is not possible to dissociate the reckless disregard for the lives of innocent civilians and for civilian property in the various tactical decisions taken by Israeli combatants with the unbearable situation of Gaza itself, strangled by a blockade and in a practical sense, deprived of its right to self-determination.

In truth, is not Ms. Blank using the very “lawfare” she condemns by quibbling about legal distinctions with respect to Israeli attacks on schools, hospitals, and religious institutions, the destruction of civilian infrastructure that “left most of Gaza in ruins,” and the use of force that killed many hundreds of children while only about a dozen of the attackers lost their lives?³⁰ While her study invokes the law of armed conflict as it now stands, it does not speak to the very disturbing claims—really, the admissions—of Israel applying new rules of humanitarian law because of the claim that the conflict is “asymmetric.” The Goldstone Report put this rather clearly when it found statements by Israeli political and military leaders before and during the war to indicate the view that disproportionate destruction served both military and political goals.³¹ “If ‘infrastructure’ were to be understood in that way and become a justifiable military objective, it would completely subvert the whole purpose of IHL [international humanitarian law] built up over the last 100 years and more,” Richard Goldstone told the Human Rights Council.³² “It would make civilians and civilian buildings justifiable targets. These attacks amounted to reprisals and collective punishment and constitute war crimes.”³³

It is argued that by narrowing the definition of military objectives, the Goldstone Report promotes a legal approach that will ultimately harm innocent civilians. This is because doing so will “embolden insurgents and terrorists who will now see the benefit of, and lack of accountability for, intermingling with the civilian population and endangering civilians with every launch of a rocket and every missile stored under a hospital.”³⁴ Perhaps Ms. Blank should go to Gaza and explain to the parents of the 342 children who were killed, the families of the more than 1,100 civilian victims, and the owners of the homes that were destroyed, why they are better protected under the Israeli definitions of legitimate targeting and proportionality.

³⁰ Blank, *supra* note 24, at 401.

³¹ Goldstone Report, *supra* note 27, ¶ 63.

³² Richard Goldstone, Statement on Behalf of the Members of the United Nations Fact Finding Mission on the Gaza Conflict Before the Human Rights Council (Sept. 29, 2009).

³³ *Id.*

³⁴ Blank, *supra* note 24, at 402.