

CHAPTER 3

A MENSCH ON THE BENCH: THE PLACE OF THE SACRED IN THE SECULAR JURISPRUDENCE OF JUSTICE RICHARD GOLDSTONE

Michael Cosser



Source: <http://www.constitutionalcourt.org.za/site/judges/justicerichardgoldstone/index1.html>

1 Introduction

Justice Richard Goldstone was one of four Supreme Court of Appeal judges (along with Lourens Ackermann, Tholie Madala and Ismail Mohamed) appointed to the first Bench of the Constitutional Court. The appointment was made by President Mandela, in consultation with the cabinet and the then Chief Justice, Judge Michael Corbett, after the appointment of Arthur Chaskalson, senior counsel and the national director of the Legal Resources Centre, as President of the Constitutional Court had been made.¹⁴⁸ Justice Goldstone served as a judge of the Court from his appointment in 1994 to his retirement in 2003 – a period of ten years.

148 Constitutional Court of South Africa 'ABOUT THE COURT | History of the court' <http://www.constitutionalcourt.org.za/site/thecourt/history.htm#judges> (accessed 13 February 2017).

Goldstone's service on the Bench of the Constitutional Court forms part of a long and illustrious career as a corporate lawyer, as a Supreme and Appellate Court judge, and as the head of various inquiries, both South African and international, into issues of local and international importance. The focus of this chapter, while it charts key moments in his career, is on his contribution to our understanding of the South African Constitution – an understanding forged both through what others have said about him and what he has said about himself in relation to the law and specifically about the Constitution, through the judgements he has handed down from the Benches of all the courts on which he has served, and through his extra-curial pronouncements, whether in interviews, speeches, reports, articles, or books. The contribution of Richard Goldstone to the Constitution, as this suggests, signifies the coalescence of a number of factors that helped shape him – amongst which, this chapter will show, is the religion into which he was born.

2 Richard Goldstone: A selective biography

The biography of Justice Goldstone provided by the Constitutional Court website¹⁴⁹ is parsimonious about his personal life and education (he was born on 26 October 1938, is married and has two daughters and four grandsons, and graduated from the University of the Witwatersrand with a BA LLB cum laude in 1962), more forthcoming about his career, and effusive about his 'Other activities' – largely, one suspects, because of their number, range, and impact. My intention here is not provide an exhaustive biography of the man; the Constitutional Court website,¹⁵⁰ Wikipedia,¹⁵¹ and other sources do this. Rather, I shall mention some of the key moments in his career that have attracted comment from others and from himself and which form the basis of the analysis in subsequent sections of this chapter.

Goldstone began his professional career practising as an advocate at the Johannesburg Bar. In 1976 he was appointed senior counsel and in 1980 was made a judge of the Transvaal Supreme Court. In 1989 he was appointed to the Appellate Division. From 1991 to 1994 he served as the chairperson of the Commission of Inquiry Regarding Public Violence and Intimidation, which came to be known as the Goldstone Commission.

From 15 August 1994 to September 1996 Goldstone served as the Chief Prosecutor of the United Nations' International Criminal Tribunals

149 Constitutional Court of South Africa 'JUDGES | Justice Richard Goldstone' <http://www.constitutionalcourt.org.za/site/judges/justicerichardgoldstone/index1.html> (accessed 13 February 2017).

150 As above.

151 Wikipedia 'Richard Goldstone' https://en.wikipedia.org/wiki/Richard_Goldstone (accessed 1 February 2017).

for the former Yugoslavia and Rwanda. In 2009, he was appointed Chair of a UN Human Rights Council inquiry into the Gaza conflict.

On his return to South Africa, Goldstone took up his place on the Bench of the Constitutional Court, in which capacity he handed down judgments that have come to shape our understanding of aspects of constitutional law. These judgments are considered later in this chapter.

One of the influences on Goldstone's life has been his religion – though not his faith, as he describes himself as having grown up in a secular family. Goldstone's maternal grandfather, who had a seminal influence on his early life and career choice, was part of 'A Jewish family who'd been expelled centuries before from Spain.'¹⁵² Goldstone first became aware of racial disparities and separate development on the cusp of the change of government in 1948 from United Party to National Party rule: 'coming from a Jewish background, the National Party had a background of anti-Semitism and still in those days its constitution banned Jews from being members of the National Party.'¹⁵³ And while none of his relatives died in the Holocaust, he reportedly considered the Nuremberg trials of Nazi war criminals "an inspiration", maintaining that "being Jewish, part of a community that has been persecuted throughout history, shaped [my] ethical views from an early age."¹⁵⁴ Goldstone was all too aware, then, of latent and patent prejudice against Jews.

Goldstone reportedly spoke 'with emotion of "this religious tradition to which I was exposed ... although I have never been a particularly religious person Either you have religion or you do not. I sometimes wish I was religious but I am not. Religion is a bit like a musical gift – you have it or you don't."¹⁵⁵ Despite not being gifted with religion, Goldstone became a bar mitzvah when he came of age. And throughout, Goldstone and his family have kept the Sabbath (on a Friday night and Jewish holy days) "out of respect for our roots and cultural identity"¹⁵⁶.

152 University of the Witwatersrand, Johannesburg 'Historical papers research archive' Constitutional Court Trust oral history project: Interview with Richard Goldstone (15 December 2011) http://www.historicalpapers.wits.ac.za/index.php?inventory_enhanced/U/Collections&c=213591/R/AG3368-G29 (accessed 7 May 2017) 1.

153 As above, 2.

154 'World Report Profile: Richard J. Goldstone: A South African jurist takes on Balkan and Rwanda conflicts, seeking to punish war criminals' *Los Angeles Times* 14 March 1995.

155 C Villa-Vicencio & M Soko *Conversations in transition: Leading South African voices* (2012) 191.

156 As above, 182.

3 Justice Goldstone in the eyes of the world

Goldstone's life and work naturally fall into three parts: *apartheid*-era judge; international judge; and Constitutional Court judge. What others have said about him in relation to these three roles is considered below.

3.1 *Apartheid-era judge*

Richard Goldstone had practised corporate and intellectual property law for 17 years before he was appointed to serve on the Bench of the Transvaal Supreme Court. The link between his commercial law career and his time on the Bench is characterised thus by Shimoni: '[Goldstone was] an outstanding commercial lawyer who had shrewdly and inventively applied the law to secure justice in politically controversial and human rights cases.'¹⁵⁷ Zimmermann hailed Goldstone as 'one of the leading "liberal" judges who never showed any propensity towards the then prevailing executive-mindedness'¹⁵⁸ while Davis and Le Roux characterised such liberal judges as Goldstone as persons who interpreted *apartheid* legislation 'as narrowly as possible to give effect to the values of the common law.'¹⁵⁹

What emerges from these ascriptions is Goldstone's capacity to work against the *apartheid* system from within the system, using ingenuity and guile to outwit his *apartheid* detractors within the country's legal framework.

One of Goldstone's major successes was his judgment in *S v Govender*.¹⁶⁰ He ruled in favour of a Mrs Govender, who had been accused of living unlawfully with her children and grandchildren in rented accommodation in a residential area reserved for whites. Goldstone exploited the Group Areas Act provision that a court convicting a person for living in such an area 'may ... make an order for the ejectment' of such a person – placing the onus on the prosecutor to place material before the court to justify the court's exercising its discretion to order the ejectment. He argued also that a person could not be evicted from a designated area unless alternative accommodation could be provided. Villa-Vicencio and Soko believe that this judgment 'effectively ended the enforcement of the Group Areas Act and it heralded the end of residential segregation'¹⁶¹ – echoing the observation made by the first Chief Justice of the

157 G Shimoni 'The Jewish response to *apartheid*: The record and its consequences' in E Mendelsohn (ed) *Jews and the state: Dangerous alliances and the perils of privilege* (2004) 38.

158 R Zimmermann 'The contribution of Jewish lawyers to the administration of justice in South Africa' (1995) 29 (1-2) *Israel Law Review* 250.

159 D Davis & M Le Roux *Precedent and possibility: The (ab)use of law in South Africa* (2009) 5.

160 1986 (3) SA 969 (T).

161 Villa-Vicencio & Soko (n 155 above) 180.

Constitutional Court, Arthur Chaskalson, and George Bizos SC.¹⁶² The judgment represented a landmark achievement opening the door to freedom of movement in South Africa.

As if in deference to this judgment, Section 26(3) of the Constitution reads:

No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.¹⁶³

Seminal judgments handed down by Goldstone – *inter alia*, his declaring (in 1985) the dismissal of 1,700 striking black staff at Baragwanath Hospital illegal; his freeing (in 1986) a political prisoner detained under the recently imposed State of Emergency; his releasing a detainee because of the police's failure to inform him of his right to legal assistance¹⁶⁴ – earned him a reputation for social justice (a commitment to justice for ordinary people) in the midst of political and legalised injustice. So much so that the state placed its confidence in him, the Judge President of the Transvaal Supreme Court appointing him to investigate the conditions under which prisoners languished in *apartheid* prisons. The government wished to quash reports of prisoners being tortured and abused but simultaneously, claimed Goldstone, to signal to prison warders and the police that assault and torturing of detainees was unacceptable.¹⁶⁵ Such was the fine line an increasingly under-pressure *apartheid* state was forced to tread.

Though Goldstone imposed the death penalty on two occasions¹⁶⁶ – and not the 28-plus occasions the Israeli newspaper Ynet news claimed¹⁶⁷ – he was clearly opposed to the death penalty; as Judge David Curlewis observed, “A person who deserves to hang was more likely to get the death sentence from me or my ilk than Goldstone or other liberal judges who are at heart abolitionists for one reason or another ... Obviously, and for that reason, they cannot be sound on the imposition of the death penalty.”¹⁶⁸

162 A Chaskalson & G Bizos 'In support of Justice Goldstone' (2010) 23(2) *Advocate* 44.

163 'The Constitution of the Republic of South Africa, 1996' (as set out in sec 1(1) of the Citation of Constitutional Laws Act 5 of 2005) sec 26(3).

164 Villa-Vicencio & Soko (n 155 above) 182.

165 As above, 182-183.

166 As above, 183.

167 This claim was made by the Israeli online newspaper *Ynetnews.com* in the wake of Goldstone's report on the Gaza conflict in which he apportioned blame for targeting civilians to both Israel and Hamas (Human Rights Council 'Human rights in Palestine and other occupied Arab territories' 2009) <http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf> (accessed 10 April 2017) – 'Judge Goldstone's dark past' *Ynetnews.com* 6 May 2010 <http://www.ynetnews.com/articles/0,7340,L-3885999,00.html> (accessed 10 April 2017).

168 P Parker & J Mokhesi-Parker *In the shadow of Sharpeville: Apartheid and criminal justice* (1998) 171.

In 1990, just four years before the transition to democracy, Goldstone was appointed by President FW de Klerk to investigate the death by hanging of an uMkhonthe weSizwe (MK) soldier, Clayton Sizwe Sithole, in John Vorster Square Police Station in Johannesburg. The controversy surrounding the death of Sithole and others under similar circumstances is evocatively depicted in Chris van Wyk's poem 'In detention':¹⁶⁹

He fell from the ninth floor
 He hanged himself
 He slipped on a piece of soap while washing
 He hanged himself
 He slipped on a piece of soap while washing
 He fell from the ninth floor
 He hanged himself while washing
 He slipped from the ninth floor
 He hung from the ninth floor
 He slipped on the ninth floor while washing
 He fell from a piece of soap while slipping
 He hung from the ninth floor
 He washed from the ninth floor while slipping
 He hung from a piece of soap while washing

The slippage, literal and metaphorical, in this poem epitomises the incredulity with which the South African Police's official version of events surrounding Sithole's death was met. Villa-Vicencio and Soko argue¹⁷⁰ that De Klerk appointed Goldstone to investigate the matter because the population at large was more likely to accept Goldstone's report, given his reputation for judgments often characterised by finely balanced reasoning, than that of any other sitting judge.

Goldstone's next high-profile case involved an investigation into the so-called 'Sebokeng massacre' in 1990, in which the police were found to have acted unlawfully by firing on a crowd with live ammunition. This incident followed escalating violence across the country, characterised by African National Congress (ANC)-Inkatha Freedom Party (IFP) contestation amidst claims of 'third force' destabilisation. The Los Angeles Times described Goldstone's finding as 'one of the strongest indictments of South Africa's police ever made by a government-appointed investigator.'¹⁷¹

Following the Sebokeng inquiry, Goldstone was appointed chair of the Standing Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation tasked with investigating the ongoing violence in the country – the 'Goldstone Commission'. The inquiry found that there

169 C van Wyk *It is Time to Go Home* (1979) 45.

170 Villa-Vicencio & Soko (n 155 above) 184.

171 'S. Africa police blamed in fatal shootings of black protesters last March' *Los Angeles Times*, 2 September 1990.

was indeed 'third force' involvement in the violence, in the form of a Mozambique national-headed front company that passed information on to the South African Military Intelligence's Directorate for Covert Collection.¹⁷² Following the release of this information at a press conference, De Klerk appointed General Pierre Steyn to investigate South African Defence Force (SADF) activities – the report on which led to the dismissal of 23 generals and other senior SADF officials.

The Goldstone Commission's investigation into the notorious Vlakplaas Unit of the security police that followed the Steyn inquiry led to the dismissal of three generals and the sentencing of Eugene de Kock and other Vlakplaas operatives for murder and other crimes. De Kock, sentenced to serve a prison sentence of 212 years, was released from prison in September 2016.¹⁷³ Villa-Vicencio and Soko claim that 'The Goldstone Commission arguably did more than any other inquiry or investigation to uncover the illegal activities of the South African security forces in the period overlapping the transition to democratic rule in South Africa.'¹⁷⁴

The ANC's assessment of the contribution of the Goldstone Commission to ending the violence is summed up in its Secretary General's Report to ANC 49th National Conference, held in Bloemfontein (now Mangaung) from 17 to 22 December 1994. In that report, Ramaphosa wrote:

The recommendations of the United Nations secretary-general to the UN Security Council helped to place extra international pressure on the De Klerk regime. That, and the findings of the Goldstone Commission, vindicated the demands of our Campaign for Peace and Democracy [which had been launched following the suspension of negotiations with the *apartheid* government in the wake of the Boipatong massacre of 39 people].¹⁷⁵

That the ANC credited the work of the UN and the Goldstone Commission as having reopened the way to the Convention for a Democratic South Africa (CODESA) negotiations – at which, appropriately, Ramaphosa was the ANC's chief negotiator – is testimony to Goldstone's impact on the transition to democracy. Goldstone, at the time of this transition, was described by fellow Justice Albie Sachs as "an honest and dignified judge who was sensitive to the fundamental human rights of all human beings and who, even in the most dire circumstances, could find space for concepts of legality and respect for human dignity."¹⁷⁶

172 Villa-Vicencio & Soko (n 155 above) 185.

173 'Eugene de Kock allowed to go home' *News24* 6 September 2016.

174 Villa-Vicencio & Soko (n 155 above) 186.

175 African National Congress 'ANC Secretary General's Report to ANC 49th Annual Conference' (1994) <http://www.anc.org.za/content/49th-national-conference-secretary-generals-report> (accessed 19 April 2017).

176 'SAF/GOLDSTONE (L-O)' *Voice of America* 2 October 2003.

The impact of Judge Richard Goldstone on the political fortunes of a country and the individual fortunes of ordinary people is manifest in this selective account of his achievements. Collectively, his judgments and inquiries during the *apartheid* era influenced the course of events in relation to: freedom of movement; unfair labour practice; release of political prisoners; the imposition of the death penalty; the actions of the security forces; and politically-motivated violence.

Significantly, Goldstone's key judgments as *apartheid*-era judge anticipated the inclusion of certain rights in the Bill of Rights in the South African Constitution. His releasing a detainee because of the police's failure to inform him of his right to legal assistance anticipated section 35 of the Constitution: 'Everyone who is detained, including every sentenced prisoner ... has the right ... to choose, and to consult with, a legal practitioner, and to be informed of this right promptly'.¹⁷⁷ His declaring the eviction of Mrs Govender and her family from a house in a 'white' area (*S v Govender*) anticipated sections 21 and 26 of the Constitution: 'Every citizen has the right to enter, to remain in and to reside anywhere in, the Republic No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions'.¹⁷⁸ His declaring the dismissal of 1,700 striking black staff at Baragwanath Hospital illegal anticipated section 23 of the Constitution: 'Every worker has the right ... to strike'.¹⁷⁹ His appointment by the Judge President of the Transvaal Supreme Court to investigate the conditions under which prisoners languished in *apartheid* prisons and Goldstone's ensuing report on the investigation anticipated section 12 of the Constitution: 'Everyone has the right to freedom and security of the person, which includes the right ... not to be tortured in any way; and ... not to be treated or punished in a cruel, inhuman or degrading way'.¹⁸⁰ His appointment by President FW de Klerk to investigate the death by hanging of Sizwe Sithole in John Vorster Square Police Station anticipated sections 12 and 35 of the Constitution: 'Everyone has the right to freedom and security of the person, which includes the right ... not to be detained without trial'; 'Everyone who is detained, including every sentenced prisoner, has the right ... to conditions of detention that are consistent with human dignity'.¹⁸¹ And finally, Goldstone's investigation into the Sebokeng massacre anticipated section 12 of the Constitution: 'Everyone has the right to freedom and security of the person, which includes the right ... to be free from all forms of violence from either public or private sources'.¹⁸²

177 'The Constitution' (n 163 above) sec 35(2)(b).

178 As above, secs 21(3) and 26(3).

179 As above, sec 23(2)(c).

180 As above, sec 12(1)(d) & (e).

181 As above, secs 12(1)(b) and 35(2)(e).

182 As above, secs 12(1)(c) and 16(1) & 16(2)(b) & (c).

This account should by no means be construed to suggest that these rights are in the Constitution because of Goldstone. Rather, the judgments with which they resonate constitute *apartheid*-era exemplars of the kind of rights-based approach adopted by Goldstone – a dispensation in which, in fulfilment of a Constitution not yet drafted, he ‘promote[d] the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination’.¹⁸³

3.2 International judge

It was the very reputation for impartiality and forthrightness manifested in Goldstone’s *apartheid* judicial career that influenced his appointments to the United Nations International Criminal Tribunal for the Former Yugoslavia (ICTY) in 1994 and later the same year the International Criminal Tribunal for Rwanda (ICTR). Success breeding success, this appointment led to several more. As Chief Prosecutor of the ICTY and ICTR, as Chairperson of the International Independent Inquiry on Kosovo (1999-2001), as Co-chairperson of the International Task Force on Terrorism (2001), as a member of the independent committee to investigate the Iraqi oil-for-food programme (the Volcker Committee; 2004), and as Chair of the Advisory Committee on the Archiving of the Documents and Records of the ICTY and ICTR (2007), Goldstone had established a reputation for fairness at the highest international levels – a reputation that preceded his appointment to head the United Nations Fact Finding Mission on the Gaza Conflict.

3.2.1 Chief Prosecutor of the ICTY and ICTR: ‘A troubled judge in the international arena’¹⁸⁴

The combination of Goldstone’s religion, his stand against *apartheid*, and his international exposure made him the perfect candidate for Chief Prosecutor of the ICTY and ICTR, the first of a number of international appointments. As Pierre Hazan said of Goldstone’s appointment as Chief Prosecutor of the ICTY: ‘Goldstone’s nomination satisfies the French The British and the Americans are also reassured. Goldstone is neither too hot-headed for London, nor too weak for Washington. The image of a white South African who directly opposed *apartheid* also suits the Russians and the Chinese.’¹⁸⁵ This perceived neutrality stemmed ironically from his religion – ironically, on two counts: first, a Jewish prosecutor, according to Antonio Cassese, Italian jurist and the first President of the Tribunal, would be ideal precisely because as a Jew Goldstone was an ‘outsider’;¹⁸⁶

183 As above, sec 9(2).

184 Villa-Vicencio & Soko (n 155 above) 180.

185 P Hazan *Justice in a time of war: The true story behind the International Criminal Tribunal for the Former Yugoslavia* (2004) 55-56.

and second, though born of Jewish parents, Goldstone grew up in a non-practising family and was not himself religious.¹⁸⁷

Goldstone's term as ICTY Chief Prosecutor was marked by his characteristic fearlessness in the face of international community tardiness in addressing the issue of war crimes in the former Yugoslavia – in particular, its perceived reluctance to pursue those indicted for war crimes. Only seven of the 74 persons indicted had been arrested by the end of his term of office. But he did ensure that there was no amnesty for those apprehended.¹⁸⁸ Goldstone also made sure that rape and sexual assault were recognised in the ICTY prosecution policy as crimes against humanity and as war crimes. As Chief Prosecutor for the ICTR, Goldstone angered the Rwandan government by excluding capital punishment for those found guilty of genocide,¹⁸⁹ thereby setting an important precedent for subsequent genocide cases.

3.2.2 *Eyeless in Gaza?*

On 3 April 2009, the President of the Human Rights Council of the United Nations established the United Nations Fact Finding Mission on the Gaza Conflict, with the mandate '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.'¹⁹⁰ Judge Richard Goldstone was appointed to head the Mission.

At the press conference at which Goldstone's appointment was announced, he was asked how he, as a Jew, felt personally about heading a UN investigation into a conflict involving Israel, a Jewish State. His response was:

Well it certainly came to me as quite a shock as a Jew to be invited by the President to head this mission. *It is obviously an additional dimension.* I've taken a deep interest in Israel in what happens in Israel and I have been associated with organizations that have worked in Israel. But having said that, I believe I can approach the daunting task that I have accepted in an even-handed and impartial manner and give it the same attention I have to situations in my own country where, perhaps, similar considerations may have been taken into account.¹⁹¹

186 HV Stuart & M Simons *The prosecutor and the judge: Benjamin Ferencz and Antonio Cassese – Interviews and writings* (2009) <http://press.uchicago.edu/Misc/Chicago/9789085550235.html> (accessed 9 March 2017).

187 'World ORT president: Israel, S. Africa face similar problems' *The Jerusalem Post* 7 June 2000.

188 Villa-Vicencio & Soko (n 155 above) 187.

189 As above.

190 Human Rights Council *Human rights in Palestine and other Occupied Arab Territories. Report of the United Nations fact-finding mission on the Gaza conflict* (2009) 13.

Goldstone's response to an invidious question that in any other context might have been deemed insensitive characteristically understates his Jewish roots – a cue for the Human Rights Council President's follow-up comment 'In my consideration, *there are no Jews or gentiles*. We are all working for the same purpose of human rights.'¹⁹²

The Gaza conflict enquiry 'interpreted [its] mandate as requiring it to place the civilian population of the region at the centre of its concerns regarding the violations of international law.'¹⁹³ While the Mission had the full support of the Palestinian Authority, it was not given any support by the Israeli government, despite repeated attempts by Goldstone himself to obtain such support. In fact Annex II of the Goldstone Report devotes 17 pages to the voluminous correspondence 'between the United Nations Fact Finding Mission on the Gaza Conflict and the Government of Israel regarding Access and Cooperation'.¹⁹⁴

Israel's response to the publication of the Goldstone Report was predictably antagonistic, degenerating at times into *ad hominem* attack. *Ynetnews.com* ran a story entitled 'Judge Goldstone's dark past' in which it reported that an investigation had allegedly 'revealed Goldstone's dark past as a cruel judge in South Africa under the *Apartheid* regime' and in which he was likened to the German SS Officer Joseph Mengele, who claimed in his defence that "'we just followed the law'".¹⁹⁵ The cynical comparison of Goldstone with a Nazi war criminal was no doubt calculated to inflict maximum harm in the face of Goldstone's war-crime investigations as Chief Prosecutor of the ICTY and ICTF.

Goldstone's former colleague on the Constitutional Court Bench, Judge Albie Sachs, asked: "'Why should any Jew who speaks out with an independent voice, especially with regard to the conduct of the State of Israel, be regarded as a self-hating Jew [of which Israeli Prime Minister Benjamin Netanyahu had accused Goldstone after the release of the Goldstone Report] ... Why should someone be made to choose between being a Jew and having a conscience?'"¹⁹⁶ Opposition to Goldstone's report was registered in South Africa too, certain high-profile Jew-hating Jews threatening to demonstrate outside the Sandton Synagogue if Goldstone were to attend his grandson's Bar Mitzvah.¹⁹⁷

191 'Near verbatim transcript of press conference by the President of the Human Rights Council, Martin Ihoeghian Uhomobhi (Nigeria) and Justice Richard J. Goldstone on the announcement of the Human Rights Council fact-finding mission on the conflict in the Gaza Strip' (emphasis added). www.ohchr.org/Documents/HRBodies/.../TranscriptPressBriefing03042009.doc (accessed 7 May 2017) n.p.

192 As above (emphasis added).

193 Human Rights Council (n 190 above) 13.

194 As above, 434.

195 'Judge Goldstone's dark past' *Ynetnews.com* 6 May 2010.

196 Cited in Villa-Vicencio & Soko (n 155 above) 188.

197 As above.

In 'An open letter to Richard Goldstone', a New York City lawyer, Trevor Norwitz, challenged the very foundation of the Mission and its subsequent report:

You may disagree with Israel's decision to ignore your Mission, but when that becomes the fundamental linchpin on which you reach your conclusions, that is not fact-finding. It is politics. I myself was unsure of the Israeli government's decision not to cooperate with your investigation, but it becomes hard to argue with those who say that your Report validates the view that the deck was so stacked against Israel that it was not worth playing the game [Y]our Report as written is an abominable travesty of justice. The damage that you and your Report have already done – to Israel, to the Jewish people, and to truth itself – can never be undone. But it can be mitigated if you are willing to admit the flaws in your Report loudly and clearly.¹⁹⁸

Ironically, while the UN resolution to which the Israeli Ambassador had referred in his correspondence with Goldstone blamed Israel only, the Goldstone Report apportioned blame for civilian-targeted activities to Israel and Hamas. Little wonder then that both Israel and Hamas rejected the report.¹⁹⁹ Notwithstanding this finding, Goldstone later expressed regret about the report having implicated Israel in civilian-targeted deaths, famously declaring in an article in *The Washington Post*:

We know a lot more today about what happened in the Gaza war of 2008-09 than we did when I chaired the fact-finding mission appointed by the U.N. Human Rights Council that produced what has come to be known as the Goldstone Report. If I had known then what I know now, the Goldstone Report would have been a different document.²⁰⁰

More significant than this retraction, however, was the reaction of Prime Minister Benjamin Netanyahu to it:

Netanyahu told his cabinet at its weekly meeting that Goldstone's retraction of his conclusion accusing Israel of war crimes was rare and deserving of further action 'There are very few incidents in which false accusations are taken back, and this is the case with the Goldstone report,' Netanyahu told ministers.²⁰¹

Why did Goldstone retract? Was he influenced by Norwitz's 'Open letter to Richard Goldstone', which accused him of having relied too heavily on the testimony of Hamas? This is the view propounded by Raphael Israeli, who says that Goldstone 'repeatedly repented on his

198 Commentary Magazine 'An open letter to Richard Goldstone' 19 October 2009 <https://www.commentarymagazine.com/articles/an-open-letter-to-richard-goldstone/> (accessed 3 May 2017).

199 Villa-Vicencio & Soko (n 155 above) 189.

200 'Reconsidering the Goldstone Report on Israel and war crimes' *The Washington Post* 1 April 2011.

201 'Israel to launch campaign urging UN to retract Goldstone Report' *Haaretz* 3 April 2011.

inflated condemnation of Israel, since he discovered the mammoth errors he had made in relying too heavily on the Hamas narrative.' Or is there another, evidence-supported, explanation? Whatever the reason for Goldstone's withdrawal of 'false accusations', the mere fact of the retraction earned him praise *from the very quarter most offended by them* – partly substantiating Norwitz's claim in his 'Open letter to Richard Goldstone' that '[the damage caused by the report] can be mitigated if you are willing to admit the flaws in your Report loudly and clearly.'

As to the veracity of the accusations, Goldstone was ultimately proved partially correct. An investigation by the Israel Defense Forces (IDF) into claims that it had targeted civilians in the Gaza conflict was launched in the wake of the Goldstone report:

Now the army has been forced to renege and open investigations it would not have conducted had it not been for the Goldstone report, human rights groups' reports and coverage in the Israeli and international media Now, when it turns out the censure of Israel had plenty of truth in it, it is time to thank the critics for forcing the IDF to examine itself and amend its procedures. Even if not all of Richard Goldstone's 32 charges were solid and valid, some of them certainly were.²⁰²

The about-turn on Israel's vilification of Goldstone may have been cold comfort, but at least it vindicated him. This, together with his having gone out of his way to afford Israel the opportunity to participate in the Mission, had the effect of heaping burning coals on Israel's head.²⁰³

Was Goldstone 'eyeless in Gaza'²⁰⁴ – blind, as Israel initially suggested, to what really happened in the Gaza conflict; or did he see despite not having the full picture which Israel's cooperation in the Mission would have given him? Goldstone himself acknowledged that *with hindsight* – 'If I had known then what I know now'²⁰⁵ – he did not have the full picture; but the IDF finding from its own investigation that it had indeed targeted certain civilians went some way towards revealing that Goldstone saw from the beginning more than his detractors had given him credit for.

202 'Thanks to the critics' *Haaretz* 27 July 2010.

203 Proverbs 25:21-22 reads 'If someone who hates you is hungry, give him food to eat; and if he is thirsty, give him water to drink. For you will heap fiery coals [of shame] on his head, and ADONAI will reward you.'

204 A reference to Judges 16:21, which tells of Samson having his eyes cut out by the Philistines – 'Judges 16:21 CJB' <http://www.biblestudytools.com/cjb/judges/16-21.html> (accessed 21 April 2017); to Milton's 'Samson Agonistes', which retells that story: '... Promise was that I/Should Israel from Philistian yoke deliver;/Ask for this great deliverer now, and find him/Eyeless in Gaza at the Mill with slaves ...' – 'The John Milton Reading Room: Samson Agonistes' https://www.dartmouth.edu/~milton/reading_room/samson/drama/text.shtml (accessed 21 April 2017); and to the bestselling novel by Aldous Huxley – *A Huxley Eyeless in Gaza* (1936).

205 *Washington Post* (n 202 above).

3.3 Constitutional Court judge

Nelson Mandela appointed Goldstone to the first Bench of the Constitutional Court. Goldstone owed his appointment not to his religion (it was a Jewish law firm that took Mandela in as a law clerk) or to Mandela's patronage; rather, his exceptional service to the judiciary on the Benches of the Transvaal Supreme Court and later the Appellate Court that manifested itself in his impartiality and commitment to human rights – and especially in the key cases and commissions outlined above – will have commended him to Mandela.

While Goldstone's landmark judgments as judge of the Transvaal and Appellate Courts, his chairmanship of the Goldstone Commission, his Chief Prosecutorial role on the ICTY and ICTR, and his investigation of the Gaza conflict tend to overshadow his career as a Constitutional Court judge, his majority author judgments in that Court are testimony to the continuation of his commitment to balance and justice. Some of the key human rights-related cases in which Goldstone was the major author are sketched below.

In *President of the Republic of South Africa and Another v Hugo*²⁰⁶ the President, who has the constitutional power to pardon offenders, had granted release to prisoners in certain categories. One such category was mothers in prison with minor children under twelve years of age. A single father of a child under twelve challenged the constitutionality of the pardon in court, claiming that it unfairly discriminated against him and his son on the grounds of sex or gender. The majority ruling was that, although the pardon may have denied men an opportunity it afforded women, it could not be said that *it fundamentally impaired their sense of dignity and equal worth*.²⁰⁷ The pardon simply deprived them of an early release – though by virtue of such pardons being exclusively the prerogative of the president, they were hardly entitled to such pardons. Nor did the pardon prevent fathers from petitioning the President directly for remission of sentence. The pardon did not, therefore, discriminate unfairly against fathers.²⁰⁸

The judgment balanced the president's right to pardon offenders, the fundamental dignity and worth of men whose children were imprisoned, and the right of men to apply directly to the president for 'remission of sentence on an individual basis'.

In *Harksen v Lane NO and Others*,²⁰⁹ the court was asked to rule on whether certain provisions of the Insolvency Act of 1936 violated the

206 *Hugo* 1997 (4) SA 1 (CC).

207 As above.

208 As above.

209 *Harksen* 1998 (1) SA 300 (CC).

equality clause in the Constitution. The sequestration of the estate of one of two spouses led to the property of the spouse whose estate had not been sequestered being vested in the master or trustee – which, it was argued, constituted unequal treatment of solvent spouses, discriminating unfairly against them. Goldstone’s ruling was that while the close relationship of solvent spouses to insolvent spouses *had the potential to diminish human dignity, solvent spouses were not a vulnerable group which had suffered discrimination in the past*. The inconvenience and potential prejudice that could result for the solvent spouses did not therefore compromise their fundamental dignity.²¹⁰

Again, Goldstone as majority author characteristically balanced the potential of the close relationship of the solvent spouse with the insolvent spouse and the usual cohabitation of spouses to ‘demean persons in their human dignity’ against the notion that solvent spouses are not a ‘vulnerable group which has suffered discrimination in the past’ – as required by the equality clause (section 9) in the Constitution.

In *Democratic Party v Minister of Home Affairs and Another*²¹¹ the Democratic Party (DP) challenged the Electoral Act requirement that voters in the upcoming election had to produce bar-coded identity documents (IDs) instead of alternative documents used during the *apartheid* era. The court found that the documentary requirements prescribed by the Electoral Act did not infringe the Constitution. Goldstone’s judgment indicated that the use of a single document, the bar-coded ID, facilitated speedy verification of the holder’s eligibility to vote, that electoral fraud would be prevented because there were records of fingerprints of bar-coded ID holders, and, most importantly from a human rights perspective, that other forms of ID had been issued *on a racial basis* and were therefore a legacy of racial discrimination during the *apartheid* era.

In *Minister for Welfare and Population Development v Fitzpatrick and Others*²¹² the Minister sought clarity on a finding by the Cape High Court that the prohibition on the adoption of a South African-born child by non-South Africans was unconstitutional. As majority author and unanimously supported by the full Bench, Goldstone ruled that the rights of the child were paramount and, notwithstanding the threat of an increase in child trafficking in which the striking down of the prohibition legislation might issue, ruled that the prohibition should in fact be set aside. Goldstone’s judgment paved the way for non-South Africans to adopt South African-born children in cases where such adoption would be in the best interests of the child. In a not dissimilar case (*S v T and Another*),²¹³

210 ‘Interpretation of equality clause in Bill of Rights’ (emphasis added) <http://sas-space.sas.ac.uk/3572/1/1576-1941-1-SM.pdf> (accessed 25 April 2017).

211 *Democratic Party* 1999 (3) SA 254 (CC).

212 *Fitzpatrick* 2000 (3) SA 422 (CC).

Goldstone – also in a unanimous decision – ruled that a child, Sofia, who was brought to South Africa from Canada by her mother and kept in South Africa in violation of an order of the Supreme Court of British Columbia and against the wishes of her father, be returned to British Columbia in terms of Article 12 of the Hague Convention on the Civil Aspects of International Child Abduction. Again, the best interests of the child were paramount for Goldstone, who nevertheless characteristically balanced the rights of the father and the child against those of the mother, ruling that mother and child would not be returned to Canada without a British Columbian authority guarantee that the mother would not be arrested for her actions upon her arrival in Canada.

In *Carmichele v Minister of Safety and Security*²¹⁴ the majority authors, Ackermann and Goldstone, handed down judgment in a case in which the applicant had sued the two Ministers for damages as a result of a brutal attack on her by a man awaiting trial for having tried to rape another woman. The police and prosecutor had recommended the man's release without bail notwithstanding his history of sexual violence. The applicant had not been given leave to appeal in lower courts; but Justices Ackermann and Goldstone, in another unanimous decision of the Constitutional Court, granted her leave to appeal.

In *Van der Walt v Metcash Trading Limited*,²¹⁵ the Supreme Court of Appeal (SCA) on two successive days had refused leave to appeal to one applicant and granted leave to appeal to another; the key facts and grounds for appeal in both applications were substantially identical. In his majority judgment, Goldstone maintained that although it was hardly desirable that contrary orders should be issued by the SCA in substantially identical cases, the constitutional right of the applicant who had been refused leave to appeal by the SCA had not been violated. Neither of the two SCA orders was arbitrary: the judicial panels had to decide whether the appeal granted would have any chance of success. In handing down this judgment, Goldstone balanced the rights of the applicant against the rights of the SCA to issue contrary orders – thereby seeking justice for the applicant in terms of the Constitution and for the judicial system.

All of these judgments reflect Goldstone's intent to balance the rights of opposing parties in ways that either did not infringe upon the human rights of either or that promoted the human rights of both. In *President of the Republic of South Africa and Another v Hugo* he sought to maintain the dignity and worth of men; in *Harksen v Lane NO and Others* he had regard to the vulnerability of persons who had not been discriminated against in the past; in *Democratic Party v Minister of Home Affairs and Another* he protected the right of persons who had been disenfranchised under *apartheid* to vote

213 *S v T* 2001 (1) SA 1171 (CC).

214 *Carmichele* 2001 (4) SA 938 (CC).

215 *Van der Walt* 2002 (4) SA 317 (CC).

on an equal playing field; in *Minister for Welfare and Population Development v Fitzpatrick and Others* and in *S v T and Another* he ruled in the best interests of the child, thereby protecting the child against the possible harm caused by one or both parents; in *Carmichele v Minister of Safety and Security* he upheld the right of a woman attacked by an alleged rapist to appeal the lower-court judgments; and in *Van der Walt v Metcash Trading Limited* he recognised the right of the judiciary to apply its legal mind differently in two substantially similar cases.

4 Justice Goldstone's view of his life and work

The above account of Richard Goldstone's life and work in three capacities – as *apartheid*-era judge, as international judge, and as Constitutional Court judge – has viewed his contributions to human rights through the eyes of others. The focus shifts in this section of the chapter to his own view of his contributions in each of these capacities.

A good starting point is Goldstone's explication of the principles that have guided his life and work:

There are three priorities that form the basis of my private and professional life: *human rights values* as entrenched in international law, *rational thought* as a basis for *honest* and strategic decision-making, and an unreserved commitment to execute a task before me with *integrity* and *dedication*. I soon realised that if you do not achieve your aim in the first round, you need to persevere. If your principles are rationally sound and you are committed to seeing them being realised you need to persevere – to hang in. Even if you don't succeed at least you know you have tried your best.²¹⁶

Four salient points emerge from this passage. First, there is in Goldstone's life no distinction between the public and the private persona: the principles by which he behaves in public are no different from those by which he lives at home. Second, there is a universality of human rights jurisprudence which should militate against nationalism. Third, rational thought, or reason, is the foundation for behaviour that is *honest*.²¹⁷ And fourth, *integrity* is coupled with *dedication* – perseverance in the face of initial failure to the point at which one has done one's best and can do no more.

A fifth priority, which Goldstone does not foreground here but which flows just beneath the surface of his life and work, is the 'influence of the

216 Villa-Vicencio & Soko (n 155 above) 192 (emphasis added).

217 The word *honest* collocates with *honour* (which suggests 'an active or anxious regard for the standards of one's profession, calling, or position'), *integrity* (which implies 'trustworthiness and incorruptibility to a degree that one is incapable of being false to a trust, responsibility, or pledge'), and *probity* (which connotes 'tried and proven honesty or integrity') – Definition of HONESTY' (Merriam-Webster Dictionary) <https://www.merriam-webster.com/dictionary/honesty> (accessed 3 May 2017).

liberal Jewish religious and cultural context within which he was raised in his young and formative years.²¹⁸ As he reflects in his interview with Villa-Vicencio and Soko, “‘Being part of a broader Jewish community that has been persecuted for 2000 years has, nevertheless, shaped my moral and legal convictions’”²¹⁹ – the nonchalance of *nevertheless* betraying a quiet confidence in his antecedents.

The ‘three priorities that form the basis of [his] private and professional life’ resonate strongly with the Bill of Rights in the South African Constitution. Three of them – human rights values, reference to international law, and reason – are directly reflected in the Constitution. First, the advancement of human rights is one of the founding provisions of the Constitution.²²⁰ Second, regard to international law is reflected in the Bill of Rights,²²¹ where a court, tribunal or forum when interpreting the Bill of Rights ‘*must* consider international law,’²²² as well as in the General Provisions of the Constitution, which devotes an entire chapter to international law and stipulates that ‘when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.’²²³ And third, the Bill of Rights is replete with references to reason and reasonableness – in relation to the environment, property, housing, health care, food, water and social security, education, access to information, just administrative action, arrested, detained and accused persons, limitation of rights, and states of emergency.²²⁴

4.1 *Apartheid-era judge*

Goldstone’s views on his tenure as judge on the Benches of the Transvaal Supreme Court and later the Appellate Court and on all matters legal and judicial are largely consistent with the ‘three priorities that form[ed] the basis of [his] private and professional life’.

In the 36th Alfred and Winifred Hoernle Memorial Lecture, which he delivered in Johannesburg on 10 February 1993, Goldstone spoke of his admiration for judges Searle (1925) and Didcott (1979) for speaking out during the colonial and *apartheid* years respectively, quoting a section from one of Didcott’s judgments:

218 Villa-Vicencio & Soko (n 155 above) 190.

219 As above, 191.

220 ‘The Constitution’ (n 163 above) sec 1(a).

221 As above, sec 37(4)(b)(i).

222 As above, sec 39(1)(b) (emphasis added).

223 As above, sec 233.

224 As above, secs 24(b), 25(5), 26(2), 27(2), 29(1)(b), 29(2), 32(2), 33(1), 35(1)(d), 35(1)(f), 35(3)(d), 36(1), 37(4)(b)(iii), and 37(6)(a), (c) & (d).

Parliament has the power to pass the statutes it likes, and there is nothing the courts can do about that. The result is law. But that is not always the same as justice. *The only way that Parliament can ever make legislation just is by making just legislation.*²²⁵

The notion that the *apartheid* Parliament was incapable of making laws that were just and that it arrogated to itself supreme powers highlighted the need for a constitution that would be the 'supreme law of the Republic'²²⁶ and a constitutional court that would be the 'highest court on constitutional matters.'²²⁷

In *Do judges speak out?* Goldstone opines extensively about the role of a judge vis-à-vis the legislation he is supposed to uphold. He claims that no 'South African judge speaking out against unjust or immoral laws whether in or out of Court, has made himself unfit to sit on the Bench. Indeed, as I have already indicated I believe that judges who did so tended to preserve the integrity of the South African Bench.'²²⁸ The integrity he speaks of here not only resonates with his own priority discussed above but alludes to the use of the term in the Constitution, where 'institutional integrity' is enjoined upon all spheres of government and organs of state.²²⁹ Before *integrity* meant 'firm adherence to a code of especially moral or artistic values' it meant 'the quality or state of being complete or undivided' (from the Latin *integer*, 'entire').²³⁰ Speaking out against unjust or immoral laws therefore preserves the wholeness of the judicial process and the officers entrusted with it.

There are many instances, both on and off the Bench, in which Goldstone spoke out; his book *Do judges speak out?* mentions some of them. On the Bench, in *S v Govender* (discussed earlier), he reflected: 'I do not believe that it was in any way improper or compromising of the integrity of the Bench to have spoken out in that way. I would like to believe that the opposite conclusion would be justified.'²³¹ Had he not spoken out, the Group Areas Act might still have been actively policed for the next three years, at least until the unbanning of the ANC in 1990, thereby impacting the negotiation process.

Off the Bench, reflecting on his approximately 3,000 visits to political prisoners to refute stories of prison torture and abuse, he observed:

225 R Goldstone *Do judges speak out?* (1993) 23 (emphasis added).

226 'The Constitution' (n 163 above) sec 2.

227 Constitutional Court of South Africa 'ABOUT THE COURT| Role of the Constitutional Court' <http://www.constitutionalcourt.org.za/site/thecourt/role.htm> (accessed 3 May 2017).

228 Goldstone (n 225 above) 25.

229 'The Constitution' (n 163 above) sec 41(1)(g).

230 Merriam-Webster Dictionary 'Definition of INTEGRITY' <https://www.merriam-webster.com/dictionary/integrity> (accessed 3 May 2017).

231 Goldstone (n 225 above) 22.

These opportunities enabled me to be more than a servile executioner of *apartheid* law. Often dealing with unsympathetic police and prison officials, I was able to contribute to ameliorating the lot of some detainees My sense of *moral ambiguity* was, however, always there. I was working within the context of the deeply immoral *apartheid* system.²³²

Unfortunate use of ‘executioner’ (in the context of *apartheid* death sentence practice) aside, ‘moral ambiguity’ (‘a lack of certainty about whether something is right or wrong’)²³³ might in any other person have issued in Hamlet-like inaction in the face of dilemma. But in Goldstone it was more likely to manifest in decisiveness accompanied by reasoned discourse. In the prison context, this meant ‘engaging in attempts to assist in the rehabilitation of former prisoners.’²³⁴

4.2 International judge

The sub-heading of Villa-Vicencio and Soko’s chapter on Richard Goldstone in their book *Conversations in transition* is ‘Troubled judge in the international arena’²³⁵ – a title on first reading seemingly inappropriate given his quiet confidence but seeking perhaps to capture the inner turmoil Goldstone experienced in:

- Accepting the appointment to head the enquiry into the Gaza conflict
- Managing the vitriolic *ad hominem* attacks on him from Israel in particular following the release of the Goldstone Report
- Subsequently retracting one of the key findings in the report (that Israel had deliberately targeted civilians in the conflict); and
- Processing the fall-out from the retraction – which included having to defend his withdrawal of the civilian-targeting claim.

When asked to head the Gaza inquiry, Goldstone confessed that:

It was not an easy decision to make, but I decided that I could execute the daunting task in an *even-handed and impartial* manner, giving it the same attention that I have given to situations in my own country I accepted the appointment because of my deep concern for peace in the Middle East and my concern for victims on all sides in the Israeli-Palestinian conflict.²³⁶

The *Los Angeles Times* article cited his claim, made in an interview captured on a video portal, that “‘What moves me is the effect that justice has on

232 Villa-Vicencio & Soko (n 155 above) 183 (emphasis added).

233 Merriam-Webster Dictionary ‘Definition of MORAL ambiguity’ <https://www.merriam-webster.com/dictionary/moral%20ambiguity> (accessed 3 May 2017)

234 Villa-Vicencio & Soko (n 155 above) 184.

235 As above, 180.

236 As above, 188-189. Reported also in *Los Angeles Times* ‘Judge named to lead Gaza inquiry is known for fairness’ <http://www.latimes.com/world/la-fg-goldstone8-2009apr08-story.html> (accessed 4 May 2017).

victims. It's really the victims who are the customers, or should be. They're often forgotten. And victims are craving for that public acknowledgment of their victimhood, what happened to them.'"²³⁷ Goldstone said his team would investigate 'all violations of international humanitarian law' before, during and after the Israeli assault. 'It's in the interest of the victims,' he said. 'It brings acknowledgment of what happened to them. It can assist in the healing process.'" And almost as an afterthought: "'I would hope it's in the interests of all the political actors too.'"²³⁸ His assertion that 'victims are craving for that public acknowledgement of their victimhood, what happened to them' arises surely from the very uncomfortable cases he would have to have dealt with in investigating war crimes while on the ICTY and ICTR.

Having accepted the appointment to head the Gaza Mission, Goldstone wrote immediately to the Israeli Ambassador to the United Nations to request Israel's support in cooperating with the Mission, including facilitating access to Israel, Gaza, and the West Bank. There followed an extraordinary exchange of letters between the two men – the extraordinariness lying chiefly in the one-sidedness of the exchange: Goldstone's five letters, four to the Israeli Ambassador, Aharon Leshno-Yaar, and one to the Israeli Prime Minister, elicited just two letters from the Ambassador.²³⁹

Goldstone's first letter to the Israeli Ambassador to the UN (dated 3 April 2009) contained three important statements. First, he assured the Ambassador that the Mission 'would be *given* unbiased and even-handed terms of reference' (emphasis added) – but then later in the letter claimed that 'As a completely independent body, the Mission will now be determining *its own* terms of reference.'²⁴⁰ Fortunately the Ambassador did not react to (if he picked up) the contradiction. Second, Goldstone was at pains to emphasise that the Mission would '*in particular* ... investigate the effects on Israeli citizens of the rocket attacks that emanated from Gaza' (emphasis added). And third, he expressed a desire to 'meet with some of the victims of those attacks, to ascertain ... the effect that they had on an ongoing basis upon the civilian population in the effected [sic] areas of Israel'²⁴¹ – bearing out his ICTY / ICTR-derived assertion that 'victims are craving for that public acknowledgement of their victimhood'.

What stands out from this correspondence is Goldstone's tenacity in pursuing Israel's cooperation with the Mission – presciently, in order to guard against later recriminations of bias. This tenacity supports the last of his three priorities discussed earlier.²⁴²

237 *Los Angeles Times* (n 238 above).

238 As above.

239 Human Rights Council (n 190 above).

240 As above, 434 (emphasis added).

241 As above.

242 Villa-Vicencio & Soko (n 155 above) 192.

4.3 Constitutional Court judge

Some of Goldstone's words spoken as Justice of the Constitutional Court were considered earlier, in the presentation and discussion of the judgments in which he was the majority author. This sub-section of the chapter examines his reflections on some of those judgments and on the Constitution more broadly.

In his interview with the HSRC that formed part of the Constitutional Justice Project,²⁴³ Goldstone was asked how best the Constitutional Court should deal with socio-economic rights – some commentators having accused the Court of having 'overstepp[ed] the mark',²⁴⁴ others of its not having gone far enough. (Christiansen, for example, maintained that 'What is revealed is a [South African Constitutional] Court that has been both less revolutionary and less irresponsible than commentators expected (and continue to allege).')²⁴⁵ Goldstone's response to the HSRC interview question was:

One of the problems which emerges, I mean, one doesn't have to be an expert to know that there are just too many millions of poor South Africans who haven't benefitted at all from socio-economic rights, notwithstanding 20 years of them. Having a *minimum core* I think would be calculated to ensure that there was at least a trickledown which potentially would affect all South Africans. That to me would ... be probably the major benefit of having a minimum core. I think that's as was pointed out in the decisions of the Constitutional Court and certainly during argument. You know, would you have one minimum core for the whole country or would you have different minimum cores for Gauteng and Mpumalanga? And what will the minimum core be? It's pointless having a minimum core ... where government simply cannot, where there's not enough money.²⁴⁶

Here Goldstone balances the government's obligation to provide a minimum core of socio-economic services that address basic rights of citizens against economic pragmatism: if the state cannot afford to implement a minimum core dispensation at national level, let alone in each of the nine provinces, what is the point of even considering it?

Yet the view of the ESCR-Net (International Network for Economic, Social and Cultural Rights) on the affordability question is that claims of unaffordability are no excuse:

243 G Pienaar 'HSRC Constitutional Justice Project: Interview with Justice RJ Goldstone' (2014).

244 As above, 3.

245 EC Christiansen 'Adjudicating non-justiciable rights: Socioeconomic rights and the South African Constitutional Court' (2007) 38 *Columbia Human Rights Law Review* 321.

246 Pienaar (n 243 above) 27 (emphasis added).

Governments, no matter what level of resources are at their disposal, are obligated to make sure that people living under their jurisdiction enjoy at least essential levels of protection of each of their economic, social, and cultural rights. While the ICESCR [International Covenant on Economic, Social and Cultural Rights] recognizes the principle of progressive realization of ESCR [economic, social and cultural rights], this does not mean that states are free to postpone undertaking their duties vis-à-vis ESCR until a later date. Protection from starvation, primary education, emergency healthcare, and basic housing are among the minimum requirements to live a dignified life and it is the duty of governments to ensure these at all times. Even in cases of economic downturn or other emergency, these core requirements must be guaranteed to everyone. States should use all the available resources, including international assistance, to make sure that every individual in their territory enjoys a bare minimum of ESCR.²⁴⁷

This statement is unequivocal in its insistence on government responsibility with regard to all its citizens, however poor. Is Goldstone's sentiment about affordability a legitimate excuse? If it is, it is countered by his own unequivocation on the issue of government accountability:

I think government is inefficient and as much as it may not perform in certain areas I think the position in our country would be far worse than without socio-economic rights. I think government at all levels knows that there's an expectation and that they can be called to account. That's very important. The question of judicial oversight I think if anything, and I hope I'm not exaggerating, I think it's more important and even its most important benefit is the knowledge by civil servants that they may be called on to account.²⁴⁸

The second key issue raised by Goldstone in his HSRC interview was the importance of consensus – not as a constitutional principle per se (though consensus was enjoined by the Constitution as a means of reaching agreement in a Government of National Unity at president, cabinet, premier, and executive council levels)²⁴⁹ – but as a Constitutional Court practice:

In the American Supreme Court the judges meet only once, the justices only meet once per case On the South African Constitutional Court very, very early on we adopted the very opposite. We meet in conference on every case and sometimes in a difficult case we may have 14 conferences on the same case. And we'll go on and on meeting until – I mean, obviously if there's unanimity then you have one meeting But in cases where there are differences of opinion or uncertainties we'll go on and on meeting until there's no point in further discussion. It's been exhausted.... And it's so valuable. I mean, you know, I can't tell you how many judges have changed their minds in the course of those discussions.²⁵⁰

247 ESCR-Net 'Minimum core obligations' <https://www.escr-net.org/resources/minimum-core-obligations> (accessed 2 May 2017).

248 Pienaar (n 243 above) 51.

249 'The Constitution' (n 163 above) Annexure B.

250 Pienaar (n 243 above) 35-36.

Judgment by fatigue (not only is the matter exhausted but the Justices must be too) is in a curious paradox touted as being 'so valuable', the fact of judges having changed their minds through an extensive face-to-face consensus-seeking process being proffered as evidence of the value it affords.

The practice Goldstone valorises mirrors the way in which the South African electoral system was negotiated:

Ideally, decisions would be reached through general consensus – and if this proved impossible the chairperson of the forum would have to decide whether there was at least 'sufficient' consensus. For most purposes, sufficient consensus was equated with agreement between the ANC and the National Party, a practice which encouraged the resolution of key issues in discreet 'bilateral' encounters between representatives of the two parties.²⁵¹

The Constitutional Court consensus-seeking process must have aimed for full consensus but have had to settle, on many occasions, for sufficient consensus – hence the combination of majority and minority judgments emanating from the Court.

5 Social justice and Judaism

Nelson Mandela, whose career owed much to the early support of the Jewish law firm Witkin, Sidelsky and Eidelman,²⁵² was later to write: 'I have found Jews to be more broad-minded than most whites on issues of race and politics, perhaps because they themselves have historically been victims of prejudice.'²⁵³ Some eight years after the publication of Mandela's *Long walk to freedom*, Kgalema Motlanthe, in his capacity as ANC Secretary General, said of the Jewish influence on the liberation movement:

That people of Jewish descent should be so prominent in the liberation movement says something fundamental about the compassion of Judaism. Many Jewish immigrants arrived in our shores in abject poverty, laying claim to little but their rich commitment to humanitarian and egalitarian ideals. These commitments were sometimes rooted in traditional Jewish teaching. They sometimes emerged from traditions of socialism Whatever the case, Jewish compassion is the fruit of empathy, rather than sympathy. It is the fruit of struggle over many millennia, against racism and persecution.²⁵⁴

251 T Lodge 'How the South African electoral system was negotiated' (2003) 2(1) *Journal of African Elections* 75.

252 N Mandela *Long Walk to Freedom* (1994).

253 As above, 54.

254 Jews for Justice for Palestine 'Address to the South African Jewish Board of Deputies, 15 Oct 2002' <http://jjfp.com/?p=73387> (accessed 7 May 2017).

While Mandela and Motlanthe collectively attribute Jewish broadmindedness, empathy and compassion to historical victimisation in the form of (racial) prejudice and persecution, another source of such compassion, maintains Sacks,²⁵⁵ is Jewish protest. Countering Marx's oft-quoted claim that religion is 'the sigh of the oppressed creature, the heart of a heartless world, and the soul of soulless conditions. It is the opium of the people',²⁵⁶ Sacks links justice and dignity to Jewish protest against the prevailing powers:

Opium of the people? Nothing was ever less an opiate than this religion [Judaism] of sacred discontent, of dissatisfaction with the status quo. It was Abraham, then Moses, Amos, and Isaiah, who fought on behalf of justice and human dignity – confronting priests and kings, even arguing with God Himself. That note, first sounded by Abraham, never died. It was given its most powerful expression in the book of Job, surely the most dissident book ever to be included in a canon of sacred scriptures. It echoes again and again in the rabbinic midrash, in the *kinot* (laments) of the Middle Ages, in Hassidic tales and the literature of the Holocaust. In Judaism, faith is not acceptance but protest, against the world that is, in the name of the world that is not yet but ought to be The Bible is not metaphysical opium but its opposite. Its aim is not to transport the believer to a private heaven. Instead, its impassioned, sustained desire is to bring heaven down to earth.²⁵⁷

The origins of South African law lie in Roman-Dutch civil law, English common law, and customary law;²⁵⁸ and the Constitution borrowed heavily from American, Canadian and German constitutional law, in particular the Canadian Charter of Rights and Freedoms.²⁵⁹ There are no demonstrable influences of Judaism upon the Constitution. Yet in a curious coincidence, the centrality of justice and dignity in Judaic law and prophecy, the representation of Jews in the liberation struggle for freedom, the generosity of spirit of a Jewish law firm, and the commitment of Jewish lawyers to social justice in South Africa coalesce in the person of Richard Goldstone, who, in interspersing a non-partisan commitment to social justice with muted references to the religion of his birth, achieves that rare balance between promoting a secular Constitution and upholding the right to religious freedom of expression. A fellow Jew, Arthur Chaskalson, held that 'Religion and ethnicity are irrelevant to the capacity to judging with

255 J Sacks *To heal a fractured world: The ethics of responsibility* (2005) 27.

256 K Marx 'Towards a critique of Hegel's philosophy of right: Introduction' (1844) https://www.marxists.org/archive/marx/works/download/Marx_Critique_of_Hegels_Philosophy_of_Right.pdf (accessed 7 May 2017).

257 Sacks (n 255 above) 27 (emphasis original).

258 J Dugard 'International law and the South African Constitution' (1997) 1 *European Journal of International Law* 79.

259 D Davis 'Constitutional borrowing: The influence of legal culture and local history in the reconstitution of comparative influence: The South African experience' (2003) 1(2) *International Journal of Constitutional Law* 186-187.

integrity'.²⁶⁰ But Goldstone, through his essential Jewish-inspired humanity, has shown himself to be a *mensh* on the Bench.²⁶¹

6 Conclusion

Justice Richard Goldstone has never denied his religious antecedents; nor has he foregrounded them. This much is perhaps to be expected from a man who, though raised in a secular home, embodied, without extolling, the proud Jewish tradition of social justice embraced by so many of his compatriots in the fight against *apartheid* – a fight that led Nelson Mandela to highlight the broad-mindedness of Jews on issues of race and politics and Kgalema Motlanthe to attribute Jewish compassion to empathy with those engaged in their own struggle.²⁶² For both Mandela and Motlanthe, such empathy was born of the prejudice suffered by Jews over millennia.

Yet the circumspection with which Goldstone carried his Jewishness in the post-*apartheid* era – pre-eminently as a Justice on the first Bench of the Constitutional Court – is a function also of the sanctity of the secular state to which the Constitution had committed South Africa and of Goldstone's allegiance to that precept. Raised in a secular home, he was at home in a secularised country in which, as a Jew, he was free nevertheless, should he have chosen to do so, to practise his religion with constitutional sanction.²⁶³ As in all things, Goldstone was measured in walking the line between secularism and religion, preferring the expansiveness of outcomes that affirmed the humanity he had in common with those with whom he interacted to any narrowness an adherence to his own religion might have afforded.

260 Chaskalson & Bizos (n 162 above) 45.

261 'Yiddish *mentsh* human being, from Middle High German *mensh*, from Old High German *mennisco*; akin to Old English *man* human being, man' *Merriam-Webster Dictionary* <https://www.merriam-webster.com/dictionary/mensch> (accessed 7 May 2017).

262 Mandela (n 252 above) 54; Jews for Justice for Palestine 'Address to the South African Jewish Board of Deputies, 15 Oct 2002' <http://jffjp.com/?p=73387> (accessed 7 May 2017).

263 See 'The Constitution' (n 163 above) secs 9(3), 15, 16, and 31.

Bibliography

- Chaskalson, A, & Bizos, G 'In support of Justice Goldstone' (2010) 23(2) *Advocate* 43-45.
- Christiansen, EC 'Adjudicating non-justiciable rights: Socioeconomic rights and the South African Constitutional Court' (2007) 38 *Columbia Human Rights Law Review* 321.
- Davis, D 'Constitutional borrowing: The influence of legal culture and local history in the reconstitution of comparative influence: The South African experience' (2003) 1(2) *International Journal of Constitutional Law* 181.
- Davis, D, & Le Roux, M *Precedent & possibility: The (ab)use of law in South Africa* (Juta and Company Ltd.: Johannesburg 2009).
- Dugard, J 'International law and the South African Constitution' (1997) 1 *European Journal of International Law* 77.
- Goldstone, R *Do judges speak out?* (South African Institute of Race Relations: Johannesburg 1993).
- Hazan, P *Justice in a time of war: The true story behind the International Criminal Tribunal for the Former Yugoslavia* (Texas A&M University Press: College Station, TX. 2004).
- Human Rights Council *Human rights in Palestine and other Occupied Arab Territories. Report of the United Nations fact-finding mission on the Gaza conflict* (Office of the United Nations High Commissioner for Human Rights: Geneva 2009).
- Huxley, A *Eyeless in Gaza* (Chatto & Windus: London 1936).
- Lodge, T 'How the South African electoral system was negotiated' (2003) 2(1) *Journal of African Elections* 71.
- Mandela, N *Long walk to freedom* (Little Brown & Co: London 1994).
- Parker, P, & Mokhesi-Parker, J *In the shadow of Sharpeville: Apartheid and criminal justice* (New York University Press: New York 1998).
- Sacks, J *To heal a fractured world: The ethics of responsibility* (Schocken Books: New York 2005).
- Shimoni, G 'The Jewish response to apartheid: The record and its consequences' in Mendelsohn, E (ed) *Jews and the state: Dangerous alliances and the perils of privilege* (Oxford University Press: Oxford 2004).
- Van Wyk, C *It is time to go home* (Ad Donker: Johannesburg 1979).
- Villa-Vicencio, C, & Soko, M *Conversations in transition: Leading South African voices* (David Philip: Cape Town 2012).
- Zimmermann, R 'The contribution of Jewish lawyers to the administration of justice in South Africa' (1995) 29 (1-2) *Israel Law Review* 250.