Upon Further Review . . .

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To the astonishment of friends and foes of Israel alike, on April 1 in the *Washington Post*, Justice Richard Goldstone reversed himself. Israeli prime minister Benjamin Netanyahu promptly demanded that the United Nations retract the Goldstone Report, which, following its publication in September 2009, quickly became the proof text for progressives determined to denounce Israel as an outlaw nation. Meanwhile, Goldstone's colleagues on the U.N. Fact Finding Mission on the Gaza Conflict—London School of Economics professor Christine Chinkin; Colonel Desmond Travers, a former officer in Ireland's Defence Forces; and Hina Jilani, advocate of the Supreme Court of Pakistan—have shown no sign of changing their minds. Indeed, on April 4, Jilani declared that "no process or acceptable procedure would invalidate the U.N. Report."

Yet whatever unfolds at the U.N. and however determined his colleagues are to stick to their story, Goldstone's dramatic reversal has great significance. Under the understated title "Reconsidering the Goldstone Report on Israel and War Crimes," Goldstone withdrew the gravest charge that he and his colleagues had leveled against Israel and its Gaza operation of December 2008-January 2009, which aimed at stopping Hamas's firing of thousands of mortar shells, rockets, and missiles at civilian populations in southern Israel.

According to Goldstone, a former justice of the Constitutional Court of South Africa, it is now established both by Israeli military investigations and by "the final report by the U.N. committee of independent experts" (chaired by former New York judge Mary McGowan Davis) that "civilians were not intentionally targeted as a matter of policy" by Israel. Coming from Goldstone—chosen to head the Human Rights Council's investigation in part because of

the prestige he brought as former prosecutor of the international criminal tribunals for the former Yugoslavia and Rwanda—this exoneration was as welcome as it was unexpected. But, like much else in his *Post* piece, it is partial and misleading.

Goldstone wrote as if he were confronting a lingering suspicion that finally can be laid to rest. He failed to acknowledge that nothing had done more than the Goldstone Report—endorsed by the U.N. General Assembly in November 2009 by a vote of 114-18, with 44 countries abstaining—to promulgate the slander that Israel had adopted an essentially criminal strategy in Operation Cast Lead.

In fact, the Goldstone Report culminates with the conclusion—not a factual finding or suspicion but a legal conclusion—that in the Gaza conflict Israel undertook

> 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. (Part V, par. 1690)

With this calumny, the Goldstone Report went beyond asserting a moral equivalence between Israel and the terrorists it was fighting. It affirmed that Israel was worse than Hamas, since Israel was a state, since Israel used state-of-the-art weaponry, and since the death and destruction it supposedly deliberately inflicted on civilians in Gaza was much greater than the harm to civilians in southern Israel caused by eight years of Hamas bombardment.

In the *Post*, Goldstone blamed his report's most egregious error on Israel's refusal to cooperate: "The allegations of intentionality by Israel were based on the deaths of and injuries to civilians in situations where our fact-finding mission had no evidence on which to draw any other reasonable conclusion." This is incorrect. For one thing, Goldstone and his colleagues did not leave matters at "allegations"; they made numerous legal findings that Israel, as a matter of strategy and policy, targeted civilians. For another, it was not as Goldstone now contends that he lacked evidence to avoid the conclusion of intentionality. Rather, the evidence he and his team collected and on which they based their legal findings was *always* insufficient to reasonably conclude that the Israel Defense Forces had committed war crimes and crimes against humanity.

To find that a military has used disproportionate force, international humanitarian law, also known as the law of armed conflict, requires an analysis of the understandings and intentions of commanders and soldiers and a determination of whether their decisions and conduct were reasonable in the circumstances. The Goldstone Report contains no such analysis. True, Israel declined to cooperate, but it was under no legal obligation to do so. The Goldstone Report, moreover, was precluded from inferring criminal intent either from Israel's decision not to cooperate or from the absence of information about Israeli understandings and

intentions. Yet the Goldstone Report leapt to grim legal conclusions about the use of disproportionate force without such elementary information as the rules of engagement under which IDF commanders and soldiers operated against terrorists who relentlessly sought to blur the distinction—fundamental in the law of armed conflict—between civilians and combatants by unlawfully positioning themselves in densely populated areas and unlawfully fighting without uniforms. In short, the Goldstone Report's legal finding that Israel sought to "terrorize a civilian population" was based on inadequate factual findings and so was inherently invalid.

Goldstone's Reconsideration also withdraws—without making clear it is doing so—a scurrilous charge against the Israeli legal system. It cites approvingly the McGowan Davis report, which notes that " 'Israel has dedicated significant resources to investigate over 400 allegations of operational misconduct in Gaza' while 'the de facto authorities (i.e., Hamas) have not conducted any investigations into the launching of rocket and mortar attacks against Israel.' "

In rightly crediting Israel's investigations, however, Goldstone does not mention his report's baseless finding that Israel's system of civilian and military justice "does not comply with" the principles of international law (Part IV, par. 1612). The Goldstone Report reached this damning conclusion even though Israel's procedures for investigating war crimes allegations compare favorably with, and in some important respects are more exacting than, those of the United States, Canada, the United Kingdom, and Australia.

Some distinguished Israelis, including *Haaretz*'s Aluf Benn and Hebrew University's Shlomo Avineri, have argued that an important lesson to be learned from Goldstone's reconsideration is that Israel ought to have cooperated with the Goldstone mission and should cooperate with similar international investigations in the future. Even if the investigators are biased, better for Israel to make its case and get it on record before official conclusions are published and ratified by the U.N.

That is the wrong lesson. Israel should not acquiesce to one set of rules and standards for itself and another for all other states. Under international humanitarian law, the obligation to investigate and prosecute war crimes falls in the first place on nations accused. Only when a country has shown itself to be unwilling or unable to discharge its obligation are international bodies authorized to pursue war crimes investigations. Israel, whose devotion to the law of armed conflict is something of which its soldiers and citizens can be proud, should not cooperate in the abrogation of its rights and responsibilities as a sovereign nation.

The Goldstone Report inflicted grave damage on Israel. But the Goldstone Reconsideration provides an excellent opportunity to reorient public discussion about international humanitarian law, not only for Israel but also for the United States, which, like its only liberal and democratic ally in the Middle East, is locked in a long war against transnational terrorists.

As Goldstone rightly observes at the end of his reconsideration, “the laws of armed conflict apply no less to nonstate actors such as Hamas than they do to national armies.” It’s high time to recognize that the chief threat to international law and order comes not, as so many Western intellectuals and international human rights lawyers are inclined to believe, from Israel and the United States, whose militaries devote untold and unprecedented hours to studying and enforcing the law of armed conflict, but from the terrorists, who utterly reject it.

Peter Berkowitz is the Tad and Dianne Taube senior fellow at the Hoover Institution, Stanford University, where he chairs the Koret-Taube Task Force on National Security and Law.