

# Goldstone's Regret: Implications for Israel and Others

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## ABOUT THE AUTHORS



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Brief Analysis

In a remarkable April 1 article published in the *Washington Post*, Judge Richard Goldstone -- chairman of the UN fact-finding mission that investigated the military conflict in Gaza in 2008-2009 -- expressed regret for some of the most damning findings against Israel in his mission's report. His article declares that "If I had known then what I know now, the Goldstone report would have been a different document."

In significant contrast to his initial report, Goldstone now asserts that civilians were not intentionally targeted as a matter of policy during the Gaza campaign and that estimates of Palestinian civilian casualties may have been exaggerated. Importantly, he gives credit to Israeli efforts to investigate operational misconduct, while denouncing Hamas's tactics and its failure to investigate its own wrongdoing.

Whether Justice Goldstone's about-face on these issues will help reverse or limit the trends enabled by his initial report is yet to be seen. If accorded its due weight, and endorsed more widely, the regret expressed by Goldstone could have a number of implications in the following areas:

## Delegitimization Efforts against Israel

The Goldstone report has served an important role in what Israel sees as an intensified effort from some quarters to challenge not just its policies but its right to exist and defend itself as a sovereign state. The Goldstone report fed this "delegitimization" campaign by essentially portraying Israel as a pariah State engaged in the intentional and unlawful targeting of civilians. It helped fuel a number of hostile initiatives against Israel in legal and political forums and, more generally, to shape the narrative of the Gaza conflict.

Goldstone's reassessment is unlikely to have an impact on those actively engaged in delegitimization initiatives, such as the calls to boycott, sanction, and divest from Israel. Moreover, while steps may be taken to enhance the article's status within the UN system, the probability that Goldstone's new position will enable repudiation of the report by the bodies that adopted it is questionable, given their political makeup, and efforts to pursue this line of action may backfire. Nevertheless, the justice's revised findings clearly undermine the weight of the report in the court of public opinion, and may serve as a caution against giving unconsidered credibility to the more outrageous claims made by Israel's detractors.

## Exposure to Prosecution in Foreign Courts

Goldstone's retractions may assist in efforts to deter or defend against the prosecution of Israeli officials in foreign courts for alleged war crimes. Various countries, including the United Kingdom, Spain, and Norway, have legal provisions that can allow for the criminal prosecution of foreign nationals for serious violations of international law, allegedly committed on foreign soil, under a principle known as universal jurisdiction.

The findings of the initial Goldstone report enhanced the risk that senior Israelis involved in the Gaza conflict would be prosecuted abroad, and various organizations have sought to exploit universal jurisdiction laws in order to target Israeli officials as a result. This situation has limited the travel of some high-ranking Israelis to certain countries and has had a chilling effect on Israel's diplomatic relations with countries, such as the UK, whose laws have been used (and abused) in this way.

Goldstone's article is not an official legal document nor does it rescind his original report. However, it may well make authorities in countries with universal jurisdiction provisions less inclined to allow hostile legal initiatives against Israeli officials to go forward. This is particularly the case because Israel's own process of investigating alleged misconduct has received notable praise both from Goldstone and in more official UN reports cited in Goldstone's article.

Generally speaking, prosecuting authorities are reluctant (and sometimes unauthorized) to pursue cases of universal jurisdiction when the relevant state is considered willing and able to investigate the conduct itself. As a result, Israel's record of investigating and, where appropriate, prosecuting its own soldiers for wrongdoing, now given credit by Goldstone and other significant authorities, will help mitigate (though not eliminate) the risk to which Israeli officials have been exposed in recent years.

## Implications for Hamas and Future Conflicts

Goldstone's article contains a forceful rebuke of the Hamas organization and its terrorist tactics. If the initial report seemed to create a moral equivalence between Israel and Hamas, Goldstone's new position pushes in the opposite direction. Not only does Goldstone offer a contrast between Israel's investigating process and Hamas's lack thereof, he regards the allegations of war crimes leveled against Hamas as self-evident, given the organization's deliberate shelling of civilian targets, while essentially retracting some similar findings against Israel.

From an Israeli perspective, Goldstone's initial report had the effect of encouraging organizations such as Hamas and Hizballah to believe that intensifying their operations from within and behind civilian areas would enhance their immunity, while sharpening international criticism of Israel when it sought to respond. The result would be to further complicate subsequent armed confrontations between Israel and Hamas and similar groups, and further endanger civilian populations and facilities.

It is questionable whether the article's assessment of Hamas will have any effect on the organization, its methods, or its continuing attempts to attain international legitimacy. Unsurprisingly, Hamas has dismissed Goldstone's revised position with the same fervor that it embraced his initial report. However, Goldstone's article may help to increase international opprobrium for Hamas's tactics, while simultaneously increasing understanding for the challenges Israel faces in responding appropriately to the group's attacks. If the result is to help shift international attention and responsibility toward those adopting tactics that deliberately endanger civilians, this can only be considered a positive contribution to the efforts to minimize civilian harm in situations of armed conflict.

## Future Israeli Cooperation with Fact-Finding Missions

Israel did not officially cooperate with the Goldstone mission. It argued that its mandate was blatantly one-sided, that certain members had already made seriously prejudicial statements against Israel on record, and that the

body that established the mission (the UN Human Rights Council) lacked all credibility given its record of hostility and discriminatory focus on Israel. In his article, Goldstone concedes that the council's "history of bias against Israel cannot be doubted," but he regrets Israel's lack of cooperation, which may have influenced the report's findings.

Goldstone's change of heart has sparked considerable debate in Israel as to whether the decision of noncooperation was appropriate, and whether in future situations Israel should agree to work with such fact-finding bodies. While not commonly known, Israeli authorities cooperate with the vast majority of international monitoring and fact-finding bodies, including numerous ad hoc mechanisms established following the recent Gaza conflict. When Israel decides not to cooperate, it is usually because the mandate or composition of the investigating body is considered so one-sided or politicized that the capacity to legitimately influence the outcome of the report is seen to be extremely limited. In the cases, the benefits of cooperation are regarded as being outweighed by the problems associated with granting legitimacy to a flawed process.

It is worth noting that even without formal cooperation, official Israeli legal and factual analysis of the Gaza conflict was publicly available for the Goldstone mission to use. In addition, much of the information that eventually led Goldstone to reassess his findings is the result of a time-consuming Israeli investigation process and was not available when the commission was preparing its report.

## Implications for Subsequent Fact-Finding Bodies

Goldstone acknowledges in his article that the purpose of fact-finding missions is "to ensure accountability for improper actions, not to second-guess, with the benefit of hindsight, commanders making difficult battlefield decisions." But, as the Goldstone report arguably shows, fact-finding bodies under pressure to produce results are often unable or unwilling to engage in the painstaking and time-consuming process required to adequately ascertain the facts and context of the situation they are investigating.

The Goldstone report was criticized for its failure to properly appreciate the nature of asymmetric warfare and the use of civilians as shields for militant activity. The attempt to deduce intent from partial evidence and the reliance on allegedly flawed or often politicized second-hand reports were just some of the fundamental methodological shortcomings critics identified in the Goldstone mission's approach. It may be hoped that Goldstone's remorse may serve as a cautionary tale for subsequent fact-finding bodies. One positive outcome would be the development of more detailed and rigorous guidelines that acknowledge the important role fact-finding can play in such situations, but encourage greater appreciation for the complexity of ascertaining the truth in combat situations. This would require, for example, avoiding the tendency to rush to judgment on the basis of selective or questionable sources, acknowledging the limitations and non-judicial character of the fact-finding process, and a more disciplined commitment to examine events from the perspective of the reasonable military commander on the ground at the time of the incident under inquiry (rather than with the benefit of hindsight).

## Conclusion

While the ultimate impact of Goldstone's reassessment is difficult to measure, the judge's revised thoughts have certainly undermined the moral and legal weight of the initial Goldstone report. This new position, especially if more widely endorsed, may help adjust expectations of what is reasonable and appropriate for states engaged in asymmetric hostilities, not only in the Israeli-Palestinian context but in other theatres of combat as well. The result may be, at least in some circles, to generate greater public understanding for the dilemmas faced by states in responding to terrorist tactics and less latitude for militant groups that seek not only to target civilians but also to shield themselves behind them.

*Tal Becker, an international associate of The Washington Institute, is the author of the recently published Policy Focus [The Claim for Recognition of Israel as a Jewish State: A Reassessment](#)*

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