

## Did Israel Use "Disproportionate Force" in [Gaza](#)?

### Dore Gold

- Israeli population centers in southern Israel have been the target of over 4,000 rockets, as well as thousands of mortar shells, fired by  [Hamas](#) and other organizations since 2001. Rocket attacks increased by 500 percent *after* Israel withdrew completely from the Gaza Strip in August 2005. During an informal six-month lull, some 215 rockets were launched at Israel.
- The charge that Israel uses disproportionate force keeps resurfacing whenever it has to defend its citizens from non-state terrorist organizations and the rocket attacks they perpetrate. From a purely legal perspective, Israel's current military actions in Gaza are on solid ground. According to international law, Israel is not required to calibrate its use of force precisely according to the size and range of the weaponry used against it.
- Ibrahim Barzak and Amy Teibel wrote for the Associated Press on December 28 that most of the 230 Palestinians who were reportedly killed were "security forces," and Palestinian officials said "at least 15 civilians were among the dead." The numbers reported indicate that there was no clear intent to inflict disproportionate collateral civilian casualties. What is critical from the standpoint of international law is that if the attempt has been made "to minimize civilian damage, then even a strike that causes large amounts of damage - but is directed at a target with very large military value - would be lawful."
- Luis Moreno-Ocampo, the Chief Prosecutor of the International Criminal Court, explained that international humanitarian law and the Rome Statute of the International Criminal Court "permit belligerents to carry out proportionate attacks against military objectives, even when it is known that some civilian deaths or injuries will occur." The attack becomes a war crime when it is directed against civilians (which is precisely what Hamas does).
- After 9/11, when the Western alliance united to collectively topple the Taliban regime in Afghanistan, no one compared Afghan casualties in 2001 to the actual numbers that died from al-Qaeda's attack. There clearly is no international expectation that military losses in war should be on a one-to-one basis. To expect Israel to hold back in its use of decisive force against legitimate military targets in Gaza is to condemn it to a long war of attrition with Hamas.

Israel is currently benefiting from a limited degree of understanding in international diplomatic and media circles for launching a major military operation against Hamas on December 27. Yet there are significant international voices that are prepared to argue that Israel is using disproportionate force in its struggle against Hamas.

## Israeli Population Centers Under Rocket Attack

There are good reasons why initial criticism of Israel has been muted. After all, Israeli population centers in southern Israel have been the target of over 4,000 rockets, as well as thousands of mortar shells, fired by Hamas and other organizations since 2001.<sup>1</sup> The majority of those attacks were launched *after* Israel withdrew completely from the Gaza Strip in August 2005. Indeed, rocket attacks increased by 500 percent (from 179 to 946) from 2005 to 2006.

Moreover, lately Hamas has been extending the range of its striking capability even further with new rockets supplied by [Iran](#). Hamas used a 20.4-kilometer-range Grad/Katyusha for the first time on March 28, 2006, bringing the Israeli city of Ashkelon into range of its rockets for the first time. That change increased the number of Israelis under threat from 200,000 to half a million.<sup>2</sup> Moreover, on December 21, 2008, Yuval Diskin, Head of the Israel Security Agency, informed the Israeli government that Hamas had acquired rockets that could reach Ashdod, Kiryat Gat, and even the outskirts of Beersheba.<sup>3</sup> The first Grad/Katyusha strike on Ashdod, in fact, took place on December 28. There had been no formal cease-fire between Israel and Hamas, but only an informal six-month *tahadiya* (lull), during which 215 rockets were launched at Israel.<sup>4</sup> On December 21, Hamas unilaterally announced that the *tahadiya* had ended.

## Critical Voices

On December 27, 2008, UN Secretary General Ban Ki-moon's spokesmen issued a statement saying that while the Secretary-General recognized "Israel's security concerns regarding the continued firing of rockets from Gaza," he reiterated "Israel's obligation to uphold international humanitarian and human rights law." The statement specifically noted that he "condemns *excessive use of force* leading to the killing and injuring of civilians [emphasis added]."<sup>5</sup>

A day later, Navi Pillay, the UN High Commissioner for Human Rights "strongly condemned Israel's disproportionate use of force." French President Nicolas Sarkozy, who holds the rotating presidency of the European Union, also condemned Israel's "disproportionate use of force," while demanding an end to rocket attacks on Israel.<sup>6</sup> Brazil also joined this chorus, criticizing Israel's "disproportionate response."<sup>7</sup> Undoubtedly, a powerful impression has been created by large Western newspaper headlines that describe massive Israeli airstrikes in Gaza, without any up-front explanation for their cause.

## Proportionality and International Law: The Protection of Innocent Civilians

The charge that Israel uses disproportionate force keeps resurfacing whenever it has to defend its citizens from non-state terrorist organizations and the rocket attacks they perpetrate. From a purely legal perspective, Israel's current military actions in Gaza are on solid ground. According to international law, Israel is not required to calibrate its use of force precisely according to the size and range of the weaponry used against it (Israel is not expected to make Kassam rockets and lob them back into Gaza).

When international legal experts use the term "disproportionate use of force," they have a very precise meaning in mind. As the President of the International Court of Justice (ICJ) in The Hague, Rosalyn Higgins, has noted, proportionality "cannot be in relation to any specific prior injury - it has to be in relation to the overall legitimate objective of ending the aggression."<sup>8</sup> In other words, if a state, like Israel, is facing aggression, then proportionality addresses whether force was specifically used by Israel to bring an end to the armed attack against it. By implication, force becomes excessive if it is employed for another purpose, like causing unnecessary harm to civilians. The pivotal factor determining whether force is excessive is the intent of the military commander. In particular, one has to assess what was the commander's intent regarding collateral civilian damage.<sup>9</sup>

What about reports concerning civilian casualties? Some international news agencies have stressed that the vast majority of those killed in the first phase of the current Gaza operation were Hamas operatives. Ibrahim Barzak and Amy Teibel wrote for the Associated Press on December 28 that most of the 230 Palestinians who were reportedly killed were "security forces," and Palestinian officials said "at least 15 civilians were among the dead."<sup>10</sup> It is far too early to definitely assess Palestinian casualties, but even if they increase, the numbers reported indicate that there was no clear intent to inflict disproportionate collateral civilian casualties.

During the Second [Lebanon](#) War, Professor Michael Newton of Vanderbilt University was in email communication with William Safire of the *New York Times* about the issue of proportionality and international law. Newton had been quoted by the Council on Foreign Relations as explaining proportionality by proposing a test: "If someone punches you in the nose, you don't burn down their house." He was serving as an international criminal law expert in Baghdad and sought to correct the impression given by his quote. According to Newton, no responsible military commander intentionally targets civilians, and he accepted that this was Israeli practice.

What was critical from the standpoint of international law was that if the attempt had been made "to minimize civilian damage, then even a strike that causes large amounts of damage - but is directed at a target with very large military value - would be lawful."<sup>11</sup> Numbers matter less than the purpose of the use of force. Israel has argued that it is specifically targeting facilities serving the Hamas regime and its determined effort to continue its rocket assault on Israel: headquarters, training bases, weapons depots, command and control networks, and weapons-smuggling tunnels. This way Israel is respecting the international legal concept of proportionality.

Alternatively, disproportionality would occur if the military sought to attack even if the value of a target selected was minimal in comparison with the enormous risk of civilian collateral damage. This point was made by Luis Moreno-Ocampo, the Chief Prosecutor of the International Criminal Court, on February 9, 2006, in analyzing the [Iraq War](#). He explained that international humanitarian law and the Rome Statute of the International Criminal Court "permit belligerents to carry out *proportionate attacks* [emphasis added] against military objectives, even when it is known that some civilian deaths or injuries will occur." The attack becomes a war crime when it is directed against civilians (which is precisely what Hamas does) or when "the incidental civilian injuries would be clearly excessive in relation to the anticipated military advantage."<sup>12</sup> In fact, Israeli legal experts right up the chain of command within the IDF make this calculation before all military operations of this sort.

### **Proportionality as a Strategic Issue**

Moving beyond the question of international law, the charge that Israel is using a disproportionate amount of force in the Gaza Strip because of reports of Palestinian casualties has to be looked at critically. Israelis have often said among themselves over the last seven years that when a Hamas rocket makes a direct strike on a crowded school, killing many children, then Israel will finally act.

This scenario raises the question of whether the doctrine of proportionality requires that Israel wait for this horror to occur, or whether Israel could act on the basis of the destructive capability of the arsenal Hamas already possesses, the hostile declarations of intent of its leaders, and its readiness to use its rocket forces already. Alan Dershowitz noted two years ago: "Proportion must be defined by reference to the threat proposed by an enemy and not by the harm it has produced." Waiting for a Hamas rocket to fall on an Israeli school, he rightly notes, would put Israel in the position of allowing "its enemies to play Russian Roulette with its children."<sup>13</sup>

The fundamental fact is that in fighting terrorism, no state is willing to play Russian Roulette. After the U.S. was attacked on 9/11, the Western alliance united to collectively topple the Taliban regime in Afghanistan; no one compared Afghan casualties in 2001 to the actual numbers that died from al-Qaeda's attack. Given that al-Qaeda was seeking non-conventional capabilities, it was essential to wage a campaign to deny it the sanctuary it had enjoyed in Afghanistan, even though that struggle continues right up to the present.

### **Is There Proportionality Against Military Forces?**

And in fighting counterinsurgency wars, most armies seek to achieve military victory by defeating the military capacity of an adversary, as efficiently as possible. There clearly is

no international expectation that military losses in war should be on a one-to-one basis; most armies seek to decisively eliminate as many enemy forces as possible while minimizing their own losses of troops. There are NATO members who have been critical of "Israel's disproportionate use of force," while NATO armies take pride in their "kill ratios" against the Taliban in Afghanistan. Moreover, decisive military action against an aggressor has another effect: it increases deterrence.<sup>14</sup> To expect Israel to hold back in its use of decisive force against legitimate military targets in Gaza is to condemn it to a long war of attrition with Hamas.

The loss of any civilian lives is truly regrettable. Israel has cancelled many military operations because of its concern with civilian casualties. But should civilian losses occur despite the best efforts of Israel to avoid them, it is ultimately not Israel's responsibility. As political philosopher Michael Walzer noted in 2006: "When Palestinian militants launch rocket attacks from civilian areas, they are themselves responsible - and no one else is - for the civilian deaths caused by Israeli counterfire."<sup>15</sup>

International critics of Israel may be looking to craft balanced statements that spread the blame for the present conflict to both sides. But they would be better served if they did not engage in this artificial exercise, and clearly distinguish the side that is the aggressor in this conflict - Hamas - and the side that is trying to defeat the aggression - Israel.

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### Notes

1. For numbers of rockets, see Dore Gold, "Israel's War to Halt Palestinian Rocket Attacks," *Jerusalem Issue Brief*, Vol. 7, No. 34, March 3, 2008, Institute of Contemporary Affairs/Jerusalem Center for Public Affairs, [http://www.jcpa.org/JCPA/Templates/ShowPage.asp?DRIT=1&DBID=1&LNGID=1&TMID=111&FID=442&PID=0&IID=2049&TTL=Israel's\\_War\\_to\\_Halt\\_Palestinian\\_Rocket\\_Attacks](http://www.jcpa.org/JCPA/Templates/ShowPage.asp?DRIT=1&DBID=1&LNGID=1&TMID=111&FID=442&PID=0&IID=2049&TTL=Israel's_War_to_Halt_Palestinian_Rocket_Attacks). See also December 2008 publications on [www.intelligence.org.il](http://www.intelligence.org.il).
2. Robert Berger, "Israeli Official Warns of Growing Hamas Military Threat," Voice of America News, [voa.com](http://www.voanews.com/english/archive/2008-05/2008-05-17-voa23.cfm?CFID=85151341&CFTOKEN=44257801), May 17, 2008, <http://www.voanews.com/english/archive/2008-05/2008-05-17-voa23.cfm?CFID=85151341&CFTOKEN=44257801>.
3. "News of Terrorism and the Israeli-Palestinian Conflict," Intelligence and Terrorism Information Center at the Israel Intelligence Heritage and Commemoration Center (IICC), December 16-23, 2008, [http://www.terrorism-info.org.il/malam\\_multimedia/English/eng\\_n/pdf/ipc\\_e006.pdf](http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/pdf/ipc_e006.pdf).
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6. "World Reacts to Israel Strikes in Gaza," *Deutsche Welle*, dw-world.de, December 28, 2008, <http://www.dw-world.de/dw/article/0,,3905288,00.html>.
7. Brazil Criticizes Israeli Attack on Gaza: Special Report: Palestine-Israel Relations," *China View*, <http://www.chinaview.cn/>, December 28, 2008,  
[http://news.xinhuanet.com/english/2008-12/28/content\\_10570016.htm](http://news.xinhuanet.com/english/2008-12/28/content_10570016.htm).
8. R. Higgins, cited in "Responding to Hamas Attacks from Gaza - Issues of Proportionality Background Paper," Israel Ministry of Foreign Affairs, March 2008.
9. Abraham Bell, "International Law and Gaza: The Assault on Israel's Right to Self-Defense," *Jerusalem Issue Brief*, Vol. 7, No. 29, January 28, 2008, Institute for Contemporary Affairs/Jerusalem Center for Public Affairs,  
[http://www.jcpa.org/JCPA/Templates/ShowPage.asp?DRIT=1&DBID=1&LNGID=1&TMID=111&FID=442&PID=0&IID=2021&TTL=International\\_Law\\_and\\_Gaza:\\_The\\_Assault\\_on\\_Israel's\\_Right\\_to\\_Self-Defense](http://www.jcpa.org/JCPA/Templates/ShowPage.asp?DRIT=1&DBID=1&LNGID=1&TMID=111&FID=442&PID=0&IID=2021&TTL=International_Law_and_Gaza:_The_Assault_on_Israel's_Right_to_Self-Defense).
10. Ibrahim Barzak and Amy Teibel, "Israeli Assault on Hamas Kills More than 200," Associated Press, December 28, 2008,  
[http://news.yahoo.com/s/ap/20081227/ap\\_on\\_re\\_mi\\_ea/ml\\_israel\\_palestinians/print](http://news.yahoo.com/s/ap/20081227/ap_on_re_mi_ea/ml_israel_palestinians/print).
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