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The Israel-Hamas War: Self Defense, Necessity and Proportionality

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Introduction: The Hamas Terror Attacks

On October 7, 2023, Hamas, the governing authority in Gaza since June 2007, launched a surprise attack against southern Israel. Hamas terrorists fired thousands of rockets indiscriminately at Israeli civilian targets, and simultaneously invaded Israeli territory from the land, sea and air. The terrorists brutally slaughtered at least 1,200 Israelis and other nationals in a variety of towns and villages. Hundreds of other victims had been enjoying an open-air music festival in the Negev desert.

The terrorists butchered babies, children, women and elderly victims. They severed limbs, burned people alive, tossed hand grenades at unarmed civilians cowering for their lives, raped women, beheaded infants and adults, gouged out eyes, and committed rape, sexual violence, and many other atrocities. Some of the terrorists wore go-pro cameras and livestreamed their savagery on the stolen cellphones of their victims.¹

Thousands of other victims were wounded, many seriously and critically. The terrorists also kidnapped nearly 250 other victims and took them to Gaza as hostages.

Israel responded with a formal declaration of war, striking Hamas targets in the Gaza Strip. Less than one week later, Israel asked all Gazan civilians to leave the northern half of the Gaza Strip and move to the south for their safety.² Hamas, however, “actively discourage[d] civilians from evacuating to the south and is reportedly even preventing them from leaving, as in the case of blocking roads.”³

Hamas also blocked hundreds of foreign passport holders trapped in Gaza from leaving for Egypt through the Rafah border crossing, effectively holding those people hostage too.⁴

As of this writing the war has lasted for more than one year, other than a one week pause in fighting in late November 2023, when Hamas traded 81 Israeli women and children hostages for more than 200 Palestinian terrorists and an influx of fuel and other supplies.

The available evidence, including the real-time videos uploaded by Hamas terrorists on the social media accounts

of some of their victims, body camera videos seized from dead and captured terrorists, footage from surveillance cameras and automobile dash-cameras, plus eyewitness accounts, overwhelmingly demonstrate the Hamas massacres, sexual violence and hostage-taking violated every norm of international law, including many provisions of the Fourth Geneva Convention and the Rome Statute.⁵

1. Sheera Frenkel and Talya Minsberg, “Hamas Hijacked Victims’ Social Media Accounts to Spread Terror,” N.Y. TIMES, Oct. 17, 2023.
2. John Reed and Mehul Srivastava, “Residents Flee Gaza City as Israel Tells 1.1mn to Leave,” FINANCIAL TIMES, Oct. 13, 2023.
3. Michael N. Schmitt, “Israel – Hamas 2023 Symposium – What Is and Is Not Human Shielding?,” LIEBER INSTITUTE (Nov. 3, 2023), available at <https://lieber.westpoint.edu/what-is-and-is-not-human-shielding/#:~:text=Hamas%20is%20actively%20discouraging%20civilians,qualify%20as%20using%20human%20shields;see%20also%20Hamas%20Tells%20Gaza%20Residents%20to%20Stay%20Put%20as%20Israel%20Ground%20Offensive%20Looms,> Oct. 13, 2023.
4. Ben Farmer and David Millward, “Hamas Blocks Foreign Nationals from Leaving Gaza,” THE TELEGRAPH, Oct. 29, 2023.
5. See, e.g., Bel Trew, “‘Kfar Aza Smells Of Death’: Inside the Israeli Border Village Where ‘Babies Were Slaughtered’ in Hamas Attack,” THE INDEPENDENT, Oct. 11, 2023; see also Samuel Forey, “Hamas Attack: October 7, a Day of Hell on Earth in Israel,” LE MONDE, Oct. 30, 2023; see also Isabel Kershner, “Israel Shares Raw Footage of the Oct. 7 Attacks,” N. Y. TIMES, Oct. 23, 2023; see also “Remarks by President Biden on the October 7th Terrorist Attacks and the Resilience of the State of Israel and its People” (Oct. 18, 2023), WHITEHOUSE.GOV, available at <https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/10/18/remarks-by-president-biden-on-the-october-7th-terrorist-attacks-and-the-resilience-of-the-state-of-israel-and-its-people-tel-aviv-israel/>

Hamas' s Violations of International Criminal Law

Genocide

Hamas carried out the October 7, 2023 attack as part of its stated plan to commit genocide against all Jews living in the State of Israel, in violation of Article 6 of the Rome Statute. The Hamas Covenant (1988) proclaims very clearly the organization's goal of destroying Israel and committing genocide against the Jewish people. The Preamble to the Hamas Covenant declares that "Israel will exist and will continue to exist until Islam will obliterate it, just as it obliterated others before it."⁶

Article 7 of the Hamas Covenant states:

[T]he Islamic Resistance Movement aspires to the realisation of Allah's promise, no matter how long that should take . . . The Day of Judgement will not come about until Moslems fight the Jews (killing the Jews), when the Jew will hide behind stones and trees. The stones and trees will say O Moslems, O Abdulla, there is a Jew behind me, come and kill him.⁷

Hamas spokesperson Ghazi Hamed confirmed the organization's genocidal intent in an interview with the LBC television network in Beirut on October 24, 2023. Hamed warned that the October 7 attack was only the beginning, and that Hamas would continue to strike Israel until it killed every Jew and destroyed the country.⁸

A Muslim physician who visited Israel as part of a delegation of human rights observers in late October 2023 described what he saw in an essay for the *Wall Street Journal*:

One word continually came to mind: genocide. No matter how it emerges, the monster is easy to recognize. As a doctor, I had a rare and panoramic view of the aftermath: the targeted people's long, agonizing journey to death . . . The Oct. 7 genocide was different, more barbaric than anything before it. The attacks were cloaked in the language and metaphors of Islam, yet corrupted with cosmic enmity for the Jewish people, Judaism, global Jewry and the Jewish state. They revealed again that Islamism is a virulent impostor of Islam with intentions anathema to the faith. And there was no doubt of

Islamism's guilt: I saw real-time footage generated by the Hamas commandos' own GoPro cameras. I heard phone calls exclaiming the Shahadah—the Islamic declaration of faith—as they murdered, executed, burned, pillaged and then broadcast their crimes.⁹

Crimes Against Humanity

The Hamas attack included the following crimes against humanity, in violation of Article 7 of the Rome Statute: murder, extermination; severe deprivation of physical liberty in violation of fundamental rules of international law; torture; rape; persecution against any identifiable group on political, racial, national, ethnic, cultural, and religious grounds; enforced disappearance of persons; and other inhumane acts intentionally causing great suffering, or serious injury to body or to mental or physical health.

War Crimes

The Hamas attack included the following war crimes in violation of Article 8 of the Rome Statute: willful killing; torture or inhuman treatment; willfully causing great suffering, or serious injury to body or health; extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; taking hostages; intentionally directing attacks against the civilian population and civilian objects; intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians; attacking or bombarding towns, villages, dwellings or buildings which are undefended and which

6. Hamas Covenant 1988, The Covenant of the Islamic Resistance Movement, available at https://avalon.law.yale.edu/20th_century/hamas.asp

7. *Id.*

8. G. Pacchiani, "Hamas Official Says Group Will Repeat Oct. 7 Attack 'Twice And Three Times' To Destroy Israel," *TIMES OF ISRAEL* (Nov. 1, 2023), available at https://www.timesofisrael.com/liveblog_entry/hamas-official-says-group-will-repeat-oct-7-attack-twice-and-three-times-to-destroy-israel/

9. Q.A. Ahmed, "The Scenes of Genocide I Saw in Israeli Morgues," *WALL ST. J.* (Nov. 10, 2023), available at https://www.wsj.com/articles/the-scenes-of-genocide-i-saw-in-israeli-morgues-hamas-oct-7-77d45c23?st=y10fuwnocwbj5zd&reflink=article_gmail_share

are not military objectives; treacherously killing or wounding individuals; declaring no quarter will be given; pillaging a town or place; committing outrages upon personal dignity, in particular humiliating and degrading treatment; and rape.

Hamas has for many years, including during the current war, committed war crimes by using the civilian population in Gaza and civilian facilities including schools, hospitals, and ambulances as shields.¹⁰ Article 8(2)(b)(xxiii) of the Rome Statute prohibits “[u]tilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations.” This prohibition derives from Article 51(7) of the Additional Protocol I to the 1949 Geneva Conventions, which provides:

The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.

Hamas deliberately launched rockets at Israel from mosques, schools, residential buildings and other civilian areas, hoping to draw Israeli reprisal attacks against civilians used as human shields, in a cynical but so far successful effort to galvanize international condemnation of Israel.

Indeed, Hamas has declared publicly for many years that sacrificing innocent Palestinian civilians is a key element of its strategic doctrine. Hamas official Fathi Hammad, in a speech on February 29, 2008, celebrated using civilians as human shields, boasting:

For the Palestinian people, death has become an industry, at which women excel, and so do all the people living on this land. The elderly excel at this, and so do the mujahideen and the children. This is why they have formed human shields of the women, the children, the elderly, and the mujahideen in order to challenge the Zionist bombing machine.¹¹

Hamas leader Khaled Mashal repeated the claim in a televised interview on *Al Arabiya* television on October 20, 2023, where he bragged about sacrificing Gazan civilians.¹²

Crimes of Aggression

The Hamas attacks constituted the following crimes of aggression in violation of Article 8 *bis* of the Rome Statute: invasion or attack by a State against the territory of another State; bombardment by the armed forces of a State against the territory of another State, or the use of any weapons by a State against the territory of another State; the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to war crimes.

Israel's Lawful Right to Self-Defense

Ever since June 2007, when Hamas took power in the Gaza Strip, Hamas has launched thousands of rockets indiscriminately targeting Israeli civilians, school, hospitals, and apartment buildings. Every such attack has triggered Israel's legal right to defend itself, pursuant to Article 51 of the United Nations Charter, which provides, “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations . . .”

In the *Nicaragua* case, the ICJ made clear that terrorist strikes such as the Hamas attacks constitute an “armed attack” triggering the Article 51 right to self-defense:

In particular, it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across

10. NATO Strategic Communications Centre of Excellence, “Hamas’ Use of Human Shields in Gaza” (June 6, 2019), available at https://stratcomcoe.org/pdfs/?file=/publications/download/hamas_human_shields.pdf?zoom=page-fit
11. H. Adelman, “Research on the Ethics of War in the Context of Violence in Gaza,” 7 J. OF ACAD. ETHICS. 110, 93-113 (2009).
12. “Hamas official says group ‘well aware’ of consequences of attack on Israel, Palestinian liberation comes with ‘sacrifices,’” ARAB NEWS (Oct. 21, 2023), available at <https://www.arabnews.com/node/2394966/middle-east>

an international border, but also “the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to” (inter alia) an actual armed attack conducted by regular forces, “or its substantial involvement therein.” This description . . . may be taken to reflect customary international law. The Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces.¹³

Necessity and Proportionality

Article 51 of the UN Charter contains no express limitations on how the right to self-defence must be exercised. However, customary international law and international humanitarian law require self-defence to be exercised subject to two conditions: necessity and proportionality. As the ICJ noted in the *Nuclear Weapons* Advisory Opinion:

The entitlement to resort to self-defence under Article 51 is subject to certain constraints. Some of these constraints are inherent in the very concept of self-defence. Other requirements are specified in Article 51. The submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law . . . a use of force that is proportionate under the law of self-defence, must, in order to be lawful, also meet the requirements of the law applicable in armed conflict which comprise in particular the principles and rules of humanitarian law.¹⁴

Malcolm Shaw noted that “necessity” and “proportionality” are not well defined in international law. Instead, determining the boundaries of necessity and proportionality “will depend on the circumstances of the case.”¹⁵ Indeed, there appears to be much conflation

of the necessity and proportionality principles, leading to further confusion and ambiguity.¹⁶ But no such ambiguity exists as applied to Israel’s wholly necessary and lawfully proportionate response to the October 7, 2023 Hamas attacks.

Necessity

The Chatham House Principles on International Law describe the necessity principle as follows:

The criterion of necessity is fundamental to the law of self-defence. Force in self-defence may be used only when it is necessary to end or avert an attack. Thus, all peaceful means of ending or averting the attack must have been exhausted or be unavailable. As such there should be no practical non-military alternative to the proposed course of action that would be likely to be effective in averting the threat or bringing an end to an attack. Necessity is a threshold, and the criterion of imminence can be seen to be an aspect of it, inasmuch as it requires that there be no time to pursue non-forcible measures with a reasonable chance of averting or stopping the attack. Necessity is also a limit to the use of force in self-defence in that it restricts the response to the elimination of the attack and is thus linked to the criterion of proportionality. The defensive measure must be limited to what is necessary to avert the attack or bring it to an end. In applying the test of necessity, reference may be made to the means available to the State under attack; the kinds of forces

13. *Military and Paramilitary Activities in and against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14 (June 27) 103-04 ¶ 195.

14. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226 (July 8) 244-45 ¶ 40-42.

15. Malcolm Shaw, *INTERNATIONAL LAW* 1002 (9th ed., 2021).

16. J. McMahan, “Necessity and Proportionality in Morality and Law,” in *NECESSITY AND PROPORTIONALITY IN INTERNATIONAL PEACE AND SECURITY LAW* 5 (Claus Kreß and Robert Lawless eds., 2020).

and the level of armament to hand will be relevant to the nature and intensity of response that it would be reasonable to expect, as well as the realistic possibilities of resorting to non-military means in the circumstances.¹⁷

There can be no doubt that Israel's resort to self-defense was a necessary response to the October 7, 2023 Hamas attacks. Corn has described necessity as arising "only in response to a threat to a state's security that is considered sufficient within the meaning of international law to justify an armed self-help response: an actual or imminent armed attack which leaves the target state with no other means of protection than the use of defensive force."¹⁸ The October 7, 2023 Hamas attack against Israel easily satisfies this test.

Proportionality

International law recognizes two different usages of the term proportionality. The first usage embodies the rule, "well established in customary international law," that self-defense must be "proportional to the armed attack."¹⁹ The second usage, codified in the Fourth Geneva Conventions, reflects the *jus in bello* prohibition against inflicting civilian casualties that are excessive in relation to the expected military advantage of an attack.²⁰

Origins of Proportionality Law

One of the primary purposes of the proportionality limitation on a state's Article 51 self-defense rights is to protect civilians. The modern doctrine of proportionality stems from Article 23 of the Annex to the 1907 Hague Conventions, forbidding belligerents from seizing or destroying enemy property unless "imperatively demanded by the necessities of war."²¹

Shlomo Brody noted that early military ethicists defined proportionality as requiring military necessity. The ethicists also required that any destruction be effective and not wanton, and that any military gains not be "grossly disproportionate" to the extent of any destruction. Quoting M. W. Royse, Brody explained that if the above criteria were met, then "the act can hardly be condemned regardless of the amount of suffering and violence."²²

The proportionality doctrine saw further development in Additional Protocol I to the 1949 Fourth Geneva Conventions.²³ Article 51(2) of the Protocol sets forth the international humanitarian law principle that "[t]he civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence

the primary purpose of which is to spread terror among the civilian population are prohibited."

Article 51(5)(b) of Additional Protocol I prohibits indiscriminate attacks, including attacks "which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be *excessive* in relation to the concrete and direct military advantage anticipated" [emphasis added].

But what does "excessive" mean? International law has struggled to answer this question.

Proportionality Law Muddled: "Excessive" vs. "Clearly Excessive"

Article 57(2)(b) of Additional Protocol I reiterates the requirement of "excessiveness" in determining whether an act of self-defense is disproportionate:

[A]n attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated [emphasis added].

17. E. Wilmschurst, "The Chatham House Principles of International Law on the Use of Force in Self-Defence," 55 INT'L AND COMPARATIVE LAW QUARTERLY 963, 966-67 (2006).

18. G. Corn, "The Essential Link between Proportionality and Necessity in the Exercise of Self-Defense," in NECESSITY AND PROPORTIONALITY IN INTERNATIONAL PEACE AND SECURITY LAW 86 (Claus Kreß and Robert Lawless eds., 2020).

19. *Supra* note 13, at 94.

20. Fourth Geneva Convention, 1949, 75 U.N.T.S. 287, art. 51 (2); *see also supra* note 15, at 1049.

21. Convention Respecting the Laws and Customs of War on Land, with Annex of Regulations, T.S. 539, Oct. 18, 1907.

22. Shlomo M. Brody, "How Israel Missed Its Chance to Eliminate the Leadership of Hamas," TABLET MAGAZINE, Dec. 4, 2023, quoting M. W. Royse, AERIAL BOMBARDMENT AND THE INTERNATIONAL REGULATION OF WARFARE 137 (Vinal, 1928).

23. *Supra* note 20.

Nearly three decades after the adoption of the Fourth Geneva Convention, additional protocols were promulgated in 1977. Article 57 of the 1977 Protocols appeared to expand the concept of proportionality and to constrict the right of self-defense:

Precautions in attack: 1. In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects. 2. With respect to attacks, the following precautions shall be taken: a) those who plan or decide upon an attack shall: i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them; ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects; iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.²⁴

Keiler argues that the 1977 Protocols

effectively ban any attack that may cause extensive civilian losses or damages, even if the attacker uses discrimination and the enemy hides its forces and assets within a civilian population. Thus, a group like Hamas, simply by taking cover among civilians, might render itself immune from attack under the rules of proportionality as defined by the Protocols.²⁵

The Rome Statute, however, expanded the scope of proportionality. Article 8(2)(b)(iv) proscribes "[i]ntentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects . . . which would

be clearly excessive in relation to the concrete and direct overall military advantage anticipated" [emphasis added].

As noted above, Article 57(2)(b) of Additional Protocol I prohibits "excessive" self-defense. The Rome Statute in Article 8(2)(b)(iv) added the word "clearly" to modify the word "excessive." The result is that an act of self-defense which might have been proscribed under the "excessive" standard of Additional Protocol I might instead be deemed lawful under the Rome Statute's heightened "clearly excessive" standard. For example, a retaliatory strike against an apartment building used as the launching base for one rocket might be deemed "excessive," but it might not be deemed "*clearly* excessive."

The precise meaning of the "excessive" threshold in Additional Protocol I and the "clearly excessive" threshold in the Rome Statute remains unclear. Indeed, some commentators question the overall meaning of the proportionality concept as a limitation on the right of self-defense. Jonathan F. Keiler, for example, argues that "the theory of proportionality is ambiguous, lacks useful precedent, and as a practical matter, is nearly impossible to interpret and enforce."²⁶

G. Knoops characterized the "excessive" element as follows:

Hence, only when the potential damage to civilians or civilian objects is expected to be "excessive," compared to the anticipated military advantage, such a military attack would be in contravention to the LOAC [law of armed conflict]. Again, it is not about a precise quantitative calculation of potential civilian loss beforehand; what is decisive is a reasonable expectation of potential collateral damage, balanced against the military gains . . . it would be a misconceived equation to portray the alleged excessiveness of a military operation purely on the ultimate result of the action. The question whether such action is deemed to be excessive warrants an evaluation of the totality of the (military

24. Protocols Additional to the Geneva Conventions, 1977, 1125 U.N.T.S. 3.

25. Jonathan F. Keiler, "The End of Proportionality," 39 *PARAMETERS* 53, 57-58 (2009).

26. *Id.*, at 63.

and situational) information available, including the overall military advantage which was initially anticipated.²⁷

Michael Wells-Greco analyzed the distinction between “excessive” and “clearly excessive”:

Despite being called the proportionality rule, Additional Protocol I uses the term “excessive,” rather than “disproportionate” and accepts, by implication, the occasional unavoidability of incidental losses which are not “excessive.” Article 8(2)(b)(iv) of the Rome Statute of the International Criminal Court is worded similarly to Article 51(5)(b), although it requires that the incidental damage be “clearly excessive,” not just “excessive.” As Watkin writes, the fact that the word “clearly” was added to the offence in that statute relating to the excessive use of force arguably reflects a concern over the quantum of collateral damage that might attract criminal sanctions. Article 8(2)(b)(i) of the Rome Statute provides that launching an indiscriminate attack resulting in loss of life or injury to civilians or damages civilian objects is also a war crime. The application of Article 8(2)(b)(iv) requires, *inter alia*, an assessment of: (a) the anticipated civilian damage or injury; (b) the anticipated military advantage; (c) and, formulaically, whether (a) was “clearly excessive” in relation to (b).²⁸

As Keiler noted:

The problem with proportionality as a law of war concept is twofold: It is subject to misinterpretation by the international media, nongovernmental organizations, and governments; and some of the most restrictive and logically twisted interpretations of the doctrine have a legitimate grounding in existing – albeit damaging – international law. What the doctrine of proportionality does not do, contrary to its more misinformed proponents, is reduce warfare to a series of tit-for-tat attacks. “Disproportion”

can be seen as the edge of an effort to delegitimize action by western nations against weaker countries or nonstate actors. Israel was castigated for responding to indiscriminate rocket fire with precision air attacks, as if a “proportional” response – indiscriminate Israeli rocket fire – would be preferable and legal . . . The United States was not limited to striking a Japanese naval base in response to the attack on Pearl Harbor. In sum, the doctrine of proportionality has little relevance to *casus belli* or *jus ad bellum* (the justice of the cause under traditional just war theory). Nor does the doctrine limit in a legal sense the legitimate military objectives a belligerent may choose to pursue; it regulates in part, to the extent it limits anything, the manner in which military objectives are pursued, and this is certainly the sense in which it is used in modern treaties.²⁹

Interpretations of Proportionality

Knoops identified the elements of an offense arising from a violation of Article 8(2) (b)(iv) of the Rome Statute as (i) establishing the anticipated civilian damage or injury; (ii) establishing the anticipated military advantage; and (iii) whether element (i) was “clearly excessive” in comparison to element (ii).³⁰ In addition, Knoops argued that proof of criminal intent must be established, rather than mere negligence.³¹

The Israeli Supreme Court regards the proportionality limitation on Israel’s self-defense rights as part of customary international law, and as part of Israeli law. The Court defined proportionality as follows in the *Public Committee Against Torture* case:

27. G-J. A. Knoops, “The Duality of the Proportionality Principle within Asymmetric Warfare and Ensuing Superior Criminal Responsibilities,” 9 INT’L CRIM. L. REV. 501, 509, 513 (2009).

28. Michael Wells-Greco, “Operation ‘Cast Lead’: Jus In Bello Proportionality,” 57 NETHERLANDS INT’L L. REV. 397, 406 (2010).

29. *Id.*, at 56-57.

30. *Supra* note 27, at 510.

31. *Id.*, at 508.

The test of proportionality stipulates that an attack on innocent civilians is not permitted if the collateral damage to them is not commensurate with the military advantage (in protecting combatants and civilians). In other words, the attack is proportionate if the advantage arising from achieving the proper military objective is commensurate with the damage caused by it to innocent civilians.³²

The Court then provided an example demonstrating the difficulty in assessing proportionality:

The rule is that combatants or terrorists may not be attacked if the expected damage to innocent civilians in their vicinity is excessive in relation to the military benefit of attacking them . . . Making this balance is difficult. Here too we need to proceed on a case by case basis, while limiting the area of the dispute. Take an ordinary case of a combatant or terrorist sniper who is shooting at soldiers or civilians from the balcony of his home. Shooting at him will be proportionate even if as a result an innocent civilian who lives next to him or who passes innocently next to his home is hurt. This is not the case if the house is bombed from the air and dozens of residents and passers-by are hurt. . . The difficult cases are those that lie in the area between the extreme examples.³³

In *Physicians for Human Rights v. IDF Commander*, the Israeli Supreme Court noted:

When these, as sometimes happens, enter a combat zone – and especially when terrorists turn the local inhabitants into “human shields” – everything must be done in order to protect the lives and dignity of the local inhabitants. The duty of the military commander, according to this basic rule, is twofold. First, he must refrain from operations that attack the local inhabitants. This duty is his “negative” obligation. Second, he must carry out acts required to ensure that the local inhabitants

are not harmed. This is his “positive” obligation . . . Both these obligations – the dividing line between which is a fine one – should be implemented reasonably and proportionately in accordance with the needs of the time and place.³⁴

Wells-Greco agreed with the Israeli Supreme Court’s case-by-case approach to proportionality as the most appropriate means of protecting civilians in a manner consistent with the requirements of Additional Protocol I to the 1949 Geneva Conventions. He described the complexities inherent in determining how to measure proportionality:

In applying the principle of proportionality an assessment could be based on each bombing separately, or each operation, consisting of an integrated holistic programme of bombings, or . . . one might try and assess the totality of civilian lives lost against military advantages gained by the war as a whole. Attacking states (or coalitions) will generally prefer to assess proportionality on a macro scale, applying the principle to the campaign as a whole, rather than to the damage caused by each individual attack; this allows attacks with greater collateral damage to be balanced by attacks that cause less collateral damage. In contrast, with cumulative assessments, Stone asserts that one can also justify loss of civilian life in terms of saving more civilian lives later in the campaign. Such an interpretation would, if correct however, effectively deprive civilians of the protection of Article 57. It seems relatively accepted, and considered extensively by Fenrick, that attacks are to be considered holistically, and not

32. *Public Committee Against Torture in Israel v. the Government of Israel*, HCJ 769/02, [2006] (2) ISRAEL LAW REPORTS 459, 505 (Dec. 14, 2006).

33. *Id.*, at 506.

34. *Physicians for Human Rights v. IDF Commander*, HCJ 4764/04, [2004] ISRAEL LAW REPORTS 200, 208, ¶ 11 (May 30, 2004).

on a "bullet-by-bullet basis," and that individual parts of the attack should not be considered in isolation from each other.³⁵

Wells-Greco applied his case-by-case methodology to the 2008 Israel-Hamas conflict, when Hamas launched rocket attacks against Israeli civilians, provoking an Israeli response causing casualties among Gazan civilians whom Hamas had used as human shields. In language stunningly prescient regarding Hamas's horrific October 2023 mass casualty attack on Israeli civilians, Wells-Greco wrote:

Most scholars seem to agree that for proportionality to be effective, the default mode of assessment must be a case-by-case analysis . . . Where does that leave us? In sum, whether an Israeli attack is disproportionate is completely independent of Hamas' attacks: the ensuing proportionality analysis is the same if Hamas' attacks kill ten Israeli civilians or a thousand. In either scenario, IHL obligates Israel to respond within the contours of proportionality.³⁶

In a report discussing her decision not to pursue war crimes prosecutions arising from the United States' 2003 invasion of Iraq, the International Criminal Court prosecutor noted that civilian deaths during war, no matter how regrettable, do not *per se* violate the proportionality principle:

Under international humanitarian law and the Rome Statute, the death of civilians during an armed conflict, no matter how grave and regrettable, does not in itself constitute a war crime. International humanitarian law and the Rome Statute permit belligerents to carry out proportionate attacks against military objectives, even when it is known that some civilian deaths or injuries will occur. A crime occurs if there is an intentional attack directed against civilians (principle of distinction) . . . or an attack is launched on a military objective in the knowledge that the incidental civilian injuries would be clearly excessive in relation to the anticipated military advantage (principle of proportionality) ...³⁷

Knoops has also noted that asymmetric warfare, such as that pitting a State such as Israel against a terrorist group such as Hamas that embeds itself within the civilian population, "induces a sui generis approach in that the proportionality principle is to be subjected to a teleological interpretation instead of one exclusively based on the objective outcome of military action."³⁸

A recent critic noted the proportionality doctrine inhibits nations ~ from defending themselves, leading to prolongation of conflict and inability to achieve victory:

Proportionality becomes the policy of not doing more than beating back the latest enemy attack—they shoot at us, we shoot back, the incident ends. The enemy is allowed to retain the initiative, to choose when, where, and how to launch the next attack, all while gaining experience and adapting to defeat American tactics more effectively. Instead of deterring the enemy, proportionality encourages the enemy in the belief that with proper preparation, America can and will be forced to retreat.³⁹

Necessity, Proportionality and the October 2023 War

Qualitative vs. Quantitative?

How should proportionality be measured in the context of instances such as the Hamas October 2023 unprovoked slaughter, rape, sexual violence and maiming of hundreds of Israeli infants, children, elderly, and women? How should it be measured given Hamas's and Iran's declared intention to destroy Israel, and the ongoing rocket, missile and drone attacks against Israel from Iran's other proxies in Lebanon, Iraq and Yemen?

35. *Supra* note 28, at 414-415.

36. *Id.*, at 415.

37. Office of the Prosecutor, International Criminal Court, Letter dated (Feb. 9, 2006), available at https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDEBEF7/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf

38. *Supra* note 27, at 514.

39. D. Zamansky, "Why America Stopped Winning Wars," TABLET MAGAZINE (Nov. 7, 2024), available at <https://www.tabletmag.com/sections/news/articles/why-america-stopped-winning-wars>

Should proportionality be measured *quantitatively*, meaning Israel is limited to killing and wounding the same number of Gazan civilians as Hamas did to Israelis in the October 7 attacks? Or should proportionality be measured *qualitatively*, meaning Israel must avoid civilian casualties in Gaza no matter what, even though Hamas uses civilians as human shields, hoping those civilians will be killed when Israel defends itself? Or does proportionality require Israel, as the stronger military force, to fight with one hand tied behind its back, taking breaks and pauses to allow Hamas to be resupplied and giving it time and space to rearm, reposition, and move hostages?

Knoops cautioned against viewing proportionality in strictly quantitative terms:

The proportionality principle is not akin to a mathematical touchstone. It is not to be defined in the abstract. One can thus not simply say that because the adversary in an armed conflict suffered civilian casualties totaling more than the other party to the conflict, the latter violated the proportionality principle . . . Hence, the mere fact that during an armed conflict civilians are killed, and even in terms of quantity in a “disproportionate” number compared to the casualties suffered by the offensive military party, does not constitute a violation of said rationale. Accordingly, such behaviour by itself is not tantamount to criminal behaviour.⁴⁰

Israel's Lawful and Proportionate Exercise of Self-Defense

Following a brief period of sympathy for Israel after the October 7, 2023 Hamas rampage, the international community quickly (and very predictably) turned against Israel as the death toll in Gaza mounted during its military reprisals against Hamas. Israel faced accusations that its military response was “disproportionate” to the losses it suffered on October 7, so much so that it was accused of committing “genocide” in the Gaza Strip.

The factual inaccuracy of these claims is stunning. The Israeli military is not perfect, but it takes far more steps to avoid civilian casualties than any other army or armed organization in the world. As early as October 13, 2023, Israel asked Gazans to leave the northern half of the tiny territory and move a few kilometers south for their own safety. The Israeli military was, in effect, notifying

civilians in advance of upcoming military operations, saying it did not want to hurt them, and urging them to leave for their own safety.⁴¹

Moreover, Israel worked with Egypt and the United States to allow trucks carrying humanitarian relief supplies to enter Gaza as early as October 23, 2023, and since then thousands of truckloads of aid have been delivered, according to Palestinian Red Crescent officials.⁴² However, according to an April 2024 PLO-run television report and other sources, Hamas has been stealing food deliveries to Gaza and killing aid workers.⁴³ Reports of

40. *Supra* note 27, at 504-505.

41. Prime Minister Netanyahu addressed these allegations in his July 24, 2024 speech to a joint session of the U.S. Congress: “The IDF has dropped millions of flyers, sent millions of text messages, made hundreds of thousands of phone calls to get Palestinian civilians out of harm’s way. But at the same time, Hamas does everything in its power to put Palestinian civilians in harm’s way. They fire rockets from schools, from hospitals, from mosques. They even shoot their own people when they try to leave the war zone. A senior Hamas official Fathi Hamad boasted – Listen to this – He boasted that Palestinian women and children excel at being human shields.” Full transcript of Netanyahu’s speech is available at <https://www.timesofisrael.com/were-protecting-you-full-text-of-netanyahus-address-to-congress/>

42. Jacob Magid, “Over 100 Aid Trucks Enter Gaza in a Day For 1st Time Since Start of Israel-Hamas War,” *TIMES OF ISRAEL*, Nov. 3, 2023 (“Palestinian Red Crescent says 374 trucks of food, water and medicine or medical supplies have entered via Rafah since October 21”).

43. Ephraim D. Tepler and Itamar Marcus, “Fatah: Hamas kills aid workers and steals food for itself,” *PALESTINE MEDIA WATCH* (April 21, 2024), available at <https://palwatch.org/page/35086> (quoting report from Fatah/PLO-run Awdah TV); *see also* TOI Staff, “Gaza Aid Truck Stolen by Gunmen and Looted as Convoys Start Crossing from Israel,” *TIMES OF ISRAEL* (Dec. 17, 2023), available at <https://www.timesofisrael.com/gaza-aid-trucks-stolen-by-gunmen-and-looted-as-convoys-start-crossing-from-israel/>; *see also* G. Pacchiani, “Video Shows Gunmen Stealing from Aid Trucks Shooting at Gaza Civilians,” *TIMES OF ISRAEL* (Dec. 5, 2023), available at https://www.timesofisrael.com/liveblog_entry/video-shows-gunmen-stealing-from-aid-trucks-shooting-at-gaza-civilians/

impending famine in Gaza turned out to have been wildly exaggerated and utterly false.

More recently, Israel paused its military operations in Gaza to enable more than 500,000 people to receive polio vaccines.⁴⁴ Israel's efforts to avoid civilian casualties and to permit humanitarian aid to enter Gaza in the middle of the ongoing war reflects the exact opposite of disproportionality and genocidal intent.

Indeed, given Hamas's candid admissions that it deliberately sacrifices Palestinian civilians, the evidence shows Israel cares far more about protecting those civilians than does Hamas. Israel's commitment to avoiding civilian casualties, unique among all nations, completely undermines any claim Israel was acting with the intent required to demonstrate a violation of the doctrine of proportionality and international humanitarian law.⁴⁵

Finally, Israel's commitment to avoiding civilian casualties stands in stark contrast to other nations, whose armies fighting defensive wars against terrorists in urban environments generally inflict a civilian to terrorist casualty ratio of 9:1.⁴⁶ However, Israel's civilian to casualty ratio in Gaza is approximately 1.5 to 1.7 civilians killed for every terrorist eliminated.⁴⁷ Israel's efforts to avoid civilian deaths have resulted in a far lower civilian to terrorist casualty ratio than in other conflicts.⁴⁸

Israel has the same legal right to defend itself as any other country. But the international community demands Israel comply with an unreasonably narrow interpretation of proportionality tailored for Israel only, and that has never been applied anywhere else in the 21st century – not to Russia's deliberate bombing of Ukrainian civilian targets, or China's murder of the Uighurs, or Myanmar's murder of the Rohingya, or Azerbaijan's bombing of Armenians in Nagorno-Karabakh, or Turkey's bombing of the Kurds, or Syria's bombing and chemical attacks against its own civilians during the long-running civil war.

The war Hamas unleashed on October 7, 2023 has claimed thousands of Israeli lives and many more thousands of Israelis wounded. The war has also tragically cost the lives of many thousands of Gazan civilians. No one knows exactly how many, because Hamas exaggerates the numbers its "Health Ministry" reports. Hamas also includes dead terrorists in its civilian casualty figures.

What is known is that Hamas hid behind those unfortunate civilians, using them as human shields. Hamas, as it has done repeatedly for the past two decades, attacked Israel hoping to draw Israeli retaliatory strikes to sacrifice those civilians. Hamas has been clear in its

public statements that sacrificing Gazan civilians, including children and the elderly, constitutes a key part

44. Tara John, Jennifer Hauser, Abeer Salman, Eugenia Yosef and Larry Register, "Israel agrees to pauses in fighting in Gaza for polio vaccination," CNN (Aug. 31, 2024), available at <https://www.cnn.com/2024/08/29/middleeast/gaza-who-humanitarian-pause-intl-latam/index.html>.
45. John Spencer, "Opinion: I'm an expert in urban warfare. Israel is upholding the laws of war," CNN (Nov. 7, 2023), available at <https://www.cnn.com/2023/11/07/opinions/israel-hamas-gaza-not-war-crimes-spencer/index.html>.
46. Press Release, Security Council "Ninety Per Cent of War-Time Casualties Are Civilians, Speakers Stress, Pressing Security Council to Fulfil Responsibility, Protect Innocent People in Conflicts," SC/14904 (May 25, 2022), available at <https://press.un.org/en/2022/sc14904.doc.htm>; see also Susannah George, Qassim Abdul-Zahra, Maggie Michael and Lori Hinnan, "Mosul is a graveyard: Final IS battle kills 9,000 civilians," AP NEWS (Dec. 21, 2017), available at <https://apnews.com/article/middle-east-only-on-ap-islamic-state-group-bbea7094fb954838a2fdc11278d65460> (In the 2016-2017 Battle of Mosul, for example, 10,000 civilians were killed compared to roughly 4,000 ISIS terrorists); see also Mosul Study Group, "What the battle for Mosul teaches the force," No 17-24 (Sept. 2017), available at <https://www.armyupress.army.mil/Portals/7/Primer-on-Urban-Operation/Documents/Mosul-Public-Release1.pdf>.
47. Ben Wolfgang, "Israel's war against Hamas posts lower civilian to combatant death ratio than other urban battles," WASHINGTON TIMES (April 18, 2024), available at <https://www.washingtontimes.com/news/2024/apr/18/israels-war-against-hamas-posts-lower-civilian-to-/>; see also "Hostilities in the Gaza Strip and Israel - reported impact 1 Day 217," OCHA (May 10, 2024), available at <https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-reported-impact-day-217>; see also Shlomo Cohen and Yaacov Samet, "The genocide claim against Israel doesn't add up," THE TIMES OF ISRAEL (June 2, 2024), available at <https://www.timesofisrael.com/the-genocide-claim-against-israel-doesnt-add-up/>.
48. Martin Sherman, "Misplaced moral outrage on civilian casualties," JNS (April 11, 2024), available at <https://www.jns.org/misplaced-moral-outrage-on-civilian-casualties/#:~:text=Likewise%2C%20Kemp%20praised%20the%20IDF,in%20general%20is%201%3A9%E2%80%94> (former commander of British forces in Afghanistan, Col. Richard Kemp, stating that the average combatant-to-civilian death ratio in urban warfare in general is 1:9).

of its strategy in the war against Israel.⁴⁹

Given these facts, Israel is not legally responsible for those civilian casualties. There is no evidence that Israel has ever deliberately or wantonly targeted Gaza's civilian population, as Hamas has always done when firing rockets into Israel and committing terrorism.

The same analysis holds true for Israel's responses to the unprovoked attacks from Lebanon, Yemen and elsewhere. Hezbollah has fired thousands of rockets at Israel since October 8, 2023, yet Israel has taken great care to respond by hitting Hezbollah installations and Hezbollah terrorists while avoiding broader civilian casualties in Lebanon, especially in Beirut. Israel's response to the Houthis' multiple attacks against Tel Aviv has been limited to damaging the Houthi-controlled port facilities in Hodeida and Ras Isa, while avoiding Yemeni civilian casualties. The same is true for Israeli self-defense strikes against targets in Syria and Iran.

Conclusion

No matter how one interprets the concept of proportionality, Israel's use of force to defend itself in the ongoing seven-front war has been necessary to protect its people and to achieve its military objectives. That fact alone should suffice to end the proportionality debate. Perhaps Keiler said it best when he recommended dispensing with the concept of proportionality altogether:

"Proportionality as a law of war concept for good reason has had limited applicability and usefulness during the last century. It deserves to be disposed of entirely."⁵⁰ ■

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49. Commenting on the deaths of civilian human shields in Gaza during Israeli retaliatory strikes, Hamas Political Bureau Chairman Ismail Haniyeh said, "The blood [spilled] in the Gaza Strip, alongside the resistance and the Al-Qassam, will defeat this occupier, will defeat this enemy . . . As I said, and I repeat every time, the blood of the children, women, and elderly . . . we need this blood so that it will ignite within us the spirit of revolution, so that it will arouse within us persistence, so that it will arouse within us defiance and advance." AL-JAZEERA (Oct. 24, 2023), <https://www.aljazeera.com/news/liveblog/2023/10/26/israel-hamas-war-live-un-ceasefire-bid-fails-as-gaza-death-toll-soars> (last accessed Dec. 11, 2023) (the English version of Al Jazeera's website deleted the quote above, but the Arabic version included it).

50. *Supra* note 25, at 63.