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International Law and Gaza: The Assault on Israel's Right to Self-Defense

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- International law authorizes Israel to initiate military countermeasures in Gaza. If Gaza is seen as having independent sovereignty, Israel's use of force is permissible on the grounds of self-defense. If Gaza is seen as lacking any independent sovereignty, Israel's use of military force is permissible as in other non-international conflicts.
- The rule of "distinction" includes elements of intent and expected result: so long as one aims at legitimate targets, the rule of distinction permits the attack, even if there will be collateral damage to civilians. The rule of "proportionality" also relies upon intent. If Israel plans a strike without expecting excessive collateral damage, the rule of proportionality permits it. Israeli attacks to date have abided by the rules of distinction and proportionality.
- Israel's imposition of economic sanctions on the Gaza Strip is a perfectly legal means of responding to Palestinian attacks. Since Israel is under no legal obligation to engage in trade of fuel or anything else with Gaza, or to maintain open borders, it may withhold commercial items and seal its borders at its discretion.
- The bar on collective punishment forbids the imposition of criminal-type penalties to individuals or groups on the basis of another's guilt. None of Israel's actions involve the imposition of criminal-type penalties.
- There is no legal basis for maintaining that Gaza is occupied territory. The Fourth Geneva Convention refers to territory as occupied where the territory is of a state party to the convention and the occupier "exercises the functions of government" in the territory. Gaza is not territory of another state party to the convention and Israel does not exercise the functions of government in the territory.
- The fighting in Gaza has been characterized by the extensive commission of war crimes, acts of terrorism and acts of genocide by Palestinians, while Israeli countermeasures have conformed with the requirements of international law. International law requires states to take measures to bring Palestinian war criminals and terrorists to justice, to prevent and punish Palestinian genocidal efforts, and to block the funding of Palestinian terrorist groups and those complicit with them.

Since Israel's withdrawal from the Gaza Strip in August 2005, Palestinian groups including Hamas, Fatah, Palestinian Islamic Jihad, the Popular Democratic Front for the Liberation of Palestine, and the Popular Resistance Committees have launched thousands of rocket attacks at Israel. All the attacks have been on civilian targets, with no more than a handful of possible exceptions. The brunt of the Palestinian assault has been borne by the town of Sderot. The attacks have killed several residents and injured dozens, struck houses and public buildings like kindergartens, and so traumatized residents that three-quarters of all Sderot children between the ages of 7 and 12 suffer from post-traumatic anxiety.

Faulty Arguments Made by Opponents of Israel

Unsurprisingly, in the wake of Israeli countermeasures, persistent critics of Israel have strongly objected to Israel's defensive actions to date, while remaining mostly mute on the crime under international law committed daily by the Gazan militias' attacks on Israeli civilians. As will be explained below, it is evident that the

criticisms are without legal basis. Israeli responses to the Palestinian terror attacks emanating from Gaza correspond to the requirements of international law, and the claims that Israel has violated international law are without merit.

One widely reported criticism came from John Dugard, a professor of international law who has accepted a permanent appointment as special rapporteur on human rights in the "occupied Palestinian territories" from the discredited UN Commission on Human Rights and its successor UN Human Rights Council. Dugard has publicly and repeatedly interpreted his mandate as requiring him to criticize only Israel and, true to form, Dugard criticized Israeli defense measures for alleged illegality in the high-profile Sunday *New York Times* (Jan. 20, 2008).

First, Dugard claimed that Israel's attack on Hamas headquarters in a Palestinian Interior Ministry building in Gaza was illegal because the target was "near a wedding venue with what must have been foreseen loss of life and injury to many civilians." However, contrary to Dugard's insinuation, the building was certainly a legitimate target under the international humanitarian legal rule of distinction as it makes a definite contribution to Hamas' hostilities. That one Palestinian civilian lost her life in the Israeli strike is unfortunate, but not a violation of the rule of proportionality, which authorizes collateral damage to civilians where justified by military necessity.

Second, Dugard asserted that Israel's closure of its borders with the Gaza Strip constitutes illegal "collective punishment." Yet there is nothing in international law that requires Israel to maintain open borders with such a hostile territory, whatever its sovereign status. Exercising legal counter-measures against a hostile entity does not constitute "collective punishment" under international law. Dugard's refusal to level the same charge against Egypt, which also kept closed its border with the Gaza Strip, underlines the bias that accompanies the legally inaccurate statement.

Dugard was not alone. UN High Commissioner for Human Rights Louise Arbour denounced Israel's "disproportionate use of force." UN Undersecretary-General for Political Affairs Lynn Pascoe told the UN Security Council that collective penalties were prohibited under international law (*Financial Times*, Jan. 22, 2008). UNRWA Commissioner General Karen Koning Abu Zayd joined the chorus by criticizing Israel's "sporadic" electricity supply to Gaza and its border closures and called on the international community to act (*Guardian*, Jan. 23, 2008). Unfortunately, these skewed assertions and misstatements of international law by UN officials framed how international public opinion views the illegal Palestinian actions in Gaza and the merits of Israeli defensive actions, and especially Israel's legal right to defend itself.

Some parties had the courage to reject the one-sided and faulty arguments. In the UN Human Rights Council in Geneva, Canada, a state that prides itself in making the defense of human rights and international law a significant factor in its foreign policy, voted against a resolution condemning Israel for the Gaza fighting. While the European state members abstained in the Human Rights Council vote, some European officials, such as Franco Frattini, European Commissioner for Justice, Freedom and Security, correctly defended the legality of the Israeli actions, and others, such as Dutch Foreign Minister Maxime Verhagen, criticized UN bias against Israel. Finally, U.S. Ambassador to the UN Zalmay Khalilzad told the UN Security Council on January 22, 2008, that Hamas was "ultimately responsible" for the current situation in Gaza.

This essay nevertheless attempts to construct a rational legal basis for evaluating Israeli behavior and potential criticisms. This is no easy task as many of the criticisms of Israel's conduct are made in conclusory fashion, without reference to legal doctrines or legal materials in support of the charges, or, alternatively, based on a misunderstanding of the requirements of the law and the factual context.

This essay examines, in turn, the six distinct bodies of law that could potentially affect the legality of Israeli counterstrikes:

1. the laws of initiating hostilities (*jus ad bellum*);
2. international humanitarian law, which governs the conduct of military actions;
3. the laws of occupied territory, which some have argued applies to Israeli actions against Gaza-based terrorists;
4. human rights laws;
5. laws on genocide; and
6. anti-terror laws.

A careful examination of the relevant law demonstrates that Israeli counterstrikes to date, and its potential future counterstrikes (both economic and military), conform to the requirements of international law. Moreover,

Palestinian commission of war crimes and acts considered under international conventions to be terrorist acts and acts of genocide require Israel and other countries to take steps to punish Palestinian criminals for their acts in the Gaza fighting.

A final preliminary note is in order. The legal status of the Gaza Strip is an extremely complex puzzle in international law and is beyond the scope of this essay. Fortunately, it turns out that many of the legal conclusions regarding the Gaza fighting are not affected by the precise nature of Gaza's status. The essay notes those instances where Gaza's status does affect the ultimate legal determination.

1. The Legality of Israeli Military Actions under *Jus ad Bellum*

The law of *jus ad bellum*, as codified by the UN Charter, prevents using military force against another state. However, Article 51 of the Charter excludes self-defense from this ban on the use of force. Furthermore, *jus ad bellum* does not restrict the use of force in non-international conflicts.

Israel's right to use force in defending itself against Palestinian attacks from Gaza is clear, notwithstanding the uncertain legal status of the Gaza Strip, which makes it difficult to determine the grounds on which Israel's actions should be analyzed. If Gaza should be seen as having independent sovereignty, Israel's use of force is permissible on the grounds of self-defense. On the other hand, if Gaza is properly seen as lacking any independent sovereignty, Israel's use of military force is permissible as in other non-international conflicts.

2. The Legality of Israeli Military Actions under International Humanitarian Law

International humanitarian law regulates the use of force once military action is underway, irrespective of its legality under *jus ad bellum*. The two most basic principles of international humanitarian law are the rules of distinction and proportionality. Israel's counterstrikes have abided by both these rules.

Distinction:

The rule of distinction requires aiming attacks only at legitimate (e.g., military and support) targets. The rule of distinction includes elements of intent and expected result: so long as one aims at legitimate targets, the rule of distinction permits the attack, even if there will be collateral damage to civilians and even if, in retrospect, the attack was a mistake based on faulty intelligence. Israel has aimed its strikes at the locations from which rockets have been fired, Palestinian combatants bearing weapons and transporting arms, Palestinian terrorist commanders, and support and command and control centers. Locations such as Interior Ministry buildings from which Hamas directs some military activities are objects that make a contribution to Hamas' military actions and are therefore legitimate targets, even though they also have civilian functions.

By contrast, the Palestinian attacks are aimed at Israeli civilians and therefore violate the rule of distinction. Moreover, one of the corollaries of the rule of distinction is a ban on the use of weapons that are incapable, under the circumstances, of being properly aimed at legitimate targets. The rockets and projectile weapons being used by the Palestinian attackers are primitive weapons that cannot be aimed at specific targets, and must be launched at the center of urban areas. This means that the very use of the weapons under current circumstances violates international humanitarian law.

Proportionality:

The rule of proportionality places limits on collateral damage. While collateral damage to civilian and other protected targets is permitted, collateral damage is forbidden if it is expected to be excessive in relation to the military need. Prosecutions for war crimes on the basis of disproportionate collateral damage are rare, and it is difficult to see how a credible claim can be made that any of Israel's counterstrikes have created disproportionate collateral damage. Moreover, like distinction, the rule of proportionality relies upon intent. If Israel plans a strike without expecting excessive collateral damage, the rule of proportionality permits it, even if, in retrospect, Israel turns out to have erred in its damage estimates.

All reported Israeli strikes in the latest round of fighting have been aimed at legitimate targets and none has caused excessive collateral damage. Legal advisors attached to Israeli military units review proposed military actions and apply an extremely restrictive standard of both distinction and proportionality, in accordance with expansive Israeli Supreme Court rulings. It is thus likely that future Israeli measures will continue to abide by the rules of distinction and proportionality.

Retorsion:

Israel's imposition of economic sanctions on the Gaza Strip, such as withholding fuel supplies and electricity, does not involve the use of military force and is therefore a perfectly legal means of responding to Palestinian attacks, despite the effects on Palestinian citizens. The use of economic and other non-military sanctions as a means of "punishing" other international actors for their misbehavior is a practice known as "retorsion." It is generally acknowledged that every country may engage in retorsion so long as the underlying acts are themselves legal. Indeed, it is acknowledged that states may even go beyond retorsion to carry out non-belligerent reprisals-non-military acts that would otherwise be illegal (such as suspending flight agreements) as countermeasures. Since Israel is under no legal obligation to engage in trade of fuel or anything else with the Gaza Strip, or to maintain open borders with the Gaza Strip, it may withhold commercial items and seal its borders at its discretion, even if intended as "punishment" for Palestinian terrorism.

Collective Punishment:

While international law bars "collective punishment," none of Israel's combat actions and retorsions may be considered collective punishment. The bar on collective punishment forbids the imposition of criminal-type penalties to individuals or groups on the basis of another's guilt. None of Israel's actions involve the imposition of criminal-type penalties.

Examples of retorsions are legion in international affairs. The United States, for example, froze trade with Iran after the 1979 Revolution and with Uganda in 1978 after accusations of genocide. In 2000, fourteen European states suspended various diplomatic relations with Austria in protest of the participation of Jorg Haider in the government. Numerous states suspended trade and diplomatic relations with South Africa as punishment for apartheid practices. Obviously, in none of these cases was a charge raised of "collective punishment."

3. The Legality of Israeli Military Actions under the Laws of Occupation

Some groups have claimed that the Gaza Strip should be considered "occupied" by Israel according to the Fourth Geneva Convention, in which case Israel would be required to "ensure the food and medical supplies of the population," as well as "agree to relief schemes on behalf of the...population" and maintain "public health and hygiene."

Due to internal political considerations as well as rulings by the Israeli Supreme Court, Israel continues to maintain the flow of basic humanitarian supplies such as food, medicine and water to the Palestinian population of Gaza. In a recent case (Albassiouni v. Prime Minister, HCJ 9132/07), the Israeli Supreme Court implied that it interpreted domestic Israeli administrative law to require the Israeli government to maintain a minimum flow of Israeli-supplied necessary humanitarian goods when engaging in retorsional acts such as cutting off the Israeli supply of electricity to Gaza. Thus, even if there were a legal basis for considering Gaza Israeli-occupied territory, Israel would be fulfilling its duties under the Fourth Geneva Convention.

However, there is no legal basis for maintaining that Gaza is occupied territory. The Fourth Geneva Convention refers to territory as occupied where the territory is of another "High Contracting Party" (i.e., a state party to the convention) and the occupier "exercises the functions of government" in the occupied territory. The Gaza Strip is not territory of another state party to the convention and Israel does not exercise the functions of government-or, indeed, any significant functions-in the territory. It is clear to all that the elected Hamas government is the de facto sovereign of the Gaza Strip and does not take direction from Israel, or from any other state.

Some have argued that states can be considered occupiers even of areas where they do not declare themselves in control so long as the putative occupiers have effective control. For instance, in 2005, the International Court of Justice opined that Uganda could be considered the occupier of Congolese territory over which it had "substituted [its] own authority for that of the Congolese Government" even in the absence of a formal military administration. Some have argued that this shows that occupation may occur even in the absence of a full-scale military presence and claimed that this renders Israel an occupier under the Fourth Geneva Convention. However, these claims are clearly without merit. First, Israel does not otherwise fulfill the conditions of being an occupier; in particular, Israel does not exercise the functions of government in Gaza, and it has not substituted its authority for the de facto Hamas government. Second, Israel cannot project effective control in Gaza. Indeed, Israelis and Palestinians well know that projecting such control would require an extensive military operation amounting to the armed conquest of Gaza. Military superiority over a neighbor, and the ability to conquer a neighbor in an extensive military operation, does not itself constitute occupation. If it did, the United States would have to be considered the occupier of Mexico, Egypt the occupier of Libya and Gaza, and China the occupier of North Korea.

Moreover, it is difficult to avoid the conclusion that foes of Israel claiming that Israel has legal duties as the

"occupier" of Gaza are insincere in their legal analysis. If Israel were indeed properly considered an occupier, under Article 43 of the regulations attached to the Fourth Hague Convention of 1907, it would be required to take "all the measures in [its] power to restore, and ensure, as far as possible, public order and safety." Thus, those who contend that Israel is in legal occupation of Gaza must also support and even demand Israeli military operations in order to disarm Palestinian terror groups and militias. Additionally, claims of occupation necessarily rely upon a belief that the occupying power is not the true sovereign of the occupied territory. For that reason, those who claim that Israel occupies Gaza must believe that the border between Israel and Gaza is an international border between separate sovereignties. Yet, many of those claiming that Gaza is occupied, like John Dugard, also simultaneously and inconsistently claim that Israel is legally obliged to open the borders between Israel and Gaza. No state is required to leave its international borders open.

4. The Legality of Israeli Military Actions under International Human Rights Law

Under the International Covenant on Civil and Political Rights, Israel is required to ensure the protection of certain rights "within its territory" including the right to life. The application of the covenant to Israeli activities in the Gaza Strip is questionable as it is unlikely that the Gaza Strip should be considered Israel's territory. Nonetheless, Israel has abided by the requirements of the convention, if it applies to Gaza. In combat situations the meaning of the rights in the convention is established by the rules of international humanitarian law. Thus, Israel is protecting the human rights of Palestinian residents of the Gaza Strip by abiding by international humanitarian law.

5. Duties of Israel under the Genocide Convention

Article Two of the Convention on the Prevention and Punishment of Genocide defines any killing with intent "to destroy, in whole or in part, a national, ethnical, racial or religious group, as such" as an act of genocide. Given expressions of intent by some of the Palestinian terrorist groups to kill Jews as a group due to their ethnic identity (such as the Hamas charter's call for an armed struggle against all Jews until judgment day), all the members of such groups who carry out killings are guilty of the crime of genocide under the convention. Under Article One of the convention, Israel and other signatories are required to "prevent and punish" not only persons who carry out such genocidal acts, but those who conspire with them, incite them to kill, and are complicit with their actions. The convention thus requires Israel to prevent and punish the terrorists themselves, as well as public figures who have publicly supported the Palestinian attacks.

6. Duties of Israel under Anti-Terrorism Conventions

The International Convention for the Suppression of the Financing of Terrorism requires Israel (like other state parties to the convention) to prevent the collection of funds intended to support terrorist attacks. The Palestinian attacks fall under the definition of terrorist attacks under Article 2(1)(b) of the convention because they are aimed at Israeli civilians in violation of the rule of distinction, and they are intended to kill or seriously injure civilians in order to intimidate a population. If Gaza is considered "territory of [the] state" of Israel, Israel is legally required to establish jurisdiction over Palestinian terrorist crimes under the convention; if Gaza is not Israeli territory, Israel is permitted to establish jurisdiction over the terrorist crimes.

Additionally, the convention establishes that Israel is not only permitted to impose certain economic sanctions on the *de facto* rulers of the Gaza Strip, it is required to do so.

Under a related convention, the International Convention for the Suppression of Terrorist Bombings, it is a crime to bomb public places (such as city streets) with the intent to kill civilians, by persons who are non-nationals of the state of which the victims are nationals. Under this convention too, the Palestinian attackers must be considered international terrorists and Israel is either required or permitted (depending on whether Gaza is Israeli "territory") to assume criminal jurisdiction over the Palestinian terrorists committing these acts. Additionally, other states signed on the convention—such as the United States, Russia, Turkey and France—must cooperate in helping to combat such Palestinian terrorist acts.

Finally, Security Council Resolution 1373 requires states to "deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens" and "prevent the movement of terrorists or terrorist groups." The resolution was adopted under Chapter VII and is therefore apparently binding on all states, although some have argued that the resolution is not binding because the Security Council is not authorized to enact quasi-legislation. While the resolution does not define terrorism, it references the International

Convention for the Suppression of the Financing of Terrorism, making it clear that the Palestinian attackers from Gaza fall within the scope of the international terrorists covered by the resolution. Consequently, if binding, this resolution requires Israel to take steps to deny safe haven to Palestinian attackers from Gaza and to prevent their free movement.

Conclusion

The Palestinian-Israeli fighting in Gaza has been characterized by the extensive commission of war crimes, acts of terrorism and acts of genocide by Palestinian fighters, while Israeli countermeasures have conformed with the requirements of international law.

International law requires states to take measures to bring Palestinian war criminals and terrorists to justice, to prevent and punish Palestinian genocidal efforts, and to block the funding of Palestinian terrorist groups and those complicit with them.

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