Putting Israel's Self-Defense in Context

July 30, 2014

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U.S. News & World Report

http://www.usnews.com/opinion/articles/2014/07/30/why-israels-response-to-hamas-isnt-disproportionate

Almost everyone, it seems, is more or less upset that Israel seeks to defend itself against indiscriminate Hamas rocket attacks. Those who speak self-righteously in the name of some mythical “international community” – including the U.N. secretary general – are generally candid about their irritation. It is not really Israeli self-defense that they oppose, or even Operation Protective Edge in particular, but rather the alleged “disproportionality” of Israel’s military operations in Gaza.

From the standpoint of pertinent international law, these criticisms are sorely mistaken. The legal standard of proportionality in the law of armed conflict has nothing to do with equal levels of suffering. If it did, virtually all major allied military operations during World War II would have been flagrantly "disproportionate."

Properly legal determinations of proportionality can never be made in an historical or geopolitical vacuum. Instead, they must always take into account the decipherable extent to which an adversary (especially a terrorist adversary, whose every action is illegal by definition) has committed prior or ongoing violations of the law of war.

In the case of Hamas, Islamic Jihad, and also “moderate” Fatah, there is incontestable evidence that these terrorists are systematically guilty of perfidy, a specific and egregious violation of the law of war involving, in this particular case, deceptions that knowingly endanger noncombatant populations. Once again, with very little objection from the "international community," Palestinian "freedom fighters" have been firing intentionally at vulnerable Israeli civilians from Gaza schools and hospitals. As for heroic Hamas leader Khaled Mashal, he prefers conspicuous safety in Qatar, to becoming a shahid, or martyr. Palestinian martyrdom is reserved by Hamas for Gaza's endlessly manipulated and impoverished masses, those who are most plainly unable to migrate to the more pleasingly wealthy Arab oil states.

Deception can be acceptable in armed conflict, but portions of the law of war, specifically the Hague Conventions, still disallow placement of civilians among military assets or personnel. Further prohibition of perfidy can be found in the protocols added to the Geneva Conventions in 1977. These incontrovertible rules are also binding on the basis of *customary* international law, which is included in the authoritative inventory of legal sources defined at Article 38 of the Statute of the International Court of Justice.

Perfidy is identified as a “grave breach” of the law of war at Article 147 of Geneva Convention No. IV. The effect of perfidy committed by all Palestinian terrorists in Gaza – especially their widespread resort to human shields – is to immunize Israel from legal responsibility for any counter-terrorist harms done to Arab civilians. Even if Hamas and Islamic Jihad and Fatah did not deliberately engage in perfidy, any terrorist-created link between civilians and insurgent warfare would still grant Israel full justification for defensive military actions.

Israel should not be granted a free hand in its applications of armed force any more than any state should. But the reasonableness of these particular applications should always be evaluated against the specific background of unreconstructed Palestinian perfidy.

Viewed against the landscape of extensive and unapologetic terrorist crimes in Gaza, Israel is not guilty of “disproportionality.” All combatants, including the terrorizing insurgents in Gaza, are required to comply fully with the law of war. This key expectation stems not only from the so-called “Martens Clause,” which makes its first appearance in the Preamble to the 1899 Hague Convention No. II, and stipulates that that the right of belligerents to adopt means of injuring the enemy is not unlimited, but also from Article 3 of the Geneva Conventions of August 12, 1949. And it is found at the two binding protocols to these Conventions*.*

It is always very tempting for those who know absolutely nothing about international law to lash out viscerally at Israel. Yet, trained legal scholars always understand the profound jurisprudential significance of context. Correct judgments under international law are never made in isolation. It is apparent, then, that any seemingly disproportionate use of force by the Israel Defense Forces is actually the outcome of prior perfidy committed by Palestinian terrorist forces in Gaza. Also significant is that in any careful comparison to the U.S.-led war on terror recently underway in Iraq and Afghanistan, Israeli counter-terrorist operations remain very deliberately limited.

Faced with Palestinian terrorists in Gaza who still make no secret of their literally genocidal intentions, Israel displays persistently marked restraint. In contrast to the witting indiscriminacy of Arab terrorists in Gaza, and to undisguised Palestinian perfidy, Israel actually takes great care to minimize civilian harms. This self-imposed Israeli limitation on armed force is codified and followed, even when the consequent risks to IDF soldiers are significantly multiplied and enlarged.

Israel has an absolutely unqualified right under international law to protect its citizens. In exercising this "peremptory" right, its use of military force has remained measured and controlled. It is, therefore, finally time for the international community to dispel all crudely propagandistic fabrications of Israeli “disproportionality.”