

The proportionality principle

Hamas endangers Israeli civilians by targeting them and endangers Gazan civilians by using them as human shields



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Every war is tragic. Every civilian death is a world lost. Nevertheless, when legal discourse is applied to a war, legal terminology, concepts, and resulting conclusions should be accurately implemented. One common misconception concerns the term 'proportionality'. Particularly, it is the argument that proportional use of force is a numbers game; that one only needs to compare the number of casualties on each side of the conflict in order to deduce which side used force disproportionately. From a legal standpoint, this notion is flawed. Had this been true, many NATO operations would have been guilty of being disproportionate and unlawful.

What proportionality means

The principle of proportionality is defined as the obligation to refrain from "any attack which may be expected to cause incidental loss or injuries to civilians, or damage to civilian objects, which would be excessive in relation to the concrete and direct military advantage anticipated". What does this mean in practice? At the outset, it may be useful to stress what 'proportionality' does not mean: clearly, it does not address casualties in a collective manner pertaining to the whole conflict, but rather, refers to particular attacks; it does not address only civilian casualties and damage, but also the intended military advantage; and it is not examined in hindsight, but before the attack takes place.

The proportionality principle means that before every military strike, military commanders must assess two factors. First, they must examine the concrete and direct military advantage anticipated from an attack, when naturally, the neutralisation of some targets would have a higher advantage than others. In order to offer such advantage, the target must be a military target, such as a weapons depot. Importantly, a seemingly civilian object, used by the adversary for military purposes (for example, a residential building used to store weapons) may be considered a lawful target.

Second, the commanders must assess, based on reasonably available information at the time of the attack, what the expected collateral damage would be. They must assess how many civilians, if any, will be present in the area of the planned attack. Then they must assess the extent of expected damage to civilian property, including indirect damage that is to be accounted for, such as infrastructure. Lastly, they must implement all

feasible precautions to mitigate harm to civilians and civilian objects. If the assessment of the two factors leads to the conclusion that the expected damage to civilians or civilian objects is deemed excessive in relation to the anticipated military advantage, carrying out an attack would be unlawful.

It follows that not every civilian death in armed conflict necessarily testifies to a breach of international law. **This principle of proportionality is the way that the law, created by states, saw fit to balance the military needs of states, who fight to protect civilians, with humanitarian imperatives.**

Wrongfully blamed

How is the principle of proportionality affected when instead of protecting its civilians, Hamas intentionally conducts its military activity from within densely populated areas? How is Israel expected to protect its major cities from Hamas rockets, when these rockets are developed, built and launched from within Gazan civilian population? **Hamas is committing a double war crime - endangering Israeli civilians by targeting them and endangering Gazan civilians by using them as human shields.** What does international law require Israel, a law-abiding state, to do, when facing Hamas' unlawful tactics?

The law of armed conflict states that when civilian presence is used to shield military objectives from attacks, that presence does not grant the target immunity. When Hamas commits the double war crime of attacking Israeli children, schools and airports from within its own civilian population, the analysis of the situation would be distorted if its criminal behaviour is not taken into account.

Despite Hamas's blatant disregard for the law or its citizens' well-being, Israel does everything feasible in order to prevent or at least minimise harm to the Palestinian civilian population, often at the cost of operational advantage. In doing so, Israel employs precautions that exceed the requirements of international law, as well as the practices commonly employed by advanced militaries of western states. **Fighting an enemy that deliberately abuses the law of armed conflict raises grave challenges for Israeli soldiers. Nevertheless, Israeli commanders apply international law, including the principle of proportionality, in every military action.**

Why is Hamas using its own population as human shields? This brings us back to the misconception of the principle of proportionality, and the knee-jerk reaction that ignores the question, who put Gazan civilians in danger in the first place? In other words, Hamas pays no price for its war crimes and often it is Israel that is wrongfully blamed. This situation provides an incentive to Hamas to continue with its heinous practices.

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