**Did Israel Use “Disproportionate Force” to Protect the Gaza Fence?**

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May 28, 2018

<http://jcpa.org/article/did-israel-use-disproportionate-force-to-protect-the-gaza-fence/>

* The Gaza border clash was not a situation of armed conflict, nor had it anything to do with the laws of armed conflict and occupation of territory. It was routine border protection by a sovereign state, from within its sovereign territory, facing a blatant threat of border violation by violent elements on the other side of the line.
* Accusing Israel of committing war crimes, massacres, and violations of international humanitarian law, as well as invoking criteria and norms – including the customary international law rule of proportionality – characteristic of situations of armed conflict, has no relevance vis-à-vis the situation along the delimiting fence between Israel and the Gaza Strip.
* The highly publicized visit by the Palestinian Foreign Minister to the prosecutor of the International Criminal Court (ICC), armed with a new set of complaints of war crimes and violations of the Geneva Conventions along the fence, cannot be considered to be anything other than a flawed and cynical manipulation of the Court.

The recent, ongoing flood of international criticism and censure against Israel, and specifically the time-worn mantra accusing Israel of a “disproportionate and indiscriminate” response to the Hamas–organized “Peaceful March of Return,” calls for comment as to the bona fides of those who so easily and glibly make such accusations.

Perhaps the most obvious, blatant, and fatuous example of this new spate of Israel-bashing is the rehashing of the accusation that Israel acted in a “disproportionate and indiscriminate” manner. This is repeated by European leaders whenever Israel is obliged to defend itself and its territory.

Pavlovian European Responses

This automatic allegation was most recently voiced by the EU foreign affairs representative, Federica Mogherini, and other senior European leaders, who did not bother to indulge themselves in ascertaining the facts of the situation.

In her statement of May 14, 2018, Mogherini ignored the violent nature of the Hamas demonstration, stating, “Israel must respect the right to peaceful protest and the principle of proportionality in the use of force.”

In a similar vein, French President Emmanuel Macron condemned Israel’s “heinous acts” of targeting “unarmed Palestinian demonstrators in the Gaza Strip.”2 The French Quai d’Orsay added its own contribution stating, “After several weeks of violence and with a growing number of Palestinian victims on the Gaza Strip again today, France again calls on the Israeli authorities to show discernment and restraint in the use of force, which should be strictly proportional.”3

The German foreign ministry, while acknowledging Israel’s right to defend its security, stated: “Exercising the right to freedom of expression and peaceful protest must not be exploited and used to violate Israel’s legitimate security interests on the border to the Palestinian territories. At the same time, the defense of these legitimate interests must remain proportionate.”4

Amnesty International, released its statement, entitled “Israeli forces must end the use of excessive force in response to ‘Great March of Return’ protests.”5

This international fixation accusing Israel of disproportionate and indiscriminate force generated a particularly lopsided resolution by the UN Human Rights Council. It condemned “the disproportionate and indiscriminate use of force by the Israeli occupying forces against Palestinian civilians, including in the context of peaceful protests, particularly in the Gaza Strip, in violation of international humanitarian law, international human rights law, and relevant United Nations resolutions.”

The Human Rights Council decided to “urgently dispatch an independent international commission of inquiry to investigate all alleged violations and abuses of international humanitarian law and international human rights law in the Occupied Palestinian Territory, including East Jerusalem, particularly in the occupied Gaza Strip, in the context of the military assaults on the large-scale civilian protests.”6

Does “Proportionality” Require Israel to Sacrifice Israelis?

The UN High Commissioner for Human Rights, Jordanian Prince Zeid Ra’ad Al Hussein, in a curious, but typically virulent, irresponsible, and hate-filled statement added:

The stark contrast in casualties on both sides is also suggestive of a wholly disproportionate response: on Monday, on the Israeli side, one soldier was reportedly wounded, slightly, by a stone. Killings resulting from the unlawful use of force by an occupying power may also constitute “willful killings” – a grave breach of the Fourth Geneva Convention.

Do Prince Zeid and the other international leaders suggest a twisted sense of proportionality that Israel’s defense against 40,000 hostile border invaders requires an equal number of Israelis killed? Only then they would be assuaged?

Prince Zeid’s statements and his rabid hostility toward Israel are incompatible with the UN Charter requirement that UN officials “refrain from any action which might reflect on their position as international officials responsible only to the Organization.”8

This is specifically relevant in light of the UN Staff Regulations and Rules setting out the basic rights and obligations of staff, which specify:

While staff members’ personal views and convictions, including their political and religious convictions, remain inviolable, staff members shall ensure that those views and convictions do not adversely affect their official duties or the interests of the United Nations. They shall conduct themselves at all times in a manner befitting their status as international civil servants and shall not engage in any activity that is incompatible with the proper discharge of their duties with the United Nations. They shall avoid any action and, in particular, any kind of public pronouncement that may adversely reflect on their status, or on the integrity, independence and impartiality that are required by that status;

As opposed to this current international uproar against Israel, the real facts of the situation are rapidly coming to light.

What Are the Facts about the Battle of the Gaza Fence?

The “peaceful” march of return and protests were presented by the Hamas propaganda machine and rapidly digested by the international community. The goal of the ostensibly innocent Palestinian civilians, according to Hamas, was to “break out” of the Gaza Strip area, liberate Jerusalem, and protest the limitations imposed as part of Israel’s maritime closure on the importation of certain dual-use materials into the Gaza Strip.

But this was far from the peaceful “picnic” publicized and plied by Hamas and the Palestinian leadership to the leaders of the international community and in the international media.

It involved attempts by Hamas operatives, hiding among those ostensibly innocent civilians most of whom were recruited, encouraged, or forced by Hamas to charge the fence separating sovereign Israeli territory from the Hamas-ruled Gaza Strip. Their declared aim was to destroy and break through the fence, enter near-by Israeli villages, kill and kidnap Israelis, and ultimately “liberate Jerusalem.”

This “peaceful” protest involved:

* lobbing explosive devices against the fence and the Israeli soldiers defending it;
* attaching explosive devices to the fence to explode and kill Israeli soldiers trying to dismantle them;
* launching incendiary devices attached to kites and balloons to fall on Israeli residents of the villages close to the fence across the dividing line and burn Israel fields and agricultural produce;
* as Hamas organized these attacks above ground, its engineers are still excavating attack tunnels 10 meters below to allow terrorists to infiltrate Israel; and
* Away from the Western media, Hamas leaders incited their followers in Arabic: “We will take down the border and tear out their [Israelis’] hearts from their bodies.”

On the ecological front, Hamas operatives, aided by civilian women and children, ignited mounds of old tires to create a massive smoke-cloud to conceal their actions against the border fence and to pollute the air in the Israeli communities along the area of the fence.

Clearly, had this indeed been a genuine, peaceful demonstration and protest, Israeli soldiers routinely stationed on the Israeli side of the fence would have had neither justification nor any necessity to act to protect the fence from those Hamas operatives intent on breaching it to attack Israeli military and civilians.

Had the Palestinian leadership and police authorities acted in accordance with their commitments in the 1995 Oslo Accords to take “responsibility for the agreed security perimeter along the Delimiting Line inside the Gaza Strip” and to “enforce special security measures aimed at preventing infiltrations across the Delimiting Line or the introduction arms, ammunition or related equipment into the Security Perimeter,” Israel’s soldiers would not have been faced with attempts to infiltrate and to violate the fence.

Clearly, the Palestinian leadership and Hamas failed to honor their Oslo commitments. On the contrary, they initiated, encouraged, incited, and organized violent activity close to the delimiting fence in direct and deliberate contravention of the Oslo Accords commitments.

Faced with the widely publicized appeals and incitement directed by Hamas to Palestinian civilians to charge the fence and to attack and kill Israeli soldiers and civilians, Israel was duty-bound to view the protests as potentially violent, and thus to prevent the anticipated violation of the border fence and danger of violent infiltration into sovereign Israeli territory.

In the course of doing so, Israel’s soldiers guarding the fence, under strict orders to engage only those violating the fence with explosive devices and attempting to infiltrate, found it necessary to direct fire against Hamas and Islamic Jihad operatives actively attacking and infiltrating the border fence. In one day of clashes, a senior Hamas official told an interviewer that 50 out of 62 fatalities were Hamas operatives.12

Other people were injured by inhaling gas used to distance the masses of protesters from the fence area.

A Classic Case of a Sovereign State Protecting its Borders

This was not a situation of armed conflict, nor had it anything to do with the laws of armed conflict and occupation of territory. It was routine border protection by a sovereign state, from within its sovereign territory, facing a blatant threat of border violation by violent elements on the other side of the line.

As such, accusing Israel of committing war crimes, massacres, and violations of international humanitarian law, as well as invoking criteria and norms – including the customary international law rule of proportionality – that are applicable to, and characteristic of situations of armed conflict, have no relevance vis-à-vis the situation along the delimiting fence between Israel and the Gaza Strip.

This obvious factor did not prevent the automatic and immediate spate of accusations against Israel of massacres, war crimes, crimes against humanity, and violations of international humanitarian law.

Proportionality

The concept of proportionality is a basic norm in the sphere of the laws of armed conflict in which armed forces in a state of combat operate against targets necessary to achieve their purpose of dealing with an enemy. In this context, the principle is that “Loss of life and damage to property incidental to attacks must not be excessive in relation to the concrete and direct military advantage expected to be gained.”13

The accepted norm of international customary law relevant in armed conflict, as codified by the ICRC in its International Humanitarian Law Database, sets the limits of proportionality to the necessity “to achieve the concrete and direct military advantage anticipated,” yet “without causing excessive incidental loss of life, injury or damage” to civilians.14

Even if one assumed that the stand-off between the Hamas-directed demonstration and Israel’s border guards was a situation of armed conflict, clearly, the fact that Israel strictly limited its use of firepower solely to those Hamas and Islamic Jihad operatives violating the border fence, is an example of Israel’s proportionate use of force. Hence, accusations of disproportionate and indiscriminate use of force have no factual or military basis.

International Criminal Court

Finally, the highly publicized visit by the Palestinian Foreign Minister to the prosecutor of the International Criminal Court (ICC), armed with a new set of complaints and accusations against Israel’s leaders and senior commanders, including of war crimes and violations of the Geneva Conventions along the fence, cannot be considered to be anything other than a flawed and cynical manipulation of the Court.

This is an attempt by the leadership of the Palestinian Authority to “climb onto the Hamas bandwagon” and reap political and public-relations benefit from the situation along the border fence generated by Hamas. The action was taken despite the inherent and ongoing hostility and rupture between the Palestinian Authority and the Hamas terror organization ruling the Gaza Strip.

The oft-repeated Palestinian propensity to turn the International Criminal Court into its own, private, Israel-bashing tribunal, undermines the objective status of the court as set out in its founding statute. It also undermines the Court’s purpose of dealing with the gravest of international crimes and above all lacks legal validity. The ICC is a court composed of states only, and the court’s jurisdiction can extend only to the sovereign territory of states members of the court.15

While the court’s prosecutor has accepted Palestinian membership of the court, relying on a questionable and non-binding UN General Assembly resolution upgrading the Palestinian status in the United Nations, the very issue of the Palestinian status vis-à-vis the court has yet to be determined juridically.16 This is all the more evident in light of the fact that pending a negotiated resolution to the issue of the permanent status of the territories, as agreed-to in the Oslo Accords, witnessed by the major powers and endorsed by the UN, there exists no sovereign state of Palestine and no sovereign Palestinian territory over which the ICC could exercise its jurisdiction.

Thus, the Palestinian attempt to manipulate the ICC lacks legal validity. The present attempt to bring the court to examine allegations of war crimes by Israel in the context of the recent events along the delimiting fence between Hamas and Israel is incompatible with the requirements of the court’s statute, which clearly defines its powers “to exercise jurisdiction over the most serious crimes of international concern.”