

# U.S. Must Strongly Affirm Israel's Right of Self-Defense

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By **Peter Berkowitz** - August 6, 2014

Over the last few days, Israel has pulled its troops out of Gaza and agreed to a 72-hour cease-fire with Hamas. The battle over international public opinion, however, continues to rage.

On July 23 the United Nation's Human Rights Council voted to establish a commission of inquiry -- the United States was the only nation on the 46-member council to vote against the resolution -- whose purpose is "to investigate all violations 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 operations conducted since 13 June 2014 and to report to the Council at its twenty-eighth session." Since the resolution presumes that Israel committed "widespread, systematic and gross violations of international human rights and fundamental freedoms" and carried out "wanton destruction of homes, vital infrastructure and public properties," there is good reason to worry that the U.N. is determined to reprise the wrongs done to Israel with its 2009 publication of the now-notorious Goldstone report.

That scandalous document also harmed America's interests indirectly by injuring a vital ally and the sole full-fledged liberal democracy in the tumultuous Middle East and by abusing the international laws of war.

Operation Protective Edge is a complex and costly military undertaking designed to degrade Hamas's capacity to launch missile bombardments and use cross-border attack tunnels to kill Israeli civilians. The defensive war, which was forced upon Israel in early July when Hamas escalated rocket attacks and sent terrorists into southern Israel through the tunnels, has exacted a terrible price. It has resulted in more than 60 Israeli deaths and, according to the Hamas health ministry, taken the lives of more than 1,600 Palestinians, a significant number of them civilians. Israeli firepower has also caused a great deal of wreckage of civilian infrastructure inside Gaza and, according to reports, driven more than 400,000 people from their homes.

Many pundits and politicians leapt to the conclusion that because Hamas has suffered much greater losses, Israel's response was disproportionate. Last week Washington Post columnist Eugene Robinson declared, "For Israeli military action to be justifiable, it must be proportionate. What we're witnessing is not." For Robinson's accusation to be justifiable, however, he would have had to examine Israel's military challenges, goals, and conduct, which he did not. A few days later, Obama press secretary Josh Earnest announced, "The

shelling of a U.N. facility that is housing innocent civilians who are fleeing violence is totally unacceptable and totally indefensible.” It is Earnest's statement, made without any reference to the use that Hamas was making of U.N. facilities, that is totally indefensible.

The assumption that proportionality involves a rough equality of losses -- or is violated when harm is caused to civilians -- is superficial. And it has no foundation in international law.

The principle of proportionality represents a noble aspiration inscribed in the international laws of war to balance the claims of military necessity and humanitarian responsibility. At the same time, proportionality is, as Emory University law professor Laurie Blanc emphasizes, “a legal term with a specific legal meaning.” It “forbids attacks in which the expected civilian casualties from the attack will be excessive in relation to the anticipated military advantage gained.” Accordingly, “widely different numbers of civilian casualties between two sides in a conflict says nothing about the proportionality of particular attacks on specific targets.”

Hamas's ruthless practices -- storing weapons in mosques, hospitals, schools (including U.N. schools), and homes; using civilian buildings as command centers, including a bunker beneath Shifa Hospital in Gaza City; launching mortars, rockets, and missiles from urban areas; killing as many Israeli civilians as possible; and compelling its own civilian population to serve as human shields -- ensured that Israel would, in defending itself, leave behind in Gaza a trail of civilian death and destruction.

The corpses and collapsed buildings are a central part of Hamas's war plan. Hamas understands that Israel exercises restraint and exposes its soldiers to heightened risk to avoid harming Palestinian civilians. And knowing that the so-called international community is eager to heap blame on Israel, Hamas, according to the Israel Defense Forces, compels Palestinian civilians to remain in their homes after Israel has warned them of imminent operations through telephone calls, text messages, and leaflets, the better to produce carnage for media consumption.

The international laws of war provide, however, that the use of civilian areas for military purposes causes them to lose their immunity from military attack. Consequently, under the laws of war properly understood, most of the Palestinian civilian casualties and destruction of civilian infrastructure in Gaza are presumptively Hamas' responsibility.

In the steady stream of knee-jerk accusations of criminality, critics have failed to show that Israel's use of force has been excessive in relation to its pursuit of legitimate military objectives: destroying Hamas's cross-border terror tunnels and its capacity to terrorize almost all of Israel with rockets and missiles.

This suggests that Israel's critics do not understand the international laws of war. One major cause is the Goldstone report.

In late December 2008, Israel launched Operation Cast Lead to degrade Hamas's capacity to rain down mortar shells, rockets, and missiles on Israel's civilian population. As has happened regarding Operation Protective Edge, before the fighting had come to a halt, the UNHRC -- which, in a world awash in violence and human rights violations, has made Israel its consuming preoccupation -- issued a resolution presuming Israel's guilt and declaring the need for an international investigation. (True to form, the UNHRC could scarcely be bothered to mention the thousands of projectiles Hamas had fired at Israeli civilian populations since Israel had evacuated the Gaza Strip in 2005.)

In April 2009, the UNHRC named Justice Richard Goldstone -- chief prosecutor in the 1990s of the international tribunals for Rwanda and the former Yugoslavia and former justice of the Constitutional Court of South Africa -- to lead a fact-finding mission. Five months later, the bulky report was published under the imprimatur of the U.N. General Assembly.

Exceeding their mandate, which was limited to finding facts, Goldstone and his team advanced numerous legal judgments. The most egregious was that in Operation Cast Lead Israel committed war crimes and crimes against humanity by conducting a "deliberately disproportionate attack designed to punish, humiliate, and terrorize a civilian population."

To reach this judgment, the Goldstone report had to disregard the legal test for determining whether Israel had respected the principle of proportionality. The test asks what reasonable commanders and soldiers would have done in the situation. It depends on an inquiry into combatants' rules of engagement, their understanding of the military advantage sought, the weapons they chose and the manner in which they handled them, the nature of the enemy and his tactics, the terrain, the weather, and all the other myriad circumstances involved in armed combat.

Because the Goldstone report failed to undertake this essential inquiry, its judgments about proportionality were invalid. And the overall good faith and competence of the UNHRC (which authorized the report), the Goldstone mission members (who prepared and signed it), and the United Nations General Assembly (which published it) were called into serious question.

Goldstone himself issued a rather extraordinary partial retraction in an April 1, 2011 op-ed in the Washington Post. "I had hoped that our inquiry into all aspects of the Gaza conflict would begin a new era of even-handedness at the U.N. Human Rights Council, whose history of bias against Israel cannot be doubted," he wrote.

Despite that mea culpa, the Goldstone report has proved costly to Israel. The report has become entrenched as the conventional wisdom -- among journalists, in diplomatic circles, and in law schools where its patently defective judgments are transmitted as authoritative

pronouncements. And it serves as a precedent for the U.N. to subject Israel's military operations to international investigations before it can conduct its own, contrary to the practice with other states and to the principles of international law.

Only when a country that has been credibly accused of war crimes has shown itself unwilling or unable to provide the appropriate investigative and judicial process -- as in Rwanda and the former Yugoslavia in the 1990s -- does international law recognize a role for U.N. investigations. By prematurely inserting itself in the 2008-2009 Gaza conflict and aftermath, the United Nations cast altogether unwarranted aspersions on Israel's ability as a sovereign nation to exercise its rights and discharge its responsibilities.

The upshot is that Israel is the only nation in the world subjected to scrutiny and slander for protecting its own civilians from military attacks launched from outside its borders. But the legacy of the Goldstone report also threatens the United States. Simply put, it incentivizes terrorists to dress as civilians, hide among civilians, launch operations from civilian areas, and use civilians as human shields. It's a future roadmap for jihadists devoted to war against the United States.

Therefore, the president's national security adviser, the secretary of state, the secretary of defense, the ambassador to the United Nations, and not least the president himself should seek opportunities to reaffirm Israel's inalienable right to self-defense, condemn Hamas's flagrant violations of the international laws of war, underscore Hamas's responsibility for civilian casualties in Gaza and the reduction of swathes of the strip to rubble, firmly oppose the recently established UNHRC commission of inquiry, and defend Israel's right and responsibility to conduct its own investigations of all credible allegations of unlawful military conduct by its combatants.

In this way, the Obama administration can provide critical support in the battle for international public opinion to a close ally who is upholding the principles of freedom in a region descending into chaos. And it can protect the international laws of war, which the American military rightly cherishes and, when well understood, are vital to a stable international order.

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