LEGAL SUBMISSION
TO THE UNITED NATIONS FACT FINDING MISSION
ON THE GAZA CONFLICT

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This submission was made by B'nai B'rith International to the United Nations

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I. The mandate of the mission

The mandate of the Mission as stated by President of the Human Rights Council Ambassador Martin Ihoeghian Uhomoibhi is

> "to investigate all violations of International Human Rights Law and International Humanitarian Law that might have been committed at any time in the context of the military operations that were conducted in Gaza during the period from 27 December 2008 and 18 January 2009 whether before during or after".

It is noteworthy that

1) The presidential mandate leaves open the question whether there were any violations, using the phrase "might have been committed".

2) The presidential mandate imposes no restriction limiting the investigation to Israeli violations. The presidential mandate may encompass Hamas violations.

3) The presidential mandate imposes no restriction limiting the investigation to violations committed against Palestinians only. The presidential mandate may encompass violations against Israelis.

The first submission that B'nai B'rith International wishes to make is that the mission respect this mandate. In the ordinary course of events, this submission would be superfluous. However, the resolution which authorized the president to confer the mandate on the mission is worrying.

The mandating resolution for the mission, Human Rights Council resolution S-9/1 of 12 January 2009, assumes that Israel occupies Gaza, which is patently not the case, particularly in light of Israel's complete withdrawal of 2005. Yet the resolution continually refers to Israel as the occupying power. The resolution assumes that Israel is violating international law and asks for a detailing of those violations. The possibility that there was no violation is not contemplated by the resolution. The resolution asks the mission to report on Israeli violations only. It does not ask the mission to report on violations by Hamas. The resolution asks for reports of alleged Israeli violations not only in Gaza but "throughout the Occupied Palestinian Territory"; this is disturbing in part on account of a failure to note the control of territories relinquished to the Palestinian Authority as well as territories seized violently by Hamas.

(To be specific: preambular paragraph 3 of the resolution asserts the right to self-determination of the Palestinian people. But it says nothing about the right to self-determination manifestated in the democratic Jewish state of Israel. The paragraph refers to the "inadmissibility of the acquisition of land by the use of force," implying that Israel has been guilty of such acquisition, but no reference is made to the inadmissibility of terrorism or the threat and use of violence that

has led to Israel's control of the territories in question. Preambular paragraph 8 recalls the obligation of the "Parties" to the Fourth Geneva Conventions. But the only relevant state party is Israel. Hamas is not a party to the Convention, nor could it be. The recall here suggests that Israel has obligations and that Hamas has none. Preambular paragraph 12 notes the Israeli response to terrorist attacks by referring to "massive ongoing Israeli military operations". But it does not note the terrorist attacks which precipitated the response. The paragraph states that the Israeli operation "has caused grave violations of the human rights of the Palestinian civilians", "exacerbated the severe humanitarian crisis", and undermined peace efforts. Again here there is a pre-emption of the work of the mission, telling the mission in the mandating resolution what its conclusions should be. Preambular paragraph 14 then refers to the Israeli attempts to use border controls to prevent terrorism, something practiced by virtually every state in the world, as a "siege", "collective punishment" and "disastrous". These conclusions, aside from being factually misplaced, tell the mission yet again what its conclusions should be.

Beyond the preambular paragraphs, operative paragraph 1 "strongly condemns the ongoing Israeli military operation" and asserts that this operation "resulted in massive violations of human rights of the Palestinian people and systematic destruction of Palestinian infrastructure". The possibility that the mission, in the face of this paragraph, would conclude that the Israeli military operation was a justifiable response to terrorist attacks, that any human rights violations inflicted on the Palestinian people and any destruction of Palestinian infrastructure were attributable to those terrorist attacks, something I believe to be the reality, does not, to the authors of the resolution, exist. Operative paragraph 2 calls for an end to both Israeli military attacks and the launching of rockets against Israeli civilians. However, the way it does so implies a criticism that the Israeli response is disproportionate. The resolution refers to more than nine hundred Palestinians killed and more than four thousand injured Palestinians injured and contrasts that with the loss of four civilian lives and some injuries. There is no indication of how many Palestinians killed and injured were armed combatants, no distinction made between intentional and unintentional casualties, and no recognition of the fact that disproportionality is not a legal standard. Operative paragraph 3 calls for an immediate withdrawal of Israeli forces. This call means that there is no willingness to acknowledge a military necessity to defend against terrorist attacks. Operative paragraph 4 calls upon Israel to commit to the establishment of an independent Palestinian state, something that leaders of the Zionist movement and Israeli governments have repeatedly done over the course of more than six decades. It does not ask Hamas to accept the existence of Israel, something Hamas has never done.

Operative paragraph 5 "demands" that Israel stop the targeting of civilians, medical facilities and staff and the systematic destruction of the cultural heritage of the Palestinian people and public and private properties. Yet, Israel has not done this. Again, the resolution tells the mission what its conclusions should be. Here, the conclusions it dictates are counter-factual. They are not supported by any evidence within the resolution or outside of it and are motivated by political reasons only. Operative paragraph 8 calls for international action to put an end to the "grave violations" committed by Israel. Again the resolution dictates a conclusion to the mission. Operative paragraph 11 asks the United Nations High Commissioner for Human Rights to report on the violations of the human rights of the Palestinian people by Israel. There is no request of a

report on the violations of the human rights of the Palestinian people by Hamas nor a request of a report on the violations of the human rights of the Israeli people. Operative paragraph 12 asks all special procedures to report on the violations of the human rights of the Palestinian people. There is no similar request for violations of the human rights of the Israeli people. Operative paragraph 13 requests Israeli cooperation. There is no request for Hamas cooperation. Operative paragraph 14 decides to dispatch a mission to investigate violations of human rights and humanitarian law by Israel against the Palestinian people. The paragraph assumes the violations have taken place. There is no request of an investigation of the violations of the human rights and humanitarian law by Hamas against the Palestinian people. Nor is there a request of an investigation of the violations of the human rights and humanitarian law against the Israeli people. Operative paragraph 16 requests that the Secretary-General investigate the "latest targeting" of UNRWA facilities. The paragraph assumes without factual foundation that the facilities have been targeted. It moreover assumes without evidence or even specification that such targeting has occurred in the past.)

This resolution does not really ask for a mission to find facts. It rather asks for endorsement of conclusions already formed.

The shift from the resolution mandate to the presidential mandate does not remove completely the problem posed to the mission by the initiating resolution. The report of the mission to Lebanon and Israel of four UN rapporteurs indicates what may be in store for this mission.

The Lebanon mission was conducted by the rapporteurs on health Paul Hunt, arbitrary executions Philip Alston, internally displaced Walter Kalin and housing Miloon Kothari. This group reported to the second session of the UN Human Rights Council in October 2006. The report of this group did not accuse Israel itself of war crimes. It did not accuse Israel of violating the Geneva Conventions on the Laws of War through disproportionate attacks. The mission report noted that Lebanon is party to Protocol I of the Geneva Conventions, in which the excessive response standard is found, while Israel is not. The report referred to the correct standard, that the attack is excessive in relation to the direct military advantage anticipated.

Because the report avoided repeating the standard legal errors and omissions in which anti-Israel voices indulge, some states at the UN condemned the report as pro-Israel. Pakistan, speaking on behalf of the Organization of Islamic Conference, said the report was a "one sided narrative", the report was "deferential towards Israel" and "accusatory towards Hezbollah". According to the press release of the debates for October 4:

> "The OIC believed that in the case of Lebanon, the principles of distinction between civilians and combatants, prohibition against indiscriminate attacks and proportionality had been violated. The OIC as a whole and OIC Council members had decided to distance themselves from the conclusions of the report, which did not have any operative value, direct or indirect."

The anti-Israel states did not want to be confronted with the facts. If the UN experts were not prepared to condemn Israeli behaviour as disproportionate, the fault lay with the experts, not

with the OIC position. As the OIC statement indicated, for some, Israeli disproportionality is not a question of fact or law; it is a question of belief.

The present mission needs to confront this situation up-front. It should note the difference between the resolution and presidential mandate and indicate that, in accepting the appointment to go about its work, it has operated under the presidential mandate (rather than the resolution mandate).

The mission should forthrightly assert that it has worked under these principles, that the mission:
a) operated under the mandate conferred by the President of the Council,
b) made no assumptions that Israel violated international human rights and humanitarian law,
c) considered not only violations of international human rights and humanitarian law allegedly inflicted on Palestinians but also by Palestinians (particularly Hamas) against Israelis.

II. The Legal Framework

Although the Mission is titled a "fact finding" mission, it is apparent that the mandate consists of more than just finding facts. The mandate to investigate violations of law which might have been committed is a mandate to determine whether or not violations have been committed. In order to determine whether or not violations of law have been committed, there must be a determination of the applicable law.

A common charge against Israel in the context of the Gaza conflict is that the Israeli response to Hamas terrorist attacks was disproportionate[1]. Whether the Israeli response to Hamas rocket attacks violated international law requires more than a factual determination whether the response was disproportionate. It requires also a determination whether there is a legal standard of disproportionality.

Arguably, there is no such standard in international law. Therefore, the charge of a disproportionate response could not possibly support a finding of breach of international law.

The Fourth Geneva Convention, the Convention relative to the Protection of Civilian Persons in Time of War, refers to proportionality when talking about wages [wages for work imposed by the occupying power on protected persons should be proportionate to capacity][2], sentences [a sentence imposed by the occupying power on a protected person should be proportionate to the offence][3], rations [internees who work should receive additional rations in proportion to the kind of labour they perform; expectant and nursing mothers and children under fifteen should be

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[1] See for instance Al Haq, "Operation Cast Lead and the Distortion of International Law," April 2009.

[2] Article 51.

[3] Articles 67 and 68.

given additional rations in proportion to their needs][1] and costs of transport [the costs of transport of mail and relief shipments should be borne by the parties to the conflict in proportion to the importance of the shipments to the nationals of the parties to the conflict][2]. But the Convention does not use the word nor refer to the concept of proportionality in relation to response to an armed attack.

Nor does Protocol I to the Geneva Conventions, the Protocol relating to the Protection of Victims of International Armed Conflicts. That Protocol does not use the word proportionality or any of its variations, not even once.

A. Indiscriminate attacks

i) The standard

To what are the critics of Israel referring about when they charge Israel with disproportionality? Al Haq states

> "the principle of proportionality dictates that launching an attack, which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated is prohibited"[3].

There is a requirement in Protocol I to the Geneva Conventions on the Laws of War which prohibits indiscriminate attacks[4]. The Protocol has a good deal describing what might be considered an indiscriminate attack. One of the forms of attack the Protocol indicates would be indiscriminate is an attack which may be expected to cause incidental loss of civilian life, injury to civilians, or damage to civilian objects which would be excessive in relation to the concrete and direct military advantage anticipated[5]. Where the attack is launched with knowledge that it will cause excessive loss of life, injury to civilians or damage to civilian objects, it is a grave breach of the Protocol which results in individual criminal responsibility[6].

ii) The differences

Yet, it is wrong to call this Protocol standard a proportionality standard. There are at least fourteen differences between a proportionality standard and the indiscriminate attack standard set out in Protocol I.

1. Conceptually there is a difference between an indiscriminate attack and a disproportionate

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[4] Article 89.

[5] Article 111.

[3] Page 4.

[4] Article 51(4).

[5] Article 51(5)(b).

[6] Article 85(3).

attack. Disproportionality suggests more on one side than another. Israel is often accused of disproportionate attacks when Israel suffers fewer casualties than it inflicts.

Determining whether an attack is indiscriminate makes no comparison between the casualties on the two sides of a conflict. The determination of whether an attack is indiscriminate compares military and civilian casualties on one and the same side and not casualties on one side with casualties on the other.

Of course, ideally, no civilian should be killed. But the law of indiscriminate attacks contemplates such killings. The issue, in context, becomes how many. The language of proportionality is misleading because it suggests that a mere imbalance in response can violate the laws of war. However, even the most imbalanced response can technically respect the laws of war.

Indeed, the balance between attack and response, in assessing compliance with the laws of war, is an irrelevancy. What is relevant is the balance between anticipated military advantage in the response and anticipated civilian casualties.

2. "Disproportionate" suggests too much. But that is not the standard. The standard is "excessive", that is to say, far too much. A response can be disproportionate without being excessive.

3. Both proportionality analysis and excessive response analysis involve examination of individual incidents. However, because the proportionality is a good deal finer standard than the excessive response standard, proportionality analysis involves a much closer examination of what was done than excessive response analysis would be.

The microscopic examination of every Israeli effort in self-defence might well happen whatever language is used. But using the language of proportionality makes this microscopic examination easier.

Relying on the language of proportionality rather than on the language of excessive response is an invitation to reweigh every move Israel makes. Proportionality critics wait to see what is done and then, in hindsight, condemn all that was done (often without offering legitimate, effective alternatives).

14. In general, the onus lies on an accuser. That principle applies as much to the accusation of indiscriminate attacks as any other accusation. A state charged with excessive response to an attack does not have to prove that its response was not excessive. Rather, it is the accuser who has to establish that the response was excessive.

Yet, when accusations of disproportionality are made against Israel, the onus is often placed on Israel to disprove these accusations. Failure to offer the disproof which satisfies the critics is

then turned into proof that Israel is guilty of disproportionality[1].

5. Israel is not a party to the First Protocol to the Geneva Conventions on the Law of War and not bound legally by it. The Protocol I principle prohibiting excessive response, arguably, exists in customary international law. Even if that is so, customary international law sets out standards binding states, not criminal prohibitions binding individuals.

No Israeli could be prosecuted under international law for breach of a treaty by which Israel itself is not bound. It would be unjust to prosecute an Israeli for an act which is forbidden only by customary international law, and not set out either nationally by statute or internationally by a binding treaty.

6. Excessive response analysis requires consideration of the concrete and direct military advantage anticipated. Anyone engaging in excessive response analysis must firstly ask, what is anticipated at the time the response was launched? Assessment whether an attack is indiscriminate requires examination not of what happened but what was anticipated to happen before the response was engaged.

It regrettably occurs all too often in war that what was anticipated and what actually happened diverge considerably. The charges of disproportionality are all *ex post facto* judgments, looking at what happened, comparing the results of what Israel did with the results of what its attackers did. But an assessment whether attacks are indiscriminate requires looking forward from a point in time when the response was launched.

7. If the military advantage of a response is minor, civilian losses will almost always be excessive. Even where the military advantage is substantial, civilian losses are regrettable. But they may not amount to a violation of the laws in war. In order to determine whether an attack is indiscriminate there has to be consideration of expected military advantage.

8. Military planners, for reasons of military security, may not wish to disclose what they saw as the military advantage anticipated. Outside advice from independent military experts can tell us what military advantage from the contested operation might reasonably be anticipated in the circumstances.

9. An assessment of excessive response requires consideration of the alternatives available. Once there is a choice, and either option leads to the same military advantage, the option with the fewest civilian casualties should be chosen.

If there is no evident choice offering the same military advantage as the option chosen, the matter is different. In that situation, it should be more difficult to establish that a violation of the

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[1] See for example Report of the Commission of Inquiry on Lebanon, A/HRC/3/2, November 23, 2006, paragraph 331.

laws in war has been committed[1]. Again, the claim of disproportionality ignores this.

10. Part of the determination whether there is an indiscriminate attack by one party to conflict is consideration by the use by the other party of the civilian population as a shield. The Protocol to the Geneva Convention which prohibits indiscriminate attacks also prohibits the use of civilian populations as shields. The Protocol states that the presence of a civilian populations "shall not be used to render certain points or areas immune from military operations."[2]

That Protocol also states that the use by one side of the civilian population as shields does not release the other side from the obligation to take precautionary measures to minimize or avoid civilian casualties[3]. Yet, the use of civilians as shields is relevant to a determination whether civilian loss consequent on an attack on a military target is excessive. Otherwise the prohibition against use of civilians as shields would be meaningless. Thus, a question that has to be answered in determining whether a response is excessive is the extent to which the other side has used civilians as shields.

Again, the concept of disproportionality ignores this. By weighing what one side does against what the other side does instead of weighing anticipated military advantage against anticipated, avoidable civilian loss, the use of civilians as shields is removed from the equation.

11. The use by the attackers of underage soldiers plays out differently for proportionality and excessive response analysis. The Convention on the Rights of the Child provides:

> "States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities."[4]

The Optional Protocol to this Convention on the involvement of children in armed conflict raises the age to eighteen[5].

An attacker who conscripts or even allows children to take part in hostilities bears full responsibility for violation of these standards. The side responding to the attack is innocent. The age of the attacker engages the responsibility of the attacker, not the responsibility of the responder.

In the Gaza conflict, critics of the Israeli counterterrorism effort have produced lists of names of civilian casualties in support of their charge of disproportionality. We can compare those names with Hamas lists of names of their own identified combatants. One can see children on both

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1 See Protocol I to the Geneva Conventions, Article 57(3).

2 Protocol I to the Geneva Conventions Article 51(7).

3 Article 51(8).

4 Article 38(2).

5 Article 1.

lists[1]. Therefore it is impossible to assume, only on the basis of age, that a victim is not a combatant in light of the use by terrorists of children for terrorist activities. The charge of disproportionality shifts the blame for child combatants from the attacker, Hamas, where it truly belongs, to the responder, Israel.

12. The same is true for the principle of distinction. Violation of this principle also is different for proportionality and excessive response analysis.

Protocol I to the Geneva Conventions provides:

> "In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."[2]

This provision sets out a dual obligation. The first is that the attacker must distinguish between its own combatants and its own civilian populations. The responder must then direct its operations only against combatants and not civilians.

However, when terrorists do not distinguish between their own combatants and the civilians in their midst it becomes difficult and sometimes impossible for the responder to direct its operations only against combatants and avoid civilians.

One has to remember that excessive response analysis is anticipatory. Where civilians and combatants are clearly demarcated, it is easier to determine, in advance, likely civilian casualties, and to balance those off against anticipated military advantage. Conversely, where the attacker makes no distinction between its own combatants and civilians, an anticipatory determination whether a response is likely to be excessive becomes more difficult.

Consequently, when assessing the appropriateness of the response to an attack from terrorists who do not respect the principle of distinction, we have to grant the responder a greater margin of appreciation. Where the attacker fails to respect the duty to distinguish between its combatants and the civilians in its midst, the likely number of civilian casualties would have to be greater to violate the excessive response standard than when the attacker complies with the duty to distinguish.

As well, as previously noted, proportionality analysis occurs after the fact. This sort of analysis considers only the fact that a civilian was a victim without regard to the critical difficulty the responder had to determine in advance whether the person was an attacker. Yet that difficulty is real in situations where the attacking side fails to respect the principle of distinction. Hamas has

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[1] Ethan Bronner, "Grim testimony on Israeli Assault," International Herald Tribune, March 20, 2009.

[2] Article 48.

used children, women, and the elderly as suicide bombers, or as cover for them.

13. The principle of distinction applies to structures as well as individuals. The attacker is obliged to attack from a military structure, not a civilian structure. The responder in turn is obliged to direct its response to the enemy's military structures and not its civilian structures.

When a terrorist launches military attacks from civilian structures, from schools or hospitals or mosques, it becomes unrealistic to expect the responder to avoid these civilian structures in its response. Again here, the fault for the lack of distinction lies with the attacker, not the responder.

The First Protocol provides:

> "In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used."[1]

Regrettably, Hamas in all too many cases has, by its own actions, rebutted this presumption. If Hamas launches a terrorist attack from a hospital, school or mosque, then the civilian structure is being used to make an effective contribution to military action.

14. The holding of hostages is relevant to excessive response analysis and abused for proportionality analysis. If attackers hold civilians hostage, then again it becomes more difficult for responders to avoid civilian casualties. What becomes excessive in this context is greater than in a context where there are no hostages.

iii) The comparison

When an attack has no concrete and direct anticipated military advantage, there is nothing to place on the other side of the scale, to balance against the loss of life, injury to civilians or damage to civilian objects. This is one reason why terrorist attacks against Israeli civilian targets are always wrong. These attacks have no legitimate military aim. Their aim is only the loss of life, injury to civilians or damage to civilian objects.

However, Israel has not done anything of this sort. Israel has not attacked a target with the aim only of loss of life, injury to civilians or damage to civilian objects. In every instance where there has been loss of life, injury to civilians or damage to civilian objects, that response has had a military aim. So, for these responses, an analysis whether the response is excessive must be engaged.

Any judgment whether or not a response is excessive has to consider what is on both sides of the scale, the advantages and disadvantages, the loss to civilians balanced against the military advantage. How Israel could best defend itself is far from the minds of implacable critics of

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[1] Article 52(3).

Israel. Thus, the charges of disproportionality are not true judgments that the Israeli response is excessive.

iv) A caution

The current mission parallels somewhat the mission to Lebanon and Israel of four UN rapporteurs. Because of the parallel, a word of caution is necessary, urging this mission not to fall into the trap into which that mission fell.

The Lebanon mission report used the language of proportionality and cited Israel with what it viewed as violations of the proportionality standard under customary international law. As noted, the report of this mission met with widespread condemnation from anti-Israel voices. It would be a mistake to conclude from this rejection that the report was actually "pro-Israel" or even fair to Israel.

The problem the report posed for Israeli self-defence is that it unreasonably asked Israel to identify the military advantage anticipated for each target hit.

As well, Israel should not be expected to disclose all its confidential military information simply in order to placate international "second-guessing." There is an alternative to Israeli disclosure – outside independent military expertise, something the report lacked. The standard would be what is objectively reasonable. The issue would be not just what was actually anticipated, but also what was reasonably anticipated. It is possible for independent outside military experts who have no inside knowledge of Israeli confidential military information to make a determination of the military advantage reasonably anticipated.

One of the recommendations of the report[1] was that, for each *prima facie* civilian target, there should be an Israeli statement as to the alleged nature of the target and the anticipated collateral or incidental effects. This is an outrageous recommendation, an *ex post facto* external micromanaging of the Israeli self-defence effort.

Hezbollah had no military installations as such. It functioned in a civilian milieu. All targeting of Hezbollah involved targeting something which was superficially civilian or disguised as civilian. This recommendation, in effect, unreasonably asks Israel to justify every single response, bullet by bullet. Israel aimed to damage the ability of Iran to deliver rockets to Hezbollah by destroying parts of Lebanese infrastructure which had been used and could be used for that delivery; Israel need not further disclose sensitive military intelligence. Unfortunately, in Lebanon – as in Gaza – many places which from the exterior looked to be civilian buildings were terrorist munitions factories or rocket silos or arms depots or training grounds.

Targets should be considered globally rather than one by one. If the target fits within a class of targets, has a profile where the direct military advantage anticipated justifies the civilian loss, that should be enough. Individual consideration of targets should be the exception rather than

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[1] 103(b).

the rule. In this way, combatants would know from the start whether a target is permissible or not.

v) The effect

Calls for Israel to explain and justify after the fact each target, one by one, misses the whole point of the laws of war. The laws of war are not in place to prevent legitimate military operations. Rather, the objective of the laws of war is to make the conduct of war more humane.

International lawyers label the laws in war humanitarian law. Yet there is an inevitable contrast between war and humanitarianism. The death of even one combat soldier on attack will be a tragedy to the soldier's friends and families. The destruction of any property, even a munitions factory, creates financial loss and physical disarray. Humanitarian law exists to mitigate the worst ravages of war rather than to stop war altogether.

For humanitarian law to work, to be accepted, to be applied, it can not hamper the conduct of war. Humanitarian law sets out the rules by which war is conducted rather than a means by which war is ended. It is meant to appeal to warriors not just because the violation of its standards is inhumane but also because these violations are unnecessary for the conduct of war. The deliberate killing of innocents, murder of prisoners of war, destruction of cultural property, prevention of medical aid to the wounded and so on, are both cruel and unwarranted.

The laws of war not only speak of humanity; they speak to humanity. The conduct of war will not be stopped by “armchair generals” refighting each war after it is over; rather, by this, it is respect for humanitarian law which ultimately will be undermined.

If respect for humanitarian law means that the conduct of war is impossible, it is not the war effort, ultimately, which will be the loser. It is rather humanitarian law which will be disregarded as an impractical fantasy.

That is why the principle of proportionality does not in law exist. The absence of the language of proportionality in the Geneva Conventions and Protocols is not just an oversight, an attempt to refer to the concept of proportionality in other ways. It was a decided choice based on the purpose of the laws of war.

Combatants, to apply the concept of proportionality, would have to engage in weighing, balancing, assessment as they fight, an unrealistic task in the heat of battle. The application of the concept of proportionality to armed combat is not required by the Geneva Conventions and Protocols; indeed, it is insensitive to the nature of war and therefore contrary to the purpose of those Conventions and Protocols.

The standard of proportionality, if applied generally, would undermine international humanitarian law.

B) Aggression

i) The prohibition

When condemning Israel for disproportionality in the Gaza war, in addition to referring to Protocol I of the Geneva Conventions on the Law of War, some critics refer to the UN Charter. Al Haq argues that the Charter justification of self-defense is not relevant to the conduct of the Gaza war because the justification of self-defense applies only to the commencement of hostilities and not their conduct[1].

Michael Byers, an academic at the University of British Columbia, accepts that the justification of self-defence can apply to the conduct of hostilities, but argues that, for the justification of self-defense to apply, the response must be proportionate. He wrote:

> "Self defence is a recognized exception to the United Nations Charter's general prohibition on taking up arms... But self-defence is always limited by requirements of necessity and proportionality... Israel's existence is not at risk from Hamas... Violations of all these rules constitute war crimes."[2]

This broadside suffers from a number of defects. The first is the starting point, the claim of a United Nations Charter's general prohibition on taking up arms. Despite what Byers write, there is no such prohibition.

The provision of the Charter which bears the closest resemblance is the statement

> "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[3]

This prohibition is different from the prohibition against taking up arms in five different ways:

1. The Charter qualifies the prohibition of the use of force. The use of force is prohibited only when it is force against the territorial integrity or political independence of any state or in any other manner inconsistent with the purposes of the United Nations. There is no general prohibition against the use of force.

2. Israel is criticized for disproportionality against Hamas. Yet Hamas is not the government of a state. Israeli use of force in Gaza is not the use of force against the territorial integrity or political independence of any state.

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1 Page 3.

2 "In the case of Israel v. Hamas, two wrongs don't make a right," January 13, 2009, Globe and Mail.

3 Article 2(4).

3. Force not used against the territorial integrity or political independence of any state violates the Charter only where the force is used in a "manner inconsistent with the purposes of the United Nations". To argue that the mere use of force, in self-defense, is itself inconsistent with the purposes of the United Nations is circular.

To violate the Charter prohibition against the use of force, the force has to be inconsistent with the purposes of the United Nations in some other manner than just that force has been used. There has to be something about the way in which force is used that makes it wrong.

4. Byers suggests Israel has violated the UN Charter by disproportionate self-defence. That reasoning takes a defence to a charge and makes it a constituent part of an offence.

For any charge, the elements of the offense have to be established for the charge, *prima facie*, to be made out. Only once the constituent elements of the offense are made out do the defences come into play. There is no need to establish a defence until the charge itself is established.

For the charge of use of force contrary to the UN Charter to be made out in a context where the force was not used against the territorial integrity or political independence of any state, there must be established that the force was used in a manner inconsistent with the purposes of the United Nations. Moreover, what that purpose is cannot be the mere prevention of the use of force itself. The notion of proportional self-defence becomes relevant only if it is established that force was used in a manner inconsistent with the purposes of the United Nations.

For instance, one of the purposes of the UN, set out in the charter as a UN purpose, is the peaceful settlement of disputes between Member states[1]. One can imagine the use of force by one UN member state against another member state which was not used against the territorial integrity or political independence of that other state but rather was used to attempt to settle a dispute in a non-peaceful way. Such a use of force would be inconsistent with the purposes of the UN.

We must contend with this line of inquiry if we are going to take seriously the UN Charter. Before we get to the issue of self-defence, we have to ask, to take the UN purpose we suggested, whether there was a meaningful opportunity which Israel forsook or abandoned for Israel and Hamas to settle their dispute by peaceful means. If we ask and answer that question honestly, we would have to say no.

The dispute Israel had with Hamas which led to the use of force was the objection Israel had to the terrorist attacks by Hamas against Israel, notably the Hamas rocket attacks against civilian targets in Sderot and southern Israel. Israel in my view explored every reasonable avenue for the peaceful settlement of this dispute with Hamas before it used force against Hamas. So the attack did not violate this UN purpose of the peaceful settlement of disputes, nor any UN purpose. So

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[1] Article 2(3).

the law of self-defence did not even become relevant.

5. The international community has never agreed on a definition of aggression. There are fully developed laws in war, humanitarian law. But the laws of war, the law of aggression, is still law in the making.

As there is no agreement on the definition of aggression, Israelis cannot be guilty of a crime which does not exist. In Latin, the principle is *nulla poene sine lege*, no punishment without law. And there is no criminal international law of aggression.

There are clear-cut cases, such as the Nazi invasion of its neighbours, which formed the basis under the Nuremberg Charter for criminalizing crimes against peace. But that was a specific criminalization, put in force by the Charter[1].

ii) Self-defense

If we get to the law of self-defense, there is indeed a concept of proportionality. The United Nations Charter says that

> "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."[2]

Under customary international law, the use of force in response to an armed attack must be proportionate in order to qualify as self-defense[3].

Finally we get to something which looks, at least verbally, like the charge of disproportionality made against Israel. Yet, that charge and the requirement of proportionality as part of the law of self-defense differ in at least eight significant ways.

1. Customary international law alone, as previously noted, can never form the basis of individual criminal responsibility. The violation of the principle of proportionality in the law of self-defense is definitely not a war crime.

2. The doctrine of proportionality as part of the law of self-defense is not an exercise in balancing the attack against what the defender did in response to the attack. (The International Court of Justice in its 1996 *Nuclear Weapons Advisory Opinion* rejected the submission that the use of nuclear weapons, because of the devastation they cause, could never be a proportionate

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1 Article 6(a)

2 Article 51

3 See Nicaragua v. United States of America, I.C.J. Reports, page 94, paragraph 176.

response to an armed attack[1]. Yet, if a nuclear response can, in some circumstances, be proportionate to a non-nuclear attack, something other a mere balancing of the two sides is in play.)

3. The doctrines of proportionality and necessity are usually coupled, stated together, and for good reason. The doctrine of proportionality has embedded within it a component of necessity.

Byers refers to the fact that the existence of Israel was not threatened by Hamas rocket attacks. That is, to be sure, a relevant consideration, but not the only relevant one. In context, it is a red herring.

In determining whether a response in self-defense meets the criterion of proportionality, what needs to be considered is whether humanitarian law was violated and whether the force went beyond was necessary to reinstate the *status quo ante*, the situation prior to the attack[2].

The question of proportionality, put in the context of the Gaza hostilities, is not whether Israeli casualties approach Palestinian casualties in number but whether humanitarian law has been respected, and whether the Israeli response went beyond what was necessary to end Hamas rocket attacks on Israel's sovereign territory and civilians.

4. The balancing that occurs in the law of proportionality for self-defence, like the balancing which occurs for humanitarian law, is prospective only. It is mistaken, as Byers does, to consider what happened. Instead, we must consider what was considered likely to happen at the time of effort of self-defense was undertaken.

5. Similarly, the balancing that occurs in the law of proportionality for self-defence, like the balancing which occurs for humanitarian law, requires consideration of available alternatives. If there are no other plausible alternatives which would lead to the desired result, the particular act of self-defense undertaken is more likely to be considered proportionate.

6. Also assessing whether there is a proportional response in self-defense, like assessing whether there is an excessive response under humanitarian law, requires access to military expertise. Without military expertise, it becomes impossible to determine the availability and viability of alternative forms of self-defense.

7. Here too there is confusion over what is to be compared. Byers compares Hamas rocket attacks on Israel with Palestinian casualties. But that is not the relevant comparison. Rather one must compare what is intended to be done with what is needed to be done to stop the attacks.

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[1] Paragraph 43.

[2] Lionel Beehner, "Israel and the Doctrine of Proportionality," Council on Foreign Relations, July 13, 2006.

Roberto Ago for the International Law Commission[1] wrote:

> "The requirement of the proportionality of the action taken in self-defence...concerns the relationship between that action and its purpose, namely...that of halting and repelling the attack... It would be mistaken, however, to think that there must be proportionality between the conduct constituting the armed attack and the opposing conduct. The action needed to halt and repulse the attack may well have to assume dimensions disproportionate to those of the attack suffered. What matters in this respect is the result to be achieved by the "defensive" action, and not the forms, substance and strength of the action itself... If, for example, a State suffers a series of successive and different acts of armed attack from another State, the requirement of proportionality will certainly not mean that the victim State is not free to undertake a single armed action on a much larger scale in order to put an end to this escalating succession of attacks."

8. What actually happened is relevant to an assessment of proportionality. If the response ends the attacks, one can always argue that, or at least wonder whether, a lesser response might also have ended the attacks. However, if the attacks continues even after the response, it is impossible to say that the response was disproportionate. On the contrary, we would have to conclude that the response was insufficient.

Yet that is the situation with Hamas and its rockets. Even after the Israeli Operation Cast Lead ended, even after there was in principle a cease-fire, rockets continued to be fired from Gaza towards Israel, although with reduced frequency. Given this reality, it is impossible to conclude that the Israeli response was disproportionate.

Conclusion

There is no law prohibiting "disproportionality" of the sort which Israel is accused of violating. How does one avoid or minimize civilian casualties? Not by arguing, as UN Special Rapporteur Richard Falk has done, that Israel cannot defend itself against terrorist attacks, because to do so involves unavoidable civilian casualties[2].

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[1] Eighth report on State responsibility by Mr. Roberto Ago, Special Rapporteur, UN Document number A/CN.4/318 paragraph 271 and 272, 24 January, 5 February and 15 June 1979. See also Yoram Dinstein, *War, Aggression and Self Defense*, 4th edition, 2005.

[2] Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Richard Falk UN Document A/HRC/10/20, 17 March 2009, Paragraph 8.

Nor by inventing or distorting a law of disproportionality. When Hamas shoots rockets at civilian targets in Israel, when Hamas uses children and adults of all ages as combatants, when Hamas fails to distinguish between civilians and combatants, when Hamas uses schools, mosques and hospitals for military purposes, when Hamas uses civilians as shields, when Hamas holds its own population hostage, and what we hear is criticism of Israel for violating a standard of disproportionality which does not exist, then the concern is something different from protection of civilians.

Inventing or distorting a law of disproportionality, arguing that there is no lawful self-defense to terrorist attacks, has the opposite effect. It makes civilian casualties more likely regionally and internationally, by engendering disrespect for both the laws of war and the laws in war.

The Mission should be wary of abandoning principle in order to criticize Israel. In the final analysis, it is respect for law, institutional mechanisms and standards which will be the victim.

Avoiding civilian casualties in Gaza is simple and straightforward and already set out in the international instruments. Terrorist attacks should cease. Children should not be used as combatants. Civilians should be distinguished from combatants. Civilian structures should be distinguished from military structures. Civilians should not be used as shields. Refugees should be resettled both locally and internationally. Only when we see a focus on these principles, instead of false charges of disproportionality against Israel, can we say that the concern for avoiding civilian casualties is real and meaningful.