ISRAEL & THE MIDDLE EAST

How Israel Missed Its Chance to Eliminate the Leadership of Hamas

The widely misunderstood doctrine of proportionality can have wildly disproportionate consequences

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COLLECTION

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The term "proportionality" is one of the most abused terms in just-war theory. The careless use of the term comes with a great cost in innocent lives lost. Israelis die when its leaders don't act decisively out of fear of claims for acting "disproportionately."

If there's one consistent criticism international figures launch against Israel, it's that its wartime responses to terror groups are disproportionate. In the current war, it took only a few days after Hamas' Oct. 7 massacre of over 1,200 Israelis and kidnapping of 240 more for NGOs like Human Rights Watch to accuse Israel of responding disproportionately. The United Nations Human Rights Office has similarly said it has "serious concerns that these are disproportionate attacks that could amount to war crimes."

Such accusations have been regularly launched since Israel began its series of intermittent operations against terrorist armies like Hezbollah and Hamas. Early in the 2006 war with Hezbollah, U.N. Secretary General Kofi Annan accused Israel of "disproportionate use of force." This was a common refrain by human rights groups during the Second Lebanon War in 2006 and the IDF's 2008 Operation Cast Lead in Gaza. Such pronouncements have a real impact. Polls showed that well over half of Europe's residents felt Israel acted disproportionately in 2006. In 2018, when Hamas initiated months of weekly charges at the Gaza border fence, the U.N. Human Rights Council accused Israel of disproportionately firing on these protesters. This was in spite of the fact that Hamas terrorists were embedded with the mob and looking to break through the fence and launch raids on Israel. We now know what happens when Hamas catches the IDF unprepared.

It is critical to understand the meaning of the term "proportionality," because it helps explain why one may morally fight a war despite the inevitable but widespread incidental killing of noncombatants. "Collateral damage" always occurs, especially in asymmetric warfare where one side purposely fights from the confines of a civilian population. Before going to war, one must consider whether its destructiveness will be out of proportion to the relative good that will be achieved by the war. So too, during war itself, one must ask whether the benefits of a particular strike or action will outweigh the toll on human lives.

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Broadly speaking, this is a healthy moral standard for believers in multivalue moral frameworks. Any ethical commander should take into account their strategic goals alongside humanitarian considerations. As my own teacher, Rabbi Aharon Lichtenstein, asserted during the First Lebanon War in 1982, we must recognize the inevitable side effects of military actions and take those into account before killing God's creatures, even among our enemies.

Such notions were well known to early writers of military ethics. Proportionality demanded the following criteria: (1) the act is militarily necessary, (2) the destruction is effective and not wanton, and (3) the gains are not "grossly disproportionate" to the extent of destruction. If these general principles were met, then, in the words of M.W. Royse, a classic writer on this topic, "the act can hardly be condemned regardless of the amount of suffering and violence." The principle of proportionality, in a nutshell, is not a separate standard. It is a means to broadly ensure that a military commander did not engage in the intentional killing of noncombatants, for which he is morally culpable.

International jurists, however, tried to go beyond these general standards to create definitive rules against any extensive damage to civilians. Beyond forbidding direct targeting of civilians, the 1977 Additional Protocol I (AP/1) to the Geneva Conventions prohibit:

> 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. (*Article 51(5)(b). Emphasis added.*)

At the time of action, each commander must therefore make a judgment call, based on the information they have. If a target may deliver a compelling or even decisive military gain, severe civilian losses may be tolerated. What would be a case of "excessive" collateral damage? The International Red Cross (ICRC), in its

widely cited 1987 commentary to the AP/1 protocols, gave the following case: "For example, the presence of a soldier on leave obviously cannot justify the destruction of a village." That's true, but the extreme example isn't too helpful for real-world scenarios. Giving an *extreme* negative example of a *disproportionate* act doesn't provide clear guidance for what is a permissive proportionate act.

Recognizing the difficulty in determining what is a proportionate order, leading legal historian Geoffrey Best declared, "Although it may be tricky and embarrassing to define in advance, the reasonable man or woman knows one when he receives one." As we know from other famous legal questions, the "I know it when I see it" criterion cannot be implemented as a legal norm. In the real world, "reasonable" men and women deeply disagree on what's excessive, especially in relation to their judgment of the desired "direct military advantage."

The ICRC, in its commentary, had a different solution to this problem of subjectivity: to change the rule. In their minds, AP/1 means "incidental losses and damages should never be extensive." Note the critical change in language. Not *excessive*, but *extensive*. If the body count is high or the damage too great, then the action is illegal, no matter what the military gain.

Having redefined the meaning of the term, human rights officials could now easily condemn military actions that caused large numbers of casualties, even if they met the classic standard of proportionality. Thus, at the beginning of the 2006 war, the U.N. High Commissioner for Human Rights condemned Israel by declaring, "The bombardment of sites with alleged military significance, but resulting invariably in the killing of innocent civilians, is unjustifiable." Similarly, the infamous Goldstone Commission that investigated the 2008 war in Gaza denounced Israel for killing more than what was considered the "acceptable loss of civilian life."

Yet no treaty has ever banned "extensive" warfare because no country could abide by such a rule, let alone agree to it. Just as the number of bodies in a morgue doesn't indicate the quality of medical care in the hospital, so too a body count doesn't indicate whether an army acted excessively or immorally. The key

ethical (and, for that matter, legal) question remains whether the damage is excessive in relation to the military gain. This point, in fact, was readily acknowledged in a 1987 brief by a leading ICRC lawyer in her analysis of the 1982 Lebanon War: "The Israeli bombardment of Beirut in June and July of 1982 resulted in high civilian casualties, but *not necessarily excessively* so given the fact that the *military targets were placed amongst the civilian population*" (emphasis added). High casualty rates do not indicate excessiveness.

To exemplify this point, consider the assassination of a senior Hamas leader and its immoral aftermath that led then-Israeli Prime Minister Ariel Sharon to make the terrible mistake of not eliminating the entire leadership of Hamas, and thereby possibly saving Israelis and Palestinians two decades of horrific bloodshed, out of fear that Israel's actions would be condemned as disproportionate.

On July 22, 2002, an Israeli fighter jet dropped a one-ton bomb on a three-story apartment building in Gaza City. The target was Salah Shehade, the commander of the al-Qassam Brigades, the military wing of Hamas. Since the outbreak of the so-called Second Intifada in 2001, Shehade had initiated a series of new combat techniques: explosive devices against tanks, boat bombs, high-trajectory Qassam rockets, and novel ways of deploying suicide bombers, including minors. Over the previous 12 months, Israeli intelligence officials asserted that Shehade had been directly involved in attacks that killed 474 people and wounded another 2,649. Israel's defense minister would later claim that Shehade was actively preparing a series of six attacks in Israeli towns—an event that might have rivaled Oct. 7 for its psychological impact on Israel's populace. He had deservedly become Israel's No. 1 wanted man in Gaza. Israel needed to neutralize him.

The bomb instantly killed Shehade along with an assistant. But it also killed 13 civilians, including his wife and teenage daughter. Over 100 people were wounded. Fierce international condemnation was quick to follow. At the U.N.

Security Council, a lineup of ambassadors condemned the Israeli strike as disproportionate (emphases added):

> Action taken in self-defence must be proportionate. Israel *must avoid civilian casualties* and must avoid damaging civilian property and infrastructure. (Britain)
>
> That disproportionate reaction led to the *death of innocent civilians*, most of them children, in addition to considerable material damage. (Guinea)
>
> There can be *no justification* for the missile attack carried out by the Israeli air force in a residential area of Gaza, *which left a high number of individuals, including children, dead or injured*. (Denmark, on behalf of the European Union)

Once again, all of these statements focus on the inevitable collateral damage. They don't ask whether the strike was excessive in proportion to the military advantage of killing, in the midst of an extended war on terror, the lead terrorist commander responsible for thousands of Israeli casualties.

Most incredible, in this respect, was the criticism of U.S. President George Bush, who rebuked Israel for "heavy-handed" action. When asked to distinguish it from cases of civilian casualties in Afghanistan, spokesperson Ari Fleischer explained, "The United States, because of an errant bomb, a mistake in a mission, has occasionally engaged in military action that very regrettably included losses of innocent lives." The Israeli operation, by contrast, Fleischer asserted, "was a deliberate attack on the site, knowing that innocents would be lost in the consequences of the attack." Again, Fleischer makes the common mistake of asserting that knowing a strike will cause the collateral death of civilians makes it inherently illegitimate.

More egregious, however, was the White House spokesman's belief that the collateral damage from a well-planned targeted strike was somehow morally worse than the accidental American bombing earlier that month of an Afghani wedding party, in which 54 innocent civilians were killed. This was one of six U.S. special operations raids into the Uruzgan province that summer which

failed to locate their wanted targets. In the process, a total of 80 Afghans were killed. Over the coming years, an estimated 22,000 Iraqi and Afghani noncombatants would be killed as collateral damage in America's post-9/11 wars. Some of these noncombatants were killed by mistake; at other times, their regrettable but inevitable deaths were known in advance. That doesn't necessarily make them morally wrong. Yet it does make Fleischer's criticism deeply hypocritical.

The Israeli assassination of Shehade was no more excessive than a host of attacks in the "wars on terror" that followed in the coming years or, for that matter, the "humanitarian interventions" in Yugoslavia or Iraq that preceded it. An Israeli commission later justified the strike by asserting that the number of civilian casualties was not foreseeable. An Israeli general apologized on CNN. In truth, there was nothing to apologize for. The deaths were lamentable and tragic. But given the significance of the target, the attack was morally justifiable even if noncombatant casualties were inevitable.

Israel's more grievous error was that it didn't assassinate Shehade earlier. In March 2002, Israel located him within a Gaza apartment but didn't strike because of the number of civilians around. Three days later, a suicide bomber deployed by Shehade blew himself up in Jerusalem's Café Moment, killing 11 Israeli citizens. A similar opportunity was passed up again in June. Two weeks later, a Hamas suicide bomber killed 19 passengers on a bus in Jerusalem. In fairness, Israel was hoping to find opportunities to eliminate Shehade with fewer civilians around, as it succeeded in doing with other terrorists. For a lower-level operator, that may have been reasonable. Yet ultimately, one must prioritize acting decisively to stop senior enemy operators before they kill your own citizens.

Some critics question the wisdom of targeted killings because they assume that another operative will simply take their place. They fail to recognize that the number of skilled terrorist operators is quite limited. Killing them disrupts the entire organization. The ultimate accomplishment of Israel's targeted killings,

despite the unfortunate amount of collateral damage, was well summed up by journalist Ronen Bergman: "Thanks to its streamlined targeted killing apparatus, the Israeli intelligence community triumphed over something that for many years had been considered unbeatable: suicide terrorism." The collateral civilian casualties were not excessive in achieving such a triumph, which spared thousands of Israelis from being killed and maimed.
Israel committed an even greater moral error by allowing the political and diplomatic fallout from the Shehade killing to stop it from a once-in-a-generation opportunity: the ability to kill the entire Hamas political and military leadership. In September 2003, Hamas leader Sheikh Ahmed Yassin gathered with all of his senior men in a three-story Gaza apartment building. Intelligence officials, led by Shin Bet head Avi Dichter, estimated that this was a historic opportunity to cause irreparable damage to the terrorist group.

Yet Israel didn't strike. Fearful of dozens of civilian casualties along with the local and international protests that would ensue, Prime Minister Sharon, at the urging of the Army Chief of Staff Moshe "Bogie" Yaalon, called off an attack using a massive bomb to topple the building. The backlash, they feared, would be even more intense than in the aftermath of the Shehade assassination. An alternative plan was hastily proposed to shoot a smaller missile to destroy the third floor, where intelligence officials speculated the meeting was taking place.

They guessed wrong. The meeting, it turned out, was on the first floor. Immediately after impact, the Hamas men went running out of the building. Israel could have utilized drones to blast every screeching car. The defense minister, however, ruled out that option. "Civilians were likely to be hurt," he said. Within a few days, 16 Israeli citizens were dead and another 75 wounded by two Hamas suicide bombers. Among the victims were Dr. David Applebaum, head of a Jerusalem emergency room, and his daughter Nava, who was to be married on the following day.

It would take another several months of Palestinian suicide bombings and Israeli targeted assassinations before Egypt brokered a ceasefire. Hamas survived and rebuilt itself, leading ultimately to its conflict with Israel in 2008 and repeated hostilities ever since.

It would have certainly been justified for Israel to wipe out the Hamas leadership in 2003. The collateral damage would have been extensive, but not excessive. Israel's decision not to act cost the lives of many innocent Israelis. Fears of "disproportionate" accusations led Israel to shirk its primary moral responsibility, which is to protect its own citizens from being murdered by terrorists.

Yet it wasn't just concern with the "CNN effect" and the Shehade backlash that led to inaction. In a later interview with *The Washington Post*, Yaalon asserted that two other factors guided his thought process not to strike. Firstly, any action taken had to pass the "mirror test": At the end of the day, will he be able to look at himself in the mirror? Secondly, from his mother's experience, who was the lone survivor of the Holocaust from her family, he learned, "Jews shouldn't be killed, but it also means that we don't kill others. You need strength to defend Israel, and on the other hand, to be a human."

This misguided binary is a bad lesson to learn from the Holocaust, placing self-interests against some foggy notion of humanitarianism. "To be a human" means to protect your own people. That's a moral obligation, not just a matter of interests. Yaalon is a seasoned army veteran with many heroic actions under his belt. He dedicated his life to protecting the Jewish nation and deserves much praise for that. Yet by not approving this unique military opportunity, he and Sharon committed a moral error that continues to cost Israel dearly. The price for worrying about cries of "proportionality" was disproportionate.

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