

Human Rights Watch (HRW) Whitewashes Israel, The Law Supports Hamas: Reflections on Israel's Latest Massacre

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[The analysis and data in this article refer to the period prior to the Israeli ground invasion.]

On 7 July 2014, Israel unleashed Operation Protective Edge against Gaza. When it launched a ground invasion on 18 July 2014, Israel had already killed 230 Gazan Palestinians, of whom 75 percent (171) were civilians and 20 percent (48) children, wounded more than 1,700, and destroyed or rendered uninhabitable hundreds of homes leaving more than [10,000 Gazans without shelter](#). On the other side, according to daily updates Palestinian projectiles had killed one Israeli civilian, wounded 18, and damaged three Israeli homes. It's hard to conceive of a more disproportionate balance sheet in an alleged "war."

Nonetheless, Human Rights Watch (HRW), in its legal reckoning, didn't so much even out as *reverse* the balance sheet. It never explicitly accused Israel of committing war crimes, whereas its first press release already accused Hamas of committing war crimes. If in fact HRW accurately interpreted the laws of war, the only rational conclusion would be that these laws are morally bankrupt and deserving of contempt: they would not be distilling but instead grossly distorting the moral realities of war, as they exonerate the major perpetrators of war crimes. But did HRW accurately interpret the laws of war, or did this influential human rights organization give Israel a green light to commit war crimes on a yet more massive scale during the ground invasion? Let's look at the record.

Israel

In its first press release on 9 July 2014, ["Indiscriminate Palestinian Rocket Attacks; Israeli Airstrikes on Homes Appear to be Collective Punishment,"](#) HRW stated that "Israeli attacks targeting homes may amount to prohibited collective punishment." In its second press release on 16 July, ["Unlawful Israeli Airstrikes Kill Civilians; Bombings of Civilian Structures Suggest Illegal Policy,"](#) HRW stated that "Israeli air attacks in Gaza...have been targeting apparent civilian structures and killing civilians in violation of the laws of war. Israel should end unlawful attacks that do not target military objectives and may be intended as collective punishment or broadly to destroy civilian property." It then proceeded to legally define the meaning of *war crimes*, but artfully avoided accusing Israel of committing them.

In these statements HRW doubly distanced itself from alleging Israeli war crimes: first, it qualified the weight of the incriminating evidence—"appear," "may," "apparent," "may be"; second, it recoiled from explicitly charging Israel with war crimes and instead settled for

lesser or vaguer charges—“collective punishment,” “violation of the laws of war,” “unlawful attacks.” The cautiousness perplexes in light of the evidence assembled by HRW itself.

In conformity with tenets of international law, HRW stated that “indiscriminate or targeted,” “deliberate or reckless,” attacks directed at civilians or civilian structures constituted “war crimes.” If Israel had a declared policy of targeting civilian homes and 75 percent of casualties were civilians, Israel prima facie committed war crimes. Why didn’t HRW reach this conclusion?

Although acknowledging that Israel targeted homes of Hamas militants “that do not serve an immediate military purpose,” HRW denounced these targeted attacks on civilian structures as mere “collective punishment.” Contrastingly, in an 11 July press release, [“UN Must Impose Arms Embargo and Mandate an International Investigation as Civilian Death Toll Rises,”](#) Amnesty International forthrightly and unequivocally stated that Israel’s targeting of Hamas militants’ homes not making an “effective contribution to military action...constitutes a war crime and also amounts to collective punishment against the families.”

HRW investigated four Israeli strikes in Gaza that resulted in civilian casualties. It consistently found “no evidence,” and “the Israeli military has presented no evidence,” that Israel was “attacking lawful military objectives or acted to minimize civilian casualties.” HRW also observed that “Israel has wrongly claimed as a *matter of policy* that civilian members of Hamas or other political groups who do not have a military role are ‘terrorists’ and therefore valid military targets” (emphasis added). “Israel’s rhetoric is all about precision attacks,” HRW’s Middle East director stated in the second press release, “but attacks with no military target and many civilian deaths can hardly be considered precise.” If, however, Israel’s “precision attacks” killed civilians in the absence of any military objective, didn’t these precisely constitute war crimes?

“Israel launched 1,800 air raids in one of the most densely populated areas of Gaza,” Raji Sourani, the respected human rights lawyer and founder of the Palestinian Center for Human Rights, [observed](#). “It’s a shame that Israel and the international community allow this to happen. These are war crimes, just as simple as that.” It really is that simple, and it’s worse than a shame that HRW, by its muted legal findings, enables this to happen.

Palestinian armed groups

“Palestinian rocket attacks on Israel appear to be indiscriminate or targeted at civilian population centers,” Human Rights Watch’s [first press release](#) stated, “which are war crimes.” On this point, Amnesty concurred. But *are* projectile attacks by Hamas (used here as short-hand for all Palestinian armed groups) war crimes or even illegal? In fact, the law is more ambiguous than often allowed.

International law prohibits an occupying power from using force to suppress a struggle for self-determination, whereas it does *not* prohibit a people struggling for self-determination from using force.[1] The International Court of Justice (ICJ) stated in its [2004 advisory opinion](#) that the Palestinian people’s “rights include the right to self-determination,” and that “Israel is bound to comply with its obligation to respect the right of the Palestinian people to self-determination.” Israel consequently has no legal right to use force to suppress the Palestinian self-determination struggle. Israel also cannot contend that, because this self-determination struggle unfolds within the framework of an occupation, it has the legal

right, as the occupying power, to enforce the occupation so long as it endures.[2] In 1971, the ICJ ruled that South Africa's occupation of Namibia had become illegal because it refused to carry out good-faith negotiations to end the occupation. It is beyond dispute that Israel has failed to carry out good-faith negotiations to end the occupation of Palestinian territory. On the Namibia precedent, the Israeli occupation is also illegal. The only "right" Israel can claim is—in the words of the United States at the time of the Namibia debate—"to withdraw its administration...immediately and thus put an end to its occupation." [3]

Although claiming for itself the right of self-defense against Hamas projectiles, in fact Israel is claiming the right to maintain the occupation. If Israel ceased using force to suppress the Palestinian struggle for self-determination, the occupation would end, and the projectile attacks would cease. (If they didn't stop, the legal situation would, of course, be different.) If it ended the occupation, Israel wouldn't need to use force. The refrain that Israel has the right to self-defense is a red herring: the real question is, *Does Israel have the right to use force to maintain an illegal occupation?* The answer is no.

It might be said that, even if Israel cannot use force to suppress the Palestinian struggle for self-determination, Hamas's use of indiscriminate projectiles and its targeting of Israeli civilians still constitute war crimes. Here, it is useful to first recall another instance of HRW's egregious double standard. In 2008, HRW issued a report entitled [Flooding South Lebanon: Israel's use of cluster munitions in Lebanon in July and August 2006](#). The report found that Israel dropped as many as 4.6 million cluster munitions on south Lebanon during the 2006 war. It was, in HRW's words, "the most extensive use of cluster munitions anywhere in the world since the 1991 Gulf war," while relative to the size of the targeted area the density of the attack was historically unprecedented. Some 90 percent of these cluster munitions were dropped during the final three days "when Israel knew a settlement was imminent" (HRW), the UN ceasefire resolution having already been passed but not yet gone into effect. But, although finding that Israel committed "extensive violations" of the laws of war, HRW did not go beyond stating that Israel's massive resort to cluster munitions was "in some locations possibly a war crime." Yet, the evidence HRW itself assembled showed that cluster munitions are indiscriminate weapons; the cluster munitions carriers used by Israel were, on HRW's own terms, indiscriminate; and the cluster munitions were fired indiscriminately and deliberately targeted civilian population centers.

It is not altogether clear what constitutes an indiscriminate weapon. The apparent standard is a relative one set by the available technology: If an existing weapon has a high probability of hitting its target, then any weapons with a significantly lower probability are classified as indiscriminate. But, by this standard, only rich countries, or countries rich enough to purchase high-tech weapons, have a right to defend themselves against high-tech aerial assaults. It is a curious law that would negate the *raison d'être* of law: the substitution of might by right.

Human Rights Watch has argued that, even if its civilians are being relentlessly targeted, a people does not have a legal right to carry out "belligerent reprisals"—that is, to deliberately target the civilians of the opposing state until it desists. ["Regardless of who started this latest round, attacks targeting civilians violate basic humanitarian norms,"](#) HRW's Deputy Middle East and North Africa director stated in the first press release. "All attacks, including reprisal attacks, that target or indiscriminately harm civilians are prohibited under the laws of war, period." Not so. International law does not—at any rate, not yet—prohibit belligerent reprisals.[4] The United States and Britain, among others, have staunchly defended the right of a state to use *nuclear* weapons by way of belligerent

reprisal.[5] By this standard, the people of Gaza surely have the right to use makeshift projectiles to end an illegal, merciless seven-year-long Israeli blockade or to end Israel's criminal bombardment of Gaza's civilian population. Indeed, in its landmark 1996 advisory opinion on the legality of nuclear weapons, the ICJ ruled that international law is not settled on the right of a state to use nuclear weapons when its "survival" is at stake. But, if a state might have the right to use nuclear weapons when its survival is at stake, then surely a *people* struggling for self-determination has the right to use makeshift projectiles when it has been subjected to slow death by a protracted blockade and recurrent massacres by a state determined to maintain its occupation.

One might legitimately question the political prudence of Hamas's strategy. But the law is not unambiguously against it, while the scales of morality weigh in its favor. Israel has imposed a brutal blockade on Gaza. Fully 95 percent of the water in Gaza is unfit for human consumption. [By all accounts](#), the Palestinian people now stand behind those engaging in belligerent reprisals against Israel. In the Gaza Strip, they prefer to die resisting than to continue living under an inhuman blockade. Their resistance is mostly notional, as makeshift projectiles cause little damage. So, the ultimate question is, *Do Palestinians have the right to symbolically resist slow death punctuated by periodic massacres, or must they lie down and die?*

Notes

[1] International law is either neutral on or supports (scholars differ) the right of a people struggling for self-determination to use force. James Crawford, *The Creation of States in International Law*, second edition (Oxford: 2006), pp. 135-37, 147; Heather A. Wilson, *International Law and the Use of Force by National Liberation Movements* (Oxford: 1988), pp. 135-36; A. Rigo Sureda, *The Evolution of the Right to Self-Determination: A study of United Nations practice* (Leiden: 1973), pp. 331, 343-44, 354.

[2] Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge: 2004), pp. 35, 94.

[3] See Norman G. Finkelstein and Mouin Rabbani, *How to Solve the Israel-Palestine Conflict* (forthcoming 2015).

[4] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume 1: Rules* (Cambridge: 2005), p. 523; A. P. V. Rogers, *Law on the Battlefield*, second edition (Manchester: 2004), p. 235.

[5] *Legality of the Threat or Use of Nuclear Weapons* (8 July 1996)—Letter dated 16 June 1995 from the Legal Adviser to the Foreign and Commonwealth Office of the United Kingdom of Great Britain and Northern Ireland, together with Written Comments of the United Kingdom; Letter dated 20 June 1995 from the Acting Legal Adviser to the Department of State, together with Written Statement of the Government of the United States of America; Oral Statement of U.S. representative (15 November 1995); Dissenting Opinion of Vice-President Schwebel. The ICJ itself elected not to rule on the legality of belligerent reprisals, para 46.

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