

Israel's Unjust War on Gaza. "Self-Defense Against Peace".

"The aggressor cannot rely upon self-defence to justify violence against resistance to its own aggression."

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Global Research, August 07, 2014

[Counterpunch](#)

Region: [Middle East & North Africa](#)

Theme: [Crimes against Humanity](#), [Law and Justice](#)

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We are bringing to the attention of GR readers this important 2009 article by the late Michael Mandel, distinguished law professor, focusing on the legal dimensions. Under Nuremberg, "the aggressor cannot rely upon self-defence to justify violence against resistance to its own aggression."

Did self-defence justify Israel's war on Gaza? [reference to 2008-2009 war on Gaza]

Objections have been raised to this claim on grounds of a lack of both proportionality and necessity. To kill over 1000 Palestinians in 3 weeks, hundreds of them children, and wound thousands more, in order to deter a threat from rockets that did not kill or injure anybody in Israel for the six months the truce was declared by both sides, or even before Israel launched its attack on December 27, is so disproportionate as to be intolerable in any ethical system that holds Palestinian lives equal in value to Israeli lives. It is also so disproportionate as to defy belief that defence against these rockets was the real motive of the war. To ignore the many diplomatic avenues available to avoid even this threat, such as lifting the suffocating 18-month siege, suggests the same thing.

A more fundamental objection, however, is the self-evident legal and moral principle that an aggressor cannot rely upon self-defence to justify violence against resistance to its own aggression. You can find this principle in domestic law and in the judgments of the Nuremberg tribunals.

To quote one Nuremberg judge:

On of the most amazing phenomena of this case which does not lack in startling features is the manner in which the aggressive war conducted by Germany against Russia has been treated by the defense as if it were the other way around. ...If it is assumed that some of the resistance units in Russia or members of the population did commit acts which were in themselves unlawful under the rules of war, it would still have to be shown that these acts were not in legitimate defense against wrongs perpetrated upon them by the invader. Under International Law, as in Domestic Law, there can be no reprisal against reprisal. The assassin who is being repulsed by his intended victim may not slay him and then, in turn, plead self defense. (Trial of Otto Ohlendorf and others, Military Tribunal II-A, April 8, 1948)

So who was the aggressor here?

There would have been no question as to who was the aggressor had this attack taken place before Israel's withdrawal from the Gaza strip in 2005. At that point Israel had been committing a continuous aggression against Gaza for 38 years, in its illegal and violent occupation of it, along with the rest of the Palestinian territory, including East Jerusalem, after its conquest in 1967.

By 2005, the occupation had been condemned as illegal by the highest organs with jurisdiction over international law, most notably the International Court of Justice in its 2004 opinion on the separation barrier. A central illegality of the occupation for the International Court lay in Israel's settlements, which violate the law against colonization, and which are central to the occupation. The fifteen judges of the International Court were unanimously of the opinion that the settlements were illegal and the wall itself was held by a majority of 13-2 to be illegal, partly because it was there to defend the settlements, and not Israel itself, and thus could not qualify as self-defence.

The rocket attacks from Gaza started in 2001 and took their first Israeli victim in 2004. Since then, there had been 14 Israeli victims prior to the current war. Tragic, indeed, but obviously piling in comparison to the 1700 Palestinians killed in Gaza during the same period. One death is indeed a tragedy, but many deaths are not just "a statistic", as Stalin had it; they are the tragedy multiplied many times over. Given Israel's illegal, aggressive and violent occupation, prior to the withdrawal, Gaza rockets could only be regarded as necessary and proportionate self-defence, or as reprisals against Israel's aggression.

Did Israel's withdrawal from Gaza in 2005 change the situation?

It has been forcefully argued that the 18-month siege of Gaza, a major reason for Hamas' refusal to extend the truce, was itself an act of aggression, giving rise to a right of self-defence.

But even more important, though usually ignored, is Israel's continued illegal and aggressive occupation of the West Bank and East Jerusalem after the withdrawal from Gaza in 2005. Indeed, the withdrawal from Gaza was intended to strengthen the hold on the other territories and was accompanied by a greater increase in the number of settlers there than those removed from Gaza.

The occupation of the West Bank and East Jerusalem figured equally with Gaza in the condemnations of the World Court and the Security Council. Furthermore, in the Oslo Accords, Israel and the Palestinians agreed that "The two sides view the West Bank and the Gaza Strip as a single territorial unit, the integrity and status of which will be preserved during the interim period." Indeed, when Hamas won the elections in 2006, elections declared impeccably fair and civil by all international observers, it won them for the whole of the Palestinian Authority, including the West Bank (it was not allowed by Israel to campaign in East Jerusalem). Many Hamas West Bank legislators remain in Israeli jails.

And the basic fact is that the Palestinians of the West Bank and Gaza are one people, however separated they are by walls and fences and check-points. Israel's unilateral withdrawal from one part of that people's land cannot turn that people into aggressors when they resist the illegal occupation of the rest.

So self-defense cannot justify this attack, or the siege that preceded it. What can? That Hamas is a “terrorist organization”? But terrorism is about deliberately killing civilians for illegal political ends, and in that enterprise, Israel has topped Hamas by many multiples. That Hamas does not recognize Israel’s “right to exist”? But Hamas has offered many times to make a long-term truce with Israel on the basis of the legal international borders, something it is clearly entitled to insist upon. Israel says that’s not good enough, that Hamas first has to recognize Israel’s legitimacy, in other words, it has to concede the legitimacy of the Jewish state and all it has meant to the Palestinians. In other words, as one Israeli journalist ironized, Israel is insisting that Hamas embrace Zionism as a condition of even talking peace with it.

These are not justifications for violence on this or any scale. Indeed, they point to the most plausible reason Israel is fighting Hamas (and the PLO before it): self-defence, if you will, not against rockets and mortars, but against having to make peace with the Palestinians on the basis of the pre-1967 borders as required by international law.

*The late **Michael Mandel** was Professor of Law at Osgoode Hall Law School of York University in Toronto, where he taught the Law of War. He is the author of [How America Gets Away with Murder](#). He was powerful legal voice in the battle for World Peace.*

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