



# policy brief

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## Proportionality and Sustainable Peace in the Mideast

**Mary Ellen O'Connell**

When Israel reacted with military force to the Hamas and Hezbollah raids of June and July, world leaders recognized Israel's right to respond, but some charged it was using disproportionate force. International law supports both points. States may take defensive measures, but every use of force must be proportionate to the harm inflicted. These rules are found in the law regulating resort to force (*jus ad bellum*) and the law regulating the conduct of force (*jus in bello*). The most important rule in either category may well be the principle of proportionality. Respect for proportionality in the use of force can help foster stable, long-term peace.

At the end of June, Hamas militants conducted a raid on Israel from Gaza, kidnapping an Israeli soldier. About two weeks later, Hezbollah militants based in southern Lebanon launched rockets into northern Israel and also conducted a raid, capturing two Israeli soldiers and killing as many as eight. Israel had the right under international law to take defensive measures in response to the Hamas and Hezbollah raids. But those measures needed to respond to the actual wrongs committed and, in carrying out the overall responsive strategy, the necessity and proportionality of attacking particular targets had to be weighed.

Proportionality is a general principle of international law, meaning it is inherent to the system. It is also reflected in both treaties and customary international law. There is no question that it is binding on all parties using force, both as to when and how force may be used.

With respect to when force is used, parties must consider proportionality at the outset of any action. The inter-state use of force is generally regulated by the United Nations Charter. The charter gives states the right to use force in self-defense if an armed attack occurs. That means the victim state may take the fight

to the territory of the attacker and eliminate the offensive capability, if that is necessary. If it is, the force exercised must be proportionate to the purpose of self-defense. The liberation of Kuwait after the invasion by Iraq in 1990 is the textbook case. Pushing the Iraqi army out of Kuwait and creating a buffer zone was what was necessary to defend Kuwait. Going all the way to Baghdad was not necessary and would have involved, therefore, a disproportionate use of force.

Under the publicly available facts, Lebanon is not legally responsible for Hezbollah's raid into Israel. Hezbollah's acts were not those of a sovereign state and thus do not give rise to the right of self-defense under Article 51 of the UN Charter. Even if the facts later show that Lebanon was responsible, the Hezbollah raid would still not give rise to the right of self-defense. Such low-level acts of violence are considered "incidents." The International Court

right to use force in self-defense on the territory of Lebanon. When Israel advanced all the way to Beirut, however, far from the area where attacks on it originated, it violated the principle of proportionality. This is the position that even the United States government took at the time.

Prior to Israel's latest incursion, Lebanon was not in a civil war. No one would say the country had achieved an adequate level of stability and self-government, but neither was it in a situation of chaos as in 1982. It was under a Security Council mandate in Resolution 1559 to disarm Hezbollah. That needed to be done, but this failure did not mean the territorial integrity of Lebanon could be completely disregarded. Nor did Israel have a unilateral right to enforce the Security Council resolution. Indeed, one apparent result of Israel's massive use of force has been to undermine both the will and the ability of the Lebanese to disarm Hezbollah. In contrast to Lebanon, Israel had a firmer

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made this point in the 1986 *Nicaragua Case*. It distinguished minor armed exchanges or "frontier incidents" from attacks that give rise to the right of self-defense. In 2005, the Ethiopia-Eritrea Claims Commission found that the armed exchange between Ethiopian and Eritrean troops, which resulted in deaths of eight Eritrean soldiers, did not give rise to the right of Eritrea to use the level of force permitted in self-defense. Nor do many incidents, separated over time, accumulate to give rise to a greater right to use force. Statements by world leaders calling Israel's reaction disproportionate reflect this understanding. Israel could lawfully react to Hezbollah's raid, but launching a major assault as far as Beirut could not be justified in terms of Hezbollah's crime.

Subsequent to initiating force against Lebanon, Israeli leaders indicated their purpose in using force was to cripple Hezbollah. This is much the same reason it gave for invading Lebanon in 1982. In 1982, however, Lebanon was in the midst of a civil war. The country was in no condition to control events on its territory. In such a situation, Israel likely did have the

basis for sending troops into Gaza because it is still arguably the occupying power there and, as such, has the right to keep order. Persons under occupation may, however, resist the occupier, so long as principles of the *jus in bello* are respected.

In the *Nicaragua Case*, the International Court of Justice said the victim of wrongdoing in a border incident may use counter-measures in response, as there is no right to use force amounting to self-defense. Counter-measures are otherwise unlawful acts, not involving the use of significant armed force, taken in response to a prior unlawful act as long as the measures are proportional to the harm caused by the wrong. The most common form of counter-measures is economic sanctions, but the potential range is wide. For example, attempting to rescue the kidnapped soldiers would have violated Lebanon's territorial integrity—a wrong, but Lebanon is at least guilty of a failure of due diligence regarding Hezbollah for which such a counter-measure might have been appropriate.

Counter-measures are also governed by a principle of proportionality. Responsive measures must be proportionate to the harm caused by the wrong. Proportionality requires assessment of the means to accomplish the lawful objective. One of the central purposes of this rule is to prevent escalation, the very thing that has occurred in fighting between Israel and Hezbollah.

With respect to how force is used, the principle of proportionality prohibits attacking a military objective if doing so will result in a loss of civilian life, damage to civilian property, or damage to the natural environment that outweighs the value of the objective. Our contemporary understanding of proportionality is informed by Article 51(5)(b) of the 1977 Additional Protocol I to the 1949 Geneva Conventions defining an indiscriminate attack. Such an attack is one “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.”

Israel chose to engage in a massive and disproportionate use of military force throughout much of Lebanon, targeting ports, airports, power stations, bridges, residential areas, and the like. Even with regard to the rocket sites and stockpiles, the proportionality of the attacks must be weighed. We judge the proportionality of the use of force against the stated purpose, even if that purpose is unlawful under the *jus ad bellum*. It is probably the case, however, that in assessing military objectives and the proportionate use of force in achieving them, an unlawful purpose colors the assessment. World opinion will expect all the more care with respect to civilian deaths and destruction if the resort to force has been unlawful.

The principle of proportionality works in conjunction with other fundamental principles of international humanitarian law, including discrimination, necessity, and humanity. The principle of discrimination is the most concrete of these principles. It prohibits intentionally targeting civilians, civilian property, and certain non-civilians, such as United Nations peacekeepers, the wounded, and those who have surrendered. It also prohibits the

use of weapons or tactics that are not or cannot be directed at specific military objectives. Hezbollah’s rocket fire on northern Israel has been indiscriminate, and, therefore, in violation of this fundamental principle.

Much has also been said about Hezbollah militants hiding among the civilian population in Lebanon. This is also strictly forbidden under international law. Violating this principle, however, does not remove all protection from the civilian population and the natural environment. Israel must still determine if deaths and destruction will be excessive in comparison to the definite military advantage to be gained. In other words, they must constantly ask, will the “collateral” damage be too great to justify the attack?

United States forces in Iraq today must constantly make this calculation. If snipers are attacking U.S. forces from a mosque, that mosque is no longer strictly off-limits for attack. Nevertheless, U.S. troops are instructed to determine whether the military advantage to be gained will be outweighed by damage to the mosque or death and injury to civilians in the mosque. Some argue this type of assessment is too subjective to be a useful legal standard. That has not been the experience of the U.S. military. Many cases will be clear. In the close cases, U.S. troops are taught to make the assessment in good faith.

It must be stressed that even if one side uses force unlawfully in a conflict, the other side is not thereafter free from restraint. International humanitarian law is a form of human rights law. It aims at protecting victims of armed conflict and is

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based on the fundamental dignity of the human being, a basis that does not disappear because of the crimes of others.

As a human rights principle, proportionality reflects a basic moral consensus. It is linked to the achievement of peace and conflict prevention. As long ago as St. Augustine (354-430 A.D.) it has been understood that waging war in a way that respects shared understandings of acceptable conduct helps to win the peace. Augustine cautioned that fighting in a way that causes bitterness and a desire for revenge will perpetuate war. It was with this perspective in mind that Abraham Lincoln ordered the first codification of the law of land warfare to govern the conduct of Union forces in the field. It did not matter that the Confederacy would not be abiding by those rules. What mattered for Lincoln was that the war would end and that the belligerents would be able to live together in peace. Treating the enemy proportionately, in accord with ancient principle, helped achieve that goal.

Unlawful force is being used by all parties in the fighting in Lebanon, Gaza, and Israel. It is incumbent on all in the international community to condemn these international law violations. All should join in urgent calls for an immediate end to the fighting. States supplying weapons to parties using force unlawfully have a duty to cut those supplies. Indeed, under the Arms Export Control Act, the United States may only supply weapons for internal security and for legitimate self-defense. If the U.S., Iran, Syria and other supplier states are truly interested in long-term peace, they will do all that they can to eliminate the means to use indiscriminate and disproportionate force.

The deaths and destruction from unlawful attacks are building anger and bitterness that fuel the cycle of violence. The sooner the fighting ends, the better the chance of real and enduring peace.



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