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Can Israel still justify Gaza war?

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Self-defence or disproportionate? How rule of law applies after 54,000 Palastinians have been killed

Donald Rothwell

ON OCTOBER 7, 2023, more than 1000 Hamas militants stormed into southern Israel and went on a killing spree, murdering 1200 men, women and children and abducting another 250 people to take back to Gaza.

It was the deadliest massacre of Jews since the Holocaust.

That day, Israeli Prime Minister Benjamin Netanyahu told the country, "Israel is at war".

The Israel Defence Forces (IDF) immediately began a military campaign to secure the release of the hostages and defeat Hamas.

Since that day, more than 54,000 Palastinians have been killed, mostly women and children.

Israel has maintained its response is justified under international law, as every nation has "an inherent right to defend itself", as Netanyahu stated in early 2024.

This is based on the right to self-defence in international law, which is outlined in Article 51 of the 1945 United Nations Charter as follows: "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[...]"

At the start of the war, many nations agreed Israel had a right to defend itself, but how it did so mattered.

This would ensure its actions were consistent with international humanitarian law.

However, 20 months after the October 7 attacks, fundamental legal issues have arisen around whether this self-defence justification still holds.

Can Israel exercise self-defence ad infinitum?

Or is it now waging a war of aggression against Palestine?

The modern principles of self-defence

were outlined in diplomatic exchanges over an 1837 incident involving an American ship,

The Caroline, after it was destroyed by British forces in Canada.

Both sides agreed that an exercise of self-defence would have required the British to demonstrate their conduct was not "unreasonable or excessive".

The concept of self-defence was also extensively relied on by the Allies in the Second World War in response to German and Japanese aggression.

Self-defence was originally framed in the law as a right to respond to a state-based attack.

However, this scope has broadened in recent decades to encompass attacks from non-state actors, such as al-Qaeda following the September 11, 2001 terror attacks.

Israel is a legitimate, recognised state in the global community and a member of the United Nations.

Its right to self-defence will always remain intact when it faces attacks from its neighbours or non-state actors, such as Hamas, Hezbollah or the Houthi rebels in Yemen.

However, the right of self-defence is not unlimited.

It is constrained by the principles of necessity and proportionality.

The necessity test was met in the current war due to the extreme violence of the Hamas attack on October 7 and the taking of hostages.

These were actions that could not be ignored and demanded a response, due to the threat Israel continued to face.

The proportionality test was also met, initially.

Israel's military operation after the attack was strategic in nature, focused on the



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return of the hostages and the destruction of Hamas to eliminate the immediate threat the group posed.

The legal question now is whether Israel is still legitimately exercising self-defence in response to the October 7 attacks.

This is a live issue, especially given comments by Israeli Defence Minister Israel Katz on May 30 that Hamas would be "annihilated" unless a proposed ceasefire deal was accepted.

These comments and Israel's ongoing conduct throughout the war raise the question of whether proportionality is still being met.

The importance of proportionality in self-defence has been endorsed in recent years by the International Court of Justice.

Under international law, proportionality remains relevant throughout a conflict, not just in the initial response to an attack.

While the law allows a war to continue until an aggressor surrenders, it does not legitimise the complete destruction of the territory where an aggressor is fighting.

The principle of proportionality also provides protections for civilians.

Military actions are to be directed at the foreign forces who launched the attack, not civilians.

While Israel has targeted Hamas fighters in its attacks, including those who orchestrated the October 7 attacks, these actions have caused significant collateral deaths of Palestinian civilians.

Therefore, taken overall, the ongoing, 20-month military assault against Hamas, with its high numbers of civilian casualties, credible reports of famine and devastation of Gazan towns and cities, suggests Israel's

exercise of self-defence has become disproportionate.

The principle of proportionality is also part of international humanitarian law. However, Israel's actions on this front are a separate legal issue that has been the subject of investigation by the International Criminal Court. My aim here is to solely assess the legal question of proportionality in self-defence and international law. Is rescuing hostages in self-defence? Israel could separately argue it is exercising legitimate self-defence to rescue the remaining hostages held by Hamas. However, rescuing nationals as an exercise of self-defence is legally controversial. Israel set a precedent in 1976 when the military rescued 103 Jewish hostages from Entebbe, Uganda, after their aircraft had been hijacked. In current international law, there are very few other examples in which this interpretation of self-defence has been adopted - and no international consensus on its use. The UN Charter and the Rome Statute of the International Criminal Court prohibit acts of aggression not otherwise justified under international law. These include invasions or attacks by the armed forces of a state, military occupations, bombardments and blockades. All of this has occurred - and continues to occur - in Gaza. The international community has rightly condemned Russia's invasion as an act of aggression in Ukraine. Will it now do the same with Israel's conduct in Gaza?

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Israel Prime Minister Benjamin Netanyahu. Picture Shutterstock