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‘Disproportionate’ Force and the Media: Misconstruing the Laws of War

It has become common to use the term ‘disproportionate’ to describe the conduct or impact of Israel’s military operations. The media’s frequent use of this term betrays at least two types of distortions. First, it confuses criticism of ends (the kinds of military objectives Israel pursues) and criticism of means (the forms of military force chosen by Israel). Second, it suggests systematic failure of moral judgment and moral concern on the part of Israel – namely, wilful indifference to the consequences of its actions on civilians – which are no more in evidence in Israel’s military operations than in any other state’s military operations. This paper analyses the various forms that this kind of criticism has taken in contemporary media discourse and considers the possible origins of the accusations. It describes the norms that govern the conduct of warfare and the principles that inform the law related to proportionality; these do not provide simple criteria for determining legitimate ends and means, and nor do they yield the conclusion that Israel is a persistent violator of international humanitarian law on the basis of ‘disproportionate’ practices. It concludes with some reflections on the place of these themes within wider currents of antisemitic practices and tropes.

Keywords: international humanitarian law; disproportionate force; proportionality; IDF; media discourse; antisemitism.

Introduction

This article attempts to clarify aspects of the law of armed conflict in order to highlight misrepresentations of the law, and patterns of media discourse, that persistently disadvantage or censure Israel. We look first at the relevant law of armed conflict, how it is applied generally and how it should be applied to some recent Israeli military activities. We then turn to how the law and its implications are distorted in media discourse. We offer some explanations as to why these misrepresentations are persistent, considering the media and NGOs both in terms of their own objectives and narratives and in terms of their relationship with perennial antisemitic tropes. We conclude with some general reflections on good media practice in relation to law and Israel.

Proportionality: Principles, Rules, and Application

Humanitarian law is intended to humanise the brutality of war as far as possible by distinguishing the treatment of combatants and non-combatants and by attempting to minimise its impact on non-combatants. There is, then, legal justification for the killing of civilians (amongst other rights violations) provided that this is a by-product of legitimate military choices. Thus military activity is conditioned by two principles: discrimination

between civilians and combatants, and proportionality in the choice of means to military ends. The latter principle, proportionality, is our principal focus but we must initially distinguish the two principles more carefully.¹

International humanitarian law forbids the direct targeting of non-combatants, it demands discrimination. Differently, the defensibility of any particular use of force depends upon the connection between the *anticipated gains* the use of force seeks to accomplish and the question of whether *the choice of means is appropriate to those ends*.² It is important that the latter principle, proportionality, should be distinguished from discrimination.³ Discrimination prohibits the direct targeting of enemy non-combatants and requires doing “everything feasible to verify that targets are military objectives.”⁴ Discrimination imposes the presumption that “persons are assumed to be civilians (and objects are assumed to be civilian) unless specified necessary conditions are satisfied”⁵; and that, wherever possible, “effective advance warning shall be given of attacks which may affect the civilian population”.⁶ Proportionality prohibits what would be “excessive in relation to the concrete and direct

¹ Note, the justification of the use of force *taken as a whole* can be expressed in the language of ‘proportionality’ but is distinct from ‘proportionality’ *within* a conflict. Proportionality in *Jus ad Bellum* (the justification of armed force itself) concerns whether resort to military force is proportionate given the level of hostility shown by an aggressive or invading force. Provided that aggressive or invading force is evidenced, it is ‘proportionate’ under the law of the UN Charter (Article 51) for a state to resort to force in self-defence. “[W]hether the response to the attack is lawful depends on observance of the criteria of the necessity and the proportionality of the measures taken in self-defence.” *Nicaragua v. United States of America - Military and Paramilitary Activities in and against Nicaragua*, Judgment of 27 June 1986, Merits [1986] ICJ 1; ICJ Reports 1986, p 14; [1986] ICJ Rep 14 (27 June 1986), para 194.

² These assumptions are most recently codified in Article 51 of the First Additional Protocol to the Geneva Conventions (1977).

³ A conceptual taxonomy of the meanings of proportionality can be found in George Letsas, “Rescuing Proportionality,” in *Philosophical Foundations of Human Rights*, ed. Rowan Cruft et al, (Oxford: Oxford University Press, 2015): 316-340.

⁴ Protocol I art. 57(2)(ai). The general principle is contained in Protocol 1 Articles 51 and 52.

⁵ Henry Shue, “Laws of War,” in *The Philosophy of International Law*, edited by Samantha Besson and John Tasioulas (Oxford: Oxford University Press, 2010) at 517.

⁶ Protocol I art. 57(2)(c).

military advantage anticipated”⁷. It concerns the choice of ends and means and their possible costs from a military, not political, perspective. Put another way, this principle demands that any attack is ‘reasonable’, at least by the tactical standards applicable to warfare. It does not, conversely, demand ‘equality’ in the kinds of causalities incurred on the two sides. Indeed, there are few actions that would be *a priori* disproportionate (not even, according to the International Court of Justice, the use of nuclear weapons⁸). All military activity has to be judged on its own terms, i.e. relative to a context of armed conflict and in the light of what is reasonable – by military standards – in that context.⁹

In application, a judgement of proportionality requires a weighing of civilian harm (loss of life and/or damage to civilian infrastructure) against the expected advantage. This is a judgment, then, that may mix the qualitative (what kinds of outcomes are likely) and quantitative (what levels of losses should be expected). These, in turn, are to be subject to normative evaluation: “civilian losses are *excessive in relation to* military advantage just in case the former *exceed, outweigh, or are unjustified by* the latter”.¹⁰ It is also a judgment of reasonable expectation, not actual consequences. Thus “[i]n determining whether an attack [is] proportionate it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the

⁷Adil Ahmad Haque, “Necessity and Proportionality in the Law of War,” in *Cambridge Handbook on Just War*, ed. Larry May (Cambridge: Cambridge University Press, 2016). Available at SSRN: <<http://ssrn.com/abstract=2827902>> at 8. Accessed December 14, 2017.

⁸ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, p. 226, International Court of Justice (ICJ), 8 July 1996.

⁹ This extends to discrimination too. “When, for example, one is facing hundreds to thousands to hundreds of thousands of armed attackers, one cannot accurately acquire and discriminatingly assess adequate evidence about each individual attacker to discriminate those morally liable to attack from those not morally liable to attack before deciding how to respond.” (Shue, “Laws of War,” 519).

¹⁰ Haque, “Necessity and Proportionality in the Law of War,” 16, emphasis in original.

attack”.¹¹ So, in applying these norms to the actions of armed forces we should note that the laws of war do not easily yield specific guidance. A general judgement has to be made concerning the value of a military objective along with narrower (operational) judgments about the likely impact of specific activities.¹² These in turn are subject to standards of reasonable military action. The resulting judgements could authorise use of force that includes some foreseeable loss of civilian life. Or a proportionality judgement could yield a humanitarian obligation not to act because the proposed activity is unreasonable. It would forbid attacking legitimate military targets if this would lead to excessive civilian casualties. It would permit an attack, for example, on a hospital were it being used as a military headquarters and had therefore ceased to be a protected target.¹³

Proportionality leaves a great deal of latitude to individual military leaders. For that reason, Khen argues that it is better understood as a moral rule, with its legal implications only rarely engaged:

There is no strict measure to decide between these options [...] decisions will be legitimate as long as any slight differences between them are within a reasonable ‘margin of appreciation.’ In most cases involving the proportionality principle, then, the criminal legal system seems much less adequate than a moral system in judging the deliberations of a commander. The legal system will be adequate in extreme cases of obvious violations of this principle.¹⁴

¹¹ ICTY, *Prosecutor v. Galić*, Judgment, IT-98-29, Trial Chamber, December 5, 2003, para. 58.

¹² US Library of Congress: ‘The Means and Methods of Warfare’ <http://www.loc.gov/rr/frd/Military_Law/pdf/LOAC-Deskbook-2015_Ch9.pdf> s. III, A, 2 ‘Military Objectives’.

¹³ See ICRC “Law of Armed Conflict: Guide”. Accessed December 14, 2017. <https://www.icrc.org/eng/assets/files/other/law3_final.pdf>. See Keiler, *op cit*. Also IDF Blog: Accessed December 14, 2017. <<https://www.idfblog.com/blog/2014/07/28/hamas-uses-hospitals-ambulances-military-purposes/>>.

¹⁴ Hilly Moodrick-Even Khen, “Aidōs and Dikē in International Humanitarian Law: Is IHL a Legal or a Moral System?,” *The Monist* 99.1 (2016): 26, 36.

The problem with this assessment is the tendency (to be returned to below) to over-moralise war and its governance. By the same token, the juridical problems here are arguably overstated. Courts do (indeed must) come to legal judgments in both routine and hard cases concerning military operations. The military context, within which a Court has to reach a judgment about reasonableness, is a clearly complex one; at the same time, all Courts have to apply reasonableness standards, precisely because of the complexity of ‘real life’ situations. Nevertheless, Khen’s characterisation of the difficulty of reaching a decision points rightly to the difficulty of making judgments, *a priori*, about what kinds of military activities are (dis)proportionate. Because of the context in which they are to be applied, the rules must work with, not seek to replace, military judgement and military virtues in the conduct of military operations.¹⁵

If proportionality, as a standard, is so variable or underdetermined how can it guide action? More specifically, given the sometimes counter-intuitive and partly virtue-based aspects of this rule, how can we expect to find any underlying principle beyond a broad and pragmatic demand to limit the worst aspects of warfare? The best principled explanation of proportionality is as a remedial principle. That is, the principle must be understood as *the requirement to limit the amount of harm produced in a wrongful but justified act*. That is, accepting that force will be used, we should nonetheless seek to ensure that force should be reduced as much as possible. This is ‘remedial’ insofar as it concedes there will be harm (indeed human rights violations) in warfare, but it demands that steps be taken to limit the kinds of harms inflicted relative to the military or strategic ends pursued. As Henry Shue puts it, the laws of war enforce certain minimum humanitarian ideas “in order that the

¹⁵ A point also raised by Johnathan F. Keiler, “The End of Proportionality?,” in *Parameters* (2009) p. 58, available at: <https://search.proquest.com/openview/28ad81133def862a267805c8f7b8ca05/1?pq-origsite=gscholar&cbl=32439>.

breaches in [our normal moral] standards are not torn more widely than the persistence of international conflict makes necessary.”¹⁶ He argues that this creates remedial, not ideal, standards: “Rather than condemning the violations inherent in violent conflict, the laws of war have concentrated on preventing the exceptions from swallowing the rules. This has involved insisting upon limits where ordinary law and morality maintain complete prohibitions: limitation, mostly without endorsement of what is not condemned.”¹⁷ Proportionality is applicable when we are already conceding that a problematic or undesirable end is being pursued *but that we can nonetheless seek to limit the undesirable consequences of doing so.*

It remains to ask how far Israel has acted in conformity with that principle and its underlying rationale.¹⁸ It is well documented that the IDF engages in *discrimination* in conformity to international humanitarian law: it tries to avoid civilian deaths by dropping leaflets, ‘knocking’ on roofs, recording announcements that interrupt radio broadcasts, amongst other techniques of warning.¹⁹ It is also clear that Israeli rules of military engagement clearly prohibit disproportionate actions²⁰ and that attempts at proportionality (in the legal sense) are

¹⁶ Shue, “Laws of War,” 511.

¹⁷ Shue, “Laws of War,” 511.

¹⁸ Another discussion can be found at Jerusalem Centre for Public Affairs: <http://www.jcpa.org/text/proportionality.pdf>.

¹⁹ IDF Blog, July 10, 2014. Accessed December 14, 2017. <https://www.idfblog.com/blog/2014/07/10/idf-strikes-houses-gaza-used-military-purposes/> Groups representing former IDF soldiers question whether these rules are always followed. Breaking the Silence “Testimonies Database.” Accessed December 14, 2017. <http://www.breakingthesilence.org.il/>.

²⁰ Israel’s Manual on the Laws of War (1998) states: “Even when it is not possible to isolate the civilians from an assault and there is no other recourse but to attack, this does not constitute a green light to inflict unbridled harm on civilians. The commander is required to refrain from an attack that is expected to inflict harm on the civilian population that is disproportionate to the expected military gain.” Israel’s Manual on the Rules of Warfare (2006) states: “In any attack, it is a duty to ensure that: [...] That the military gain expected from the attack is proportional to the expected damage that would be caused to civilians as a result of the offensive.”

evidenced by, for instance, aborting air strikes that will result in excessive civilian casualties.²¹ Israel claims that it

fulfils the proportionality requirement. Targeted killings are performed only as an exceptional step, when there is no alternative to them. Its goal is to save lives. It is considered at the highest levels of command. In every case, an attempt is made to minimize the collateral damage liable to be caused to civilians during the targeted killing. In cases in which security officials are of the opinion that alternatives to targeted killing exist, such alternatives are implemented to the extent possible. At times targeted killing missions have been cancelled, when it has turned out that there is no possibility of performing them without disproportionately endangering innocent persons.²²

Equally, the Israeli Courts have censured failures of discrimination and proportionality.²³

Violations of proportionality by Israel have been documented²⁴ and at least two high-profile cases brought to court.²⁵ However, any generalised claims about Israel's conformity to, or violation of proportionality must take place in the context of the correct reading of the

²¹ Reuters, "Videos of Aborted Airstrikes," *Jerusalem Post* July 14, 2014. Accessed December 14, 2017. <<http://www.jpost.com/Operation-Protective-Edge/IDF-releases-video-of-aborted-strikes-in-Gaza-to-prevent-civilian-casualties-362733>>.

²² HCJ [Supreme Court of Israel] Case Number 769/02: *Public Committee Against Torture in Israel v. Government of Israel*. Accessed December 14, 2017. <<https://www.law.upenn.edu/institutes/cerl/conferences/targetedkilling/papers/IsraeliTargetedKillingCase.pdf>> para. 13.

²³ Richard Goldstone, "Reconsidering the Goldstone Report" *The Washington Post*, April 1, 2011, <https://www.washingtonpost.com/opinions/reconsidering-the-goldstone-report-on-israel-and-war-crimes/2011/04/01/AFg111JC_story.html?utm_term=.9721a43e6ce5>. Also, the *Public Committee against Torture in Israel case* (2006) Available at: <http://www.btselem.org/download/hc5100_94_19990906_torture_ruling.pdf>.

²⁴ UN Human Rights Council, 'Report of the United Nations Fact Finding Mission on the Gaza Conflict: Conclusions and Recommendations' A/HRC/12/48, para 48. "In drawing its legal conclusions on the attack against al-Fakhura junction, the Mission recognizes that for all armies proportionality decisions, weighing the military advantage to be gained against the risk of killing civilians, will present very genuine dilemmas in certain cases. The Mission does not consider this to be such a case. The firing of at least four mortar shells to attempt to kill a small number of specified individuals in a setting where large numbers of civilians were going about their daily business and 1,368 people were sheltering nearby cannot meet the test of what a reasonable commander would have determined to be an acceptable loss of civilian life for the military advantage sought. The Mission considers thus the attack to have been indiscriminate in violation of international law, and to have violated the right to life of the Palestinian civilians killed in these incidents." Available at: <<http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf>>

²⁵ HCJ 5872/01; also HCJ 769/02.

relevant law. The custodians of international humanitarian law, the International Committee of the Red Cross, have argued that despite mistakes and misconduct on both sides during recent Israeli military activities, no especial blame is deserved by Israel either because of recent operations (particularly Operation Cast Lead) or more generally. On the contrary, they have cautioned against double standards being used with regards to Israel. The ICRC representative

criticized the trend of some critics opposing military attacks based on the limited military advantage of a particular attack, saying that the issue of whether “military advantage” was sufficient to justify an attack should be viewed more broadly in terms of overall operations. [He] added that proportionality in civilian casualties should take into consideration the number of civilians who would be “saved” by the elimination of a terrorist, who could otherwise have caused more casualties.²⁶

Proportionality demands that military leaders make judgments in line with this remedial virtue, demanding the careful balancing of possible outcomes, and choosing the least bad outcome, in chaotic contexts. There is no simple formula to find the right course of action within those parameters. This justifies Shue’s criticisms of overly moralised readings of the laws of war. Responding to a demand for the laws of war to do more to limit civilian casualties, he says

The basic mistake is to over-moralize war [and, in particular, assume we can attune] ‘the evils of war to the wrongs of the parties’. No one is to die in war except individuals who morally deserve, or rather are morally liable, to die. It is profoundly to be wished that war could become like that. [However a] major part

²⁶ Yonah Jeremy Bob, “ICRC: World Holds Israel to a Legal Double Standard,” *Jerusalem Post*, December 3, 2014. Accessed December 14, 2017. Available at: <<http://www.jpost.com/Arab-Israeli-Conflict/ICRC-World-holds-Israel-to-legal-double-standard-383509>>.

of the horror of war is that, in Kutz's terms, the evils bear no relation to the wrongs.²⁷

It is this over-moralisation that potentially fuels misunderstanding of proportionality in the media and elsewhere. For that reason, it is helpful to focus on what the principle does *not* demand. It does not demand the absence of civilian casualties. It does not demand parity of causalities. And nor does it demand the cessation of hostilities in asymmetric circumstances.

Proportionality, Media Discourse and Israel

Large sections of the media have misconstrued the doctrine of proportionality in relation to Israel and have incorrectly used it to mean either *inequality of death or civilian suffering* between the Israelis and Palestinians or *inequality of military might* between the two. This misreading of the doctrine of proportionality means that there is a relative consensus within the international media that, although Israel has a right to defend itself against Hamas and Hezbollah rockets, its use of force is 'disproportionate.'²⁸ According to the military expert Jonathan Keiler, the media charge of 'disproportionate force' against Israel has been prominent since the 2006 Israel-Lebanon War.²⁹

The 'disproportionate force' charge to mean *inequality of death or suffering* between the Israelis and Palestinians amounts to a criticism of Israel in terms of the *impact* of its military actions. Examples from recent conflicts between Israel and Hamas are useful to illustrate this incorrect media use of the term. For instance, on November 18th 2012, the BBC World Service broadcast an exchange about Operation Pillar of Defence in which the correspondent, Julian Marshall, said to an Israeli spokesperson, Avital Leibovich of the IDF, "I think one of the observations made by critics of Israel is that you always respond disproportionately and –

²⁷ Shue, "Laws of War," 519, footnotes removed.

²⁸ Simon Plosker, "Another Charge of 'Disproportionate' Force," July 22, 2014. Accessed December 14, 2017. Available at: <https://honestreporting.com/another-charge-of-disproportionate-force>.

²⁹ Keiler, "The End of Proportionality?," 58.

ah – in a way the figures tell the story. Since this offensive of yours began, 39 Palestinians have been killed and three Israelis. There’s a disproportionate use of force here.”³⁰ This amounts to a direct and explicit equivalence between the doctrine of proportionality and the numbers of those killed on either side of the conflict. Similarly, on the BBC’s *Newsnight* programme on June 16th 2015, journalist and presenter Evan Davies wrongly promoted the notion that ‘proportionality’ means equality in the number of deaths on each side of the conflict when he interviewed Israeli MK Tsipi Livni. He said, “The UN, others, plenty, think there is disproportionate force used by the Israeli army – for the threat – against Palestinian civilians [...]. What is the ratio of families losing children?” Livni replied, “We are not targeting civilians.” Davis responded, “I know you are not *targeting* but what is the ratio of civilian to – untargeted killed by the Israelis relative to those killed by Hamas?”³¹

It is not just the BBC. Editorials in the *New York Times* in 2006 and in the *Independent* in 2014, and numerous reports by *Al Jazeera* since 2004, have explicitly promoted the same inaccurate meaning of ‘disproportionate force’; that is, inequality in the number of deaths or civilian suffering between Israelis and Palestinians. Some of these reports have even used language which suggests that Israel’s use of ‘disproportionate force’ does not distinguish between military and civilian positions. For example, one correspondent writing for the *Washington Post* in 2006 described the impact of Israel’s military response to Hezbollah as “utterly disproportionate *carnage*,”³² and the UK media during Operation Protective Edge routinely used the phrase “disproportionate *bombardment* of Gaza” to describe the impact of

³⁰ Hadar Sela, “BBC World Service dusts off ‘disproportionate,’” *BBC Watch*, November 18, 2012. Accessed December 14, 2017. Available at: <https://bbcwatch.org/2012/11/18/bbc-world-service-dusts-off-disproportionate/>

³¹ Hadar Sela, “BBC’s Evan Davis misleads on BDS proportionality in warfare,” *BBC Watch*, June 18, 2015, emphasis in original. Accessed December 14, 2017. Available at: <https://bbcwatch.org/2015/06/18/bbcs-evan-davis-misleads-on-bds-proportionality-in-warfare/>

³² Eugene Robinson, “It’s Disproportionate...” Op. Ed., *The Washington Post*, July 25, 2006, emphasis added. Accessed December 14, 2018. Available at: <https://washingtonpost.com/wp-dyn/content/article/2006/07/24/AR2006072400810.html>.

Israel's military operations.³³ This language is inconsistent with the fact that the IDF is documented to engage in discrimination, making every effort to distinguish between combatants and civilians in conformity with international humanitarian law.

The other incorrect use of 'disproportionate force' by the media refers to *inequality of military might* between the Israelis and Palestinians. This involves the claim that there is *inequality in the sophistication or lethality of the firepower received and returned by Israel*. During Operation Pillar of Defence in 2012 the term favoured by the media was 'disproportionate response' rather than 'disproportionate force.'³⁴ This amounts to a criticism of Israel in terms of the *conduct* or *execution* of its military actions. For example, an editorial in the *Independent* on July 22nd 2014, stated that while no one doubted that indiscriminate attacks on Israel were unacceptable, "Nonetheless, the *military gulf* between the two sides is *vast* and the Israeli response over the past fortnight has been *disproportionate*."³⁵

The notion that Israel should calibrate its use of force according to the size and range of the weaponry used in order to conduct its military operations in a proportionate manner has further been promoted by the media without actually using the phrase 'disproportionate force.' This has been done by means of the careful juxtaposition of words to denote an asymmetry of power. For example, a BBC Radio 4 current affairs programme in 2007 about

³³ See for example, Staff and agencies, "Israel continues Gaza bombardment pushing death toll past 120," *The Guardian*, July 12, 2014, emphasis added. Accessed December 14, 2017. Available at:

https://www.theguardian.com/world/2014/jul/12/Israel-continues-gaza-bombardment-pushing-death-toll-past-120?CMP=share_btn_link ; Simon Tomlinson, "Raging Gaza: Before and after satellite images show the true devastation of Israel's bombardment as 700 homes and mosques are turned to rubble and 400 craters blight the war zone," *Mail Online*, July 30, 2014. Accessed 14 December, 2017. Available at:

<https://dailymail.co.uk/news/article/-2710868/Raging-Gaza-Before-Satellite-images-true-devastation-Israels-bombardment-700-homes-mosques-turned-rubble-400-craters-blight-war-zone.html>; "Israel's actions 'disproportionate'", *Belfast Telegraph*, July 17, 2014. Accessed 14 December, 2017. Available at:

<https://m.belfasttelegraph.co.uk/news/uk/Israel-actions-disproportionate-30439211.html> ; Justin Schlosberg, "Media wars over Gaza: why British broadcasters are still failing in their scrutiny of Israeli officials," *Open Democracy UK*, July 31, 2014. Accessed 14 December, 2017. Available at: <https://www.opendemocracy.net/ourkingdom/justin-schlosberg/media-wars-over-gaza>.

³⁴ Corey Feldman, "Israel's Disproportionate Response," *The Times of Israel blog*, November 23, 2012. Accessed 14 December, 2017. Available at: <https://blogs.timesofisrael.com/israels-disproportionate-response>.

³⁵ Plosker, "Another Charge of Disproportionate Force," emphasis added.

the 2006 Israel-Lebanon War described Israel's counter-terror operations as a "massive Israeli response" and Hezbollah's raid of Israel in which it killed two IDF soldiers and kidnapped eight others as a mere "border incursion."³⁶ Both these terms were used in the same sentence to suggest an imbalance in the conduct of military action.

Frequently, the media conveys *both* meanings of 'disproportionate force' – inequality of death and inequality of military might – by referring to the number of dead on the Palestinian side without stating the percentage who were combatants, alongside phrases like "Israeli offensive" or "Israeli assault" to describe Israel's military conduct. A good example is a television news report for the BBC by correspondent Orla Guerin on July 30th 2014 which opened with the sentence, "Israel's big guns pounding Gaza again today. Israel calls this Operation *Protective Edge* but this massive assault has now killed more than thirteen hundred Palestinians – the vast majority of them civilians."³⁷

The UK media has on at least one occasion promoted the idea that Israel *deliberately* uses disproportionate or excessive force in order to exact revenge against the Palestinians. One example of where this was done was in an episode of BBC Radio 5's '*5 Live Drive*' programme aired on November 14th, 2012. The following remarks were made by one of its presenters, Peter Allen, regarding Operation Pillar of Defence, "Yeah, you can count up the casualties and see – you know – that Israel always wreaks revenge and the revenge it takes is greater than the original – erm – suffering in this war. It does it all the time."³⁸

³⁶ "The Summer War in Lebanon," presented by Ed Stourton, BBC Radio 4, April 3 & 10, 2007. Accessed December 14, 2017. Available at: https://bbc.co.uk/radio4/newssummer_war_lebanon.shtml.

³⁷ Hadar Sela, "If you thought there were no sharks left for the BBC's Orla Guerin to jump...," *BBC Watch*, August 1, 2014, emphasis in original. Accessed 14 December, 2017. Available at: <https://bbcwatch.org/2014/08/01/if-you-thought-there-were-no-sharks-left-for-bbcs-orka-guerin-to-jump>.

³⁸ Hadar Sela, "BBC's Peter Allen: Israel always wreaks its revenge," *BBC Watch*, November 16, 2012. Accessed 14 December, 2017. Available at: <https://bbcwatch.org/2012/11/16/bbcs-peter-allen-israel-always-wreaks-its-revenge/>

The UK media has also promoted the idea that Israel *deliberately* uses disproportionate or excessive force in order to express its superiority over the Palestinians. On 17th July 2014, *The Guardian* reported comments made by then Deputy Prime Minister, Nick Clegg, that Israel's response to Hamas was "deliberately disproportionate" and that "[The] Israelis have proved their point." Israel, Clegg continued, was "imposing a disproportionate form of collective punishment" on the citizens of Gaza which was leading to a "humanitarian crisis" and "a very great number of deaths."³⁹ Although this example of media reporting involves the opinion of a politician rather than a journalist, the story's prominence may be explained by the *Guardian's* intense interest in the Israeli-Palestinian conflict and its preoccupation with Israel's "crimes." Indeed, academic Ben Gidley has suggested that the Israeli-Palestinian conflict is hugely over-represented in the British media when compared to other conflicts around the world. For example, *The Guardian* published 351 articles on the Israeli-Palestinian conflict in 2014, a conflict that cost 2,200 lives that year, but only 190 on Syria with its death toll of 76,021 that year. In the same year, the war in the Ukraine resulted in less than a quarter of the coverage in *The Guardian* despite its being responsible for over twice the number of deaths.⁴⁰

The BBC Radio 5 and *The Guardian* reports both illustrate the view that Israel's use of 'disproportionate force' involves the *intentional* and *indiscriminate* targeting of civilians and civilian infrastructure, which is a breach of international humanitarian law and a war crime. The BBC in particular has been responsible for advancing this claim – that Israel's 'disproportionate force' involves the deliberate and indiscriminate bombing of civilians and

³⁹ Nicholas Watt, "Nick Clegg: Israeli response to Hamas appears deliberately disproportionate," *The Guardian*, July 17, 2014. Accessed December 14, 2017. Available at: https://www.theguardian.com/politics/2014/jul/17/nick-clegg-israeli-response-hamas-deliberately-disproportionate?CMP=share_btn_link

⁴⁰ Ben Gidley, "50 days in the Summer: Gaza, Political Protest and Antisemitism in the UK": *A Sub-Report Commissioned to Assist the All Party Parliamentary Inquiry into Antisemitism* (2015). Accessed 14, December 2017. Available at: <https://files.graph.cool/cj3e6rg8y906h0104uh8bojao/cj4muda2r0015014568kz1fv5>.

civilian infrastructure, the commission of war crimes and breaches of international humanitarian law – by routinely promoting the reports of NGOs, such as Amnesty International and Human Rights Watch. These organisations are said to be political NGOs engaged in ‘lawfare’ against Israel whose reports are based on subjective eye witness accounts.⁴¹ They have unequivocally accused Israel of war crimes, of using excessive force, of failing to distinguish between military and civilian targets, and of directing attacks against Palestinian civilians and civilian infrastructure. There is little doubt that these powerful, well-financed NGOs, with views that are criticised for being politically biased, influence media reporting. Indeed, it has been observed that the main influence of NGOs results from the application of “soft power” defined as “the ability to get what you want through attraction rather than coercion or payments.”⁴² Their “soft power” is said to be based on the perception of technical expertise, combined with morality and normative goals, and untainted by partisan politics or economic objectives.⁴³ This perception not only influences the media but is projected through it. Moreover, NGOs are particularly influential on issues relating to human rights and humanitarian aid.⁴⁴

According to Gerald Steinberg of NGO Monitor, Amnesty International, which was founded to campaign on behalf of prisoners of conscience and the abolition of torture, mainly in Eastern Europe and Africa, has held itself out since the end of the Cold War as an expert in the law governing asymmetric warfare, advanced military technology, international law, human rights, military necessity and proportionality.⁴⁵ On August 23rd, 2006, the BBC News website promoted a report by Amnesty International that began, “Amnesty International has

⁴¹ Hadar Sela, “Uncritical amplification of NGO allegations on BBC One,” *BBC Watch*, November 16, 2017. Accessed 14 December, 2017. Available at: <https://bbcwatch.org/tag/amnesty-international>.

⁴² Gerald M. Steinberg, “The Politics of NGOs, Human Rights and the Arab-Israel Conflict,” *Israel Studies*, Vol. 16, No 2 (Summer 2011): 24-54, at 24. Accessed 14 December, 2017. Available at: <https://www.jstor.org/stable/10.2979/israelstudies.16.2.24>.

⁴³ Steinberg, “The Politics of NGOs,” 24.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*, 25.

accused Israel of war crimes and of deliberately targeting civilian infrastructure.”⁴⁶ It went on to state the report’s conclusions that, “Many of the violations identified in our report are war crimes, including indiscriminate and disproportionate attacks.”⁴⁷

Similarly, Human Rights Watch which, as Steinberg observes, grew out of “Helsinki Watch” founded in the 1970s as a research-oriented alternative to Amnesty International, has become a powerful international actor which strongly influences the media.⁴⁸ On August 7th, 2014, a BBC World Affairs correspondent produced a film report which quoted a Human Rights Watch representative as saying, “We’ve seen reports of large amounts of heavy artillery [...]. The issue is, you know, what are your (sic) targeting policies and when are you going to bring down very heavy attacks on populated areas in an indiscriminate and disproportionate way?”⁴⁹ Journalists repeat the technical claims and military analyses of Amnesty International and Human Rights Watch without question and it has been observed that Israel has become the primary target of these powerful NGOs.⁵⁰ Their reports and analyses seem to reflect a concern with the threat posed by Israel and an indifference to the threats facing Israel.

The allegations against Israel made by powerful NGOs like Amnesty International and Human Rights Watch also influence UN officials who are then quoted by the media. For example, the promotion of the war crime allegation by the BBC began just eight days into the 2006 Israel-Lebanon War when its news website ran an article headlined, ‘*UN Warning on Mid-East War Crimes*’ and said, “The UN High Commissioner for Human Rights [...] warns

⁴⁶ BBC News Channel, “Israel accused of war crimes,” August 23, 2006. Accessed December 14, 2017. Available at: https://news.bbc.co.uk/1/hi/world/middle_east/5276626.stm

⁴⁷ Ibid.

⁴⁸ Steinberg, “The Politics of NGOs,” 25.

⁴⁹ This report also featured on the BBC News website for five consecutive days under the heading *Israel’s Military Strategy in Gaza under Scrutiny*. Accessed December 14, 2017. Available at: <https://bbc.co.uk/news/av/world-middle-east-28684497/israel-s-military-strategy-in-gaza-under-scrutiny>.

⁵⁰ Steinberg explains that this is because NGOs are dominated by a post-colonial ideology that gives preference to the “victims of Western imperialism and capitalism,” (“The Politics of NGOs,” 26).

that those involved in the spiral of violence between Israel and Lebanon could face war crime charges if they are found to have deliberately attacked civilians.”⁵¹ Although the headline does not make it clear, the article claimed that Israel was *deliberately* attacking civilians in Lebanon but provided no evidence to support the claim.

The BBC has even promoted the claim that Israel’s use of ‘disproportionate force’ involves the *targeted* killing of Palestinian *children*. In October 2014, BBC journalist Kevin Connolly reported on BBC Radio 4’s news and current affairs *Today* programme the claim of Mustafa Baghouti that “Israel’s war crimes included the collective disproportional use of force targeting civilians and *targeting children* and killing them.”⁵² Baghouti’s opinion was broadcast without supporting evidence, corroboration, challenge, or analysis. This amounted to a journalistic failure to check the facts and provide balance.

Explaining the Media Distortions

The question is why does the media so readily misconstrue the principle of proportionality in relation to Israel? There are several possible explanations. One is the soft power influence of the NGOs. Kenneth Anderson has noted that NGOs like Human Rights Watch, “focus to near exclusion on what the attackers do, especially in asymmetrical conflicts where the attackers are Western armies” and tend “to present to the public and press what are essentially lawyers’ briefs that shape the facts and the law toward conclusions that [they] favour...without really presenting the full range of factual and legal objections to [their] position.”⁵³ The media

⁵¹ BBC News Channel, “UN warning on Mid-East war crimes,” July 20, 2006. Accessed December 14, 2017. Available at: https://news.bbc.co.uk/1/world/middle_east/5/97544.stm.

⁵² Hadar Sela, “Documenting the BBC contribution to political warfare against Israel – part three,” *BBC Watch*, October 10, 2010. Accessed December 14, 2017. Available at: <https://bbcwatch.org/2014/10/10/documenting-the-bbc-contribution-to-political-warfare-against-israel-part-three>.

⁵³ Kenneth Anderson, “Questions re Human Rights Watch’s Credibility in London Reporting,” *Kenneth Anderson Laws of War Blog*, 23 August 2006, cited in Steinberg, “The Politics of NGOs,” 26. Accessed December 14, 2017. Available at: <http://kennethandersonlawofwar.blogspot.com/2006/08/questions-re-human-rights-watch.html>

accepts their accounts uncritically because of what Steinberg has termed the “halo effect.”⁵⁴ By this he means that groups perceived to promote “good” principles are protected from scrutiny by the image of objectivity and morality.⁵⁵

Another possible explanation for the media’s misreading of ‘proportionality’ in relation to Israel is that it relies on the word’s popular meaning. The media’s use of ‘disproportionate force’ to convey inequality in the number of civilian deaths, in the amount and extent of civilian suffering, and in military power, accords with the popular usage of the word ‘proportional,’ which suggests ‘numerical comparability.’⁵⁶ Indeed, Webster’s Dictionary defines ‘proportionate’ as ‘*agreeing in amount, magnitude or degree*’⁵⁷ and the Oxford English Dictionary defines it as ‘*corresponding in size or amount to something else*’⁵⁸ However, as explained above, the term ‘disproportionate force’ has an entirely different meaning under the law of armed conflict and it does not demand an absence of civilian casualties, a parity of casualties, or the cessation of hostilities in asymmetric circumstances as the media incorrectly assumes.

Another possible explanation is that the media accuses Israel of ‘disproportionate force’ because Israel itself has admitted to using ‘disproportionate force’ as a part of its defence strategy. The Dahiya Doctrine was enunciated in 2008 by IDF General Gadi Eisenkot. It is a strategy that requires Israel to use tremendous force disproportionate to the actions of Hezbollah or Hamas. Its objective is to deter protracted warfare and it is intended for use only in asymmetric conflict. This is where a regular army is in combat with an enemy that is not a

⁵⁴ Steinberg, “The Politics of NGOs,” 26.

⁵⁵ Ibid. This explains why the public, UN officials and academics are just as accepting of the claims made by powerful NGOs as is the media.

⁵⁶ Keith Pavlischek, “Proportionality in Warfare,” *The New Atlantis*, 27 (2010): 21 – 24. Accessed December 14, 2017.

⁵⁷ Webster’s Dictionary. Accessed December 14, 2017. Available at: <https://www.merriam-webster.com/dictionary/proportional>.

⁵⁸ Oxford English Dictionary. Accessed December 14, 2017. Available at: <https://en.oxforddictionaries.com/definition/proportionate>.

regular army and is embedded within the civilian population. However, the ‘disproportionate force’ allegation against Israel was wide-scale and systematic well before the Dahiya Doctrine was enunciated in October 2008. Further, according to Keiler, the same strategy was used by the American military in Afghanistan and Iraq without the American military receiving condemnation (at least on the grounds of ‘disproportion.’)⁵⁹ Further, the Doctrine does not envisage the use of ‘disproportionate force’ in the international law sense; rather, it urges the use of overwhelming force against *military targets*, which is not a breach of international humanitarian law. All this suggests that Israel’s critics may have opportunistically or recklessly seized on the Dahiya Doctrine to accuse Israel of breaches of international humanitarian law and of war crimes and that this has influenced media reporting.

Yet another possible explanation is that the media’s inaccurate promotion of the view that Israel uses ‘disproportionate force’ is part of the broader discursive assault against Israel that is informed by antisemitic ways of thinking. This explanation has considerable supporting evidence when one considers the presence of what are arguably antisemitic tropes in the various media charges of ‘disproportionate force’ against the Jewish state. For instance, the promotion of the view that Israel’s use of ‘disproportionate’ force involves the deliberate and intentional targeting of civilians and civilian infrastructure, or at the very least, involves the indiscriminate use of force, despite clear evidence to the contrary,⁶⁰ resonates with the blood libel - the idea that Jews entertain homicidal intentions towards non-Jews. The blood libel began in England in the 12th century, spread throughout Western Europe, reached Muslim lands, and is now a global phenomenon that has acquired an anti-Zionist character. According

⁵⁹ Keiler, “The End of Proportionality,” 53.

⁶⁰ See, for example, Colonel Richard Kemp’s *Submission to the United Nations Independent Commission of Inquiry On the 2014 Gaza Conflict*, February 20, 2015. Accessed December 14, 2017. Available at: <https://richard-kemp.com/submission-to-the-united-nations-independent-commission-of-inquiry-on-the-gaza-conflict>.

to lawyer and writer Anthony Julius, the blood libel is the governing trope in today's characterisation of Israel,⁶¹ ascribing to the Jewish state "a certain kind of indiscriminate terror."⁶² The media's use of language such as "carnage" and "bombardment" to describe the impact of Israel's military operations, as well as the claim that Israel *intentionally* and *indiscriminately targets* Palestinian *civilians* and their infrastructure, does indeed suggest that Israel engages in acts of indiscriminate terror. The libel relies heavily on a perception of Jews as innately cruel, which cruelty propels them to act criminally. Accordingly, Julius describes the blood libel as "a free-floating trope of Jewish criminality."⁶³

The blood libel has two distinct derivations or versions: the genocide libel and the infanticide libel, and these are also arguably present in the media reporting. The genocide libel resonates with each unsubstantiated media reference to the *intentional* and *indiscriminate* killing of *innocent civilians* and the infanticide libel resonates with each explicit and unsubstantiated reference to *dead Palestinian "children."* It's as if this use of language to describe the military responses of the Jewish state is a reflexive response that reflects deeply ingrained, no doubt unconscious, antisemitic ways of thinking. This is especially so as the blood libel also incorporates the conspiracy libel, presupposing as it does that Jews act as one, in pursuit of goals that are inimical to the interests of non-Jews. For the media critics of Israel's military actions, it appears that the IDF and the Israeli government conspire to use overwhelming military force against the Palestinians, indifferent to the death and destruction inflicted on them. This way of thinking could be said to further incorporate the spectre of Jewish particularism, the idea that Jews only help their own and disregard the suffering of non-Jews, which is a classic antisemitic trope. When applied to Israel, it takes the form of a belief, and even an expectation, that the Jewish state is prepared to flout all universal norms of humanity

⁶¹ Anthony Julius, *Trials of the Diaspora: A History of Antisemitism in England* (Oxford: Oxford University Press, 2010): 96

⁶² *Ibid.*, 100.

⁶³ *Ibid.*, 95.

in pursuit of its own self-serving security interests. The International Holocaust Remembrance Alliance (IHRA) Working Definition of Antisemitism, which has been adopted by 31 countries and has seen almost universal adoption in Britain, states that using the symbols and images associated with classic antisemitism, such as the blood libel, to characterise Israel or Israelis is, depending on context, an example of antisemitism.⁶⁴

Another factor pointing towards the conclusion that the media promotion of Israel's lack of proportionality is a function of contemporary antisemitism are the double-standards involved. According to Keiler, Israel pursued modern warfare tactics in Lebanon in 2006 and in Gaza 2008/9, 2012, and 2014 similar to those used by US and NATO forces in Kosovo, Afghanistan and Iraq.⁶⁵ Yet, despite the overwhelming use of force in each of those campaigns and the high civilian casualty figures, there was little attention in the international media given to the concept of proportionality.⁶⁶ In relation to the Shock and Awe campaign in Iraq, media reports, particularly by the BBC and CNN, suggested that the overwhelming force used was the best way to win the battle. While there have been a few media references to the doctrine of proportionality when covering the civil war in Syria, they have been directed at pro-government forces *and* terrorist groups in equal measure.⁶⁷ The majority of media reports about Syria, despite the alarming civilian death toll, including many children, have not used the term 'disproportionate force' or indicated any expectation that military losses should be on a one-on-one basis. The IHRA Working Definition of Antisemitism gives

⁶⁴ IHRA Working Definition of Antisemitism. Accessed December 14, 2017. Available at: <https://www.holocaustremembrance.com/working-definition-antisemitism>

⁶⁵ Keiler, "The End of Proportionality," 54.

⁶⁶ There was a CNN report in 2007 that President Hamid Karzai accused NATO forces of disproportionate force causing the death of civilians, see, "Karzai blasts NATO over civilian deaths", *CNN International Com*, June 24, 2007. Accessed December 14, 2017. Available at: <https://edition.cnn.com/2007/WORLD/asiapcf/06/23/afghanistan.karzai.index.html>; and there were occasional references to proportionality found in accounts of the Iraq war. (Keiler, "The End of Proportionality", 53).

⁶⁷ David Sim, "Syria: The lives - and the tragic deaths - of children in the war-torn country", *International Business Times*, January 13, 2016. Accessed December 14, 2017. Available at: <https://ibtimes.co.uk/syria-lives-tragic-deaths-children-war-torn-country-graphic-mages-1529540>

as an example of antisemitism “applying double standards by requiring of [Israel] a behaviour not expected or demanded of any other democratic nation.”⁶⁸

Conclusion

Whatever the explanation or explanations for the media’s incorrect use of the doctrine of proportionality in relation to Israel, it appears that the charge of ‘disproportionate force’ against the Jewish states involves antisemitic ways of thinking. This is because the language typically resonates with the blood libel, conspiracy theory, Jewish particularism and the practice involves double standards. This suggests that the media plays a significant role in the broader discursive assault against Israel and is instrumental in the demonisation and delegitimisation of the Jewish state. This conclusion is supported by the misreporting of other aspects of the Israeli-Palestinian conflict in a way that also resonates with the blood libel and related antisemitic tropes. For example, *The Independent* newspaper on August 9th, 2018 published the misleading headline, “Israeli airstrikes kill pregnant woman and one-year-old daughter as fighting with Hamas escalates.”⁶⁹ This headline was misleading because Israel was responding to an attack by Hamas which, having fired over 200 missiles into Israel, had caused injuries to several civilians and damage to domestic and commercial property. It is curious that, given these facts, reference to the Palestinian rocket fire that preceded Israel’s retaliatory attack was completely omitted from the *Independent’s* headline. The BBC also provided a misleading headline in relation to the same set of facts. The headline was, “Israeli airstrikes kill pregnant woman and baby.”⁷⁰ As with the *Independent*,

⁶⁸ IHRA Working Definition

⁶⁹ Bethan McKernan, “Israeli airstrikes kill pregnant woman and one-year-old daughter as fighting with Hamas escalates,” *The Independent* August 9th 2018. Accessed December 14, 2017. Available at: <https://www.independent.co.uk/news/world/middle-east/israel-hamas-air-strikes-west-bank--palestinian-attack-a8484091.html?amp>

⁷⁰ “Israel to lodge formal complaint over BBC coverage of Gaza violence,” *Times of Israel*, August 9, 2018. Accessed August 9, 2018. Available at: <https://www.timesofisrael.com/israel-to-lodge-formal-complaint-over-bbc-coverage-of-gaza-violence>

the BBC omitted any reference to the Palestinian rocket fire that preceded Israel's retaliatory attacks.⁷¹

Headlines are important. This is so even where the facts are objectively reported. Research has shown that many people do not read most of the articles in their daily papers; rather, they just skim the headlines and then read whatever draws their attention.⁷² This means that for many casual readers who do not closely follow the Israeli-Palestinian conflict, all they know about the conflict is from the headlines and the alerts of articles that they do not actually read.⁷³ Headlines also impact the way we read and remember articles. Responding to a 2014 study published in the *Journal of Experimental Psychology: Applied*⁷⁴ on the effects of misinformation in headlines, Maria Konnikova wrote in *The New Yorker*

Psychologists have long known that first impressions really do matter – what we see, hear, feel or experience in our first encounter with something colors how we process the rest of it. Articles are no exception. And just as people can manage the impression that they make through their choice of attire, so too can the crafting of a headline subtly shift the perception of the text that follows. By drawing attention to certain details or facts, a headline can affect what existing knowledge is activated in your head. By its choice of phrasing, a headline can influence your

⁷¹ "Israel to lodge formal complaint," *Times of Israel*.

⁷² Nausicaa Renner, "'A very blunt instrument': The potential and power of mobile notifications," *Columbia Journalism Review*, December 21, 2016. Accessed December 14, 2017. Available at: <https://www.cjr.org/tow-center/mobile-notifications-changing-new-york-times.php>

⁷³ It has been observed that readers view news alerts as standalone stories, taking them at face value, without clicking through to read more, (Henner, "'A very blunt instrument.'")

⁷⁴ U.K.H. Ecker, S. Lewandowsky, E.P. Chang, & R. Pillai, "The Effects of Subtle Misinformation in News Headlines," *Journal of Experimental Psychology Applied*, 20(4), 323-335 (2014). Accessed December 14, 2017. Available at: <https://www.ncbi.nlm.nih.gov/m/pubmed/25347407/>

mind-set as you read so that you later recall details that coincide with what you were expecting.⁷⁵

The media misrepresentation of the Israeli-Palestinian conflict is not in the public interest. The public have the right to expect news that is not only relevant, informative, and engaging but that is also proportionate and balanced. The media's inaccurate claim that Israel uses 'disproportionate force' when defending itself against Hamas and Hezbollah, who are non-state actors, oversimplifies a complex regional conflict, misuses the language of international humanitarian law, and promotes unjust accusations of "war crimes" against the Jewish state. This has serious consequences not only for Israel but also, by extension, for Jews in the Diaspora who are assumed to support Israel and are frequently blamed for Israel's "crimes". It is therefore necessary for the media, when reporting on the Israeli-Palestinian conflict, to strive for professional independence and objectivity. It can do this by maintaining the distinction between journalism and advocacy, by not allowing semantics to become politicised, by checking sources and facts, and by seeking to understand the legal terminology it uses to describe the conflict. To the extent that it fails to do this, it will be difficult to avoid the conclusion that the media's persistent appeal to the doctrine of proportionality in the case of Israel's military actions, and only in the case of Israel's military actions, is a reflex that is at best the product of anti-Israel sentiment, and at worst a function of contemporary antisemitism.

⁷⁵ Maria Konnikova, "How Headlines Change the Way We Think," *The New Yorker*, December 17, 2014. Accessed December 14, 2017. Available at: <https://www.google.co.uk/amp/s/www.newyorker.com/science-maria-konnikova/headlines-change-way-think/amp>

