

## ISRAEL'S INVASION OF GAZA IN INTERNATIONAL LAW

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### I. INTRODUCTION

Israel commenced an aerial bombardment of the Gaza Strip on December 27, 2008 in a military operation it dubbed "Operation Cast Lead."<sup>1</sup> Israel augmented its attack with a ground invasion beginning on January 3, 2009.<sup>2</sup> Israel initially claimed that the assault was necessary to halt rocket fire from the Gaza Strip into Southern Israel and was, therefore, an exercise of Israel's sovereign right of self-defense.<sup>3</sup> Israeli leaders apparently also sought to re-establish Israel's "deterrent capacity," believed to have been diminished during the 2006 war on Lebanon.<sup>4</sup> Operation Cast Lead followed the breakdown of a truce that, from June 2008 to early November of that same year, had brought substantial calm to the border areas of Southern Israel and Gaza.<sup>5</sup>

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1. Samuel Sockol, *Israeli Warplanes Pound Gaza; Hundreds Killed in Reprisal Airstrikes Targeting Hamas Security Facilities*, THE WASHINGTON POST, Dec. 28, 2008, at A1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/12/27/AR2008122700324.html>; Nidal al-Mughrabi, *Israel Kills Scores in Air Strikes*, REUTERS, Dec. 27, 2008, <http://www.reuters.com/article/topNews/idUSLR1342320081227?feedType=RSS&feedName=topNews>.

2. Isabel Kershner & Taghreed el-Khodary, *Israeli Troops Launch Attack on Gaza*, N.Y. TIMES, Jan. 4, 2009, at A1, available at <http://www.nytimes.com/2009/01/04/world/middleeast/04mideast.html>.

3. On the morning of the attack, Israel's U.N. ambassador, Gabriela Shalev, sent identical letters to the U.N. Secretary General and the President of the Security Council stating:

I am writing this urgent letter in order to inform you that after a long period of utmost restraint, the Government of Israel has decided to exercise, as of this morning, its right to self-defence. Israel is taking the necessary military action in order to protect its citizens from the ongoing terrorist attacks originating from the Gaza Strip and carried out by Hamas and other terrorist organizations.

Security Council, *Identical Letters Dated 27 December 2008 from the Permanent Representative of Israel to the United Nations Addressed to the Secretary-General and to the President of the Security Council*, U.N. Doc. S/2008/816 (Dec. 27, 2008), available at <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Gaza%20S2008816.pdf>.

4. Ethan Bronner, *Israel Reminds Foes that It Has Teeth*, N.Y. TIMES, December 28, 2008, at A1, available at <http://www.nytimes.com/2008/12/29/world/middleeast/29assess.html>.

5. See details of the truce *infra* Section III.

Israel's self-defense claim was soon challenged.<sup>6</sup> Evidence surfaced in the Israeli press that Israel had been planning the operation for at least six months, casting doubt on the claim that the attack was primarily a response to the breakdown of the truce.<sup>7</sup> Indeed, it appeared that Israel had exploited the truce period to gather intelligence regarding potential targets in the attack.<sup>8</sup> During the same period Israel had reportedly crafted a public relations campaign to defend its planned operation, to which new military spokespeople were assigned.<sup>9</sup> A number were women officers—apparently selected “to project a feminine and softer image” to Western media audiences.<sup>10</sup>

Allegations also arose that, regardless of Israel's justification for initiating the attack, the conduct of its military in the operation violated international law in a number of respects. Rapidly mounting casualties among Palestinian civilians raised concerns that Israeli troops were failing to discriminate between military and civilian targets, or were using disproportionate force.<sup>11</sup> Reports also suggested that Israeli troops had used white phosphorous shells in densely populated parts of Gaza, leading to deaths and terrible wounds among Palestinian civilians.<sup>12</sup>

On January 8, 2009, the United Nations Security Council passed a resolution calling for an immediate halt to fire from both Israel and Hamas.<sup>13</sup> Nonetheless, the assault continued until January 18, when Israel and Hamas<sup>14</sup> each instituted unilateral ceasefires, finally ending active hostilities.<sup>15</sup>

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6. See, e.g. *Israel's Bombardment of Gaza Is Not Self-defense – It's a War Crime*, THE SUNDAY TIMES, Jan. 11, 2009, at 20, available at <http://www.timesonline.co.uk/tol/comment/letters/article5488380.ece> (letter signed by twenty-nine international lawyers and legal academics).

7. Barak Ravid, *Disinformation, Secrecy, and Lies: How the Gaza Offensive Came About*, HAARETZ, <http://www.haaretz.com/hasen/spages/1050426.html> (last visited Sept. 26, 2009) [hereinafter *Ravid*].

8. See *id.*

9. Anshel Pfeffer, *Israel Claims Success in the PR War*, THE JEWISH CHRONICLE, Dec. 31, 2008, <http://www.thejc.com/articles/israel-claims-success-pr-war>.

10. *Id.*; see also Yosefa Loshitzky, *Israel's Blonde Bombshells and Real Bombs in Gaza*, THE ELECTRONIC INTIFADA, Jan. 5, 2009, <http://electronicintifada.net/v2/article10119.shtml>. The public relations campaign to justify Israel's attack was launched in the days preceding the war, see Jack Khoury & Barak Ravid, *Israel Kicks Off Global PR Campaign to Recruit Support for Gaza Raids*, HAARETZ, Dec. 21, 2008, <http://www.haaretz.com/hasen/spages/1048606.html>, and was intensified as the assault continued, see Barak Ravid, *Israel to Mount Emergency International PR Effort in Wake of Gaza Campaign*, HAARETZ, Dec. 28, 2008, <http://www.haaretz.com/hasen/spages/1050402.html>. On the role gender images play in Israel's effort to win Western favor, see Aluf Benn, *Bar Refaeli in Gaza*, HAARETZ, Feb. 18, 2009, <http://www.haaretz.com/hasen/spages/1065135.html>.

11. See, e.g., Press Briefing, Int'l Comm. of the Red Cross, Gaza: Pliht of Civilians Traumatic in 'Full-blown Humanitarian Crisis' (Jan. 6, 2009), available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/palestine-press-briefing-060109?opendocument>.

12. Ethan Bronner, *Outcry Erupts Over Reports That Israel Used Phosphorous Arms on Gazans*, N.Y. TIMES, Jan. 21, 2009, at A16, available at <http://www.nytimes.com/2009/01/22/world/middleeast/22phosphorus.html?scp=1&sq=israel%20white%20phosphorous&st=cse>.

13. S.C. Res. 23, U.N. Doc S/2009/23 (Jan. 8, 2009), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N09/204/26/PDF/N0920426.pdf?OpenElement>.

14. “Hamas” is the acronym of the “Harakat al-Muqawama al-Islamiya” the “Movement of Islamic Resistance,” and also means “enthusiasm” or “zeal” in Arabic. Hamas party members were elected to a majority in the Palestinian Legislative Council in 2006, and took over complete governing

This article considers the possible violations of international law entailed in Israel's twenty-two day assault on the Gaza Strip. The main bodies of law applicable to the Gaza invasion are international humanitarian law, the central purpose of which is to minimize human suffering in times of armed conflict,<sup>16</sup> and international criminal law, which establishes state and individual culpability for grave violations of international law, including for war crimes and crimes against humanity.<sup>17</sup> There is substantial evidence that Israel committed numerous violations of international law, in some cases amounting to war crimes or crimes against humanity, and this evidence is sufficient, at a minimum, to justify further investigation. If such evidence is further substantiated, Israel could bear state responsibility and Israeli political and military leaders could bear personal criminal liability. If so, they should be held accountable for their transgressions.

The primary focus of the article is on major violations of international law and ones that appear systemic—in other words, those which stem from policy decision-making and military doctrines.<sup>18</sup> Although the names of various Israeli officials appear in the article in contexts that may suggest culpability for criminal offenses, we make no allegations of individual responsibility here. Linking identified individuals to definite, specific offenses would involve complex issues of intent, and we make no pretense of having established such linkages in the article.

We further maintain that Hamas forces also likely committed war crimes during the fighting, particularly by undertaking indiscriminate attacks against

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authority in Gaza in June 2007 in bitter fighting with its principal rival party, Fatah. On Hamas generally, see KHALED HROUB, *HAMAS: POLITICAL THOUGHT AND PRACTICE* (2000). On Hamas's rise to power in the Gaza Strip, see David Rose, *The Gaza Bombshell*, VANITY FAIR, Apr. 2008, <http://www.vanityfair.com/politics/features/2008/04/gaza200804>.

15. Isabel Kershner, *Few Israelis Near Gaza Feel War Achieved Much*, N.Y. TIMES, Jan. 21, 2009, at A8, available at [http://www.nytimes.com/2009/01/21/world/middleeast/21israel.html?\\_r=1&scp=2&sq=gaza%20ceasefire&st=cse](http://www.nytimes.com/2009/01/21/world/middleeast/21israel.html?_r=1&scp=2&sq=gaza%20ceasefire&st=cse).

16. In the words of one commentator: "International humanitarian law in armed conflicts is a compromise between military and humanitarian requirements. Its rules comply with both military necessity and the dictates of humanity." Christopher Greenwood, *Historical Development and Legal Basis*, in *THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW* 1, 37 (Dieter Fleck ed., rev. ed. 2008).

17. AMNESTY INTERNATIONAL, *THE CONFLICT IN GAZA: A BRIEFING ON APPLICABLE LAW, INVESTIGATIONS, AND ACCOUNTABILITY* 6 (2009), available at <http://www.amnestyusa.org/pdf/gazabriefing.pdf> (arguing international human rights law provides an additional layer of protections) [hereinafter *The Conflict in Gaza: A Briefing on Applicable Law, Investigations, and Accountability*].

18. In some cases it may be difficult to distinguish between systemic wrongs and acts of individual misconduct by Israeli troops, of which there is also some evidence. For example, in advance of the Gaza assault, some Israeli troops had received a booklet prepared by Israel's chief military rabbi, Brigadier General Avichai Rontzki, declaring that mercy in battle is "terribly immoral." Amos Harel, *IDF Rabbinate Publication During Gaza War: We Will Show No Mercy on the Cruel*, HAARETZ, Jan. 16, 2009, <http://www.haaretz.com/hasen/spages/1058758.html>. If individual Israeli soldiers were encouraged by the booklet to commit violations of laws of warfare, it is a difficult call as to whether they would constitute systemic or simply individual wrongs.

Israeli civilians.<sup>19</sup> But these offenses in no way justify or excuse Israel's violations, which bore far more devastating consequences both for lives, for the prospects for peace in the Middle East, and for the status of international law.<sup>20</sup> Still, what is sauce for the goose is sauce for the gander, and a fair course of action would entail investigations of Hamas political and military leaders along with their Israeli counterparts.

It is to be expected that combatants in a conflict would deny violations of international law and would seek to justify their behavior by reference to legal norms.<sup>21</sup> Thus, claims by any party about its wartime actions must be subjected to critical and skeptical review. As noted above, Israel has invested substantial effort in defending its actions before international public opinion.<sup>22</sup> Having the advantage of advance knowledge of the operation, not to mention greater resources and familiarity with the sensibilities of Western audiences, Israel's public relations campaign has far exceeded that of its opponent,<sup>23</sup> including, even, teleconferences on Twitter and videos made available by the Israel Defense Forces (IDF) via YouTube.<sup>24</sup> While ascertaining facts through the proverbial "fog of war" is always

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19. See *infra* Section XIII.

20. 1,440 Palestinians were killed by Israel during the fighting, and 5,380 were wounded, U.N. Office for the Coordination of Humanitarian Affairs, *Field Update on Gaza from the Humanitarian Coordinator* (Feb. 3-5, 2009), available at [http://www.ochaopt.org/gazacrisis/admin/output/files/ocha\\_opt\\_gaza\\_humanitarian\\_situation\\_report\\_2009\\_02\\_05\\_english.pdf](http://www.ochaopt.org/gazacrisis/admin/output/files/ocha_opt_gaza_humanitarian_situation_report_2009_02_05_english.pdf), while nine Israelis – six soldiers and three civilians – were killed by Palestinians (another four Israeli soldiers were killed by "friendly fire"), Sebastian Rotella & Rusdi abu Alouf, *Hamas Hints It's Open to Deal to End War*, L.A. TIMES, Jan. 13, 2009, at A8. The impact of Israel's violations of international law on prospects for peace in the region and on the stature of international law is addressed briefly in the Conclusion, *infra* Section XV.

21. Indeed, it appears that Israeli military lawyers in the International Law Division of the office of the Military Advocate General had carefully studied the possible justifications for Israel's military actions, and also participated in briefings and operations planning during the assault itself. See Yotam Feldman & Uri Blau, *Consent and Advise*, HAARETZ, February 5 2009, <http://www.haaretz.com/hasen/spages/1059925.html> [hereinafter *Feldman & Blau*].

22. Ethan Bronner of the New York Times further reported that members of the press, while barred from entering Gaza, were provided with "full access to Israeli political and military commentators eager to show them around southern Israel, where Hamas rockets have been terrorizing civilians. A slew of private groups financed mostly by Americans are helping guide the press around Israel." Ethan Bronner, *Israel Keeping Reporters from Close Look at War*, N.Y. TIMES, Jan. 7, 2009, at A13, available at <http://www.nytimes.com/2009/01/07/world/middleeast/07media.html> [hereinafter *Bronner*].

23. A hint of such resources is offered in David Russell, *Meet David Saranga, the Man Whose Campaigns Are Rebranding Israel*, THE JEWISH CHRONICLE, May 23, 2008, <http://www.thejc.com/articles/meet-david-saranga-man-whose-campaigns-are-rebranding-israel>. Hamas's outreach was limited to several op-eds in Western newspapers including: Mousa Abu Marzook, *Hamas Speaks: A 'Legacy of Suffering' Fuels Palestinian Resistance, Says One of Its Leaders*, L.A. TIMES, Jan. 6, 2009, at A15, available at <http://www.latimes.com/news/opinion/commentary/la-oe-marzook6-2009jan06.0,7451769.story>; Mousa Abu Marzook, *A Decisive Loss for Israel*, THE GUARDIAN, Jan. 22, 2009, <http://www.guardian.co.uk/commentisfree/2009/jan/22/gaza-israel-palestine-hamas-obama>; Khalid Mish'al, *This Brutality Will Never Break Our Will to be Free*, THE GUARDIAN, Jan. 6, 2009, at 26, available at <http://www.guardian.co.uk/commentisfree/2009/jan/06/gaza-israel-hamas>.

24. Noam Cohen, *The Toughest Q's Answered in the Briefest Tweets*, N.Y. TIMES, Jan. 4, 2009, at WK4, available at <http://www.nytimes.com/2009/01/04/weekinreview/04cohen.html>. The Israel

difficult, the challenges are greater when this “fog” is carefully planned and deliberately manufactured. The challenge is compounded by the fact that Israel largely barred Western reporters from entering the Gaza Strip during most of the fighting on the grounds of security—rendering independent verification of the realities of the assault all but impossible.<sup>25</sup>

There is, moreover, reason to suspect that Israel's spokespeople were not consistently truthful in representing the actions of the Israel Defense Forces. This seemed evident, for example, in exchanges over allegations that the Israeli military had used white phosphorous shells. In a sequence chronicled by the Times of London, Israel initially denied that its troops had used white phosphorous.<sup>26</sup> Confronted with evidence to the contrary, Israeli spokespeople eventually admitted that white phosphorous had been used by Israeli troops and that an investigation for illegality in at least one instance was underway.<sup>27</sup> Remarkably, however, Israeli spokespeople ended the exchange with the Times by denying their initial denial of white phosphorous use!<sup>28</sup> Thus it has seemed prudent to this article's authors to examine all of Israel's claims regarding the Gaza invasion with heightened vigilance.<sup>29</sup> To repeat, however: such skepticism is always due, and examples of other nations misrepresenting facts so as to justify the use of force are notably rife. Israel, for its part, has accused Hamas of distorting figures concerning civilian deaths due to the Gaza assault, and it would be naïve not to consider that a real possibility.<sup>30</sup>

The next section following this introduction explores the complex and contentious issue of what law is applicable to Israel's recent invasion of the Gaza Strip. Operation Cast Lead cannot be understood, either legally or politically, in a historical vacuum. Thus, Section III will sketch the necessary backdrop to the recent fighting, beginning with Israel's 2005 withdrawal of troops and settlers from the Gaza Strip, and extending through the months directly preceding Israel's

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Defense Forces Spokesperson's Unit Youtube channel can be viewed at <http://www.youtube.com/user/idfnadesk> (last visited Sept. 26, 2009).

25. Bronner, *supra* note 22..

26. Sheera Frenkel & Philippe Naughton, *UN Headquarters in Gaza Hit by Israeli 'White Phosphorus' Shells*, TIMES ONLINE, Jan. 15, 2009, [http://www.timesonline.co.uk/tol/news/world/middle\\_east/article5521925.ece](http://www.timesonline.co.uk/tol/news/world/middle_east/article5521925.ece).

27. James Hider & Sheera Frenkel, *White Phosphorus Was Used in Gaza, Ministry Says*, TIMES OF LONDON, Jan. 24, 2009, at 50, available at [http://www.timesonline.co.uk/tol/news/world/middle\\_east/article5575070.ece](http://www.timesonline.co.uk/tol/news/world/middle_east/article5575070.ece) (offering a chronology of the exchange).

28. *Id.*

29. Indeed, this article concludes that another frequent claim by Israel's defenders – that Hamas fighters used Palestinian civilians as “human shields” – is poorly substantiated in the factual record. On the contrary, there is stronger evidence that this banned practice was employed by Israeli troops; see *infra* Section VII. Israel's credibility is also questioned by Kenneth Roth, *The Incendiary IDF*, HUMAN RIGHTS WATCH, Jan. 22, 2009, available at <http://www.hrw.org/en/news/2009/01/22/incendiary-idf-kenneth-roth>.

30. Yaakov Katz, *World Duped by Hamas Death Count*, THE JERUSALEM POST, Feb. 15, 2009, <http://www.jpost.com/servlet/Satellite?cid=1233304788684&pagename=JPost%2FJPArticle%2FShowFull>.

attack, during which a truce had prevailed. Section IV carefully examines Israel's justification for launching its attack—that it was necessary to defend itself against rocket fire emanating from the Gaza Strip—and ultimately rejects that claim. Section V argues that, as Israel's assault was not justified by self-defense, in fact, it may have constituted the crime of aggression. Section VI suggests that Israel deliberately targeted civilian infrastructure and civilian individuals in acts that constituted war crimes. Section VII examines the possibility that Israeli troops used Palestinians as human shields and concludes that there is some evidence to support such a charge. Section VIII reviews the question of proportionality and finds that statements by Israeli leaders and facts of the battlefield strongly suggest that Israel deliberately employed disproportionate force in its assault on Gaza. Section IX reviews charges that Israel failed to meet its obligations to protect and respect medical personnel and facilities, while Section X considers alleged Israeli failures to allow treatment of the wounded and evacuation of the dead. Section XI examines evidence that Israel used weapons illegally during the bombardment and invasion. Section XII details the bottom line; that is, the deaths and destruction caused by Operation Cast Lead. Section XIII looks at possible Hamas war crimes and finds that Hamas likely launched indiscriminate attacks against Israeli civilians in violation of the laws of war. Section XIV reviews state and individual liability, and surveys possible venues for the prosecution of war crimes committed during the Gaza invasion. Section XV offers a brief conclusion.

## II. THE STATUS OF GAZA AND THE QUESTION OF APPLICABLE LAW

The international legal status of the Gaza Strip is currently contested. There is no dispute that the Gaza Strip is not a sovereign state; rather, the main controversy is whether or not, after Israel's 2005 "disengagement" from the Gaza Strip, the territory remains subject to belligerent occupation within the meaning of international law. Israel maintains that its evacuation from the Gaza Strip ended its occupation,<sup>31</sup> while other observers and commentators have maintained that the occupation persists.<sup>32</sup>

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31. The Disengagement Plan prepared by the government of Israel before the withdrawal, for example, states: "Upon completion of this process, there shall no longer be any permanent presence of Israel security forces or Israeli civilians in the areas of Gaza Strip . . . . As a result, there will be no basis for claiming that the Gaza Strip is occupied territory." Israel Ministry of Foreign Affairs, The Disengagement Plan – General Outline (Apr. 18, 2004), *available at* <http://www.mfa.gov.il/MFA/Peace+Process/Reference+Documents/Disengagement+Plan++General+Outline.htm>[hereinafter *Disengagement Plan*].

The Israeli High Court, in a case upholding the government's restrictions on the flow of electricity from Israel to the Gaza Strip, has also held that the region is no longer occupied:

In this context, we note that since September 2005, Israel no longer has effective control over what takes place within the territory of the Gaza Strip. The military government that previously existed in that territory was abolished by means of a decision of the government, and Israeli soldiers are not present in that area on a permanent basis and do not direct what occurs there. In these circumstances, under the international law of occupation, the State of Israel has no general obligation to care for the welfare of the residents of the Strip or to maintain public order within the Gaza Strip. Israel also does not have the effective capability, in its current status, to maintain order and manage civilian life in the

Whether Gaza is occupied or not is of considerable legal consequence. First, international humanitarian law imposes affirmative duties on an occupier in its treatment of the occupied civilian population. Israel, both before and during Operation Cast Lead itself, failed its legal duties as an occupying authority. Second, the law of occupation also restricts an occupier's right to use force in maintaining public order in the territory it occupies. Israel, in unleashing its powerful military against the Gaza Strip, vastly exceeded the limits of acceptable legal force for an occupying authority. Third, if Israel continues to occupy the Gaza Strip, it may not be able to plead self-defense as justification for Operation Cast Lead. Arguably, a state cannot claim self-defense vis-à-vis a territory it has already occupied. Finally, whether Israel's attack on the Gaza Strip constitutes the crime of aggression may turn, in part, on the Strip's status, as that crime, classically, involves an attack by one state against another state, rather than an attack by a state on a non-state entity. For all these reasons, we must, as a preliminary matter, clarify Gaza's current status in international law. The better argument, in our view, is that the Gaza Strip continues to be occupied territory. This section will lay out the arguments concerning the applicable law, while subsequent sections will take up the factual record and detail the manners in which Israel violated its legal obligations.

#### *A. Israel's Continuing Occupation of the Gaza Strip*

The Gaza Strip was formerly part of the British Mandate for Palestine.<sup>33</sup> Under the United Nations partition plan for Palestine, Gaza was slated to become part of a Palestinian Arab state.<sup>34</sup> That state never came to fruition, and after the first Arab-Israeli war in 1948, the Gaza Strip fell under Egyptian administration.<sup>35</sup>

Israel seized control of the Gaza Strip (and the West Bank, Golan Heights, and Sinai Peninsula) in the June 1967 war, immediately establishing a military government there.<sup>36</sup> Israel maintained that, because it had not displaced a recognized sovereign state in taking control of the Gaza Strip and the West Bank, these territories were "administered" by Israel, but not "occupied" within the meaning of international law.<sup>37</sup> Israel's position was rejected by most authorities, and in time, its status as an occupying power was confirmed by the International

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Gaza Strip.

HCI 9132/07 Gaber v. Prime Minister [2008] IsrSC 215, available at [http://www.mfa.gov.il/NR/rdonlyres/938CCD2E-89C7-4E77-B071-56772DFF79CC/0/HCI\\_Gazaelectricity.pdf](http://www.mfa.gov.il/NR/rdonlyres/938CCD2E-89C7-4E77-B071-56772DFF79CC/0/HCI_Gazaelectricity.pdf)

32. See *infra* notes 53, 63.

33. CHARLES D. SMITH, PALESTINE AND THE ARAB-ISRAELI CONFLICT 106-07 (Katherine E. Kurzman, Mary T. Stone, & Bridget Leahy eds., Bedford/St. Martin's 2001).

34. *Id.* at 192, 195, 202.

35. See *id.* at 203.

36. Meir Shamgar, *Legal Concepts and Problems of the Israeli Military Government – The Initial Stage*, in 1 MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL, 1967-1980: THE LEGAL ASPECTS 13, 21-22 (Meir Shamgar ed., 1982).

37. This is sometimes referred to as the "missing reversioner" thesis. Yehuda Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 ISR. L. R. 279 (1968).

Court of Justice,<sup>38</sup> the Oslo Accords,<sup>39</sup> the Israeli Supreme Court,<sup>40</sup> the UN Security Council,<sup>41</sup> the UN General Assembly,<sup>42</sup> and the U.S. State Department.<sup>43</sup>

Israel dismantled its settlements and withdrew its forces from its permanent military bases in Gaza in 2005. Though Israel maintains that its “withdrawal” from Gaza ended its occupation of the Strip<sup>44</sup> and that, accordingly, it no longer has any obligations to the population of Gaza,<sup>45</sup> it is still widely accepted that Israel continues to occupy the Gaza Strip as a matter of international law.<sup>46</sup>

Article 42 of the 1907 Hague Regulations sets forth the legal standard defining occupation: “Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.”<sup>47</sup> The

38. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 166 (July 9).

39. PALESTINIAN LIBERATION ORGANIZATION – NEGOTIATIONS AFFAIRS DEPARTMENT, THE ISRAELI “DISENGAGEMENT” PLAN: GAZA STILL OCCUPIED (Sept. 2005), available at [http://www.nadplo.org/inner.php?view=facts\\_gaza\\_GAZA\\_STILL\\_OCCUPIED](http://www.nadplo.org/inner.php?view=facts_gaza_GAZA_STILL_OCCUPIED) (citing Agreement on Preparatory Powers and Responsibilities (Aug. 9, 1994), Art. XIII, §§ 4-5) [hereinafter *Palestinian Liberation Organization – Negotiations Affairs Department*].

40. *Id.* (citing *Ayub, et al. v. Minister of Defense, et al.*, 606 Il. H.C. 78; *Adjuri v. IDF Commander*, 7015 Il. H.C. 02, 7019 Il. H.C. 02 (2002); and 2056 Il. H.C. 04 (2004)).

41. S.C. Res. 1544, U.N. Doc. S/RES/1544 (May 19, 2004), cited in *Palestinian Liberation Organization – Negotiations Affairs Department*, *supra* note 39.

42. G.A. Res. 58/292, U.N. Doc. A/RES/58/292 (May 17, 2004), cited in *Palestinian Liberation Organization – Negotiations Affairs Department*, *supra* note 39.

43. *Palestinian Liberation Organization – Negotiations Affairs Department*, *supra* note 39 (citing U.S. DEP’T OF STATE, COUNTRY REPORT ON HUMAN RIGHTS PRACTICES: ISRAEL AND THE OCCUPIED TERRITORIES 2003 (Feb. 25, 2004), available at <http://www.state.gov/g/drl/rls/hrrpt/2003/27929.htm>).

44. The Disengagement Plan prepared by the government of Israel before the withdrawal, for example, states: “Upon completion of this process, there shall no longer be any permanent presence of Israel security forces or Israeli civilians in the areas of the Gaza Strip . . . As a result, there will be no basis for claiming that the Gaza Strip is occupied territory.” *Disengagement Plan*, *supra* note 31.

45. *See, e.g.*, Israel’s Revised Disengagement Plan, which states: “The completion of the plan will serve to dispel the claims regarding Israel’s responsibility for the Palestinians in the Gaza Strip.” Israel Ministry of Foreign Affairs, Revised Disengagement Plan (June 6, 2004), available at <http://www.mfa.gov.il/MFA/Peace+Process/Reference+Documents/Revised+Disengagement+Plan+6-June-2004.htm> [hereinafter *Revised Disengagement Plan*].

46. *See, e.g.*, U.N. Human Rights Council, *Human Rights Situation in Palestine and Other Occupied Arab Territories*, ¶ 11(d), U.N. Doc. A/HRC/7/17 (Jan. 21, 2008) (prepared by John Dugard) (stating that the “fact that Gaza remains occupied territory means that Israel’s actions toward Gaza must be measured against the standards of international humanitarian law”) [hereinafter *Human Rights Situation in Palestine and Other Occupied Arab Territories*]; *see also Israel: Threatened Sanctions on Gaza Violate Laws of War, Rocket Attacks Cannot Justify Collective Punishment*, HUMAN RIGHTS WATCH, Sept. 19, 2007, available at <http://hrw.org/english/docs/2007/09/20/isrlpa16920.htm> (stating “Israel remains an occupying power in the Gaza Strip even though it withdrew its military forces and illegal civilian settlers in August and September 2005”) [hereinafter *Rocket Attacks Cannot Justify Collective Punishment*]; Central Intelligence Agency, *The World Factbook* (Sept. 24, 2009), available at <https://www.cia.gov/library/publications/the-world-factbook/geos/gz.html> (stating the “West Bank and Gaza Strip are Israeli-occupied with current status subject to the Israeli-Palestinian Interim Agreement - permanent status to be determined through further negotiation; Israel removed settlers and military personnel from the Gaza Strip in August 2005”).

47. *Laws and Customs of War on Land* (Hague IV), art. 42, Oct. 18, 1907, 36 Stat. 2277, T.S. 539

test to establish occupation under Article 42 of the Hague Regulations is that of "effective control."<sup>48</sup>

The test does not require the presence of permanent military personnel in the occupied territory.<sup>49</sup> This principle was confirmed by the Nuremberg Tribunal in *USA v. Wilhelm List et al.*, in which the Tribunal determined that the German occupation of Greece and Yugoslavia did not end with the withdraw of German forces and the assertion of some degree of authority by indigenous groupings because the German military could have reentered the territories and exercised effective control at will.<sup>50</sup>

Israel maintains control over Gaza to a much greater degree than that exercised by Germany over Yugoslavia and Greece, which it should be noted, are significantly larger than the Gaza Strip. "The test for application of the legal regime of occupation," the Tribunal stated in the *List Case*, "is not whether the occupying power fails to exercise effective control over the territory, but whether it has the ability to exercise such power."<sup>51</sup> Israel not only retains the *ability* to exercise such power, but also continues actively to exercise such power. Israel, for example, maintains authority over Gaza in accordance with its Revised Disengagement Plan, which states: "Israel will guard and monitor the external land perimeter of the Gaza Strip, will continue to maintain exclusive authority in Gaza airspace, and will continue to exercise security activity in the sea off the coast of the Gaza Strip."<sup>52</sup>

Indeed, Israel regularly patrols Gaza's airspace—legally, part of Gaza's territory—with both manned and unmanned aircraft.<sup>53</sup> Israeli naval ships, moreover, daily patrol Gaza's territorial waters.<sup>54</sup> Additionally, Israel regularly conducts military operations within Gaza itself,<sup>55</sup> and the withdrawal of its land troops has had little effect on the frequency, scale, or destructiveness of Israeli military activities in the Strip.<sup>56</sup> Israeli military forces killed approximately 1,250

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[hereinafter *Hague IV*].

48. Iain Scobbie, *An Intimate Disengagement: Israel's Withdrawal from Gaza, the Law of Occupation and of Self-Determination*, 11 Y.B. ISLAMIC AND MID. EASTERN L. 3, 20-22 (2004-05).

49. *Id.*

50. U.S. v. Wilhelm List, et al. (Hostages Trial), 15 I.L.R. 646 (Nuremberg Military Tribunal 1948), *quoted in* Palestinian Liberation Organization – Negotiations Affairs Department, *supra* note 39.

51. *Id.*

52. Revised Disengagement Plan, *supra* note 45.

53. B'TSELEM, THE GAZA STRIP: ISRAEL'S CONTROL OF THE AIRSPACE AND TERRITORIAL WATERS OF THE GAZA STRIP, *available at* [http://www.btselem.org/english/gaza\\_strip/control\\_on\\_air\\_space\\_and\\_territorial\\_waters.asp](http://www.btselem.org/english/gaza_strip/control_on_air_space_and_territorial_waters.asp) [hereinafter *Israel's Control of the Airspace and Territorial Waters of the Gaza Strip*]; *see also* Jimmy Johnson, *Unmanned Aerial Vehicles and the Warfare of Inequality Management*, THE ELECTRONIC INTIFADA, Feb. 17, 2009, *available at* <http://electronicintifada.net/v2/article10312.shtml> (discussing Israel's use of unmanned aircraft).

54. Israel's Control of the Airspace and Territorial Waters of the Gaza Strip, *supra* note 53.

55. Israel Ministry of Foreign Affairs, *Terror in Gaza: Twelve Months Since the Hamas Takeover* (June 16, 2008), *available at* <http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Palestinian+terror+since+2000/Terror+in+Gaza-+Two+months+since+the+Hamas+takeover+16-Aug-2007.htm>.

56. In March of 2008, Israeli Deputy Defense Minister Matan Vilnai stated that Israeli forces "are

Palestinians in the Gaza Strip between September 2005 and December 27, 2008.<sup>57</sup> According to the UN Office for the Coordination of Humanitarian Affairs, 112 Palestinians were killed in Gaza in 2005, 531 in 2006, 301 in 2007, and 389 in the first ten months of 2008.<sup>58</sup>

Finally, Israel exercises almost complete control over the movement of people and goods into and out of the Strip.<sup>59</sup> The Rafah Crossing with Egypt is operated in accordance with an agreement concluded between the Palestinian Authority and Israel, by which the Palestinian Authority and Egypt are authorized to administer the crossing,<sup>60</sup> but Israel is able to shut the crossing at will.<sup>61</sup> Israel also continues to control Gaza's telecommunications network, electricity and sewage systems, and population registry.<sup>62</sup> Control of Gaza's population registry gives Israel the authority to determine legal residency in Gaza, thus allowing the Israeli military the power to prevent the entrance into the Strip of Palestinians it chooses not to register.<sup>63</sup>

The degree of control Israel retains over the Gaza Strip makes it clear that, in the words of UN Special Rapporteur John Dugard, "statements by the government of Israel that the withdrawal ended the occupation are grossly inaccurate."<sup>64</sup>

#### *B. Israel's obligations under the Law of Occupation*

International humanitarian law imposes specific obligations on occupying powers, among them Israel in its continuing occupation of the Gaza Strip. These obligations are spelled out in provisions of the Hague Convention (II) respecting the Laws and Customs of War on Land and its annexed regulations of 1907<sup>65</sup>, the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of

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permanently engaged in Gaza and what we are doing now is within the scope of such activities." Steven Erlanger & Taghreed El-Khodary, *Israel Takes Gaza Fight to Next Level in a Day of Strikes*, N.Y. TIMES, Mar. 2, 2008, at A3, available at <http://www.nytimes.com/2008/03/02/world/middleeast/02mideast.html?hp>.

57. Victor Kattan, *Gaza: Not a War of Self-Defense*, JURIST (Jan. 15, 2009), <http://jurist.law.pitt.edu/forumy/2009/01/gaza-not-war-of-self-defense.php> (citing information collected by the U.N. Office for the Coordination of Humanitarian Affairs, Occupied Palestinian Territory, <http://www.ochaopt.org/>) [hereinafter *Kattan*].

58. U.N. Office for the Coordination of Humanitarian Affairs, Occupied Palestinian Territory, Protection of Civilians: Casualties Database, available at <http://www.ochaopt.org/poc/> (click Download the Casualties Summary Statistics in Excel Format).

59. Human Rights Situation in Palestine and Other Occupied Arab Territories, *supra* note 46, at ¶ 11.

60. Palestinian Liberation Organization – Negotiations Affairs Department, *supra* note 39.

61. Rocket Attacks Cannot Justify Collective Punishment, *supra* note 46.

62. *Gaza: Israel's Fuel and Power Cuts Violate Laws of War, Civilians Should Not be Penalized for Rocket Attacks by Armed Groups*, HUMAN RIGHTS WATCH, Oct. 29, 2007, available at [http://hrw.org/english/docs/2007/10/29/isrlpa17198\\_txt.htm](http://hrw.org/english/docs/2007/10/29/isrlpa17198_txt.htm).

63. Human Rights Situation in Palestine and Other Occupied Arab Territories, *supra* note 46, at ¶ 11.

64. U.N. Human Rights Council, *Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967*, ¶ 8, U.N. Doc. A/HRC/2/5 (Sept. 5, 2006).

65. Laws and Customs of War on Land (Hague II), art. 43, July 29, 1899, 32 Stat. 1803, T.S. 403 [hereinafter *Hague II*].

War of 1949<sup>66</sup>, and customary norms of international law pertaining to belligerent occupation. As a general matter, these regulations are designed to reduce the impact of military occupation on civilian life to the maximum extent possible, while preserving the freedom of the occupier to act according to military necessity.<sup>67</sup>

Article 43 of the Hague Regulations, for example, requires that an occupying power “take all steps in his power to re-establish and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.”<sup>68</sup> The Fourth Geneva Convention describes civilians who fall under the control of a foreign military authority as “protected persons,”<sup>69</sup> and vests the occupying forces with responsibility to ensure their basic welfare. Article 3 of the Fourth Geneva Convention mandates that civilians must be treated humanely.<sup>70</sup> Occupying authorities may not willfully kill, ill-treat, or deport protected persons,<sup>71</sup> and may seize or destroy civilian property only if militarily necessary.<sup>72</sup> Occupiers must ensure supplies of food and medical supplies,<sup>73</sup> and facilitate the care and education of children.<sup>74</sup> In the event that food or other vital supplies in the territory become inadequate, the occupier is obligated to permit the entry of relief consignments.<sup>75</sup>

All of these duties were incumbent upon Israel in its occupation of the Gaza Strip. Subsequent sections will demonstrate that Israel violated many of its legal obligations under the law of occupation, before and during Operation Cast Lead.

### *C. Law enforcement or “armed conflict”?*

While an occupying force has a duty—and a right—to maintain public order in an occupied territory, its obligation to protect the civilian population implies limits on the amount of force that can be lawfully employed to fulfill that duty. According to Amnesty International:

Under normal circumstances, the occupying power is bound by law enforcement standards derived from human rights law when maintaining order in occupied territory. For example, these would require the

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66. Convention Relative to the Protection of Civilian Persons in Times of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter *Geneva Convention IV*].

67. The International Committee of the Red Cross (ICRC) commentary to Article 27 of the Fourth Geneva Convention states that “regulations concerning occupation are based on the idea of the personal freedom of civilians remaining in general unimpaired.” International Committee of the Red Cross (ICRC), Convention (IV) Relative to the Protection of Civilian Persons in Time of War, <http://www.icrc.org/ihl.nsf/COM/380-600032?OpenDocument> (last visited October 1, 2009).

68. Hague II, *supra* note 65, at art. 43.

69. Geneva Convention IV, *supra* note 66, at art. 4.

70. *Id.* at art. 3. This article is common to the four Geneva Conventions, and is often referred to as “Common Article 3.”

71. *Id.* at art. 49.

72. *Id.* at art. 53.

73. *Id.* at art. 55.

74. *Id.* at art. 50.

75. *Id.* at art. 60.

occupying power to seek to arrest, rather than kill, members of armed groups suspected of carrying out attacks, and to use the minimum amount of force necessary in countering any security threat.<sup>76</sup>

Nonetheless, Israel has been pressing to shift the legal basis for its troops' operations in the Occupied Territories since 2001 from a law enforcement model to one of "armed conflict."<sup>77</sup> This move was necessary because some of Israel's practices in suppressing the second Palestinian "*intifada*" ("uprising")—also called the "*al-Aksa Intifada*"—clearly departed from a law enforcement model. The most obvious of these practices was "targeted killings," in which Israel was assassinating Palestinian leaders and other militants in the West Bank and the Gaza Strip without making any attempt to arrest them.<sup>78</sup> While Israel had engaged in deliberate killings of Palestinians in the Occupied Territories since the 1970s, it had generally done so surreptitiously, by means of "death squads"—and had typically denied the practice.<sup>79</sup> During the *al-Aksa Intifada*, however, the scale of these killings greatly increased.<sup>80</sup> Moreover, Israel resorted, in some cases, to highly public means of killings—including bombings by air—that often caused many civilian casualties, and in which the absence of any attempt to arrest was patent.<sup>81</sup> In 2002, for example, an Israeli F-16 fighter-bomber dropped a one ton bomb on an apartment building in Gaza, killing Hamas military wing leader Salah Shehadeh and fourteen innocent bystanders.<sup>82</sup> Israel had also resorted to massive violence in suppressing riots, including the use of helicopter gunships, tanks, and F-16 aircraft, that did not square easily with a law enforcement model.<sup>83</sup>

Israeli representatives attempted to justify these actions by arguing that the circumstances prevailing in the Occupied Territories constituted an "armed conflict short of war." Israeli submissions to the "Sharm el-Sheikh Fact Finding Committee" headed by former-U.S. Senator George Mitchell in April 2001

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76. The Conflict in Gaza: A Briefing on Applicable Law, Investigations, and Accountability, *supra* note 17, at 6.

77. Feldman & Blau, *supra* note 21.

78. *Id.*

79. STEVEN R. DAVID, FATAL CHOICES: ISRAEL'S POLICY OF TARGETED KILLINGS 7 (The Begin-Sadat Center for Strategic Studies, Bar-Ilan University: Mideast Security and Policy Studies No. 51 2002), available at <http://www.biu.ac.il/Besa/david.pdf>.

80. *Id.* See also Yossi Melman, *Targeted Killings: A Retro Fashion Very Much in Vogue*, HAARETZ, Mar. 15, 2009, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=407999&contrastID=2>. According to Gal Luft, Israel committed at least eighty targeted killings in the first two years of the al-Aqsa Intifada. Gal Luft, *The Logic of Israel's Targeted Killings*, 10 MIDDLE EAST QUARTERLY 1, Winter 2003.

81. This does not mean, however, that Israel abandoned its use of death squads during the al-Aqsa Intifada. See Donald Macintyre, *Israel's Death Squads: A Soldier's Story*, THE INDEPENDENT, Mar. 1, 2009, available at <http://www.independent.co.uk/news/world/middle-east/israels-death-squads-a-soldiers-story-1634774.html>.

82. Gideon Levy, At the Salah Shehadeh Home in Gaza City, Znet, Aug. 2, 2002, <http://www.zmag.org/znet/viewArticle/11823>; see also Yuval Yoaz, *State Commission to Examine Civilian Deaths in 2002 Shahade Assassination*, HAARETZ, Sept. 19, 2007, <http://www.haaretz.com/hasen/spages/904552.html>.

83. ZEEV MAOZ, DEFENDING THE HOLY LAND: A CRITICAL ANALYSIS OF ISRAEL'S SECURITY AND FOREIGN POLICY 265 (2006).

claimed that Israel was facing “live fire attacks on a significant scale” carried out by “a well-armed and organised militia.”<sup>84</sup>

While the phrase “armed conflict short of war” had no established meaning in international law, the Mitchell committee report did not categorically repudiate it. It noted that in the great majority of confrontations with the Israeli military during the uprising—73 percent—Palestinians were, in fact, unarmed, and recommended that “the IDF adopt and enforce policies and procedures encouraging non-lethal responses to unarmed demonstrators.”<sup>85</sup> It also criticized the application of the “armed conflict short of war” notion as “overly broad,” and counseled against its “blanket” use.<sup>86</sup> But in doing so, the Report appeared to accept the possibility that the categorization could be valid for some kinds of confrontations between the Israeli military and Palestinians in the Occupied Territories.

Needless to say, the Mitchell Report pronounced the opinions of its authors, not international law. Nonetheless, its tacit and partial acceptance of Israel’s “armed conflict” model opened the door for an adaptation of the law of occupation that permitted war like tactics in occupied territories when fighting there reached a requisite scale and level of intensity.

The question of which model should govern the Israeli military’s actions in the Occupied Territories—law enforcement or armed conflict—was squarely confronted by the Israeli High Court in its 2006 judgment in a challenge to the Israeli military’s “targeted killings.” The High Court held that: “The general, principled starting point is that between Israel and the various terrorist organizations active in Judea, Samaria, and the Gaza Strip (hereinafter “the area”) a continuous situation of armed conflict has existed since the first *intifada*,”<sup>87</sup> and that the applicable law, therefore, was that of international armed conflict.<sup>88</sup> The

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84. SHARM EL-SHEIKH FACT FINDING COMMITTEE, THE MITCHELL REPORT 24 (Apr. 30, 2001), available at [http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressdata/EN/reports/ACF319.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressdata/EN/reports/ACF319.pdf).

85. *Id.* at 24, 35.

86. *Id.* at 25.

87. HCJ 769/02 Pub. Comm. Against Torture in Israel v. Israel [2005] IsrSC 9, available at [http://elyon1.court.gov.il/Files\\_ENG/02/690/007/A34/02007690.A34.pdf](http://elyon1.court.gov.il/Files_ENG/02/690/007/A34/02007690.A34.pdf).

88. *Id.* at 11. The High Court also found that, where the law of international humanitarian law left gaps, these gaps could be filled by reference to international human rights law. It further rejected the relevance of the law of *non-international* armed conflict. International humanitarian law regulates both international armed conflicts and non-international ones (that is, conflicts occurring within the borders of a single state), but the sources of law for the two kinds of conflicts differ. The principal sources of law governing international armed conflict are the four Geneva Conventions of 1949 (excluding Common Article 3), and the 1977 Protocol I Additional to the Geneva Conventions. Non-international armed conflicts, on the other hand, are governed by Common Article 3 of the four Geneva Conventions, and the 1977 Protocol II to the Geneva Conventions. Rule of Law of Armed Conflicts Project, *The Qualification of Conflicts*, GENEVA ACADEMY OF INT'L HUMANITARIAN LAW AND HUMAN RIGHTS, [http://www.adh-geneva.ch/RULAC/qualification\\_of\\_armed\\_conflict.php](http://www.adh-geneva.ch/RULAC/qualification_of_armed_conflict.php). The main difference between these two branches of international humanitarian law is that, while the law of international armed conflicts includes a clear definition of a “combatant,” and thus, by contrast, a clear means of identifying “non-combatants,” the law of non-international conflict lacks such definitions. The Conflict

court upheld the practice of targeted killings under limited circumstances, but relied on principles from Protocol I to the Geneva Conventions, even though Israel has neither signed Protocol I nor has it enacted any legislation implementing the Protocol.<sup>89</sup> The High Court thus acknowledged that Protocol I is part of customary international law, including most critically, the protection in Article 51(3) for civilians not taking “direct part in hostilities,” and, as such, was binding on Israeli troops operating in the West Bank and Gaza Strip.<sup>90</sup>

It can be inferred from the Israeli government’s recent actions and statements that it has treated Operation Cast Lead as if it were an international armed conflict. Israel’s attempted invocation of its right to self-defense under Article 51 of the United Nations Charter, and reporting its actions to the United Nations Security Council, are practices consistent with an international armed conflict.<sup>91</sup> Israel’s Ministry of Foreign Affairs has cited articles of Additional Protocol I – which deals with international armed conflict – in accusing Hamas of war crimes during the Gaza fighting.<sup>92</sup>

Neutral observers, such as Amnesty International, seem to have accepted the Israeli view that at least some military operations in occupied territories should be judged according to “armed conflict” standards. “However, if a situation arises in which fighting inside the occupied territory reaches the requisite scale and intensity, then international humanitarian law rules governing humane conduct in warfare apply . . .”<sup>93</sup> In Amnesty’s view, which model applies turns on the particular circumstances. For example, facing a demonstration during a conflict an occupier must revert to law enforcement, not armed conflict, standards.<sup>94</sup>

There is, of course, some appeal to treating different kinds of military occupations according to flexible legal standards; arguably, Israel’s powers and responsibilities as an occupying power should be adjusted in some sense to reflect the changed circumstances following its 2005 “disengagement” from the Gaza Strip. In particular, Israel is no longer in charge of day-to-day administration of Palestinian affairs and has no permanently stationed troops there, and these changes would, presumably, limit Israel’s capacity to meet its full obligations under the established law of occupation. Indeed, Hebrew University law professor

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in Gaza: A Briefing on Applicable Law, Investigations, and Accountability, *supra* note 17, at 11.

89. *Id.* at 12.

90. *Id.*

91. Identical Letters Dated 27 December 2008 from the Permanent Representative of Israel to the United Nations Addressed to the Secretary-General and to the President of the Security Council, *supra* note 3.

92. ISRAELI MINISTRY OF FOREIGN AFFAIRS, HAMAS’S ILLEGAL ATTACKS ON CIVILIANS AND OTHER UNLAWFUL METHODS OF WAR (2009), [http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Hamas+war+against+Israel/Legal\\_aspects\\_of\\_Hamas\\_methods\\_7\\_Jan\\_2009.htm](http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Hamas+war+against+Israel/Legal_aspects_of_Hamas_methods_7_Jan_2009.htm).

93. The Conflict in Gaza: A Briefing on Applicable Law, Investigations, and Accountability, *supra* note 17, at 7. In another view, Israeli actions in the Gaza Strip are subject both to international humanitarian law concerning armed conflicts and the law of occupation. Geneva Academy of Humanitarian Law and Human Rights, Rule of Law in Armed Conflicts Project, Qualification of Armed Conflicts (Oct. 8, 2009), [http://www.adh-geneva.ch/RULAC/qualification\\_of\\_armed\\_conflict.php](http://www.adh-geneva.ch/RULAC/qualification_of_armed_conflict.php).

94. *Id.*

Yuval Shany advises “the establishment of nuanced tests, which permit varying levels of legal responsibilities commensurate with varying levels of physical control” for the situation in Gaza and for other “post-modern” occupations.<sup>95</sup> The Israeli High Court has taken tentative steps in that direction in a case upholding the legality of Israel’s restrictions on the supply of industrial fuel and electricity to the Gaza Strip. The High Court held that, while occupation of the Gaza Strip had formally ended, Israel had ongoing responsibilities toward the Gaza Strip due to its control of its borders and airspace, and by virtue of the Strip’s dependence on Israel resulting from 38 years of military occupation.<sup>96</sup> The Court appeared to be recognizing an intermediary position between the “all” of the full law of occupation or the “nothing” of a military’s responsibilities toward territories outside of its boundaries.

Yet any movement toward flexible standards for belligerent occupants—either in determining whether an occupation exists as a matter of international law, or in judging which among the duties of the law of occupation should pertain in particular circumstances or not—could initiate a significant erosion of the protections afforded by international humanitarian law. We should, accordingly, consider such shifts with extreme caution. It is by virtue of superior military strength that occupiers become occupiers; it is to be expected, therefore, that they would press for legal standards that permit them to exploit their military advantage. It will be belligerent occupants who will choose when and where to resort to the “armed conflict” model, and which of their duties under the law of occupation they may suspend, and for how long. It is, moreover, comparatively easy for any occupying power to manufacture circumstances that could be

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95. Yuval Shany, *Binary Law Meets Complex Reality: The Gaza Occupation Debate*, 41 *ISR.L.R.* 68, 86 (2008).

96. In the words of the court:

In this context, we note that since September 2005, Israel no longer has effective control over what takes place within the territory of the Gaza Strip. The military government that previously existed in that territory was abolished by means of a decision of the government, and Israeli soldiers are not present in that area on a permanent basis and do not direct what occurs there. In these circumstances, under the international law of occupation, the State of Israel has no general obligation to care for the welfare of the residents of the Strip or to maintain public order within the Gaza Strip. Israel also does not have the effective capability, in its current status, to maintain order and manage civilian life in the Gaza Strip. Under the circumstances that have developed, the primary obligations imposed on the State of Israel regarding residents of the Gaza Strip are derived from the state of warfare that currently ensues between Israel and the Hamas organization which controls the Gaza Strip; these obligations also stem from the degree of control that the State of Israel has at the border crossings between it and the Gaza Strip; and also from the situation that was created between the State of Israel and the territory of the Gaza Strip after years of Israeli military control in the area, following which the Gaza Strip is now almost totally dependent on Israel for its supply of electricity.

HCJ 9132/07 Gaber v. Prime Minister [2008] *IsrSC* 8, available at <http://www.mfa.gov.il/NR/rdonlyres/938CCD2E-89C7-4E77-B071-56772DFF79CC/0/HCJGazaelectricity.pdf>.

presented to the outside world to justify the use of military force on a large scale—and to be judged according to the “armed conflict” standard. Cleaving to the law enforcement standard, on the contrary, affords occupiers prospective clarity over their responsibilities and allows others to retrospectively assess to what extent those responsibilities have been met.

It should be noted that Israel’s attempt to remake international humanitarian law—in this and in other respects—is completely self-conscious and deliberate. As Colonel Daniel Reisner, former head of the International Law Division of the Israeli Military Advocate General, stated in a recent interview:

If you do something for long enough, the world will accept it. The whole of international law is now based on the notion that an act that is forbidden today becomes permissible if executed by enough countries . . . International law progresses through violations. We invented the targeted assassination thesis and we had to push it. At first there were protrusions that made it hard to insert easily into the legal moulds. Eight years later it is in the center of the bounds of legitimacy.<sup>97</sup>

Permitting Israel to maintain its occupation through effective control of the Gaza Strip, while freeing its military to use massive force against the residents of the region, is fundamentally unfair. It is contrary to the aim of international humanitarian law to minimize civilian suffering in times of war. It forces the people of the Gaza Strip to face one of the most powerful militaries in the world without the benefit either of its own military, or of any realistic means to acquire the means to defend itself.<sup>98</sup> Thus, we believe that Israel’s attempt to transform international humanitarian law in this respect should be firmly resisted, and that its military’s operations in the Gaza Strip should continue to be evaluated by law enforcement standards.

At the same time, we cannot say that Israel’s effort has failed; as we have noted above, observers appear to have accepted Israel’s position, and have analyzed Operation Cast Lead as if it were an instance of “international armed conflict.” Therefore, we will consider Israel’s actions during Operation Cast Lead according to the law of occupation, where appropriate, and according to the law of international armed conflict. Under either legal regime, however, Israel appears to have committed massive violations.

### III. PRELUDE TO THE INVASION

In one sense, Israel’s December 2008 attack on the Gaza Strip was not a “war” in itself. Rather, it was an abrupt escalation in a conflict that had been previously simmering for months, if not years. Placing the invasion in proper context requires that we trace developments since 2005, when Israel withdrew its

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97. Feldman & Blau, *supra* note 21.

98. Central Intelligence Agency, The World Factbook, Country Comparison: Military Expenditures, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2034rank.html?countryName=Israel&countryCode=is&regionCode=me&rank=6#is> (showing Israel spends 7.3% of GDP on military).

settlers and troops from the Gaza Strip, as we have seen, claiming to end its then thirty-eight year military occupation of the region.<sup>99</sup> Day-to-day administration of Gaza thereafter was left in the hands of the Palestinian Authority.<sup>100</sup>

*A. The 2006 Elections*

In January 2006, members of the Hamas-affiliated "Change and Reform" list won seventy-six of 132 seats in the Palestinian Legislative Council, and with this majority, earned the right to form the next cabinet in the Palestinian Authority.<sup>101</sup> Israel and the United States quickly initiated sanctions against the Territories and Hamas, demanding that they recognize Israel, renounce all violence, and agree to honor previous agreements signed by Palestinian leaders.<sup>102</sup> Israel withheld \$50 million in customs revenues it had collected on behalf of the Palestinian Authority, freezing assets while tightening restrictions and prohibitions on the movement of people and goods into, out of, and within the Territories.<sup>103</sup> Meanwhile the United States barred access to U.S. banking and foreign aid.<sup>104</sup> The election results spurred Prime Minister Mahmoud Abbas of Fatah to join Hamas officials in creating a unity government that took office on March 17, 2007.<sup>105</sup>

The freezing of assets and the imposition of economic sanctions, even before Hamas' formation of a government, set the stage for impending fissures in the fragile coalition. The sanctions compelled the Palestinian Authority to suspend salary payments to 160,000 civil servants in the Occupied Territories by the following March.<sup>106</sup>

*B. The Hamas takeover and Israel's response*

By June 2007, tensions between Hamas and Fatah spilled over into armed conflict in the streets of Gaza.<sup>107</sup> By some reports, Hamas feared an impending coup against it by followers of Fatah and attacked preemptively, routing Fatah fighters within a matter of days and establishing Hamas as the sole ruling party in

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99. *See supra* Section II.

100. The Palestinian Authority is an entity created by the "Oslo Accords," a series of agreements between the government of Israel and the Palestine Liberation Organization between 1993 and 1998. The Palestinian Authority (PA) has exercised limited powers of administration in parts of the West Bank and the Gaza Strip over the Palestinian residents of those regions. The PA is headed by an elected president, and by a prime minister. The Palestinian Legislative Council acts as the PA parliament. *See generally* GEOFFREY WATSON, *THE OSLO ACCORDS: INTERNATIONAL LAW AND THE ISRAELI-PALESTINIAN PEACE AGREEMENTS* (2000).

101. Scott Wilson, *Hamas Sweeps Palestinian Elections, Complicating Peace Efforts in Mideast*, *THE WASHINGTON POST*, Jan. 27, 2006, at A1.

102. ALJAZEERA.NET, Middle East News, Profile, Hamas, <http://english.aljazeera.net/news/middleeast/2009/01/20091115216586178.html>.

103. *Israel to Impose Hamas Sanctions*, *BBC NEWS*, February 19, 2006, [http://news.bbc.co.uk/2/hi/middle\\_east/4729000.stm](http://news.bbc.co.uk/2/hi/middle_east/4729000.stm).

104. *Id.*

105. WORLD BANK, *WEST BANK & GAZA COUNTRY BRIEF* (2008), available at <http://go.worldbank.org/Q8OGMLXI40>.

106. *Id.*

107. *Id.*

the Gaza Strip.<sup>108</sup> The schism occurred amidst ongoing clashes between Israel and Hamas fighters, leading up to an Israeli ground incursion into the Strip on June 27.<sup>109</sup>

Israel responded to Hamas' ascension by imposing a blockade against the Gaza Strip, tightly restricting the flow of goods and people into and out of the Gaza Strip.<sup>110</sup> The effects of the closure and the isolation of the Gazan population were dire. Poverty reached exorbitant levels and unemployment approached 40 percent (some estimates were well above 50 percent).<sup>111</sup> Just prior to Operation Cast Lead, 60 percent of Gazans were living below the poverty line, 35 percent in extreme poverty.<sup>112</sup> Over 80 percent of the population became dependent upon some form of humanitarian aid.<sup>113</sup>

By February 2008, the number of truckloads of aid allowed to enter the Strip had declined by 86 percent from the year before the blockade.<sup>114</sup> Since those figures were released, there have been even steeper cutoffs in aid, with near-complete closure of all crossings into and out of the Strip between November 5 and 16, 2008.<sup>115</sup> During Operation Cast Lead, an average of thirty truckloads per day bearing food, cargo, and basic necessities were allowed into Gaza by Israeli authorities that went to support a dependent population of over one million.<sup>116</sup> For the trickle of supplies that managed to reach Palestinians inside Gaza during that time, tons more spoiled under the sun at border crossings, barred passage by the Israeli military.<sup>117</sup>

Restrictions and closures along the coast and at the borders have had

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108. David Rose, *The Gaza Bombshell*, VANITY FAIR, Apr. 8, 2008, <http://www.vanityfair.com/politics/features/2008/04/gaza200804>.

109. Ian Fisher & Taghreed El-Khodary, *Israelis Kill 11 Militants Inside Gaza; 2 Civilians Die*, NY TIMES, June 28, 2007, at A10.

110. Heather Sharp, *Guide: Gaza Under Blockade*, BBC NEWS, June 15, 2009, [http://news.bbc.co.uk/2/hi/middle\\_east/7545636.stm](http://news.bbc.co.uk/2/hi/middle_east/7545636.stm) [hereinafter *Sharp*].

111. INT'L MONETARY FUND AD HOC LIAISON COMMITTEE MEETING, MACROECONOMIC AND FISCAL DEVELOPMENTS IN THE WEST BANK AND GAZA 2, n. 1 (2007), available at [http://domino.un.org/pdfs/IMF\\_AHLCrep240907.pdf](http://domino.un.org/pdfs/IMF_AHLCrep240907.pdf).

112. *Id.*

113. U.N. Office for the Coordination of Humanitarian Affairs, OCHA Special Focus: Occupied Palestinian Territory, *The Closure of the Gaza Strip: The Economic and Humanitarian Consequences*, at 1 (Dec. 2007), available at [http://www.ochaopt.org/documents/Gaza\\_Special\\_Focus\\_December\\_2007.pdf](http://www.ochaopt.org/documents/Gaza_Special_Focus_December_2007.pdf).

114. OXFAM INTERNATIONAL, THE GAZA STRIP: A HUMANITARIAN IMPLOSION 8 (Sept. 2008), available at [http://www.oxfam.org.uk/resources/downloads/oxfam\\_gaza\\_lowres.pdf](http://www.oxfam.org.uk/resources/downloads/oxfam_gaza_lowres.pdf) [hereinafter *A Humanitarian Implosion*].

115. Int'l Comm. of the Red Cross, Interview with Katharina Ritz Head of Mission for the Occupied Territories, Gaza: Responding to Urgent Medical Needs of Choked-off Strip, <http://www.icrc.org/web/eng/siteeng0.nsf/html/palestine-interview-181108>.

116. U.N. Office for the Coordination of Humanitarian Affairs, *The Humanitarian Monitor: Occupied Palestinian territory*, No. 32 (Dec. 2008), available at <http://domino.un.org/unispal.nsf/db942872b9eae454852560f6005a76fb/204aadb8b6892b4a852575440067b032?OpenDocument>.

117. Michael Slackman, *At a Border Crossing, Drivers and Truckloads of Aid for Gaza Go Nowhere*, NEW YORK TIMES, Jan. 28, 2009, at A5, available at <http://www.nytimes.com/2009/01/28/world/africa/28iht-egypt.1.19737976.html>.

oppressive and disastrous consequences on the general population. Fuel restrictions and naval patrols have decreased the output of Gaza's fishing industries by 98 percent, exacerbating unemployment and the dependency on aid.<sup>118</sup> Lack of imports and raw materials have shut down private businesses and industrial factories.<sup>119</sup> Reduced fuel and lack of spare parts have strained sewage treatment, waste management, water supply, and hospitals.<sup>120</sup> *B'Tselem*, a human rights group, described the humanitarian crisis in Gaza,

As a result of the [blockade], the stocks of imported food products in Gaza are dwindling, driving their prices sky-high, while fruit and vegetables that were intended for export are being sold in Gazan markets at a loss. Many families cannot afford to buy them, however, due to the high poverty rate in Gaza. 80 percent of Gazan households now live below the poverty line, subsisting on less than 2,300 shekels a month for a family of six. Households in deep poverty, living on less than 1,837 shekels a month, currently comprise 66.7 percent of the population. 80 percent of all Gazan families would literally starve without food aid from international agencies.<sup>121</sup>

Under customary international law, a blockade is an act of war.<sup>122</sup> It is employed to cut off communications and supplies of an enemy.<sup>123</sup> While the modern concept extends beyond its original and exclusive maritime roots to include both land and technological blockades, the consistent feature is that a blockade's purpose has been to deprive a military adversary of necessary supplies.<sup>124</sup> A belligerent imposing a blockade upon a region consisting of a civilian population must allow the free passage of relief consignments to the civilian population.<sup>125</sup> In fact, the legality of a blockade under customary international law hinges on the requirement that aid for the civilian population be met with free passage.<sup>126</sup>

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118. U.N. Office for the Coordination of Humanitarian Affairs, *The Humanitarian Monitor: Occupied Palestinian Territory*, No. 23 (Mar. 2008), available at [http://www.ochaopt.org/documents/HM\\_Mar\\_2008.pdf](http://www.ochaopt.org/documents/HM_Mar_2008.pdf).

119. A Humanitarian Implosion, *supra* note 114, at 4-5.

120. Sharp, *supra* note 110.

121. B'TSELEM, THE GAZA STRIP: TIGHTENED SIEGE AND INTENSIFIED ECONOMIC SANCTIONS, available at [http://www.btselem.org/english/Gaza\\_Strip/Siege\\_Tightening.asp](http://www.btselem.org/english/Gaza_Strip/Siege_Tightening.asp).

122. ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW vol. I, at 408 (Peter MacAlister-Smith ed., Max Planck Inst. for Comparative Public Law and Int'l Law Under the Direction of Rudolf Bernhardt 2000).

123. *See id.*

124. INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 ¶ 2095 (Yves Sandoz, Christophe Swinarski, & Bruno Zimmermann eds., Martinus Nijhoff Publishers 1987).

125. ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW vol. IV, at 1401 (Peter MacAlister-Smith ed., Max Planck Inst. for Comparative Public Law and Int'l Law Under the Direction of Rudolf Bernhardt 2000).

126. *See* CUSTOMARY INTERNATIONAL HUMANITARIAN LAW Vol. II, at 1189 (Jean-Marie Henckaerts & Louise Doswald-Beck et al. eds., Cambridge University Press 2005) [hereinafter

The reasons cited for Israel's refusal to allow passage of basic necessities are untenable. Israel claimed that its restrictions were necessary to put pressure on Hamas officials to halt or substantially hinder the firing of rockets into Southern Israel. However, there is no reasonable relationship between depriving Gazan civilians of subsistence items and the suppression of Hamas' rocket launchings against Israeli towns. Israel's duties to "protected persons" as an occupier of the Gaza Strip under Article 55 of the Fourth Geneva Convention require that it allow the passage of all aid, foodstuffs, and water given the severity of the humanitarian crisis. The blockade appears to have clearly violated this provision of the law of occupation.

*C. The blockade as Collective Punishment*

Israel's blockade, which by the launching of Operation Cast Lead had persisted for eighteen months, violated international law in another respect. Under Article 33 of the Fourth Geneva Convention: "No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism . . . against protected persons and their property are prohibited."<sup>127</sup>

This article prohibits the use of collective punishment of protected persons, the breach of which constitutes war crimes.<sup>128</sup> "Protected persons" are civilian individuals who find themselves, in case of an armed conflict or occupation, in the hands of a power of which they are not nationals.<sup>129</sup> The term has also been applied more specifically to refugees and stateless persons.<sup>130</sup>

A blockade against a civilian population inherently raises concerns of collective punishment because of the effect that prohibiting food and other essentials may have, particularly over the long run, on the survival of that population. According to Amnesty International's Middle East and North Africa program director, Malcolm Smart, Israel's action "appears calculated to make an already dire humanitarian situation worse, one in which the most vulnerable—the sick, the elderly, women and children—will bear the brunt, not those responsible for the attacks against Israel."<sup>131</sup>

To reiterate: Israel instituted the blockade against the Gaza Strip not in response to a violent attack, but rather in response to Hamas's ascension to exclusive authority in the Gaza Strip, and earlier in response to the Hamas victory in the 2006 Palestinian elections. Israel, in short, engaged in an act of war against an occupied people, and violated its legal obligations to them long before

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*Customary International Humanitarian Law Vol. II*].

127. Geneva Convention IV, *supra* note 66, at art. 33.

128. *Id.*

129. ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW vol. III, at 1144 (Peter MacAlister-Smith ed. Max Planck Inst. For Comparative Public Law and Int'l Law Under the Direction of Rudolf Bernhardt 2000).

130. *Id.* at 1146.

131. AMNESTY INT'L, ISRAEL CUTS ELECTRICITY AND FOOD SUPPLIES TO GAZA (Jan. 21, 2008), available at <http://www.amnesty.org/en/news-and-updates/news/israel-cuts-electricity-and-food-supplies-gaza-20080121>.

Operation Cast Lead had commenced.

#### *D. The Truce*

Hamas and Israel arrived at a truce agreement, which became effective on June 19, 2008.<sup>132</sup> Israel has consistently claimed that its military offensive in Gaza came about as a result of Hamas' violation of this ceasefire. Foreign Minister Livni, for example, stated the day after the commencement of Operation Cast Lead that "the calm that was achieved through" the truce "worked for a few weeks, and then Hamas deliberately violated the truce by targeting Israel on a daily basis" and by taking other actions contrary to the truce agreement.<sup>133</sup> Livni's assertion that Hamas first violated the ceasefire, and the corresponding implication that Israel abided by its terms, excludes important facts.

One such fact is the blockade described in the previous section. In addition to providing for the cessation of Israeli military operations in the Strip and an ending of Hamas rocket attacks on southern Israel (the parties' adherence to these provisions will be addressed below), the June agreement required Israel to ease its blockade of Gaza.<sup>134</sup> Israel did not adequately abide by this obligation. On November 29, 2008—five months after the truce went in to effect—Human Rights Watch published a letter to Israeli Prime Minister Ehud Olmert expressing "deep concern about Israel's continuing blockade of the Gaza Strip, a measure that is depriving its population of food, fuel, and basic services, and constitutes a form of collective punishment."<sup>135</sup> "The latest measures [taken by Israel]," the letter continued, "are part of an ongoing policy by your government that has prevented the normal flow of goods and people in and out of Gaza since January 2006. It has contributed to a humanitarian crisis, deepened poverty and ruined the economy."<sup>136</sup> Referring specifically to the truce agreement, Human Rights watch noted: "Israel made a commitment in June to ease some of these restrictions – but the movement of goods into Gaza and people in and out of the territory remains a fraction of what it was when borders were last opened for free trade."<sup>137</sup>

#### *E. Israel's November 4 Raids*

Israel's primary justification for its invasion of Gaza was rocket attacks launched from the Strip, attacks which Israel has repeatedly asserted were

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132. *Israel and Hamas 'Agree Truce'*, BBC NEWS, June 18, 2008, [http://news.bbc.co.uk/2/hi/middle\\_east/7459200.stm](http://news.bbc.co.uk/2/hi/middle_east/7459200.stm) [hereinafter *Israel and Hamas Agree Truce*].

133. Tzipi Livni, Israel Minister of Foreign Affairs, Briefing in Sderot – Opening Remarks (Dec. 28, 2008), available at [http://www.mfa.gov.il/MFA/Government/Speeches+by+Israeli+leaders/2008/FM\\_Livni\\_briefing\\_Sderot\\_Opening\\_remarks\\_28-Dec-2008.htm](http://www.mfa.gov.il/MFA/Government/Speeches+by+Israeli+leaders/2008/FM_Livni_briefing_Sderot_Opening_remarks_28-Dec-2008.htm) [hereinafter *Livni Briefing in Sderot*].

134. *Hamas Fires Rockets at Israel After Airstrike*, THE WASHINGTON POST, Nov. 5, 2008, at A10 [hereinafter *Hamas Fires Rockets at Israel After Airstrike*]; Israel and Hamas Agree Truce, *supra* note 132.

135. Human Rights Watch, Letter to Olmert: Stop the Blockade of Gaza, <http://www.hrw.org/en/news/2008/11/20/letter-olmert-stop-blockade-gaza> [hereinafter *Letter to Olmert: Stop the Blockade of Gaza*].

136. *Id.*

137. *Id.*

unprovoked violations of the ceasefire.<sup>138</sup> Indeed, rocket attacks from Gaza increased in the weeks immediately preceding the offensive of December 27.<sup>139</sup> But these attacks followed Israeli operations which killed six Palestinians in Gaza on November 4. Before Israel's violation of the ceasefire in these raids, rocket attacks from Gaza had stopped almost entirely, totaling only one a month in July, September, and October and eight in the month of August.<sup>140</sup> It was not until after the November 4 raids that rocket attacks from Gaza began increasing in number, and indeed the *Washington Post* reported on November 5 that Hamas' assertion of responsibility for the attacks in response to the Israeli operations was the "first such announcement by the group since the Egyptian-brokered cease-fire went into effect June 19."<sup>141</sup>

Thus, Hamas was, according to the Intelligence and Terrorism Information Center at the Israel Intelligence Heritage and Commemoration Center, "careful to maintain the ceasefire", and it "tried to enforce the terms of the arrangement on the other terrorist organizations and to prevent them from violating it."<sup>142</sup> In regards to stopping attacks on Israel, the ceasefire was, in the words of a study conducted by MIT professor Nancy Kanwisher and others, "remarkably effective."<sup>143</sup> "After it began in June 2008, the rate of rocket and mortar fire from Gaza dropped to almost zero, and stayed there for months."<sup>144</sup> "The latest ceasefire," Kanwisher concludes, "ended when Israel first killed Palestinians, and Palestinians *then* fired rockets into Israel."<sup>145</sup>

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138. Speaking before the United Nations Security Council on December 31, 2008, Israel's UN Ambassador Gabriela Shalev reported that in the preceding weeks Israel had "witnessed a steep escalation in the attacks of Hamas against Israel" and that Israel launched its military operation on December 27 with the aim of "protecting Israelis living in Southern Israel from the incessant barrage of rocket and mortar shell fire." Gabriela Shalev, Israel Ambassador to the UN, Statement by Amb Shalev to UN Security Council (Dec. 31, 2008), *available at* [http://www.mfa.gov.il/MFA/Foreign+Relations/Israel+and+the+UN/Speeches++statements/Statement\\_Amb\\_Shalev\\_UN\\_Security\\_Council\\_31-Dec-2008.htm?WBCMODE=PresentationUnpCredits](http://www.mfa.gov.il/MFA/Foreign+Relations/Israel+and+the+UN/Speeches++statements/Statement_Amb_Shalev_UN_Security_Council_31-Dec-2008.htm?WBCMODE=PresentationUnpCredits).

139. Nancy Kanwisher, Johannes Haushofer & Anat Biletzki, *Reigniting Violence: How Do Ceasefires End?*, THE HUFFINGTON POST, Jan. 6, 2009, [http://www.huffingtonpost.com/nancy-kanwisher/reigniting-violence-how-d\\_b\\_155611.html](http://www.huffingtonpost.com/nancy-kanwisher/reigniting-violence-how-d_b_155611.html) [hereinafter *How Do Ceasefires End?*].

140. *Id.*

141. Hamas Fires Rockets At Israel After Airstrike, *supra* note 134.

142. Norman G. Finkelstein, *Foiling Another Palestinian "Peace Offensive": Behind the Bloodbath in Gaza*, THE OFFICIAL WEBSITE OF NORMAN G. FINKELSTEIN, Jan. 19, 2009, <http://www.normanfinkelstein.com/finkelstein-on-gaza-war-massacre> (quoting THE SIX MONTHS OF THE LULL ARRANGEMENT 2, 7 (Intelligence and Terrorism Information Center at the Israel Intelligence Heritage & Commemoration Center, Dec. 2008)) [hereinafter *Finkelstein*].

143. *How Do Ceasefires End?*, *supra* note 139.

144. *Id.*

145. This pattern is not unusual. Examining all the periods of one or more days without a death on either side from September 2000 until October 2008, Kanwisher has established that "it is overwhelmingly Israel that kills first after a pause in the conflict: 79% of all conflict pauses were interrupted when Israel killed a Palestinian, while only 8% were interrupted by Palestinian attacks (the remaining 13% were interrupted by both sides on the same day)." The study continues:

In addition, we found that this pattern – in which Israel is more likely than Palestine to kill first after a conflict pause – becomes more pronounced for longer conflict pauses. Indeed, of the 25 periods of nonviolence lasting longer than a

Israel's November 4 military operations in Gaza, which ended a four-month period of relative calm, severely weaken Israel's claim of self-defense. Nothing in international law allows a state to use armed force to provoke—whether intentionally or not—an attack and then use that attack as a basis for a claim of self-defense.<sup>146</sup>

#### IV. ISRAEL'S CLAIM OF SELF-DEFENSE

Israel has characterized its latest operations in Gaza as actions taken in self-defense. On the opening day of the offensive, Israel's UN Ambassador stated in a letter to the Secretary General of the United Nations that “after a long period of utmost restraint, the government of Israel has decided to exercise, as of this morning, its right to self-defense.”<sup>147</sup> Echoing this claim the following day, Israeli Foreign Minister Tzipi Livni stated: “[T]he only way in which maybe we can shorten the time of the military operation is by making it clear that Israel has the right to defend itself, that the international community supports Israel as it continues to work against Hamas.”<sup>148</sup>

The Charter of the United Nations explicitly preserves the right of states to act in self-defense.<sup>149</sup> It is, however, a limited exception to the general obligation established in the Charter that states resolve their disputes by pacific means. Under Article 51, a state making a claim of self-defense must have been the target of an “armed attack” by another state.<sup>150</sup> Moreover, the exercise of self-defense must be both necessary and “proportional”—that is, limited in scope to redress the

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week, Israel unilaterally interrupted 24, or 96%, and it unilaterally interrupted 100% of the 14 periods of nonviolence lasting longer than 9 days....The lessons from these data are clear: First, Hamas can indeed control the rockets, when it is in their interest. The data shows that ceasefires can work, reducing violence to nearly zero for months at a time. Second, if Israel wants to reduce rocket fire from Gaza, it should cherish and preserve the peace when it starts to break out, not be the first to kill.

*Id.*

146. The fact that Hamas's rocket attacks may themselves constitute serious violations of the laws of war does nothing to change this, for, as was stated at Nuremberg in regard to the Nazi occupation of the Soviet Union, even

[i]f it is assumed that some of the resistance units in Russia or members of the civilian 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.

TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 VOL. IV 493-94 (Oct. 1946 – Apr. 1949).

147. Kattan, *supra* note 57.

148. Livni Briefing in Sderot, *supra* note 133.

149. U.N. Charter art. 51.

150. This requirement comports with the common-sense proposition that one must be *responding* to the acts of another, acts which must be of a certain gravity, if one's actions are to qualify as self-defense. *Id.*

harm that the invoking state has suffered.<sup>151</sup>

We believe that Israel's claim of self-defense fails on at least four grounds. First, we doubt that self-defense can be properly invoked by an occupier vis-à-vis a territory that it has previously occupied. Second, Israel did not suffer an "armed attack"—at least, not one that it had not provoked itself—in the months prior to its invocation of the right of self-defense. Third, Israel could have preserved the rightful security of its citizens through means other than force—by negotiating an extension of the truce—and thus the exercise of force was not necessary. Fourth, even assuming that all of the foregoing were not true, the scale of Israel's attack vastly exceeded the scope of a permissible exercise of self-defense. We will examine each argument individually.

A. "*Self-defense*" within an occupied territory?

The International Court of Justice has cast serious doubt on Israel's ability to invoke a claim of self-defense against attacks emanating from Gaza. As noted above, under Article 51 of the United Nations Charter, Israel is entitled to act in self-defense in response to armed attacks.<sup>152</sup> In its 2004 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* decision, however, the ICJ stated that Article 51 of the UN Charter "recognizes the existence of an inherent right of self-defense in the case of armed attack by one State against another State."<sup>153</sup> Noting that Israel "does not claim that the attacks against it are imputable to a foreign state," the Court concluded that attacks launched from the West Bank do not give rise to an Israeli right of self-defense.<sup>154</sup> The *Wall* decision did not address attacks launched from Gaza, but the reasoning of the Court applies with equal force to the Strip, which like the West Bank, is a non-state entity.

As Victor Kattan has observed: "[N]ot all defensive measures are measures taken in self-defense under Article 51 of the UN Charter. This is because self-defense is an exculpatory plea regarding resort to force in the first place, and not for an offense taken during an armed conflict."<sup>155</sup> In other words, Israel is employing a *jus ad bellum* (justifications for going to war) principle in a *jus ad bello* (principles governing the conduct of war) context—citing a ground for initiating conflict for its behavior in what is, legally and in fact, a continuing conflict. This does not mean that Israel, in principle, cannot use force to suppress violence emanating from either the West Bank or the Gaza Strip, or act to protect its own civilian population. But as a matter of law, it must do this as an exercise of

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151. MARY ELLEN O'CONNELL, THE AM. SOC'Y OF INT'L LAW: TASK FORCE ON TERRORISM THE MYTH OF PREEMPTIVE SELF-DEFENSE (Aug. 2002), available at <http://www.asil.org/taskforce/oconnell.pdf>.

152. "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." U.N. Charter art. 51. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, 194 (July 9).

153. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, 194 (July 9).

154. *Id.*

155. Kattan, *supra* note 57.

its right to police the occupied territories, and not as an exercise of the right of self-defense.

*B. The "Armed Attack" requirement*

We have already described the sequence of events leading to the breakdown of the truce, and have suggested that Hamas rocket fire, which followed Israel's November 4 raid, cannot be cited by Israel as having triggered its right of self-defense. No state can launch an attack, and then point to the retaliation for that attack as the trigger for a claim of self-defense—unless, for example, the retaliation involved a significant escalation of violence over the initial attack. Here it should be pointed out that the Hamas rocket fire between Israel's lethal November 4 raid and its far more lethal invasion on December 27 had caused no Israeli deaths.<sup>156</sup> It does not seem reasonable that Hamas' response to Israeli-initiated violence (which continued after November 4 as well) was an escalation at all, at least judged by its results.

Yet can Israel cite the rocket fire it suffered *prior* to the truce as the "armed attack" justifying its use of force?<sup>157</sup> We do not believe so. It does not comport with the understanding of self-defense as a limited exception to the general obligation that states resolve their disputes peacefully that a state be permitted to "nurse" or "store" a claim of self-defense—then invoke it at a later time at its convenience.<sup>158</sup> The more logical position is that a claim of self-defense, if not exercised within a reasonable period of time, lapses. In this case, southern Israel had enjoyed virtually complete calm for five months, before Israel's own acts precipitated the breakdown of the truce and the resumption of rocket fire by Hamas in November 2008.

It is further significant that during the pre-truce period, Israel's hands were not clean. As noted above, Israel had instituted an illegal blockade against the Gaza Strip, causing immense suffering to the Palestinian civilian population.<sup>159</sup> Furthermore, it had repeatedly raided and attacked the Gaza Strip, from September 2005 until the launch of Operation Cast Lead killing, as previously stated, 1,250 Palestinians.<sup>160</sup> Israeli violence in no way justified the rocket and mortar fire by Hamas and other Palestinian organizations, which were indiscriminate, illegal, and

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156. See HUMAN RIGHTS WATCH, *ROCKETS FROM GAZA: HARM TO CIVILIANS FROM PALESTINIAN ARMED GROUPS' ROCKET ATTACKS 10-16* (2009), available at <http://www.hrw.org/sites/default/files/reports/ioptqassam0809webwcover.pdf>.

157. We assume for the sake of argument that the earlier attacks, in the aggregate, were sufficient to constitute an "armed attack." Yet this conclusion is not ineluctable. Not all uses of force constitute armed attacks giving rise to a right of self-defense—a limitation designed to deprive states from exploiting minor border incidents to justify broad-scale attacks. The ICJ has held, for example, that acts of armed force carried out by "armed bands, groups, irregulars or mercenaries" must be "of such gravity as to amount to, *inter alia*, an actual armed attack conducted by regular forces." *Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27) (citing G.A. Res. 3314 (XXIX), Annex, art. 3(g), U.N. Doc. A/RES/3314(XXIX) (Dec. 14, 1974)).

158. See U.N. Charter art. 5.

159. Letter to Olmert: Stop the Blockade of Gaza, *supra* note 135.

160. Kattan, *supra* note 57.

caused much harm to Israeli civilians. But Israel's incessant attacks on the Gaza Strip cannot be irrelevant in assessing whether the earlier rocket fire triggered Israel's right of self-defense. We conclude that it did not.

*C. The Necessity Requirement*

In order for a claim of self-defense to be valid, the actions taken in accordance with that claim must be necessary. As the ICJ has stated: "[I]n customary international law 'whether the response to . . . [an] [armed] attack is lawful depends upon observance of the criteria of the necessity and the proportionality of the measures taken in self-defense.'"<sup>161</sup> Even if it is assumed that the rocket attacks on Israel from the Gaza Strip are sufficient to constitute an armed attack, Operation Cast Lead was not necessary and thus cannot be justified as a legitimate act of self-defense.

Most importantly, however, Israel had an alternative to violence in its quest to stop rocket fire from the Gaza Strip; namely, to renegotiate the truce that had brought the greatest calm to its southern residents in six years. This option remained open even after the lapse of the formal truce on December 19, as Hamas leaders offered to consider renewing the truce as long as Israel lifted its blockade of the Gaza Strip.<sup>162</sup>

Israeli Foreign Minister Livni stated before Operation Cast Lead began that a prolonged truce with Hamas "harms the Israeli strategic goal, empowers Hamas, and gives the impression that Israel recognizes the movement."<sup>163</sup> In short, Israel chose violence not because it was necessary, but because the peaceful alternative of negotiations bore a political cost that Israel was unwilling to pay: enhanced legitimacy for Hamas.

*D. The Proportionality Requirement*

Military action undertaken in self-defense must be limited in scope, or "proportional", to the harm to be redressed. A state purportedly acting in self-defense uses only such force as is necessary to repel the attack against it or to reestablish the *status quo ante*.<sup>164</sup> Thus, "[a]cts done in self-defense must not exceed in manner or aim the necessity provoking them."<sup>165</sup> In this context, had Israel suffered an unprovoked "armed attack," the scope of its response would be limited to targets necessary to stop rocket fire from Gaza—the harm that Israel was claiming to redress. Attacks on military or civilian targets not tied to rocket fire, on

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161. *Oil Platforms (Iran v. U.S.)*, 2003 I.C.J. 161, ¶ 74 (Nov. 6) (quoting *Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 194, (June 27)). The question of proportionality will be taken up in the next sub-section.

162. *Hamas 'May Extend' Truce if Israel Ends Siege, Stops Attacks*, THE DAILY STAR, Dec. 24, 2008, [http://www.dailystar.com.lb/article.asp?edition\\_id=10&categ\\_id=2&article\\_id=98679](http://www.dailystar.com.lb/article.asp?edition_id=10&categ_id=2&article_id=98679).

163. Finkelstein, *supra* note 142 (citing Saed Bannoura, *Livni Calls For a Large Scale Military Offensive in Gaza*, INTERNATIONAL MIDDLE EAST MEDIA CENTER, Dec. 10, 2008), available at <http://www.imemc.org/article/57960>.

164. JEFFREY L. DUNOFF, STEVEN R. RATNER & DAVID WIPPMAN, *INTERNATIONAL LAW NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH* 862 (Aspen Law & Business 2002).

165. *Id.* (quoting Oscar Schachter, *In Defense of International Rules on the Use of Force*, 53 U. CHI. L. REV. 113, 138-39 (1986)).

the other hand, would exceed the scope of legitimate self-defense. In fact, Operation Cast Lead seemed calculated to achieve objectives considerably beyond stopping rocket fire from Gaza—a fact reflected both in statements by Israeli officials, and in Israel's choice of targets during the fighting.

In its decision in the *Case Concerning Oil Platforms*, the ICJ confirmed that one aspect of the criteria of necessity and proportionality “is the nature of the target of the force used avowedly in self-defense.”<sup>166</sup>

Israel's choice of targets during Operation Cast Lead was incompatible with a proper exercise of self-defense. Speaking of the latest invasion of Gaza, Major Avital Liebowitz of the IDF Spokesperson's Office stated: “Anything affiliated with Hamas is a legitimate target.”<sup>167</sup> “We are hitting not only terrorists and launchers,” Deputy IDF Chief of Staff Brigadier-General Dan Harel explained, “but also the whole Hamas government and all its wings.”<sup>168</sup> “After this operation there will not be one Hamas building left standing in Gaza.”<sup>169</sup>

Israel has claimed that at least some of these targets harbored fighters or military supplies, but the statements above seem more consistent with an intent to disable if not destroy Hamas's capacity to govern.<sup>170</sup> Moreover, the record of death and destruction—detailed below<sup>171</sup>—is consistent with these pronouncements by Israeli spokespeople. Thus, even if all the other requirements of a valid exercise of the right of self-defense were present—and they were not—Israel's attack on the Gaza Strip thus appears to have exceeded the scope of a valid exercise of that right.

#### V. THE CRIME OF AGGRESSION

There are only two exceptions to the general prohibition on the use of force in international affairs—military action taken with the approval of the UN Security Council and the use of force in self-defense.<sup>172</sup> The Security Council did not authorize Israel's latest military campaign against the Gaza Strip, and as demonstrated above, Operation Cast Lead does not qualify as self-defense.

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166. *Oil Platforms*, 2003 I.C.J. at ¶ 74, 76. In that case, the Court rejected the assertion of the US that its attacks on certain Iranian oil platforms constituted self-defense because there was insufficient evidence to support a finding of Iranian military presence on the platforms. The Court also rejected the US' claim of self-defense because there was no evidence to prove that the United States made any complaints to Iran about the alleged military use of the Iranian platforms.

167. Finkelstein, *supra* note 142 (citing B'TSELEM, THE GAZA STRIP: B'TSELEM TO ATTORNEY GENERAL MAZUZ: CONCERN OVER ISRAEL TARGETING CIVILIAN OBJECTS IN THE GAZA STRIP (Dec. 31, 2008)), available at [http://www.btselem.org/English/Gaza\\_Strip/20081231\\_Gaza\\_Letter\\_to\\_Mazuz.asp](http://www.btselem.org/English/Gaza_Strip/20081231_Gaza_Letter_to_Mazuz.asp).

168. Tova Dadon, *Deputy Chief of Staff: Worst Still Ahead*, YNETNEWS.COM, Dec. 28, 2008, available at <http://www.ynet.co.il/english/articles/0,7340,L-3646462,00.html>.

169. *Id.*

170. B'TSELEM, THE GAZA STRIP: B'TSELEM TO ATTORNEY GENERAL MAZUZ: CONCERN OVER ISRAEL TARGETING CIVILIAN OBJECTS IN THE GAZA STRIP (Dec. 31, 2008), available at [http://www.btselem.org/English/Gaza\\_Strip/20081231\\_Gaza\\_Letter\\_to\\_Mazuz.asp](http://www.btselem.org/English/Gaza_Strip/20081231_Gaza_Letter_to_Mazuz.asp).

171. *See infra* Section VIII.

172. *See* U.N. Charter art. 2(4), 42 & 51.

Without the authorization of the Security Council or the justification of self-defense, Israel's invasion of Gaza arguably amounts to aggression. According to the Nuremberg Tribunal, "[t]o initiate a war of aggression . . . is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole."<sup>173</sup> "War on a major scale causes great suffering and almost invariably involves the commission of atrocities."<sup>174</sup>

There is little question that the scale and character of Israel's attack on Gaza would be adequate to constitute aggression if it had been committed against another state. As Antonio Cassese notes, despite some instability in current definitions of aggression in international criminal law: "Customary international law appears to consider as international crimes: the planning, or organizing, or preparing, or participating in the first use of armed force by a state against another state in contravention of the UN Charter, provided the acts of aggression concerned have large-scale and serious consequences."<sup>175</sup> Israel's Gaza invasion was of a massive scale, and clearly brought about extremely serious consequences.<sup>176</sup>

But the charge of aggression may be inapposite for two other reasons: first, as we have shown, Gaza is not a state, and it is not clear that aggression can be committed against a non-state entity; second, whether or not Gaza is a state, as we have also shown, it remains under Israeli occupation, and arguably, alleging aggression—like Israel's claim to self-defense—improperly imports *jus ad bellum* principles into a context of an ongoing conflict. In this view, aggression, in essence, involves the unjustified *initiation* of war by one state against another state, not its continuation.

As to the first of these concerns: we believe that customary international law currently establishes that aggression may be committed against non-state entities that, like the West Bank and the Gaza Strip, have been designated as "self-determination units" by the international community. The United Nations General Assembly Resolution 3314, which offers a "Definition of Aggression," states: "Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, *or in any other manner inconsistent with the Charter of the United Nations . . .*" (italics added).<sup>177</sup> Article 1(1) of the Charter of the United Nations recites as one of the purposes of the organization: "To develop friendly relations among nations based on respect for

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173. ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 267 (Cambridge University Press 2007).

174. *Id.*

175. ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 114 (Oxford University Press 2003). The definition of aggression contained in General Assembly resolution 3314 (XXIX) of 1974, similarly states: "Aggression is the use of armed force by a State against the sovereignty, territorial integrity, or political independence of another State, or in any manner inconsistent with the Charter of the United Nations." G.A. Res. 3314 (XXIX), Annex, art. 1, U.N. Doc. A/RES/3314(XXIX) (Dec. 14, 1974).

176. *See infra* Section VIII.

177. G.A. Res. 3314 (XXIX), Annex, art. 1, U.N. Doc. A/RES/3314(XXIX) (Dec. 14, 1974).

the principles of equal rights and self-determination of peoples . . .”<sup>178</sup> As UN General Assembly Resolution 2131 states, all states have a duty to “respect the right of self-determination and independence of peoples and nations, to be freely exercised without any foreign pressure, and with absolute respect for human rights and fundamental freedoms.”<sup>179</sup> The duty outlined in resolution 2131 is customary international law.<sup>180</sup> Furthermore, as General Assembly Resolution 2625 provides, “Every state has the duty to refrain from any forcible action which deprives peoples . . . of their right to self-determination and freedom and independence.”<sup>181</sup> The definition of aggression annexed to General Assembly Resolution 3314 also reaffirms “the duty of States not to use armed force to deprive peoples of their right to self-determination, freedom and independence . . .”<sup>182</sup>

As the International Court of Justice observed in 2004, the right of the Palestinian people to self-determination is a well-established fact.<sup>183</sup> And since at least the mid-1970s, the right of the Palestinian people to self-determination could be implemented only if, *inter alia*, “Israel evacuated the Palestinian territory it had occupied by force contrary to the Charter of the United Nations and its resolutions . . .”<sup>184</sup> The United Nations General Assembly recognized as early as 1984 that the West Bank (including East Jerusalem) and the Gaza Strip were the locus for the exercise of the Palestinian people’s right of self-determination.<sup>185</sup> The same notion was unanimously affirmed by the United Nations Security Council in its resolution endorsing the “Roadmap for Peace.”<sup>186</sup> Accordingly, the objection to an allegation of aggression on the ground of the Gaza Strip’s status as a non-state entity is without merit.

The second concern, that Israel cannot “aggress” against a territory that it currently occupies, is more weighty. We agree that the crime of aggression principally implicates *jus ad bellum*, not *jus in bello*, principles. Fairly speaking, if

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178. U.N. Charter art. 1(2).

179. G.A. Res. 2131 (XX), U.N. Doc. A/RES/20/131 (Dec. 21, 1965).

180. See SIMON CHESTERMAN, THOMAS M. FRANCK, & DAVID M. MALONE, LAW AND PRACTICE OF THE UNITED NATIONS 117-18 (Oxford University Press 2008).

181. G.A. Res. 2625 (XXV), at 123, U.N. Doc. A/8082 (Oct. 24, 1970).

182. G.A. Res. 3314, *supra* note 177, at 143.

183. “As regards the principle of the right of peoples to self-determination, the Court observes that the existence of a “Palestinian people” is no longer in issue. Such existence has moreover been recognized by Israel. . .” Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 182 (July 9).

184. U.N. Comm. on the Exercise of the Inalienable Rights of the Palestinian People, *The Right of Self-Determination of the Palestinian People*, ¶ 33, U.N. Doc. ST/SG/SER.F/3 (Jan. 1, 1979), available at <http://domino.un.org/pdfs/STSGSERF3.pdf>.

185. G.A. Res. 39/146, ¶ 3, U.N. Doc. A/RES/39/146 (Dec. 14, 1984).

186. S.C. Res. 1515, U.N. Doc. S/RES/1515 (Nov. 19, 2003) (The resolution, by its terms, only “Reaffirm(ed) its vision of a region where two States, Israel and Palestine, live side by side within secure and recognized borders,” but, in referencing its earlier resolutions, 242 of 1967 and 338 of 1973, made clear that the site of the Palestinian state would be in the West Bank (including East Jerusalem) and the Gaza Strip.).

the Gaza Strip remains occupied, as we have argued above,<sup>187</sup> it is logically consistent to hold that Israel's December-January attack did not constitute aggression, and instead must be evaluated solely according to *jus in bello* standards. Conversely, if for any reason, Israel's invocation of the right to self-defense is considered timely (although not necessarily valid in all respects), the only fair conclusion is that it may also have committed aggression against the Gaza Strip.

We now turn from Israel's justification for launching its attack—failed, in legal terms, as we have argued—to examine Israel's conduct during the fighting itself. Here, as well, we find that Israel has committed serious violations of international law.

#### VI. TARGETING CIVILIAN INFRASTRUCTURE AND THE PRINCIPLE OF DISTINCTION

In the preceding section, it was suggested that Israel had exceeded the scope of a valid exercise of the right of self-defense because it attacked targets, many of them civilian, that could not reasonably be linked to the objective of stopping rocket fire from the Gaza Strip. Yet Israel's attacks on civilian targets also appear to have violated another independent legal principle: the duty of distinction. These failures seem to fall into three categories: 1) those stemming from Israel's definition of all institutions and individuals associated with Hamas as legitimate military targets—a definition that flies in the face of established international law; 2) those reflecting, perhaps, Israeli troops' employment of overly liberal rules of engagement; 3) those involving indiscriminate uses of weapons.

##### A. *The Duty of Distinction*

The duty of distinction is perhaps the most basic tenet of international humanitarian law,<sup>188</sup> and stands for the proposition that “the parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed at civilians.”<sup>189</sup> This basic rule of war is codified in many international agreements and conventions, including the 1863 Lieber Code, 1907 Hague Convention, the Geneva Conventions of 1949, as well as the Additional Protocols I and II to the Geneva Conventions. The United Nations General Assembly in Resolution 2444 of 1969 outlined the scope of the principle, which affirms “That the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited; it is prohibited to launch attacks against the civilian populations as such.”<sup>190</sup> The companion rule regarding targeting objects states that “the parties to the conflict must at all times distinguish between civilian objects and military objectives. Attacks may only be directed

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187. See *supra* Section II.

188. See generally Michael N. Schmitt, *The Principle of Discrimination in 21st Century Warfare*, 2 YALE HUM. RTS. & DEV. L.J. 143, 148 (1999); Gabriel Swiney, *Saving Lives: The Principle of Distinction and the Realities of War*, 39 INT'L LAW. 733 (2005); Mark David Maxwell & Richard V. Meyer, *The Principle of Distinction: Probing the Limits of its Customariness*, 2007 ARMY LAW. 1, 1 (2007).

189. Customary International Humanitarian Law Vol. II, *supra* note 126, at 3.

190. G.A. Res. 2444 (XXIII) at 50, U.N., Doc. A/7433 (Dec. 19, 1968).

against military objectives. Attacks must not be directed against civilian objects.”<sup>191</sup> Israel’s own Law of War booklet codifies this principle. It states that “in principle, the IDF accepts and applies the principle of distinction.”<sup>192</sup>

International law contains clear definitions of “armed forces” for the purposes of armed conflict and maintains that civilians must still be protected. Under customary international law, “armed forces of a party” include “all organized armed forces, groups and units, which are under a command responsible to that party for the conduct of its subordinates.”<sup>193</sup> Even when the distinction of armed forces is less clear, civilians retain their status: “All that can be said is that persons [civilians] who do not take a direct part in the hostilities of a non-international armed conflict enjoy protection against attack while persons who take a direct part in hostilities are liable to lawful attack.”<sup>194</sup> Taking direct part in the hostilities must mean “acts which are intended to cause actual harm to enemy personnel and *materiel* . . . supplying food and shelter to combatants, and generally speaking sympathizing with them, is insufficient reason to deny civilians protections against attack.”<sup>195</sup>

International criminal law makes individuals liable for serious violations of this rule. Violations of the rule of distinction may be in the form of intentional targeting of civilians and civilian areas as such, or attacks that are indiscriminate in nature even if their stated targets are not civilian. The Geneva Convention considers “grave breaches” to include “willful killing, torture or inhumane treatment, . . . willfully causing great suffering or serious injury to body or health, . . . and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.”<sup>196</sup> Similarly, indiscriminate attacks in which the attacker was aware of the danger posed to the civilians in the targeted area are also war crimes under customary international law.<sup>197</sup>

#### *B. Israel’s attacks on Gaza’s civilian infrastructure and private sector*

In the twenty-two day assault of the Gaza Strip, Israel struck numerous civilian targets, among them schools, mosques, the UN headquarters, roads, bridges, numerous government administrative buildings, courts, prisons, forty police stations, fire houses, harbors, bird farms, and money changers.<sup>198</sup> Despite

191. CUSTOMARY INTERNATIONAL HUMANITARIAN LAW VOL. I: RULES 25 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter *Customary International Humanitarian Law Vol. I*].

192. Customary International Humanitarian Law Vol. II, *supra* note 126, at 6.

193. Customary International Humanitarian Law Vol. I, *supra* note 191, at 14; *See also* Geneva Convention IV, *supra* note 66, at art. 3.

194. RED CROSS SYMPOSIUM: PROTECTING CIVILIANS IN 21ST-CENTURY WARFARE 13 (Mireille Hector and Martine Jellema, eds., Wolf Legal Productions, 2001).

195. *Id.*

196. Geneva Convention IV, *supra* note 66, at art. 3. *See also* Customary International Humanitarian Law Vol. I, *supra* note 191, at 601.

197. Customary International Humanitarian Law Vol. I, *supra* note 191, at 601.

198. Jonathan Cook, *Devastation Has Always Been a Goal for Israel*, THE NATIONAL, Jan. 18, 2009, <http://www.thenational.ae/article/20090118/FOREIGN/573500826/1011/SPORT>; *see also* Ben White, *Israel’s Targets in Gaza*, NEW STATESMAN, Jan. 6, 2009, <http://www.newstatesman.com/>

explicit protection under international law<sup>199</sup>, cultural sites came under direct fire, such as the al-Nasr mosque which was built in 736 C.E.,<sup>200</sup> and the Antiquities Museum of Gaza.<sup>201</sup> The Gaza zoo came under attack by Israeli forces, where many animals were shot at point plank range.<sup>202</sup>

Israel ravaged the private sector of Gaza as well. A cattle farm was attacked on January 3, killing twenty-one cattle.<sup>203</sup> Palestinian industry has been crippled, with more than 230 factories destroyed, including whole swaths of industrial zones where factories produced goods such as cookies, wooden furniture, and ice cream.<sup>204</sup> As one reporter observes, "It's as if a tsunami of fire had roared through Gaza's industrial district, leaving behind a tide of twisted metal and smashed buildings."<sup>205</sup>

Israel claimed that many of these targets either housed weapon caches or were sites from which Hamas fighters were returning fire on Israeli troops. This may well have been the case as to some of the targets—although Israel's record of dubious, if not false, claims regarding its war conduct should be recalled here.<sup>206</sup> Yet a number of these targets were hit during the first surprise wave of bombings on December 27, and thus could not have been struck by Israel in response to return fire. This was true, for example, of the Gaza City police compound, where sixty-five police recruits were killed as they attended graduation ceremonies.<sup>207</sup>

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middle-east/2009/01/israel-targets-gaza-hamas.

199. Hague IV, *supra* note 47, at art. 23(g).

200. *Gaza Prayer Turns Deadly as Israel Hits Mosques*, AL ARABIYA, Jan. 6, 2009, <http://www.alarabiya.net/articles/2009/01/06/63609.html>.

201. Lauren Gelfond Feldinger, *First Evidence of Damage to Gaza's Cultural Sites Emerges*, THE ART NEWSPAPER, Jan. 28, 2009, <http://www.theartnewspaper.com/article.asp?id=16827>.

202. Ashraf Helmi, *Israeli Troops Shot and Killed Zoo Animals*, GULFNEWS, Jan. 25, 2009, [http://gulfnews.com/region/Middle\\_East/10278858.html](http://gulfnews.com/region/Middle_East/10278858.html).

203. Press Release, Al-Mezan, *Israeli Forces Bomb Schools and Mosque*, THE ELECTRONIC INTIFADA, Jan. 3, 2009, <http://electronicintifada.net/v2/article10105.shtml>.

204. Tim McGirk, *The Devastation of Gaza: From Factories to Ice Cream*, TIME, Jan. 28, 2009, <http://www.time.com/time/world/article/0,8599,1874539,00.html> [hereinafter *McGirk*].

205. *Id.*

206. See *supra* Introduction; see McGirk, *supra* note 204; see Ben Lynfield, 'My Daughters, They Killed Them': Doctor Shows Israelis Horror of War, THE INDEPENDENT, Jan. 19, 2009, at 18, available at <http://www.independent.co.uk/news/world/middle-east/my-daughters-they-killed-them-tv-doctor-shows-israelis-horror-of-war-1419286.html>; see *The Street Smells of Death*, SPIEGEL, Jan. 13, 2009, <http://www.spiegel.de/international/world/0,1518,601040-2,00.html>; see Elliot D. Woods, *Rebuilding Gaza Beset by Hamas, U.S., Others Refuse to Deal with Rulers*, THE WASHINGTON TIMES, Jan. 22, 2009, at A01, available at <http://www.washingtontimes.com/news/2009/jan/22/rebuilding-gaza-beset-by-hamas/>; Ethan Bronner & Sabrina Tavernise, *In Shattered Gaza Town, Roots of Seething Split*, N.Y. TIMES, Feb. 3, 2009, at A1, available at <http://www.nytimes.com/2009/02/04/world/middleeast/04gaza.html>; see Barak Ravid & Akiva Eldar, *UN: IDF Officers Admitted There Was No Gunfire From Gaza School Which Was Shelled*, HA'ARETZ, Jan. 9, 2009, <http://www.haaretz.com/hasen/spages/1054009.html>; see Ibrahim Barzak & Christopher Tochia, *Israel Shells UN Headquarters in Gaza*, ASSOCIATED PRESS, Jan. 15, 2009, [http://www.huffingtonpost.com/2009/01/15/israel-shelles-un-headquar\\_n\\_158078.html](http://www.huffingtonpost.com/2009/01/15/israel-shelles-un-headquar_n_158078.html); see Jack Schenker, *Chaos in Khoza'a*, THE NATIONAL, Jan.30, 2009, <http://www.thenational.ae/article/20090130/REVIEW/158145792/1008>.

207. *Legal Aspects of Israel's Attacks on the Gaza Strip During Operation Cast Lead*, AL-HAQ, Jan. 7, 2009, <http://www.alhaq.org/etemplate.php?id=411>.

Others, including much of the industrial sector, were destroyed as Israeli troops withdrew, after Hamas resistance had virtually ended.<sup>208</sup> Moreover, the UN Office of Coordination of Humanitarian Affairs has affirmed, “[i]n many instances, Israel provided no explanation for why a civilian building was attacked.”<sup>209</sup> Amnesty International has similarly documented several cases of destruction of a house, a mosque and a school, which had been targeted by Israeli forces for supposedly housing weapons caches.<sup>210</sup> In each building, Amnesty field workers found no evidence of “secondary conflagration,” which would be expected had weapons been present, or signs of anything having been removed from the rubble.<sup>211</sup> The attacks, instead, seemed consistent with Israel’s avowal to hit any target associated in any way with Hamas, whether or not that target had a military value, as evidenced in the pronouncements of Israeli military spokespeople adduced above.<sup>212</sup>

The Islamic University of Gaza was one of many educational centers targeted by Israeli forces, being hit in six separate airstrikes,<sup>213</sup> destroying both the science building and the women’s college<sup>214</sup>. Israeli officials claimed, on the one hand, that the university housed a weapons research center,<sup>215</sup> making it a legitimate military target. This claim has not been substantiated,<sup>216</sup> and Israeli officials have offered an alternative justification, namely that the university was a cultural icon for Hamas students and militants. Fox News reported that “senior military and security experts in Israel say Islamic University is much more than an institution of higher education. They say that universities historically have been breeding grounds for radical thought, free speech and protest.”<sup>217</sup> Similarly, an Israeli academic has

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208. See, e.g., U.N. Human Rights Council, U.N. Fact-Finding Mission on the Gaza Conflict, *Human Rights in Palestine and Other Occupied Arab Territories*, ¶ 349, 992, 997-1000, U.N. Doc. A/HRC/12/48 (Sep. 15, 2009) (prepared by Richard Goldstone) [hereinafter *Report of the U.N. Fact-Finding Mission on the Gaza Conflict*].

209. The Conflict in Gaza: A Briefing on Applicable Law, Investigations, and Accountability, *supra* note 17, at 13, 14.

210. Amnesty International, Livewire, Widespread Destruction of Homes, <http://livewire.amnesty.org/2009/01/29/908/?lang=es#more-908> (last visited Oct. 15, 2009) [hereinafter *Widespread Destruction of Homes*].

211. *Id.*

212. See *supra* Section IV.

213. Neve Gordon & Jeff Halper, *Where’s the Outrage Now?*, THE CHRON. OF HIGHER EDUC., Jan. 9, 2009, available at <http://chronicle.com/news/article/5725/opinion-where-the-academic-outrage-over-the-bombing-of-a-university-in-gaza> [hereinafter *Gordon & Halper*].

214. Statement from Association of World Citizens to the Secretary-General of the U.N., U.N. Doc. A/HRC/S-9/NGO/6 (Jan. 8, 2009), available at <http://unispal.un.org/unispal.nsf/eed216406b50bf6485256ce10072f637/ee1c2482fec5033e8525753d00702825?OpenDocument>.

215. Amos Harel & Avi Issacharoff, *IAF Bombs 3 Gaza Government Buildings; Officials: 25 Wounded*, HA’ARETZ, Jan. 1, 2009, <http://www.haaretz.com/hasen/spages/1051305.html> [hereinafter *Harel & Issacharoff*].

216. An Israeli academic points out as well that even if they were, “Weapon development and even manufacturing have, unfortunately, become major projects at universities worldwide — a fact that does not justify bombing them.” Gordon & Halper, *supra* note 213.

217. Stephanie L. Freid, *Bombing of Islamic University: Strategic Target or War Crime?*,

affirmed that “[v]irtually all the commentators agree that the Islamic University was attacked, in part, because it is a cultural symbol of Hamas.”<sup>218</sup> A civilian object is not rendered a “military objective” because it supports or even teaches political opinions that the attacking party finds offensive or dangerous.

Government buildings were heavily targeted in the bombing campaign, including a court building,<sup>219</sup> the education and transportation ministries, the parliament building, and a seven-story building that housed the finance, foreign and labor ministries.<sup>220</sup> Israeli air force officials characterized the office of Hamas Prime Minister Ismail Haniyeh, which was hit twice, a “terror target;” IDF officials explained that it was a “government target that also served as a planning, support, and finance center for terrorist activity.”<sup>221</sup> This targeting rationale flies in the face of the criteria set up by international humanitarian law that limits attacks on dual purpose buildings as only those that serve a fundamental military function.<sup>222</sup>

Buildings housing media outlets have also been targeted and damaged by Israeli attacks. A building housing Iranian al-Alam and Press TV was hit by Israeli fire, despite assurances from Israeli forces, who are reported to have been aware of its coordinates, that it would not be attacked, and installing light projectors on the roof to further identify it.<sup>223</sup> In an attack that has been recognized as intentional, Israeli forces also fired on the Al-Johara Tower in Gaza City, which houses over twenty international news outlets.<sup>224</sup> In an Al-Jazeera interview Israeli Prime Minister, Ehud Olmert, defended the strike, “saying that communications equipment in the building could have been used by Hamas.”<sup>225</sup> The potential for use of military communications certainly does not qualify a civilian building as a military objective, and even if the suspicion were strong, the attacking force must still assume it to be a non-military objective if there is doubt.<sup>226</sup>

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FOXNEWS, Dec. 20, 2008, <http://www.foxnews.com/story/0,2933,474084,00.html>.

218. Gordon & Halper, *supra* note 213.

219. MSNBC.com, Israel Forces Storm Gaza Neighborhood, <http://www.msnbc.msn.com/id/28633969/>.

220. Harel & Issacharoff, *supra* note 215.

221. *Id.*

222. Feldman & Blau, *supra* note 21.

223. Reuters, *Iranian State TV Station Says IDF Strike Targeted Its Gaza Offices*, HA'ARETZ, Jan. 9, 2009, <http://www.haaretz.com/hasen/spages/1054228.html>.

224. Out of Print, Digital Crossroads- Wake Up America, <http://radioactivegavin.wordpress.com/2009/01/14/digital-crossroads-gaza-wake-up-america/> (last visited Oct. 15, 2009).

225. CPJ.org, Airstrike Hits Media Building in Gaza, <http://cpj.org/2009/01/press-under-fire-in-gaza-again.php>.

226. Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) arts. 48, 52(2), June 8, 1977, 1125 U.N.T.S. 3, available at <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/f6c8b9fee14a77fdc125641e0052b079> [hereinafter *Additional Protocol I*] (Only physical objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction offers a definite military advantage may be legitimately targeted.); Customary International Humanitarian Law Vol. II, *supra* note 126, at 29-32; see also International Committee of the Red Cross, Commentary on the First Additional Protocol of 8 June 1977 to the Geneva Conventions of 12 August 1949, para. 2002, n. 3 (Yves Sandoz, Christophe Swinarski, & Bruno Zimmermann eds., 1987). “In case of doubt whether an object which is normally dedicated to civilian purposes...is being

*C. Hamas as a "terrorist organization"*

Israel's position that anything affiliated with Hamas is a valid military target is not supported by international law. Hamas is an organization that has discrete military and civilian wings.<sup>227</sup> While Israel and a handful of other nations have designated Hamas a "terrorist organization," this designation has only domestic legal implications in the countries adopting it. The designation bears no international legal import, and does nothing to relieve Israel of its obligation to respect the civilian-combatant and civilian objects-military objectives distinctions.<sup>228</sup> Unless treated by the international community as legally binding—that is, as customary international law—the designation cannot be understood to transform well-established norms of international law defining "civilians" and "combatants" and requiring distinction between the two. There is no indication that the designation of Hamas as a "terrorist organization" has become a binding principle of international law. On the contrary, the fifty-six member Organization of the Islamic Conference has adopted a declaration holding that violent resistance to foreign military occupation or colonization cannot be considered terrorism.<sup>229</sup>

*D. Lax rules of engagement*

News media also reported attacks on civilian population centers in Gaza that killed dozens of civilians. These attacks, though not conclusive of war crimes, suggest intentional targeting of civilians and civilian objects. It is unclear whether apparently deliberate attacks on Palestinian individuals were the outgrowth of individual misconduct by Israeli troops, possibly fueled by anti-Palestinian racial animus, or were the product of lax rules of engagement. There is evidence to support both inferences.

One of the most severe attacks on a densely populated civilian area happened in the al-Zeitouna district of Gaza City in early January, where Israeli forces "reduced the eastern Gaza City suburb to little more than rubble in a matter of days."<sup>230</sup> These attacks were described at the time as "the single bloodiest incident

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used to make an effective contribution to military action, it shall be presumed not to be so used."

227. Some nations, such as the United Kingdom and Australia, recognize this distinction by designating only Hamas's military wing, the Izz ed-Din al-Qassam brigades, as a "terrorist organization." See Australian National Security, Listing of Terrorist Organisations, <http://www.nationalsecurity.gov.au/agd/www/nationalsecurity.nsf/AllDocs/95FB057CA3DECF30CA256FAB001F7FBD?OpenDocument> (last visited Oct. 26, 2009); see United Kingdom, Office for Security and Counter Terrorism, Proscribed Terrorist Groups, <http://security.homeoffice.gov.uk/legislation/current-legislation/terrorism-act-2000/proscribed-groups> (last visited Oct. 26, 2009).

228. Hamas has been designated a "terrorist organization" by the United States, Israel, Canada, Japan, and the Council of the European Union (although not by its constituent members). The United Kingdom and Australia additionally consider the armed wing of Hamas a "terrorist organization." Anita Rice, *War Crimes Convictions After Gaza?*, AL JAZEERA, Jan. 23, 2009, available at <http://english.aljazeera.net/focus/2009/01/20091229274380583.html>; United Kingdom, *supra* note 227.

229. OIC Convention to Combat Terrorism, Convention of the Organisation of the Islamic Conference on Combatting International Terrorism art. 2, July 1, 1999, available at <http://www.oicun.org/7/38/>.

230. Sheera Frenkel, *Israeli Soldiers Recall Gaza Attack Orders*, TIMES ONLINE, Jan. 28, 2009,

of the Gaza conflict<sup>231</sup> and UN officials called it “one of the gravest incidents” yet.<sup>232</sup> Graffiti in Hebrew left behind after the troops’ withdrawal—“Death to Arabs,” “War on Arabs—Sounds Good to Me,” “The Only Good Arab is a Dead Arab,” “I hate Arabs,” and one in English “1 is down, 999,999 to go”<sup>233</sup>—further point to a potentially lethal animus toward the residents as a whole, not just Hamas, and one that could easily lead to violations of proscriptions against deliberately targeting civilians.

However, this graffiti and the racist animus behind it may not only be the work of individual soldiers. Indeed, Israeli troops had been supplied with written materials from both the army chief rabbinate and from Israeli settler or right wing organizations that counseled against mercy toward “the cruel.” One such writing advised: “soldiers of Israel to spare your lives and the lives of your friends and not to show concern for a population that surrounds us and harms us. We call on you . . . to function according to the law ‘kill the one who comes to kill you.’ As for the population, it is not innocent . . . We call on you to ignore any strange doctrines and orders that confuse the logical way of fighting the enemy.”<sup>234</sup> The latter may be read as an invitation to contravene international humanitarian law. Thus, it is hard to ascertain whether the apparently indiscriminate attacks on civilians were the consequences of individual misconduct, or of official incitement.

Some soldiers admitted to following extremely liberal rules of engagement, revealing to journalists that their orders were to “fire on anything that moves in al-Zeitouna.”<sup>235</sup> One soldier reported that, “We were to shoot first and ask questions later.”<sup>236</sup>

At least twenty-nine members of the Samouni family were killed by Israeli forces in al-Zeitouna.<sup>237</sup> Family members recounted that a kinsman was killed in front of his family after raising his hands when Israeli soldiers approached his home. Israeli soldiers continued to fire on the rest of the family, killing the man’s four-year-old son.<sup>238</sup> Other family members explained that 100 members of their clan were herded by Israeli troops into one building, which later was directly and repeatedly fired on. Many of the family members died instantly, while others died over a period of four days while the Israeli forces refused entry of the Red Cross

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[http://www.timesonline.co.uk/tol/news/world/middle\\_east/article5601177.ece](http://www.timesonline.co.uk/tol/news/world/middle_east/article5601177.ece) [hereinafter *Israeli Soldiers Recall Gaza Attack Orders*].

231. Tim Butcher, *Gaza Medics Describe Horror of Strike Which Killed 70*, TELEGRAPH, Jan. 7, 2009, <http://www.telegraph.co.uk/news/worldnews/middleeast/israel/4162193/Gaza-medics-describe-horror-of-strike-which-killed-70.html>.

232. *Israel Maintains Gaza Assault Despite Cease-fire Resolution*, THE DAILY STAR, Jan. 10, 2009, available at [http://www.dailystar.com.lb/article.asp?edition\\_id=10&categ\\_id=2&article\\_id=98922](http://www.dailystar.com.lb/article.asp?edition_id=10&categ_id=2&article_id=98922).

233. Rod Nordland, *The Smell of Death*, NEWSWEEK, Jan. 19, 2009, <http://www.newsweek.com/id/180483> [hereinafter *Nordland*].

234. Amos Harel, *IDF Rabbinate on the War: We Will Show No Mercy on the Cruel*, HAARETZ, Jan. 26, 2009, <http://www.haaretz.com/hasen/spages/1058758.html>.

235. *Israeli Soldiers Recall Gaza Attack Orders*, *supra* note 230.

236. *Id.*

237. Nordland, *supra* note 233.

238. *Id.*

into the area to evacuate the wounded.<sup>239</sup> In all, reports indicate that around seventy corpses of members of the same clan were pulled from the rubble after the troops withdrew.<sup>240</sup>

In yet another attack on a town, this time in southern Gaza, reports indicate that the village of Khuza'a was attacked by the Israeli army over a period of hours, during which several women, children, and elderly people were killed. Residents from the village contacted the Israeli human rights organization B'tselem early in the attack to report that women had been shot by Israeli forces while waving a white flag as well as several other residents exiting a house on soldiers' orders.<sup>241</sup> Further reports indicate that during the attack, groups of civilians were shot at indiscriminately after being told by Israeli troops to evacuate, homes and structures were destroyed indiscriminately sometimes with the residents still inside, and that several individual civilians were targeted by snipers and shot dead.<sup>242</sup>

#### *E. Indiscriminate use of weapons*

A senior military analyst with Human Rights Watch has condemned the use of certain weapons as amounting to indiscriminate attacks when directed at dense population centers.<sup>243</sup> Israeli airstrikes against Rafah refugee camp, even when ostensibly targeting militants, have caused indiscriminate death and destruction to the surrounding civilian population, including many women and children hit in

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239. Jonathan Finer, *At a Flash Point in Gaza, A Family's Deadly Ordeal*, THE WASHINGTON POST, Jan. 27, 2009, at A01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/26/AR2009012602481.html>; Nordland, *supra* note 233; *Democracy Now, Part II: Palestinian US College Grad Loses 2 Brothers in Israeli Shooting; Father Watched Son Bleed to Death After Israeli Troops Blocked Ambulances*, (radio broadcast Jan. 22, 2009), available at [http://www.democracynow.org/2009/1/22/part\\_ii\\_palestinian\\_us\\_college\\_grad](http://www.democracynow.org/2009/1/22/part_ii_palestinian_us_college_grad).

240. Butcher, *supra* note 231.

241. Press Release, B'tselem, *Witness Reports that Israeli Soldiers Shot Woman Waving White Flag in Gaza Strip* (Jan. 13, 2009), available at [http://www.btselem.org/English/Press\\_Releases/20090113.asp](http://www.btselem.org/English/Press_Releases/20090113.asp); Ashraf Khalil, *In Gaza town, A Bitter Aftermath; Witnesses Say White Flags Didn't Keep Israeli Troops from Firing. The Event Could be Key to any War Crimes Probe*, L.A. TIMES, Feb. 15, 2009, at A12, available at <http://www.latimes.com/news/nationworld/world/mideasternail/la-fg-gaza-reconstruct15-2009feb15,0,6630449.story> (identifying the murdered woman as Rawhiya Najjar).

242. Fida Qishta & Peter Beaumont, *Israeli Accused of War Crimes Over 12-hour Assault on Gaza Village*, THE OBSERVER, Jan. 18, 2009, <http://www.guardian.co.uk/world/2009/jan/18/israel-war-crimes-gaza-conflict>; Jack Shekner, *Chaos in Khoza'a*, THE NATIONAL, Jan. 30, 2009, <http://www.thenational.ae/article/20090130/REVIEW/158145792/1008>.

243. HUMAN RIGHTS WATCH, *ISRAEL: STOP SHELLING IN CROWDED GAZA CITY*, Jan. 16, 2009, available at <http://www.hrw.org/en/news/2009/01/16/israel-stop-shelling-crowded-gaza-city>. ("Firing 155mm shells into the center of Gaza City, whatever the target, will likely cause horrific civilian casualties," said Marc Garlasco, Senior Military Analyst at Human Rights Watch. "By using this weapon in such circumstances, Israel is committing indiscriminate attacks in violation of the laws of war.") See also Ben Night, *Amnesty International Accuses Israel of War Crimes in Gaza*, ABC.NET, Jan. 20, 2009, <http://www.abc.net.au/news/stories/2009/01/20/2469609.htm?section=justin>; The Conflict in Gaza: A Briefing on Applicable Law, Investigations, and Accountability, *supra* note 17 (stating that "Israel's firing of artillery into densely populated civilian areas in Gaza may amount to indiscriminate attacks.").

their own homes.<sup>244</sup> Researchers found evidence that Israeli troops had fired 155 millimeter howitzers into heavily populated areas.<sup>245</sup> These shells have a margin of error of thirty meters, and a blast radius of 300 meters.<sup>246</sup> According to Fred Abrahams of Human Rights Watch, Israel's choice of less precise weaponry raises questions of intent: "When you have an alternative that is GPS-guided and very accurate, why would you use a shell that is much less accurate and has a much larger kill radius?"<sup>247</sup>

*F. Legal implications of Israel's warnings to Palestinian civilians*

Israel made use of a variety of kinds of warnings to Palestinian residents of the Gaza Strip, including leaflets dropped by air, and cell phone messages.<sup>248</sup> A message typically claimed that a particular structure housed weapons and its destruction was imminent, and any inhabitants should evacuate immediately.<sup>249</sup> Israeli troops also employed a technique dubbed "knocking on the roof," whereby artillery fire would be directed at corners of buildings to serve as a warning to individuals inside to leave, before more powerful ordnance was aimed at more vulnerable parts of the structure.<sup>250</sup> Israeli military lawyers advised commanders and troops that any Palestinian civilians who failed to heed these warnings were acting as "voluntary human shields," and therefore, were partaking in hostilities and could be legally treated thereafter as "combatants."<sup>251</sup>

Did these warnings in any way relax or alter Israel's duty of distinction in Operation Cast Lead? The probable answer is: "no." In principle, such warnings would tend to indicate an effort by a warring party to minimize civilian casualties, and thus, to respect the principle of distinction. The difficulty in actual application, however, is that civilians in the midst of battle often would not be aware of, or actually have, safe routes of escape to a place of sanctuary. As a practical matter, then, if there is no refuge, the warnings would only amplify the suffering of civilians by adding to their fear and confusion.

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244. See HUMAN RIGHTS WATCH, ISRAEL/HAMAS: CIVILIANS MUST NOT BE TARGETS, Dec. 30, 2008, available at <http://www.unhcr.org/refworld/docid/496321bb2c.html>; AL MEZAN CENTER FOR HUMAN RIGHTS, ISRAELI MASSACRES IN GAZA CONTINUE: 284 KILLED; INCLUDING 32 CHILDREN, AND 755 INJURED; GAZA'S SERVICE SYSTEMS PARALYZED UNDER SEVERE LACK OF MEDICINE, FOOD AND POWER, Dec. 29, 2008, available at <http://www.reliefweb.int/rw/rwb.nsf/db900sid/EDIS-7MSLBF?OpenDocument>.

245. Ben Hubbard & Alfred de Montesquieu, *Rights Groups Says Laws of War violated in Gaza*, THE ASSOCIATED PRESS, Feb. 4, 2009, <http://abcnews.go.com/International/wireStory?id=6800758>.

246. *Id.*

247. *Id.*

248. Abraham Rabinovich, *Israel warning civilians to flee*, THE AUSTRALIAN, Dec. 30, 2008, at 7, available at <http://www.theaustralian.news.com.au/story/0,25197,24853989-15084,00.html>.

249. Israel Ministry of Foreign Affairs, *IDF issues warnings to the civilians of Gaza*, Jan. 7, 2009, available at [http://www.mfa.gov.il/MFA/Government/Communiques/2009/IDF\\_warns\\_Gaza\\_population7-Jan-2009.htm](http://www.mfa.gov.il/MFA/Government/Communiques/2009/IDF_warns_Gaza_population7-Jan-2009.htm); *Report of the U.N. Fact-Finding Mission on the Gaza Conflict*, *supra* note 208.

250. Feldman & Blau, *supra* note 21.

251. *Id.*

In the particular case of Gaza, it should be recalled that Israel fenced the entire region beginning in 1994,<sup>252</sup> and that during the fighting, all exit points from the Strip were virtually sealed.<sup>253</sup> Thus the vast majority of its 1.5 million residents was unable to flee outside the Strip, and with bombardments occurring throughout it, had no effective refuge within it. Indeed, the Samouni clan, whose terrible ordeal was described above, had obeyed orders by Israeli troops to assemble in a family compound—and then was attacked despite its compliance.<sup>254</sup>

Apart from the ineffectuality of the warnings, it strikes us as particularly egregious to argue that mere failure to adhere to an evacuation warning would, *ipso facto*, render a civilian a combatant—a notion that rests on a severely twisted understanding of “voluntariness.”

#### VII. ISRAELI TROOPS AND THE USE OF PALESTINIAN CIVILIANS AS HUMAN SHIELDS

There is evidence to suggest that Israeli troops in some instances used Palestinian civilians as human shields. This practice has something in common with the offenses described in the prior section, in the sense that each unjustifiably exposes civilians to injury and death. However, the practice is distinct, as it does not involve the direct and deliberate targeting of civilians by the offending party, and the practice is also governed by a distinct set of legal principles.

##### A. *International Law Governing the Use of Human Shields*

The use of human shields is prohibited by international law, and the violation of the laws and customs prohibiting this practice constitutes a war crime. Common Article 3 of the Fourth Geneva Convention, to which Israel and Hamas are bound by customary international law and Israel specifically as a signatory to the 1949 Geneva Conventions, states that “[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ‘hors de combat’ by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely.”<sup>255</sup> “Violence to life and person”<sup>256</sup> and the “taking of hostages”<sup>257</sup> are strictly prohibited against the above mentioned class of protected persons. Customary international law likewise proscribes the use of human shields in non-international armed conflict,<sup>258</sup> and violation of this norm is

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252. See Israel-Palestine Liberation Organization Agreement on the Gaza Strip and the Jericho Area, Isr.-P.L.O., May 4, 1994, 33 I.L.M. 622, available at <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Agreement+on+Gaza+Strip+and+Jericho+Area.htm>.

253. A small number of injured civilians was permitted to leave. See generally *id.* at Annex II.

254. Kershner & el-Khodary, *supra* note 2.

255. Geneva Convention IV, *supra* note 66, at art. 3(1). See also Emanuel Gross, *Use of Civilians as Human Shields: What Legal and Moral Restrictions Pertain to a War Waged by a Democratic State Against Terrorism?*, 16 EMORY INT'L L. REV. 445, 449-50 (2002).

256. Geneva Convention IV, *supra* note 66, at art. 3(1).

257. *Id.* at art. 3(1)(b).

258. Customary International Humanitarian Law Vol. I, *supra* note 191, at 3, 337 (specifically Rule 9, deriving from APII: 13(1) and the prohibition of taking hostages in foreign case law); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of

a war crime recognized under customary international law, the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Court.<sup>259</sup>

The use of human shields is generally defined as using the presence of civilians or civilian objects to render military objects immune from attack;<sup>260</sup> accordingly, military objectives should be located outside civilian areas and away from civilian persons to the extent possible.<sup>261</sup> The mere presence of military objects within civilian areas or near protected persons is not dispositive of the use of human shields.<sup>262</sup> Rather, the military objects must have been *purposefully* placed within or in close proximity to the civilian persons or objects with the *intent* of using this protected class to immunize the military objects from attack.<sup>263</sup>

### *B. Israel's Use of Palestinian Civilians as Human Shields*

There is increasing reason to suspect that Israeli forces used Palestinian civilians as human shields in their ground offensive in Gaza. If so, this would be consistent with long Israeli practice in the Occupied Territories; the IDF has repeatedly been brought before the Israeli High Court and its well-documented uses of human shields have been consistently criticized by that court.<sup>264</sup> Human Rights Watch workers are reporting that consistent with previous practice by the Israeli army,<sup>265</sup> they have documented cases in which Israeli troops have entered

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Non-International Armed Conflicts (Protocol II) art. 4(2)(c), Dec. 7, 1978, 1125 U.N.T.S. 609, 16 I.L.M. 1442 [hereinafter *Protocol II*]; Customary International Humanitarian Law Vol. I, *supra* note 191, at 334 (see the customary international law articulated in Rule 96). *See also* Rome Statute of the International Criminal Court, art. 8(2)(b)(xxiii), July 17, 1998, 2187 U.N.T.S. 3 [hereinafter *Rome Statute*] (classifying as a war crime the utilization of the presence of civilian or other protected person to render certain points, areas or military forces immune from military operations).

259. Customary International Humanitarian Law Vol. I, *supra* note 191, at 599 (Rule 156); Rome Statute, *supra* note 258, at art. 8(2)(b)(xxiii).

260. Customary International Humanitarian Law Vol. I, *supra* note 191, at 337 (Rule 97); Geneva Convention IV, *supra* note 66, at art. 28; Additional Protocol I, *supra* note 226, at art. 51(7).

261. Additional Protocol I, *supra* note 226, at art. 58(b). *See also id.* at art. 44 (recognizing that circumstances may arise in which combatants will mingle with the civilian population, and requiring that in such cases they carry their arms openly).

262. *Id.* at art. 50(3).

263. Customary International Humanitarian Law Vol. I, *supra* note 191, at 340. *See also* KNUT DÖRMANN, ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 32 (2003) (referencing the Rome Statute, *supra* note 258, at art. 8(2)(b)(xxiii), and quoting Int'l Criminal Court, *Elements of Crimes Regulations*, U.N. Doc. PCNICC/2000/1/Add.2 (Sept. 9, 2002), which states that elements of a "[w]ar crime of using protected persons as shields" include: "(1) [t]he perpetrator moved or otherwise took advantage of the location of one or more civilians or other persons protected under the international law of armed conflict" and "(2) [t]he perpetrator intended to shield a military objective from attack or shield, favour or impede military objectives"). *See also* Customary International Humanitarian Law Vol. I, *supra* note 191, at 344-45 (explaining that the *travaux préparatoires* make it clear that the mens rea requirement for the war crime of human shielding is specific intent).

264. *See Israel Bans Use of Human Shields*, Oct. 6, 2005, BBC NEWS, [http://news.bbc.co.uk/2/hi/middle\\_east/4314898.stm](http://news.bbc.co.uk/2/hi/middle_east/4314898.stm).

265. Chris McGreal, *Demands Grow for Gaza War Crimes Investigation*, THE GUARDIAN, Jan. 13, 2009, at 1, available at <http://www.guardian.co.uk/world/2009/jan/13/gaza-israel-war-crimes>.

civilian homes and forced the inhabitants to remain on the ground floor while the rest of the house was used by Israeli military personnel as a base and a snipers' position.<sup>266</sup>

In a report from the ravaged southern Gazan village of Khuza'a, Israeli snipers allegedly shot at civilians from inside a house, while holding the Palestinian inhabitants hostage during the assault.<sup>267</sup> In one of several reported individual cases of Israelis practicing clear human shielding tactics, a Palestinian resident of Jabalya recounted how he was taken from his home at gunpoint by Israeli forces. He was detained for two days, sometimes in handcuffs, and was made to accompany military personnel into heavy fighting, as well as used to approach homes where there were known or suspected Hamas militants inside.<sup>268</sup> A similar accusation has been made by another person from the same area, who explained how he was rounded up with several other young men and forced to approach homes where Hamas militants were suspected of being, in advance of the Israeli troop approach.<sup>269</sup>

These incidents closely track humanitarian law's definition of human shields, in which there is a clear and knowing use of civilian persons and areas with the intent of immunizing the Israeli forces from attack or harm.

#### VIII. DISPROPORTIONATE FORCE

This section examines Israel's disproportionate use of force against Palestinians in the Gaza Strip. The proportionality principle is notoriously difficult to apply in live battle circumstances, and proving violations of the principle is similarly fraught.<sup>270</sup> But in the case of Israel's Gaza invasion, Israeli military and political leaders have repeatedly and explicitly pledged their intention of using disproportionate force—and then appear to have fulfilled their promises.

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266. Press Release, Amnesty Int'l, *Gaza: Military Tactics of Both Sides Endangering Civilians*, Says Amnesty International (Jan. 7, 2009), <http://www.amnesty.org/en/for-media/press-releases/gaza-military-tactics-both-sides-endangering-civilians-says-amnesty-inte>.

267. Jack Shenker, *Chaos in Khoza'a*, THE NATION, Jan. 30, 2009, <http://www.thenational.ae/article/20090130/REVIEW/158145792/1008>.

268. Donald Macintyre, *My Terror as a Human Shield: The Story of Majdi Abed Rabbo*, THE INDEPENDENT, Jan. 30, 2009, at 30, available at <http://www.independent.co.uk/news/world/middle-east/my-terror-as-a-human-shield-the-story-of-majdi-abed-rabbo-1520420.html>

269. *Israel Accused of Using 'Human Shields' in Gaza*, AL-JAZEERA, Feb. 8, 2009, <http://english.aljazeera.net/news/middleeast/2009/02/2009291423652274.html>.

270. See LAURENCE BOISSON DE CHAZOURNES AND PHILLIPE SANDS, INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE, AND NUCLEAR WEAPONS 275-77 (1999). See also Karma Nabulsi: Crimes of War A-Z Guide, Jus Ad Bellum/Jus In Bello, <http://www.crimesofwar.org/thebook/jus-ad-bellum.html>. The analysis of proportionality as a *jus in bello* principle overlaps, but is distinct from, the analysis of the proportionality requirement associated with the right of self-defense. First, the *jus in bello* version of proportionality is binding on both parties to a conflict. *Id.* Second, there is a difference in what proportionality of an attack is *measured against*. *Id.* In the self-defense context, proportionality of force is measured against the harm to which the state is responding. *Id.* In the *jus in bello* context, the proportionality of force measures against the expected cost to civilian lives against the anticipated military advantage to be gained. *Id.*

A. *The Principle of Proportionality*

The proportionality requirement can appear confusing and paradoxical. On the one hand, it functions as an exception to the principle of distinction, in that proportionality recognizes that the legitimate use of force may sometimes knowingly target civilian areas, as long as the military advantage conferred from such an attack is greater than the harm to the civilians. On the other hand, the principle of proportionality is often misunderstood to require that there be equivalent damage caused to both sides for the hostilities to have been lawful. In fact, the principle of proportionality merely dictates that any harm caused as a result of the use of force cannot be disproportionate to the military advantage of the act. Simply put, “the costs of war must not outweigh the benefits.”<sup>271</sup>

The proportionality principle has been codified in international conventions, such as the Additional Protocol I to the Geneva Conventions,<sup>272</sup> and is accepted as a part of customary international law.<sup>273</sup> As a restraint on the use of force, it applies throughout a conflict, both when a nation goes to war under presumably justifiable circumstances (i.e. in situations of self-defense), *jus ad bellum*, and in the way a war is conducted, regardless of the reasons for entering into the armed conflict, *jus in bello*.<sup>274</sup> Under customary international law, the principle of proportionality states that “launching an attack 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, is prohibited.”<sup>275</sup>

International criminal law imposes criminal liability on actors who violate the principle. Customary international law explains, “launching . . . an attack that in the knowledge that it will cause excessive incidental civilian loss, injury or damage” constitutes a war crime as a violation of the principle of proportionality.<sup>276</sup> A similar criminal statute exists with the International Criminal

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271. Judith Gail Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L L. 391, 391 n. 1 (1993).

272. Additional Protocol I, *supra* note 226, at art. 51(5)(b) prohibited to launch “an attack 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.”

273. See Customary International Humanitarian Law Vol. I, *supra* note 191, at 46, 58 (Rules 14 and 18); William J. Fenrick, *Attacking the Enemy Civilian as a Punishable Offense*, 7 DUKE J. COMP. & INT'L L. 539, 544 (1997); JEAN PICTET, DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW 62 (1985). A spokesperson for the Executive Branch of the United States has also endorsed proportionality as part of customary law: Gardam, *supra* note 271, at 408.

274. See Gardam, *supra* note 271, at 404-5 and n.3. The general principle of proportionality thus applies more broadly than the requirement of proportionality attached to the right of self-defense (see *supra* Section IV(4)). The measurement of proportionality also differs: for the general principle, the use of force is delimited by the military advantage to be gained; in the context of self-defense, the use of force is delimited by the nature of the harm to be redressed by the state that has suffered an “armed attack.”

275. Customary International Humanitarian Law Vol. I, *supra* note 191, at 46.

276. *Id.* at 568-60 (Rule 156).

Court.<sup>277</sup>

*B. Measuring proportionality*

“The main problem with the principle of proportionality is not whether or not it exists but what it means and how it is to be applied.”<sup>278</sup> Because intentionally targeting civilians or civilian objects as such is prohibited under humanitarian law, proportionality tends to focus instead on 1) what military objectives are, 2) what “military advantage” means and what its boundaries are, and 3) how to balance this against “incidental” harm to civilians.<sup>279</sup>

The definition of military objectives is guided by two requirements: (1) that the proposed target “by their nature, location, purpose or use make an effective contribution to military actions;”<sup>280</sup> and (2) that the “total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definitive military advantage.”<sup>281</sup>

For the purpose of the first criterion, customary international law considers legitimate military objectives to be combatants,<sup>282</sup> civilians taking direct participation in hostilities,<sup>283</sup> as well as physical objects that comport with the above described general description. Because there may be ambiguity related to the classification of buildings and other physical structures, which are generally civilian in nature as military objectives may be, Additional Protocol I specifically limited subjective interpretations, erring on the side of classifying such objects as civilian. The pertinent article states, “[i]n case of doubt whether an object which is normally dedicated to civilian purposes . . . is being used to make an effective contribution to military action, it shall be presumed not to be so used.”<sup>284</sup>

The more subjective second prong of the military objective definition guides the degree and nature of the military response necessary in relation to the objective. This clause indicates that even when an object is identified as a military objective, the means with which it is attacked and the hoped for outcome are not

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277. Rome Statute, *supra* note 258, at art. 8(2)(b)(iv) (“war crimes” include “[i]ntentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects. . . .”)

278. Fenrick, *supra* note 273, at 545.

279. *See id.*

280. Additional Protocol I, *supra* note 226, at art. 52(2).

281. *Id.*

282. *See id.* at art. 43; Customary International Humanitarian Law Vol. I, *supra* note 191, at 3, 11 (Rules 1 and 3); INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE FIRST ADDITIONAL PROTOCOL OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 632, para. 2002, n. 3 (Yves Sandoz, Christophe Swinarski, & Bruno Zimmermann eds., 1987).

283. *See* Additional Protocol I, *supra* note 226, at art. 51(3); Customary International Humanitarian Law Vol. I, *supra* note 191, at 19 (Rule 6).

284. Additional Protocol I, *supra* note 226, at art. 52(3). In the recent history of significant armed conflicts, this restriction appears to have been respected both in Serbia and Iraq, despite the presence of voluntary human shields. Rewi Lyall, *Voluntary Human Shields, Direct Participation in Hostilities and the International Humanitarian Law Obligations of States*, 9 *Melb. J. Int'l L.* 313, section IV(B)(2008), available at <http://www.austlii.edu.au/au/journals/MelbJIL/2008/11.html>.

unlimited,<sup>285</sup> but rather must be tailored to the needs and exigencies “ruling at the time.” Furthermore, the requirement that the attack on the contemplated objective give a “definite military advantage” means that “it is not legitimate to launch an attack which only offers potential or indeterminate advantages.”<sup>286</sup>

Additional Protocol I requires that the military advantage be “concrete and direct,”<sup>287</sup> indicating that military advantage should be evaluated with respect to discrete battlefield decisions. The *travaux préparatoires* of Additional Protocol I interpreted “concrete and direct” to mean “substantial and relatively close” and went on to state, “advantages which are hardly perceptible and those which would only appear in the long term should be disregarded.”<sup>288</sup> Although some interpretations of military advantage posit that it need not focus on individual “tactical gains” but can instead be seen as comprising the sum of military actions in the “full context of a war strategy,”<sup>289</sup> this perspective is far from being widely accepted, and appears to contradict the plain language of the Additional Protocol as well as the intentions of the drafters.

“Incidental” harm to civilians and civilian objects—the counter balance to military advantage—poses a similar question as to whether harm should be measured in terms of the immediate impact or the potential long-term effects of the military action. While there is no definitive rule on this issue, the growing concern and awareness of the long term effects of certain military actions on the civilian population, especially those which harm the environment and basic civilian infrastructures necessary for survival (e.g. water purifying plants, sewage treatment, etc.), lends support to the position that “planners must consider the long-term, indirect effects on a civilian population,”<sup>290</sup> instead of a myopic immediate harm analysis. The only limit of this position is that a military strategist’s liability rests on a determination of being “a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her.”<sup>291</sup>

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285. See INTERNATIONAL COMMITTEE OF THE RED CROSS, *supra* note 282, at 625, para. 1979.

286. *Id.* at 636, para. 2024.

287. See Additional Protocol I, *supra* note 226, at art. 51(5)(b).

288. William J. Fenrick, *Riding the Rhino: Attempting to Develop Usable Legal Standards for Combat Activities*, 30 B.C. INT'L & COMP. L. REV. 111, 124 (2007).

289. Virgil Wiebe, *Footprints of Death: Cluster Bombs as Indiscriminate Weapons under International Humanitarian Law*, 22 MICH. J. INT'L L. 85, 101 (2000), (citing *Air & Space Law*, in THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, U.S. ARMY, OPERATIONAL LAW HANDBOOK 27-29 (Richard M. Whitaker, ed. & Scott R. Morris, rev. edit ed., 1997)). This latter perspective, however, does not appear to be strongly supported by international law. The *travaux préparatoires* of Additional Protocol I interpreted “concrete and direct” to mean “substantial and relatively close” and went on to state, “advantages which are hardly perceptible and those which would only appear in the long term should be disregarded . . . .” Fenrick, *supra* note 288, at 124.

290. MATTHEW C. WAXMAN, INTERNATIONAL LAW AND THE POLITICS OF URBAN AIR OPERATIONS 21 n.4 (2000), available at [http://www.rand.org/pubs/monograph\\_reports/MR1175/MR1175\\_chap2.pdf](http://www.rand.org/pubs/monograph_reports/MR1175/MR1175_chap2.pdf), cited in Virgil Wiebe, *Footprints of Death: Cluster Bombs as Indiscriminate Weapons under International Humanitarian Law*, 22 MICH. J. INT'L L. 85, n. 62 (2000).

291. Prosecutor v. Galic, Case No. IT-98-29-T, Judgment and Opinion, ¶ 58 (Dec. 5, 2003). See also Customary International Humanitarian Law Vol. II, *supra* note 126, at 331.

*C. Israel's use of disproportionate force*

Because of the proportionality principle's vague formulation of military advantage, it creates a "lack of precision [which] operates in the interest of military rather than that of civilians."<sup>292</sup> However, in the assaults on Gaza, Israeli military and political officials have frequently made explicit statements that in fact they knowingly and purposely authorized disproportionate use of force, elevating it to the level of military doctrine.

Months in advance of Operation Cast Lead, Gabriel Siboni, an Israeli army colonel stated:

[C]hallenges [of Gaza] can be overcome by adopting the principle of a disproportionate strike against the enemy's weak points as a primary war effort, and operations to disable the enemy's missile launching capabilities as a secondary war effort. With an outbreak of hostilities, the IDF will need to act immediately, decisively, and with force that is disproportionate to the enemy's actions and the threat it poses. Such a response aims at inflicting damage and meting out punishment to an extent that will demand long and expensive reconstruction processes. The strike must be carried out as quickly as possible, and must prioritize damaging assets over seeking out each and every launcher.<sup>293</sup>

This was dubbed the "Dahiya doctrine," referring to the Beirut suburb flattened during Israel's offensive in Lebanon in 2006, an attack which Human Rights Watch concluded was "both indiscriminate and disproportionate."<sup>294</sup> Israeli Army Commander Gadi Eisenkot explained the doctrine in an October 2008 interview concerning possible future conflict in Gaza:

What happened in the Dahiya quarter of Beirut in 2006 will happen in every village from which Israel is fired on . . . *We will apply disproportionate force* on it and cause great damage and destruction there. From our standpoint, these are not civilian villages, they are military bases . . . This is not a recommendation. This is a plan. And it has been approved.<sup>295</sup> (italics added)

Statements by Israeli leaders during the twenty-two day assault on the Gaza Strip were consistent with the "Dahiya doctrine." Israeli Prime Minister Olmert during a cabinet meeting in January 2009, vowed that there "will be a disproportionate Israeli response to the fire on the citizens of Israel and its security

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292. Gardam, *supra* note 271, at 407.

293. Gabriel Siboni, *Disproportionate Force: Israel's Concept of Response in Light of the Second Lebanon War*, INSS PUBLICATIONS, Oct. 2, 2008, <http://www.inss.org.il/publications.php?cat=21&incat=&read=2222>.

294. *Why They Died: Civilian Casualties in Lebanon during the 2006 War*, HUMAN RIGHTS WATCH, Sep. 5, 2007, <http://www.hrw.org/en/reports/2007/09/05/why-they-died>.

295. Joseph Nasr, *Israel Warns Hezbollah War Would Invite Destruction*, REUTERS, Oct. 3, 2008, <http://uk.reuters.com/article/worldNews/idUKTRE4923I020081003>.

forces.”<sup>296</sup> Foreign Affairs Minister, Tzipi Livni, was quoted as saying that the offensive, “Operation Cast Lead,” had “restored Israel’s deterrence . . . Hamas now understands that when you fire on its citizens it responds by going wild—and this is a good thing.”<sup>297</sup> Commanding officer in the south of Israel, Yoav Galant, stated that the IDF intended to “send Gaza decades into the past.”<sup>298</sup>

The military advantage conferred to the Israeli military from many if not most of the attacks is unclear.<sup>299</sup> There is serious doubt about whether Hamas’ military capacity was in fact significantly diminished by the Israeli offensive.<sup>300</sup> More pertinent though, is the comparison of the minimal and ineffective resistance<sup>301</sup> of Hamas fighters overall, and the ferocious military might with which it was met. In this sense, whatever discrete military advantage was gained by these large-scale attacks was dwarfed by the chaos and bloodshed that it meant for the civilian population. Amnesty International field workers describe how they “were told that Palestinian armed groups had fired rockets from nearby open spaces—but it was hard to see how this could warrant the destruction of entire residential neighbourhoods,” citing specifically to al-Mughraqa where “a quarter of the town was razed to the ground by Israeli forces.”<sup>302</sup> Additionally, the order that the Givati Shaked battalion received to “fire on anything that moves in Zeitoun,”<sup>303</sup> a neighborhood where dozens of civilians were killed, reveals, at least in some military operations, a total disregard for balancing the possible military gains against the harm caused to civilians.

While no armed force is under the obligations to expose themselves to unnecessary risk of injury, “a willingness to accept some own-side casualties in order to limit civilian casualties may indicate a greater desire to ensure compliance

296. *Rockets hit Israel, Prime Minister Olmert Vows 'Disproportionate' Response*, THE TELEGRAPH, Feb. 1, 2009, <http://www.telegraph.co.uk/news/worldnews/middleeast/israel/4420172/Rockets-hit-Israel-Prime-Minister-Olmert-vows-disproportionate-response.html>.

297. Kim Sengupta & Donald Macintyre, *Israeli Cabinet Divided Over Fresh Gaza Surge*, THE INDEPENDENT, Jan. 13, 2009, at 20, available at <http://www.independent.co.uk/news/world/middle-east/israeli-cabinet-divided-over-fresh-gaza-surge-1332024.html>.

298. Cook, *supra* note 198, at 2.

299. This is especially true during the ground offensive stage of the conflict, as Israeli officials admitted that their “target bank” was nearly empty following the weeks of airstrikes. Amos Harel & Avi Issacharoff, *Israel's Aim in Gaza Is to Break Hamas Resistance*, HAARETZ, Jan. 4, 2009, <http://www.haaretz.com/hasen/spages/1052336.html>; see also Amos Harel, Barak Ravid and Avi Issacharoff, *In Response to Gaza Raids, Hamas Threatens to Assassinate Livni, Barak*, HAARETZ, Dec. 29, 2009, <http://www.haaretz.com/hasen/spages/1050681.html>; Abraham Rabinovich, *Hamas Appeals for Ceasefire in Gaza*, THE AUSTRALIAN, Jan. 2, 2009, at 7, available at <http://www.theaustralian.news.com.au/story/0,25197,24864396-2703,00.html>.

300. Ethan Bronner, *Parsing Gains of Gaza War*, N.Y. TIMES, Jan 18, 2009, at 1, available at [http://www.nytimes.com/2009/01/19/world/middleeast/19assess.html?\\_r=3&hp=&pagewanted=all](http://www.nytimes.com/2009/01/19/world/middleeast/19assess.html?_r=3&hp=&pagewanted=all).

301. Much of the group’s manpower remains, mostly because it made a point of fighting at a distance — or not at all — whenever possible despite the fury of the Israeli advance and bombardment. *Id.* Since the start of hostilities, three Israeli civilians have been killed, and ten Israeli soldiers including three who died from “friendly fire.” *Id.*

302. Widespread Destruction of Homes, *supra* note 210.

303. Israeli Soldiers Recall Gaza Attack Orders, *supra* note 230.

with the principle of proportionality.”<sup>304</sup> As one soldier describes, “We knew everything was booby-trapped, we knew that they would try to kidnap us and if they did that was the end, we were finished . . . so we took no chances. We pounded them with fire; they never had a chance.”<sup>305</sup> Unfortunately, neither did many Palestinian civilians have a chance.

#### *D. Deterrence and Disproportionality*

As we have noted previously,<sup>306</sup> one of Israel's apparent goals in launching its massive attack on the Gaza Strip was to restore its “deterrent capacity.” This position has been summed up by a phrase regularly being used in Israel and among officials: “the boss has lost it,”<sup>307</sup> which one commentator describes as “calculated rage.”<sup>308</sup> Is this a valid military gain or objective, as some have suggested, that can be weighed in the proportionality calculus? At least one commentator, noted military analyst Anthony Cordesman, believes so.<sup>309</sup> We believe not. Terrorizing 1.5 million people so that Hamas, as well as other regional adversaries,<sup>310</sup> “learns its lesson”<sup>311</sup> is problematic legally and definitely morally as a “definite military advantage.” It smacks, if anything, as a form of “preventive war,” which has failed to gain broad acceptance as an accepted practice under international law.<sup>312</sup>

Though there is no requirement under the proportionality rule that damage to both sides be equivalent, the catastrophic losses suffered by Palestinian civilians, compared to dubiously classified military objectives and questionable military advantage Israel received from these attacks, it is fair to conclude that disproportionate force was clearly used in this conflict.

#### IX. FAILURE TO RESPECT AND PROTECT MEDICAL PERSONNEL AND MEDICAL UNITS

Reports emanating from Gaza suggest that Israeli forces violated special international legal provisions concerning the protection of medical personnel and units. “Medical personnel” have protected status under customary international

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304. Fenrick, *supra* note 273, at 548.

305. Israeli Soldiers Recall Gaza Attack Orders, *supra* note 230.

306. *Supra* Introduction.

307. Bronner, *supra* note 300, at 1.

308. *Id.*

309. See generally ANTHONY CORDESMAN, THE “GAZA WAR”: A STRATEGIC ANALYSIS (n. pub.) 67-68, available at [http://www.csis.org/media/csis/pubs/090202\\_gaza\\_war.pdf](http://www.csis.org/media/csis/pubs/090202_gaza_war.pdf).

310. See *id.* at 27, 31.

311. See *ABC News* (ABC television broadcast Jan. 4, 2009) (an interview by George Stephanopoulos with Shimon Peres, President of Israel), available at <http://abcnews.go.com/ThisWeek/story?id=6573506&page=1>: “We don't intend . . . to crush Hamas, but to crush terror. And Hamas needs a real and serious lesson. They are now getting it.” See also Donald Macintyre and Kim Sengupta, *Gaza Sliced in Two by Israel's Land Assault*, THE INDEPENDENT, Jan. 5, 2005, at 2, available at <http://www.independent.co.uk/news/world/middle-east/gaza-sliced-in-two-by-israels-land-assault-1225794.html>.

312. Brian Angelo Lee, *Preventive War, Deterrent Retaliation, and Retrospective Disproportionality*, 2009 B.Y.U. L. REV. 253, 284 (2009).

law, a designation that is accepted by almost every nation.<sup>313</sup> The first paragraph of Article 20 of the Fourth Geneva Convention provides that “[p]ersons regularly and solely engaged in the operation of and administration of civilian hospitals, including the personnel engaged in the search for, removal, and transporting of and caring for wounded and sick civilians, the infirm, and maternity cases, shall be respected and protected.”<sup>314</sup> This rule was further articulated in Article 15 of Additional Protocol I, which states, “civilian medical personnel shall be respected and protected.”<sup>315</sup> The term “medical personnel” is defined in Article 8(c) of Additional Protocol I.<sup>316</sup> The definition recognizes both civilian and military medical personnel, but limits the designation to individuals who exclusively perform medical assignments.<sup>317</sup> Article 8(c)(ii) mandates that all parties to a conflict “recognize and authorize” the personnel of aid societies (i.e. the ICRC or Red Crescent Societies).<sup>318</sup>

Similarly, “medical units” have protected status under the rules of customary international law. Article 18 of the Fourth Geneva Convention states that, “[c]ivilian hospitals organized to give care to the wounded and sick, the infirm, and maternity cases, may in no circumstances be the object of attack but shall at all times be respected and protected by the Parties to the conflict.”<sup>319</sup> These provisions of the Fourth Geneva Convention and Additional Protocol I are customary international law binding on all nations.

#### A. Attacks on medical personnel

There have been numerous reports by the ICRC and other aid and human rights organizations that allege attacks upon medical personnel in the field. Amnesty International alleged that medical personnel came under Israeli fire repeatedly during the twenty-two day assault on the territory. Seven medical rescue workers were killed and twenty wounded while transporting or attempting to collect the dead or wounded in Gaza.<sup>320</sup>

On January 4, 2009, an ambulance arrived fifteen minutes after a missile strike in Beit Lahiya. A few minutes later, the ambulance was hit with a tank shell filled with flechettes, which killed one paramedic and seriously injured another.<sup>321</sup>

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313. The International Committee of the Red Cross (ICRC), *Customary International Humanitarian Law*, (Mar. 2005), available at <http://www.icrc.org/ihl.nsf/FULL/612?OpenDocument>.

314. Geneva Convention IV, *supra* note 66, at art. 20.

315. Additional Protocol I, *supra* note 226, at art. 15.

316. *Id.* at art. 8(c).

317. *Id.*

318. *Id.* at art. 8(c)(ii).

319. This rule is further defined in Article 12(2) of Additional Protocol I, which states that this rule “shall apply to civilian medical units, provided that they: (a) belong to one of the Parties to the conflict . . .” or “. . . (b) are recognized and authorized by the competent authority of one of the Parties to the conflict . . .” Like medical personnel, the protections include but are not limited to the ICRC and other recognized aid societies (i.e. PCRS) as well as those belonging to the parties themselves. *Id.* at art. 12(2).

320. Press Release, Amnesty Int’l, Attacks on Ambulance Workers in Gaza (Jan. 28, 2009), <http://www.amnesty.org/en/news-and-updates/news/ambulance-20090128>.

321. *Id.*

On the same day in Gaza City, three paramedics were killed by Israeli missile fire as they walked through a small field to reach two wounded men nearby.<sup>322</sup> Furthermore, ambulance crews could not reach the bodies of these aid workers for days because they too were coming under Israeli fire as they approached.<sup>323</sup> On January 9, 2009, the ICRC reported that Israeli forces fired directly upon an aid convoy.<sup>324</sup> On January 12, 2009, several ambulances responded to the site of a six-storey apartment building that had been hit with two missiles.<sup>325</sup> A doctor and paramedic entered the building to collect the wounded. The doctor was killed when an Israeli tank shell was fired into the building despite the fact that there were a number of ambulances and other aid workers downstairs.<sup>326</sup>

These acts by the Israeli military appear on their face to violate international legal norms. The consequences of these violations go beyond the danger and harm to particular aid workers at a point in time. For example, in the days following the January 9 incident, the ICRC conducted an investigation into the circumstances of the incident and ordered their workers to remain within Gaza City. As a result, aid workers could not gain access to wounded people in other areas. When medical personnel are attacked, the ICRC and other aid organizations are forced to balance the safety of their employees with their duty to care for the wounded.<sup>327</sup>

#### *B. Attacks on medical units*

During Israel's assault on the Gaza Strip many "medical units" came under fire, were damaged, and destroyed. Reports from the territory indicate patients and medical supplies suffered harm that will have both short and long term effects on the territory.

Reports from the ICRC state that on one particular day, January 15, 2009, there were four incidents where various "medical units" in the Gaza Strip came under Israeli fire. There were two separate attacks on the PCRS compound where the al-Quds hospital is located. In the first attack Israeli forces shelled the compound and the al-Quds hospital sustained at least one direct hit. This caused a fire to break out in the hospital, partially damaging the pharmacy.<sup>328</sup> All of the patients had to be moved to the ground floor for their safety.<sup>329</sup> In a second attack, the PCRS compound was shelled once again. Seven hundred people had to be

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322. *Id.*

323. *Id.*

324. The International Committee of the Red Cross (ICRC), *Gaza: The Challenge of Reaching Civilians in Need, Audio Interviews with Antoine Grand, the Head of the ICRC's Sub-Delegation in Gaza and Said Shaath, a Palestinian ICRC Employee*, (Jan. 11, 2009) [hereinafter ICRC audio transcript] (audio transcript available at <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/palestine-interview-110109!OpenDocument>).

325. Amnesty Int'l, *supra* note 320.

326. *Id.*

327. ICRC audio transcript, *supra* note 324.

328. Press Release, The Int'l Comm. of the Red Cross, *Gaza: Wounded at Risk as Al-Quds Hospital Is Hit* (Jan. 15, 2009), <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/palestine-israel-news-150109>.

329. *Id.*

evacuated from the compound, one hundred of them patients at the al-Quds hospital who had to be moved to Shifa hospital.<sup>330</sup> In the third incident on that same day, one of the two PRCS warehouses in Gaza was shelled and set ablaze, causing damage to relief items inside.<sup>331</sup> In a fourth incident, an UNRWA compound was hit by Israeli forces.<sup>332</sup> These reports again suggest severe breaches of international law and warrant further investigation.

#### X. FAILURES TO ALLOW FOR THE SEARCH, COLLECTION, EVACUATION, AND TREATMENT OF THE DEAD AND WOUNDED

International Law mandates that parties to a conflict must take all possible measures to collect and evacuate the dead and the wounded and allow for necessary medical care to those persons. Article 13 of the Fourth Geneva Convention states that this duty applies to the whole population, military and civilians alike.<sup>333</sup> Article 16 states that the wounded “shall be the object of particular protection and respect,” and that each party to a conflict must “facilitate the steps taken to search for the killed and wounded.”<sup>334</sup> Article 17 to Additional Protocol I of the Geneva Conventions of 1949 specifies that the parties may appeal to organizations, i.e. ICRC and PRCS, to collect the wounded.<sup>335</sup> Similarly, customary international law mandates that parties to an armed conflict search for and collect the dead.<sup>336</sup> These rules have been accepted into the law and practice of nations through treaties as well as domestic law and military procedure.

Reports from the territory describe a number of incidents where these rules were violated by Israel in its twenty-two day assault on Gaza. The number and the severity of the violations have led al-Haq to question whether there has been an Israeli policy of denying medical care arbitrarily.<sup>337</sup> ICRC reports state that coordinating with Israeli forces to gain access to wounded people was generally difficult during this period.<sup>338</sup> On January 7, 2009, Israel announced that there would be a three hour cessation of hostilities each day to allow medics to get to wounded people.<sup>339</sup> In response, the ICRC made a statement that this action was not sufficient and aid workers needed to be able to assist people at all times, not only during a three hour period each day.<sup>340</sup> The ICRC emphasized “the creation of

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330. *Id.*

331. *Id.*

332. *Id.*

333. Geneva Convention IV, *supra* note 66, at art. 13.

334. *Id.* at art. 16.

335. Additional Protocol I, *supra* note 226, at art. 17.

336. Customary International Humanitarian Law Vol. I, *supra* note 191, at 406.

337. Press Release, Al-Haq, Impending Medical Relief in the Gaza Strip: Israel's War Crimes Against the Injured (Jan. 17, 2009), <http://www.alhaq.org/etemplate.php?id=419>.

338. See Press Release, The Int'l Comm. of the Red Cross, Gaza: ICRC Demands Urgent Access to Wounded as Israeli Army Fails to Assist Wounded Palestinians (Jan. 8, 2009), <http://www.icrc.org/web/eng/siteeng0.nsf/html/palestine-news-080109>.

339. Press Release, Embassy of Isr., Cessation of IDF Activities in Gaza to Facilitate Humanitarian Activities (Jan. 7, 2009), <http://www.israeemb.org/Operation%20Cast%20Lead/Website4.htm>.

340. Press Release, The Int'l Comm. of the Red Cross, Gaza: Life-Saving Ambulances Must Be Given Unrestricted Access to the Wounded (Jan. 8, 2009), <http://www.icrc.org/web/>

humanitarian corridors will in no way alter the fact that civilians living outside them must also have access to humanitarian aid and medical care at all times.<sup>341</sup>

One incident that suggests a glaring violation of international law relating to the treatment of wounded people is in the ICRC report on the events that transpired in the by now familiar al-Zeitouna neighborhood January 3-7, 2009. On January 3, Palestinian families were taking shelter in the homes on that block on orders from the Israeli military.<sup>342</sup> That day, the neighborhood came under heavy shelling, causing severe damage to persons and property. ICRC workers arrived to render aid to those in need; however, the IDF refused to grant permission until January 7, which resulted in worsened conditions and deaths of injured people. On that day, limited access was allowed to medical aid workers. However, access to some homes was denied. The IDF refused to remove dirt barriers preventing ambulances from entering the area. Aid workers were forced to enter and search the area on foot and were only able to evacuate people using a donkey cart.<sup>343</sup>

On January 6, 2009, in another incident, the UNRWA shelter for displaced people in Jabaliya was attacked and forty-three people were killed and many others injured.<sup>344</sup> In addition to UNRWA efforts being affected, an ICRC employee expressed concern over the attack, "we too had referred families who were seeking safety to this particular shelter," he stated, "this is a very serious incident which shows that people cannot be sure of finding safety anywhere right now."<sup>345</sup>

Another example of Israeli forces denying medical aid to wounded people comes from the story on the Shurrab family on January 16, 2009.<sup>346</sup> That day, a father and two of his sons came under Israeli gunfire upon exiting their jeep fifty meters from their home and all three were shot. One son died immediately. The second son and his father were both badly injured. The soldiers who shot the family stood by and continued to threaten the men if they moved or used the phone. Eventually, however, the father was able to reach ICRC and a number of NGOs by phone. These aid organizations attempted to arrange to render aid to the family but Israeli forces denied clearance to the relief agencies for nearly 24 hours, during which time the second son died as well (from the worsening of his injury, two bullet wounds to the leg).<sup>347</sup>

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eng/siteeng0.nsf/htmlall/palestine-israel-news-080109?opendocument.

341. Operational Update, The International Committee of the Red Cross (ICRC), Gaza: Access to the Wounded Remains Top Priority (Jan. 7, 2009), available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/palestine-update-060109>.

342. *Id.*

343. The International Committee of the Red Cross (ICRC), *supra* note 338.

344. The International Committee of the Red Cross (ICRC), *supra* note 341.

345. *Id.*

346. *Democracy Now!: Part II: Palestinian US College Grad Loses 2 Brothers in Israeli Shooting; Father Watched Son Bleed to Death After Israeli Troops Blocked Ambulances*, (PBS television broadcast Jan. 22, 2009) (video and transcript available at [http://www.democracynow.org/2009/1/22/part\\_ii\\_palestinian\\_us\\_college\\_grad](http://www.democracynow.org/2009/1/22/part_ii_palestinian_us_college_grad)).

347. *Id.*

The actions of Israeli forces alleged in these reports indicate that there may have been serious violations of international law. The firing upon medical personnel and medical units, discussed above, makes the collection of and care of the wounded difficult. Another violation comes from the failure to grant access to the wounded once medical workers respond to a call for help or a massive attack.

#### XI. ILLEGAL USES OF WEAPONS

As stated above, attacking civilians with any weapon is categorically prohibited under international law. Furthermore, with certain weapons that are indiscriminate in nature or particularly dangerous to human life, international law mandates that they only be used where there is no alternative and extra care is taken to protect civilians from harm. Weapons that cause superfluous injury or unnecessary suffering are prohibited. Reports from the Gaza Strip during Israel's assault suggest illegal uses of weapons in densely populated civilian areas and against civilian targets. Other reports allege the use of deadly precision weapons directly against civilian targets. These actions seem in direct violation of international legal norms and must be investigated further.

##### *A. Restrictions on the uses of weapons*

International legal principles governing the use of weapons have developed with the goals of reducing the unnecessary suffering of all people in armed conflicts and avoiding any unnecessary harm to civilians. Article 35(2) of Additional Protocol I states, "it is prohibited to employ weapons, projectiles, and materials and methods of warfare of a nature to cause superfluous injury or unnecessary suffering."<sup>348</sup> Adherence to this rule of customary international law is the purpose of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (CCW).<sup>349</sup> The CCW consists of the umbrella treaty and five annexed protocols. The convention itself is written in general terms to prohibit weapons that are indiscriminate or cause unnecessary suffering.<sup>350</sup> Israel is a party to this convention.<sup>351</sup>

Article 2 of Protocol III to the CCW states that incendiary weapons may not be used against civilians or civilian objects.<sup>352</sup> Furthermore, it prohibits the use of incendiary weapons against military targets located within a concentration of civilians by method of air delivery or any other method, except when the military objective is clearly separated from civilians and civilian objects.<sup>353</sup> Of 110 parties to the CCW, 104 have signed on to Protocol III; however, Israel is not a

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348. Additional Protocol I, *supra* note 226, at art. 35(2).

349. Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 19 I.L.M. 1523, 1342 U.N.T.S. 7 [hereinafter CCW].

350. U.N. Office of Geneva, *The Convention on Certain Conventional Weapons*, [http://www.unog.ch/80256EE600585943/\(httpPages\)/4F0DEF093B4860B4C1257180004B1B30?OpenDocument#Top](http://www.unog.ch/80256EE600585943/(httpPages)/4F0DEF093B4860B4C1257180004B1B30?OpenDocument#Top) (last visited Sept. 13, 2009).

351. CCW, *supra* note 349.

352. *Id.* at Protocol III, art. 2.

353. *Id.*

signatory.<sup>354</sup> Despite its decision not to sign on to Protocol III, Israel has chosen to incorporate some of its internationally accepted legal restrictions on the use on incendiary weapons.

*B. Israel's use of White Phosphorous*

White Phosphorous (WP) is a toxic chemical that is dispersed in artillery shells, bombs, and rockets.<sup>355</sup> A WP shell contains over 100 felt filaments that ignite on contact with air, drift to the ground and continue to burn.<sup>356</sup> Burning WP creates thick, white smoke.<sup>357</sup> It may be used legally as a smoke screen to hide troop movements. However, the explosion of a WP shell results in the indiscriminate scattering of fragments,<sup>358</sup> so it may not be used against human beings or in densely populated areas where there is danger that people will be injured by it.<sup>359</sup> This is because WP sparks fires that are difficult to extinguish and causes very severe burns to human tissue (WP can burn flesh away to the bone, as it does not stop burning upon contact with the skin).<sup>360</sup>

On January 21, 2009, the Israeli government admitted that its troops might have used white phosphorous in contravention of international law, despite the fact that it was claimed up until that point that it was only used for legal purposes.<sup>361</sup> According to senior IDF officers quoted in Ha'aretz, there are two types of phosphorus munitions that were used in Gaza. The first, are 155mm shells that contained trace amounts of phosphorus. The second are 88mm and 120mm standard phosphorus shells that are fired from mortars.<sup>362</sup>

An internal military inquiry will take place surrounding an incident that occurred on January 17, 2009 when an Israeli paratroop brigade allegedly fired twenty standard WP shells in a heavily built up area around Beit Lahiya, including a UN school.<sup>363</sup> Israel claims that this could have been caused by a failure of the GPS that guides the mortars, however, this is the same justification put forth in 2006 for similar incidences in Gaza.<sup>364</sup> This incident is one of many that allege the use of WP in civilian areas. This, and all others, require further investigation to determine if these munitions were used in contravention of international law.

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354. *Id.*

355. *Outcry Over Weapons Used in Gaza*, AL-JAZEERA, Jan. 19, 2009, <http://english.aljazeera.net/news/middleeast/2009/01/200911916132228885.html>.

356. Nicholas Blanford & Robert Marquand, *Gaza: Israel Under Fire for Alleged White Phosphorous Use*, CHRISTIAN SCI. MONITOR, Jan. 14, 2009, at 7, available at <http://www.csmonitor.com/2009/0114/p07s01-wome.html>.

357. Peter Beaumont, *Israel Admits Troops May Have Used Phosphorus Shells in Gaza*, THE GUARDIAN, Jan. 21, 2009, <http://www.guardian.co.uk/world/2009/jan/21/gaza-phosphorus-shells>.

358. *Id.*

359. *Outcry Over Weapons Used in Gaza*, *supra* note 355.

360. *Id.*

361. Beaumont, *supra* note 357.

362. *Id.*

363. *Id.*

364. *Id.*

Many reports of white phosphorous use in civilian areas come from witnesses who were present when the munitions were fired. Marc Garlasco, senior military analyst for Human Rights Watch reported watching WP munitions exploding over the Jabaliya refugee camp, one of the most crowded areas in Gaza, over the five-day period between January 9 and 14, 2009.<sup>365</sup> Other reports indicate that on January 15, 2009, three shells containing WP hit a UN compound in Gaza city,<sup>366</sup> and on the same day, the al-Quds hospital in Gaza city was hit by a WP shell.<sup>367</sup>

Other reports come from those who have witnessed the aftermath of the attacks. While working in the territory during this period, Amnesty International (AI) delegates found indisputable evidence of widespread use of WP in densely populated areas in northern Gaza. Christopher Cobb-Smith, weapons expert for AI, toured the area on January 19, 2009, with a four-person delegation.<sup>368</sup> They discovered streets and alleyways littered with still-burning wedges of WP and the remnants of the WP shells and canisters fired by the Israeli army.<sup>369</sup> Donatella Rovera, AI researcher, says that the use of WP in civilian areas in Gaza is undeniable. She reported that on January 20, 2009 there were still WP wedges burning all over Gaza, specifically at the UN school and compound.<sup>370</sup>

Additionally, doctors in the territory have been reporting serious burn injuries that they say are likely caused by WP munitions. These burns tend to deteriorate over time, requiring skin grafts even though none would have been required based on the initial presentation.<sup>371</sup> WP burns may also cause liver and kidney problems. Doctors are reporting that treating these injuries is difficult because it is difficult to distinguish WP burns at first, and most doctors have never witnessed WP burns before.<sup>372</sup> These factors make treating WP burns very difficult and increase the risk of long-term harm or death of victims. Concern over this led Amnesty International to call on the Israeli authorities to “disclose the weapons and munitions used during the fighting in Gaza, citing that they, ‘now know that white phosphorous munitions were used in built-up civilian areas.’ It was highlighted that this information is critical so that doctors can, ‘be fully informed so that they can provide life-saving care.’”<sup>373</sup>

The allegations of WP shells being fired at civilian targets indicate that there may have been serious breaches of international law by Israeli forces in the Gaza Strip. Reports from the territory, discussed above, show overwhelming evidence

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365. Blanford & Marquand, *supra* note 356, at 7.

366. Beaumont, *supra* note 357.

367. *Id.*

368. *Outcry Over Weapons Used in Gaza*, *supra* note 355.

369. *Id.*

370. Beaumont, *supra* note 357.

371. Amira Haas, *Gaza Burn Victims Exhibit Possible Signs of White Phosphorous Wounds*, HAARETZ, Feb. 15, 2009, <http://www.haaretz.com/hasen/spages/1061720.html>.

372. *Id.*

373. Press Release, U.N. Office for the Coordination of Humanitarian Affairs (OCHA), Situation Report on the Humanitarian Situation in the Gaza Strip, Situation Report No. 16 (Jan. 23, 2009), <http://unispal.un.org/UNISPAL.NSF/fd807e46661e3689852570d00069e918/f0b7d1a3a8e7cf1985257552004f640e?OpenDocument>.

that these munitions were either used against civilian targets, or that they were used without significant precaution, resulting in severe injury to civilians and civilian objects. Furthermore, the types of injuries linked to WP use raise questions about use of weapons that inflict superfluous injury and unnecessary suffering in contravention of international law. These allegations warrant further investigation as to whether or not international law was violated.

*C. Israel's use of flechettes*

Flechettes are 4cm-long metal darts that are pointed at the front and have four fins at the rear.<sup>374</sup> 5000-8000 are packed into 120mm shells that are generally fired out of tanks.<sup>375</sup> When fired, the darts scatter over an area 300M wide by 100M long.<sup>376</sup> Experts believe they should never be used in built up civilian areas because this is an anti-personnel weapon designed to penetrate dense vegetation.<sup>377</sup> The use of flechette shells is not expressly prohibited by international law.<sup>378</sup> However, as they are indiscriminate in nature, many consider their use restricted in a densely populated area like Gaza.<sup>379</sup> B'Tselem has recorded that flechettes were used in both Gaza and Lebanon numerous times in the past.<sup>380</sup> At present, there are several reports alleging the use of flechettes in Gaza by Israeli forces during the twenty-two day assault on the territory. One incident involving the use of flechettes is mentioned above, in which an ambulance was hit with a tank shell filled with flechettes, killing one paramedic and seriously injuring another.<sup>381</sup> On January 5, 2009, several flechette shells were fired on the main road in the town of 'Izbat Beit Hanoun.<sup>382</sup> Two civilians were killed and several others were injured.<sup>383</sup> On January 7, 2009, a flechette shell struck a home in the village of al-Mughraqua killing a father and his two children.<sup>384</sup> At this time, there is strong evidence that these indiscriminate weapons were used in populated civilian areas, constituting a severe breach of international law. The international community should take action to further investigate the use of flechettes in Gaza.

*D. Allegations concerning Dense Inert Metal Explosives (DIME) and other experimental weapons*

Dense Inert Metal Explosives (DIME, also known as *zamma* or

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374. Press Release, Amnesty Int'l, Israeli Army Used Flechettes Against Gaza Civilians (Jan. 27, 2009), <http://www.amnesty.org/en/news-and-updates/news/israeli-army-used-flechettes-against-gaza-civilians-20090127>.

375. *Id.*

376. *Id.*

377. *Id.*

378. Jonathan Cook, *Israeli Weaponry Under Scrutiny*, THE NATIONAL, Jan. 12, 2009, <http://www.thenational.ae/apps/pbcs.dll/article?AID=/20090112/FOREIGN/150565837>.

379. *Id.*

380. *Id.*

381. Amnesty Int'l, *supra* note 320.

382. Amnesty Int'l, *supra* note 374.

383. *Id.*

384. *Id.*

“mosquito”<sup>385</sup>) are dispersed by shells that expel “a blade of charged tungsten dust that burns and destroys everything within a four-meter radius.”<sup>386</sup> The pressure wave created by the detonation of a DIME device moves from the ground up, causing the amputation of the lower limbs and abdomen.<sup>387</sup> The U.S. Air Force developed DIME devices as precision weapons. They are designed for use in urban areas because the explosions they create are highly lethal, but have a very limited range of explosive force.<sup>388</sup> DIME devices contain radioactive materials that have long-term effects on victims, including cancer.<sup>389</sup>

DIME devices are not an officially licensed weapons as they are still experimental; therefore, they are not covered under any specific provisions of international law that refer to specific weapons.<sup>390</sup> The use of DIME is governed by international law that governs the use of weapons in general. These legal norms, discussed above, state that the targeting of civilians is a violation of international law as is the failure to take special care to limit harm to civilians and civilian objects. Furthermore, as discussed above, it is a violation of international law to use weapons that cause superfluous injury or unnecessary suffering.

Due to the nature of DIME devices as precision weapons, the incidences of civilian casualties resulting from their use are alarming. Dr. Erik Fosse, a Norwegian doctor working in the Al-Shifa hospital in northern Gaza, reports that most of the patients he saw with injuries thought to be caused by these devices were children.<sup>391</sup> This indicates that the devices must have been detonated within four meters of these children.<sup>392</sup>

The use of DIME is somewhat difficult to detect; however, doctors working in Gaza have learned that it is an indication that DIME devices are being used where both legs are lost in an attack as opposed to one.<sup>393</sup> Dr. Jan Brommundt of Medecins du Monde noted greater incidences of these types of injuries in Khan Younis during Israel’s assault on the territory.<sup>394</sup> Dr. Fosse noted a significant increase in the number of double amputations at al-Shifa hospital as well.<sup>395</sup> He suspected DIME devices because of the nature of the amputations and the large amounts of flesh torn off of the lower bodies of victims.<sup>396</sup> Dr. Mads Glibert, a Norwegian specialist working at al-Shifa hospital, also reported that the injuries he had seen were consistent with DIME. He stated that the wounds from this weapon are distinctive. It results in severed or melted limbs and internal abdominal

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385. Interview by Rose Mishaan with Shabbir Wadee, M.D., in Gaza City, Gaza (Feb. 3, 2009) [hereinafter *Shabbir Wadee interview*] (on file with author).

386. *Outcry Over Weapons Used in Gaza*, *supra* note 355.

387. *Id.*

388. Blanford & Marquand, *supra* note 356, at 7.

389. *Outcry Over Weapons Used in Gaza*, *supra* note 355.

390. Cook, *supra* note 378.

391. *Outcry Over Weapons Used in Gaza*, *supra* note 355.

392. *Id.*

393. *Id.*

394. *Id.*

395. *Id.*

396. *Outcry Over Weapons Used in Gaza*, *supra* note 355.

ruptures. No shrapnel is found on the body; only a dusting of metal particles becomes visible upon autopsy. Similar injuries were witnessed when Israel attacked Gaza in 2006, possibly caused by a prototype weapon similar to DIME.<sup>397</sup>

Other reports allege uses of new or experimental weapons based on never-before-seen injuries witnessed by doctors working in the Gaza Strip. Miri Weingarten, spokesperson for Physicians for Human Rights, stated that physicians suspect that Israel has been using a new weapon akin to DIME called *kalanit* (anemone), which is a shell that shoots out hundreds of discs.<sup>398</sup> Doctors have reported removing these discs from patients' bodies and have noted that they cause both bilateral and unilateral amputations and irregular cuts.<sup>399</sup>

Dr. Jan Brommundt, a German doctor working in Khan Younis, recently dealt with never before seen abdominal injuries resulting from Israeli attacks on Gaza. She explained that some patients presented with a slight pain that deteriorated to "acute abdomen," like appendicitis, within one to five hours.<sup>400</sup> When doctors tried to perform an operation, they discovered dozens of 1x1 millimeter or 1x2 millimeter particles in the patient's organs.<sup>401</sup> This type of injury cannot be treated and most patients die from multi-organ failure and septicemia within twenty-four hours.<sup>402</sup> These injuries are most likely caused by an explosive shell that disperses small particles that penetrate all of the bodies' internal organs.<sup>403</sup>

In addition to reports of new and experimental munitions use in Gaza, allegations of uranium use have surfaced as well. The International Atomic Energy Agency (IAEA) has opened an investigation into the use of depleted uranium in munitions used in Gaza.<sup>404</sup> This type of uranium is added to weapons because it allows them to penetrate armor more easily; however, dust left behind at blast sites may be linked to cancer.<sup>405</sup> Inquiry by a British newspaper found elevated levels of radiation at Israeli missile craters.<sup>406</sup>

Suspicious surrounding the use of DIME and other experimental weapons in Gaza, as well as allegations that depleted uranium weapons were used, demand further investigation. The international community must exercise diligence in determining precisely what these weapons are and why they were selected by Israel for use in Gaza. First, it is important to know how these weapons function to determine if they were properly selected for use on certain targets and to explain the large number of civilian casualties resulting from them. Second, it is important

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397. Cook, *supra* note 378.

398. *Id.*

399. Shabbir Wadee interview, *supra* note 385.

400. *Outcry Over Weapons Used in Gaza*, *supra* note 355.

401. *Id.*

402. *Id.*

403. *Id.*

404. *UN to Probe Weapons Used in Gaza*, AL-JAZEERA, Jan. 22, 2009, <http://english.aljazeera.net/news/middleeast/2009/01/2009121134641106186.html>.

405. *Id.*

406. Cook, *supra* note 378.

to determine their short and long-term effects, so that victims may be treated, if they can be treated at all. Details in the reports thus far indicate that Israel may have violated multiple provisions of international law by using these weapons, including the targeting of civilians and civilian objects, using weapons that cause superfluous harm or unnecessary suffering, using weapons that are indiscriminate in nature, and failing to allow for the medical attention to the wounded required by their condition.

## XII. THE BOTTOM LINE: ISRAEL'S TOLL OF DEATH AND DESTRUCTION

The toll on the civilian population of Israel's apparently indiscriminate and disproportional assault on the Gaza Strip has been nothing short of catastrophic. UN Secretary General Ban-ki Moon has described the aftermath of the attacks on Gaza as "shocking and alarming. These are heartbreaking scenes."<sup>407</sup> Antoine Grand, head of the ICRC office in Gaza, described Gaza residents as "if they were waking from a nightmare."<sup>408</sup> In a joint statement prepared by Under-Secretary-General for Humanitarian Affairs John Holmes and UN Special Coordinator for the Middle East Peace Process Robert Serry, the UN officials stated that "[t]he mission was struck by the scale and urgency of the needs of the people of Gaza, and the heavy and multi-faceted impact that this conflict has had on the civilian population."<sup>409</sup> And the UN Emergency Relief Coordinator described that "it is shocking that civilians suffered so disproportionately in this military operation."<sup>410</sup>

As of February 5, 2009, there are 1,440 Palestinians dead, 431 of them children and 114 women.<sup>411</sup> The number of injured Gazans is at 5,380, 1,872 of whom are children, and 800 women.<sup>412</sup> These figures do not include people who died due to lack of access to regular health care,<sup>413</sup> or the injuries and death of the approximately 3,700 women who went into labor during the hostilities.<sup>414</sup> The number of dead, however, may continue to rise as family members report deaths, and people unaccounted for are dug out of the rubble.<sup>415</sup>

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407. *UN to Embark on Humanitarian Assessment in Post-Conflict Gaza*, UN NEWS CENTRE, Jan. 21, 2009, <http://www.un.org/apps/news/story.asp?NewsID=29612&Cr=gaza&Cr1>.

408. Press Release, The Int'l Comm. of the Red Cross, Gaza: Massive Devastation Calls for Vast Humanitarian Effort (Jan. 20, 2009), <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/palestine-update-200109?OpenDocument>.

409. *Senior UN Officials Survey 'Shocking' Aftermath of Israeli Offensive in Gaza*, UN NEWS CENTRE, Jan. 22, 2009, <http://www.un.org/apps/news/story.asp?NewsID=29630&Cr=gaza&Cr1>.

410. U.N. Office for the Coordination of Humanitarian Affairs (OCHA), *supra* note 373.

411. Press Release, U.N. Office for the Coordination of Humanitarian Affairs (OCHA), Field Update on Gaza from the Humanitarian Coordinator (Jan. 27-29, 2009), [http://www.ochaopt.org/gazacrisis/admin/output/files/ocha\\_opt\\_gaza\\_humanitarian\\_situation\\_report\\_2009\\_01\\_29\\_english.pdf](http://www.ochaopt.org/gazacrisis/admin/output/files/ocha_opt_gaza_humanitarian_situation_report_2009_01_29_english.pdf).

412. Press Release, U.N. Office for the Coordination of Humanitarian Affairs (OCHA), Field Update on Gaza from the Humanitarian Coordinator (Feb. 3-5, 2009), [http://www.ochaopt.org/gazacrisis/admin/output/files/ocha\\_opt\\_gaza\\_humanitarian\\_situation\\_report\\_2009\\_02\\_05\\_english.pdf](http://www.ochaopt.org/gazacrisis/admin/output/files/ocha_opt_gaza_humanitarian_situation_report_2009_02_05_english.pdf).

413. *Id.*

414. Press Release, U.N. Population Fund, Restoring Reproductive Health Services and Addressing Post-Traumatic Stress in Gaza Jan. 20, 2009, <http://www.unfpa.org/news/news.cfm?ID=1248>.

415. U.N. Office for the Coordination of Humanitarian Affairs (OCHA), *supra* note 410.

The health situation is dire; pre-conflict health care was already deficient due to the closures, and the massive amounts of injured and traumatized Gazans are left with even fewer resources. The World Health Organization reports that "15 of Gaza's 27 hospitals suffered damage, 9 [Ministry of Health] and 6 NGO hospitals, among them Al-Wafa rehabilitation hospital, which is Gaza's only rehabilitation hospital."<sup>416</sup> Primary care clinics have also been subject to massive destruction.<sup>417</sup> The agency UNFPA, in addition to rehabilitating and restoring health units and launching a mental health initiative aimed at women and young people coping with the aftermath of the war, must also reconstruct the "key primary care clinics and five hospitals that were damaged in the incursion."<sup>418</sup>

Access to potable water has been greatly diminished. One-fifth of the population lacks direct access to drinking water,<sup>419</sup> and though UNICEF has been delivering water purification tablets, they only have enough for a fraction of the Gaza population.<sup>420</sup> The Sheikh Ajleen sewage treatment plant, which processed sewage for about 400,000 people, was severely damaged after being hit by Israeli fire during the hostilities, causing raw sewage to pour into rivers, residential areas, and the Mediterranean Sea,<sup>421</sup> and posing serious health risks.<sup>422</sup> UNICEF estimates the damage to the water sector at \$3.5 million.<sup>423</sup>

The full extent of damage to residential buildings is still unknown, but ICRC will be providing bedding and other household supplies to around 80,000 people.<sup>424</sup> ICRC delegate Jérôme Giraud reports that "[t]he level of destruction is absolutely overwhelming . . . Most people have not been able to move back to their houses. Many checked on their homes, but then decided to return to the UNRWA shelters. They had no other choice."<sup>425</sup>

With seven schools completely destroyed, dozens more damaged, and significant losses of materials, classrooms are taking two to three shifts a day to accommodate as many students as possible.<sup>426</sup> Upon return to her school one

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416. Press Release, World Health Org., Health Action in Crisis: Health Situation in Gaza (Feb. 4, 2009), [http://www.who.int/hac/crises/international/wbgs/sitreps/gaza\\_4feb2009/en/index.html](http://www.who.int/hac/crises/international/wbgs/sitreps/gaza_4feb2009/en/index.html).

417. *Id.*

418. U.N. Population Fund, *supra* note 414.

419. Press Release, Relief Web, Gaza: Emergency Aid Alone is not Enough (Jan. 22, 2009), <http://www.reliefweb.int/rw/rwb.nsf/db900SID/EDIS-7NJNSD?OpenDocument>.

420. *UN to Embark on Humanitarian Assessment in Post-Conflict Gaza*, *supra* note 407.

421. Press Release, The Int'l Comm. of the Red Cross, TV News Footage: Emergency Aid Alone Cannot Rebuild Gaza (Jan. 23, 2009), <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/palestine-israel-tvnews-230109>.

422. *Id.*; Relief Web, *supra* note 419.

423. U.N. Office for the Coordination of Humanitarian Affairs (OCHA), *supra* note 373.

424. Press Release, The Int'l Comm. of the Red Cross, Gaza: Massive Devastation Calls for Vast Humanitarian Effort (Jan. 20, 2009), <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/palestine-update-200109?OpenDocument>.

425. *Id.*

426. Press Release, UNICEF, Back to School in Gaza, Children Welcome Chance to Resume Normal Lives (Jan. 26, 2009), [http://www.unicef.org/infobycountry/oPt\\_47592.html](http://www.unicef.org/infobycountry/oPt_47592.html); McGirk, *supra* note 204.

student remarked, "I was shocked from the scenes that I saw—classrooms damaged, windows broken, every corner in the school reminds us of the war."<sup>427</sup>

As a whole, Gaza's infrastructure and industrial sector have been devastated. In Northern Gaza, households are receiving around six hours of power a day.<sup>428</sup> Gaza's factory row was almost entirely wiped out in the bombings, and the UN estimates total damages at \$1.5 billion.<sup>429</sup> "Getting this infrastructure up and running will require the unrestricted and constant flow of building materials and other necessary items into the territory," explained Antoine Grand, head of the ICRC office in Gaza.<sup>430</sup>

OCHA has announced that "only \$63 million of the \$117 million needed for priority projects in Gaza has been committed or pledged so far."<sup>431</sup> Though humanitarian and financial help may be more forthcoming as the magnitude of the damage becomes more widely known, Israel's unrestrained punishment of Gazan civilian infrastructure may have served as a deterrent not only to its enemies, but also as a deterrent to donors, who may be asking themselves, as Norway's Foreign Minister put it, "[s]hall we give once more for the construction of something which is being destroyed?"<sup>432</sup>

### XIII. HAMAS AND ALLEGATIONS OF WAR CRIMES

While Israel has a special duty to the people of the effectively occupied territory of Gaza under the laws of belligerent occupation,<sup>433</sup> this does not release Hamas from responsibility for its conduct of hostilities during an armed conflict. Specifically, Hamas fighters may be held liable for war crimes for deliberately targeting civilians and civilian objects, or employing weapons indiscriminately. However, Israeli allegations that Hamas has employed Palestinian civilians as "human shields" have not been substantiated.

As detailed above, the principle of distinction is one of the cornerstones of International Humanitarian Law, the prohibition on purposefully targeting civilian persons and objects being codified in every humanitarian legal instrument, court or tribunal mandate, and universally accepted to be part of customary international law.<sup>434</sup> While civilians are not immune from attack, according to the principle of proportionality and military advantage, they are never to be the object of an attack. This principle is just as binding on non-state actors as it is on nation states.<sup>435</sup>

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427. UNICEF, *supra* note 426.

428. Relief Web, *supra* note 419.

429. McGirk, *supra* note 204.

430. Relief Web, *supra* note 419.

431. *UN to Embark on Humanitarian Assessment in Post-conflict Gaza*, *supra* note 407.

432. Cook, *supra* note 198.

433. Geneva Convention IV, *supra* note 66, at arts. 2, 6.

434. The principal of distinction is one of the "cardinal principles contained in the texts constituting the fabric of humanitarian law. . .," as well as one of the "intransgressable principles of international customary law." *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, at ¶¶ 78-79 (July 8); Customary International Humanitarian Law Vol. I, *supra* note 191, at 3, 36; Customary International Humanitarian Law Vol II, *supra* note 126, at 3, 296.

435. BETH VAN SCHAACK AND RONALD C. SLYE, INTERNATIONAL CRIMINAL LAW AND ITS

Since the start of hostilities, Hamas fighters have continued to fire missiles aimed at civilian areas in southern Israel.<sup>436</sup> Furthermore, on many occasions, Hamas has stated that its aim is to target and terrorize the civilian population.<sup>437</sup> These acts, regardless of the actual damage inflicted,<sup>438</sup> appear in serious breach<sup>439</sup> of the laws and customs of war, and Hamas fighters could be held liable for a variety of war crimes.<sup>440</sup>

Military actions by Hamas against Israeli military objectives,<sup>441</sup> however, do not constitute war crimes unless such military objectives are targeted along with civilian ones in an indiscriminate manner,<sup>442</sup> or the military advantage gained by attacking Israeli military objects is outweighed by the harm caused to civilians. The placement of military objectives close to or within civilian areas on the part of the Israeli military<sup>443</sup> raises questions about whether some of the damage in parts of southern Israel,<sup>444</sup> on which Hamas rockets landed, are considered unlawful indiscriminate attacks.<sup>445</sup>

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ENFORCEMENT 246 (2007).

436. Press Release, Isr. Def. Force Spokesperson, Rocket Statistics (Jan. 3, 2009), <http://idfspokesperson.com/2009/01/03/rocket-statistics-3-jan-2009/> (stating that there were 500 rocket and mortar launches between Dec. 27, 2008 and Jan. 3, 2009); Barak Ravid, *IDF: Hamas Rocket Fire down 50% since Start of Gaza Offensive*, HA'ARETZ, Jan. 21, 2009, <http://www.haaretz.com/hasen/spages/1054596.html>; Shira Frenkel & James Hider, *Burns Victim Vows to Be Suicide Bomber while Israelis Ask: 'Was It All Worth It?'*, TIMES OF LONDON, Jan. 23, 2009, at 35, available at [http://www.timesonline.co.uk/tol/news/world/middle\\_east/article5567396.ece](http://www.timesonline.co.uk/tol/news/world/middle_east/article5567396.ece).

437. "Hamas took responsibility for the Katyushas aimed at Be'er Sheva, and its military wing said Tuesday night that it plans to fire at Israeli targets that are even further away as long as the IDF operation continues." Harel & Issacharoff, *supra* note 215.

438. Even though Additional Protocol I art. 85(3) defines grave breach as "causing death or serious injury," customary international law does not have a result requirement. Customary International Humanitarian Law Vol. I, *supra* note 191, at 569 (Rule 156, stating, "not all acts necessarily have to result in actual damage to persons or objects in order to amount to war crimes."). See Additional Protocol I, *supra* note 226, at art. 85(3). See also DÖRMANN, *supra* note 263, at 130 (explaining that during the *travaux préparatoires*, the delegates discussed the Additional Protocol definition and decided on a non-results oriented definition of the war crime for intentionally targeting civilians). See Additional Protocol I, *supra* note 226, at art. 8(2)(b)(i).

439. Customary International Humanitarian Law Vol. I, *supra* note 191, at 569; Geneva Convention IV, *supra* note 66, at art. 147.

440. Geneva Convention IV, *supra* note 66, at art. 3; Customary International Humanitarian Law Vol. I, *supra* note 191, at 590, 596, 599 (Rule 156).

441. *Hamas Rocket Hits Israeli Air Base*, PRESSTV, Jan. 11, 2009, <http://www.presstv.ir/detail.aspx?id=81683&sectionid=351020202>.

442. Customary International Humanitarian Law Vol I, *supra* note 191, at 590-91, 597-99 (Rule 156).

443. *IDF Soldiers: We Tried to no Avail to Have Base Near Nahal Oz Relocated*, HA'ARETZ, Nov. 30, 2008, <http://www.haaretz.com/hasen/spages/1042031.html>; Curt Goering, *A Day in Southern Israel*, Human Rights Now Blog (Jan. 29, 2009, 6:06 PM), <http://blog.amnestyusa.org/middle-east/a-day-in-southern-israel/> (describing military presence at the army base at the entrance to Nahal Oz).

444. Yaakov Katz, *Three Killed by Hamas Rocket Fire in the South*, JERUSALEM POST, Dec. 29, 2008, <http://www.jpost.com/servlet/Satellite?pagename=JPost%2FJPArticle%2FShowFull&cid=1230456508070> (describing how five Israeli civilians were wounded when a Hamas rocket landed near Nahal Oz).

445. The inaccurate nature of the weapons that Hamas uses makes it likely that attacks that were

The Israeli government has alleged that Hamas fighters have committed war crimes by using Palestinian civilians as “human shields.”<sup>446</sup> This accusation has been used both as an indictment of Hamas’s conduct during the ongoing hostilities, as well as a defense for the high numbers of Palestinian civilian casualties and civilian structural damage caused by the Israeli military assault.<sup>447</sup> However, the use of Palestinian civilians and civilian objects as human shields by Hamas fighters in the current conflict has been largely unsubstantiated and in some cases openly refuted and disproven.

In order to establish that Hamas fighters are in fact using civilian areas and persons as shields, it must be shown that Hamas militants’ *intent* is to use those areas or protected persons *in order* to immunize themselves from attack.<sup>448</sup> As a Human Rights Watch report explains, “[i]ndividuals responsible for shielding can be prosecuted for war crimes; failing to fully minimize harm to civilians is not considered a violation prosecutable as a war crime. To constitute shielding, there needs to be a specific intent to use civilians to deter an attack.”<sup>449</sup> While this differentiation may seem more technical than moral or practical, the intent element of the crime of human shielding is crucial; otherwise, any armed force that was backed into a civilian area because of the flow of battle would be rendered impotent to defend itself militarily under humanitarian law.

Many reported incidents of Hamas fighters using human shields do not provide enough information about the incidents to be at all conclusive about possible “human shielding.” Most of the reports lack firsthand accounts of whether or not civilians were present during incidents in which Hamas fighters were located in civilian areas due to the complete ban of allowing journalists into the Gaza Strip until weeks into the conflict.<sup>450</sup> Furthermore, there are tens of thousands

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thought legitimately to be aimed at military objectives, would be considered indiscriminate because of the lack of precision of the weapons used. Customary International Humanitarian Law Vol. I, *supra* note 191, at 3, 25, 40-41 (Rules 1, 7, 12(b)); Geneva Convention IV, *supra* note 66, at art. 3.

446. Press Release, Isr. Ministry of Foreign Affairs, Hamas Use of Civilians as Human Shields (Jan. 13, 2009), [http://www.mfa.gov.il/MFA/Terrorism--Obstacle+to+Peace/Terror+Groups/Hamas\\_Exploitation\\_Civilians\\_Jan\\_2009.htm](http://www.mfa.gov.il/MFA/Terrorism--Obstacle+to+Peace/Terror+Groups/Hamas_Exploitation_Civilians_Jan_2009.htm).

447. *Israel Shatters Key Hamas Targets*, SKYNEWS, Dec. 29, 2008, <http://news.sky.com/skynews/Home/World-News/Israel-Bombs-Gaza-Islamic-University-Shattering-Key-Hamas-Cultural-Symbol-Whilst-Ground-Troops-Move/Article/200812415194709>; Press Release, Isr. Def. Forces, IDF Targets Hamas Government Terrorist Infrastructure In The Gaza Strip (Dec. 27, 2008), <http://dover.idf.il/IDF/English/opcast/op/press/2701.htm>.

448. Customary International Humanitarian Law Vol. I, *supra* note 191, at 340 (Rule 97). *See also* Rome Statute, *supra* note 258, at art. 8(2)(b)(xxiii). DÖRMANN, *supra* note 263, at 344-45 (explaining that the *travaux préparatoires* make it clear that the mens rea requirement for the war crime of human shielding is specific intent).

449. HUMAN RIGHTS WATCH, WHY THEY DIED: CIVILIAN CASUALTIES IN LEBANON DURING THE 2006 WAR VI(D) (Sept. 5, 2007), <http://www.hrw.org/en/reports/2007/09/05/why-they-died>. *See also* Lyall, *supra* note 284, at 316 (explaining that “liability does not attach to a breach of art. 58 amounting to a failure by a defending state to fulfill its responsibility to take adequate precautions to remove and protect civilians from attack.”).

450. Press Release, Isr. Ministry of Foreign Affairs, E.g., Hamas Use of Civilian Shields (Jan. 13, 2009), [http://www.mfa.gov.il/MFA/Terrorism+Obstacle+to+Peace/Terror+Groups/Hamas\\_Exploitation\\_Civilians\\_Jan\\_2009.htm](http://www.mfa.gov.il/MFA/Terrorism+Obstacle+to+Peace/Terror+Groups/Hamas_Exploitation_Civilians_Jan_2009.htm).

of Gazan residents who have been displaced from their homes because of Israeli bombings and attacks,<sup>451</sup> indicating that many civilian areas have been emptied of their residents perhaps before Hamas fighters arrived. In assessing Hamas's culpability, due attention must also be paid to the possibility that Hamas fighters had been forced to retreat into densely populated areas in the face of an onslaught from an overwhelmingly superior military force, merely in order to survive.<sup>452</sup>

A party to an armed conflict where the adversary employs the tactic of human shielding is still bound by the fundamental humanitarian principle of distinction, which specifies that civilians and non-military objectives may never be the intended targets of military actions.<sup>453</sup> Statements made by Israeli officials, such as Israeli Foreign Minister Tzipi Livni who stated, "we cannot avoid completely any kind of civilian casualties. But the responsibility for this lies on Hamas' shoulders,"<sup>454</sup> demonstrates a lack of understanding that liability for violations of the principle of discrimination cannot be transferred to the other party even if human shields are used.

Further investigation of Hamas's battlefield practices is no doubt due. But the evidence that Hamas fighters exploited Palestinian civilians as human shields is, at this point, scant. Rather, the accusation seems more likely a part of Israel's calculated "spin" operation<sup>455</sup> that attempts to shift responsibility for civilian deaths from Israel to Hamas.

#### XIV. LIABILITY AND THE END OF ISRAELI IMPUNITY

##### A. State Liability

Israel, under international law, is liable for its violations of its international legal obligations. Article 91 of the Additional Protocol I to the Geneva Conventions (AP I) provides that "[a] Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by

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451. U.N. Office for the Coordination of Humanitarian Affairs, Field Update on Gaza from the Humanitarian Coordinator, *supra* note 412.

452. *Israeli forces Surround Gaza City*, IRISH TIMES, Jan. 4, 2009, <http://www.irishtimes.com/newspaper/breaking/2009/0104/breaking1.htm>; *Israeli Forces Partially Surround Gaza City, Ehud Barak Says*, FRANCE 24, Jan. 5, 2009, <http://www.france24.com/en/20090104-clone-battles-rage-israeli-troops-push-deeper-gaza->; UN Office for the Coordination of Humanitarian Affairs (OCHA), Situation Report from the Humanitarian Coordinator, Jan. 5, 2009 ("Israeli ground forces are currently deployed around the large Palestinian population centres in the northern Gaza Strip (Gaza City, Beit Hanoun, Beit Lahiya, and the Jabalia Refugee Camp), eastern Gaza Strip, between the Gaza governorate and Middle Area, and in southeast Rafah."); *Israeli Forces, Tanks Advance Bisecting Gaza*, CBSNEWS, Jan. 4, 2009, <http://cbs5.com/national/israel.hamas.strikes.2.899569.html>.

453. Geneva Convention IV, *supra* note 66 at art. 3; Additional Protocol I, *supra* note 226, at art. 13(2); Additional Protocol I, *supra* note 226, at arts. 48, 51(4), 50(3), 51(8); Hague IV, *supra* note 47, at art. 23(g); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, at ¶ 78-79 (July 8); Customary International Humanitarian Law Vol. I, *supra* note 191, at 3, 17, 37, 40 (Rules 1, 5, 11, 12(a) and (c)).

454. *Israel Shatters Key Hamas Targets*, *supra* note 447.

455. Ravid, *supra* note 7.

persons forming part of its armed forces.”<sup>456</sup>

Rules 149, 150 and 158 of ICRC study on customary international law (ICRC study) provide for the customary rules for state responsibility.<sup>457</sup> Rule 149 provides that:

[a] State is responsible for violations of international humanitarian law attributable to it, including: (a) violations committed by its organs, including its armed forces; (b) violations committed by persons or entities it empowered to exercise elements of governmental authority; (c) violations committed by persons or groups acting in fact on its instructions, or under its direction or control; and (d) violations committed by private persons or groups which it acknowledges and adopts as its own conduct.<sup>458</sup>

Rule 150 provides that responsible states are required to make reparations for loss or injury caused.<sup>459</sup> Finally, Rule 158 imposes a duty to investigate and prosecute war crimes committed by their own nationals or armed forces, or those that occurred upon their territory.<sup>460</sup>

Further, Israel, in the *Adolf Eichmann* case, has recognized and affirmed the principle of state responsibility. In *Eichmann*, the Israeli High Court stated that “it is true that under international law Germany bears responsibility for all the crimes that were committed as its own acts of State, including the crimes attributed to the accused.”<sup>461</sup> This recognition is made again in the Report on the Practice of Israel, which states that Israel acknowledges and supports the view that states bear a responsibility under international law, for all violations of the laws of war perpetrated by them or by individuals under their responsibility.<sup>462</sup>

In the present situation, these rules of customary international law impose upon Israel: (1) responsibility for actions taken by its officials and the Israeli Defense Force (IDF); (2) a duty to make reparations for any injury or loss caused to Gazans; and (3) a duty to investigate and prosecute any war crimes perpetrated by its officials and IDF officers both in Israel and, as the occupying power, in Gaza.

#### *B. Individual Criminal Liability*

Beyond state responsibility, under international criminal law, individuals can be held accountable for actions taken which violate certain principles of international humanitarian law and international human rights. Nuremberg Principle One states that “[a]ny person who commits an act which constitutes a

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456. Additional Protocol I, *supra* note 226, at art. 91.

457. Customary International Humanitarian Law Vol. I, *supra* note 191, at 530, 537, 607 (Rules 149, 150, 158).

458. *Id.* at 530 (Rule 149).

459. *Id.* at 537 (Rule 150).

460. *Id.* at 607 (Rule 158).

461. *State of Israel v. Adolf Eichmann*, 36 I.L.R. 5 (Dist. Ct. Jer. 1968).

462. Customary International Humanitarian Law Vol. II, *supra* note 126, at 6.

crime under international law is responsible therefore and liable to punishment.”<sup>463</sup> The International Military Tribunal in Nuremberg affirmed this principle where it proclaimed that “individuals can be punished for violations of international law. Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”<sup>464</sup>

Under these norms, individual liability has been firmly established for war crimes, crimes against humanity, and genocide. Further, liability can incur not only for actual commission of a war crime, but also for “attempting to commit a war crime, as well as for assisting in, facilitating, aiding or abetting the commission of a war crime . . . [and] for planning or instigating the commission of a war crime.”<sup>465</sup>

Rules 151 – 155 of the ICRC study provide the customary rules for individual criminal liability.<sup>466</sup> The same rules apply regardless of whether the crimes alleged were perpetrated during an international or non-international armed conflict. The rules provide for individual criminal liability for any war crime committed (Rule 151), command responsibility for crimes perpetrated pursuant to their orders (Rule 152), command responsibility for failure to prevent or punish with knowledge of a war crime (Rule 153), and subordinate responsibility, where there is knowledge that an act would be unlawful, regardless of the presence of a superior order (Rule 155).<sup>467</sup> These rules are substantially the same as the basis for individual criminal liability found in Article 25 of the Rome Statute of the International Criminal Court (Rome Statute),<sup>468</sup> which is commonly accepted as a codification of customary international criminal law at the time of enactment.<sup>469</sup> Thus, crimes against humanity and war crimes, as defined in Articles 7 and 8 of the Rome Statute, also form customary international law.<sup>470</sup> In the present situation, Israeli officials and IDF members could be charged with individual criminal liability for the commission of war crimes and crimes against humanity for the operation in Gaza.<sup>471</sup>

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463. U.N. International Law Commission, *Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal*, Principle 1, U.N. Doc. A/1316 (1950), available at [http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7\\_1\\_1950.pdf](http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7_1_1950.pdf).

464. U.N. International Military Tribunal, *Judgment: Law of the Charter, Judgment of the International Military Tribunal for the Trial of German Major War Criminals*, (1951), available at <http://avalon.law.yale.edu/imt/judlawch.asp>.

465. Customary International Humanitarian Law Vol. I, *supra* note 191, at 554.

466. *Id.* at 551, 556, 558, 563, 565 (Rules 151, 152, 153, 154, 155).

467. *Id.*

468. Rome Statute, *supra* note 258, at art. 25.

469. ROBERT CRYER, ET. AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 126 (2007).

470. The Conflict in Gaza: A Briefing on Applicable Law, Investigations, and Accountability, *supra* note 17, at 24-25.

471. Press Release, Amnesty Int'l, Time for Accountability in Gaza and Southern Israel (Jan. 26, 2009), <http://www.amnesty.org/en/appeals-for-action/time-accountability-gaza-and-southern-israel>.

The elements of crimes against humanity require that the act in question be committed “as part of a widespread or systematic attack directed against any civilian population with knowledge of the attack . . .”<sup>472</sup> Further, crimes against humanity do not require a situation of armed conflict.<sup>473</sup> During the recent attack on Gaza, Israeli officials and IDF members could be held accountable for crimes against humanity for, among others, collective punishment<sup>474</sup> and unlawful killing of civilians<sup>475</sup> as discussed in section 7(1)(h), section 7(1)(a), and 7(1)(b).

War crimes include violations that are considered to be “[g]rave breaches of the Geneva Conventions”<sup>476</sup> and those that constitute “[o]ther serious violations of the laws and customs applicable in international armed conflict . . .”<sup>477</sup> The crimes that appear to be most relevant for the present circumstances include, among others: (1) willful killing;<sup>478</sup> (2) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;<sup>479</sup> (3) intentionally directing attacks against the civilian population not taking part in hostilities or civilian objects;<sup>480</sup> (4) attacks against humanitarian personnel and installations;<sup>481</sup> (5) attacks on buildings dedicated to religion or education, hospitals, buildings, medical units or personnel using the emblems of the Geneva Conventions;<sup>482</sup> (6) destruction or seizure of enemy property not for military necessity;<sup>483</sup> (7) employing weapons or materials and methods of warfare which can cause superfluous injury or unnecessary suffering or weapons which are inherently indiscriminate;<sup>484</sup> (8) utilizing human shield;<sup>485</sup> and (9) employing intentional starvation by deprivation of objects indispensable for survival or willful impeding of relief supplies.<sup>486</sup> The substance of these alleged crimes are discussed in detail in previous sections.

### C. Ending Israeli Impunity: Venues for “Prosecution”

The recent events in Gaza have sparked an outcry in the international community for criminal accountability for Israeli military and political leaders.<sup>487</sup> Navanethem Pillay, the UN High Commissioner for Human Rights stated to the

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472. Rome Statute, *supra* note 258, at art. 7.

473. The Conflict in Gaza: A Briefing on Applicable Law, Investigations, and Accountability, *supra* note 17, at 5.

474. Rome Statute, *supra* note 258, at art. 7(1)(h).

475. *Id.* at art. 7(1)(a) and 7(1)(b)

476. *Id.* at art. 8(2)(a).

477. *Id.* at art. 8(2)(b).

478. *Id.* at art. 8(2)(a)(i).

479. *Id.* at art. 8(2)(a)(iv).

480. *Id.* at art. 8(2)(b)(i), (ii), & (iv).

481. *Id.* at art. 8(2)(b)(iii).

482. *Id.* at art. 8(2)(b)(ix), & (xxiv).

483. *Id.* at art. 8(2)(b)(xiii).

484. *Id.* at art. 8(2)(b)(xx).

485. *Id.* at art. 8(2)(b)(xxiii).

486. *Id.* at art. 8(2)(b)(xxv).

487. Amnesty Int'l, *supra* note 471; Press Release, Human Rights Watch, Israel/Gaza: International Investigation Essential (Jan. 27, 2009), <http://www.hrw.org/en/news/2009/01/27/israelgaza-international-investigation-essential>.

special session of the Human Rights Council on the situation in Gaza<sup>488</sup> that:

[a]ccountability must be ensured for violations of international law. As a first step, credible, independent, and transparent investigations must be carried out to identify violations and establish responsibilities. Equally crucial is upholding the right of victims to reparation. I remind this Council that violations of international humanitarian law may constitute war crimes for which individual criminal responsibility may be invoked.<sup>489</sup>

The Security Council, in Resolution 1674, reaffirmed the principle that the elimination of a culture of impunity is important both to prevent future abuses and make reparations for past abuses and violation:

. . . ending impunity is essential if a society in conflict or recovering from conflict is to come to terms with past abuses committed against civilians affected by armed conflict and to prevent future such abuses, *draws attention* to the full range of justice and reconciliation mechanisms to be considered, including national, international and "mixed" criminal courts and tribunals and truth and reconciliation commissions, and *notes* that such mechanisms can promote not only individual responsibility for serious crimes, but also peace, truth, reconciliation and the rights of the victims.<sup>490</sup>

In order to bring an end to the impunity generally afforded Israeli security and defense forces, it is paramount to hold both the Israeli state and its individual actors responsible for their international human rights law and international humanitarian law violations for their recent operation in Gaza.

#### *D. Special Tribunal pursuant to Security Council Chapter 7 powers*

In the last sixteen years, the Security Council has exercised its Chapter 7 powers four times to create or assist with the creation of a special tribunal in an attempt to give form and effect to international criminal justice. These actions have resulted in the creation of the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the Special Tribunal for Lebanon, and the Special Court for Sierra Leone.<sup>491</sup> The Security Council could, if it chose, establish a tribunal to investigate and try alleged war crimes in the Gaza invasion.

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488. Press Release, U.N. High Comm'r for Human Rights, Statement of Ms. Navanethem Pillay, United Nations High Commissioner for Human Rights to the Ninth Special Session of the Human Rights Council on The Grave Violations of Human Rights in the Occupied Palestinian Territory Including the Recent Aggression of the Occupied Gaza Strip, (Jan. 9, 2009), <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/D78B7DAC697D3060C1257539003B5F3A?opendocument>.

489. *Id.*

490. S.C. Res. 1674, ¶ 7, U.N. Doc. S/RES/1674 (Apr. 28, 2006).

491. *See* S.C. Res. 827, U.N. Doc. S/RES/827, (May, 25, 1993); S.C. Res. 955, U.N. Doc. S/RES/955, (Nov. 8, 1994); S.C. Res. 1757, U.N. Doc. S/RES/1757, (May 30, 2007); S.C. Res. 1315, U.N. Doc. S/RES/1315, (Aug. 14, 2000).

Yet any non-procedural decision taken by the Security Council will be subject to the Article 27(3) veto power granted to the permanent members of the Council.<sup>492</sup> The United States, which has a long history of using its veto power on Security Council resolutions related to Israel,<sup>493</sup> would necessarily have to approve of the creation of such a tribunal, which, given the past record seems unlikely. Perhaps the recent change of administration in the United States will move towards a change in U.S. policy in this area, but the new administration has made no statement to indicate movement towards such a change.<sup>494</sup>

In requesting that the Secretary-General negotiate with the Government of Sierra Leone, the Security Council recognized that “a credible system of justice and accountability for the very serious crimes committed there would end impunity and would contribute to the process of national reconciliation and to the restoration and maintenance of peace . . .”<sup>495</sup> A similar recognition is needed here in relation to the Israeli operation in Gaza; the question is whether such a recognition will ever be made.

#### *E. The International Criminal Court*

The International Criminal Court (ICC), while arguably the ideal venue for prosecutions on individual criminal liability, likely lacks jurisdiction over the crimes committed in the present situation. Israel, as a non-signatory to the Rome Statute,<sup>496</sup> falls outside the general jurisdiction of the ICC, and as such, the ICC has limited power to investigate and prosecute the possible war crimes perpetrated by Israel from December 27, 2008 through the declaration of a ceasefire on January 18, 2009. This could only happen in three possible ways, all of which are unlikely to result in actual ICC investigations and prosecutions.

First, Israel could ratify the Rome Statute and submit to the jurisdiction of the ICC. But this in itself is insufficient because the ICC can only prosecute crimes that occur after ratification of the treaty by the state party. As such, in the situation where Israel submits to ICC jurisdiction, they would have to make a declaration under Article 12 (3) of the Rome Statute accepting jurisdiction over the crimes in question.<sup>497</sup> Further, ratification looks to be unlikely. In June 2002, Israeli Ministry of Foreign Affairs released their views on the ICC.<sup>498</sup> They expressed concerns that

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492. U.N. Charter art. 27(3).

493. Subjects of UN Security Council Vetoes, <http://www.globalpolicy.org/security-council/tables-and-charts-on-the-security-council-0-82/subjects-of-un-security-council-vetoes.html> (last visited Sept. 14, 2009). See also Barry James, *Unlike U.S., France Uses Its Veto Power Sparingly*, N.Y. TIMES, (Mar. 3, 2003), available at [http://www.nytimes.com/2003/03/03/news/03iht-veto\\_ed3\\_.html](http://www.nytimes.com/2003/03/03/news/03iht-veto_ed3_.html).

494. Richard Lister, *Obama's Strategic Silence on Gaza*, BBC NEWS, Jan. 6, 2009, <http://news.bbc.co.uk/2/hi/americas/7812498.stm>.

495. U.N. Indep. Special Court, *Council Asks Secretary-General, Sierra Leone To Negotiate Agreement For Creation Of Independent Special Court*, U.N. Doc. SC/6910 (Aug. 14, 2000).

496. Press Release, Int'l Criminal Court, *The States Parties to the Rome Statute* (July 21, 2009), <http://www.icc-cpi.int/Menus/ASP/states+parties>.

497. Rome Statute, *supra* note 258, at art. 12.

498. Press Release, Isr. Ministry of Foreign Affairs, *Israel and the International Criminal Court* (June 30, 2002), [http://www.mfa.gov.il/MFA/MFAArchive/2000\\_2009/2002/6/Israel%20and%20the%20International%20Criminal%20Court](http://www.mfa.gov.il/MFA/MFAArchive/2000_2009/2002/6/Israel%20and%20the%20International%20Criminal%20Court).

“the court will be subjected to political pressures and its impartiality will be compromised.”<sup>499</sup> Those concerns were found upon what the Ministry of Foreign Affairs described to be: (1) a highly selective list of crimes; (2) the method of judicial appointment, specifically the regional appointment structure which would likely preclude the appointment of an Israeli judge; (3) the extensive powers of the Office of the Prosecutor; and (4) a concern that the ICC statute attempted to rewrite international law, in particular they were troubled by the inclusion of “the transfer, directly or indirectly, by the occupying power of parts of its own civilian population into the territory it occupies” as a war crime.<sup>500</sup> As none of the provisions that concern Israel have changed since the release of this statement,<sup>501</sup> absent a re-evaluation by Israel, ratification does not look likely at this point.

Second, the situation could be referred by the Security Council to the ICC Office of the Prosecutor for investigation pursuant to Article 13(b) of the Rome Statute, which states that “[a] situation in which one or more of such crimes appears to have been committed is referred to the prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.”<sup>502</sup> This situation is analogous to the discussion presented above on the exercise of Security Council power under Chapter VII to create a special tribunal to investigate and prosecute the crimes in Gaza. This is unlikely to happen due to a likely U.S. veto of any attempts to take any actions of the sort.

Third, upon referral by a state to the Office of the Prosecutor, the prosecutor can institute an investigation to ascertain if the situation falls within the jurisdiction of the ICC.<sup>503</sup> As of this writing, this option is currently being explored by the ICC Office of the Prosecutor after they received over 210 appeals for investigation from the Palestinian Authority, individuals and NGOs.<sup>504</sup> On January 21, Ali Khashan, justice minister for the Palestinian Authority, faxed a letter to the court recognizing the court’s jurisdiction over “acts committed in the territory of Palestine since 1 July 2002.”<sup>505</sup> On February 3, Luis Moreno Ocampo, the ICC chief prosecutor, in a change from his statement made in mid-January that the court lacked jurisdiction over the situation,<sup>506</sup> announced that the ICC would begin a preliminary analysis of the allegations of war crimes in Gaza.<sup>507</sup>

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499. *Id.*

500. *Id.*

501. *See generally* Rome Statute, *supra* note 258.

502. *Id.* at art. 13.

503. *Id.* at art. 13 and 15.

504. Thijs Bouwknecht, *ICC Starts Analysis of Gaza War Crimes Allegations*, RADIO NEDERLAND WERELDOMROEP, Feb. 3, 2009, <http://static.rnw.nl/migratie/www.radionetherlands.nl/currentaffairs/region/middleeast/090203-icc-gaza-war-crimes-redirected>.

505. Sebastian Rotella, *International Court May Look at Recent Gaza Battle*, LOS ANGELES TIMES, Feb. 5, 2009, at 4, available at <http://articles.latimes.com/2009/feb/05/world/fg-court-palestinians5>.

506. Thijs Bouwknecht, *ICC Has No Jurisdiction over Gaza War Crimes Claims*, RADIO NEDERLAND WERELDOMROEP, Jan. 15, 2009, <http://www.rnw.nl/international-justice/article/icc-has-no-jurisdiction-over-gaza-war-crimes-claims>.

507. Bouwknecht, *supra* note 504.

The first step in this process will be for Mr. Ocampo and the Office of the Prosecutor to determine if the Palestinian Authority has the power to recognize the jurisdiction of the court. This step faces two significant obstacles. First, the ICC can only investigate cases of a *nation* that has accepted its jurisdiction, and as of yet the Palestinian Authority has not been recognized by the international community as a sovereign state.<sup>508</sup> The Palestinian Authority is claiming that as the “de facto” state in Gaza, it has the power to recognize ICC jurisdiction.<sup>509</sup> Mr. Kashan, the Palestinian Authority’s justice minister stated, “[w]e have the fundamentals of a state and we have met all conditions required from a state.”<sup>510</sup> On this matter, Mr. Ocampo stated that “[i]t is the territorial state that has to make a reference to the court. They are making an argument that the Palestinian Authority is, in reality, that state.”<sup>511</sup> Further complicating matters is that after June 2007, the Palestinian Authority no longer holds power in Gaza, which also acts to cast doubt on their ability to refer the situation to the ICC.<sup>512</sup> The ICC, in its relatively short tenure, has yet to make a decision on such a matter and has promised careful consideration of the situation and all surrounding factors.<sup>513</sup> Mr. Ocampo has stated that “[e]ach legal area is complicated . . . We move when we are completely sure . . . We will consider this carefully and thoroughly.”<sup>514</sup>

The path to ICC jurisdiction now has an opening due to the Office of the Prosecutor’s recent steps to explore the possibility of bringing the situation in Gaza to the court. This path though is still fraught with obstacles and due to the lack of ICC jurisprudence, difficult to predict.

*F. Employing Universal Jurisdiction: Prosecution in domestic jurisdictions*

Rule 157 of the ICRC study finds a customary rule which grants states the right to exercise “universal jurisdiction” over war crimes in their domestic courts.<sup>515</sup> Over twenty nations have enacted legislation permitting the exercise of jurisdiction in domestic courts for war crimes,<sup>516</sup> and many more have enacted legislation that allows universal jurisdiction of war crimes considered to be “grave breaches” of the Geneva Conventions.<sup>517</sup> The Princeton Principles on Universal Jurisdiction, which is considered to be “a progressive restatement of international law on the subject of universal jurisdiction,” helps provide guidelines to the application of universal jurisdiction by domestic courts.<sup>518</sup> Principle One states that

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508. Rome Statute, *supra* note 258, at art. 11(2); Maev Kennedy and Rory McCarthy, *Pope Calls for ‘Sovereign Palestinian Homeland,’* THE GUARDIAN, May 13, 2009, <http://www.guardian.co.uk/world/2009/may/13/pope-bethlehem-palestinian-homeland>.

509. Bouwknecht, *supra* note 504.

510. Rotella, *supra* note 505.

511. ICC *looking at ways to prosecute Israeli officers*, YNETNEWS, Feb. 2, 2009, <http://www.ynetnews.com/articles/0,7340,L-3665413,00.html>.

512. Rotella, *supra* note 505.

513. *Id.*

514. *Id.*

515. Customary International Humanitarian Law Vol. I, *supra* note 191, at 604 (Rule 157).

516. *Id.* at 604 n.190-94.

517. *Id.* at 606-07, n. 206.

518. STEPHEN MACEDO, UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF

“. . . universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.”<sup>519</sup>

Israel, in its decision in the *Eichmann* case has recognized and utilized the principle of universal jurisdiction.

The abhorrent crimes defined under this Law are not crimes under Israeli law alone. These crimes, which struck at the whole of mankind and shocked the conscience of nations, are grave offenses against the law of nations itself (*delicta juris gentium*). Therefore, so far from international law negating or limiting the jurisdiction of countries with respect to such crimes, *international law is, in the absence of an international court, in need of the judicial and legislative organs of every country to give effect to its criminal interdictions and to bring the criminals to trial*. The jurisdiction to try crimes under international law is universal.<sup>520</sup>

The court then goes on to further set forth their rationale for individual liability under universal jurisdiction.

It will be recalled that the reference here is to a group of acts committed by members of the armed forces of the enemy which are contrary to the “laws and customs of war.” These acts are deemed to constitute in essence international crimes, they involve the violation of the provisions of customary international law . . . *those crimes entail individual criminal responsibility because they challenge the foundations of international society and affront the conscience of civilized nations*.<sup>521</sup>

Further, Israeli recognition and fear of the possibility of the exercise of universal jurisdiction by another domestic court in reaction to the Gaza operation can be seen in the actions that have been taken by the Israeli government in the days following the ceasefire. The Israeli cabinet has declared that it would grant legal aid and support to IDF officers if they face liability for war crimes.<sup>522</sup> Prime Minister Ehud Olmert has been quoted to have said, “[t]he state of Israel will fully back those who acted on its behalf . . . [t]he soldiers and commanders who were sent on missions in Gaza must know that they are safe from various tribunals.”<sup>523</sup>

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SERIOUS CRIMES UNDER INTERNATIONAL LAW 26 -27 (2004).

519. *Id.* at 21.

520. Shofar FTP Archives, Adolf Eichmann Transcripts, <http://www.nizkor.org/ftp.cgi/people/e/eichmann.adolf/transcripts/ftp.py?people/e/eichmann.adolf/transcripts/Judgment/Judgment-002> (last visited Sept. 14, 2009) (emphasis added).

521. Shofar FTP Archives, Adolf Eichmann Transcripts, <http://www.nizkor.org/ftp.py?people/e/eichmann.adolf/transcripts/Appeal/Appeal-Session-07-03> (last visited Sept. 14, 2009) (emphasis added).

522. Barak Ravid, *Israel to Grant Legal Aid to IDF Troops Accused of Gaza War Crimes*, HAARETZ, Jan. 25, 2009, <http://www.haaretz.com/hasen/spages/1058509.html>.

523. *Israel to Fight Any War Crimes Charges*, CBS NEWS, Jan. 26, 2009,

In fact, Attorney General Menachem Mazuz stated at the Jerusalem Center for Ethics conference that “we are preparing for a wave of international lawsuits over the operation in Gaza.”<sup>524</sup> Further, IDF officers planning to travel out of the state have been told to contact the Judge Advocate General’s Office before leaving Israel,<sup>525</sup> and the IDF censor has applied strict restrictions preventing the media from identifying officers who participated in the Gaza Strip fighting and the information about them that may be used in legal proceedings against them abroad.<sup>526</sup>

These preceding actions taken by Israel illustrate the very real possibility that another country could “exercise their obligations to conduct prompt, thorough, independent and impartial criminal investigations”<sup>527</sup> in the form of universal jurisdiction.

#### *G. International Court of Justice Advisory Opinion*

Article 65 (1) of the International Court of Justice (ICJ) Statute provides for the ICJ to issue advisory decisions on any legal question by request of the UN General Assembly, Security Council, or other authorized bodies.<sup>528</sup> By design, advisory decisions are non-binding.<sup>529</sup>

While an advisory opinion by the ICJ may result in an authoritative view of the violations of international human rights and humanitarian law during the Gaza operation, the utility of such an opinion is questionable. Israel has shown complete disregard for the ICJ in the past, both by their failure to participate in the proceedings and by their rejection of the final advisory opinion issued in the proceedings concerning Israel’s “separation” wall in the West Bank.<sup>530</sup> This disregard coupled with the non-binding nature of an advisory opinion casts doubt upon effectiveness of an ICJ decision to actually end Israel’s impunity.

#### *H. International Civil Society and boycotts, divestment, and sanctions*

The end of apartheid stands as one of the crowning accomplishments of the past century, but we would not have succeeded without the help of international pressure— in particular the divestment movement of the

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<http://www.cbsnews.com/stories/2009/01/25/world/main4752239.shtml>.

524. Aviad Glickman, *Mazuz: Israel Bracing for Slew of Lawsuits over Gaza op*, YNETNEWS, Jan. 11, 2009, <http://www.ynetnews.com/articles/0,7340,L-3654464,00.html>.

525. Tova Tzimuki, *Travel Advisory Issued for Top IDF Officers*, YNETNEWS, Jan. 19, 2009, <http://www.ynetnews.com/articles/0,7340,L-3658823,00.html>.

526. Amos Harel, *IDF Censor Bans Naming Officers Involved in Gaza op*, HAARETZ, Feb. 3, 2009, <http://www.haaretz.com/hasen/spages/1057964.html>.

527. *The Conflict in Gaza: A Briefing on Applicable Law, Investigations, and Accountability*, *supra* note 17, at 19.

528. U.N. Charter art. 65, para 1.

529. *The Interpretation of Peace Treaties (First Phase)*, Advisory Opinion, 1950 I.C.J. 71, (Mar. 30) (stating that court opinions “of an advisory nature . . . [have] no binding force.”). *See also* MOHAMED SAMEH M. AMR, *THE ROLE OF THE INTERNATIONAL COURT OF JUSTICE AS THE PRINCIPAL JUDICIAL ORGAN OF THE UNITED NATIONS* 113-14 (2003).

530. GERNOT BIEHLER, *PROCEDURES IN INTERNATIONAL LAW* 280 (2008).

1980s.<sup>531</sup>

-Archbishop Desmond Tutu

International civil society “prosecution” can help act where traditional forms of international criminal prosecution have failed. Archbishop Tutu, recognized with a Nobel Prize for his non-violent struggle to bring peace to South Africa,<sup>532</sup> in recognition of the important role that divestment and boycotts played in bringing about the end of apartheid has stated that “[e]ventually, institutions pulled the financial plug and the South African Government thought twice about its policies.”<sup>533</sup> He then goes further to recommend a similar movement to end the occupation of Palestine by Israel.<sup>534</sup> In July 2005, such a campaign was called for by Palestinian non-governmental organizations with the stated aim for “people of conscience all over the world to impose broad boycotts and implement divestment initiatives against Israel similar to those applied to South Africa in the apartheid era.”<sup>535</sup>

The boycott/divestment/sanctions (BDS) movement offers a powerful model for those seeking justice in Israel/Palestine today. Israel depends on foreign trade and is sensitive to international opinion, especially in the West, and therefore is vulnerable from international civil society. When all other avenues are blocked, and governments fail their responsibilities, citizens must assume responsibility to ensure respect for international law.

#### XV. CONCLUSION

There is prima facie evidence that Israel has committed numerous and grave violations of international law during its assault on the Gaza Strip. Hamas fighters, too, appeared to have committed war crimes, although on a far lesser scale than Israel. Further investigation is due in both cases, and if culpability is, indeed, corroborated, the state of Israel and individuals on both sides must be held accountable.

In this article, we prioritized Israeli offenses, for two reasons. First, the human consequences of Israeli violations of international law during Operation Cast Lead are multiples greater—taking just one measure, the number of lives claimed—100 times greater.<sup>536</sup> We do not have figures for property damage caused by Hamas rocket and mortar fire, but in light of the estimates of property damage in the Gaza

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531. Desmond Tutu, *Israel: Time to Divest*, THIRD WORLD TRAVELER, Feb. 2003, [http://www.thirdworldtraveler.com/Israel/Israel\\_Time\\_To\\_Divest.html](http://www.thirdworldtraveler.com/Israel/Israel_Time_To_Divest.html).

532. Press Release, The Norwegian Nobel Comm., The Nobel Peace Prize 1984 (Oct. 5, 1984), [http://nobelprize.org/nobel\\_prizes/peace/laureates/1984/press.html](http://nobelprize.org/nobel_prizes/peace/laureates/1984/press.html).

533. Tutu, *supra* note 531.

534. *Id.*

535. Naomi Klein, *Enough. It's Time for a Boycott*, THE GUARDIAN, Jan. 10, 2009, <http://www.guardian.co.uk/commentisfree/2009/jan/10/naomi-klein-boycott-israel>.

536. Widespread Destruction of Homes, *supra* note 210; Israeli Soldiers Recall Gaza Attack Orders, *supra* note 230.

Strip,<sup>537</sup> the differential in respect of that factor may be even greater.

Second, there is no chance that Hamas rocket fire or its other uses of violence will alter international humanitarian law in any way. Hamas' illegal acts are roundly and rightly condemned by the international community. Not so of Israel, that, as we have seen, has consciously and assiduously tried to push the limits of the law in manners that serve its short-term, military benefit. This campaign at the margin, and sometimes beyond the margin, of international legality is dangerous, both for Israel, and for all nations. A common sense measure of the value of a principle of international humanitarian law is whether one would countenance its application to one's own country, or to one's own forces in battle. We do not want another power "knocking on the roofs" of our civilians, nor warning them to evacuate a city so as to transform it into a free-fire zone.

Israel's capacity to trample international humanitarian law in its current state is a function of two factors: its overwhelming military superiority as against any combination of its neighbors; and the cocoon of impunity in which it has been enwrapped—largely due to the diplomatic cover provided it by the United States. The United States government has exercised its veto power in the United Nations Security Council forty-two times—over half the vetoes it has employed since the birth of the United Nations—to spare Israel censure for its actions.<sup>538</sup> In the recent fighting in Gaza, a Security Council resolution for a ceasefire was delayed in part out of concern over a probable U.S. veto, permitting Israel to extend its operation into several weeks.<sup>539</sup> Meanwhile, U.S. President Obama, as a candidate, affirmed support for a military aid package for Israel of \$3 billion per year for ten years.<sup>540</sup>

It is true, of course, that customary international law is formed by the actual practice of states. But there is a difference between assent to the practices of a particular state, and acceptance that its actions were lawful, on the one hand, and sullen acquiescence to what the majority of the world's nations resent, but are powerless to resist, on the other hand. The former represents the natural and healthy evolution of international law, and the latter, the ancient and discredited principle that "might makes right." The stature of international law as a whole is jeopardized by one nation operating in open defiance of its strictures. For the sake of all nations, and most of all, for the good of the Palestinian and Israeli peoples, Israel's impunity must end.

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537. McGirk, *supra* note 204.

538. See Global Policy Forum, Subjects of UN Security Council Vetoes, <http://www.globalpolicy.org/security-council/tables-and-charts-on-the-security-council-0-82/subjects-of-un-security-council-vetoes.html> (last visited Sept. 14, 2009).

539. *UN Security Council Fails to Agree over Gaza Ceasefire*, DEUTSCHE WELLE, Jan. 4, 2009, [http://www.dw-world.de/dw/function/0,,12215\\_cid\\_3920320,00.html?maca=en-en\\_nr-1893-xml-atom](http://www.dw-world.de/dw/function/0,,12215_cid_3920320,00.html?maca=en-en_nr-1893-xml-atom).

540. *Obama to Increase Aid to Israel*, PRESS TV, Oct. 6, 2008, <http://www.presstv.ir/detail.aspx?id=71409&sectionid=3510203>.