

THE GAZA STRIP: ISRAEL, ITS FOREIGN POLICY, AND THE GOLDSTONE REPORT

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At the end of 2008, Israel launched a three-week military offensive in the Gaza Strip (Operation Cast Lead), during which Israel carried out over 2,360 air strikes and numerous ground assaults over Gaza, causing the death of approximately 1,300 Palestinians, and wounding over 5,000 individuals. The Gaza conflict sparked numerous allegations of war crimes and international humanitarian law violations by both Israel and Hamas. Thus, the Human Rights Council (HRC) appointed a U.N. Fact Finding Mission on the Gaza Conflict (Goldstone Mission) led by prominent international jurist Richard Goldstone. The Goldstone Mission issued the Goldstone Report in September 2009, concluding that both Israel and Hamas committed international law violations by indiscriminately targeting civilians. It is a fair assertion that the Goldstone Report was met by controversy. Israel and its most important allies, such as the United States, have condemned the Report and have questioned its veracity and authenticity. Arab states, as well as other, less Israel-friendly states, have hailed the Goldstone Report as an important international legal document shedding light on international humanitarian law violations committed by Israeli forces and calling into question the Israeli policy over Gaza. This Article will attempt to illuminate the above debate, by examining the history of Israel and its policy vis-à-vis the Gaza Strip, Operation Cast Lead itself and its aftermath, as well as the relevant provisions international humanitarian law as they apply to the Gaza Strip. This Article will conclude that the Goldstone Report, despite all the controversy surrounding it, nonetheless represents an invaluable contribution to international humanitarian law and to international relations in their application to the volatile Middle East region.

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I. INTRODUCTION

On May 31, 2010, Israeli commandoes stormed an “activist” ship, sailing in a flotilla of ships that were carrying aid and other activists to the Gaza Strip, which had been blockaded by Israel and Egypt since 2007.¹ The activists were attempting to draw international support for Gaza, and to spark further condemnation of the Israeli blockade.² In the raid, nine passengers were killed by the Israeli commandoes, dozens of activists were wounded, and several Israeli soldiers were shot.³ International reaction was swift; most countries condemned Israel, and even the U.S. President, Barack Obama, voiced deep regret over the raid.⁴ Accounts of what exactly happened on the morning of May 31 vary. Israel claimed that the activists fired first at Israeli soldiers, causing Israel to fire in self-defense, while activists claimed the Israeli commandoes illegally boarded the activist ship and opened fire.⁵ What is undoubted is that Israel was involved in yet another international incident involving Gaza where its soldiers opened fire and killed several individuals. The May 31 incident fits into an existing paradigm of internationally questionable Israeli military policy over Gaza, and

¹ Amy Teibel and Tia Goldenberg, *Israeli Commandos Storm Aid Flotilla; 9 Killed*, ASSOCIATED PRESS, May 31, 2010, available at <http://newsgroups.derkeiler.com/Archive/Soc/soc.retirement/2010-05/msg04927.html> [hereinafter “Teibel & Goldenberg”].

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

portrays Israel once again as the potential aggressor and occupier over the Gaza strip.⁶

In fact, at the end of 2008, Israel launched a three-week military offensive in the Gaza Strip (Operation Cast Lead), during which Israel carried out over 2,360 air strikes and numerous ground assaults over Gaza, causing the death of approximately 1,300 Palestinians, and wounding over 5,000 individuals.⁷ The Gaza conflict sparked numerous allegations of war crimes and international humanitarian law violations by both Israel and Hamas.⁸ Thus, the Human Rights Council (HRC) appointed a U.N. Fact Finding Mission on the Gaza Conflict (Goldstone Mission) led by prominent international jurist Richard Goldstone. The Goldstone Mission issued the Goldstone Report in September 2009, concluding that both Israel and Hamas committed international law violations by indiscriminately targeting civilians.⁹ The Goldstone Report requested that the U.N. Security Council call on both Israel and Hamas to conduct investigations into war crimes allegations over the Gaza conflict and recommended that if such investigations were not undertaken, the Security Council should refer the Gaza situation to the International Criminal Court (ICC) Prosecutor.¹⁰ The HRC accepted the Goldstone Report's recommendations, and called upon all parties to ensure their implementation.¹¹

It is a fair assertion that the Goldstone Report was met by controversy. Israel and its most important allies, such as the United States, have condemned the Report and have questioned its veracity and authenticity.¹² Arab states, as well as other, less Israel-friendly states, have hailed the Goldstone Report as an important international legal document shedding light on international humanitarian law violations committed by Israeli forces and calling into question the Israeli policy over Gaza.¹³ This Article will attempt to illuminate the above debate, by examining, in Part II, the history of Israel and its policy vis-à-vis the Gaza Strip. In Part III, this Article will briefly describe Operation Cast Lead, the events that preceded it,

⁶ *Id.*

⁷ Yaël Ronen, *ICC Jurisdiction Over Acts Committed in the Gaza Strip*, 8 J. INT'L CRIM. JUST. 3, 3–4 (2010).

⁸ *Id.* at 4.

⁹ *Id.* at 4–5.

¹⁰ *Id.* at 5.

¹¹ *Id.*

¹² See Michael Posner, U.S. Assistant Sec'y of State for Democracy, Human Rights and Labor, U.S. Response to the Report of the United Nations Fact-Finding Mission on the Gaza Conflict (Sept. 29, 2009), available at <http://geneva.usmission.gov/news/2009/09/29/gaza-conflict/> (arguing that the report is “deeply flawed and disagree[ing] sharply with its methodology and many of its recommendations”).

¹³ See, e.g., *UN Report Clear Proofs of Israel's War Crimes*, EZZEEDEN AL-QASSAM BRIGADES (Palestine) Sept. 16, 2009, available at http://www.qassam.ps/news-1840-UN_report_clear_proofs_of_Israels_war_crimes.html.

the actual warfare, and its aftermath. Part IV of this Article will focus on international humanitarian law, and specifically, the violations thereof that have been alleged in Gaza. Part V will describe the Goldstone Report, its main conclusions, and the reasoning behind such conclusions. Ultimately, Part VI will attempt to place the Goldstone Report in the larger context of international law, by analyzing its contributions to international humanitarian law, its reliance on the ICC, and its implications for foreign policy in the Middle East. This Article will conclude that the Goldstone Report, despite all the controversy surrounding it, nonetheless represents an invaluable contribution to the body of international law and to international relations in their application to the volatile Middle East region.

II. ISRAEL AND GAZA: HISTORY, POLICY AND WAR

The Gaza Strip used to be part of the British Mandate for Palestine, and was destined to become part of a larger Palestinian Arab state.¹⁴ However, that plan never materialized, and Gaza fell under Egyptian administration after the first Arab-Israeli war in 1948.¹⁵ In the so-called Six Day War of 1967, Israel seized control of the Gaza Strip, establishing a military government in this region.¹⁶ Israel's claim was that since Israel did not displace a sovereign state when it took control over Gaza, Gaza was not an "occupied" territory within the meaning of international law.¹⁷ Thus, Israel claimed that Gaza was simply "administered" by Israel.¹⁸ This position, however, was rejected by the international community, which came to view Israel as an occupier.¹⁹

In 2005, Israel dismantled its settlements and withdrew its land-based military forces from Gaza.²⁰ Consequently, Israel reaffirmed its claim that Gaza was not an occupied territory, and that Israel had no specific obligations toward the Gazan population.²¹ This position is untenable under

¹⁴ George E. Bisharat, *Israel's Invasion of Gaza in International Law*, 38 DENV. J. INT'L L. & POL'Y 41, 47 (2009).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*; see also Yehuda Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 ISR. L. REV. 279 (1968) (discussing that this idea has sometimes been referred to as the "missing reversioner" thesis).

¹⁸ Bisharat, *supra* note 14, at 47.

¹⁹ *Id.* at 47–48 (noting that Israel's status as occupier of Gaza has been confirmed by the International Court of Justice, the Oslo Accords, the Israeli Supreme Court, the U.N. Security Council, the U.N. General Assembly, and the U.S. State Department).

²⁰ *Id.* at 48.

²¹ According to the Disengagement Plan prepared by the government of Israel before the withdrawal from Gaza, "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."

international law. Article 42 of the 1907 Hague Regulations (Hague Regulations) sets forth the “effective control” test for establishing occupation.²² Under this test, “[T]erritory 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 is established and can be exercised”²³ Under this test, however, the presence of permanent military forces is not required in the occupied territory. The Nuremberg Tribunal, in applying this test, held that occupation continues, even though the occupier has withdrawn its military forces from the occupied territory, if the occupier can re-enter the occupied territory and exercise effective control at will.²⁴ Israel certainly retains the ability to re-enter Gaza, and to exercise effective control over this territory at will.²⁵ Israel maintains authority over Gaza pursuant to the Revised Disengagement Plan.²⁶ Moreover, Israel patrols Gaza’s airspace, Israeli naval ships patrol Gaza’s territorial waters, and Israel regularly conducts military operations within Gaza itself.²⁷ Operation Cast Lead, mentioned above, was yet another example of Israeli military operations in Gaza after the former’s “disengagement” from Gaza.²⁸ Finally, Israel is in full control over the movement of people and goods to and from Gaza and is able to shut crossings from Gaza at will.²⁹ Israel controls Gaza’s telecommunication networks, electricity, and sewage systems, as well as its population registry.³⁰ The latter allows Israel to determine which individuals will

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 has also held that the Gaza Strip was no longer occupied. See H CJ 9132/07 Jaber v. Prime Minister [2008] (Isr.). Moreover, in a Revised Disengagement Plan, Israel has stated that “[t]he 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].

²² Convention Respecting the Laws and Customs of War on Land (Hague IV), art 42, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter Hague IV].

²³ *Id.*

²⁴ U.S. v. Wilhelm List, et al. (Hostages Trial), 15 I.L.R. 646 (Nuremberg Military Tribunal 1948).

²⁵ Bisharat, *supra* note 14, at 49.

²⁶ The Revised Disengagement Plan states that “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.” Revised Disengagement Plan, *supra* note 21, § 3.

²⁷ Bisharat, *supra* note 14, at 49.

²⁸ For a detailed description of Operation Cast Lead, see *infra* Part III.

²⁹ See, e.g., U.N. Human Rights Council, *Human Rights Situation in Palestine and Other Occupied Arab Territories*, at 11, U.N. Doc. A/HRC/7/17 (Jan. 21, 2008) (prepared by John Dugard) [hereinafter Human Rights Situation in Palestine].

³⁰ Bisharat, *supra* note 14, at 50.

be accorded, and denied, legal residency in Gaza.³¹ Thus, the degree of control, which Israel still exercises over Gaza, clearly demonstrates that Israel has not ended its occupation of Gaza.

As an occupier, Israel has specific international legal obligations toward the people of Gaza. These obligations are detailed in several treaties, including the Hague Convention (II) respecting the Laws and Customs of War on Land and the Hague Regulations of 1907, the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 1949 (Fourth Geneva Convention), as well as in customary norms of international law.³² “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.”³³ Article 43 of the Hague Regulations requires that the occupier “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.”³⁴ The Fourth Geneva Convention designates civilians who fall under the power and control of the occupier as “protected persons.”³⁵ The occupier, pursuant to this Convention, must ensure their basic welfare, and must treat civilians humanely.³⁶ For example, occupiers may not willfully kill or otherwise mistreat protected persons, must ensure that protected persons are supplied with food and medical necessities, and must care for the well-being and education of children.³⁷ More specifically, if food and other necessities in the occupied territory become inadequate, the occupier must permit the entry of humanitarian relief.³⁸

Israel, as the occupier of Gaza, is obligated under international law to fulfill the above-described duties.³⁹ In the case of Gaza, Israel violated its international obligations under the law of occupation, before, during, and after Operation Cast Lead. For example, before and after Operation Cast Lead, Israel maintained a blockade of the Gaza Strip, rejecting humanitarian

³¹ *Id.*

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

³³ Bisharat, *supra* note 14, at 51.

³⁴ Hague II, *supra* note 32, art. 43.

³⁵ Geneva Convention IV, *supra* note 32, art. 4.

³⁶ *Id.* art. 3. This article is found in all four Geneva Conventions, and is often referred to as common article 3.

³⁷ Geneva Convention IV, *supra* note 32, arts. 49, 50, 55.

³⁸ *Id.* art. 60.

³⁹ Bisharat, *supra* note 14, at 51 (noting that “[a]ll of these duties were incumbent upon Israel in its occupation of the Gaza Strip”).

aid for Gaza and thereby forcing the Gazan population into poverty.⁴⁰ Moreover, Israel has treated Operation Cast Lead as an international armed conflict, and has invoked its inherent right of self-defense against Hamas attacks on southern Israel.⁴¹ Yet, because Israel is the occupier of Gaza, and because Gaza is not a sovereign, independent state, any military action in Gaza must be treated as a law enforcement action, and not as an international conflict.⁴² In other words, an occupier has specific duties toward the occupied territory and the population therein, which may preclude the occupier from engaging in armed conflict-type military operations in the occupier territory. “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.”⁴³ For example, under the law of occupation, the occupier is required “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.”⁴⁴ Most Israeli military actions fall outside of the law enforcement model, and Israel itself has consistently denied its occupation of Gaza and has cast its military action within the paradigm of international warfare.⁴⁵

While it is true that all military operations in occupied territories are different, and that Israel, because of its 2005 disengagement from Gaza, is no longer in charge of the daily administration of the Strip, these facts on their own do not call for a complete alteration of the law of occupation, or for the application of the law of armed conflict over the law of occupation. Israel as the occupier would prefer that the law of armed conflict be applied in Gaza, because:

[I]t 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 is, moreover, com-

⁴⁰ *Id.* at 58 (noting the poverty level in Gaza due to the Israeli blockade and the fact that Israel had rejected humanitarian supplies before).

⁴¹ In fact, on the first day of Operation Cast Lead, Israel’s U.N. Ambassador stated in a letter to the U.N. Secretary General that “the government of Israel has decided to exercise, as of this morning, its right to self-defense.” Victor Kattan, *Gaza: Not a War of Self-Defense*, JURIST, Jan. 15, 2009, available at <http://jurist.law.pitt.edu/forumy/2009/01/gaza-not-war-of-self-defense.php> [hereinafter Kattan]. Similarly, Israeli foreign Minister Tzipi Livni asserted that “Israel has the right to defend itself.” 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 [hereinafter Livni Briefing].

⁴² See Bisharat, *supra* note 14, at 54–56.

⁴³ *Id.* at 51.

⁴⁴ *Id.* at 51–52.

⁴⁵ See *id.* at 47 (referring to Israeli denial of its status as occupier of Gaza). See also discussion *infra* Part III (discussing Operation Cast Lead).

paratively easy for any occupying power to manufacture circumstances that could be 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.⁴⁶

In fact, it appears unfair to permit Israel to maintain its effective occupation of the Gaza Strip, while allowing it to use massive military force against the Gaza resident, under the standards of law of armed conflict.⁴⁷ "It forces the people of 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."⁴⁸

Whether treated under the law of armed conflict standard, or the law of occupation criteria, Israeli military actions during Operation Cast Lead violated fundamental rules and principles of international humanitarian law.

III. OPERATION CAST LEAD

The war in Gaza at the end of 2008 was not a true war; rather, it was a culmination of conflicts and skirmishes that had been simmering for a long time. As mentioned above, Israel withdrew its military forces and settlers from Gaza in 2005, claiming that it was ending its four-decade long occupation of Gaza.⁴⁹ The daily administration of this region was thus left to the Palestinian Authority, and in January 2006, a Hamas-affiliated party, "Change and Reform," won the majority of legislative seats in the Palestinian Legislative Council, earning the right to form the next cabinet.⁵⁰ Despite Israeli and American-led sanctions and protests, Prime Minister Mahmoud Abbas of Fatah joined Hamas officials in creating a unity government in early 2007.⁵¹ As a response to the Hamas ascension to power, Israel imposed a blockade on the Gaza Strip, which resulted in abject poverty for the population of Gaza.⁵² A human rights group described the humanitarian crisis in Gaza as follows:

⁴⁶ Bisharat, *supra* note 14, at 55–56.

⁴⁷ *Id.* at 56.

⁴⁸ *Id.*

⁴⁹ *Id.* at 56–57.

⁵⁰ See, e.g., Scott Wilson, *Hamas Sweeps Palestinian Elections, Complicating Peace Efforts in Mideast*, THE WASH. POST, Jan. 27, 2006, at A1.

⁵¹ See *West Bank & Gaza Country Brief*, THE WORLD BANK, <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/MENAEXT/WESTBANKGAZAEXTN/0,,contentMDK:20149751~menuPK:294370~pagePK:1497618~piPK:217854~theSitePK:294365,00.html> (last visited Oct. 10, 2010).

⁵² Bisharat, *supra* note 14, at 58.

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 . . . 80 percent of all Gazan families would literally starve without food aid from international agencies.⁵³

A blockade can be described as an act of war under international customary law.⁵⁴ The legality of any blockade under international customary law depends on whether the occupier is allowing the free passage of aid for the civilian population.⁵⁵ Israel has claimed that its blockade of Gaza was necessary in order to pressure Hamas to cease the firing of rockets into southern Israel.⁵⁶ However, there is no reasonable relationship between the blockade, depriving Gazan civilians of food and basic medical necessities, and the ceasing of Hamas' bombings of Israeli territories. In fact, as occupier, Israel is obligated under Article 55 of the Fourth Geneva Convention to allow the passage of humanitarian aid toward the Gazan population.⁵⁷ The blockade clearly violated the Fourth Geneva Convention, and has, moreover, raised concerns that it was a form of collective punishment against the Gazan population, which is prohibited under Article 33 of the Fourth Geneva Convention.⁵⁸ It appears therefore that Israel instituted a blockade of the Gaza Strip in response to Hamas' rise to power in this region; as such, Israel engaged in an act of war against its occupied territory, before Operation Cast Lead commenced.⁵⁹

Hamas and Israel reached an official ceasefire agreement on June 19, 2008.⁶⁰ This agreement required both sides to cease their military opera-

⁵³ *Id.* at 59 (quoting *The Gaza Strip: The Siege on Gaza and Intensified Economic Sanctions*, B'TSELEM, http://www.btselem.org/english/gaza_strip/siege.asp (last visited Oct. 10, 2010)).

⁵⁴ ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 408 (Peter MacAlister-Smith ed., Max Planck Inst. for Comparative Public Law and Int'l Law Under the Direction of Rudolf Bernhardt 2000).

⁵⁵ CUSTOMARY INTERNATIONAL HUMANITARIAN LAW VOLUME I: RULES 189 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter *Customary IHL I*].

⁵⁶ Bisharat, *supra* note 14, at 60.

⁵⁷ *Id.*

⁵⁸ Article 33 of the Fourth Geneva Convention states that "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." Geneva Convention IV, *supra* note 32, art. 33. A blockade against a civilian population, like the Israeli blockade of Gaza, raises concerns of collective punishment, because of the effect that the blockade will have on the population, threatening, in the long run, the latter's survival.

⁵⁹ Bisharat, *supra* note 14, at 60–61.

⁶⁰ Israel and Hamas "Agree Truce," BBC NEWS, June 18, 2008, *available at* <http://>

tions and attacks, and Israel to ease its blockade of Gaza.⁶¹ Israel did not abide by the latter obligation, and maintained tight control over Gazan borders, a fact which was deplored by major human rights groups.⁶² On November 4, 2008, Israeli troops killed six Palestinians in Gaza.⁶³ Before this event, rocket attacks from Gaza on southern Israel had stopped almost completely.⁶⁴ Many had noted that the ceasefire agreement had been extremely effective, and that Hamas had truly abided by the terms of the agreement.⁶⁵ However, after Israeli military operations on November 4, Hamas rocket attacks picked up again, prompting Israel to engage in Operation Cast Lead.⁶⁶

As mentioned above, Israel characterized Operation Cast Lead as self-defense.⁶⁷ Israel accused Hamas of breaking the ceasefire agreement, and then invoked its right, as a state, to self-defend.⁶⁸ This argument, however, fails under international law for several reasons.

First, as described above, it is doubtful that Hamas broke the ceasefire agreement. It is much more likely that it was Israel that actually disrespected the terms of the agreement by refusing to ease up the blockade and by engaging in the November 4, 2008, attacks in Gaza.⁶⁹ Hamas rocket

news.bbc.co.uk/2/hi/middle_east/7459200.stm.

⁶¹ *Id.*

⁶² In fact, on November 9, 2008, Human Rights Watch issued a letter to Israeli Prime Minister Ehud Olmert, which stated that “[t]he latest measures 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 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.” Human Rights Watch, Letter to Olmert: Stop the Blockade of Gaza, *available at* <http://www.hrw.org/en/news/2008/11/20/letter-olmert-stop-blockade-gaza>.

⁶³ Bisharat, *supra* note 14, at 62.

⁶⁴ Rocket attacks from Gaza totaled one in July, September and October of 2008, and eight in August. Nancy Kanwisher, Johannes Haushofer & Anat Biletzki, *Reigniting Violence: How Do Ceasefires End?*, THE HUFFINGTON POST, Jan. 6, 2009, *available at* http://huffingtonpost.com/nancy-kanwisher/reigniting-violence-how-d_b_155611.html.

⁶⁵ Thus, MIT professor Nancy Kanwisher remarked that the ceasefire agreement had been “remarkably effective,” and that “the rate of rocket and mortar fire from Gaza dropped to almost zero, and stayed there for months.” *Id.*

⁶⁶ Bisharat, *supra* note 14, at 61–62.

⁶⁷ *See supra* note 14 and accompanying text.

⁶⁸ *See* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 194 (July 9) (Israel claimed the Barrier was “wholly consistent with the right of States to self-defence enshrined in Article 51 of the Charter”). Under the U.N. Charter, every state has the right to act in self-defense if it is a target of an “armed attack” by another state, and if its exercise of self-defense is necessary and proportional (limited in scope to respond to the harm that the attacked state suffered). U.N. Charter art. 51.

⁶⁹ *See* Bisharat, *supra* note 14, at 65.

launches after November 4, 2008, can be viewed as responses to Israel's decision to break the peace agreement. Under these conditions, Israel may not claim self-defense.⁷⁰

Second, because Israel is the occupier of Gaza, it is doubtful that it can invoke the self-defense argument, which exists within the paradigm of the law of armed conflict and thus applies to wars fought between sovereign states.⁷¹ An occupier, if facing violence by inhabitants of the occupied territory, can certainly engage in military efforts to quell the violence; however, the occupier cannot claim self-defense and must limit its military response to law enforcement operations.⁷²

Third, in order for Israel to claim the right of self-defense, it must have, under the rules of international law, suffered an armed attack.⁷³ Israel itself attacked Gaza on November 4, 2008, provoked Hamas, and drove the Gazan population into poverty.⁷⁴ Thus, it was not a victim of armed attack and could not claim the right of self-defense.

Fourth, the Israeli military response in Gaza, even if it had constituted a legitimate exercise of self-defense, was neither necessary nor proportional. Operation Cast Lead was not necessary, as Israel could have at least attempted to renegotiate the peace agreement, and should have in good faith abided by the terms of the agreement.⁷⁵ In fact, Hamas leaders had offered to consider renewing the truce if Israel lifted the blockade of the Gaza Strip.⁷⁶ Israeli Foreign Minister Livni publicly stated that Israel was not interested in prolonging the truce with Hamas, because the truce "harms the Israeli strategic goal, empowers Hamas, and gives the impression that Israel recognizes the movement."⁷⁷ Israel thus chose to use military force, because continuing on the peaceful path would have implied that Israel recognized Hamas as a legitimate government of Gaza. Moreover, Operation Cast Lead was not proportional to the harm that it sought to redress. Even if it were true that Israel had suffered an armed attack, its response had to be

⁷⁰ *See Id.* ("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").

⁷¹ *Id.* at 64–65.

⁷² *See id.* (discussing the right to use force as a police power and not as an exercise of self-defense).

⁷³ *See* U.N. Charter, art. 51.

⁷⁴ *See* Bisharat, *supra* note 14 and accompanying text.

⁷⁵ *See Id.* at 66.

⁷⁶ *Hamas May Consider New Truce with Israel*, TURKISH DAILY NEWS, Dec. 24, 2008, available at 2008 WLNR 24654389 ("Hamas is ready to renew the truce 'if Israel respects the conditions of a ceasefire.'").

⁷⁷ NORMAN G. FINKELSTEIN, THIS TIME WE WENT TOO FAR: TRUTH & CONSEQUENCES OF THE GAZA INVASION 50 (2010) (explaining that a ceasefire could spotlight Hamas's "pragmatism in word and deed" and cause international pressure on Israel).

limited to targets necessary to stop rocket launching from Gaza.⁷⁸ However, “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.”⁷⁹ Thus, even if Israel did have a right of self-defense, its military operations in Gaza exceeded the valid scope of this right and thereby violated international law.⁸⁰

Operation Cast Lead formally began on December 27, 2008, when Israel began aerial bombardment of the Gaza Strip.⁸¹ A ground invasion followed, beginning on January 3, 2009.⁸² Palestinian casualties mounted rapidly, as did allegations of violations of international humanitarian law rules by Israeli soldiers, who, allegedly, used disproportionate force, failed to distinguish between military and civilian targets, and used white phosphorous shells.⁸³ On January 8, 2009, the U.N. Security Council passed a resolution, calling for an immediate cessation of hostilities by both Israel and Hamas.⁸⁴ The war continued until January 18, 2009, when both parties instituted unilateral ceasefires, ultimately ending ongoing hostilities.⁸⁵ The destruction and death toll caused by Operation Cast Lead were enormous, calling into question Israel’s respect of international humanitarian law rules.⁸⁶ The section below examines such rules as they apply to the conflict in Gaza.

⁷⁸ See JEFFREY L. DUNOFF, STEVEN R. RATNER & DAVID WIPPMAN, *INTERNATIONAL LAW NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH* 862 (2002 ed.) [hereinafter DUNOFF ET AL.] (explaining that proportionality “precludes a state from using force beyond that necessary to repel an attack or to restore the *status quo ante*”).

⁷⁹ Bisharat, *supra* note 14, at 67.

⁸⁰ *Id.*

⁸¹ See Rory McCarthy & Ewen MacAskill, *Israel Pounds Hamas in Gaza: Government Buildings Destroyed in Latest Air Strikes: Hospitals Overflow with Casualties as Civilian Death Toll Mounts*, GUARDIAN.CO.UK, Dec. 30, 2008, available at 2008 WLNR 27778472 (“Israel has continued bombing Gaza for a fourth day . . . threatening a drawn-out conflict.”).

⁸² See Isabel Kershner & Taghreed el-Khodary, *Israeli Tanks and Troops Launch Attack on Gaza*, N.Y. TIMES, Jan. 4, 2009, at A1, available at 2009 WLNR 152598 (“Israeli tanks and troops swept across the border into Gaza on Saturday night, opening a ground war against the militant group Hamas after a week of intense airstrikes.”).

⁸³ Bisharat, *supra* note 14, at 42.

⁸⁴ S.C. Res. 1860, S/RES/1860 (Jan. 8, 2009), available at http://www.un.org/Docs/sc/unsc_resolutions09.htm (follow “S/RES/1860 (2009)” hyperlink) (last visited Oct. 10, 2010) (calling for “an immediate, durable and fully respected ceasefire, leading to the full withdrawal of Israeli forces from Gaza”).

⁸⁵ Isabel Kershner, *Few Israelis Near Gaza Feel War Achieved Much*, N.Y. TIMES, Jan. 21, 2009, at A8, available at 2009 WLNR 1150354.

⁸⁶ See *UN to Embark on Humanitarian Assessment in Post-Conflict Gaza*, FINANCIAL TIMES, Jan. 23, 2009, available at 2009 WLNR 1237274 (quoting U.N. Secretary General Ban-ki Moon’s description of the attacks on Gaza as “shocking and alarming” and saying that “[t]hese are heartbreaking scenes”).

IV. INTERNATIONAL HUMANITARIAN LAW AND ITS APPLICABILITY TO GAZA

During Operation Cast Lead, Israel violated several international humanitarian law rules. The sections below will detail Israeli violations of some of the most fundamental rules of international humanitarian law, which include the duty of distinction or discrimination, the principle of proportionality, and illegal uses of weapons. This section will conclude that because of an overall death toll and destruction caused in Gaza by Operation Cast Lead, this military campaign appears to have been led without regard for the most fundamental rules and principles of the laws of war.

A. *Duty of Distinction or Discrimination*

First, Israel violated its duty to discriminate between civilian and non-civilian targets.⁸⁷ In fact, the Israeli commanders designated all institutions and individuals associated with Hamas as legitimate military targets, a designation which, on its own, violates international law.⁸⁸ Second, Israeli commanders ordered their troops to employ extremely liberal rules of engagement. Third, Israeli troops used indiscriminate weapons, which caused excessive suffering to the Gazan population.⁸⁹

1. Israeli failure to distinguish between civilian and non-civilian targets

The duty of distinction or discrimination states as follows: “[T]he 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.”⁹⁰ This fundamental rule of international humanitarian law is codified in the 1863 Lieber Code, in the 1907 Hague Convention, the Fourth Geneva Convention, and the 1977 Additional Protocols to the Geneva Convention, *inter alia*.⁹¹ The U.N. General Assembly confirmed this duty, stating that parties in a conflict must not “launch attacks against the civilian populations as such,” and must not adopt “means of injuring the enemy” which are “unlimited.”⁹² Israel’s own Law of War booklet confirms this principle, stating that “the IDF accepts and applies the

⁸⁷ Bisharat, *supra* note 14, at 70.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Customary IHL I*, *supra* note 55, at 3.

⁹¹ Bisharat, *supra* note 14, at 70.

⁹² G.A. Res. 2444 (XXIII) at 50, U.N. Doc. A/7433 (Dec. 19, 1968), available at <http://www.un.org/Depts/dhl/resguide/r23.htm> (follow “A/RES/2444(XXIII)” hyperlink) (last visited Oct. 10, 2010) (calling for respect for human rights in armed conflicts).

principle of distinction.”⁹³ In order to apply the rule of discrimination, a military commander must thus distinguish between armed forces and civilians. The former are defined under international law as “all organized armed forces, groups, and units, which are under a command responsible to that party for the conduct of its subordinates.”⁹⁴ Consequently, “persons 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.”⁹⁵ If a military commander refuses to obey the rule of discrimination, he or she may face individual criminal liability.⁹⁶ Violations of the rule of discrimination may include maneuvers such as the intentional targeting of civilians as such, attacks that are indiscriminate in nature, as well as indiscriminate attacks in which the military commander knows of the danger posed to civilians in the targeted area.⁹⁷ The 1949 Geneva Convention specifies as a “grave breach” the acts of “willful killing, torture or inhumane treatment . . . willfully causing great suffering or serious injury to body or health . . . not justified by military necessity and carried out unlawfully and wantonly.”⁹⁸

During the three-week long attack on Gaza, Israeli forces targeted numerous civilian objectives, such as schools, U.N. headquarters, religious institutions, courts, prisons, police stations, fire houses, and infrastructure points, such as roads, bridges, harbors, etc.⁹⁹ Cultural sites were also targeted, as well as the Gaza zoo, where many animals were fatally shot.¹⁰⁰ Israeli forces strongly attacked the Gaza industry and private sector, targeting farms and factories and literally destroying the Gazan population’s economic viability.¹⁰¹ For most of these targets, Israel alleged some link to

⁹³ Bisharat, *supra* note 14, at 71.

⁹⁴ CUSTOMARY INTERNATIONAL HUMANITARIAN LAW VOL. I: RULES 25, at 14 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter CUSTOMARY IHL I] (rule 4); *see also* Geneva Convention IV, *supra* note 32, art. 3 (“Persons taking no part in the hostilities . . . shall in all circumstances be treated humanely.”).

⁹⁵ RED CROSS SYMPOSIUM: PROTECTING CIVILIANS IN 21ST- CENTURY WARFARE 13 (Mi-reille Hector & Martine Jellema eds., 2001) (defining “direct part in hostilities” as “acts which are intended to cause actual harm” such as the use of weapons).

⁹⁶ Bisharat, *supra* note 14, at 71.

⁹⁷ *Id.*

⁹⁸ Geneva Convention IV, *supra* note 32, art. 147; *see also* CUSTOMARY IHL I, *supra* note 55, at 601.

⁹⁹ *See, e.g.*, Jonathan Cook, *Israel's Doctrine of Destruction*, PALESTINE CHRONICLE, Jan. 20, 2009, available at 2009 WLNR 1122504 (according to one senior Israeli official, “[t]here are many aspects of Hamas, and we are trying to hit the whole spectrum because everything is connected and everything supports terrorism against Israel”).

¹⁰⁰ *Gaza Prayer Turns Deadly as Israel Hits Mosques*, AL ARABIYA, Jan. 6, 2009, available at <http://www.alarabiya.net/articles/2009/01/06/63609.html>; Ashraf Helmi, *Israeli Troops Shot and Killed Zoo Animals*, GULFNEWS (U.A.E.), Jan. 25, 2009, available at http://gulfnews.com/region/Middle_East/10278858.html.

¹⁰¹ Bisharat, *supra* note 14, at 72.

Hamas. For example, the office of the Hamas Prime Minister Ismail Haniyeh was designated as a ‘terror target,’ because it ‘‘served as a planning, support, and finance center for terrorist activity.’’¹⁰² Similarly, the Islamic University of Gaza was targeted in six separate air strikes, because Israeli officials claimed that the University housed a weapons research center.¹⁰³ When this claim was refuted, Israel alternatively claimed that this University was a cultural icon for Hamas students and militants.¹⁰⁴

However, a civilian object is not transformed into a legitimate military target simply because it supports political opinions that the attacker finds dangerous.¹⁰⁵ Moreover, even if a facility is a so-called dual use building, thus combining features of a civilian and military target, it may only be targeted if it serves a fundamental military function.¹⁰⁶ Finally, if in doubt, the attacker must assume that a target is a non-military objective, and must abstain from attacking it.¹⁰⁷ The Israeli position during Operation Cast Lead—that Hamas is a terrorist organization and that anything or anyone associated with Hamas is a legitimate target—is unsupported in international law.¹⁰⁸ The terrorist designation of Hamas has no bearing on Israel’s obligations and duties under international humanitarian law, and Israel was still under the duty to discriminate between civilian and military targets.¹⁰⁹ The Israeli targeting practice clearly violated all of the above rules, and even if Israel had serious doubts about the role and use of some of the buildings that it targeted, it had a duty under international humanitarian law to first investigate to substantiate its claim before striking in a military fashion.

2. Liberal rules of engagement

News media covering the conflict in Gaza reported numerous attacks on civilians. At the least, these attacks suggest that civilians were deliberately targeted, and this supports the conclusion that Israeli troops ab-

¹⁰² Amos Harel & Avi Issacharoff, *IAF Bombs 3 Gaza Government Buildings; Officials: 25 Wounded*, HA’ARETZ, Jan. 1, 2009, available at <http://haaretz.com/hasen/spages/1051305.html> (Israeli warplanes bombed Hamas Prime Minister Ismail Haniyeh’s office a second time in a separate attack during the offensive).

¹⁰³ *Id.*

¹⁰⁴ Bisharat, *supra* note 14, at 73.

¹⁰⁵ *Id.* at 74.

¹⁰⁶ *Id.*

¹⁰⁷ Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I), arts. 48, 52(2), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I] (‘‘In 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.’’).

¹⁰⁸ Bisharat, *supra* note 14, at 75.

¹⁰⁹ *Id.*

ided by liberal rules of engagement.¹¹⁰ In fact, Israeli soldiers themselves confirmed that they were ordered to “[f]ire on anything that moves,” and “to shoot first and ask questions later.”¹¹¹ For example, in one of the deadliest attacks during Operation Cast Lead, occurring in the al-Zeitouna district of Gaza City in the beginning of January 2009, Israeli forces “reduced the eastern Gaza City suburb to little more than rubble in a matter of days.”¹¹² Moreover, some families were particularly targeted, with almost seventy members of the same clan killed.¹¹³ In another deadly attack on a town in southern Gaza, the village of Khuza was attacked over several hours, and several women, children, and elderly people were killed.¹¹⁴ Reports indicate that during this attack, civilians were shot at indiscriminately, homes were being destroyed with residents still inside, and some civilians were targeted by snipers and killed.¹¹⁵

It is true that Israel used a variety of warning methods to alert residents of the Gaza Strip about the upcoming attacks, such as dropping leaflets and cell phone messaging.¹¹⁶ Israeli troops would also “knock on the roof,” by directing artillery fire at corners of buildings, as a warning to individuals inside that a more powerful attack was forthcoming.¹¹⁷ Israel asserted that Palestinian civilians who did not abide by these warnings were acting as “voluntary human shields,” and were thus taking part in hostilities and could be targeted as combatants.¹¹⁸ While these warning indicate that Israel did attempt to respect the duty of discrimination, their application in the case of Gaza is problematic. In fact, Israel blockaded and fenced the entire region of Gaza, and closed all exit points from the Strip during Operation Cast Lead.¹¹⁹ Thus, those Palestinian civilians who wished to abide by the warnings simply had nowhere to go. Finally, the claim that a civilian

¹¹⁰ *Id.*

¹¹¹ Sheera Frenkel, *Israeli Soldiers Recall Gaza Attack Orders*, TIMES ONLINE (London), Jan. 28, 2009, available at http://www.timesonline.co.uk/tol/news/world/middle_east/article5601177.ece [hereinafter Frenkel] (quoting an anonymous Israeli soldier).

¹¹² *Id.* (an Israeli soldier spoke of the offensive, “[w]e pounded Zeitoun into the ground”).

¹¹³ Bisharat, *supra* note 14, at 76–77.

¹¹⁴ *Id.* at 77.

¹¹⁵ Fida Qishta & Peter Beaumont, *Israeli Accused of War Crimes Over 12-hour Assault on Gaza Village*, OBSERVER, Jan. 18, 2009, available at 2008 WLNR 24879553 (one civilian recalled, “[the Israeli soldiers] wanted to bury us alive”).

¹¹⁶ Abraham Rabinovich, *Israel Warning Civilians to Flee*, THE AUSTRALIAN, Dec. 30, 2008, at 7, available at 2008 WLNR 24879553 (including phone calls and leaflets dropped from aircraft).

¹¹⁷ George Bisharat, *Israel on Trial*, N.Y. TIMES, Apr. 4, 2009, at A19, available at 2009 WLNR 6331259 (“Israeli gunners ‘knocked on roofs’—that is, fired first at corners of buildings, before hitting more vulnerable points—to ‘warn’ Palestinian residents to flee.”).

¹¹⁸ *Id.* (“Israeli military lawyers instructed army commanders that Palestinians who remained in a targeted building after having been warned to leave were ‘voluntary human shields,’ and thus combatants.”).

¹¹⁹ Bisharat, *supra* note 14, at 79.

automatically becomes a combatant if he or she does not leave a structure despite a warning the structure would be attacked is unsupported in international law.

3. Indiscriminate use of weapons

Israeli forces chose less precise weapons in their strikes on the Gaza Strips, thereby causing the death and suffering of more civilians than if more precise weapons had been used. Reports indicate that Israeli troops fired so-called 155-millimeter howitzers into densely populated areas; such shells have a margin of error of thirty meters and a blast radius of 300 meters.¹²⁰ Thus, such shells cause indiscriminate killings and suffering of civilians in heavily populated areas. Because Israel allegedly had alternatives—shells that are GPS-guided and very accurate—its choice of less precise weapons in civilian areas indicates a violation of the duty to discriminate between civilian and military targets.¹²¹

B. *The Principle of Proportionality*

The proportionality principle recognizes that the attacker may at times legitimately use force in civilian areas, so long as the military advantage gained from such an attack is greater than the harm caused to civilians.¹²² In other words, “the costs of war must not outweigh the benefits.”¹²³ The proportionality principle is enshrined in both treaty law, such as the Additional Protocol I to the Geneva Conventions (Additional Protocol 1) as well as customary international law.¹²⁴ This principle applies both to rules about the initiation of war and the use of justified force (*jus ad bel-*

¹²⁰ Ben Hubbard & Alfred de Montesquieu, *Rights Groups Says Laws of War violated in Gaza*, ASSOCIATED PRESS, Feb. 4, 2009, available at Westlaw, 2/4/09 AP Alert - Bus. 13:00:12 (“Israel’s choice of such weapons over more precise alternatives raises questions of intention.”).

¹²¹ *Id.* (Human Rights Watch criticized Israel’s use of less precise weapons, “[w]hen 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?”). It should be noted that other countries have been criticized in the past over their use of less precise weapons in populated civilian areas. For example, NATO countries were criticized and even sued in the International Court of Justice over their use of weapons in the 1999 air strikes on the former Yugoslavia. See, e.g., DUNOFF ET AL., *supra* note 79, at 543–44.

¹²² Bisharat, *supra* note 14, at 82.

¹²³ JAMES TURNER JOHNSON, JUST WAR TRADITION AND THE RESTRAINT OF WAR 204 (1981) in Judith Gail Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT’L L. 391, 391 n.1 (1993).

¹²⁴ Additional Protocol I, *supra* note 107, art. 51(5)(b) (defining and prohibiting indiscriminate attacks) (“[A]n 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.”). See also Customary IHL I, *supra* note 55, at 46, 58 (referencing Rules 14 and 18).

lum), as well as to the way a war is conducted, once initiated (*jus in bello*).¹²⁵ The proportionality principle obliges military commanders to perform the proportionality calculus before launching a military operation; if the proportionality calculus isn't satisfied, the military commander should abandon the proposed military operation. "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."¹²⁶ The violation of this principle exposes military commanders to individual criminal liability.¹²⁷

The difficulty in relation to the principle of proportionality lies with its application. An analysis of proportionality tends to focus on what legitimate military objectives are, what military advantage means, and how to balance this advantage against incidental harm to civilians.¹²⁸ A military target is such that "by [its] nature, location, purpose or use [it] make[s] an effective contribution to military action[s]," and that the "total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."¹²⁹ For example, combatants are legitimate military objectives, as well as civilians taking direct participation in hostilities.¹³⁰ With relation to buildings, Additional Protocol I specifically states that "[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."¹³¹ In addition, Additional Protocol I requires that the military advantage sought in the attack be "concrete and direct."¹³² The *travaux préparatoires* to Additional Protocol I indicate that "concrete and direct" advantage means "substantial and relatively close," and that long-term military advantages which are "hardly perceptible" should not be pursued by military commanders.¹³³ Finally, with regard to incidental harm caused to civilians by the military attack, attack

¹²⁵ Bisharat, *supra* note 14, at 82; *see also id.* at 82, n. 274 (explaining that the principle of proportionality is not identical in its application to the rules of war as opposed to the right of self-defense).

¹²⁶ *Customary IHL I*, *supra* note 55, at 46.

¹²⁷ *See id.* at 568–69.

¹²⁸ William J. Fenrick, *Attacking the Enemy Civilian as a Punishable Offense*, 7 DUKE J. COMP. & INT'L L. 539, 545 (1997).

¹²⁹ Additional Protocol I, *supra* note 107, art. 52(2).

¹³⁰ *Id.* arts. 43, 51(3).

¹³¹ *Id.* art. 52(3).

¹³² *Id.* art. 51(5)(b).

¹³³ *Prosecutor v. Galic*, Case No. IT-98-29-T, Judgement and Opinion, para. 58 n.106 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003), <http://www.icty.org/x/cases/galic/tjug/en/gal-tj031205e.pdf> in 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) (internal citations omitted).

planners should consider the long-term effects on the civilian population, in addition to just a short-term, immediate effect analysis.¹³⁴

During Operation Cast Lead, evidence shows that Israeli military commanders purposely used a disproportionate amount of force.¹³⁵ In fact, Israeli forces adopted the so-called Dahiya doctrine, referring to the Beirut suburb razed during Israel's military offenses in Lebanon in 2006.¹³⁶ Israeli military commanders explicitly stated that this doctrine would apply to Gaza.¹³⁷ Thus, an Israeli army colonel stated that Israeli forces would adopt "the principle of a disproportionate strike against the enemy's weak points as a primary war effort," and that Israeli forces would "need to act immediately, decisively, and with force that is disproportionate to the enemy's actions and the threat it poses."¹³⁸ Similarly, Israeli Army commander, Gadi Eisenkot, stated that "[W]e will apply disproportionate force on it and cause great damage and destruction there."¹³⁹ Israeli Prime Minister Olmert asserted in January 2009 that there "will be a disproportionate Israeli response to the fire on the citizens of Israel and its security forces."¹⁴⁰ Finally, Israeli Foreign Affairs Minister, Tzipi Livni, stated that Israel, if fired upon, would respond by "going wild" and that this was a "good thing."¹⁴¹

It is possible and probable that Israel gained some military advantage from some of the attacks on Gaza. However, there is serious doubt whether Operation Cast Lead truly diminished Hamas' military capacity.¹⁴² Moreover, "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."¹⁴³ It is true that military forces are not obligated under international humanitarian law to expose themselves to unnecessary risk of

¹³⁴ See, e.g., Virgil Wiebe, *Footprints of Death: Cluster Bombs as Indiscriminate Weapons under International Humanitarian Law*, 22 MICH. J. INT'L L. 85, 103 n.62 (2000).

¹³⁵ Bisharat, *supra* note 14, at 85.

¹³⁶ HUMAN RIGHTS WATCH, WHY THEY DIED: CIVILIAN CASUALTIES IN LEBANON DURING THE 2006 WAR 73–75 (2007), available at <http://www.hrw.org/sites/default/files/reports/lebanon0907.pdf> (describing the disproportionate use of force in Dahieh).

¹³⁷ Bisharat, *supra* note 14, at 85.

¹³⁸ Gabriel Siboni, *Disproportionate Force: Israel's Concept of Response in Light of the Second Lebanon War*, INSS INSIGHT NO. 74 (Oct. 2, 2008), <http://www.inss.org.il/publications.php?cat=21&incat=&read=2222>.

¹³⁹ Joseph Nasr, *Israel Warns Hezbollah War Would Invite Destruction*, REUTERS, Oct. 3, 2008, available at <http://uk.reuters.com/article/worldNews/idUKTRE4923I020081003>.

¹⁴⁰ Rockets hit Israel, Prime Minister Olmert Vows "Disproportionate" Response, THE TELEGRAPH, Feb. 1, 2009, available at <http://www.telegraph.co.uk/news/worldnews/middleeast/israel/4420172/=Rockets-hit-Israel-Prime-Minister-Olmert-vows-disproportionate-response.html>.

¹⁴¹ 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>.

¹⁴² Bisharat, *supra* note 14, at 86.

¹⁴³ *Id.*

death of injury. However, compliance with the principle of proportionality does entail a willingness to accept some casualties in order to limit civilian suffering.¹⁴⁴ Unfortunately, Israeli actions in Gaza indicate that Israel did not accept casualties on its own side, and, as a result, countless civilians died. Consequently, Israel did not respect the principle of proportionality. Israel's goal in Operation Cast Lead was to restore its "deterrent capacity" in the Gaza Strip.¹⁴⁵ This goal appears both legally and morally problematic, and does not meet the definition of a direct military advantage.¹⁴⁶

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.¹⁴⁷

1. Israeli use of illegal and/or indiscriminate weapons

Under international humanitarian law, certain weapons are prohibited because they cause excessive injuries and/or unnecessary suffering.¹⁴⁸ Moreover, some weapons, because they are indiscriminate in nature, may only be used if there is no other military alternative and when extraordinary care is undertaken to prevent harm to civilians.¹⁴⁹ Eyewitness reports from the Gaza Strip suggest that Israel used illegal weapons during Operation Cast Lead in densely populated civilian areas.¹⁵⁰

Article 32(1) of Additional Protocol I prohibits "weapons, projectiles, and materials and methods of warfare of a nature to cause superfluous injury or unnecessary suffering."¹⁵¹ A more specific convention, 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, consisting of an umbrella treaty and five protocols also bans weapons that are indiscriminate or that cause unnecessary suffering.¹⁵² Israel is a party to this treaty.¹⁵³

¹⁴⁴ Fenrick, *Attacking the Enemy*, *supra* note 128, at 548.

¹⁴⁵ Bisharat, *supra* note 14, at 87.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 92.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ Additional Protocol I, *supra* note 107, art. 35(2).

¹⁵² 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, 1342 U.N.T.S. 7 *reprinted in* 19 I.L.M. 1523.

¹⁵³ Int'l Comm. of the Red Cross, *State Parties to the Following International Humanitarian Law and Other Related Treaties as of 14-Sep-2010*, [http://www.icrc.org/IHL.nsf/\(SPF/](http://www.icrc.org/IHL.nsf/(SPF/)

The Israeli government admitted that its forces may have used white phosphorous shells in their attacks in Gaza.¹⁵⁴ White phosphorous shells may not be used in densely populated areas, because their explosion results in an indiscriminate scattering of fragments, causing severe burns to human tissue and thus superfluous injury and suffering to civilians.¹⁵⁵ However, eyewitness accounts confirm that white phosphorous shells were fired upon heavily populated civilian areas in Gaza.¹⁵⁶ “The allegations of [white phosphorous] shells being fired at civilian targets indicate that there may have been serious breaches of international law by Israeli forces in the Gaza Strip.”¹⁵⁷

Israeli forces may have illegally used two other kinds of weapons in Gaza during Operation Cast Lead: flechettes and Dense Inert Metal Explosive (DIME). Flechettes are metal darts, pointed at the front with four fins at the rear.¹⁵⁸ Several thousand flechettes are packed into a shell, which is generally fired out of a tank, scattering over a large area.¹⁵⁹ While flechettes are not a prohibited weapon per se in international law, they are indiscriminate in nature and many agree that their use should be prohibited in densely populated civilian areas.¹⁶⁰ There is strong evidence suggesting that Israel did use flechettes in civilian areas in Gaza, in an indiscriminate manner, which would be a breach of international law.¹⁶¹

DIMEs are dispersed through shells that expel “a blade of charged tungsten dust that burns and destroys everything within a four-metre radius.”¹⁶² DIMEs are extremely lethal, but very precise and thus designed for use in populated urban areas.¹⁶³ DIMEs also contain radioactive materials, which can cause long-term effects on victims, such as cancer.¹⁶⁴ Because DIMEs are still an experimental weapon, their use is not prohibited by in-

party_main_treaties/\$File/IHL_and_other_related_Treaties.pdf.

¹⁵⁴ 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>.

¹⁵⁵ *Outcry Over Weapons Used in Gaza*, AL JAZEERA, Jan. 19, 2009, <http://english.aljazeera.net/news/middleeast/2009/01/200911916132228885.html> [hereinafter *Outcry Over Weapons*].

¹⁵⁶ Bisharat, *supra* note 14, at 94.

¹⁵⁷ *Id.*

¹⁵⁸ 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>.

¹⁵⁹ *Id.*

¹⁶⁰ Jonathan Cook, *Israeli Weaponry Under Scrutiny*, THE NATIONAL, Jan. 12, 2009, available at <http://www.thenational.ae/apps/pbcs.dll/article?AID=/20090112/FOREIGN/150565837>.

¹⁶¹ Bisharat, *supra* note 14, at 95.

¹⁶² *Outcry Over Weapons*, *supra* note 155.

¹⁶³ Bisharat, *supra* note 14, at 96.

¹⁶⁴ *Outcry Over Weapons*, *supra* note 155.

ternational law.¹⁶⁵ However, their use is subject to all the rules of international humanitarian law; for example, they are not to be used against civilians, who are never legitimate targets.¹⁶⁶ Reports from the Gaza Strip suggest that Israeli forces may have used DIMEs against civilians, which would be a violation of international law.

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.¹⁶⁷

2. Overall death and destruction in Gaza

The number of Gazan victims caused by Operation Cast Lead, as well as the extensive infrastructure damage, suggest that Israel's attack on Gaza was indiscriminate, and that the amount of force used by Israel was disproportional. U.N. Secretary-General, Ban-ki Moon, described the scene in Gaza after Operation Cast Lead as "shocking and alarming."¹⁶⁸ A U.N. Emergency Relief Coordinator stated that "it is shocking that civilians suffered so disproportionately in this military operation."¹⁶⁹ More than 1,400 Gazans died during Operation Cast Lead and more than 5,000 were injured; a number of people may have died in the aftermath of the military operation itself, or may be simply unaccounted for.¹⁷⁰ The health situation in Gaza is precarious, as many Gazan hospitals suffered damage in this war.¹⁷¹ The Israeli army destroyed many private homes and residences, and most Gazans have had to live in shelters and other kinds of temporary housing.¹⁷² Schools were destroyed and, in general, Gaza's infrastructure and its industrial sector have been obliterated.¹⁷³ Rebuilding Gaza will require billions of

¹⁶⁵ Cook, *supra* note 160.

¹⁶⁶ Bisharat, *supra* note 14, at 96.

¹⁶⁷ *Id.* at 98.

¹⁶⁸ *UN to Embark on Humanitarian Assessment in Post-Conflict Gaza*, UN NEWS CENTRE (Jan. 21, 2009), <http://www.un.org/news/dh/pdf/english/2009/21012009.pdf>.

¹⁶⁹ 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://www.reliefweb.int/rw/rwb.nsf/retrieveattachments?openagent&shortid=MUMA7NL4K5&file=Full_Report.pdf.

¹⁷⁰ Bisharat, *supra* note 14, at 98.

¹⁷¹ Press Release, World Health Org., Health Action in Crises: Health Situation in Gaza (Feb. 4, 2009), http://www.who.int/hac/crises/international/wbgs/sitreps/gaza_4feb2009/en/index.html.

¹⁷² Bisharat, *supra* note 14, at 99.

¹⁷³ *Id.* at 99–100.

dollars in foreign aid.¹⁷⁴ In sum, Operation Cast Lead, through its excessive nature, caused unnecessary civilian suffering and damage. Israel thus violated international humanitarian law and should seriously consider providing some form of accountability for its actions.

IV. THE GOLDSTONE REPORT: FACT-FINDING, CONCLUSIONS, RECOMMENDATIONS

In the aftermath of Operation Cast Lead, the HRC formally charged Justice Richard Goldstone, one of the most prominent international jurists of our time, with a mandate “to investigate all violations of international human rights law and international humanitarian law that might have been committed at any time in the context of the military operations that were conducted in Gaza during the period from 27 December 2008 and 18 January 2009, whether before, during or after.”¹⁷⁵ On September 15, 2009, the Goldstone Report was released.¹⁷⁶ It is a comprehensive document of nearly 600 pages, divided into twenty-one chapters.¹⁷⁷ Sixteen chapters deal with Israeli abuses of international law, while five deal with abuses committed by “armed groups in Gaza” and the Palestinian Authority.¹⁷⁸ Justice Goldstone himself explained this disparity by indicating that Hamas’ attacks on southern Israel were virtually undisputed, whereas Israeli attacks on Gaza were heavily disputed.¹⁷⁹ Thus, the Goldstone Report chose to focus on the latter. In order to investigate violations of international law in Gaza, Justice Goldstone requested cooperation from both parties; only Hamas accepted, while Israel consistently refuses to cooperate.¹⁸⁰

The Goldstone Mission, in order to address possible violations, chose to investigate several “illustrative” incidents, which were exemplary of what had taken place in Gaza.¹⁸¹ The Goldstone Report ultimately con-

¹⁷⁴ *Id.* at 100 (noting that foreign donors may be deterred by the prospect of another future destructive war in Gaza).

¹⁷⁵ U.N. Human Rights Council, *Human Rights in Palestine and Other Occupied Arab Territories: Rep. of the United Nations Fact Finding Mission on the Gaza Conflict*, ¶ 131–32, at 39, U.N. Doc. A/HRC/12/48 (Sept. 15, 2009), available at http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/docs/UNFFMGC_Report.pdf [hereinafter Goldstone Report] (appointing Justice Goldstone and three other members to the U.N. Mission).

¹⁷⁶ David Kaye, *The Goldstone Report*, 13 ASIL INSIGHTS (Oct. 1, 2009), <http://www.asil.org/files/insight091001pdf.pdf>.

¹⁷⁷ *Id.* at 2 (characterizing the Goldstone Report).

¹⁷⁸ *Id.*

¹⁷⁹ *UN Finds Evidence of War Crimes in Gaza Fighting: Interview with Richard Goldstone*, PBS NEWSHOUR WITH JIM LEHRER (Sept. 15, 2009), http://www.pbs.org/news/hour/bb/middle_east/july-dec09/gaza_09-15.html (Justice Richard Goldstone in a television interview regarding the U.N. fact-finding Mission report on the Israeli campaign in Gaza).

¹⁸⁰ Kaye, *supra* note 176, at 2 (without Israeli cooperation the Mission investigation still faced barriers in Gaza even with Hamas’ offered cooperation).

¹⁸¹ *Id.* at 2.

cludes that both sides violated international humanitarian law.¹⁸² With respect to Hamas and other armed groups in Gaza, the Goldstone Report alleges their responsibility with respect to the targeting of civilians and their failure to adequately take precautions to protect civilians.¹⁸³ The Goldstone Report recommends that Hamas and other groups attempt to respect international humanitarian law in the future.¹⁸⁴ With respect to Israel, the Goldstone Report is critical of a number of acts, ranging from abusive detentions, to repression of dissent.¹⁸⁵ Moreover, the Goldstone Report describes thirty-six different incidents, which all include some form of illegal attacks on civilians by the Israeli forces, either in the form of indiscriminate or disproportionate use of force, or deliberate attacks on civilian objectives.¹⁸⁶ The Goldstone Report also alleges the use of Palestinian civilians as “human shields” during Operation Cast Lead.¹⁸⁷ The Report ultimately finds many different violations of international humanitarian law, as well as possible elements of war crimes.¹⁸⁸ Most importantly, the Goldstone Report concludes that Operation Cast Lead was directed against the people of Gaza on the whole, as part of “an overall policy aimed at punishing the Gaza population for its resilience and for its apparent support for Hamas.”¹⁸⁹ Thus, according to the Goldstone Report, Operation Cast Lead was the result of an Israeli policy of “massive and deliberate destruction.”¹⁹⁰

¹⁸² *Id.*

¹⁸³ Goldstone Report, *supra* note 175, ¶ 1721, at 473 (finding that the Palestinian armed groups failed in their duty to protect and respect civilians); *Id.* ¶ 494, at 150 (failing to take all feasible precautions would have constituted a violation of the customary rules of international humanitarian law); *Id.* ¶ 1337, at 373 (Hamas violated international humanitarian law through its prolonged detention of Israeli soldier Gilad Shalit); *Id.* ¶1365, at 381 (Hamas violated human rights by the targeting of Fatah associates).

¹⁸⁴ *Id.*, ¶ 1770, at 551 (recommending that Palestinian armed groups, “undertake forthwith to respect international humanitarian law, in particular by renouncing attacks on Israeli civilians and civilian objects, and take all feasible precautionary measures to avoid harm to Palestinian civilians during hostilities”).

¹⁸⁵ *Id.*, ¶ 1098, at 298 (finding that Israel coerced detainees); *Id.* ¶ 1165–1173, at 322–24 (Israel’s interrogation and treatment of detainees violated numerous international conventions and constituted war crimes); *Id.* ¶ 1520, at 419 (Israeli detention practices violated international human rights and humanitarian law); *Id.* ¶¶ 1796–1805, at 492–94 (concluding that the Mission has insufficient information to come to definitive findings but also criticizing Israel’s alleged actions as a “substantial cause for concern”).

¹⁸⁶ Kaye, *supra* note 176, at 2.

¹⁸⁷ Goldstone Report, *supra* note 175, ¶¶ 1094–97, 1101, at 296–99 (Israel’s alleged use of human shields was an intentional war crime and a violation of the Fourth Geneva Convention).

¹⁸⁸ Kaye, *supra* note 176.

¹⁸⁹ Goldstone Report, *supra* note 175, ¶¶ 1680–81, at 523.

¹⁹⁰ *Id.* ¶ 1190, at 329 (after reviewing the available information and without collaboration with the Israeli military the Mission found a qualitative policy shift toward “massive and deliberate destruction”).

The Goldstone Report called for accountability on behalf of all the parties involved. It specifically rejected the Israeli claim that it would investigate violations of international humanitarian law independently, and suggested alternatives to domestic justice.¹⁹¹ These alternatives include Security Council monitoring, an ICC investigation, and the exercise of universal jurisdiction by other states interested in prosecuting Israeli officials.¹⁹²

V. THE IMPORTANCE OF THE GOLDSTONE REPORT IN INTERNATIONAL LAW

The Goldstone Report may have limited influence in Israel and may not provoke much change in the Israeli military and foreign policy. However, the Report, and more specifically its recommendations related to accountability, may morph into an important international document, and a possible precedent for other conflicts and accountability demands.

First, the Goldstone Report provides extensive documentation on Operation Cast Lead, thereby facilitating the investigative task for any other country willing to prosecute Israeli officials in its domestic courts under universal jurisdiction statutes.¹⁹³ In other words, the Goldstone Report may have heightened the risk for Israel that another sovereign state will choose to prosecute its political or military leaders.¹⁹⁴ Second, the Goldstone Report recommendation that the Security Council establish an independent expert committee to monitor Israeli efforts to hold violators accountable suggests a possible new mechanism for pushing Israel into compliance with international humanitarian law. While it is probable that this recommendation will not be followed, because of the U.S. veto power on the Security Council, it nonetheless describes a novel monitoring scheme that may be useful in the future.¹⁹⁵ Third, although the Goldstone Report recommendation that the Security Council refer this situation to the ICC is certain to fail, also because of a probable U.S. veto, the Report highlights the need to involve the ICC and possibly put more pressure on Israel to comply with international humanitarian law, in order to avoid ICC scrutiny.

Finally, the Goldstone Report draws attention the Gazan blockade and occupation, and contributes to a deterioration of Israeli reputation abroad. The recent incident involving the Israeli killing of nine individuals aboard one of the flotilla ships carrying humanitarian aid to Gaza continues to paint Israel in a negative light and to incite more international support for the Gazan issue.¹⁹⁶ Israel, by choosing not to cooperate with the Goldstone

¹⁹¹ *Id.* ¶ 1629, at 508.

¹⁹² *Id.* ¶ 1766, at 546–47; *Id.* ¶1654, at 515.

¹⁹³ Kaye, *supra* note 176.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* (noting that this recommendation is unlikely to be adopted by the Security Council).

¹⁹⁶ See Teibel & Goldenberg, *supra* note 1 (noting that several states have condemned Israel's response and called for international investigations).

Mission, forfeited the chance to advance its own arguments and to portray itself in a serious and credible light.¹⁹⁷ By not cooperating with the Goldstone Mission, Israel may have confirmed the Goldstone Report's rejection of Israel as a possible forum for any investigations of international law violations. The HRC's endorsement of the Goldstone Report is another significant fact contributing to the overall importance of this document in international law.¹⁹⁸

VI. CONCLUSION

The Goldstone Report sheds light on Operation Cast Lead, a deadly and destructive military offensive in Gaza initiated by Israeli forces over a three-week period in late 2008 and early 2009.¹⁹⁹ Because Israel likely committed numerous violations of international humanitarian law, it is imperative that justice and accountability prevail through a formal, independent investigation. Thus, the Goldstone Report recommendations may be useful in providing models for such investigations and accountability mechanisms. Moreover, the world community should turn its attention to the issue of Gaza, and the overall Israeli military policy toward this entity. The recent flotilla killings illuminate the tensions between Israel and any state or entity willing to help Gaza. This incident, coupled with Operation Cast Lead, underlines the need to seriously address the issue of Gazan blockade, and to persuade Israel into more flexible solutions. The Goldstone Report's ultimate achievement may lie within its possible contribution toward a politically tenable solution for the Middle East.

¹⁹⁷ Kaye, *supra* note 176.

¹⁹⁸ Ronen, *supra* note 7, at 5.

¹⁹⁹ *Id.* at 3.