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Legal Implications of Operation Cast Lead, Part 2

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### Operation Cast Lead: The Elusive Quest for Self Defense under International Law

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On December 27, 2008, Israel launched a 22-day military offensive against Gaza called “Operation Cast Lead.”<sup>1</sup> Israeli forces killed some 1,300 Palestinians, including 280 children, and injured approximately 4,300 others, including 1,100 children.<sup>2</sup> Civilians comprised nearly 70 percent of the Palestinian death toll.<sup>3</sup> The aerial and ground offensive also destroyed 2,400 homes, 29 schools, 121 commercial and industrial workshops, 60 police stations, and 30 mosques.<sup>4</sup> During the Operation, thirteen Israelis were killed including three civilians and four soldiers killed by friendly fire.<sup>5</sup>

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<sup>1</sup> Howard Schneider, *Israeli Closes Military Probe*, Washington Post, March 31, 2009, at A07, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/30/AR2009033001240.html>.

<sup>2</sup> Palestine Center for Human Rights, *IOF Offensive on the Gaza Strip makes it like an earthquake zone and Claims Civilians and Property*, (Jan. 22, 2009), available at <http://www.pchrgaza.org/files/PressR/English/2008/19-2009.html>.

<sup>3</sup> See Schneider, *supra* note 1 (Israeli authorities claim that of those killed, only 295 were civilians.).

<sup>4</sup> Palestine Center for Human Rights, *supra* note 2.

<sup>5</sup> *Israel/Gaza: Operation ‘Cast Lead’: 22 days of death and destruction*, Amnesty International, July 2009, available at <http://www.amnesty.org/en/library/asset/MDE15/015/2009/en/8f299083-9a74-4853-860f0563725e633a/mde150152009en.pdf> [hereinafter Amnesty].

International law's single exception to the prohibition on the unilateral use of force is self-defense.<sup>6</sup> The legal nature of "Operation Cast Lead" is therefore contingent on its characterization as an act of self-defense as opposed to one of aggression. Accordingly, throughout the offensive and its aftermath, Israel and its allies characterized Israel's attack as one of self-defense.<sup>7</sup> In an address to the Israeli Knesset on December 29th, then Foreign Minister Tzipi Livni stated, "Israel is entitled to defend itself against any attempt to harm its sovereignty, the well-being of its residents and the security of its citizens. Israel's actions fulfill its basic right to self defense."<sup>8</sup> In a Congressional resolution passed on the fourteenth day of the offensive, the U.S. House of Representatives recognized "[Israel's] right to act in self-defense to protect its citizens against Hamas's unceasing aggression, as enshrined in the United Nations Charter."<sup>9</sup> This article will examine the doctrine of self-defense in international law and its application to Israel's offensive against Gaza.

*Jus ad bellum*, or the justice of fighting a war, is the legal framework that regulates self-defense.<sup>10</sup> This is to be distinguished from *jus in bello*, or the regulation of the way that a war should be fought.<sup>11</sup> There is a substantial argument that despite Israel's unilateral withdrawal from Gaza in 2005, the Strip remains occupied territory.<sup>12</sup> As such, the laws of occupation, and not armed conflict, would govern Israel's offensive against Gaza. Under the laws of occupation, Israel's claim of self-defense appears dubious because self-defense is a legal justification for the initiation of force (*jus ad bellum*), not for its exercise in a situation of belligerent occupation (*jus in bello*). Be that as it may, for the sake of this discussion, I will examine Israel's claim as if the Gaza Strip were not occupied.<sup>13</sup>

The doctrine of self-defense in international law continues to be a salient topic. Its contentious nature is perpetuated by two schools of thought: one that suggests that self-defense is circumscribed by the UN Charter, and the other that posits that the modern Charter system does not subsume but rather complements pre-existing customary international law. In the first instance,

<sup>6</sup> See U.N. CHARTER art. 51.

<sup>7</sup> See e.g., Israel Ministry of Foreign Affairs, *Address to the Knesset by FM Livni on Gaza Operation*, (Dec. 29, 2008), available at [http://www.mfa.gov.il/MFA/Government/Speeches+by+Israeli+leaders/2008/Address\\_Knesset\\_FM\\_Livni\\_Gaza\\_operation\\_29-Dec-2008.htm](http://www.mfa.gov.il/MFA/Government/Speeches+by+Israeli+leaders/2008/Address_Knesset_FM_Livni_Gaza_operation_29-Dec-2008.htm) [hereinafter *Livni*]; H. R. Con. Res. 34, 111<sup>th</sup> Cong. (2009) [hereinafter 111th Cong.].

<sup>8</sup> *Livni*, *supra* note 7.

<sup>9</sup> 111th Cong., *supra* note 7.

<sup>10</sup> See David Luban, *Was the Gaza Campaign Legal?*, 31 NAT'L SEC. L. R. 2, (Jan./Feb. 2009), available at <http://ssrn.com/abstract=1364608>.

<sup>11</sup> See Luban, *supra* note 10.

<sup>12</sup> See e.g., John Dugard, *Despite the 'Withdrawal,' the siege of Gaza goes on*, THE INDEPENDENT, Oct. 5, 2006, available at <http://www.independent.co.uk/opinion/commentators/john-dugard-despite-the-withdrawal-the-siege-of-gaza-goes-on-418723.html>. See also Human Rights Watch, *Disengagement will not end Gaza Occupation*, (Oct. 28, 2004), available at <http://www.hrw.org/en/news/2004/10/28/israel-disengagement-will-not-end-gaza-occupation> ("The removal of settlers and most military forces will not end Israel's control over Gaza...Israel plans to reconfigure its occupation of the territory, but it will remain an occupying power with responsibility for the welfare of the civilian population.") (quoting Sarah Leah Whitson, Executive Director of Human Rights Watch's Middle East and North Africa Division).

<sup>13</sup> See Luban, *supra* note 10.

an “armed attack” must trigger a forceful response and in the second, preemptive actions and actions intended to eschew compliance with international law are accepted so long as they meet the tests of necessity, immediacy, and proportionality. The linchpin of both frameworks is proportionality.

In this article, I will demonstrate that applied to either framework, Israel’s military offensive against Gaza fails to qualify as an act of self-defense. Of utmost concern is the fact that according to several reports drafted by various non-governmental and international human rights organizations, Israel engaged in the direct targeting of civilians or behavior that amounted to the targeting of civilians. Under the proportionality doctrine, the prohibition of the direct targeting of civilians is the only point around which there exists consensus among scholars. Accordingly, even if we were to generously assume that Israel’s attack amounted to one of self-defense, Israel’s offensive would still be illegal due to its wildly disproportional nature. In effect, under the most liberal interpretations of self-defense and proportionality, Operation Cast Lead fails to meet its lowest possible standards.

## I. Self-defense in international law

### A. Self-defense under the modern Charter system

Under the modern Charter system, unilateral acts of force that are not characterized as self-defense are illegal. The UN Charter prohibits the use of force in article 2(4) which states that “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”<sup>14</sup> Despite the qualifying reference to “territorial integrity” and “political independence,” it is widely accepted that all incursions into another territory would violate this broad prohibition.<sup>15</sup>

Whereas Article 2(4) spells out the prohibition of unilateral force, Article 51 provides its exception in the case of self-defense: “[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations.”<sup>16</sup> The interpretation of Article 51, and specifically the scope of self-defense, is far from settled and continues to be the topic of debate among legal scholars.<sup>17</sup> In particular, the debate concerns the inclusion of the word “inherent” and the explicit reference to an “armed attack,” and whether these references limit or alternatively complement the preexisting formation of self-defense

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<sup>14</sup> U.N. CHARTER art. 2 para. 4.

<sup>15</sup> See e.g., Major Jason S. Wrachford, *The 2006 Israeli Invasion of Lebanon: Aggression, Self-Defense, Or a Reprisal Gone Bad?*, 60 A.F. L. REV. 29, 59 (2007).

<sup>16</sup> U.N. CHARTER art. 51

<sup>17</sup> See YORAM DINSTEIN, *WAR, AGGRESSION, AND SELF-DEFENCE*, 168 (3d ed., Cambridge University Press 2001); See also Oscar Schachter, *Self-Defense and the Rule of Law*, 83 AM. J. INT’L L. 259 (1989); Wrachford, *supra* note 21; Jackson Nyamuya Maogoto, *Walking an International Tightrope: Use of Military Force to Counter Terrorism-Willing the Ends*, 31 BROOKLYN J. INT’L L. 405 (2006); John Yoo, *Using Force*, 71 U. CHI. L. REV. 729 (2004).

in customary international law.<sup>18</sup> This preexisting formation reserves the right to use unilateral force to resolve conflicts, including anticipatory self-defense, reprisals, and retribution.<sup>19</sup>

Jackson Nyamuya Maogoto categorizes this debate into two schools of thought he labels as “Restrictionist” and Counter-Restrictionist.”<sup>20</sup> The Restrictionist approach considers Article 2(4) to be an absolute prohibition on the use of force except in the narrow exception provided in Article 51 of an armed attack.<sup>21</sup> This is read as an “actual armed attack” and not the threat of attack, anticipatory self-defense, reprisals, or the prevention of renewed attack.<sup>22</sup> Restrictionists argue that Article 51 provides for an exclusive exception as to when force may be legitimately used.<sup>23</sup> Under this approach, customary international law predating the Charter would be limited by its terms, as doing otherwise would render the Charter meaningless.<sup>24</sup>

Counter-Restrictionists disagree and argue that the inclusion of ‘inherent right’ in Article 51 suggests that the meaning of self-defense as it existed prior to the Charter’s existence is still legitimate.<sup>25</sup> Under this framework, Article 51 preserves all customary international law in regard to self-defense, including the legitimate use of force for anticipatory self-defense, retribution, and reprisals. Rather than limiting the applicability of preexisting law, as Restrictionists would suggest, Article 51 and customary international law would run concurrently.<sup>26</sup> Professor John Yoo goes further and argues “Article 51 of the UN Charter must be read as recognizing, but not regulating, the right of self-defense and that its meaning is to be derived from international customary law.”<sup>27</sup>

## B. Self-defense predating the modern Charter System

### i. Natural Law

Natural law is customary law’s antecedent. Whereas customary law refers to a consensus among the community of nations as defined by both state practice and acceptance of such practice as obligatory,<sup>28</sup> natural law is the “system of deductive reasoning from which the natural rights of men and sovereign nations may be discovered.”<sup>29</sup> The 17th century philosopher, Hugo Grotius, was

<sup>18</sup> Maogoto, *supra* note 17.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> See e.g., Dinstein, *supra* note 17.

<sup>24</sup> Wrachford, *supra* note 15, at 62.

<sup>25</sup> Sean D. Magenis, *Natural Law as the Customary International Law of Self-Defense*, 20 B.U. INT’L L.J. 413, 424 (2002).

<sup>26</sup> Wrachford, *supra* note 15, at 62.

<sup>27</sup> Yoo, *supra* note 17, at 739.

<sup>28</sup> Vienna Convention on the Law of Treaties, May 23, 1969, art. 38, available at [http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf); See also I.C.J. Statute art. 38.1(b), available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>.

<sup>29</sup> Magenis, *supra* note 25, at 415. See also Hugo Grotius, THE RIGHTS OF WAR AND PEACE INCLUDING THE LAW AND NATURE

the first to expound on the right to self-defense as natural law in his seminal work on just war theory, On the Law of War and Peace. Grotius considered force used in the recovery of property, in retribution, and in defense as justifiable because “nature commits to each his own protection.”<sup>30</sup> In this regard, Grotius considered anticipatory self-defense and reprisals among acceptable forms of self-defense.<sup>31</sup> Grotius’s work suggests that the genesis of such rights in natural law protects them from limitations imposed by positive law.<sup>32</sup> Under this formulation, a state’s preservation takes precedence over established law and therefore only a state can assess what is necessary in its self-defense.

In a post-Charter era, politicians and lawyers alike have not abandoned Grotius’s view that law cannot govern the rights of states and have insisted that “[t]he survival of states is not a matter of law.”<sup>33</sup> Notwithstanding the emphatic hold on age-old doctrines, today there exists consensus that self-defense is not a subjective standard.

As put by Oscar Schachter, “[t]o say that each state is free to decide for itself when and to what extent it may use arms would remove the principal ground for international censure, and, in effect, bring to the vanishing point the legal limits on unilateral recourse to force.”<sup>34</sup> In order to have a place in law, and not just politics, there must be an objective standard against which self-defense can be measured. This principle necessitates the ability of courts to investigate and adjudicate whether a military attack was indeed necessary and therefore defensive.<sup>35</sup> Such assessment should serve as the non-political basis for the community of nations to support or condemn a particular use of force.<sup>36</sup>

## ii. Customary International Law

Customary international law enshrines self-defense as an objective standard and maintains the legitimacy of reprisals and anticipatory self-defense. Self-defense in customary law is defined by the *Caroline* incident.<sup>37</sup> In 1837, the *Caroline*, a U.S. naval vessel, carried arms and supplies to Canadian insurgents waging an armed rebellion against British rule in Canada.<sup>38</sup> In response, a British force entered U.S. territory, boarded the ship, set it on fire, and launched it down the Niagara

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OF NATIONS 32 (Archibald Colin Campbell trans., M. Walter Dunne 1901) (1625).

<sup>30</sup> Magenis, *supra* note 25, n.105.

<sup>31</sup> *Id.* at 418.

<sup>32</sup> Schachter, *supra* note 17, at 259.

<sup>33</sup> *Id.* at 260 (quoting Acheson, Remarks, 57 ASIL Proc. 13, 14 (1963)). In an address to the American Society of International Law, Dean Acheson, lawyer and former U.S. Secretary of State, dismissed international lawyers who debated the legality of the U.S.’s quarantine of the Cuban Missile Crisis of 1962. He declared that law “simply does not deal with such questions of ultimate power.” *Id.*

<sup>34</sup> Schachter, *supra* note 17, at 263.

<sup>35</sup> *Id.* at 261.

<sup>36</sup> Magenis, *supra* note 25, at 431-32.

<sup>37</sup> See Yoo, *supra* note 17, at 740.

<sup>38</sup> *Id.*

Falls.<sup>39</sup> In response to British claims of self-defense, then-U.S. Secretary of State Daniel Webster insisted that:

[The British Government show the] necessity of self-defense was instant, overwhelming, leaving no choice of means, and no moment for deliberation . . . . Even supposing the necessity of the moment authorized [British forces] to enter the territories of the United States at all, they did nothing unreasonable or excessive; since the act, justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it.<sup>40</sup>

Webster's formulation informs the standard requirements of self-defense in customary law: necessity, immediacy, and proportionality, which have come to be known as the *Caroline Doctrine*.<sup>41</sup> The International Court of Justice upheld this standard in its 1986 review of the U.S.'s material support for Contras in the Nicaraguan civil war, *Nicaragua v. United States*.<sup>42</sup> There it established that for a response to an attack to be lawful "depends on the observance of the criteria of necessity and proportionality of the measure taken in self-defense."<sup>43</sup>

- Proportionality

The discussion of self-defense can begin and end with an examination of proportionality. Even theories legitimating the use of force beyond self-defense regard proportionality as a central element.<sup>44</sup> There exists no significant difference between proportionality in just war theory and the modern Charter system except for the yardstick against which the evils of war are measured. While in the modern Charter system, the overall evil is measured against the self-defense achieved, in just war theory it is measured against the good it would create.<sup>45</sup> Under both formulations, the permissible evils of war are not unlimited.<sup>46</sup>

Abstractly, proportionality is the concept that military gains should be balanced against limiting harm to civilians during war.<sup>47</sup> Normatively, proportionality prohibits the use of weapons

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.* (quoting Daniel Webster, Letter to Henry Fox, British Minister in Washington (Apr 24, 1841), in Kenneth Bourne and D. Cameron Watt, eds, 1 British Documents on Foreign Affairs: Reports and Papers from the Foreign Office Confidential Print (Part I, Series C) 153, 159 (University Publications of America 1986)).

<sup>41</sup> Wrachford, *supra* note 21, at 54. See also Timothy Kearley, *Raising the Caroline*, 17 WIS. INT'L L.J. 325, 325 (1999).

<sup>42</sup> Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 103 (June 27).

<sup>43</sup> *Id.* "The Court has therefore to assess whether the risk run by these 'essential security interests' is reasonable, and secondly, whether the measures presented as being designed to protect these interests are not merely useful but 'necessary.'" *Id.* at 117.

<sup>44</sup> Judith Gail Gardem, *Proportionality and Force in International Law*, 87 AM. J. INT'L L. 391, 403 (July 1993).

<sup>45</sup> *Id.*

<sup>46</sup> Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art 35, para. 1, June 8, 1997, ("In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.") [hereinafter *Protocol*].

<sup>47</sup> *Id.* art. 57.

and methods of warfare that can cause “superfluous injury or unnecessary suffering.”<sup>48</sup> Moreover the doctrine mandates that military operations be cancelled if it becomes apparent that the loss of civilian life or objects will be “excessive in relation to the concrete and direct military advantage anticipated.”<sup>49</sup>

Proportionality does not suggest that noncombatants should be afforded absolute immunity from the effects of war. To the contrary, civilian casualties are tolerated as a consequence of armed conflict so long as the attack is not punitive and the casualties are not ‘excessive’ relative to the anticipated gains. The doctrine of proportionality “has assumed the pivotal role in determining the extent to which civilians are entitled to be protected from the collateral effects of armed conflict.”<sup>50</sup>

Like self-defense, proportionality has not been established as a definitive standard. Indeed a chart delineating the acceptable evil associated with a military operation would be ludicrous. Consequently, proportionality has been subject to broad and varying interpretations. In its most conservative form, proportionality suggests that the harm returned should not exceed the harm received.<sup>51</sup> Conversely, a more radical reading suggests that proportionality in the context of self-defense should be evaluated subjectively in light of a State’s intent.<sup>52</sup> So that “[i]f a State responds to an ‘armed attack’ by ridding itself of the threat, it is not unreasonable or excessive.”<sup>53</sup> Major Wrachford takes issue with both readings, but insists proportionality should not be a subjective standard.<sup>54</sup> He cautions that absent an objective yardstick, states would have the unlimited authority to “take any action it desires to meet the ultimate objective of removing any threat, including the complete annihilation of the opposing party.”<sup>55</sup>

Additionally, Protocol I of the Geneva Conventions expounds one definitive standard upon which there exists scholarly consensus: civilian populations and civilians shall not be the object of attack.<sup>56</sup> Among states, the most liberal interpretations may be espoused by the US and its allies who interpret proportionality to prohibit only two types of attacks: “first, those that intentionally target civilians; and second, those that involve negligent behavior in ascertaining the nature of a target or the conduct of the attack itself, so as to amount to the direct targeting of civilians.”<sup>57</sup>

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<sup>48</sup> *Id.* art. 35, para. 2 (“It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.”).

<sup>49</sup> *Id.* art. 57(2)(b).

<sup>50</sup> Gardem, *supra* note 44, at 398.

<sup>51</sup> Wrachford, *supra* note 15, at 74.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 76.

<sup>54</sup> *Id.* at 74-75.

<sup>55</sup> *Id.* at 75.

<sup>56</sup> *Protocol*, *supra* note 46, at art. 51, para. 2 (“The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.”).

<sup>57</sup> Gardem, *supra* note 44, at 410.

## II. Application of Self-Defense to Operation Cast Lead

### A. Applicable scope of self-defense

My intent is to examine the applicability of self-defense to Israel's military offensive irrespective of its proper reading in the UN Charter. While its appropriate scope merits treatment, for the sake of this analysis, I will explore its applicability in both a Restrictionist as well as a Counter-Restrictionist framework.

#### i. The Charter System and Operation Cast Lead

Israel justified its attack on Gaza as a response to Hamas rocket fire into Israel in violation of the ceasefire.<sup>58</sup> While Hamas indeed renewed its cross-border attacks leading up to Operation Cast Lead, it did so in response to an Israeli raid into Gaza that killed six Hamas militants on November 4, 2008, four months into the tenuous ceasefire.<sup>59</sup> Israeli authorities claimed that the operation was intended to prevent an immediate threat.<sup>60</sup> In its most narrow formulation, self-defense under the modern Charter system must be triggered by an actual armed attack, as opposed to posing a threat of an attack or demonstrating a history of attacks that a belligerent seeks to deter. It is therefore critical that Israel, and not Hamas, launched the armed attack dissolving the ceasefire.

The Egyptian-brokered ceasefire, established in June 2008, stipulated that Israel would cease its incursions into, and ease its blockade of, the Gaza Strip while Hamas would cease its missile and mortar attacks into Israel.<sup>61</sup> By its very terms, the ceasefire agreement recognized past-armed attacks launched by Hamas as well as previous military operations conducted by Israel.<sup>62</sup> In this context, an actual armed attack would be a new attack amounting to a breach of the established truce. Ehud Olmert, the Israeli Prime Minister at the time, affirmed this understanding when he threatened renewed Israeli military action if Hamas renewed its cross-border rocket attacks.<sup>63</sup>

Far from renewing its cross-border rocket attacks during the short-lived truce, Hamas rocket fire declined significantly. According to the Intelligence and Terrorism Information Center (Center) at the Israel Intelligence Heritage and Commemoration Center, the number of rockets fell from three digit numbers to single digits: one in July, eight in August, one in September, and one in October.<sup>64</sup> Additionally, according to the Center, Hamas was not responsible for any of the rocket

<sup>58</sup> *Livni, supra* note 7.

<sup>59</sup> Rory McCarthy, *Gaza Truce Broken as Israeli Raids Kill Six*, GUARDIAN, Nov. 5, 2008, available at <http://www.guardian.co.uk/world/2008/nov/05/israelandthepalestinians>.

<sup>60</sup> *Id.* "This was a pinpoint operation intended to prevent an immediate threat," the Israeli military said in a statement. "There is no intention to disrupt the ceasefire, rather the purpose of the operation was to remove an immediate and dangerous threat posted by the Hamas terror organisation." *Id.*

<sup>61</sup> *Israel and Hamas ceasefire begins*, BBC, Jun. 19, 2008, available at [http://news.bbc.co.uk/2/hi/middle\\_east/7462554.stm](http://news.bbc.co.uk/2/hi/middle_east/7462554.stm).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> Intelligence and Terrorism Information Center, *Gaza Hamas Fact Sheet*, Dec. 22, 2008, available at [http://www.israelpolitik.org/wp-content/uploads/2008/12/gaza\\_fact\\_sheet.pdf](http://www.israelpolitik.org/wp-content/uploads/2008/12/gaza_fact_sheet.pdf). See also Nancy Kanwisher, *Reigniting*



fire into Israel during the ceasefire.<sup>65</sup> Instead, “the movement tried to enforce the terms of the arrangement on the other terrorist organizations and to prevent them from violating it.”<sup>66</sup> By all accounts, Hamas “was careful to maintain the ceasefire.”<sup>67</sup>

Israel’s November 4th raid into Gaza marked the first significant breach of the ceasefire, which was then met by renewed Hamas cross-border attacks and ultimately Israel’s 22-day offensive against Gaza. Nothing in international law sanctions the provocation of an attack to justify the use of force in self-defense, which Israel attempts to do here. While Israel may be justified in its exercise of force in an existing or continuing conflict, that justification is not equivalent to the right to initiate force. The laws of armed conflict, *jus in bello*, govern the former category. The laws justifying the use of force, *jus ad bellum*, namely those acts characterized as self-defense, govern the latter and constitute the scope of this article.

Israel professed that its initial attack was intended to prevent a threat of an attack, indicating the absence of a requisite armed attack necessary to meet the threshold of self-defense under a narrow reading in the modern Charter system. For the sake of argument, even if we were to accept that Israel’s provocation was of no consequence and therefore it was indeed responding to an armed attack, its response would still have to meet the threshold requirements of necessity and proportionality. I will explore both elements below in my examination of Israel’s claim of self-defense under customary international law.

## ii. Customary law and Operation Cast Lead

Israel’s attack may have been intended to thwart the threat of an attack or to deter renewed attacks, which unlike the modern Charter system is permissible under customary law. To qualify as self-defense under customary law, the use of force must satisfy the three-pronged standard delineated in the Caroline Doctrine: necessity, immediacy, and proportionality.

### a. Necessity

In Secretary Webster’s words, a necessity of self-defense must “leav[e] no choice of means” to resolve a conflict or protect one’s nation or citizens.<sup>68</sup> In the case of protecting its citizens from Hamas rocket fire, it is arguable whether Israel had no choice but to launch an aerial and ground offensive against Gaza. According to the Israel Ministry of Foreign Affairs (MFA), “Israeli military forces had no choice but to respond [to rockets and mortar fire from Gaza] in order to protect the

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*Violence: How do Ceasefires End?*, HUFFINGTON POST, Jan. 6, 2009, available at [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).

<sup>65</sup> Intelligence and Terrorism Information Center at the Israel Intelligence Heritage and Commemoration Center, *The Six Months of the Lull Arrangement* at 3, (Dec. 2008), available at [http://www.terrorism-info.org.il/malam\\_multimedia/English/eng\\_n/pdf/hamas\\_e017.pdf](http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/pdf/hamas_e017.pdf) (“ Hamas was careful to maintain the ceasefire and its operatives were not involved in rocket attacks.”) [hereinafter *Intelligence*].

<sup>66</sup> *Id.* at 7.

<sup>67</sup> *Id.*

<sup>68</sup> Yoo, *supra* note 23, at 740 (quoting Webster, *supra* note 40).

civilian communities in the south.”<sup>69</sup>

Yet only a few months before, the MFA had declared that the ceasefire successfully brought “calm” and normalcy to Israel.<sup>70</sup> In an article dated July 27, 2008, the MFA wrote, “[m]ore than one month has passed since the calm agreement went into effect, with only sporadic violations by the terrorist organizations. Signs of normal life can be seen in towns on both sides of the Israel-Gaza Strip border.”<sup>71</sup>

According to the MFA’s website, there was a significant drop in rocket and mortar fire directly after the ceasefire went into effect and a significant spike immediately after it was broken by Israeli forces on November 4, 2008.<sup>72</sup> In a chart, the MFA prominently demonstrates the ceasefire’s success in diminishing attacks on its citizens.<sup>73</sup> According to the chart, only twenty rockets and eighteen mortar shells were fired from Gaza into Israel during the four months following the implementation of the ceasefire. Significantly, in the single month following Israel’s raid into Gaza that killed six Hamas militants, 203 rockets and 121 mortar shells were fired at Israel.<sup>74</sup>

The figures strongly demonstrate that Israel diminished rocket attacks and mortar shellings in a matter of weeks through diplomatic means. Israel was able to bring more protection to its citizens during the four months when it agreed to a ceasefire than it was able to provide in all the months preceding and in the month following the ceasefire when it had used force.

In addition to diminishing the rocket and mortar attacks, Israel was also able to forge a mutual interest with Hamas. During the ceasefire, Hamas not only ceased its attacks on Israel but it worked to prohibit other groups from launching attacks as well. According to the MFA, “Hamas leaders have [publicly] stated time and again that the lull is a Palestinian national interest. On several occasions, Hamas members have arrested Fatah operatives who were involved in firing at Israel and confiscated their arms.”<sup>75</sup>

Israel’s own proclamations and figures demonstrate that it was not left without “a choice of means” to protect itself and its citizens. However, if we consider that Israel defines the mere governance of Hamas, and not the rocket and mortar fire from Gaza, as a threat to its security, then its short-lived ceasefire could never have been sufficient. Consequently, nothing short of Hamas’s

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<sup>69</sup> *Behind the Headlines: Rocket and mortar fire despite calm in South*, Israel MFA, (Dec. 10, 2008), available at <http://www.mfa.gov.il/MFA/About+the+Ministry/Behind+the+Headlines/Behind+the+Headlines-+Calm+in+the+South+19-Jun-2008.htm> [hereinafter *Behind the Headlines*].

<sup>70</sup> *One month of Lull along the Israel-Gaza Border*, Israel MFA, (July 27, 2008), available at <http://www.mfa.gov.il/MFA/Terrorism+Obstacle+to+Peace/Hamas+war+against+Israel/One+month+of+calm+in+Gaza+28-Jul-2008.htm> [hereinafter *Lull*].

<sup>71</sup> *Id.*

<sup>72</sup> *Behind the Headlines*, *supra* note 69.

<sup>73</sup> *Id.* The chart graphic is available at <http://www.mfa.gov.il/NR/rdonlyres/297F5195-4BB4-4C98-9DCE-A9BFF91E6407/0/rockets2008.jpg>.

<sup>74</sup> *Id.*

<sup>75</sup> *Lull*, *supra* note 70.

removal amounts to security for Israel. Tzipi Livni, Israel's former foreign minister, made this goal explicit in late December when she declared, "We will not allow the prolonged existence of a Hamastan state in Gaza."<sup>76</sup>

To frame this goal within an acceptable definition of self-defense, Israel may argue that since its electoral victory in January 2006, it has employed several means, including measures in contravention of international humanitarian law, to remove Hamas from power. These attempts have included imposing economic sanctions on the Palestinian government; imposing a blockade of basic goods, water, and fuel that has caused a "humanitarian catastrophe"; and supporting a Fatah-led coup against the political party. All of those measures have failed to remove Hamas from its governing post. As the argument may go, these failed attempts have left Israel with no choice of means but to attack Hamas militarily. Taken to its logical end, Israel may equate the removal of this 'threat' with Hamas's capitulation, or alternatively its annihilation. Moreover, because Hamas is a political party, comprised of an ideology and not just a militant force, its unfettered removal may amount to the annihilation of all its adherents.

As discussed above, self-defense and proportionality are objective standards. Under no circumstances can Israel have *carte blanche* to remove Hamas from power. Assuming that Israel can legitimately aspire to remove a ruling party in the name of security at all, this aspiration would still be limited by the doctrine of proportionality, which I will discuss below.

#### b. Immediacy

To meet the standard of immediacy under the Caroline Doctrine, a government would have to be "overwhelmed" and left with "no moment for deliberation" to consider another response.<sup>77</sup> Immediacy requires that the initial attack and the response to it in self-defense be proximate in time 'so that the cause (armed attack) and the effect (self-defense) are plain for all to see.'<sup>78</sup>

As demonstrated in the previous section, rather than enduring an unanticipated threat in the midst of calm, Israel broke the otherwise successful ceasefire with Hamas. There did not exist an obvious cause to justify an effect. Notwithstanding Israel's breach, and an exchange of attacks, Hamas expressed its willingness to renew the ceasefire as late as December 23.<sup>79</sup> Israel, having decided to launch an offensive against Gaza on December 19, dismissed Hamas's overtures as well as Egypt's attempts to stave off an escalation in hostilities.<sup>80</sup> Four days later, Israel launched Operation Cast Lead.

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<sup>76</sup> Roe Nahmias, *Hamas Willing to renew truce*, YNET NEWS, Dec. 23, 2008, available at <http://www.ynet.co.il/english/articles/0,7340,L-3642815,00.html>.

<sup>77</sup> Wrachford, *supra* note 15, at 54 (quoting THE PAPERS OF DANIEL WEBSTER, DIPLOMATIC PAPERS, 1841-1843, at 67 (Kenneth E. Shewmaker ed., 1983)).

<sup>78</sup> *Id.* at 56.

<sup>79</sup> Nahmias, *supra* note 76.

<sup>80</sup> *Id.*

Evidence suggests that far from lacking a ‘moment for deliberation,’ Israel had been deliberating an attack against Gaza for six months.<sup>81</sup> According to *Ha’aretz*, an acclaimed Israeli newspaper, Ehud Barak, then Israeli Defense Minister, began preparing for the offensive as Israel entered into ceasefire negotiations with Hamas in June 2008.<sup>82</sup> “[S]ix months of intelligence gathering [aimed] to pinpoint Hamas targets including bases, weapon silos, training camps and the homes of senior officials.”<sup>83</sup> Preparation for the offensive also involved a “disinformation and deception” campaign.<sup>84</sup> The campaign aimed to create a false sense of security among Hamas leaders in order to benefit from the initial aerial attacks and maintain an element of tactical surprise.<sup>85</sup> Barak explained that the timing for the operation was a function of Israel’s patience running out.<sup>86</sup>

The expiration of patience coupled with a premeditated blueprint for attack does not amount to a sense of “immediacy” under the Caroline Doctrine. Rather than illustrate a cause and its effect, it suggests that Israel considered an attack on Gaza as inevitable irrespective of an actual cause.

Commentators have suggested that this formulation of immediacy is inappropriate when applied to acts that systematically target civilians.<sup>87</sup> They contend that the standard articulated by advocates on behalf of battered women is a better-suited fit for such cases.<sup>88</sup> Women enduring “battered women’s syndrome” are involved in abusive relationships wherein the violent abuse is cyclical and unpredictable. Courts have rejected claims of self-defense by battered women accused of murdering their husbands when the husband is not harming her, “since the imminent threat of death or grievous bodily harm did not exist at the time of her actions.”<sup>89</sup> Victim advocates argue that the imminence requirement is misplaced in these cases because the lack of actual infliction of harm does not negate the ongoing harm and the impending threat that she will be struck again thereby suspending her sense of danger. For this reason they argue, the imminence standard in self-defense is ill-fitting to battered women.<sup>90</sup>

Notwithstanding the serious flaws in this analogy, which equates politically motivated acts of violence against civilians with the domestic abuse of women, it does not apply to Israel and Hamas. The battered women syndrome refers to a woman caught in an abusive relationship wherein power,

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<sup>81</sup> Barak Ravid, *Disinformation, secrecy, and lies: How the Gaza offensive came about*, HAARETZ, Feb. 6, 2009, available at <http://www.haaretz.com/hasen/spages/1050426.html>.

<sup>82</sup> *Id.*

<sup>83</sup> Ian Black, *Six months of secret planning - then Israel moves against Hamas*, GUARDIAN, December 29, 2008, available at <http://www.guardian.co.uk/world/2008/dec/29/israel-attack-hamas-preparations-repercussions>.

<sup>84</sup> *Id.*

<sup>85</sup> Ravid, *supra* note 81. See also Black, *supra* note 83.

<sup>86</sup> Black, *supra* note 83.

<sup>87</sup> See Wrachford, *supra* note 15, at 71-72.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 71.

<sup>90</sup> *Id.* at 72.

and not physical abuse, is the central element. A male partner beats his wife in the exercise and perpetuation of that power and in effect enfeebles his female partner. Left powerless and desperate, the woman may one day “lose it” and murder her husband in order to end her torment. In order for the analogy to apply to Israel and Hamas, we must assume that Israel is the powerless woman and Hamas is the abusive man. However, Israel controls the air space, the sea ports, the ingress and egress of goods and people into and out of Gaza, it controls its trade, and even its fuel supply. At worst, Israel is an occupying power in Gaza, at best it continues to exert control over the Strip. In both cases, Israel is not powerless.

Secondly, the syndrome suggests that a woman continues to suffer abuse until she ultimately “snaps.” Far from exercising restraint until it launched Operation Cast Lead, Israel has consistently provoked and/or responded to Hamas rocket and mortar fire. In addition to waging military attacks against Gaza, Israel has also imposed an economic and humanitarian blockade that has caused a “humanitarian crisis” in Gaza. Israel did not “snap” when it began its offensive, to the contrary, it escalated its attacks in order to crush Hamas’s ability to fight back. If anything, the battered women’s syndrome would more appropriately apply to Hamas as opposed to Israel.

### c. Proportionality

Of the Caroline Doctrine’s three elements, proportionality is perhaps the most significant. Proportionality stipulates that whether or not a belligerent had the right to defend itself, the exercise of its right must be proportional to its stated military goals. This applies to cases triggered by an armed attack as well as those intended to be preemptive or deterrent. As such, the net beneath any analysis of self-defense is the doctrine of proportionality.

The definition and scope of proportionality has also constituted the centrality of the debate around Operation Cast Lead.<sup>91</sup> Here I will not opine about proportionality’s proper reading but instead explore whether Israel violated its least controversial formulation as articulated by the United States, namely a prohibition on the direct targeting of civilians and/or negligent behavior in ascertaining a target thereby amounting to the direct targeting of civilians.<sup>92</sup> Investigations conducted by Amnesty International, Human Rights Watch, the National Lawyers Guild,<sup>93</sup> and Physicians for Human Rights each document Israel’s violation of this principle as defined by the United States.

### I. Shooting at civilians carrying white flags

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<sup>91</sup> See Michael Walzer, *The Gaza War and Proportionality*, DISSENT MAGAZINE, Jan. 8, 2009, available at [www.dissentmagazine.org/online.php?id=191](http://www.dissentmagazine.org/online.php?id=191) (Proportionality is a forward looking enterprise that should be measured by how much harm was averted as to how much harm was done. Consequently, proportionality is speculative and unhelpful as a marker because proportionality calculations “won’t provide the most moral limits on warfare.”). See also George Bisharat, *Israel is Committing War Crimes*, WALL STREET JOURNAL, Jan. 10, 2009, (“Deliberate attacks on civilians that lack strict military necessity are war crimes.”).

<sup>92</sup> Gardem, *supra* note 44, at 410.

<sup>93</sup> I participated in the National Lawyers Guild fact-finding mission in early February 2009. Several of the narratives recorded here are ones that I documented personally while I was in the region.

The National Lawyers Guild report, “Onslaught: Israel’s Attack on Gaza & the Rule of Law,” documents at least three incidents wherein Israeli forces deliberately shot and killed civilians.<sup>94</sup> In one well-documented story,<sup>95</sup> the Israeli military ordered a family to come out of their home and without warning opened fire at a father, his wife, three daughters, and elderly mother, killing two young girls. According to the report:

On the morning of January 7, three Israeli tanks stationed themselves outside of the Abed Rabbo home, one tank only ten meters away. At approximately 12:50 p.m., Abed Rabbo heard Israeli soldiers shout in Arabic, ‘Everyone come out of the house!’ Abed Rabbo, along with his mother, wife, and three daughters, came out of the home carrying four white flags among them. The six stood in front of the tank for five to seven minutes awaiting instructions from the soldiers; two of the soldiers were outside of the tank eating chips and chocolates. Then a third soldier emerged from the tank, and without warning, opened fire on the family. Abed Rabbo’s two-year old daughter, Amal, and his seven-year old daughter, Suad, were shot and killed.<sup>96</sup>

Khaled Abed Rabbo, who receives a salary as a policeman from the Fatah-dominated PA in Ramallah said, “We are not Hamas. My children were not Hamas. And if they were going to shoot anyone it should have been me . . . I want the international community and the International Red Cross to ask Israel why it has done this to us. They talk about democracy but is it democracy to kill children? What did the kids do to them?”<sup>97</sup>

Khaled Abed Rabbo, who is affiliated with Fatah and not Hamas, was not involved in the fighting and did not leave his home until ordered to do so. He and his family posed no threat to the soldiers who were calm enough to be eating “chips and chocolates.” There was no fighting in the area as the family stood for “five to seven minutes awaiting instructions from the soldiers.” Additionally, the family of one man and four women including three children and an elder were clearly identified as civilians by the white flags they carried. The

<sup>94</sup> *Onslaught: Israel’s Attack on Gaza & the Rule of Law*, NATIONAL LAWYERS GUILD, available at <http://www.nlg.org/NLGGazaDelegationReport.pdf> (Israeli forces opened fire on Khaled Abed Rabbo and his family at close range killing his two-year old daughter Amal and his seven-year old daughter Suad in eastern Jabalya; An Israeli sniper shot Rouhiya al-Najjar in her left temple killing her instantly while she carried a white flag and marched out of her home on orders by Israeli forces in the Khan Yunis district; An Israeli soldier shot 72-year old Ahmad Mubarak Hussein Shrahi in his back at close proximity after Shrahi was shot by an Israeli sniper and was on the ground face down.) [hereinafter NLG].

<sup>95</sup> Donald Macintyre, *Gaza: I saw the Israeli military shoot dead my two little girls*, THE INDEPENDENT, Jan. 21, 2009, available at <http://www.independent.co.uk/news/world/middle-east/gaza-i-watched-an-israeli-soldier-shoot-dead-my-two-little-girls-1452294.html>; See also Dion Nissenbaum, *Israeli troops killed Gaza children carrying white flags, Witnesses Say*, McCLATCHY NEWSPAPERS, Jan. 27, 2009, available at <http://www.mcclatchydc.com/226/story/60853.html>; Defence for Children International-Palestine Sector, *Cast Lead: 2 Sisters Killed and 1 maimed in Willful Attack*, available at <http://www.dci-pal.org/english/display.cfm?DocId=1064&CategoryId=1>.

<sup>96</sup> NLG, *supra* note 94, at 10.

<sup>97</sup> Macintyre, *supra* note 95.



attack against them at close proximity violates the most basic prohibition on the targeting of civilians.

## II. Shooting at civilians and denying them medical care

Physicians for Human Rights Israel (PHR) found that Israeli forces attacked medical personnel while engaging in the rescue of injured persons in the Gaza Strip in a dozen cases.<sup>98</sup> According to a report of the World Health Organization, 16 medical personnel were killed and 25 injured while performing their duties.<sup>99</sup> Israel claims that it considered ambulances legitimate targets because Hamas used them to transport weapons and militants.<sup>100</sup> However, PHR documents two incidents in which Israeli forces knowingly prohibited the access of medical personnel to treat the injured resulting in unnecessary deaths in one of the cases.<sup>101</sup>

In the case of Mohammad Shurrab and his two sons, Kassab (28) and Ibrahim (18), they were shot by Israeli soldiers in mid-day as they traveled from their agricultural farm in the Al-Fakhari region to their home during the “humanitarian corridor,” a three-hour ceasefire meant to enable the flow of humanitarian goods and services.<sup>102</sup> Kassab, who was ordered to step out of the vehicle and shot seven times in the chest, died shortly after sustaining his wounds.<sup>103</sup> Mohammed was shot in his arm and not in critical condition and Ibrahim, who was shot below his knee when he stepped out of the vehicle, lost a large quantity of blood.<sup>104</sup> Mohammed called the International Committee of the Red Cross, the Red Crescent Society, and PHR in his attempt to get a rescue vehicle.<sup>105</sup> He also called to the Israeli soldiers around him for help.<sup>106</sup> The soldiers did not assist him nor permit the access of rescue vehicles claiming they did not know the precise location of the vehicle.<sup>107</sup>

Mohammed stated that his son Ibrahim was shouting in pain and he tried to call an ambulance. The army soldiers shouted at him and cursed him: “shut up or we will shoot you.” Mohammed later contacted the Red Crescent and the [International Committee of the Red Cross]. Many hours passed but no ambulance arrived. His son Ibrahim died due to a loss of blood at 24:30 am, approximately twelve hours

<sup>98</sup> Dan Magen, *Ill Morals: Grave Violations of the Right to Health during the Israeli Assault on Gaza*, Physicians for Human Rights-Israel, March 2009, at 25, available at [http://www.phr.org.il/phr/files/articlefile\\_1237966109984.pdf](http://www.phr.org.il/phr/files/articlefile_1237966109984.pdf) [hereinafter *Ill Morals*].

<sup>99</sup> *Id.* at 25 (citing *Gaza Strip: Initial Health Needs Assessment*, World Health Organization, Gaza, Feb. 16, 2009).

<sup>100</sup> See *Use of ambulances and medical vehicles by Palestinian terrorist organizations*, Israel MFA (Feb. 14, 2002) available at <http://www.mfa.gov.il/MFA/Government/Communiques/2002/Use%20of%20ambulances%20and%20medical%20vehicles%20by%20Palestin>.

<sup>101</sup> *Ill Morals*, *supra* note 98, at 35.

<sup>102</sup> *Id.* at 37.

<sup>103</sup> *Id.*; See also NLG, *supra* note 94, at 27.

<sup>104</sup> *Ill Morals*, *supra* note 98, at 37. See also NLG, *supra* note 102, at 27.

<sup>105</sup> *Ill Morals*, *supra* note 98, at 38.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

after he was injured.<sup>108</sup>

Mohammed was ultimately rescued from the scene along with the bodies of his two sons twenty-four hours after being shot.<sup>109</sup>

Mohammed and his sons were farmers traveling home from their agricultural land during the humanitarian corridor.<sup>110</sup> Israeli soldiers shot and killed Kassab at close proximity without provocation.<sup>111</sup> They shot Ibrahim below the knee and allowed him to bleed to death for twelve hours, denying him medical attention and preventing the access of a rescue vehicle.<sup>112</sup> Under the most conservative interpretation of proportionality, this amounts to disproportionate force.

### III. Precision drones strike at civilians

In its report, “Precisely Wrong: Gaza Civilians Killed by Israeli Drone-Launched Missiles,” Human Rights Watch (HRW) documents six incidents involving unmanned drones resulting in 29 civilian deaths including eight children.<sup>113</sup> The human rights organization found that Israeli forces failed to take all available precautions to verify that its targets were combatants, or they failed to distinguish between combatants and civilians.<sup>114</sup>

Drones, which are unmanned and piloted remotely, provide a high level of precision during combat.

In addition to the high-resolution cameras and other sensors on the drones themselves, the missile fired from a drone has its own cameras that allow the operator to observe the target from the moment of firing [. . .] With these visual capabilities, drone operators should have been able to tell the difference between fighters and others directly participating in hostilities, who are legitimate targets, and civilians, who are immune from attack, and to hold fire if that determination could not be made. If a last-second doubt arises about a target, the drone operator can use the missile’s remote guidance system to divert the fired missile, steering the missile away from the target with a joystick.<sup>115</sup>

For this reason, use of drones should limit harm to civilians but as stated by HRW, the ability of

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<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 37.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 38.

<sup>113</sup> *Precisely Wrong: Gaza Civilians Killed by Israeli Drone-Launched Missiles*, Human Rights Watch, June 2009, at 3, available at [http://www.hrw.org/sites/default/files/reports/iopt0609web\\_0.pdf](http://www.hrw.org/sites/default/files/reports/iopt0609web_0.pdf) [hereinafter *HRW*].

<sup>114</sup> *Id.* at 3-4.

<sup>115</sup> *Id.* at 12.



drones to spare civilian life is only as precise as the care taken by their operators.<sup>116</sup>

In the six incidents documented in the report, there was no evidence of fighting or fighters in the immediate area of attack.<sup>117</sup> Additionally, the targets were not fleeing the area or moving quickly, providing enough time for the drone operators to verify their status as civilian or combatant and to refrain from firing if they could not make the distinction.<sup>118</sup>

In one mid-day incident, an IDF-drone launched missile hit a group of students waiting for a bus in central Gaza City across the street from the United Nations Relief Works Agency for Palestine Refugees (UNRWA).<sup>119</sup> The attack killed nine students aged between 17 and 19 years old, including two women, as well as three other civilian bystanders.<sup>120</sup> There was no fighting in the area at the time and no missiles were being shot from the neighborhood.<sup>121</sup> According to three international staff from the UN, Hamas and other groups did not operate in the area because of the presence of international workers as well as the area's distance from the armistice line making it unsuitable for Qassam and Grad rockets.<sup>122</sup> The IDF has not responded to HRW's inquiries about the incident and has failed to explain why it targeted a group emerging from a university, adjacent to UNRWA headquarters, on a crowded street with no known military activity at the time.<sup>123</sup>

Details of this incident indicate that there was no military activity at the time and that historically, Hamas militants did not conduct attacks against Israel from this area.<sup>124</sup> The only possible explanation for the targeting of these civilians is that they were fighters, however, given that they were leaving their University and waiting for a bus to head home in a crowded area makes this an unlikely scenario.<sup>125</sup> Also, Israeli forces had the benefit of a calm day to make a reasoned decision as to whether or not to target these students. The attack on the students could not have been a mistake in light of the drone's precise nature and its remotely controlled missiles. At best this amounts to negligent behavior in ascertaining a target thereby amounting to the direct targeting of civilians—a violation of the lowest standard of proportionality.

#### IV. Tank shells strike all moving objects

Amnesty International's (AI) most recent report, "Operation Cast Lead: 22 Days of Death and Destruction," details the wanton destruction of Gaza and the deliberate targeting of civilians

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<sup>116</sup> *Id.* at 3.

<sup>117</sup> *Id.* at 4.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 14.

<sup>120</sup> *Id.* at 16-17.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 14.

<sup>124</sup> *Id.* at 16.

<sup>125</sup> *Id.* at 17.

and civilian infrastructure.<sup>126</sup> In one incident in Zaytoun, a neighborhood outside of Gaza City, approximately 100 members of the Sammouni family were gathered into a single home and kept under house arrest by Israeli ground troops.<sup>127</sup> On the second day of their captivity on January 5, 2009, the house was struck with tank rounds killing 31 civilians inside.<sup>128</sup> Israeli soldiers shot at injured civilians who fled the struck home.<sup>129</sup> Several family members bled to death over a three-day period waiting to be rescued in vain because Israeli forces prohibited ambulances from reaching the area.<sup>130</sup> In testimony provided by Salah al-Sammouni to AI, he explains:

Soldiers came to the area at night [on 3 January 2009] and at dawn on 4 January many relatives came to my house to stay with us. We thought that if we stayed in our house we would be all right. After a while soldiers came to the house and my father spoke to them in Hebrew; he told them: 'These are my children, my family, there are no terrorists here.' The soldiers told us to leave our house and go to Wa'el's house across the road and we obeyed. We were many relatives, about 100 altogether, many of them children. We stayed there all day and all night. We had hardly any food in the house and the children were hungry. Nobody could come to the area, not even ambulances. We were scared. The following morning (5 January) three of my cousins and I tried to go out of the house, to the walled garden to get some tomatoes and some wood to cook something. As soon as we got out of the door we were shelled. My cousins Muhammad and Hamdi were killed and Wa'el and I were injured and we retreated back into the house. Then the house was shelled again – at least two shells – from above. Some 25 people were killed and most of the others were injured. My little girl, Azza, was killed and my wife was injured. My mother Rahma was holding baby Mahmoud (six months old) and she was killed but she shielded the baby with her body and saved him. My father was killed. Wa'el's children, a boy and a girl, were both killed. Safa, the wife of my brother Iyad, was killed and Maha, the wife of my brother Hilmi, and their baby son Muhammad were all killed. Why did they shell the house after having put us all in there? We thought we'd all be killed; those of us who could ran out of the house. Many of us were injured; I was injured in the head and blood was pouring down my face as I ran. Nearby there were soldiers in the house of the Sawafiri family and they shouted to us to go back and shot at us, but we kept running. When we got to safety we raised the alarm, called the Red Cross to send an ambulance to the house to get the injured, but the army did not let any ambulances approach the area. We knew there were people still alive in the house because we called the mobile numbers and children answered; they were scared, with dead bodies all around them. Some of the injured died in the house waiting to be rescued. Only three days later could the Red Cross go in, but only on foot as the army did not let the ambulances approach; they found some

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<sup>126</sup> Amnesty, *supra* note 5.

<sup>127</sup> *Id.* at 20.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 20-21.

<sup>130</sup> *Id.* at 20.

children still alive and many others dead.<sup>131</sup>

The Red Cross account of rescuing civilians, including emaciated children, after being denied access to the site for several days corroborates Salah's narratives.<sup>132</sup> Ofer, a Golani Brigade fighter, the Israeli Army's elite combat unit, comments ". . . we shot at anything that moved. The civilians in the area had been told we were coming in, so I don't feel bad for anyone hurt there. If they remained there, they must have been Hamas."<sup>133</sup>

The horrific account of the Sammouni family indicates that Israeli soldiers forcibly removed civilians from their homes, put them into a single home, prevented them from leaving, shelled the home repeatedly, shot at civilians fleeing the home, and denied medical relief to the injured caught inside for an extended period of time causing unnecessary deaths. The status of the Sammouni family was not in controversy because the Israeli soldiers personally removed them from their homes and placed them into the home of Wael al-Sammouni. If the home was inadvertently shelled in the first instance then nothing explains its subsequent shelling. Finally, even if the attack on the home was a mistake there is no reason to shoot at fleeing civilians nor for denying the Red Cross access to the site to rescue the debilitated injured. At best, this attack amounts to a negligent behavior in ascertaining a target thereby amounting to the direct targeting of civilians. In the worst case, the Israeli army deliberately targeted civilians. In both cases, the Army violated the only explicit standard of proportionality.

#### V. Israeli Army's Military Investigation

The investigations conducted, and reports completed, by the National Lawyers Guild, Physicians for Human Rights-Israel, Human Rights Watch, and Amnesty International do not have the same credibility afforded to a multilateral independent institution like the United Nations. Aware of this inherent shortcoming, several of the reports called upon the UN to conduct its own investigation.<sup>134</sup> The global body ultimately commissioned an investigation, headed by Richard Goldstone, a renowned South African and Jewish jurist.<sup>135</sup> However, Israel has refused to comply with the investigatory body citing that irrespective of its outcome, the Goldstone Commission would be biased against Israel.<sup>136</sup>

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<sup>131</sup> *Id.* at 20-21.

<sup>132</sup> Craig Whitlock, *Red Cross reports Grisly Find in Gaza*, WASHINGTON POST, Jan. 8, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/07/AR2009010700791.html>. The Red Cross found fifteen dead bodies and emaciated children near the bodies of their dead mothers and siblings.

<sup>133</sup> Anshel Pfeffer, *Gaza soldiers speak out*, THE JEWISH CHRONICLE, Mar. 5, 2009, available at <http://www.thejc.com/articles/gaza-soldiers-speak-out>.

<sup>134</sup> See NLG, *supra* note 94; Ill Morals, *supra* note 98; Amnesty, *supra* note 5; HRW, *supra* note 113.

<sup>135</sup> See Claudia Braude, *Will Goldstone's Gaza report prove him just a naive idealist?*, HAARETZ, Sept. 23, 2009, available at <http://www.haaretz.com/hasen/spages/1116379.html>.

<sup>136</sup> *Goldstone's UN Inquiry Team Arrives in Gaza*, BBC, Jun. 1, 2009, available at [http://news.bbc.co.uk/2/hi/middle\\_east/8076690.stm](http://news.bbc.co.uk/2/hi/middle_east/8076690.stm) Foreign Ministry spokesman, Yigal Palmor, stated to the Associated Press, "[t]hey have been instructed to prove that Israel is guilty and we will not collaborate with such a masquerade." *Id.*

Instead, Israel conducted its own military investigation, which Israeli human rights organizations and non-profit organizations have rejected for lacking independence.<sup>137</sup> Israel's investigatory findings demonstrated that "throughout the fighting in Gaza, the IDF operated in accordance with international law. The IDF maintained a high professional and moral level while facing [the] enemy."<sup>138</sup> The investigation revealed only a "small number" of operational or intelligence errors during the fighting which it deemed characteristic of any combat situation.<sup>139</sup> Finally, the report attributes even the small incidence of errors to Hamas's tactics of shielding itself among civilians.<sup>140</sup>

A report comprised of 26 first-hand accounts by Israeli soldiers who participated in the Operation corroborates the account of disproportional force and challenges the military's investigatory findings.<sup>141</sup> Their testimony, collected by an Israeli veterans' group, *Breaking the Silence*, demonstrates that Israel's alleged violations were not random incidents, but rather representative of a policy-wide practice among the Army.<sup>142</sup>

The soldiers' testimonies indicate that there were no clear rules of engagement, or instructions from commanders about when to open fire, on whom, and when to shoot to kill.<sup>143</sup> Typically, commanders brief soldiers on these rules before they assume duty.<sup>144</sup> However, the soldiers' report describes the ambiguity of that briefing at best.<sup>145</sup>

In commenting on rules of engagement, one soldier in the report describes the messianic tone with which his commanders described Palestinian civilians:

Another point that came up was when that rabbi said we are actually conducting the war of 'the sons of light' against 'the sons of darkness.' . . . [M]ore disturbing . . . than this theological point, is its demonization of the other side. . . . There is no differentiation which we would expect to find between civilians and others. Namely,

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<sup>137</sup> Press Release, Israeli Human Rights organizations: Results of Israeli military investigations published today of alleged violations in Gaza are very problematic – the only way to truly investigate is through an external mechanism (Mar. 30, 2009) (on file with author). See also *Israel/Gaza: Israeli Military Investigations not Credible*, Human Rights Watch, Apr. 23, 2009, available at <http://www.hrw.org/en/news/2009/04/23/israelgaza-israeli-military-investigation-not-credible>.

<sup>138</sup> IDF: *Conclusion of investigations into claims in Operation Cast Lead - Part 1*, Israel MFA, Apr. 22, 2009, available at <http://www.mfa.gov.il/MFA/Terrorism+Obstacle+to+Peace/Hamas+war+against+Israel/IDF+Conclusion+of+investigations+Operation+Cast+Lead+Part1+22-Apr-2009.htm> [hereinafter *Investigation*].

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Cast Lead-testimonies*, (*Breaking the Silence*), available at [http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/14\\_07\\_09\\_breaking\\_the\\_silence.pdf](http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/14_07_09_breaking_the_silence.pdf) [hereinafter *Breaking the Silence*].

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

here is one people fighting another people, with all the messianic implications.<sup>146</sup>

Another soldier described the encouraged disregard for Palestinian civilian life.

Look, we're a pretty old company. We're a founding battalion, all of us are 33 years-old, and we took this very skeptically, a bit fearful of the army's approach . . . . I know personally that this pretty much disgusted me. There was a clear feeling, and this was repeated whenever others spoke to us, that no humanitarian consideration played any role in the army at present. The goal was to carry out an operation with the least possible casualties for the army, without its even asking itself what the price would be for the other side.<sup>147</sup>

As for instructions on when “shoot to kill,” one soldier summarily responded that he was instructed to open fire on “[a]nything that looks suspicious.”<sup>148</sup>

The soldiers’ testimonies exacerbate the question of transparency already surrounding the military’s investigation. While it may not refute the possible legitimacy of the investigation, it does dilute its value as a counter-narrative to other damning investigations. At present there exist at least four organizational reports alleging the direct targeting of civilians, or behavior that amounts to the direct targeting of civilians; a UN investigation that was refused entry by Israel; and an Israeli military investigation of itself that acquits it of nearly all wrongdoing.

Assuming that the information in the multiple reports is accurate, then Israel violated Proportionality’s only unequivocal principle—its very lowest standard prohibiting the direct targeting of civilians. Proportionality’s abrogation defeats any understanding of the right to self-defense in international law. Therefore, whether we indeed find that Israel failed to demonstrate its right to self-defense under the modern Charter system and/or the customary law formulation, or alternatively, we find that it did have the right to self-defense, Israel’s wildly disproportional behavior in Gaza negates its existence.

### III. CONCLUSION

Whether examined under a narrow framework of self-defense as found in the strict reading of the UN Charter, or under a much broader one that purports that the modern Charter system complements, rather than supplants, customary international law, Israel fails to demonstrate that its 22-day aerial and ground offensive against Gaza was an act of self-defense. Even if we generously assume that its operation qualified as self-defense, its disproportionate force would render it null.

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<sup>146</sup> *Id.* See also Gershon Gorenberg, *New Testimony from Gaza*, THE AMERICAN PROSPECTS, July 15, 2009, available at [http://www.prospect.org/cs/articles?article=new\\_testimony\\_from\\_gaza](http://www.prospect.org/cs/articles?article=new_testimony_from_gaza). See also *Breaking Silence on Gaza Abuses*, BBC, July 15, 2009, available at [http://news.bbc.co.uk/2/hi/middle\\_east/8151336.stm](http://news.bbc.co.uk/2/hi/middle_east/8151336.stm).

<sup>147</sup> *Breaking the Silence*, *supra* note 141.

<sup>148</sup> *Id.*

Challenging these findings would be an exercise in fact and not in law. To that end, aside from a dispute of fact, this conclusion is not controversial. Israel must demonstrate that the narratives recorded by various non-governmental and international human rights organizations are inaccurate. Israel denied the United Nations its investigatory mandate, and attempted to rebut these accusations in a military investigation of itself. Additionally, there are no independent media accounts recorded because Israel implemented a media blackout during the Offensive.<sup>149</sup> Therefore, the closest thing to the “truth” was presented here.

The only place from which Israel’s attack can be viewed as self-defense is in Grotius’s formulation of it in natural law. There the standard is subjective and it is left to each state to determine what is necessary for its self-defense. Affording such an elastic standard would set a frightening precedent. One that would not only bring to the vanishing point existing legal standards on self-defense, but could also bring nation-states to the brink of self-destruction in its name.

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<sup>149</sup> Middle East Children's Alliance, *Media blackout continues; no foreign journalists let into Gaza*, MA'AN NEWS AGENCY, Jan. 6, 2009, available at <http://www.mecaforpeace.org/article.php?id=398>.