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Israel's War Crimes: A First Hand Account of Israel's Attacks on Palestinian Civilians and Civilian Infrastructure

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I. Introduction ^ϕ

In Israel's 22-day offensive termed "Operation Cast Lead," approximately 1,417 Palestinians were killed, 926 of which were civilians, and 5,303 Palestinians were injured, including 1,606 children and 828 women.¹ In comparison, Israeli deaths totaled thirteen – three civilians and ten soldiers (four of whom were killed by friendly fire).² Despite Israel's attempts to deny foreign media sources

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^ϕWith the Obama administration's recent push for a renewal of peace talks and the consequent sidelining of the Goldstone Report, the Obama administration is denying the Palestinians what they want most: justice and accountability. This article is intended to join the innumerable voices seeking to shed light on the realities of the Palestinians as an occupied, besieged and terrorized people who desire not an empty peace, doused in meaningless rhetoric, but a viable and equitable solution which will not forsake the humanity of one people for the alleged security of another.

¹ Palestinian Centre for Human Rights, Press Release, *Confirmed figures reveal the true extent of the destruction inflicted upon the Gaza Strip; Israel's offensive resulted in 1,417 dead, including 926 civilians, 255 police officers, and 236 fighters*, Mar. 12, 2009, available at <http://www.pchrgaza.org/files/PressR/English/2008/36-2009.html>. The Palestinian Ministry of Health in Gaza cited different figures. U.N. Office for the Coordination of Humanitarian Affairs, *Field Update on Gaza from the Humanitarian Coordinator*, Jan. 16, 2009, available at http://www.ochaopt.org/gazacrisis/admin/output/files/ocha_opt_gaza_humanitarian_situation_report_2009_01_16_english.pdf (As of 4 PM on Jan. 19, 370 children dead and 1745 injured).

One in every 225 Palestinian in Gaza was either killed or injured, not counting mental injury which was extensive. A recent report released by Unicef concluded that 96% of Gaza residents suffer from depression, and 81% of residents of North Gaza and Rafah districts suffer from intense depression. Unicef, *Gaza Crisis, UNICEF oPt Information Note*, Jan. 29, 2009, 8:00 p.m. available at http://www.unicef.org/oPt/UNICEF_Information_Note_GAZA_28_JAN.pdf.

² REUTERS UK, *FACTBOX-Developments in Gaza fighting*, Jan. 17, 2009, available at <http://uk.reuters.com/article/UKNews1/idUKTRE50F27120090117?pageNumber=1&virtualBrandChannel=0>; but see

from entering Gaza, and its own heightened media campaign,³ disturbing images of brutally killed Palestinians and ravaged Palestinian infrastructure trickled out and led many in the international community to question Israel's compliance with international humanitarian law. The outcry and demand for accountability included not only international lawyers, but also prominent United Nations figures, including United Nations Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967, Richard Falk, and Director of United Nations Relief and Works Agency (UNRWA) in Gaza, John Ging.⁴ These allegations have been granted further credibility by Israeli soldier testimonials admitting to the willful killing of Palestinian women and children and the unnecessary destruction of Palestinian civilian infrastructure.⁵

On February 2, 2009, I crossed into Gaza through Rafah along with six other lawyers and one law student on the National Lawyers Guild delegation. Our objective was to examine first-hand the legal implications of Israel's recent military operations in the Gaza Strip between December 27, 2008 and January 18, 2009. Specifically, the delegation sought to interview witnesses, medical workers, and other relevant persons in order to determine: 1) whether Israel targeted Palestinian civilians and civilian infrastructure; 2) whether Israel used weapons illegally; and 3) whether Israel deliberately or arbitrarily blocked needed medical assistance. Each of these three areas implicates international humanitarian laws that if violated, could amount to war crimes.⁶

In all three areas, we found that Israel breached international humanitarian law and that it did, in fact, commit war crimes. Despite Israel's claims of self-defense, it failed to abide by the international legal principles of distinction and proportionality in its military offensive. In addition,

U.N. Office for the Coordination of Humanitarian Affairs, *supra* note 1. One soldier was killed on a military base inside Israel. This explains the confusion in counting civilian and military dead and the discrepancy in some articles.

³ Anti-Defamation League, *ADL Launches Viral Media Campaign To Make Case For Israel's War Against Hamas*, Jan. 7, 2009, available at http://www.adl.org/PresRele/IsIME_62/5433_62.html; Toni O'Loughlin, *Israel mounts PR campaign to blame Hamas for Gaza destruction: Foreign minister briefs Rice, Miliband, and Solana*, THE GUARDIAN, Dec. 28, 2008, available at <http://www.guardian.co.uk/world/2008/dec/28/israel-gaza-hamas>; Ethan Bronner, *Israel Puts Media Clamp on Gaza*, N.Y. TIMES, Jan. 6, 2009, available at <http://www.nytimes.com/2009/01/07/world/middleeast/07media.html>.

⁴ See Richard Falk, *Israel's War Crimes*, LE MONDE DIPLOMATIQUE, Mar. 2009, available at <http://mondediplo.com/2009/03/03warcrimes>. See also BBC NEWS, *Gaza Strikes Ahead of Truce Vote*, Jan. 17, 2009, available at http://news.bbc.co.uk/2/hi/middle_east/7834255.stm.

⁵ Amos Harel, *IDF in Gaza: Killing Civilians, Vandalism, and Lax Rules of Engagement*, HAARETZ, Mar. 19, 2009, available at <http://haaretz.com/hasen/spages/1072040.html>; BBC NEWS, *Israel Troops Admit Gaza Abuses*, Mar. 19, 2009, available at http://news.bbc.co.uk/2/hi/middle_east/7952603.stm; Ethan Bronner, *Further Accounts of Gaza Killings Released*, N.Y. TIMES, Mar. 20, 2009, available at

http://www.nytimes.com/2009/03/20/world/middleeast/21gaza.html?_r=3&ref=world&pagewanted=all.

⁶ Not every violation of human rights or of the Geneva Conventions constitutes a war crime. Rather, "grave breaches" of the Geneva Conventions as defined in Article 147 of the Fourth Geneva Conventions provide the legal foundation for allegations of war crimes. Such breaches include willful killing, torture or inhuman treatment, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a person to serve in the forces of a hostile Power, willfully depriving a protected person of the rights of fair and regular trial, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly. In addition, Article 8 of the Rome Statute of the International Criminal Court defines war crimes as "(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention." Amongst the acts included is "(i) Willful killing;" "(iii) Willfully causing great suffering, or serious injury to body or health;" "(iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;" and "(v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power." Rome Statute of the International Criminal Court, July 17, 1998, available at <http://untreaty.un.org/cod/icc/statute/romefra.htm>.

it breached multiple articles defining the laws of war in the conventions that comprise the cornerstone of international humanitarian law: the Geneva Conventions of 1949 along with the two additional protocols of 1977.⁷ While Israel is a party and thus bound by the four Geneva Conventions, it has not ratified either of the additional protocols. Yet there is international consensus that Additional Protocol I and provisions of Additional Protocol II state principles of customary international law and are thus binding on all states, including Israel.⁸

In its offensive, Israel attacked civilians and murdered innocent men, women, and children in close proximity with documented claims of at least seven incidences where Israeli soldiers were seen firing at Palestinian civilians carrying white flags.⁹ Civilian infrastructure, including the American International School in Gaza and United Nations facilities, were targeted and demolished or heavily damaged. In addition, Israel used white phosphorus extensively and illegally throughout Gaza, causing tremendous damage to Palestinian infrastructure and resulting in serious and even deadly injuries to the Palestinian people.¹⁰ Aside from white phosphorus, both doctors and weapons

⁷ See Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, available at <http://www.icrc.org/IHL.nsf/1595a804df7efd6bc125641400640d89/f6c8b9fee14a77fdc125641e0052b079!OpenDocument>. See also Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, available at <http://www.icrc.org/IHL.NSF/1595a804df7efd6bc125641400640d89/d67c3971bcff1c10c125641e0052b545!OpenDocument>.

⁸ While these conventions provide the most recent codification of international humanitarian law during hostilities, customary law was developed and codified throughout the last two centuries, most notably in the Hague Conventions of 1899 and 1907. See, for example, Hague Convention Respecting the Laws and Customs of War on Land and its annex, Oct. 18, 1907, 187 Consol. T.S. 227 [hereinafter the Hague Convention]. The introduction states, “[t]he provisions of the two Conventions on land warfare, like most of the substantive provisions of the Hague Conventions of 1899 and 1907, are considered as embodying rules of customary international law. As such they are also binding on states which are not formally parties to them.” *Id.* (introduction available at <http://www.icrc.org/ihl.nsf/INTRO/195?OpenDocument>).

⁹ White flags symbolize truce and surrender. While under international law, civilians are immune from attack regardless of whether they carry a white flag or not, civilians carrying white flags clearly indicate their non-hostility. Recently, Human Rights Watch released a report comprehensively documenting seven incidents when Israeli soldiers fired on Palestinian civilians, killing 11 civilians and injuring at least eight others. In each of these incidences, Israelis had control of the area, there was no fighting taking place at the time, and Palestinian fighters were not hiding amongst the civilians who were shot at. These direct and deliberate attacks upon civilians violate the laws of war and amount to war crimes. See Human Rights Watch, *White Flag Deaths: Killings of Palestinian Civilians During Operation Cast Lead*, Aug. 13, 2009, available at <http://www.hrw.org/en/reports/2009/08/13/white-flag-deaths>. According to UN Special Rapporteur Richard Falk, there are documented claims of twenty occasions on which Israeli soldiers were seen firing at women and children carrying white flags. See Richard Falk, *Israel's War Crimes*, LE MONDE DIPLOMATIQUE, available at <http://mondediplo.com/2009/03/03warcrimes>.

¹⁰ While I do not discuss Israel's illegal use of weapons in this report, including Israel's illegal use of white phosphorus, the NLG delegation has extensively discussed Israel's use of white phosphorus in our report *Onslaught: Israel's Attack on Gaza & the Rule of Law*, Feb. 2009, available at <http://nlg.org/NLGGazaDelegationReport.pdf>. White phosphorus is particularly problematic in the needless suffering it causes. Phosphorus burns result in a greater risk of mortality because phosphorus continues to burn and spread so long as it is exposed to oxygen. Additionally, the phosphorus that is absorbed into the body through the burned area causes liver, heart, and kidney damage, and in some cases multiple organ failure. See *Id.* at 22. Included in our report is a synopsis of an interview that I personally conducted with Samia Sulman al-Minay'ah, a sixteen year old, who was heavily burned when a white phosphorus missile crashed into her room where her and her mother were sleeping. *Id.* at 23. Our findings have been corroborated by both Amnesty International in its report *Fuelling Conflict: Foreign Arms Supplies to Israel/Gaza*, Feb. 23, 2009, available at <http://www.amnesty.org/en/library/asset/MDE15/012/2009/en/5be86fc2-994e-4ceb-a6e8-3dd68c28b31/mde150122009en.html> and Human Rights Watch in its report *Rain of Fire: Israel's Unlawful Use of White Phosphorus in Gaza*, Mar. 25, 2009, available at <http://www.hrw.org/node/81760>.

experts have made strong claims that Israel used experimental weapons, such as the new Israeli-produced Spike missiles, which have concentrated blasts and release large numbers of sharp-edged cube-shaped shrapnel up to twenty meters away, as well as DIME (Dense Inert Metal Explosive).¹¹ Due to the relative newness of DIME munitions and the lack of information on its potential long-term carcinogenic effects, DIME may violate Protocol I of the Convention on Conventional Weapons, which would make its use illegal not only against civilians, but also against combatants.¹²

Additionally, Israel unnecessarily blocked paramedics' access to the injured for hours and days at a time and denied medical assistance to wounded Palestinians, many of whom died from blood loss or treatable injuries.¹³ Israel also targeted medical personnel, killing approximately sixteen medical workers and injuring twenty-five, all while performing their medical duties.¹⁴ Finally, Israel hit thirty-four medical facilities, including eight hospitals and twenty-six primary care clinics.¹⁵

In this article, I will examine international humanitarian law as it relates to civilians and civilian infrastructure. I will show how Israel breached those laws in its military offensive and how such grave breaches of international humanitarian law constitute war crimes, and - if criminal intent is shown - require criminal prosecution. Where appropriate, I will include first-hand Palestinian testimonials and observations from my visit to Gaza, which exemplify specific instances of Israel's violations of international humanitarian law. Part II of the article examines the laws of distinction

¹¹ Interview with international munitions expert (who asked to remain anonymous), Gaza City, Gaza (Feb. 6, 2009) who stated that although there was no conclusive evidence that DIME has been found, it was highly likely that Israel did use DIME weaponry. Interview with South African Dr. Shabbir Ahmed Wadee in the Department of Pathology at the University of Stellenbosch, Gaza City, Gaza (Feb. 3, 2009) and interview with Dr. Nafiz Abu Shaaban, head of the Burn Unit at Al-Shifa Hospital, Gaza City, Gaza (Feb. 3, 2009) expressing strong convictions that Israel used DIME munitions. Further, according to Amnesty International's report *Fuelling Conflict: Foreign Arms Supplies to Israel/Gaza*, *supra* note 10, doctors reported unusual wounds that may have been caused by DIME munitions including "limbs severed in a sharp amputation-like manner, with wounds looking as if cauterized and with little or no bleeding; very deep burns; and unexplained deterioration and deaths of patients with seemingly light injuries." DIME is a low collateral weapon that reduces the radius of the blast. Yet upon detonation, the carbon casing disintegrates and the tungsten alloy acts like micro-shrapnel that is lethal at close range. DIME is believed to have carcinogenic effects and is composed of heavy tungsten metal alloy (HMTA) which is chemically toxic, damages the immune system, rapidly causes cancer, and attacks the DNA. DIME has not been licensed to be used and may be an illegal weapon if further testing proves that it causes superfluous injury or unnecessary suffering. See National Lawyers Guild, *Onslaught*, *supra* note 10.

Similarly, new missiles were used which were launched from unmanned drones and explode into cube-shaped shrapnel. This shrapnel can penetrate even thick metal doors and causes maximum injury. During our delegation, we met a doctor who had a bag containing some of this cube-shaped shrapnel and flechettes which he had extracted from several patients. He confirmed that both the shrapnel and flechettes resulted in serious injuries and event fatalities amongst his patients. See also Human Rights Watch, *Precisely Wrong*, Jun. 30, 2009, available at http://www.hrw.org/en/node/84077/section/3#_ftn4.

¹² Due to the potential that DIME munitions may cause superfluous injury and unnecessary suffering and may violate the provisions of the Protocol on Non-Detectable Fragments (Protocol I to the Convention on Conventional Weapons) of 10 October 1980, their use may even be illegal against combatants. Amnesty Int'l, *Fuelling Conflict*, *supra* note 10

¹³ While I do not discuss Israel's denial of medical access and blocking of medical aid, the NLG delegation discusses this extensively in our report *Onslaught*, *supra* note 10. During our delegation, we documented many serious violations of the medical requirement to allow for medical access to the injured. Further, we heard many testimonies of Israeli forces firing on Palestinian medical workers and attacking medical facilities. Recent news reports indicate that Israeli forces were directed to shoot at medics and emergency rescuers. See Amira Hass, *IDF Soldiers Ordered to Shoot at Gaza Rescuers*, *Note Says*, HAARETZ, April 28, 2009, available at <http://www.haaretz.com/hasen/spages/1072830.html>. This is a direct violation of international humanitarian law.

¹⁴ Amira Hass, *Rights Group: IDF Killed 16 Medical Workers During Gaza Op*, HAARETZ, Mar. 23, 2009, available at <http://www.haaretz.com/hasen/spages/1073191.html>.

¹⁵ *Id.*

and proportionality and Part III discusses how Israel breached those laws by targeting Palestinian civilians and civilian infrastructure, specifically Israel's illegal targeting of the American International School in Gaza and various UN facilities. Part IV discusses how Israel breached both the Fourth Geneva Convention and the principle of distinction by using Palestinians as human shields. Part V rejects Israel's justification of self-defense and explains how Israel acted aggressively and outside of the law in its military offensive in Gaza. Lastly, Part VI concludes by examining U.S. complicity in its arms supplies and military funding to Israel and calls for both the U.S. and the international community to hold Israel accountable.

II. The International Laws of Distinction and Proportionality

Throughout Israel's military offensive, Israeli spokespersons made strong assertions that Israel was abiding by international law in its attacks. Deputy Spokesman at the Israeli Ministry of Foreign Affairs, Andy David, told the BBC that "Israel act[ed] according to international laws and with the highest regards to morality during combat, even beyond the requirement of the law."¹⁶ His statement was substantiated by a spokesperson for the Israeli army who argued, "operations in the Gaza Strip were carried out in compliance with the rules of warfare under international law."¹⁷

In order for Israel's claims to be true, Israel must have primarily abided by the fundamental legal principles of distinction and proportionality. The doctrine of distinction as defined by the 1977 Additional Protocols requires that parties to an armed conflict distinguish between civilians and combatants and between civilian objects and military targets.¹⁸ A civilian under international humanitarian law is a person who is not a member of his or her country's armed forces or else a person who is not involved in combat.¹⁹ Article 50(1) of Additional Protocol I clarifies that "in case of doubt whether a person is a civilian, that person shall be considered a civilian."²⁰ Thus, international law grants overwhelming deference in favor of a civilian presumption.

Once established that a person is a civilian, the doctrine of distinction requires that "the civilian population as such, as well as individual civilians, shall not be the object of attack."²¹ Further, it prohibits indiscriminate attacks which are not directed at specific military objectives including bombardments "which treat[] as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects."²²

Prior to an attack, a belligerent must "do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives."²³ This requires that a belligerent "take all feasible precautions in the choice of

¹⁶ Bethany Bell, *Who Can Probe Gaza War Crimes Claims?*, BBC, Feb. 18, 2009, available at http://news.bbc.co.uk/go/pr/fr/-/2/hi/middle_east/7896372.stm.

¹⁷ *Id.*

¹⁸ See Protocol Additional to the Geneva Conventions, art. 48 (1977)(Although Israel is not a signatory to the Additional Protocols, the principle of distinction is also valid under customary law.) available at <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/f6c8b9fee14a77fdc125641e0052b079>.

¹⁹ *Id.* at art. 50.

²⁰ *Id.*

²¹ *Id.* at art. 51(2).

²² *Id.* at art. 51(4)-51(5)

²³ *Id.* at art. 57(2)(i)

means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.”²⁴ Further, if the belligerent receives information that the attack will result in incidental civilian casualties or that the objective is non-military, the “attack shall be cancelled or suspended.”²⁵ In sum, the doctrine of distinction requires that a belligerent be confident that its attacks are focused on military objects and that significant precautions are taken to protect and preserve civilian life and infrastructure.

Related to the doctrine of distinction is the doctrine of proportionality, which originated in the 1907 Hague Conventions and was later codified in the 1977 Additional Protocols of the Geneva Conventions. Proportionality relates the military means to the anticipated military ends. While the intentional targeting of civilians is never permitted, the principle of proportionality determines whether the incidental harm to civilians or collateral damage caused is proportional to the anticipated military advantage. If the harm to civilians or civilian objects is “excessive in relation to the concrete and direct military advantage anticipated,” the combatant must refrain from such an attack.²⁶ Further, area bombardments that, by their nature, do not distinguish between military objectives and civilian targets are prohibited, and the principle of proportionality does not even come into play.²⁷

Overall, disproportionate, indiscriminate, and targeted attacks on civilians and civilian infrastructure are breaches of the doctrines of distinction and proportionality and, when committed with criminal intent, amount to war crimes. Thus, belligerents who engage, facilitate, order, or aid and abet in such serious violations of international humanitarian law are criminally liable.²⁸

III. Israel’s Attacks on Palestinian Civilians and Civilian Infrastructure

In Israel’s recent military offensive, the Israeli army not only attacked and killed Palestinian civilians through indiscriminate bombardment, but also specifically targeted and killed Palestinian civilians in close proximity.²⁹ While only the Israeli military can verify the total tonnage of weapons dropped, it has been estimated that up to 1.5 million tons of explosives were dropped on the Gaza Strip during Israel’s 22-day offensive.³⁰ Many of the artillery shells used were area weapons that lack

²⁴ *Id.* at art. 57(2)(ii)

²⁵ *Id.* at art. 57(2).

²⁶ *Id.* at art. 57(2)(iii).

²⁷ *Id.* at art. 51(5)(a).

²⁸ See Human Rights Watch, *Indiscriminate Fire*, Jun. 30, 2007, available at <http://www.hrw.org/en/node/10911/section/5>. The report states:

With respect to individual responsibility, serious violations of international humanitarian law, including intentional, indiscriminate, and disproportionate attacks harming civilians, when committed with criminal intent are war crimes. Individuals may also be held criminally liable for attempting to commit a war crime, as well as assisting in, facilitating, aiding, or abetting a war crime. Responsibility may also fall on persons planning or instigating the commission of a war crime. Commanders and civilian leaders may be prosecuted for war crimes as a matter of command responsibility when they knew or should have known about the commission of war crimes and took insufficient measures to prevent them or punish those responsible. (Footnotes omitted)

²⁹ See *infra* Section III(B).

³⁰ Ghassan Abu Sittah and Swee Ang, *Preliminary Findings on Israel’s Gaza Attack for the Lancet*, Feb. 2, 2009, available at http://www.nucleardisarmament.org/news.cfm?article_id=4665&view=search_details&details=full; *Lancet Withdraws Gaza Article, Author Responds*, PULSE, available at <http://pulsemedia.org/2009/03/04/lancet-withdraws-gaza-article/>. Israel has yet to verify the exact number of explosives dropped on Gaza during its 22-day offensive. It is relevant to note that the atomic bomb that fell on Hiroshima was 15-20 kilotons (15,000-20,000 tons). Thus, if the estimates of 1.5

pinpoint accuracy and are highly indiscriminate.³¹ The indiscriminate nature and colossal number of the weapons used is all the more problematic considering the population density in Gaza. The Gaza Strip is approximately 146 square miles, twenty-five miles long by four to seven and a half miles wide. Nearly 1.5 million Palestinians live within Gaza, making it one of the most densely populated areas in the world.³² In addition, about 800,000 or 56% of the Gazan population are under the age of eighteen.³³ Thus, the Palestinian death toll exceeding 1,400, of which more than one third were children and nearly 65 percent were civilians, should come as no surprise.³⁴

A. Israel's Indiscriminate Attacks

During our investigation in Gaza, we heard innumerable testimonies of indiscriminate Israeli bombardments of Palestinian towns and homes without warning or any discernable military objective.³⁵ As a result, hundreds of innocent men, women, children and the elderly, were killed. For example, in Al-Zaytoun, after Israeli soldiers shepherded over one hundred family members from the Sammouni family into one home, the Israeli army hit the home with two tank shells, killing more than 40 of the inhabitants.³⁶ Israel has yet to provide any verifiable evidence as to why its soldiers directed members of the Sammouni family, including dozens of women and children, into one home only to subsequently target it.

Israel's large-scale use of indiscriminate weaponry and reckless use of precision weaponry³⁷ against a densely-populated and confined population unable to flee the sealed borders of Gaza is

million tons are accurate, Israel dropped approximately 100 times the amount of explosives on Gaza during its 22-day offensive as the U.S. dropped on Hiroshima.

³¹ Amnesty Int'l, *Fuelling Conflict: Foreign Arms Supplies to Israel/Gaza*, Feb. 23, 2009, available at <http://www.amnesty.org/en/library/asset/MDE15/012/2009/en/5be86fc2-994e-4eeb-a6e8-3ddf68c28b31/mde150122009en.html>. In the report, Amnesty International states that "artillery is an area weapon, not one that can be used with pinpoint accuracy, and so should never be used in densely-populated civilian areas."

³² Sorcha O'Callaghan and Sara Pavanello, *Laws of War Under Threat in Densely-Populated Gaza*, ALERTNET, Jan. 14, 2009, available at <http://www.alertnet.org/db/blogs/56091/2009/00/14-164734-1.htm>.

³³ U.N. Office for the Coordination of Humanitarian Affairs, *Flash Appeal for occupied Palestinian territory - Gaza 2009*, Feb. 2, 2009, available at <http://ochaonline.un.org/humanitarianappeal/webpage.asp?page=1740>.

³⁴ See *supra* note 1.

³⁵ Article 57 of Additional Protocol 1 encourages armed forces to provide "effective" warnings prior to an attack. Even when Israel did warn of impending attacks, its warnings were largely ineffective and insufficient. The IDF dropped leaflets from high altitudes, which would scatter over wide areas throughout Gaza. These leaflets contained vague warnings to leave the area but did not specify where the Palestinians should go to. Some leaflets stated to "move to the city centers," but the city centers then similarly came under attack. Such warnings were not "effective" and even if they were effective, warnings alone are insufficient to satisfy Article 57's requirements, including the protection of civilian life and property and minimizing civilian harm at all cost. In July, the IDF recognized that its warnings were ineffective and announced that future warnings would contain more specific information. Hanan Greenberg, *IDF to Give Better Warnings Before Attacks*, YNET, July 29, 2009, available at <http://www.ynetnews.com/articles/0,7340,L-3753851,00.html>.

³⁶ Rory McCarthy, *Amid Dust and Death, A Family's Story Speaks for the Terror of War*, THE GUARDIAN, Jan. 19, 2009, available at <http://www.guardian.co.uk/world/2009/jan/20/gaza-israel-sammouni-family>. During our delegation, we met with members of the Sammouni family who recounted how Israeli soldiers gathered them into one home and subsequently shelled the home. One of my co-delegates published a piece where she described her interview with Ibrahim al-Sammouni. Noura Erakat, *Investigating War Crimes on our Fact Finding Mission to Gaza*, HUFFINGTON POST, Feb. 17, 2009, available at http://www.huffingtonpost.com/noura-erakat/investigating-war-crimes_b_167609.html. Until the time of our delegation, three weeks after Israel declared a unilateral ceasefire, the area where the Sammouni family used to live in, Al Zaytoun, still smelt of rotting bodies and white phosphorus.

³⁷ In Human Rights Watch's publication *Precisely Wrong*, it documents six drone strikes that killed 29 civilians, eight of them children. This number is by no means a comprehensive number and other human rights organizations have documented up to forty-two drone attacks killing eighty-seven civilians. Drone-launched missiles are regarded as having

prima facie evidence that its attacks were inherently unlawful and constitute war crimes of great magnitude.³⁸ In an unprecedented move, Israel prevented the entirety of the Gazan population, other than 200 foreign wives, from escaping the war zone.³⁹ Considering the small size and density of Gaza and the lack of natural or man-made shelters, it was inevitable that a disproportionate number of Palestinian civilians would be killed and maimed by Israel's sweeping attacks, as they were.⁴⁰

As stated above, wanton destruction on property and area bombardments that, by nature, do not distinguish between military objectives and civilian targets are illegal, even when based on military necessity.⁴¹ In such cases, the principle of proportionality is not even applicable. Unless Israel can provide evidence that it was possible with sufficient accuracy to distinguish between military targets and the surrounding Palestinian civilian populations when using non-precision artillery such as mortar shells, white phosphorus missiles, flechettes, and tank munitions in the Gaza Strip's densely-populated and urbanized areas, the immediate and undeniable conclusion is that Israel committed war crimes.

Further, the overwhelming evidence on the ground, as exemplified by the case of the Sammouni family, is that Israel's extensive use of modern weaponry *did* attack Palestinian civilians and civilian infrastructure, resulting in an inhumane form of warfare that killed and maimed thousands, and inflicted extensive mental harm in upwards of 90% of the entire Palestinian population in Gaza.⁴² In addition, the sheer number of civilian infrastructure destroyed in the 22-day military offensive further corroborates this conclusion:

- 2400 homes destroyed, and at least 12,000 homes damaged;
- 60 police stations and 30 mosques completely destroyed;
- 21 private enterprises, including cafeterias, wedding halls, and hotels, damaged;
- 28 public civilian facilities, including ministry buildings, municipalities, and fishing harbours, damaged;
- 121 industrial/commercial workshops destroyed and at least 200 damaged;
- 5 concrete factories and one juice factory destroyed;
- 5 media and 2 health institutions destroyed;
- 29 educational facilities, including schools, damaged or destroyed, and
- Thousands of dunums of agricultural land damaged.⁴³

During our investigation, we witnessed the rampant obliteration of Gaza's civilian infrastructure. Israel attacked nearly every neighborhood in Gaza, with the heaviest destruction

pinpoint accuracy, yet their accuracy is only as good as the persons operating them. Human Rights Watch, *Precisely Wrong*, Jun. 30, 2009, available at http://www.hrw.org/en/node/84077/section/3#_ftn4.

³⁸ U.N. General Assembly, *Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967*, Richard Falk, Feb. 2009, available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/10session/A.HRC.10.20.pdf>.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Rome Statute of the International Criminal Court, art. 8(2)(iv), 8(2)(b)(i), July 17, 1998.

⁴² See *supra* note 1. Interview with Dr. Eyad Sarraj, Director of Gaza Community Mental Health Program, Gaza City, Gaza (Feb. 3, 2009) stating that the entirety of the Gazan population was traumatized as a result of Israel's attacks and in need of mental psychiatric intervention.

⁴³ Dunum is equivalent to one-quarter of an acre of land. Palestine Centre for Human Rights, *Aftermath (3) "Is this not forbidden?"*, Feb. 19, 2009, available at <http://www.pchrgaza.org/files/campaigns/english/aftermath/3.html>.

occurring in border towns and villages. Israel also destroyed Palestinian industries, media centers, schools, health institutions, private enterprises, public facilities, and factories. Such infrastructure is presumptively civilian until evidence proves that it is being used for military purposes.⁴⁴ Israeli bulldozers and tanks came through and systematically crushed whatever civilian infrastructure impeded their movement, including hundreds of homes, often while Palestinian civilians were still inside. During our interviews, Palestinians reported that there was very little fighting from in or around the homes. Despite the lack of military necessity and often after the Israeli military took control of an area, the Israeli military would still engage in wanton home demolition. Specifically, we saw the widespread destruction of homes and sometimes entire neighborhoods in eastern Jabaliya (Izbet Abed Rabu), al-Zaytoun (al-Sammouni neighborhood), and Khoza'a (Ezzata neighborhood). In addition, we observed heavy destruction throughout Gaza City, Khan Younis, Beit Lahiya, and Rafah.

According to the Israeli military and government, Israel's attacks and destruction were in fact meant to harm Palestinian civilians in addition to Hamas military targets. The Israeli leadership and military intentionally sought an unrestraint military offensive that would result in maximum destruction. Former Israeli National Security Advisor Giora Eiland summed up the Israeli military's theory in the Hebrew phrase "baal habayit hishtageya" or "the boss has lost it."⁴⁵ Eiland was quoted as saying, "[t]his phrase means that if our civilians are attacked by you, we are not going to respond in proportion but will use all means we have to cause you such damage that you will think twice in the future."⁴⁶ Similarly, then-Foreign Minister Tzipi Livni stated that Israel was deliberately "going wild" in its use of military force in Gaza.⁴⁷

The Israeli use of supreme force was strategically calculated to instill fear and create maximum destruction. The Israeli military demolished thousands of Palestinian homes, industries, and schools so as to destabilize the entirety of Gaza's civil society. Additionally, the Israeli military killed and maimed thousands of Palestinian civilians and terrorized the entirety of the population who were trapped within the confines of the Gaza Strip – unable to flee to safety – to allegedly teach Hamas a lesson. Yet such unmeasured brute force resulting in the intentional destruction of civilian infrastructure and the killing and maiming of civilians is illegal and criminally prosecutable.⁴⁸ Israel's indiscriminate and disproportionate attacks on the Palestinians in Gaza were in complete defiance of international humanitarian laws, and thus constitute war crimes of the greatest magnitude.⁴⁹

⁴⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 52(3), Jun. 8, 1977, 1125 U.N.T.S. 3 (stating that "[i]n case of doubt whether an object which is normally dedicated to civilian purposes such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used").

⁴⁵ Ethan Bronner, *Parsing Gains of Gaza War*, N.Y. TIMES, Jan. 18, 2009, available at http://www.nytimes.com/2009/01/19/world/middleeast/19assess.html?_r=1&pagewanted=1&ref=world.

⁴⁶ *Id.*

⁴⁷ Kim Sengupta and Donald Macintyre, *Israeli Cabinet Divided Over Fresh Gaza Surge*, THE INDEPENDENT, Jan. 13, 2009, available at <http://www.independent.co.uk/news/world/middle-east/israeli-cabinet-divided-over-fresh-gaza-surge-1332024.html>.

⁴⁸ See *supra* note 28 and relevant text on war crimes and criminal prosecution.

⁴⁹ *Id.*

B. Israel's Targeted Attacks

In addition to area bombardments and wide-scale civilian attacks, Israeli soldiers specifically targeted Palestinian civilians and civilian infrastructure. The Israeli military killed up to 87 civilians using missiles launched from unmanned combat aerial vehicles (UCAV), otherwise known as drones.⁵⁰ Israeli drones are precision artillery which contain high-resolution cameras and advanced sensors, providing a clear view of the objects on the ground in both day and night. Similarly, the missiles on the drones carry their own cameras, allowing the operator to view the target from the moment of firing to impact.⁵¹ Thus if doubt arises even after the launch, the drone operator may divert the missile elsewhere.

Despite the high precision of these weapons and their technological capabilities, the Israeli military still targeted and killed dozens of Palestinian civilians. According to Human Rights Watch's report, *Precisely Wrong*, in all six of the documented drone strikes, the total 29 Palestinians who were killed were found to be civilians who were clearly identifiable as civilians and were not near fighting or in the vicinity of Palestinian fighters.⁵² Yet, in these six instances, the Israeli drone operators still launched the drone missiles and killed Palestinian non-combatants even though they had the visual capabilities to differentiate between legitimate targets and civilians and could have diverted the missiles even after the missiles' launch.

Recent Israeli soldier testimonials leaked by Israeli newspapers *Maariv* and *Haaretz*, and picked up by many news sources including *The New York Times* and the *British Broadcasting Corporation (BBC)* indicate however that Israeli soldiers knew they were targeting Palestinian civilians but felt entitled to shoot and kill at will.⁵³ In response to an inquiry about an Israeli sharpshooter who killed an elderly Palestinian woman who came within 100 yards of a commandeered house, an Israeli soldier was quoted as saying, "That's what is so nice, supposedly, about Gaza: You see a person on a road, walking along a path. He doesn't have to be with a weapon, you don't have to identify him with anything and you can just shoot him. With us it was an old woman, on whom I didn't see any weapon. The order was to take the person out, that woman, the moment you see her."⁵⁴ The same soldier later stated, "[w]hat I felt was, there was a lot of thirst for blood."⁵⁵

⁵⁰ Human Rights Watch, *Precisely Wrong*, Jun. 30, 2009, available at http://www.hrw.org/en/node/84077/section/3#_ftn4.

⁵¹ *Id.*

⁵² *Id.*

⁵³ Another soldier quoted in the reports said troops felt they could write "Death to the Arabs" on the walls of homes, toss furniture out the windows and spit on family pictures "just because you can." One squad leader said he argued with his commander over rules of engagement that allowed the army to clear out houses by shooting the residents without warning. "When we entered a house, we were supposed to bust down the door and start shooting inside and just go up story by story," he was quoted as saying. "Each story, if we identify a person, we shoot them. I asked myself: 'How is this reasonable?' Richard Boudreaux, *Israeli Soldiers Report Abuses in Gaza*, L.A. TIMES, Mar. 20, 2009, available at <http://articles.latimes.com/2009/mar/20/world/fg-gaza-probe20>. "From above they said it was permissible, because anyone who remained in the sector and inside Gaza City was in effect condemned, a terrorist, because they hadn't fled. I didn't really understand. On one hand they don't really have anywhere to flee to, but on the other hand they're telling us they hadn't fled so it's their fault." Ethan Bronner, *Further Accounts of Gaza Killings Released*, N.Y. TIMES, Mar. 20, 2009, available at <http://www.nytimes.com/2009/03/20/world/middleeast/21gaza.html>. These statements indicate that the soldiers had knowledge that they were attacking civilians, and despite that knowledge they intentionally and wantonly targeted them.

⁵⁴ Amos Harel, "Shooting and Crying," HAARETZ, Mar. 20, 2009, available at <http://www.haaretz.com/hasen/spages/1072475.html>.

⁵⁵ See Ethan Bronner, *Further Accounts of Gaza Killings Released*, N.Y. TIMES, Mar. 20, 2009, available at

In a different account, one soldier explained how another soldier shot and killed a Palestinian woman and her two children after they misunderstood the soldier's command, turning left instead of right upon emerging from a house. According to the soldier's narration, the other soldier "did what he was supposed to, like he was following orders . . . The lives of Palestinians, let's say, is something very, very less important than the lives of our soldiers. So as far as they are concerned they can justify it that way."⁵⁶

1. Targeted Attacks on Palestinian Civilians

These leaked accounts closely resemble much of the Palestinian testimony we heard while in Gaza. Khaled Mohammad Abed Rabbo, age 32, spoke to members of the delegation about how his family was shot at from close range while they stood outside their home holding white flags.⁵⁷ On January 7, 2009, at approximately 12:50 p.m., Israeli soldiers stationed in tanks ten meters away from the Abed Rabbo home, yelled in Arabic to Khaled and his family to come out of the house. Khaled, his wife, his elderly mother, and his three daughters, Amal, Suad, and Samar, came out holding four white flags. They stood in front of their door awaiting orders from the soldiers for somewhere between five and ten minutes. Khaled noted that two of the soldiers standing outside of the tanks were eating chocolates and chips. Without warning, a third soldier emerged from the tank and started shooting at Khaled and his family.⁵⁸

Khaled's sixty-year-old mother sustained bullet wounds to her left arm. Amal, age two, was hit with not less than four bullets across her chest and Suad, age seven, with approximately ten bullets.⁵⁹ Both Amal and Suad died instantly.⁶⁰ Samar, age four, was also shot in the chest. While Samar survived, she is paralyzed and has been sent to Belgium to receive medical treatment.⁶¹

Khaled's testimony is merely one of dozens of Palestinian testimonies describing instances where Israeli soldiers intentionally targeted and murdered Palestinian civilians, including children, that we obtained during our week-long investigation.⁶² In Khaled Abed Rabbo's case, the soldiers were in no apparent danger, as evidenced by two of the soldiers standing outside of their tanks eating chocolates and chips. Additionally, Khaled's family stood outside awaiting orders for somewhere between five and ten minutes while holding white flags. Khaled's daughters, who were killed, could not be confused for anything but civilians. Yet despite the age of the children (two, four, and seven), the fact that the family was non-combatants and carried white flags, and that the soldiers were in no way threatened, an Israeli soldier still opened fire at close range and specifically targeted Khaled's young children.

<http://www.nytimes.com/2009/03/20/world/middleeast/21gaza.html>.

⁵⁶ Harel, *supra* note 54.

⁵⁷ Khaled Abed Rabbo's story was also documented by Human Rights Watch. See Human Rights Watch, *White Flag Deaths: Killings of Palestinian Civilians During Operation Cast Lead*, Aug. 13, 2009, available at <http://www.hrw.org/en/reports/2009/08/13/white-flag-deaths>.

⁵⁸ Interview with Khaled Abed Rabbo, Gaza (Feb. 4, 2009).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² See National Lawyers Guild, *Onslaught: Israel's Attack on Gaza & the Rule of Law*, Feb. 2009, available at <http://nlg.org/NLGGazaDelegationReport.pdf> for more civilian testimonies.

These targeted attacks on Palestinian civilians are clear breaches of the fundamental principle of distinction. In fact, in the case of Khaled Abed Rabbo, the soldier who targeted and murdered Abed Rabbo's children breached Common Article 3 of the Geneva Conventions, a Convention that is binding on Israel.⁶³ The Israeli soldier's attack on the Abed Rabbo family amounted to a grave breach of the Geneva Conventions and a war crime. The Israeli soldier, along with those who directed, aided or abetted his targeted assault that led to the murder of Amal and Suad and the infliction of severe physical injury on Samar and Khaled's mother must be criminally prosecuted.⁶⁴ Of course, all soldiers and military officials who directly or indirectly partook in the murder, injury, or direct attack upon Palestinian civilians are equally criminally liable for breaching international humanitarian law.

2. Targeted Attacks on Palestinian Civilian Infrastructure

Israel similarly engaged in targeted attacks on Palestinian civilian infrastructure. During its military offensive, Israel admitted to targeting police buildings, courthouses, and government ministries in Gaza,⁶⁵ which are neither *de facto* nor *de jure* military targets even when organized and funded by a government or semi-governmental authority engaged in military combat. Yet the Israeli military also specifically targeted and attacked non-governmental civilian infrastructure including the American International School in Gaza and various United Nations facilities, despite the high risk of killing and injuring innocent civilians. These attacks resulted in the death and injury of hundreds of Palestinian civilians and the wholesale destruction of both the American International School in Gaza as well as the United Nations warehouse in Gaza City. During our investigation, we visited and witnessed the clearly targeted obliteration of both the American International School and the United Nations main compound.

At approximately 2 a.m. on January 3, 2009, the Israeli Air Force dropped two missiles on the American International School in Gaza, completely demolishing it and killing the night watchman, Salem Abu Klaiq, age 24.⁶⁶ None of the surrounding area was targeted. The school, which opened in the year 2000, provided primary and secondary Western education to nearly 600 Palestinian boys and girls.⁶⁷ A number of those Palestinian youth were subsequently awarded scholarships to study in colleges abroad including in the United States. Neighbors who witnessed the bombing stated that there was no military activity taking place from the schoolyards. In fact,

⁶³ Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

⁶⁴ Despite the Israeli soldiers' testimonies about engaging in what amounts to war crimes, Prime Minister Ehud Olmert and other Israeli high officials have made statements alleging that they will protect any member of the Israeli Defence Force from accusation, indictment, or prosecution: "The soldiers and commanders who were sent on mission in Gaza must know that they are safe from various tribunals and that the state of Israel will assist them and defend them." Ashraf Khalil, *Israel Vows to Defend Soldiers Against Calls for War Crimes Inquiries*, L.A. TIMES, Jan. 26, 2009, available at <http://articles.latimes.com/2009/jan/26/world/fg-gaza26>.

⁶⁵ Taghreed El-Khodary & Ethan Bronner, *Israelis Say Strikes Against Hamas Will Continue*, N.Y. TIMES, Dec. 27, 2008, available at <http://www.nytimes.com/2008/12/28/world/middleeast/28mideast.html>. Published reports show that the Israeli military deliberated the attack on the cadet graduation ceremony for months. This indicates premeditation with regard to launching an attack on a civilian target. See Yotam Feldman and Uri Blau, *How IDF legal experts legitimized strikes involving Gaza civilians*, HAARETZ, Jan. 1, 2009, available at <http://www.haaretz.com/hasen/spages/1057648.html>.

⁶⁶ Interview with Ribhi Salem, Director of the American International School in Gaza, Gaza (Feb. 4, 2009). See also American International School in Gaza, <http://www.aisgaza.com/>.

⁶⁷ *Id.*

according to the school's director, Ribhi Salem, the school's administration had come to an agreement with Palestinian militant groups to not use the school grounds for military activity and that no resistance activity had in fact ever taken place on the property.⁶⁸

Prior to targeting the school, the Israeli military did not forewarn the neighboring areas or those on the property of the school, including the watchman, who was dismembered as a result of the attack.⁶⁹ Until now, Israel has not provided any evidence as to why it targeted the School. When asked to explain its attack on the American International School, Israel has merely provided a feeble response indicating that "the matter is under investigation."⁷⁰

The Israeli military also targeted a number of United Nations facilities, including approximately six of the twenty-three United Nations Relief and Works Agency (UNRWA)-operated schools, despite the over 15,000 Palestinians who had taken refuge in them.⁷¹ All UN schools and facilities have the large UN letters painted in blue on their roof and are easily identifiable from the air.⁷² Further, Israel has all UN facilities' GPS coordinates and UN administrators were in constant contact with the Israeli military throughout the offensive, notifying them of their coordinates and that each of their facilities housed hundreds of Palestinian civilians.⁷³ Yet despite the UN's real-time communication with Israel and the clear indication that the buildings were UN facilities, Israel still directly and indirectly attacked UN facilities and consequently killed and injured hundreds of Palestinians.⁷⁴

Israel fired a missile at the courtyard of the UNRWA's Asma School in the Shati refugee camp on January 5, 2009, killing three members of the Al-Sultan family as they emerged from the toilets.⁷⁵ Fifteen hours later, around 3 p.m., Israeli missiles hit right outside of UNRWA's Fakhura School in Jabaliya, killing more than forty Palestinians.⁷⁶ Each of these UNRWA schools housed approximately 400 Palestinians during the attacks.⁷⁷ In response to the international uproar at

⁶⁸ *Id.*

⁶⁹ Under international law, warning of civilians is not enough. Each requirement of Article 57 of Additional Protocol I must similarly be satisfied. A belligerent is also required not to engage in wanton and/or indiscriminate destruction. Even if the Israeli military warned before attacking the American International School in Gaza, its attack was still illegal as the School was not a military objective and there was no military activity taking place on its grounds.

⁷⁰ Interview with Ribhi Salem, Director of the American International School in Gaza, Gaza (Feb. 4, 2009).

⁷¹ Ban Ki-Moon, The Secretary-General, United Nations, Statement by the Secretary-General on strike on UN Relief and Works Agency (UNRWA) School in Gaza, available at <http://www.un.org/apps/sg/sgstats.asp?nid=3647>. In one of the more publicized attacks on the UNRWA-run school in Beit Lahiya, Christopher Gunness, UNRWA's spokesman said, "Where you have a direct hit on an UNRWA school where about 1,600 people have taken refuge, where the Israeli Army knows the coordinates and knows who's there, where this comes as the latest in a catalogue of direct and indirect hits on UNRWA facilities, there have to be investigations to establish whether war crimes have been committed." *Israel Declares Ceasefire; Hamas say it will Fight On*, N.Y. TIMES, Jan. 18, 2009, available at <http://www.nytimes.com/2009/01/18/world/middleeast/18mideast.html>.

⁷² Interview with John Ging, Director of Gaza Operations, United Nations Relief and Works Agency, in Gaza City, Gaza (Feb. 2, 2009).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Akiva Eldar, *U.N. rejects IDF claim Gaza militants operated from bombed-out school*, Haaretz, Jan. 7, 2009, available at <http://www.haaretz.com/hasen/spages/1053455.html>; Suad Abu Ramadan, *Israel shells houses, schools in 11th day of offensive*, Xinhua, Jan. 6, 2009, available at http://news.xinhuanet.com/english/2009-01/07/content_10614920.htm; Ahmed Abu Hamda and Dion Nissenbaum, *Israel shells U.N. warehouse, hospital, news bureaus*, McClatchy Newspapers, Jan. 15, 2009, available at <http://www.mcclatchydc.com/homepage/story/59768.html>.

⁷⁶ Eldar, *supra* note 75.

⁷⁷ *Id.*

Israel's directed attacks against the UNRWA schools, Israel provided video evidence showing Palestinian militants firing from the Fakhura School to justify its attacks.⁷⁸ The video, though, was subsequently dated to 2007.⁷⁹ Israel has yet to provide relevant and timely justification for its attack on the Fakhura School, which resulted in the death and injury of many dozens.

Israel also directly attacked the UNRWA main compound in Gaza City, which housed over 700 civilians at the time.⁸⁰ During our visit, we met with John Ging, the director of UNRWA in Gaza. He confirmed that Israel attacked the compound on January 15, 2009 using white phosphorus shells as UN workers were communicating with the Israeli military and warning them that missiles were falling dangerously close to the UN main compound.⁸¹ Despite Israeli military assurances that they would not attack the UN compound, Israel still directly hit the UN warehouse, located inside the main UN compound, and set it ablaze.⁸² Consequently, several tons of humanitarian aid including medicines and food were destroyed.⁸³ Outside of the warehouse and within the compound were two highly combustible UN fuel trucks filled with gasoline. UN workers risked their lives to move the trucks so that they would not catch on fire and explode.⁸⁴ We spoke to two of these workers who recounted how they faced imminent death in moving the trucks. When asked why they would risk their lives to move the trucks, the two UN workers explained that they were doomed either way. Even if they did not move the trucks, the workers were sure to die, along with the hundreds of Palestinians within the compound, if the trucks caught on fire and exploded.⁸⁵

Israel's direct attacks against the various UN facilities, with the knowledge that hundreds of Palestinian civilians were taking refuge in them, indicates Israel's clear lack of respect for international laws protecting civilians and civilian infrastructure. Israel's false assurances during its real-time communication that it would not attack the UN facilities and their subsequent attacks on the schools and main compound are even more abhorrent and are in complete defiance of international law.⁸⁶

Unfortunately Israel's targeted attacks were not limited to the American International School in Gaza and the UN facilities, but to the many other civilian infrastructures including medical care facilities in Gaza. Physicians for Human Rights-Israel recently released a report indicating that Israel

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Interview with John Ging, Director of Gaza Operations, United Nations Relief and Works Agency, in Gaza City, Gaza (Feb. 2, 2009); Peter Beaumont, *UN chief demands investigation into Israeli attack on Gaza Headquarters*, THE GUARDIAN, Jan. 20, 2009, available at <http://www.guardian.co.uk/world/2009/jan/20/gaza-israel-ban-ki-moon>.

⁸¹ Interview with John Ging, Director of Gaza Operations, United Nations Relief and Works Agency, in Gaza City, Gaza (Feb. 2, 2009)

⁸² *Id.*

⁸³ *Id.* This is particularly appalling and problematic considering that 80% of the Palestinians in Gaza rely on humanitarian aid to survive. U.N. Office for the Coordination of Humanitarian Affairs, *Field Update on Gaza from the Humanitarian Coordinator*, ¶ 2 (Jan. 30-Feb. 2, 2009) available at [http://reliefweb.int/rw/RWFiles2009.nsf/FilesByRWDocUnidFilename/VDUX-7NVTZ9-full_report.pdf/\\$File/full_report.pdf](http://reliefweb.int/rw/RWFiles2009.nsf/FilesByRWDocUnidFilename/VDUX-7NVTZ9-full_report.pdf/$File/full_report.pdf).

⁸⁴ Interview with UN workers, United Nations Relief and Works Agency, in Gaza City, Gaza (Feb. 2, 2009).

⁸⁵ *Id.*

⁸⁶ See *supra* note 35 stating that international law requires a belligerent to warn civilians before launching an attack. Yet a warning is not enough and all requirements of Article 57 of Additional Protocol I must be met.

attacked thirty-four medical facilities in Gaza, including eight hospitals.⁸⁷ While in Gaza, we visited the Red Crescent Medical Center in Jabaliya, which provides first aid and medical care. Israel hit the Center with white phosphorus missiles and shot artillery shells and live bullets at it throughout its military offensive. In fact, Israeli soldiers were posted in a building across from the Center and would constantly fire at the Center, particularly when the medics would attempt to leave in their ambulance cars to pick up the dead or injured.⁸⁸

Israel not only failed to warn Palestinian civilians in the circumstances outlined above or to protect important civilian infrastructure, but it actively targeted such structures with the affirmative knowledge that it would be placing hundreds of Palestinian civilians' lives at risk. In the case of the UN warehouse, Israel also destroyed tens of tons of needed humanitarian aid. Israel's illegal acts are nothing short of war crimes.

IV. Israel's Use of Palestinian Human Shields

Beyond the indiscriminate bombardment and targeted attacks on Palestinian civilians, Israeli soldiers also used Palestinians as human shields during Israel's 22-day military offensive.⁸⁹ The Hague Convention expressly forbids belligerents from compelling "nationals of the hostile party to take part in the operations of war directed against their own country."⁹⁰ Further, Article 28 of the Fourth Geneva Convention prohibits placing civilians alongside soldiers or military objects so as to immunize areas from military operations.⁹¹ Based on the Conventions' Official Commentary, the use of human shields is "cruel and barbaric."⁹²

In addition, under the legal principle of distinction, civilians are protected persons and are entitled "in all circumstances, to respect for their persons . . . and shall be protected especially

⁸⁷ Physicians for Human Rights-Israel, *Physicians for Human Rights-Israel in a Report on Medical Ethics During the War on Gaza: "The Military repeatedly violated Codes of Medical Ethics during the Gaza Offensive,"* Mar. 23, 2009, available at <http://www.humanrightsblog.org/reports/archives/008457.html>.

⁸⁸ Interview with Palestinian medics, Jabalia Red Crescent Medical Center, Jabaliya, Gaza City (Feb. 4, 2009). From the Red Crescent Medical Center, we could see where the snipers had been posted and the many holes they created to shoot from. Similarly, we witnessed how the Medical Center and ambulance cars were riddled with bullets from the Israeli snipers.

⁸⁹ While Israel asserted that Hamas used Palestinians as human shields, these allegations have not been verified by the major international human rights organizations. In its report, *Rain of Fire: Israel's Unlawful Use of White Phosphorus in Gaza*, HRW states it "found no evidence of Hamas using human shields in the vicinity at the time of the attacks." Further, the small size of Gaza and its density coupled by Israel's sealing of the Gazan borders complicates Israel's claims that Hamas used civilians as human shields or civilian sites for resistance activities. Inevitably, there would be a high likelihood of intermingling. On the other hand, there have been innumerable Palestinian testimonies of Israeli soldiers using Palestinian men and boys as human shields. Clancy Chassay, *Palestinian brothers: Israel used us as human shields in Gaza war*, THE GUARDIAN, Mar. 23, 2009, available at <http://www.guardian.co.uk/world/2009/mar/23/gaza-human-shields-claim>. See also *Israeli Soldiers Leave Gaza Homes in Devastated Condition*, AMNESTY INT'L, Jan. 23, 2009, available at <http://www.amnesty.org/en/news-and-updates/news/israeli-soldiers-leave-gaza-homes-devastated-condition-20090123>.

⁹⁰ Hague Convention Respecting the Laws and Customs of War on Land and its annex art. 23, Oct. 18, 1907, 36 Stat. 2277 (1908), U.S.T.S. 539, 1 Bevans 631.

⁹¹ Geneva Convention relative to the Protection of Civilian Persons in Time of War art. 28, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 973, available at <http://www.icrc.org/ihl.nsf/COM/380-600033?OpenDocument> [hereinafter Geneva Convention] (stating that "The presence of a protected person may not be used to render certain points or areas immune from military operations.").

⁹² *Id.* See also *Human Shields: Legal Background*, B'TSELEM, available at http://www.btselem.org/english/human_shields/legal_background.asp.

against all acts of violence or threats thereof and against insults and public curiosity.”⁹³ The use of human shields and the “compelling [of] a protected person to serve in the forces of a hostile Power” is a grave breach of the Geneva Conventions, opening those who conduct such illegal acts to international criminal liability.⁹⁴

During Israel’s ground invasion, Israeli soldiers would often separate the men from the women and children. Palestinian adolescents, adults, and even elderly men were used as human shields and would be forced to accompany Israeli tanks and foot soldiers for days at a time as the soldiers entered Palestinian villages or went from house to house. These men were often blindfolded and handcuffed. Sometimes Israeli soldiers would shoot from behind the men so as to protect themselves from oncoming bullets.

While in Gaza, we heard many accounts from Palestinian men who testified that Israeli soldiers employed them as human shields. Sami Rashid Mohammad Mohammad, in his mid to late 40s, told me that on January 5, 2009, Israeli soldiers entered his neighborhood of Izbet Abed Rabu.⁹⁵ At approximately 12:30 a.m., the soldiers came crashing into his home and forced the family into one room. A few hours later, once the sun had risen, the soldiers blindfolded and handcuffed Sami and separated him from his family, including his wife, children, siblings, and elderly parents. They also took Sami’s neighbor.⁹⁶

For four days, Sami alleged that Israeli soldiers used Sami and approximately fifteen to twenty other Palestinian men as human shields. Sami recounted going from house to house and forcing open the doors of the homes as Israeli soldiers waited behind him to ensure their safety.⁹⁷ Once Sami verified that the house was safe, the soldiers would enter. In other instances, soldiers would make Sami and the other Palestinian men walk in front of them and their tanks as they entered villages or walked through empty fields.⁹⁸ On the first day, Sami walked with the soldiers into an open field where they were met with oncoming bullets. Immediately, the soldiers stationed themselves behind Sami and his neighbor and began shooting from over Sami’s shoulders and between his legs. Throughout the four days, the Israeli military used Sami and the other Palestinian hostages as human shields.⁹⁹ Israeli soldiers would often use two Palestinian men at a time as shields and shoot from behind them whenever there was oncoming gunfire. In addition, Sami was often made to sit on his knees in open fields in between the long marches, acting as a deterrent for Palestinian militants from attacking the Israeli soldiers.¹⁰⁰ During the initial two days, Sami was deprived of both food and water, and on the following two days he was given very little food and water. Sami was even prevented from using the bathroom.¹⁰¹ Sometimes at night, the soldiers would take over a Palestinian home and shackle the fifteen to twenty Palestinian men, including Sami, together so that they would not escape as the soldiers rested or slept.¹⁰²

⁹³ Geneva Convention, *supra* note 91, art. 27.

⁹⁴ *Id.* art. 147.

⁹⁵ Interview with Sami Rashid Mohammad Mohammad, Izbet Abed Rabu, Jabaliya, Gaza (Feb. 4, 2009).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

After four days, the Israeli soldiers released Sami but prevented him from going back to his home. Sami went to his uncle's home nearby and was reunited with members of his immediate family.¹⁰³ Later, Sami would find out that the Israeli soldiers had murdered Sami's younger brother, Sameer, on the same day that Sami was taken as a human shield. Sameer was shot in the chest and left to bleed to death in Sami's home. When Sami was able to return to his home, he found Sameer's cold and dead body on his balcony.¹⁰⁴

Sami was one of many Palestinian men who were forced to act as human shields for Israeli soldiers. Despite the Israeli Supreme Court decision in 2005 outlawing the use of human shields,¹⁰⁵ Israel continued to use Palestinians as human shields during its military offensive in Gaza.¹⁰⁶ The Israeli military policy of using Palestinian human shields is illegal both under international humanitarian law as well as under Israeli law, and should subject those responsible to criminal liability. It breaches multiple articles of both the Fourth Geneva Convention and the Hague Convention outlined above as well as the fundamental principle of distinction. Further, the use of human shields is considered a grave breach of international law rising to the level of a war crime.¹⁰⁷ Based on the testimonies of the Palestinians in Gaza, such as Sami, as well as the written and videotaped evidence of the use of Palestinian human shields,¹⁰⁸ Israeli soldiers and those who directed and aided in the use of human shields have violated international law and are guilty of perpetrating war crimes.

V. Israel's False Claims of Self-Defense

Israel justified much of its aggression in its recent onslaught in Gaza on the premise of self-defense. Under Article 51 of the United Nations Charter, a member state may act in self-defense if "an armed attack occurs against a Member of the United Nations."¹⁰⁹ A claim of self-defense under international law requires that the recourse to force is both "necessary" and "defensive."¹¹⁰ Yet nations acting in self-defense must *still* abide by international humanitarian law as outlined above. Even if Israel was acting in self-defense, it must have acted within the principles of distinction and proportionality.¹¹¹ It may not, under any circumstance, knowingly target and attack Palestinian civilians and civilian infrastructure or engage in warfare that is highly probable of disproportionately killing and maiming civilians or destroying civilian infrastructure.¹¹² In addition, Israel may not violate the Fourth Geneva Convention, a Convention it ratified, by using Palestinians as human

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Donald Macintyre, *Israeli Use "Human Shields" is Judged Illegal*, THE INDEPENDENT, Oct. 7, 2005, available at <http://www.independent.co.uk/news/world/middle-east/israeli-use-of-human-shields-is-judged-illegal-509907.html>.

¹⁰⁶ See *Gaza War Crimes Investigation: Civilians, Medics and Investigators Talk to the Guardian about Allegations of War Crimes During Israel's 23-day Campaign in Gaza*, THE GUARDIAN, available at <http://www.guardian.co.uk/world/series/gaza-war-crimes-investigation>.

¹⁰⁷ See UN mission finds evidence of war crimes by both sides in Gaza conflict, UN News Centre, Sept. 15, 2009, available at <http://www.un.org/apps/news/story.asp?NewsID=32057&Cr=palestin&Cr1>.

¹⁰⁸ *Id.*

¹⁰⁹ U.N. Charter art. 51, available at <http://www.un.org/en/documents/charter/index.shtml>.

¹¹⁰ U.N. General Assembly, *Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967*, *supra* note 38.

¹¹¹ Mary Ellen O'Connell, *The Myth of Preemptive Self-Defense*, THE AMERICAN SOCIETY OF INTERNATIONAL LAW, Aug. 2002, available at <http://www.asil.org/taskforce/oconnell.pdf>.

¹¹² See *supra* Section II.

shields.¹¹³ Therefore, even if Israel was correct in its assertions that it was acting in self-defense, it was still acting illegally by breaching international humanitarian law in its attacks on Palestinian civilians and civilian infrastructure.

The reality, though, is that Israel lacks legal justification to even apply force in Gaza, much less to engage in a military offensive that killed and injured thousands and destroyed what little civil society Gaza had. Israel remains an occupying power in Gaza, which it occupied in 1967.¹¹⁴ While Israel physically disengaged from Gaza in 2005 by evacuating its troops and approximately 8,000 settlers, it still maintains effective control over Gaza.¹¹⁵ Israel controls all entry and exit routes by land and sea, and controls Gazan airspace and territorial waters.¹¹⁶ Further it controls basic governmental functions such as Gaza's utilities (fuel, water, and electricity), travel permits, economic stimulation, and security.¹¹⁷ In addition, the Israeli-imposed blockade on Gaza in 2007 that greatly restricted Palestinian mobility, economic development, and mere access to much-needed humanitarian aid has affected the livelihood and well-being of all persons in Gaza.¹¹⁸ As such, Israel remains an occupying power in Gaza, a sentiment agreed upon by the international community.¹¹⁹

The laws remain unclear whether an occupying power, such as Israel, may claim self-defense in relation to an occupied society.¹²⁰ While Israel maintains that it was acting in self-defense – protecting its population against Hamas's Qassam rockets – international law may even prevent it

¹¹³ See *supra* Section IV.

¹¹⁴ *The Other Middle East Occupation: Israel Launches Largest Offensive in Gaza Since 1967*, Democracy Now, May 18, 2004, available at http://www.democracynow.org/2004/5/18/the_other_middle_east_occupation_israel.

¹¹⁵ Daphna Baram, *Disengagement and ethnic cleansing*, The Guardian, Aug. 16, 2005, available at http://www.abudis.net/disengagement_ethnic_cleansing.htm.

¹¹⁶ *Israel's Control of the Airspace and the Territorial Waters of the Gaza Strip*, B'TSELEM, available at http://www.btselem.org/english/gaza_strip/control_on_air_space_and_territorial_waters.asp.

¹¹⁷ Vita Bekker, *Israel Starved Gaza of Power and Water*, THE NATIONAL, Aug. 13, 2009, available at <http://www.thenational.ae/apps/pbcs.dll/article?AID=/20090813/FOREIGN/708129882/1002/art>.

¹¹⁸ After Hamas won the elections and became the governing authority of the Palestinian Authority, Israel tightened restrictions on the occupied Palestinian territory, including instituting closures on the Gaza Strip that, among other things, prevented travel and obstructed the delivery of aid to Palestinians there. This closure denied residents of Gaza adequate food, fuel, medical supplies, parts, and other essential commodities. This comprehensive closure destroyed the already feeble Gaza economy, further increased the number of Palestinians needing international humanitarian assistance to 80 percent, and created a situation of chronic malnutrition. Forty-five percent of children in Gaza today suffer from acute anemia. The closure depleted Gaza hospitals of basic medicine and medical supplies leaving them, and Gaza's infrastructure as a whole, unequipped to handle the casualties that resulted from Israel's assault. Doug Struck, *Israeli Siege Leaves Gaza Isolated and Desperate*, WASH. POST FOREIGN SERVICE, Aug. 28, 2006, available at http://www.washingtonpost.com/wp-dyn/content/article/2006/08/27/AR2006082700768_pf.html.

¹¹⁹ Official pronouncements of UN High Commissioner for Human Rights (A/HRC/8/17), the General Assembly (A/63/96, A/63/98), the UN Secretary General (A/HRC/8/17) and the Security Council (S/RES/1860). "Israel remains an occupying power in the Gaza Strip even though it withdrew its military forces and illegal civilian settlers in August and September 2005." Human Rights Watch, *Israel: Threatened Sanctions on Gaza Violate Laws of War*, Sep. 20, 2007, available at <http://hrw.org/english/docs/2007/09/20/isrlpa16920.htm>; "Statements by the Government of Israel that the withdrawal ended the occupation of Gaza are grossly inaccurate. . . In effect, following Israel's withdrawal, Gaza became a sealed off, imprisoned, and occupied territory." John Dugard, Special Rapporteur, *Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967*, U.N. Doc. A/HRC/4/17 (Jan. 2007) available at <http://www.universalhumanrightsindex.org/documents/857/1062/document/en/pdf/text.pdf>. See also Gisha, *Disengaged Occupiers: The Legal Status of Gaza*, Jan. 2007, available at <http://www.gisha.org/index.php?intLanguage=2&intSiteSN=119>.

¹²⁰ U.N. General Assembly, *Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967*, Richard Falk, Feb. 2009, available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/10session/A.HRC.10.20.pdf>.

from acting in such a manner so long as it remains an occupying power over Gaza. Further, international law clearly states that people under foreign occupation have the right to resist occupation. Such resistance may even take place using armed struggle.¹²¹ Yet while Hamas's Qassam rockets likely extended beyond the international right to armed resistance, Israel still acted as an aggressor and beyond the mandate of international law by applying force without exhausting diplomatic alternatives. Essentially, Israel's attack was neither defensive nor necessary.

On June 19, 2008, Israel signed a six-month Egyptian-brokered ceasefire with Hamas.¹²² Under the conditions of the ceasefire, Israel would ease its crippling blockade on Gaza as well as end its military incursions into the Gaza Strip.¹²³ Palestinians, in turn, would halt rocket and mortar fire into Israel and move toward releasing captured Israeli corporal Gilad Shalit.¹²⁴

During the first few months of the ceasefire, the number of rockets and mortars fired from Gaza into Israel dropped drastically from an average of 400 rounds per month to single digits. In October 2008, the number dropped to one rocket and one mortar.¹²⁵ Yet despite the significant reduction of rockets, and in direct contradiction with the terms of the ceasefire, Israel continued to tighten the blockade on Gaza, increasing the percentage of Palestinians in need of humanitarian assistance from 60% to 80%.¹²⁶ Further, on November 4, 2008, Israel launched a military raid into Gaza and killed six Hamas members, thereby breaking the ceasefire. In response to Israel's raid, Hamas fired rockets into Southern Israel resulting in the deterioration of the ceasefire. Yet even as the ceasefire was coming to an official end on December 19, 2008, Hamas leaders including Khalid Mishal offered to renew the truce in exchange for Israel's lifting of the blockade and opening of all Gaza crossings.¹²⁷ Israel's response to Hamas's offer for a renewed truce was Operation Cast Lead, the most aggressive show of force on Gaza in its history.

Israel's deadly response, starting on December 27, 2008, nearly one week after Hamas proposed an extension of truce, indicates that Israel acted offensively. Its attacks on Gaza were neither defensive nor necessary. Israel could have diplomatically engaged Hamas and developed a long-term ceasefire, which would have benefited both populations. Rather, Israel decided to engage

¹²¹ UN General Assembly Resolution 3070 of December, 14 1960 "reaffirms the legitimacy of the people's struggle for liberation from colonial and foreign domination and alien subjugation by all available means, including armed struggle."

¹²² *Israel Agrees to Truce with Hamas on Gaza*, N.Y. TIMES, Jun. 18, 2008, available at <http://www.nytimes.com/2008/06/18/world/middleeast/18mideast.html>.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ Nancy Kanwisher, Hohannes Haushofer, and Anat Biletzski, *Reigniting Violence: How Do Ceasefires End?*, Jan. 24, 2009, concludes that "the ceasefire was remarkably effective: after it began in June 2008, the rate of rocket and mortar fire from Gaza dropped to almost zero, and stayed there for almost four months." Further, the study mentioned that from 2000-2008, it was found that in 79% of the violent interaction incidents it was Israel that broke the pause in violence. Total monthly rockets and mortars fired each month in 2008 amounted to 245 in June, 12 in July, 11 in August, 4 in September, 2 in October, 193 in November, 602 in December, and 493 in January. See *The Israel Project, Hamas Continues to Fire Rockets into Israel, Operate Smuggling Tunnels*, Feb. 24, 2009, available at <http://www.jewishpolicycenter.org/792/hamas-continues-to-fire-rockets-into-israel>.

¹²⁶ Interview with John Ging, Director of Gaza Operations, United Nations Relief and Works Agency, in Gaza City, Gaza (Feb. 2, 2009).

¹²⁷ Khalid Mish'al, *This Brutality Will Never Break Our Will to be Free*, THE GUARDIAN, Jan. 6, 2009, available at <http://www.guardian.co.uk/commentisfree/2009/jan/06/gaza-israel-hamas>. See also Roe Nahmias *Hamas: Willing to renew truce*, YEDIOTH AHRONOTH, Dec. 23, 2008, available at <http://www.ynet.co.il/english/articles/0,7340,L-3642815,00.html>.

militarily and acted with gross military force against a largely defenseless population.¹²⁸ In a publicized news report on Israel's Galey Tzahal (Army Radio), Israel's Minister of Defense Ehud Barak stated that "the firing of [Qassam] rockets would have stopped had Israel accepted the calm [offered by Hamas]."¹²⁹ Prime Minister Ehud Olmert responded by stating, "There are no negotiations. Israel does not intend to arrange a 'calm' with that organisation [Hamas]."¹³⁰ Prime Minister Olmert continued by asserting, "What the Defense Minister [Barak] proposes proves that there was no value in the whole Cast Lead Operation. [Barak is] suggesting that now that we have smashed Hamas, we should accept the conditions that they offered to us before the operation."¹³¹

Beyond internal statements which indicate that Israel acted aggressively and unnecessarily, Israeli press also leaked news reports that Israel had planned its attack on Gaza for up to six months prior. Even as Israel negotiated its six-month Egyptian-brokered ceasefire with Hamas, it was engaging in a highly meticulous, intelligence-gathering operation centered on deception-tactics and disinformation which were meant to significantly increase the number of casualties in a strike planned on Gaza at the end of the ceasefire.¹³²

After Israel started its attacks on Gaza, it refused to engage in any real efforts to stop its attacks, which were clearly targeting Palestinian civilians and civilian infrastructure. On January 8, 2009, the United Nations Security Council overwhelmingly passed a resolution which called for an immediate ceasefire in Gaza leading to a full Israeli withdrawal.¹³³ Israel did not respond to the resolution and continued in its assault on Gaza for another ten days. Finally, over three weeks later, on January 18, 2009, Israel declared a unilateral ceasefire, two days prior to President Barack Obama taking office. While seemingly a coincidence, Israel purportedly cut its offensive short in exchange for a guarantee of unimpeded U.S. arms supply following President Obama's inauguration.¹³⁴

¹²⁸ Israel has the fourth largest military in the world in addition to chemical warfare capabilities. Comparatively, Palestinians lack a formal military, air force, navy, tanks, aircrafts, and nuclear weapons, all of which Israel possesses in abundance.

¹²⁹ Charles Lenchner, *Barak: Ceasefire with Hamas Could Have Worked*, Mar. 10, 2009, available at http://war.change.org/blog/view/barak_ceasefire_with_hamas_could_have_worked. Original transcript in Hebrew available at <http://glz.msn.co.il/NewsArticle.aspx?NewsId=36577>.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Barak Ravid, *LAF Strike Followed Months of Planning*, HAARETZ, Dec. 29, 2009, available at <http://www.haaretz.com/hasen/pages/1050448.html>.

¹³³ S.C. Res. 1860, ¶ 1, U.N. Doc. S/Res/1860 (Jan. 8, 2009).

¹³⁴ Seymour M. Hersh, *Syria Calling: The Obama Administration's Chance to Engage in a Middle East Peace*, THE NEW YORKER, Apr. 6, 2009, available at http://www.newyorker.com/reporting/2009/04/06/090406fa_fact_hersh. According to Pulitzer Prize-winning investigative journalist, Seymour Hersh:

The Obama transition team also helped persuade Israel to end the bombing of Gaza and to withdraw its ground troops before the Inauguration. According to the former senior intelligence official, who has access to sensitive information, "Cheney began getting messages from the Israelis about pressure from Obama" when he was President-elect. Cheney, who worked closely with the Israeli leadership in the lead-up to the Gaza war, portrayed Obama to the Israelis as a "pro-Palestinian," who would not support their efforts (and, in private, disparaged Obama, referring to him at one point as someone who would "never make it in the major leagues"). But the Obama team let it be known that it would not object to the planned resupply of "smart bombs" and other high-tech ordnance that was already flowing to Israel. "It was Jones"—retired Marine General James Jones, at the time designated to be the President's national-security adviser—"who came up with the solution and told Obama, 'You just can't tell the Israelis to get out.'" (General Jones said that he could not verify this account; Cheney's office declined to comment.)

Israel's allegation that it was acting in self-defense is completely baseless when considering Israel's legal status as an occupying power, its failure to exhaust diplomatic alternatives, and its clear offensive military forethought. As an unjustified military offensive attack on Gaza, Operation Cast Lead was illegal in nature and amounted to collective punishment, a violation of Article 33 of the Fourth Geneva Convention.¹³⁵ When considering Israel's prior eighteen-month blockade of Gaza, which nearly crippled Gazan civil society, Israel's subsequent onslaught in Gaza cannot be considered anything short of aggression, the supreme crime in the Nuremberg trials and a grave breach of international humanitarian law.

VI. Conclusion

Israel's entire military offensive in Gaza, from its inception to its day-to-day activities which resulted in the targeting of Palestinian civilians and civilian infrastructure was illegal. Israel was not justified in attacking Gaza, much less in killing and injuring thousands of innocent Palestinian civilians and destroying the entirety of Gazan civil society. More problematically, Israel did not allow Palestinians a place of refuge and turned the entirety of Gaza into a battlefield. In an unprecedented policy, Israel sealed the borders of Gaza and did not allow the Palestinians a means to escape as refugees.¹³⁶ For the entire 22 days of the Israeli onslaught, Palestinians were forced to find refuge in their homes or emergency shelters operated by UNRWA. Yet as discussed above, even UNRWA shelters were directly attacked and hit, leaving the entirety of Gaza vulnerable and insecure. Gaza became an open-air prison as Israel dropped a colossal tonnage of weaponry on the imprisoned and largely unarmed population.

Yet despite the high risk of civilian death and injury, Israel maintained its attacks in Gaza for 22 days, in the face of the UN Security Council's call for an immediate ceasefire ten days earlier. Israel used some of the most highly destructive and indiscriminate weapons on the Gazan population, which resulted in unprecedented deaths and injuries in Gaza, often so extreme that Palestinian and foreign doctors did not know how to treat their patients properly. While international weapons experts have identified a number of the weapons used in Gaza, there remain weapons that have not been identified due to the lack of autopsies conducted during the offensive. On the first day of the attacks, Israel hit and destroyed the only forensic lab in Gaza, preventing doctors from conducting autopsies to determine the exact causes of death, which would similarly help determine the weapons used.

Yet the weapons identified to date which Israel used in Gaza are largely traceable to U.S. manufacturers and arms suppliers. These U.S.-made and supplied weapons were used by Israel in committing its war crimes and killing innocent Palestinian men, women, and children in Gaza. Within the U.S., the Arms Export Control Act (AECA) dictates the four limited circumstances in which the U.S. may provide weaponry to other countries: (i) for internal security, (ii) for legitimate self-defense, (iii) to permit participation in regional or collective arrangements consistent with the United Nations Charter or when requested by the United Nations for international peacekeeping,

¹³⁵ Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 33, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 973.

¹³⁶ International humanitarian law does not address "refugee denial." Yet Richard Falk, the UN Special Rapporteur for the Occupied Territories, has called for an impartial investigation to determine whether such practice would constitute a crime against humanity. *Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967*, *supra* note 38.

and (iv) to assist undeveloped friendly foreign countries to develop public infrastructure.¹³⁷ In conjunction, the Foreign Assistance Act (FAA) forbids assistance to countries engaged in human rights violations.¹³⁸ Upon the finding that gross violations took place, the FAA requires the immediate termination of military assistance.

Needless to say, the AECA and the FAA should be triggered and the U.S. must immediately stop its arms supplies and approximately \$3 billion a year of military financing to Israel. While Israel remains a staunch ally to the U.S., Israel's illegal warfare in Gaza – that can only be characterized as a massacre – is counter to both international human rights standards and to the core principles of U.S. democracy. No nation, including Israel, should be allowed to act above the law and commit, with full protection and impunity, war crimes. Rather, the U.S. must stop its fueling of the Israeli military machine, as the Reagan Administration did in 1982 after Israel used cluster munitions in Lebanon.

Further, an international tribunal must be set up to try Israeli officials and soldiers who directly and indirectly committed war crimes in Gaza. To date, Israel has denied any wrongdoing and maintains that it “operated in accordance with international law.” According to the results of the Israeli Defense Force's internal investigation released on April 22, only “a very small number” of “unavoidable” incidents occurred.¹³⁹ Yet despite Israel's false assurances that it acted within international humanitarian law, Israel denied entrance and refused to cooperate with the Human Rights Council's U.N. Fact Finding Mission on the Gaza conflict, headed by Richard Goldstone, a South African judge and chief prosecutor for the war crimes tribunals in Rwanda and former Yugoslavia.¹⁴⁰

Thus it is imperative that the U.S. and international community pressure Israel to give full consideration to the mission's findings and recommendations. Yet even if Israel rejects the findings of the mission, as it refused to initially cooperate, it is the duty of the U.N. member states to press for international prosecution to hold those in Israel who committed war crimes liable.

¹³⁷ Arms Export Control Act, 22 U.S.C. §§ 2751-2799aa-2 (2009). For a thorough discussion of the AECA in the context of Israeli actions during the Al-Aqsa Intifada, see National Lawyers Guild, *The Al-Aqsa Intifada and Israel's and Israel's Apartheid: The U.S. Military and Economic Role in the Violation of Palestinian Human Rights*, Jan. 2001, available at http://nlg.org/resources/delegations/al_aqsa_intifada.pdf.

¹³⁸ 22 U.S.C. § 2304 et seq (2006).

¹³⁹ Israel Ministry of Foreign Affairs, *The Operation in Gaza – Factual and Legal Aspects*, July 29, 2009, available at <http://www.mfa.gov.il/MFA/Terrorism+Obstacle+to+Peace/Terrorism+and+Islamic+Fundamentalism-/Operation+in+Gaza-Factual+and+Legal+Aspects.htm>.

¹⁴⁰ UN Investigator “Shocked” By Scale of Destruction in Gaza, HAARETZ, June 6, 2009, available at <http://www.haaretz.com/hasen/spages/1090452.html>. Since the writing of this article, the Human Rights Council Report has been released. In its 574 pages, the report accuses Israel of committing actions amounting to war crimes and potentially crimes against humanity. Further, it states that Israel's blockade on Gaza amounts to collective punishment. As opposed to Israel's claims, the report found that Israel had not carried out any credible investigations into the alleged violations. The report recommends that Israel carry out credible investigations and prosecutions with regard to the violations identified in the report and subsequently report to it. The report further recommends that the U.N. Security Council set up a body of independent experts to report to it on the progress of Israeli investigations and prosecutions. Lastly, if Israel does not act in good faith within six months, the report recommends that the Security Council should refer the situation in Gaza to the ICC Prosecutor. See *Report of the United Nations Fact Finding Mission on the Gaza Conflict*, UN HUMAN RIGHTS COUNCIL, available at <http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/FactFindingMission.htm>.

While Israel is now calling for a resumption of peace talks, Israel – comprised of the children of Holocaust victims and the architects of the Nuremburg trials – should realize that peace only follows justice and accountability.