THE OPERATION IN GAZA
27 DECEMBER 2008 – 18 JANUARY 2009

FACTUAL AND LEGAL ASPECTS

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The State of Israel

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I. EXECUTIVE SUMMARY

1. This detailed Paper discusses a range of factual and international legal issues relating to the military operation undertaken by the Israel Defence Forces ("IDF") in Gaza in December 2008–January 2009 (the "Gaza Operation").

2. The Paper has been prepared at this time in order to place the Gaza Operation in its proper factual and legal context. On a number of issues the Paper offers only a provisional analysis as the IDF is still conducting comprehensive field and criminal investigations into allegations regarding the conduct of its forces during the Operation. Such investigations will be reviewed by the Military Advocate General and are subject to further review by the Attorney General. In addition, petitions may be filed for judicial review by the Supreme Court of Israel (sitting as the High Court of Justice).

3. The Paper addresses the context of the Gaza Operation and notes that Israel had both a right and an obligation to take military action against Hamas in Gaza to stop Hamas' almost incessant rocket and mortar attacks upon thousands of Israeli civilians and its other acts of terrorism. Israel was bombarded by some 12,000 rockets and mortar shells between 2000 and 2008, including nearly 3,000 rockets and mortar shells in 2008 alone. Hamas specifically timed many of its attacks to terrorise schoolchildren in the mornings and the afternoons. These deliberate attacks caused deaths, injuries, and extensive property damage; forced businesses to close; and terrorised tens of thousands of residents into abandoning their homes.

4. The Paper notes that Hamas constantly worked to increase the range of its weapons and that, by late 2008, its rocket fire was capable of reaching some of Israel's largest cities and strategic infrastructure, threatening one million Israeli civilians, including nearly 250,000 schoolchildren. Hamas also orchestrated numerous suicide bombings against Israeli civilians and amassed an extensive armed force of more than 20,000 armed operatives in Gaza.

5. The Paper also describes the numerous non-military approaches Israel pursued to try to stop the attacks before commencing the Gaza Operation, including urgent appeals to the U.N. Secretary General and successive Presidents of the Security Council to take determined action, and diplomatic overtures, directly and through intermediaries, to stop the violence. Hamas nonetheless continued, and in fact escalated, its cross-border attacks. These attacks included a raid into Israeli territory from Gaza in June 2006 and the abduction of an IDF soldier, Corporal Gilad Shalit, who, more than three years later,

remains in captivity, having been held incommunicado without access to the International Committee of the Red Cross ("ICRC") or any other international body.

6. In a detailed legal analysis, including a survey of the relevant legal principles and State practice, the Paper notes that Israel's resort to force in the Gaza Operation was both a necessary and a proportionate response to Hamas' attacks. While the IDF continues to investigate specific incidents during the Operation, the Paper demonstrates that Israeli commanders and soldiers were guided by International Humanitarian Law, including the principles of distinction and proportionality. These principles, enshrined in IDF training, Code of Ethics and rules of engagement, required IDF forces to direct their attacks solely against military objectives and to try to ensure that civilians and civilian objects would not be harmed. Where incidental damage to civilians or civilian property could not be avoided, the IDF made extraordinary efforts to ensure that it would not be excessive in relation to the anticipated military advantage in each instance and as a whole. Both before and during the Gaza Operation, the IDF went to great lengths, as documented in the Paper, to ensure that humanitarian aid reached the Palestinian population, including by facilitating the delivery of 1,511 trucks carrying 37,162 tons.

7. By contrast, both before and during the Gaza Operation, Hamas committed clear grave violations of international law. The Paper documents Hamas' deliberate rocket and mortar attacks against Israel's civilian population, which violated the international law prohibition on deliberate attacks against civilians and civilian objects. It also documents deliberate Hamas tactics that put Gaza's civilian population in grave danger. These included the launching of rocket attacks from within densely populated areas near schools and protected U.N. facilities, the commandeering of hospitals as bases of operations and ambulances for transport, the storage of weapons in mosques, and the booby-trapping of entire civilian neighbourhoods so that an attack on one structure would devastate many others. These actions, which are clearly shown in photographic and video evidence throughout the Paper, violated international law. Many of the civilian deaths and injuries, and a significant amount of the damage to property during the Gaza Operation, was attributable to Hamas' tactic of blending in with the civilian population and its use of, or operations near, protected facilities and civilian property. The Paper also notes the direct injury and damage caused to Palestinians by the explosion of Hamas' weapons factories and the falling of rockets short of their targets on Palestinians in Gaza.

8. The Paper addresses the acute dilemmas faced by Israel in confronting an adversary using its own civilian population as a shield. It details the extensive precautions taken by the IDF to avoid or limit harm to civilians in Gaza, while still having to achieve the necessary

objective of stopping Hamas' constant rocket and mortar fire on Israeli civilians and property. The IDF not only checked and cross-checked targets and used the least destructive munitions possible to achieve legitimate military objectives; it also implemented an elaborate system of warnings, including general warnings to civilians (through media broadcasts and leaflets) to avoid or minimise the presence of civilians in areas and facilities used by Hamas, regional warnings to alert civilians to leave specific areas before IDF operations commenced, and specific warnings (through telephone calls and warning shots to rooftops) to warn civilians to evacuate specific buildings targeted for attack. The IDF dropped more than 2.5 million leaflets and made more than 165,000 phone calls warning civilians to distance themselves from military targets.

9. In this Paper, Israel acknowledges that, despite the precautions taken, the Gaza Operation resulted in many civilian deaths and injuries and significant damage to public and private property in Gaza. Israel makes no attempt to minimise the human costs incurred. As former Prime Minister Olmert stated at the close of the conflict: "On behalf of the Government of Israel, I wish to convey my regret for the harming of uninvolved civilians, for the pain we caused them, for the suffering they and their families suffered as result of the intolerable situation created by Hamas."

10. In analysing the legal aspects of the conflict, the Paper notes that civilian deaths and damage to property, even when considerable, do not necessarily mean that violations of international law as such have occurred. In particular, the principles of distinction and proportionality are only violated when there is an intention to target civilians or to target military objectives with the knowledge that it would cause harm to civilians that is excessive in relation to the anticipated military advantage. Hamas' deliberate attacks against Israel's civilian population violated such standards and thus constituted a violation of international law. The IDF's attacks directed against Hamas military targets, despite their unfortunate effects on Gaza's civilian population, did not.

11. The Paper also gives a detailed account of Israel's efforts to coordinate and facilitate humanitarian relief and assistance to the Palestinians in Gaza. It also documents repeated Hamas abuses of these arrangements, including Hamas' launching of attacks during humanitarian pauses and directed at crossing points, and Hamas' hijacking and theft of humanitarian supplies intended for those in need.

12. The Paper also gives previously unpublished details of the multiple IDF investigations into allegations made by various groups that violations of the law were committed. IDF investigative teams are currently examining approximately 100 complaints, including 13

criminal investigations opened so far, and will examine more complaints if and when filed. The Paper sets forth the preliminary findings of some of the IDF field investigations, including investigations relating to allegations concerning 1) incidents where U.N. and international facilities were fired upon or damaged; 2) incidents involving shooting at medical facilities, buildings, vehicles, and crews; 3) certain incidents in which many civilians were harmed; 4) the use of munitions containing white phosphorous; and 5) destruction of private property and infrastructure by ground forces. It provides as much information as can be released with regard to the investigations currently underway without comprising the integrity and independence of these investigations.

13. The field investigations constitute only the preliminary stage of an extensive legal process. They are subject to independent review by the Military Advocate General, who may order the opening of a criminal investigation. The decisions of the Military Advocate General are subject to review by the Attorney General and may also be reviewed by the Israeli Supreme Court (sitting as the High Court of Justice). Israel's system for investigating alleged violations, including its judicial review process, is internationally recognised as thorough and independent; its procedures and institutions are similar to those in other Western countries.

14. Israel deeply regrets the civilian losses that occurred during the Gaza Operation. But Israel has both the responsibility and the right under international law, as does every State, to defend its civilians from intentional rocket attacks. It believes that it discharged that responsibility in a manner consistent with the rules of international law. Israel is committed to a thorough investigation of all allegations to the contrary and to making the results of these investigations and subsequent reviews public when they are completed.

II. INTRODUCTION

15. Democratic States today frequently face attacks from non-State actors seeking to terrorise civilian populations. For eight years, Hamas, a terrorist organisation avowedly dedicated to the destruction of Israel, has launched deliberate attacks on Israeli civilians, from suicide bombings to incessant mortar and rocket attacks. Since October 2000, Hamas and other terrorist organisations unleashed more than 12,000 rockets and mortar rounds from the Gaza Strip at towns in Southern Israel. Even though Israel withdrew from the Gaza Strip in August 2005, the attacks continued. Even though Israel made repeated diplomatic efforts, including appeals to the U.N. Security Council, to end the violence, the attacks continued. The death, injuries and — as Hamas intended — terror among the civilian population, including children, were intolerable, particularly as Hamas increased the range and destructiveness of its attacks.

16. Under international law, Israel was entitled to take military action to stop the thousands of deliberate rocket and mortar attacks that had killed or wounded Israeli civilians and that threatened and terrorised hundreds of thousands more. Israel is a sovereign State, with a moral and legal obligation, and an inherent right under international law, to protect its citizens from terrorism. No nation is required to submit to terrorist attacks. Every nation has a right and an obligation to stop them. After exhausting other options, that is what Israel sought to do in its operation in Gaza, between 27 December 2008 and 17 January 2009 (the "Gaza Operation," also known as "Operation Cast Lead") — to eliminate the weapons and the infrastructure that Hamas had used to launch attacks against Israeli civilians on thousands of occasions, and to prevent those attacks from recurring.

17. For a State, like Israel, that recognises its obligation to minimise harm to civilians, responding to and preventing such attacks poses operational, legal and moral challenges. Hamas amplified those challenges, by using the civilian population in Gaza to shield its military operations during Israel's recent intervention. Confronted with those tactics, Israel took extraordinary steps to avoid harming civilians in its Gaza Operation while protecting its own population from continued deliberate attacks and its soldiers from hostile fire.

18. Nonetheless, in many cases, the results of the Gaza Operation were unfortunate. Civilians were killed or injured, and private property as well as Gaza's public infrastructure were damaged. Israel in no way seeks to dismiss those tragedies or to devalue the human loss incurred. As then-Prime Minister Olmert said to the citizens of Gaza, "Your suffering is terrible. Your cries of pain touch each of our hearts. On behalf of the Government of

Israel, I wish to convey my regret for the harming of uninvolved civilians, for the pain we caused them, for the suffering they and their families suffered as a result of the intolerable situation created by Hamas."[1] But as tragic as those casualties were, the mere fact that they occurred does not in and of itself mean that Israel did not have a right — indeed a duty — to protect its citizens against the incessant terror emanating from Gaza, or that in its various operations it violated applicable international law norms while doing so, as some have been quick to accuse.

19. Compliance with applicable international law norms is a cornerstone in the IDF rules and policies. In the aftermath of the Gaza Operation, IDF launched multiple investigations into the allegations made by various groups that the IDF had violated international law. Many of the IDF investigations are continuing, and even those for which the first stage — an IDF field review — is now complete, will be subject to further independent review, first by the Military Advocate General, and thereafter is subject to the review of the Attorney General of Israel as part of the civilian legal system. In addition, they ultimately may be subject to review by the Supreme Court, if such a petition is filed. Israel is committed to fully and fairly investigating all allegations of misconduct, and to taking appropriate action, including sanctioning IDF commanders or soldiers found to have committed offences. This is no hollow promise. Numerous outside observers have confirmed the rigor of Israel's system for investigating such allegations including, ultimately, judicial review of the conclusions. Indeed, the international respect for the Israeli system was apparent just a few weeks ago when the National Court of Spain rejected Spanish jurisdiction over a case involving previous incidents in Gaza, on the basis of a finding that Israel was investigating the incidents itself and that Israel's system of appellate review was independent and impartial.

20. Some in the international community nonetheless appear to have reached conclusions without waiting for the evidence — to have inferred from the fact of civilian casualties and the damage to civilian property that Israel violated international law. Reports by non-governmental organisations and others have levelled numerous charges about specific incidents in the Gaza Operation. Israel has not yet fully reviewed those claims, although processes are underway to do that. But because of the rush to judgment and the myriad accusations of legal violations, generally without pause to consider what International Humanitarian Law actually requires, it is important to release this Paper now, to place the

[1] A speech made by the then-Prime Minister, Ehud Olmert on 17 January 2009 following the Cabinet meeting that day, during which the Cabinet decided to enact an Israeli ceasefire.

Gaza Operation into its proper legal and factual context and to answer propaganda and prejudice with facts and law.

21. It should be noted that presenting a full and accurate picture of the conflict is a complex and challenging task. Hamas' *modus operandi* means that damage to civilian structures in Gaza remains apparent for all to see, while the weapons and terrorists they concealed there are long gone. Moreover, making public the sensitive information needed to present a full picture — including the intelligence on which operational decisions were made and the techniques used to counter Hamas' tactics — is fraught with security concerns. The conflict with Hamas is not over. It remains a terrorist organisation and is in control of the Gaza Strip. And it still seeks the destruction of Israel. For Israel to reveal its own strategies and capabilities, or how Hamas' weapons succeeded or failed, would enable Hamas further to refine its tactics and threaten the lives of Israeli soldiers and civilians.

22. Nonetheless, this Paper has assembled and analysed a substantial record on a number of specific incidents subject to the greatest public criticism. That record makes clear that the principal charges regarding the Gaza Operation rest on incomplete and often inaccurate information, that they do not take into account the devastating impact of Hamas' abuses on the population of Gaza, and that they do not reflect the applicable principles of the Law of Armed Conflict. Notwithstanding the tragic civilian casualties in Gaza, the evidence analysed thus far demonstrates that Israel took extensive measures to comply with its obligations under international law.

23. More specifically, Hamas chose deliberately and systematically to exploit Palestinian civilians as shields for military targets in the IDF's Gaza Operation. It did not provide any protection for the civilian population. Instead, it exposed the Palestinian civilian population of Gaza to additional harm. With the intent of exploiting the civilian population, Hamas stored explosives and weapons in and around schools, mosques, U.N. facilities and homes, even though other storage sites were available. It used medical facilities and ambulances for military purposes, exploiting the protected status of medical sites and restricting effective care for civilians. It repeatedly fired mortars and other weapons from locations adjacent to U.N. schools and medical facilities, and from the roofs of residential apartment buildings. It used individual civilians as human shields to protect Hamas terrorists. And it turned civilian neighbourhoods into battlefields, by digging warrens of tunnels lined with explosives and booby-trapping residential buildings in order to cause their collapse at the outset of any IDF incursion. In short, Hamas made the likelihood of harm to the citizens and homes of Gaza the centrepiece of its defensive strategy, to inhibit Israeli attacks and to score propaganda coups and vilify Israel when

Israel tried to attack a legitimate military objective and unintended civilian casualties resulted.

24. Hamas' tactics, however, could not legally prevent Israel from defending its own population, nor bar the IDF from protecting its soldiers under fire. Israel's obligations under International Humanitarian Law were, *inter alia*, to direct attacks against combatants and military objects, to take precautions that were feasible and that would still allow the IDF to achieve its legitimate military objectives, and not to carry out attacks which were likely to cause collateral damage excessive in relation to the military advantage anticipated. Israel fulfilled this obligation. The IDF chose its targets against Hamas terrorists, materiel, and facilities in accordance with international law and as carefully as possible despite a rapidly unfolding situation. The Israeli armed forces dropped leaflets warning occupants to stay away from Hamas strongholds and leave buildings that Hamas was using to launch attacks. It attempted to contact occupants by telephone, to warn of impending attacks on particular buildings. It fired warning shots that hit the roofs of structures before attacking them. It checked and double-checked the coordinates of weapons firing on IDF positions. And it attempted to use the most precise weapons available, applying no more force than necessary to achieve its legitimate military objectives. Israel's use of shells containing white phosphorous as a smoke obscurant, for example, was consistent with — and not prohibited by — applicable rules of international law and permitted the IDF to avoid the use of high explosives and munitions that would have otherwise been necessary to protect Israeli forces.

25. These IDF's mode of operation reflected the extensive training of IDF soldiers to respect the obligations imposed under international law and to adhere to the IDF Code of Ethics. Further, the conduct of the IDF in the Gaza Operation evidenced the longstanding efforts in the IDF to reinforce awareness of these obligations among commanders and soldiers, to investigate alleged infringements, and to punish violations. The IDF's procedures are very similar to those of other democracies.

26. Certainty and precision, however, are elusive in military conflicts, and, in the heat of battle, commanders must make agonising, complex and hazardous decisions affecting the lives of their soldiers, the achievement of their military mission and the safety of civilians. Experience — including the NATO bombings of the former Yugoslavia and operations in Afghanistan and Iraq by the United States, the United Kingdom and others — has shown that even the most sophisticated systems and the most rigorous training cannot prevent all civilian casualties and damage to public and private property. Hamas' cynical choice of tactics — including the unlawful strategy of deliberately shielding their operatives and

munitions in civilian buildings and protected sites — made difficult, complex and hazardous battlefield decisions by IDF even *more* difficult, *more* complex, and *more* hazardous. While Hamas has inflated the number of casualties to inflame world opinion, Israel is nevertheless acutely aware that many innocent Palestinians were killed or injured. The fact that civilian casualties were the inevitable result of Hamas' criminal mode of operations, however, does not diminish Israel's deep sadness regarding each and every one of them. Had it been possible to protect the civilian population of Israel from Hamas' terrorist attacks without civilian casualties in Gaza, Israel would have done so.

III. THE APPLICABLE LEGAL FRAMEWORK

27. Israel faces many of the problems faced by other democratic States, as they try to conduct military operations against terrorists who violate the most fundamental principles of international law. The purpose of this Paper is not to set forth an exhaustive analysis of the relevant law regarding those military operations. Israel has articulated in other forums, including its Supreme Court, its long-standing commitment to applicable human rights standards and humanitarian principles relevant to situations of armed conflicts. This Paper will focus on, and then apply, certain basic legal principles applicable to the Gaza Operation. These principles are described further in Sections IV.C and V.A. At the outset, though, it is important to emphasise four basic propositions.

28. First, the applicable legal framework for assessing the recent operations in Gaza is the "Law of Armed Conflict," also known as "International Humanitarian Law."[2] According to the decision of the International Criminal Tribunal for the former Yugoslavia ("ICTY") in the *Tadić* case, "an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State."[3] The conflict between Israel and Hamas in Gaza meets this definition.[4] Hamas is a highly organised and well-armed group that uses armed force against Israel, and, indeed, considers such armed struggle to be its primary mission. By any measure, the conflict between Israel and Hamas has been protracted, spanning many years and intensifying in recent years as Hamas tightened its unlawful grip on Gaza.

29. Generally, international law recognises two kinds of armed conflicts: "international armed conflict" and "non-international armed conflict."[5] Each has its own rules, although many of the basic provisions are common to both. It is not yet settled which regime applies to cross-border military confrontations between a sovereign State and a non-State terrorist armed group operating from a separate territory.

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[2] This Paper will use the term "Law of Armed Conflict" in its ordinary sense — describing the legal obligations of parties to an armed conflict in the course of their military operations. International Humanitarian Law is used by many commentators and countries as an interchangeable term. Israel, like many other countries, prefers the term Law of Armed Conflict.

[3] *Prosecutor v. Tadić*, International Criminal Tribunal for the former Yugoslavia ("ICTY"), Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, at ¶ 70, 2 October 1995.

[4] For the sake of convenience, this Paper hereafter refers to Hamas only, but this should be seen as a reference to all terrorist organisations that took part in the fighting in Gaza during the recent conflict.

[5] The law of international armed conflicts has traditionally been used for fighting across borders between sovereign States, while the law of non-international armed conflicts has traditionally been applied within the boundaries of a State, such as civil wars or insurgencies.

30. In this case, the Gaza Strip is neither a State nor a territory occupied or controlled by Israel.[6] In these *sui generis* circumstances, Israel as a matter of policy applies to its military operations in Gaza the rules of armed conflict governing both international and non-international armed conflicts. At the end of the day, classification of the armed conflict between Hamas and Israel as international or non-international in the current context is largely of theoretical concern, as many similar norms and principles govern both types of conflicts.

31. Some of the rules governing the use of force in armed conflicts are set forth in treaties, such as the Geneva Conventions of 1949 and the Regulations annexed to the Fourth Hague Convention of 1907.[7] Others have gained acceptance by the practice of the international community and become part of customary international law. The Israeli High Court has ruled that these customary international law rules bind Israel under both international law and Israeli law.[8] In particular, Israel's High Court of Justice has confirmed that in the ongoing armed conflict with Palestinian terrorist organisations, including Hamas, Israel must adhere to the rules and principles in (a) the Fourth Geneva Convention,[9] (b) the Regulations annexed to the Fourth Hague Convention (which reflect customary international law), and (c) the customary international law principles reflected in *certain* provisions of Additional Protocol I to the Geneva Conventions on 1949.[10] Israel is not a party to the Additional Protocol I, but accepts that some of its provisions accurately reflect customary international law.[11]

32. The second basic proposition is that the actions of Hamas must also be measured against accepted principles and applicable rules of international law. As the Appeals Chamber of the Special Court for Sierra Leone held in 2004, "it is well settled that all parties to an

[6] The High Court of Justice recognized last year that "since September 2005 Israel no longer has effective control over what happens in the Gaza Strip," and thus no longer can be considered an "occupying power" under international law. *Jaber Al-Bassiouni v. The Prime Minister of Israel,* HCJ 9132/07 at ¶ 12 (30 January 2008), available at http://elyon1.court.gov.il/verdictsSearch/EnglishStaticVerdicts.html.

[7] Hague Convention (IV) Respecting the Laws and Customs of War on Land (1907) (hereafter "Hague Convention IV").

[8] *Public Committee against Torture in Israel v. Government of Israel*, HCJ 769/02 at ¶ 19 (11 December 2005).

[9] IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949) (hereafter "Geneva Convention IV").

[10] Additional Protocol I to the Geneva Convention of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts, 8 June 1977 (hereafter "Additional Protocol I").

[11] *Public Committee against Torture in Israel v. Government of Israel*, HCJ 769/02 at ¶ 20 (11 December 2005).

armed conflict, whether states or non-state actors, are bound by International Humanitarian Law, even though only states may become parties to international treaties."[12]

33. The third core proposition in this Paper is that the Law of Armed Conflict balances two competing considerations. According to Judge Greenwood, "[i]nternational humanitarian law in armed conflicts is a compromise between military and humanitarian requirements. Its rules comply with both military necessity and the dictates of humanity."[13]

34. The final core proposition that runs through this Paper is that, while the principles of customary international law may be "basic" and can be simply stated, they nevertheless must be applied with analytical rigor. Reports by non-governmental organisations and rapporteurs and committees acting under mandates from international organisations too often jump from reporting tragic incidents involving the death or injury of civilians during armed combat, to the assertion of sweeping conclusions within a matter of hours, days or weeks, that the reported casualties *ipso facto* demonstrate violations of international law, or even "war crimes."[14] Often, these leaps of logic bypass the most basic steps, such as identification of the specific legal obligation at issue and explanation of how it was violated. The depth of feeling in the face of civilian losses is understandable, but it does not excuse this rush to judgment. It is a fundamental precept of the rule of law that any legal inquiry about events relating to armed conflicts cannot assume the conclusion, particularly a conclusion that — as shown below — proper application of the law does not sustain.[15]

35. The appropriate starting point for a proper analysis is the central distinction between the legality of a State's resort to force in particular circumstances *(jus ad bellum*), and the legality of particular uses of force during hostilities *(jus in bello*). Again, too often the two inquiries are collapsed into one, such that concerns about particular incidents — which

[12] *Prosecutor v. Sam Hinga Norman*, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), at ¶ 22, 31 May 2004. *See also* Christopher Greenwood, *Scope of Application of Humanitarian Law*, *in* THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 45, 76 (Dieter Fleck ed., 2d ed. 2008) (explaining that "[t]he obligations created by international humanitarian law apply not just to states but to individuals and to non-state actors such as a rebel faction or secessionist movement in a civil war.").

[13] Christopher Greenwood, *Scope of Application of Humanitarian Law*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 37 (Dieter Fleck ed., 2d ed. 2008).

[14] *See, e.g.,* Report, *Operation Cast Lead: 22 Days of Death and Destruction*, Amnesty International (29 June 2009); Report of the Independent Fact Finding Committee on Gaza, *No Safe Place.*, League of Arab States (30 April 2009); Report, *Rain of Fire: Israel's Unlawful Use of White Phosphorus in Gaza*, Human Rights Watch (March 2009).

[15] *Cf.* Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, 14 June 2000 (hereafter "NATO Bombings, Final Report to the ICTY Prosecutor"), ¶ 51, available at http://www.un.org/icty/pressreal/nato061300.htm ("[m]uch of the material submitted to the OTP consisted of reports that civilians had been killed, often inviting the conclusion to be drawn that crimes had therefore been committed." Yet in truth, "[c]ollateral casualties to civilians and collateral damage to civilian objects can occur for a variety of reasons.").

may involve the decisions individual commanders or soldiers make in the midst of battle — prompt sweeping assertions about the legality of military operations as a whole. This Paper treats these separate inquiries separately. Section IV addresses issues regarding the resort to force, based on the broader context of the Gaza Operation. Section V addresses issues regarding particular uses of force.

IV. THE CONTEXT OF THE OPERATION

A. The Ongoing Armed Conflict with Hamas

36. Israel has been engaged in an ongoing armed conflict with Hamas and other Palestinian terrorist organisations since the massive outbreak of armed terrorist violence and hostilities in October 2000, what the Palestinians have termed the *Al Aqsa Intifadah*. The terrorist attacks against Israelis have included suicide bombings in the heart of Israeli cities, shooting attacks on vehicles, murders of families in their homes, and unrelenting rocket and mortar fire on Israeli towns and villages — all told resulting in the deaths of more than 1,100 Israelis, the wounding of thousands more, and the terrorisation of millions.

37. Hamas has launched terrorist attacks on Israel's civilian population as a weapon of choice in order to achieve its strategic goals – to disrupt negotiations between Israel and the Palestinian Authority and to prevent a peaceful resolution of the conflict in the Middle East. Hamas has sought to paralyse normal civilian life. By murdering Israelis and threatening civilian communities in Israel. Hamas has pushed its agenda as expressed in its founding Charter, namely, to destroy and inflict terror upon civilian communities in Israel, and Hamas has sought to promote its long-term political agenda, as stated in its Charter, to exterminate the State of Israel and establish a Muslim state over all the territory of historic "Palestine."[16] The Hamas Charter begins by declaring that "Israel will arise and continue to exist until Islam wipes it out," and rejects all "[peace] initiatives, the so-called peaceful solutions and international conferences," because they "contradict the Islamic Resistance Movement's ideological position." It emphasises that "there is no solution to the Palestinian problem except Jihad . . . the international initiatives, suggestions and conferences, they are an empty waste of time, and complete nonsense."[17] And it calls for the killing of Jews because they are Jews.[18] In other words, Hamas does not acknowledge the right of Israel to exist, nor any role for diplomacy, either direct or indirect. Its Charter espouses a militantly anti-Semitic world view, stating that "[n]o war takes place anywhere in the world without [the Jews] behind the scenes having a hand in it."[19]

38. Hamas has chosen, in particular, to launch extensive and almost incessant rocket and mortar attacks against civilian communities in Southern Israel. For the eight years

[16] The Hamas Charter is available at http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/pdf/hamas_charter.pdf.

[17] Hamas Charter, art. 13. The Oxford English Dictionary (2d ed. 1989) defines Jihad as "[a] religious war of Muslims against unbelievers in Islam, inculcated as a duty by the Koran and tradition."

[18] Hamas Charter, art. 7.

[19] Hamas Charter, art. 22.

preceding the Gaza Operation at issue in this Paper, Hamas and other terrorist organisations (such as "Palestinian Islamic Jihad" and the "Popular Resistance Committees") launched more than 12,000 rockets and mortar rounds from the Gaza Strip at the towns in Southern Israel. The daily attacks began in 2000 and have continued since that time with only brief respites in the violence.

39. In August 2005 Israel withdrew from the Gaza Strip, terminating its civilian and military presence there. Hamas exploited this disengagement to promote its terrorist agenda and publicly endorsed terrorism as the preferred tool for achieving its political goals. For instance, on 30 March 2007 Hamas spokesman Ismail Radwan issued a call to "liberate Palestine" by attacking and killing Jews rather than by engaging in diplomatic efforts.[20]

40. In June 2007 Hamas executed a violent and bloody *coup d'état* in the Gaza Strip, persecuting some of the leaders and members of Fatah and the legitimate Palestinian Authority, neutralising the Palestinian Authority's military and political power and setting up a radical Muslim entity in its place. Since then, Hamas' control of Gaza has been due not to the election of 2006, but to the *coup*. The new entity, aided and abetted by Iran and Syria, wages an ongoing terrorist campaign against Israel, and operates separately and in defiance of the legitimate Palestinian Authority in the West Bank. Hamas has fortified the Gaza Strip as a launching pad for terrorist attacks against residential communities in Southern Israel.

B. Hamas' Increasing Attacks on Israel During 2008

41. Following Hamas' violent takeover of the Gaza Strip, the frequency and intensity of rocket and mortar attacks on Israel increased dramatically. In 2008 alone, nearly 3,000 rockets and mortars were fired,[21] despite the six relatively calm months of the lull ("*Tahadiya*"),[22] which Hamas and other terrorist organisations used to rearm and prepare for the next round of hostilities. On 19 December 2008, Hamas unilaterally terminated the lull and resumed the use of the Gaza Strip as a launching pad for terrorist activities. Consequently, Israeli civilians, confronted with daily attacks on their homes, schools, kindergartens, shops,

[20] *See* Intelligence and Terrorism Information Center, *Hamas spokesman Ismail Radwan delivered a hate-filled sermon…*, 11 April 2007, available at http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/html/hamas_e_sermon.htm.

[21] *See* Intelligence and Terrorism Information Center, Summary of Rocket Fire and Mortar Shelling in 2008, 1 January 2009, available at http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/pdf/ipc_e007.pdf.

[22] On 17 June 2008, after several months of indirect contacts between Israel and Hamas through Egyptian mediators, Egypt and Hamas individually announced that a lull arrangement had been reached between Israel and the Palestinians in the Gaza Strip. The lull arrangement was based on unwritten understandings and called for the cessation of the fighting in the Gaza Strip.

clinics, factories and other civilian infrastructure, raced to bomb shelters several times a day and lived in constant fear of where the next rockets would hit.

42. Responding to the ongoing threat of rocket and mortar attacks on civilian communities in Southern Israel, Israeli authorities took a variety of measures to protect its citizens and to reduce the risk to civilians, with special attention being given to sensitive facilities, such as educational institutions and hospitals. These efforts included the establishment of public shelters and fortification of public institutions, as well as the instruction of the population in risk how to act in times of emergency.

43. In light of the growing number of rocket attacks in the latter part of 2008, the Israeli Government and the Home Front Command stepped up the efforts to protect Israeli citizens living within range of rocket fire. On 7 December 2008, the Government decided to approve a special budget to fortify existing shelters in localities within a 4.5 kilometre range of the Gaza border at a cost of 327 million NIS (83 million U.S. Dollars). This project was carried out with the cooperation of various government agencies, including the Ministry of the Interior and the Ministry of Construction and Housing, which provided expedited permits to allow local municipalities to execute the decision.[23]

44. Furthermore, the Home Front Command distributed informational booklets to all homes within rocket range. These booklets included emergency contact numbers, updated instructions on how to choose and build a "safe space" within a house, as well as thorough instructions on behaviour during rocket and mortar attacks. Civilians were instructed regarding behaviour in a variety of situations, including while driving, while at home and while in an open space. Depending on their distance from Gaza, citizens were advised regarding the amount of time available to seek shelter from the moment a siren sounded. Road signs were posted along roads within rocket range, advertising a designated radio station which broadcast the siren in the event of rocket fire. Signs clearly marking the nearest shelter were posted in all public spaces, including supermarkets, shopping malls, educational facilities, government buildings and hospitals.

45. To ensure accessibility to this information by all the citizens under the threat of rocket and mortar attacks, the Home Front Command provided detailed instructions online in Hebrew, Arabic, English, Russian, Amharic, French and Thai. Instructional videos on "How to

[23] Based on information currently available, Israel's investment in shielding and protecting schools and civilians' houses between the years 2005 – 2011 will amount to approximately 1,798 million NIS ($461 million). In 2008 alone, 260.5 million NIS ($66.79 million) were invested in such shielding, while 630 million NIS ($161.5 million) were further allocated for civilian shielding projects during 2009, 277 million NIS ($71 million) during 2010 and 200 million NIS ($51.3 million) during 2011.

Behave in a Qassam Rocket or Mortar Attack" were also available online in a number of languages.[24] During the operation in Gaza, the Home Front Command also published detailed daily instructions regarding the necessary precautions. Civilians were discouraged from gathering outside and encouraged to always stay close to a fortified shelter. Schools that did not have adequate shelters and facilities were shut down for the duration of the campaign.

46. The Home Front Command used the most sophisticated equipment to detect the launching of rockets and sounded air raid sirens whenever a rocket launch was detected. These sirens could, at most, provide advance notice seconds before a rocket struck, and had no way of providing advance warning when a mortar was launched. Nevertheless, were it not for such warnings, as well as the use of other measures discussed above, the human casualties from Hamas' bombardment undoubtedly would have been substantially greater. Even so, many people and buildings have survived by pure chance. The number of such close calls is enormous. As of July 2008, *before* the escalation that led to the Gaza Operation, nearly 92 percent of the residents of Sderot (a city of nearly 20,000 persons) had heard or seen a rocket land nearby, 56 percent had shrapnel fall on their homes, and 65 percent knew someone who had been injured.[25]

47. During these eight years of fire, the impact on the Israeli population of the daily barrage of rockets was debilitating. The tactics are termed "terrorism" for a reason. Studies have documented an entire generation of children traumatised by the terror of rocket strikes and the helplessness of adults to ensure their safety.[26] Hamas increased the terror engendered by its attacks by timing them to coincide with the time when children were on their way to school in the morning or were returning in the afternoon.

48. Hamas' attacks inflicted death, injury and extensive property damage,[27] forced businesses to close and terrorised tens of thousands of residents into abandoning their homes. Statistics do not capture the full impact of these terrorist acts.[28]

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[24] The video is available at http://www.oref.org.il/315-en/PAKAR.aspx.

[25] Toni O'Loghlin, *Middle East Deadly Divide: Children of Conflict*, The Guardian, 15 July 2008, available at http://www.guardian.co.uk/world/2008/jul/15/israelandthepalestinians.middleeast.

[26] According to one study of the psychological effects on the residents of Sderot, "children aged seven to 12 suffered most, with 74% experiencing extreme fear, 67% refusing to talk or visit places that remind them of an attack, and 57% enduring nightmares and other sleep difficulties." *Id.*

[27] Based on information currently available, due to the incessant deliberate rocket and mortar attacks on Southern Israel, between 2006 and July 2009, approximately 13,000 compensation claims due to property damage were submitted to the Israel Tax Authority, and approximately 410 million NIS ($105 million) was granted, of which approximately 290 million NIS ($74.3 million) was a direct result of the Gaza Operation. It is estimated that the damages will amount to approximately 500 million NIS ($128.2 million). As for direct damage caused to buildings or

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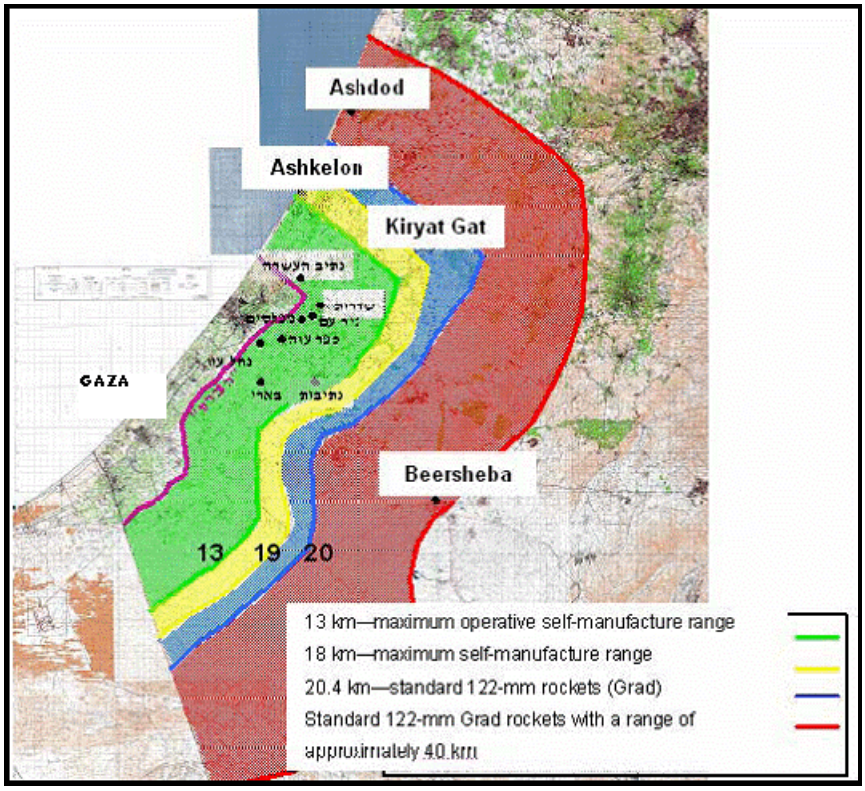
49. Over time, Hamas extended the range of the rocket fire, by late 2008 reaching as far as some of Israel's largest cities, including Ashkelon (with a population of over 110,000), Ashdod (with a population of over 185,000), *and* threatening one million Israeli civilians — almost 15 percent of the Israeli population — as well as Israeli strategic installations, such as major electricity and gas-storage facilities. Hamas frequently fired rockets towards these installations, even though some of these facilities served the Palestinian population in Gaza. The following map illustrates the increasing range of Hamas' daily rocket attacks, super-imposed upon a map of Southern Israel identifying some of the major population centres exposed to such attacks.



► More than 200 Israeli cities and towns are within range of Hamas rockets from Gaza

50. These rocket attacks were intended to reach strategic sites, such as the Ashdod port and power stations in Ashkelon and Ashdod, a direct hit on which would cause substantial

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property as a result of a rocket or mortar attacks, 2,400 claims, amounting to a total of approximately 31 million NIS ($7.95 million) were submitted in 2008, in addition to 2,300 additional claims between January and July 2009, of which a total of approximately 25 million NIS ($6.4 million) was granted thus far.

[28] Reports from NGOs and the press have confirmed the physical and mental toll taken on Israeli civilians, from attacks that were deliberately directed at the civilian population. *See, e.g.,* Personal Stories, Natal: Israel Trauma Center for Victims of Terror and War, available at http://natal.org.il/English/?CategoryID=260.

harm. Hospitals within target range included the Barzilai Medical Center in Ashkelon (with capacity of 500 hospitalisation beds) and the Soroka University Medical Center in Be'er Sheva (with a capacity of 1,000 hospitalisation beds). Educational institutions within the 40-kilometre rocket range of Hamas' mortar and rocket attacks included the Ben-Gurion University in Be'er Sheva (almost 20,000 students) and several academic colleges. One of these colleges — Sapir Academic College (with more than 8,000 students) has been regularly targeted by Hamas, and on 27 February 2008, a Qassam rocket killed an Israeli citizen in the college compound. There are also 2,200 primary and secondary schools within the range of the rockets. These institutions include 1,701 kindergartens (with 52,226 children) and 499 schools (with 196,466 children). There are a total of 248,692 students within rocket range.

51. Had the onslaught of rocket attacks continued unabated, it was only a matter of time before a direct hit on a school, hospital or other public facility would have caused extensive loss of life. It was inevitable that civilian casualties, economic loss and the overall impact of these terrorist assaults would have mounted.

52. To stop the attacks, Israel exhausted a variety of non-military options before launching air and later ground operations against Hamas in December 2008 and January 2009. In the eight years preceding Israel's decision to launch the Gaza Operation, Israel sent dozens of letters to the Secretary General of the United Nations and the President of the Security Council, describing the Qassam rocket shelling of Israeli town and cities and suicide attacks on Israeli civilians.[29] Israel sent similar letters to the Under-Secretary General for

[29] *See, e.g.,* Letters of 3 October 2000 (U.N. Doc. S/2000/937 • A/55/441), 7 October 2000 (U.N. Doc. S/2000/970 • A/55/460), 11 October 2000 (U.N. Doc. S/2000/980 • A/55/470), 12 October 2000 (U.N. Doc. S/2000/985), 20 October 2000 (U.N. Doc. S/2000/1007 • A/55/508), 2 November 2000 (U.N. Doc. S/2000/1065 • A/55/540), 20 November 2000 (U.N. Doc. S/2000/1108 • A/55/634), 22 November 2000 (U.N. Doc. S/2000/1114 • A/55/641), 29 December 2000 (U.N. Doc. S/2000/1252 • A/55/719), 1 January 2001 (U.N. Doc. S/2001/1198 • A/56/706), 2 January 2001 (U.N. Doc. S/2001/2 • A/55/725), 23 January 2001 (U.N. Doc. S/2001/71 • A/55/742), 25 January 2001 (U.N. Doc. S/2001/81 • A/55/748), 2 February 2001 (U.N. Doc. S/2001/103 • A/55/762), 9 February 2001 (U.N. Doc. S/2001/125 • A/55/777), 13 February 2001 (U.N. Doc. S/2001/132 • A/55/781), 14 February 2001 (U.N. Doc. S/2001/137 • A/55/787), 2 March 2001 (U.N. Doc. S/2001/187 • A/55/819), 6 March 2001 (U.N. Doc. S/2001/193 • A/55/821), 7 March 2001 (U.N. Doc. S/2001/197 • A/55/823), 14 March 2001 (U.N. Doc. S/2001/24 • A/55/730), 19 March 2001 (U.N. Doc. S/2001/244 • A/55/842), 26 March 2001 (U.N. Doc. S/2001/278 • A/55/858), 27 March 2001 (U.N. Doc. S/2001/280 • A/55/860), 29 March 2001 (U.N. Doc. S/2001/291 • A/55/863), 16 April 2001 (U.N. Doc. S/2001/364 • A/55/901), 23 April 2001 (U.N. Doc. S/2001/396 • A/55/910), 1 May 2001 (U.N. Doc. S/2001/435 • A/55/924), 9 May 2001 (U.N. Doc. S/2001/459 • A/56/69), 11 May 2001 (U.N. Doc. S/2001/473 • A/56/72), 18 May 2001 (U.N. Doc. S/2001/506 • A/56/78), 25 May 2001 (U.N. Doc. S/2001/524 • A/56/80), 30 May 2001 (U.N. Doc. S/2001/540 • A/56/81), 4 June 2001 (U.N. Doc. S/2001/555 • A/56/85), 11 June 2001 (U.N. Doc. S/2001/580 • A/56/91), 13 June 2001 (U.N. Doc. S/2001/585 • A/56/92), 18 June 2001 (U.N. Doc. S/2001/604 • A/56/97), 19 June 2001 (U.N. Doc. S/2001/611 • A/56/98), 21 June 2001 (U.N. Doc. S/2001/619 • A/56/119), 2 July 2001 (U.N. Doc. S/2001/656 • A/56/131), 3 July 2001 (U.N. Doc. S/2001/662 • A/56/138), 13 July 2001 (U.N. Doc. S/2001/696 • A/56/184), 17 July 2001 (U.N. Doc. S/2001/706 • A/56/201), 26 July 2001 (U.N. Doc. S/2001/737 • A/56/223), 27 July 2001 (U.N. Doc. S/2001/743 • A/56/225), 6 August 2001 (U.N. Doc. S/2001/768 • A/56/272), 7 August 2001 (U.N. Doc. S/2001/770 • A/56/275), 9 August 2001 (U.N. Doc. S/2001/775 • A/56/280), 10 August 2001 (U.N. Doc. S/2001/780 • A/56/286), 14 August 2001 (U.N. Doc. S/2001/787 • A/56/294), 28 August 2001 (U.N. Doc. S/2001/825 • A/56/324), 30 August 2001 (U.N. Doc. S/2001/834 • A/56/325), 5 September 2001 (U.N. Doc. S/2001/840 •

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Political Affairs and to the United Nations High Commissioner on Human Rights.[30] In the year 2008 alone, Israel sent 29 letters to the U.N. Secretariat, regarding the increasing toll in Israel of Hamas' rocket and mortar attacks and other Palestinian violence and terrorism.[31]

53. These letters documented the escalation of rocket and mortar shell attacks launched from the Gaza Strip and targeting the civilian population in Southern Israel. Seeking to preserve the *Tahadiya* (lull) negotiated in June 2008 through Egyptian mediators, these letters repeatedly affirmed Israel's desire to find a non-violent solution in the face of this ongoing and intensifying terrorist activity. They also, however, referenced Israel's inherent right to defend itself and its citizens from such armed attacks, and stated that Israel would not indefinitely tolerate a situation where Israeli citizens became de facto hostages of a terrorist organisation. Israel repeatedly noted the persistence of terrorist attacks even after its disengagement from the Gaza Strip.

54. These letters were accompanied by numerous other diplomatic overtures, including through intermediaries, as well as public statements of Israeli officials and appeals by Israel's Ambassadors and representatives at the various U.N. bodies, primarily the Security Council. They were a clear indication of Israel's genuine will, not only to caution against the escalating situation, but also to exhaust all diplomatic channels prior to its realisation that it was necessary to launch a wide-ranging military operation in Gaza.

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Doc. S/2006/502 • A/60/935), 10 October 2006 (U.N. Doc. S/2006/798 • A/61/507), 14 November 2006 (U.N. Doc. S/2006/887 • A/61/574), 15 November 2006 (U.N. Doc. S/2006/891 • A/61/578), 24 November 2006 (U.N. Doc. S/2006/916 • A/61/594), 5 December 2006 (U.N. Doc. S/2006/941 • A/61/608), 19 December 2006 (U.N. Doc. S/2006/1000 • A/61/647), 26 December 2006 (U.N. Doc. S/2006/1029 • A/61/681), 19 January 2007 (U.N. Doc. S/2007/23 • A/61/705), 7 February 2007 (U.N. Doc. S/2007/60 • A/61/729), 22 February 2007 (U.N. Doc. S/2007/101 • A/61/755), 7 March 2007 (U.N. Doc. S/2007/129 • A/61/787), 4 September 2007 (U.N. Doc. S/2007/524 • A/61/1038), 12 December 2007 (U.N. Doc. S/2007/728 • A/ES-10/406), 19 December 2007 (U.N. Doc. S/2007/750 • A/ES-10/407), 15 January 2008 (U.N. Doc. A/62/647-S/2008/24), 4 February 2008 (U.N. Doc. A/62/673 - S/2008/72), 8 February 2008 (U.N. Doc. A/62/685 - S/2008/86), 11 February 2008 (U.N. Doc. A/62/688 - S/2008/90), 27 February 2008 (U.N. Doc. A/62/710 - S/2008/132), 13 March 2008 (U.N. Doc. A/62/735 - S/2008/169), 27 March 2008 (U.N. Doc. A/62/770 - S/2008/209), 9 April 2008 (U.N. Doc. A/62/797 - S/2008/233), 18 April 2008 (U.N. Doc. S/2008/261), 22 April 2008 (U.N. Doc. A/62/812 - S/2008/269), 25 April 2008 (U.N. Doc. A/62/820 - S/2008/277), 9 May 2008 (U.N. Doc. A/62/839 - S/2008/311), 12 May 2008 (U.N. Doc. A/62/840 - S/2008/316), 14 May 2008 (U.N. Doc. A/62/843 - S/2008/328), 5 June 2008 (U.N. Doc. A/62/857 - S/2008/367), 24 June 2008 (U.N. Doc. S/2008/420), 22 December 2008 (U.N. Doc. S/2008/807), 24 December 2008 (U.N. Doc. S/2008/814).

[30] *See, e.g.,* Letters of 13 March 2008, 18 December 2008, 29 December 2008.

[31] *See, e.g.,* Letters of 15 January 2008 (U.N. Doc. A/62/647-S/2008/24), 4 February 2008 (U.N. Doc. A/62/673 - S/2008/72), 8 February 2008 (U.N. Doc. A/62/685 - S/2008/86), 11 February 2008 (U.N. Doc. A/62/688 - S/2008/90), 27 February 2008 (U.N. Doc. A/62/710 - S/2008/132), 13 March 2008 (U.N. Doc. A/62/735 - S/2008/169), 27 March 2008 (U.N. Doc. A/62/770 - S/2008/209), 9 April 2008 (U.N. Doc. A/62/797 - S/2008/233), 18 April 2008 (U.N. Doc. S/2008/261), 22 April 2008 (U.N. Doc. A/62/812 - S/2008/269), 25 April 2008 (U.N. Doc. A/62/820 - S/2008/277), 9 May 2008 (U.N. Doc. A/62/839 - S/2008/311), 12 May 2008 (U.N. Doc. A/62/840 - S/2008/316), 14 May 2008 (U.N. Doc. A/62/843 - S/2008/328), 5 June 2008 (U.N. Doc. A/62/857 - S/2008/367), 24 June 2008 (U.N. Doc. S/2008/420), 22 December 2008 (U.N. Doc. S/2008/807), 24 December 2008 (U.N. Doc. S/2008/814).

55. In withdrawing from the Gaza Strip in 2005, Israel sought to de-escalate the conflict, and advance prospects for coexistence. Hamas, however, rejected coexistence, proclaiming its unyielding hostility to peace and its commitment to violence.

56. On 25 June 2006, Palestinians terrorists from Gaza attacked an Israeli army post on the Israeli side of the southern Gaza Strip border after crossing into Israel through an underground tunnel near the Kerem Shalom border crossing. During the attack the terrorists killed two IDF soldiers, wounded four others and captured the Israeli soldier Corporal Gilad Shalit. Since his abduction more than three years ago, Shalit has been held by Hamas incommunicado in an undisclosed location. Other than a single audio tape with Shalit sending a message appealing for his release, no sign or indication regarding his condition was conveyed by Hamas. Furthermore, throughout this period, all representatives, including the ICRC, have been denied any access to Shalit.[32] Appeals for his release made by other prominent members of the international community have also been rejected by Hamas.

57. In addition to its many diplomatic appeals to end Hamas' attacks on Israel, Israel joined several members of the international community in instituting economic sanctions against Hamas, while at the same time endeavouring to supply the Palestinian population with humanitarian relief.[33] Canada, the European Union, and the United States all designated Hamas as a terrorist organisation for purposes of sanctions, and Australia has so designated Hamas' military wing, the Izz al-Din al-Qassam Brigades.[34]

58. Neither Israel's diplomatic overtures, nor its pleas to the international community, nor sanctions imposed by numerous States, were able to stop the rocket attacks.

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[32] News Release, *Gaza: ICRC urges Hamas to allow captured Israeli soldier Gilad Shalit regular contact with his family*, ICRC, 18 June 2009, available at http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/palestine-news-180609?opendocument.

[33] For the legal analysis of these measures, see *Jaber Al-Bassiouni v. The Prime Minister of Israel*, HCJ 9132/07 (30 January 2008).

[34] *See* Currently listed entities, Public Safety Canada, available at http://www.publicsafety.gc.ca/prg/ns/le/cle-en.asp (Canada); Anton La Guardia, *Hamas is added to EU's blacklist of terror*, Telegraph, 12 September 2003, available at http://www.telegraph.co.uk/news/worldnews/middleeast/israel/1441311/Hamas-is-added-to-EUs-blacklist-of-terror.html and *EU blacklists Hamas political wing*, BBC News, 11 September 2003, available at http://news.bbc.co.uk/2/hi/middle_east/3100518.stm (the European Union); Country Reports on Terrorism 2005, United States Department of State, April 2006, at ¶¶ 132-136 and 183, available at http://www.state.gov/documents/organization/65462.pdf and *U.S. Welcomes European Union Designation of Hamas as Terrorists*, United States Department of State, 6 September 2003, available at http://www.america.gov/st/washfile-english/2003/September/20030906173844ynnedd0.1619074.html (the United States); and Listing of Terrorist Organisations, Australian National Security, available athttp://www.nationalsecurity.gov.au/agd/www/nationalsecurity.nsf/AllDocs/95FB057CA3DECF30CA256FAB001F7FBD?OpenDocument (Australia).

59. Hamas obtained military supplies through a vast network of tunnels and clandestine arms shipments from Iran and Syria. During this period in which Israel sought a diplomatic solution, the terrorist organisations in the Gaza Strip, with Hamas at the forefront, worked intensively to enlarge and upgrade their military capabilities and infrastructure.[35] These organisations abused the *Tahadiya* to smuggle in vast quantities of weapons through tunnels running under the border with Egypt.[36] They accelerated and enhanced their training, enlarged their underground network of tunnels used for smuggling and enabling terrorist attacks, acquired advanced weaponry, developed weapons of their own, and increased the range and lethality of their rockets.

60. On Friday, 19 December 2008, Hamas unilaterally announced the end of the *Tahadiya*, launching dozens of Qassam and longer-range Grad rockets against Israeli population centres. On 24 December 2008, the U.N. Secretary-General strongly condemned Hamas' actions and warned of further harm to civilians if the attacks did not cease immediately.[37] On that same day, 24 December 2008, thirty more rockets were launched into Israel.[38] Hamas' actions forced the residents of Southern Israel to resume a life of fear, with no sign that the attacks would abate and every indication they were intensifying. Some residents with the means to do so fled their homes for the relative safety of locations further north. Other civilians could not afford to leave, and led most of their daily life in underground shelters. Schools were often closed, as were many workplaces.

61. Hamas persisted in launching its rockets and mortar rounds at Israel. And, once the IDF began the Gaza Operation, Hamas stepped up its bombardment of Israeli towns even further, vowing that it would not stop shelling Israeli civilians. During this time alone, Hamas hit 101 of the 200 Israeli towns and villages in rocket range with a total of 617 rockets and 178 mortar shells. These included:

[35] *See* Intelligence and Terrorism Information Center, Exploitation of the 'Lull' by Hamas to Re-Arm, 21 August 2008, available at http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/pdf/hamas_e003.pdf.

[36] *See* Intelligence and Terrorism Information Center, Weapons-smuggling tunnels in Gaza, 28 October 2008, available at http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/pdf/ct_e009.pdf.

[37] The Secretary-General of the United Nations issued the following statement on 24 December 2008:

The Secretary-General is gravely concerned about the situation in Gaza and southern Israel and the potential for further violence and civilian suffering if calm is not restored. He condemns today's rocket attacks on southern Israel and calls on Hamas to ensure that rocket attacks from Gaza cease immediately.

See "New York, 24 December 2008 - Statement attributable to the Spokesperson for the Secretary-General on the Situation in Gaza and southern Israel," available at http://www.un.org/apps/sg/sgstats.asp?nid=3631.

[38] *See* Intelligence and Terrorism Information Center, Summary of Rocket Fire and Mortar Shelling in 2008, 1 January 2009, at 9, available at http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/pdf/ipc_e007.pdf.

- 25 towns within 7 kilometres of the Gaza Strip border – most rockets in this range hit the town of Sderot (19,400 residents) and the Kibbutzim A'lumin, Gevim and Mefalsim.

- 44 towns within 7-20 kilometres of the Gaza Strip border – most rockets in this range hit the towns of Ashkelon (110,000 residents) and Netivot (26,100 residents).

- 32 towns more than 20 kilometres from the Gaza Strip border – most rockets in this range hit the towns of Be'er Sheva (over 185,000 residents) and Ashdod (210,000 residents –the 5th largest city in the State of Israel).

- Other major towns that suffered rockets attacks during the operation were Kiryat Gat (47,900 residents), Rahat (43,300 residents), Yavne (32,300 residents), Ofakim (24,700 residents) and Kiryat Malachi (19,700 residents). Schools in the affected areas remained closed through most of the Gaza Operation.

62. On 27 December 2008, one of the longer-range Grad rockets killed 58-year-old Beber Vaknin of Netivot.[39] Two days later, two civilians going about their day were killed by similar rockets.[40] On 30 December 2008, a Hamas rocket landed in a kindergarten classroom in Be'er Sheva, one of Israel's main cities, luckily causing no injuries because it fell late in the day after the children had left.[41] In total, during the Gaza Operation, close to 800 rockets and mortar rounds landed on Israeli territory, killing 4 civilians, injuring 182 others, and terrorising nearly a million civilians, both Jews and Arabs, who were forced to flee beyond the range of the rockets or else to live their lives within the range of Hamas rocket attacks.

63. Hamas attacks were often so indiscriminate that they even inflicted casualties on the Palestinian population. In the month of December 2008 alone, the following examples were reported:

[39] *See* Press Release, *Victims of Palestinian Violence and Terrorism since September 2000*, Israel Ministry of Foreign Affairs, available at http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Palestinian+terror+since+2000/Victims+of+Palestinian+Violence+and+Terrorism+sinc.htm.

[40] *Id*.

[41] Israel Ministry of Foreign Affairs Press Release, *Behind the Headlines: Hamas increases range of rocket fire*, 31 December 2008, available at http://www.mfa.gov.il/MFA/About+the+Ministry/Behind+the+Headlines/Hamas_increases_range_rocket_fire_31-Dec-2008.

- On 6 December 2008, four rockets fired at the Kerem Shalom crossing fell on the Rafah Crossing with Egypt;[42]

- On 20 December 2008, two five-year-old Palestinian children in Beit Hanoun were wounded by the explosion of a rocket that fell in the Gaza Strip;[43]

- On 24 December 2008, a rocket fell on the house of Imad al-Drimli in the Tel al- Hawa district of Gaza City;[44]

- On 26 December 2008, an explosion in Beit Hanoun killed two girls, aged 5 and 13, and wounded a Palestinian man;[45]

- Between 27 and 31 December 2008, the first five days of Israel's air offensive, about 6.5 percent of the rockets fired by Hamas at Israel fell in the Gaza Strip.

64. None of these casualties can be attributed to Israeli action. Instead, they serve to demonstrate the wholly indiscriminate nature of Hamas' attacks and total disregard of human lives, including the Palestinian population under their control.

65. Furthermore, rocket fire aimed at Israel also damaged U.N. humanitarian installations inside Gaza. For instance, according to a U.N. investigation into damage to U.N. property during the Gaza Operation:

> "In the case of the WPF Karni Warehouse, the Board concluded that the most serious damage sustained was caused by a rocket fired by a Palestinian faction, most likely Hamas, which was intended to strike in Israel, but which fell short."[46]

66. In sum, the rocket attacks launched by Hamas and other terrorist organisations from the Gaza Strip against Israel inflicted deliberate and intimidating damage on both sides of the Gaza border. Aside from the physical injuries and the deaths those attacks caused,

[42] Intelligence and Terrorism Information Center, Hamas Exploitation of Civilians as Human Shields, January 2009 ¶96, available at http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/pdf/hamas_e028.pdf.

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] U.N. General Assembly, *Letter dated 4 May 2009 from the Secretary-General addressed to the President of the Security Council : Summary by the Secretary-General of the report of the United Nations Headquarters Board of Inquiry into certain incidents in the Gaza Strip between 27 December 2008 and 19 Jan 2009* (hereafter "U.N. BoI Report"), 15 May 2009, A/63/855–S/2009/250, at ¶ 89, available at http://www.unhcr.org/refworld/docid/4a292c8dd.html .

hundreds of thousands of Israeli civilians have been forced to live in a permanent state of fear from a daily barrage of rockets threatening their homes, schools and hospitals. While Hamas' rockets did not always hit their intended targets, they achieved their terrorist objective of causing indiscriminate destruction, sparing nothing and no one within their range.

C. Israel's Right and Obligation to Defend Itself and Its Citizens from Attack

67. In these circumstances, there is no question that Israel was legally justified in resorting to the use of force against Hamas. As explained above, this resort to force occurred in the context of an ongoing armed conflict between a highly organised, well-armed, and determined group of terrorists and the State of Israel. The Gaza Operation was simply the latest in a series of armed confrontations precipitated by the attacks perpetrated without distinction against all Israeli citizens by Hamas and its terrorist allies. In fact, over the course of this conflict, Israel conducted a number of military operations in the West Bank and the Gaza Strip, to halt terrorist attacks.

68. Even apart from the eight years of ongoing armed conflict, which justified Israel's resort to force both previously and during the Gaza Operation, Hamas' intensified armed attacks on Israel and its citizens during 2008 independently justified Israel's response to defend its citizens. All States have the inherent right to defend themselves against armed attacks. This right is recognised by customary international law, and is further confirmed in Article 51 of the United Nations Charter.[47]

69. A State's right of self-defence extends beyond attacks by other States.[48] Even before the U.N. Charter, customary international law recognised the right of self-defence against non-

[47] U.N. Charter, art. 51 (confirming "the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security").

[48] *See, e.g.,* Christopher Greenwood, *Terrorism: The Proper Law and the Proper Forum, in* 79 INTERNATIONAL LAW AND THE WAR ON TERROR 353, 355 (Fred L. Borch & Paul S. Wilson eds., 2003) ("Nothing in the text or the drafting history of the Charter suggests that 'armed attack' is confined to the acts of states . . . Nor has state practice or the jurisprudence of international tribunals since the adoption of the Charter espoused a formalistic distinction between acts of states and acts of terrorist and other groups in determining what constitutes an armed attack."); Thomas M. Franck, *Terrorism and the Right of Self-defense*, 95 AM. J. INT'L L. 839, 840 (2001) (declaring it "inconceivable" that States should not be allowed to exercise the same right of self-defence against non-State actors as they would have against other States); *see also* Chatham House, "Principles of International Law on the Use of Force by States in Self-Defence," International Law Programme, ILP WP 05/01, at 2, 11-13 (2005) (hereafter "Chatham House Principles") (conclusion by a group of prominent experts that Article 51 "applies also to attacks by non-state actors," provided such attacks are "large scale" and that the State hosting the attacking actors is "unable or unwilling to deal with the non-state actors itself"). *See also* Institut de Droit International, 10A resolution (Tenth Commission), Present Problems of the Use of Armed Force in International Law - Self Defence, 27 October 2007.

State actors, such as armed groups launching attacks of significant scale and scope.[49] The United Nations Security Council invoked the right of self-defence in the wake of the September 11 attacks on the United States, calling upon the international community to combat such terrorism perpetrated by non-State actors.[50] When organised groups rather than standing armies launch attacks against a State, they trigger a State's right to self-defence if "such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces."[51]

70. There is no question that Israel faced an "armed attack" within the meaning of customary international law or Article 51 of the U.N. Charter, and has the right to use force against Hamas in self-defence.[52]

71. Israel's overall use of force against Hamas during the Gaza Operation was also proportional to the threat posed by Hamas. International law "does not require a defender to limit itself to actions that merely repel an attack; a state may use force in self-defence to remove a continuing threat to future security."[53] Under the customary international law principle of proportionality, a state may use defensive measures necessary to avert on-going attacks or preserve security against further similar attacks.[54] This assessment focuses on "the scale of the whole operation,"[55] not specific incidents of targeting.

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[49] *See, e.g.,* Letter from Daniel Webster to Lord Ashburton (6 August 1842), *quoted in* 2 John Bassett Moore, A DIGEST OF INTERNATIONAL LAW 412 (1906) (providing guidelines for customary international law on the use of force in self-defence, in the context of defence against a non-State actor).

[50] United Nations Security Council Resolution 1368 (12 September 2001) (recognizing "the inherent right of individual or collective self-defence," in connection with "threats to international peace and security caused by terrorist acts"); United Nations Security Council Resolution 1373 (28 September 2001) (noting that "international terrorism constitute[s] a threat to international peace and security" while "*reaffirming* the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations as reiterated in resolution 1368") (emphasis added).

[51] Bruno Simma, THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, vol. I, at 800 (3d ed. 2002).

[52] In its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion, I.C.J. reports 2004, at 136), the International Court of Justice, asserted, *ipse dixit,* and without any persuasive rationale, that the attacks launched by Palestinian terrorist organisations against Israel could not qualify as an armed attack under Article 51 of the U.N. Charter. This unsubstantiated assertion in the Advisory Opinion has met with widespread criticism from academic commentators and indeed from other judges of the court. *See* separate opinion of Judge Higgins, at 15 (¶ 33); declaration of Judge Buergenthal, at 242 (¶ 6); separate opinion of Judge Kooijmans, at 229-230 (¶ 35); *see also* S. D. Murphy, "Self-Defense and the Israeli Wall Advisory Opinion: An *Ipse Dixit* from the ICJ?," 99 AJIL 62 62-63 (2005),

[53] Sean Murphy, PRINCIPLES OF INTERNATIONAL LAW 447 (2006).

[54] Rosalyn Higgins, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT, at 232 (1995) (stating the proportionality of military action "cannot be in relation to any specific prior injury — it has to be in relation to the overall legitimate objective, of ending the aggression"); *see also* Chatham House Principles at 10. Judge Christopher Greenwood has confirmed that the law does *not* mandate that "the degree of force employed in self-defence must be no greater than that used in the original armed attack." Christopher Greenwood, Essays on War in International Law 80 (2006). The late Judge Roberto Ago likewise wrote that "[i]t would be mistaken . . . to think that there must be proportionality between the conduct constituting the armed attack and the opposing conduct. The action needed to

[FOOTNOTE CONTINUED ON NEXT PAGE]

72. In conclusion, the Gaza Operation was justified as an act of self-defence in response to Hamas' escalating rocket and mortar attacks against Israel during 2008. In any case, Israel's right to use force against Hamas was triggered years ago, when Palestinian terrorist organisations, including Hamas, initiated the armed conflict which is still ongoing. The current operation was another regrettable stage in this conflict.

D. Hamas' Military Capabilities in Gaza

73. Hamas' military capabilities necessarily defined the challenges Israel faced in its efforts to stop Hamas' attacks, and they explained the types of force Israel used in its targeted three-week operation in Gaza.[56]

74. Since violently seizing power in the Gaza Strip, Hamas' leadership in Gaza has operated through a "political bureau" which in turn directs the movement's military wing, the Izz al-Din al-Qassam Brigades, and the internal security forces. The Hamas leadership has accelerated the military build-up of both these armed forces in preparation for a military confrontation with the IDF. As of December 2008, there were more than 20,000 armed operatives, directly subordinate to the Hamas military wing or designated to be integrated into its forces during an emergency. In addition to Hamas, Israel faced a sizeable military force of several thousand operatives from terrorist organisations such as the Palestinian Islamic Jihad, the Popular Resistance Committees, Fatah/Al-Aqsa Martyrs Brigades groups and the Army of Islam.

75. Hamas has organised its forces into semi-military formations throughout the Gaza Strip and deployed them in territorial brigades and designated units. Each territorial brigade has more than 1,000 operatives divided into battalions. They regularly conduct large-scale training operations in the Gaza Strip and also train in Iran and Syria. These forces have received advanced weaponry, upgraded rockets and advanced anti-tank weapons. They prepared for attacks to be mounted against the IDF, including any attempt by Israel to quell the rocket attacks, by constructing underground systems for fighting and concealment throughout the Gaza Strip, developing powerful Improvised Explosive Devices ("IEDs") and placing them on or near locations where IDF activities were anticipated.

[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]
halt and repulse the attack may well have to assume dimensions disproportionate to those of the attack suffered."*(Id.* (quoting Judge Ago).

[55] *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, ICJ Rep. 2003, ¶ 77.

[56] For a detailed account of Hamas military capabilities and buildup, *see* Intelligence and Terrorism Information Center, *Hamas' military buildup in the Gaza Strip*, April 2008, available at http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/pdf/hamas_080408.pdf.

76. Hamas continued to expand the vast underground network of tunnels running through the Gaza Strip, not only to serve as smuggling routes, but also to facilitate attacks on IDF forces operating in the Gaza Strip. The tunnels were also designed to neutralise some of the IDF's capability to damage the Hamas military infrastructure and to give Hamas' armed forces an operational shield during prolonged, extensive fighting. Additionally, Hamas designated tunnels for terrorist attacks against IDF posts and villages near the border fence. It dug others as bait for IDF forces. In an interview with Al-Hayat on 17 December 2007, Abu Obeida, the spokesman for Hamas' Izz al-Din al-Qassam Brigades, said:

> "Our defence plan is based, to a great extent, on rockets which have not yet been used and on a network of ditches and tunnels dug under a large area of the [Gaza] Strip. The [Israeli] army will be surprised when it sees fighters coming up out of the ground and engaging it with unexpected equipment and weapons…"[57]

77. Hamas' military capabilities in 2008 included both its armed forces and its internal security forces. The armed forces in the military-terrorist wing (the Izz al-Din al-Qassam Brigades) included more than 15,000 operatives, according to Hamas' own claims.[58] In the event of an escalation in the conflict with Israel, Hamas designated the internal security forces to join the armed resistance against the IDF. In the initial stages, they were to provide primarily logistical and intelligence support. In broader and lengthier hostilities, such as occurred between December 2008 and January 2009, the internal security forces were to supplement the fighting units of the Izz al-Din al-Qassam Brigades and confront the IDF, even at the expense of weakening their capabilities to deal with internal security matters. Many Hamas operatives played a dual role by joining both the internal security forces and the Izz al-Din al-Qassam Brigades.[59]

78. In December 2008, Hamas' internal security forces included more than 13,000 operatives, many of them also members of the Izz al-Din al-Qassam Brigades, as detailed further below. These forces are divided into five primary forces: the "Police" (formerly the Executive Force, which also includes the elite unit, the Rapid Intervention Force, and the

[57] *Id.*

[58] Marie Colvin, *Hamas Wages Iran's Proxy War on Israel*, The London Sunday Times, 9 March 2008, available at http://www.timesonline.co.uk/tol/news/world/middle_east/article3512014.ece (reporting interview with a senior Hamas terrorist operative, who stated that the Izz al-Din al-Qassam Brigades had 15,000 operatives).

[59] For detailed analysis, see Intelligence and Terrorism Information Center, *Mounting evidence indicates that during Operation Cast Lead (and in ordinary times) members of Hamas' internal security forces served as commanders and operatives in Hamas' military wing*, 24 March 2009, available at http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/html/hamas_e067.htm. *See also* legal analysis at V.C(3)(b).

Naval Police); the Internal Security Service; the Security and Protection Force; the National Security and the Civil Defence Service.

79. The core of Hamas' internal security forces is the "Police," which in 2008 included more than 6,000 members armed with Kalashnikov or M-16 assault rifles, hand grenades and anti-tank weapons. The Naval Police included hundreds of operatives carrying light arms and various IEDs and was involved in shooting at Israel Navy patrol boats. The Internal Security Service, also numbering in the hundreds of operatives, was responsible for dealing with suspected collaborators, gathering information on individuals suspected of anti-Hamas activities, torturing and interrogating detainees. The Security and Protection Force was responsible for guarding important Hamas individuals and institutions, while the National Security Service, with a membership of several hundred, was deployed mainly along the Philadelphi route[60] and responsible for border security and control of smuggling.

80. These various forces were heavily armed. Before the Gaza Operation began in December 2008, Hamas had amassed substantial stockpiles of weapons and munitions, most smuggled into Gaza through tunnels under the border with Egypt and some independently produced or obtained after Hamas took over the security forces of the Palestinian Authority in June 2007. Hamas weapons capabilities included foreign manufactured rockets (122mm artillery rockets with the range of 20km [Grad] and 40 km); locally made rockets (Qassam series); mortars, both imported and locally made; anti-tank weapons; locally manufactured IEDs; foreign manufactured mines; machine guns, automatic rifles; anti-aircraft weapons; night vision equipment; listening equipment for intelligence gathering; advanced communications equipment; and huge quantities of ammunition.

81. The extent of this arms build-up by Hamas is indisputable. Hamas itself has displayed its weaponry on television and the Internet, including (for example) the following photographs of anti-aircraft weaponry:

[60] Philadelphi is the term commonly used to describe the security route along the border between Gaza and Egypt.


► Anti-aircraft weapons in the hands of Hamas. Left: Picture posted by the Izz al-Din al-Qassam Brigades' information department on YouTube (6 December 2007); Right: Image of an anti-aircraft machine gun in the hands of a Hamas operative (Source: Al-Aqsa TV, 24 December 2007)

► PA weapons seized by Hamas: 14.5mm anti-aircraft machine guns (Source: Al-Aqsa TV, 24 December 2007)


► Left: Photo of 14.5mm anti-aircraft machinegun, posted by the Izz al-Din al-Qassam Brigades on YouTube (11 January 2008); Right: 14.5mm anti-aircraft machinegun hidden under a green net (Source: Al-Aqsa TV, 24 December 2007)

82. Hamas' military build-up crucially increased the urgency of Israeli action to stop the attacks.

E. Stages of the Operation

83. On 27 December 2008, after exhausting other alternatives and after issuing warnings that Israel would attack if the rocket and mortar assault from Gaza did not stop, the IDF launched a military operation against Hamas and other terrorist organisations in the Gaza Strip. The Operation was limited to what the IDF believed necessary to accomplish its objectives: to stop the bombardment of Israeli civilians by destroying and damaging the mortar and rocket launching apparatus and its supporting infrastructure, and to improve the safety and security of Southern Israel and its residents by reducing the ability of Hamas and other terrorist organisations in Gaza to carry out future attacks.[61] The Gaza Operation did not aim to re-establish an Israeli presence in the Gaza Strip.

84. The Gaza Operation commenced with aerial operations on 27 December 2008. These focused on Hamas terrorist infrastructure, as well as rocket and mortar launching units. The Israel Air Force ("IAF") targeted military objectives, including the headquarters from which Hamas planned and initiated operations against Israel, command posts, training camps and weapons stores used in the planning, preparation, guidance and execution of terrorist attacks. In carrying out its strikes, IAF used sophisticated precision weapons to minimise the harm to civilians, given Hamas' practice of basing their operations in densely populated areas. As described further in Section V.C(4) below, the extensive precautions adopted by Israel to protect civilians during this conflict — often at the expense of military advantage and at the risk of Israeli soldiers — sought to meet the most demanding standards of modern military operations.

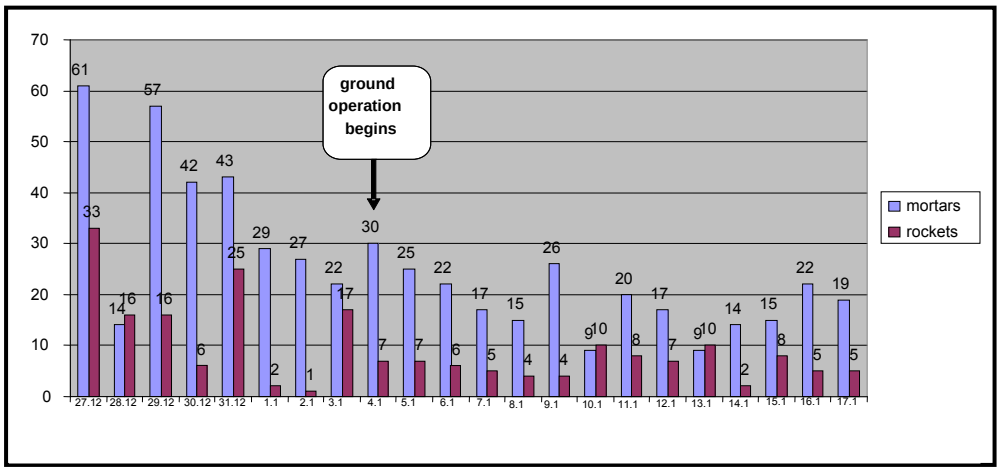
85. On 3 January 2009, one week into the Gaza Operation and facing the continued rocket and mortar attacks on Israeli civilians, the IDF commenced a ground manoeuvre. Despite initial reluctance, a ground manoeuvre was necessary because, despite the Israeli aerial attacks, Hamas refused to stop firing on Israeli localities. Moreover, continued reliance on aerial strikes alone — in light of Hamas' tactic of taking cover within the densely populated areas of Gaza — would have likely resulted in significant numbers of Palestinian civilian casualties. Ground forces entered the Gaza Strip with naval and air support. The objectives of this manoeuvre included undermining Hamas' terrorist infrastructure, taking control of rocket and mortar launching sites and reducing the number of attacks on Israeli territory. The IDF expanded the ground manoeuvre on 10 January

[61] This broader objective is no different than the objective that NATO articulated for using force in the former Yugoslavia, which was to "[d]amage Serbia's capacity to wage war against Kosovo in the future or spread the war to neighbors by diminishing or degrading its ability to wage military operations." NATO Bombings, Final Report to the ICTY Prosecutor, ¶ 45 (quoting the Cohen, Shelton Joint Statement on Kosovo).

2009, entering deeper into the Gaza Strip, with the objective of dismantling terrorist infrastructure and taking control of rocket launching sites in the heart of the urban areas.

86. The Gaza Operation ended on 17 January 2009 (after 22 days in all) with Israel's implementation of a unilateral ceasefire. Subsequently, IDF troops began their withdrawal from the Gaza Strip, which they completed on 21 January 2009 in accordance with Security Council Resolution 1860.[62] Since then, and even during the Gaza Operation itself, Israel has sought to provide and facilitate humanitarian assistance to Palestinians of the Gaza Strip.

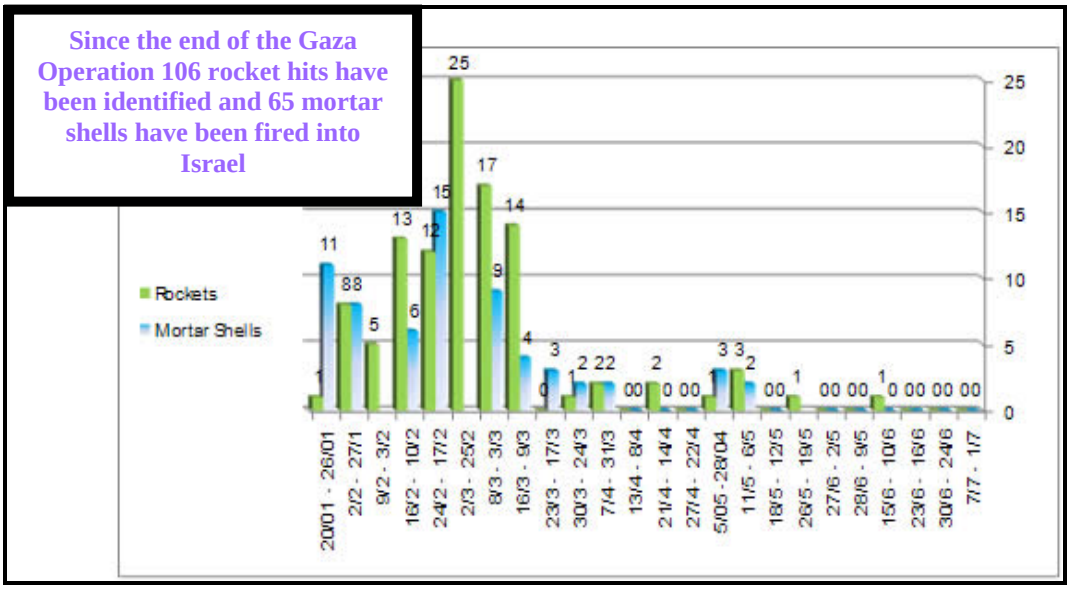
87. The Gaza Operation was demonstrably effective in achieving its military objectives. As the chart below demonstrates, the level of rocket and mortar attacks on Israeli towns decreased significantly even during the three weeks of the Gaza Operation:



► Rocket and mortar shells fired at Israel during the Gaza Operation between 27 December 2008 and 17January 2009

[62] Resolution 1860 was adopted by the Security Council on 8 January 2009 and called – *inter alia* – upon Member States to intensify efforts to provide arrangements and guarantees in Gaza in order to sustain a durable ceasefire and calm, including to prevent illicit trafficking in arms and ammunition and to ensure the sustained reopening of the crossing points.

88. Since the end of the Gaza Operation, rocket and mortar attacks have continued to be lower than before the Operation, as illustrated below:



► Rocket and mortar shells fired at Israel since the end of the Gaza Operation

V. THE USE OF FORCE

A. The Legal Framework

89. Even where resort to force is justified, as it was for Israel in responding to heightened attacks by Hamas in the course of its long-standing armed conflict with Israel, customary law limits the *manner* in which a State can exercise force (*jus in bello*). The two critical aspects of this limitation — the principle of distinction and the principle of proportionality — are both designed to protect civilians not taking direct part in the hostilities and civilian objects, while taking into account the military necessities and the exigencies of the situation.

90. The fact of civilian casualties in an armed conflict, even in significant numbers, does not in and of itself establish any violation of international law. In fact, the doctrine of "proportionality operates in scenarios in which incidental injury and collateral damage are the *foreseeable*, albeit undesired, result of attack on a legitimate target."[63] As Kenneth Watkin, the Canadian Judge Advocate General, has explained, "although civilians are not to be directly made the object of an attack, humanitarian law accepts that they may be killed or civilian property may be damaged as a result of an attack on a military objective."[64]

91. It is for this very reason that the Office of the Prosecutor, at the International Criminal Tribunal for the former Yugoslavia, rejected any suggestion, in its evaluation of the NATO bombing campaign in Yugoslavia, that the mere fact of civilian harm was indicative of wrongdoing. As the Committee Established to Review the 1999 NATO Bombing Campaign Against the Federal Republic of Yugoslavia stated in 2000 to the Prosecutor of the ICTY, "[m]uch of the material submitted to the OTP consisted of reports that civilians had been killed, often inviting the conclusion to be drawn that crimes had therefore been committed." Yet as the Prosecutor's Committee noted, "[c]ollateral casualties to civilians and collateral damage to civilian objects can occur for a variety of reasons."[65] For example, they may be harmed due to their proximity to a military target, or by operational mistakes. At times civilians may suffer harm because they are conscripted by the adversary to serve as "human shields" against an attack upon a military target.

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[63] Michael N. Schmitt, *The Principle of Discrimination in 21st Century Warfare*, 2 YALE HUM. RTS & DEV. L.J. 143, 150 (1999) (emphasis added).

[64] Kenneth Watkin, *Assessing Proportionality: Moral Complexity and Legal Rules*, *in* YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 3, 9 (Timothy L.H. McCormack ed., 2005).

[65] NATO Bombings, Final Report to the ICTY Prosecutor, ¶ 51.

92. In those and similar situations, one cannot jump from the unfortunate occurrence of civilian harm to the unfounded conclusion that the attacks were illegal. The critical but often omitted link in determining the legality of an attack — even an attack that results in death or injury to civilians — is whether the attacking forces sought to observe the rules of the Law of Armed Conflict, and in particular the principles of distinction and proportionality. This analysis depends on the particular facts of each incident. When individual attacks are legitimate, "the mere cumulation" of such instances, all of which are deemed to have been lawful, "cannot *ipso facto* be said to amount to a crime."[66]

93. For this reason, and as discussed in detail below, any assessment of the legality of particular conduct cannot focus only on the consequences (whether civilians were harmed). Instead, the proper focus is on whether the persons carrying out the attack, based on what they knew and the conditions they faced at the time, complied with the applicable rules of international law. The IDF made extensive efforts to comply, not only in its training and rules of engagement but also as implemented regularly in the field. Hamas made no attempt to comply with these principles, but has exploited these rules in an attempt to gain military advantage from the constraints the rules imposed on IDF activities.

(1) The Principle of Distinction

94. The first core principle of the Law of Armed Conflict, as reflected both in treaty law and in customary international law, is that "the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."[67] The principle imposes obligations on both parties to an armed conflict.

(a) The Obligation Not to Target the Adversary's Civilians

95. It is unlawful to deliberately make civilians the object of attack. As the customary international law principle is reflected in Additional Protocol I, "[t]he civilian population as such, as well as individual civilians, shall not be the *object* of attack. Acts or threats of

[66] *Id.* ¶ 52.

[67] Additional Protocol I, art. 48. Although the State of Israel is not a party to the Additional Protocols to the Geneva Conventions, it accepts that this provision, as with certain others addressing the principles of distinction and proportionality, accurately reflects customary international law. *See Public Committee against Torture in Israel v. Government of Israel*, HCJ 769/02 at ¶ 20 (11 December 2005).

violence the primary *purpose* of which is to spread terror among the civilian population are prohibited."[68] Rather, "[a]ttacks shall be limited strictly to military objectives."[69]

96. It is important to make clear what this principle does *not* require. First, by definition, the principle of distinction does not forbid the targeting of combatants, nor the targeting of civilians who take a direct part in the hostilities.[70]

97. Second, this principle addresses only deliberate targeting of civilians, not incidental harm to civilians in the course of striking at legitimate military objectives. This understanding of customary international law was made explicit by numerous States in their ratifications of Additional Protocol I,[71] and many other States have officially adopted this interpretation.[72]

98. Direct participation in hostilities has been interpreted by Israel's High Court of Justice as involving all persons that perform the function of combatants, including "a civilian bearing arms (openly or concealed) who is on his way to the place where he will use them against the army, at such place, or on his way back from it," as well as "a person who collected intelligence on the army, whether on issues regarding the hostilities . . . or beyond those issues . . . ; a person who transports unlawful combatants to or from the place where the hostilities are taking place; a person who operates weapons which unlawful combatants use, or supervises their operation, or provides service to them, be the distance from the battlefield as it may."[73]

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[68] Additional Protocol I, art. 51(2) (emphasis added).

[69] Additional Protocol I, art. 52(2).

[70] International Committee of the Red Cross, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, Vol. I: Rules at 11 (Jean-Marie Henckaerts and Louise Doswald-Beck, eds., 2005) (hereafter "ICRC CIL Study, Rules"), Rules 1 and 7. Like many other States, Israel does not agree that all of the "rules" stated in the ICRC CIL Study reflect customary international law, but it does agree that it accurately states the principle of distinction. *See generally* Daniel Bethlehem, The Methodological Framework of the Study, in Elizabeth Wilmshurst and Susan Breau, PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (Cambridge University Press 2007), at 3-14. W. Hays Parks, *The ICRC Customary Law Study: A Preliminary Assessment*, 99 Am. Soc'y Int'l L. Proc. 208, 212 (2005) (arriving at the "preliminary conclusion that [the study] is not an impartial analysis of the law but rather a compilation of statements . . . it lacks context, a filtration process, and battlefield state practice"). *See also* Charles Garraway, "The Use and Abuse of Military Manuals," 7 Yearbook of International Humanitarian Law, at 425-440 (Timothy L.C. McCormack ed.) (T.M.C. Asser Institute, The Hague, Netherlands 2004).

[71] For example, Australia, Canada, France, Italy, New Zealand and the United Kingdom all expressly stated upon ratification that Article 52(2) of Additional Protocol I was neither intended to address, nor did it address, the question of incidental or collateral damage resulting from an attack directed at a military objective. *See* International Committee of the Red Cross, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOL. II: Practice, (Jean-Marie Henckaerts and Louise Doswald-Beck, eds., 2005) (hereinafter "ICRC CIL Study, Practice"), Ch.1, ¶¶ 86-91.

[72] *See* ICRC CIL Study, Practice, Ch. 1, ¶¶ 143, 147, 149 (noting also statements by Germany, the Netherlands, and the United States to this effect).

[73] *See Public Committee against Torture in Israel v. Government of Israel*, HCJ 769/02 at ¶¶ 34-35 (11 December 2005).

99. Fourth, more broadly, the presence *of civilians at a site* (whether voluntarily or involuntarily) does not by itself forbid an attack on an otherwise legitimate military target. As explained in Oppenheim's INTERNATIONAL LAW, civilians "do not enjoy absolute immunity. Their presence will not render military objects immune from attack for the mere reason that it is impossible to bombard [the military objects] without indirectly causing injury to the non-combatants."[74] The military manuals of numerous countries echo this point.[75] So do leading commentators, such as W. Hays Park, who has written that:

> "Within both the Just War Tradition and the law of war, it has always been permissible to attack combatants even though some noncombatants may be injured or killed; so long as injury to noncombatants is ancillary (indirect and unintentional) to the attack of an otherwise lawful target, the principle of noncombatant immunity is met."[76]

100. The expected presence of *civilians*, though, does impact the analysis of the proportionality of an attack, discussed in Section V.A(2) below.

101. The determination of what is a lawful "military objective" turns on an assessment of "military advantage." Additional Protocol I reflects customary international law in defining "military objectives" as "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage."[77] The tactics and strategy of the opposing force can transform sites that may once have been purely civilian into legitimate military objectives. As the ICRC Commentary to Additional Protocol I explains,

> "In combat areas it often happens that purely civilian buildings or installations are occupied or used by the armed forces and such objectives may be attacked, provided that this does not result in excessive losses among the civilian population. For example, it is clear that if fighting between armed forces takes place in a town which is defended house by house, these buildings — for which Article 52 (General protection of civilian objects), paragraph 3, lays down a presumption regarding their civilian use — will inevitably become military objectives because they

[74] Lassa Oppenheim, II INTERNATIONAL LAW: Disputes, War and Neutrality 525 (7th ed. 1952).

[75] *See, e.g.,* ICRC CIL Study, Practice, Ch. 2, ¶ 635 (quoting Australia's Defence Force Manual as providing that "[t]he presence of noncombatants in or around a military objective does not change its nature as a military objective. Noncombatants in the vicinity of a military objective must share the danger to which the military objective is exposed."). Some of the manuals cited in the ICRC study were not necessarily formal military manuals in a classic sense, but rather training manuals.

[76] W. Hays Parks, AIR WAR AND THE LAW OF WAR, 32 A.F. L. Rev. 1, 4 (1990).

[77] Additional Protocol I, art. 52(2).

> offer a definite contribution to the military action. However, this is still subject to the prohibition of an attack causing excessive civilian losses."[78]

102. Judging military advantage with respect to a target evaluated during combat is not an exercise in hindsight. The perspective is that of the commander in the field at the time of a targeting decision, with the information then available.[79]

103. This point, too, is reflected in military manuals of many States. Thus, for example, the Military Manual of the Netherlands explains that:

> "the definition of 'military objectives' implies that it depends on the circumstances of the moment whether an object is a military objective. The definition leaves the necessary freedom of judgement to the commander on the spot."[80]

104. The military manuals of other States likewise afford a margin of discretion to the commander in the field.[81]

105. The military manuals of many States also confirm that the relevant "military advantage" defining a "military objective" relates to "the military campaign or operation of which the attack is a part considered *as a whole* and not only from isolated or particular parts of that campaign or operation."[82] Further, the "security of the attacking forces" is a proper consideration in assessing military advantage.[83]

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[78] ICRC Commentary on Additional Protocol I. Article 5(4)(a), ¶ 1953.

[79] Kenneth Watkin, *Assessing Proportionality: Moral Complexity and Legal Rules*, *in* 8 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 3, 38 (Timothy L.H. McCormack 2005) (quoting *Prosecutor v. Galić*, (hereafter "*Galić*") Case No. IT-98-29-T, Judgment and Opinion, ¶¶ 50-51, 55 (5 December 2003).

[80] ICRC CIL Study, Practice, Ch. 2, ¶ 335 (quoting Netherlands, *Military Manual* (1993)).

[81] *See, e.g.,* ICRC CIL Study, Practice, Ch. 2, ¶¶ 334, 337 (quoting manuals of Italy and Spain). The U.S. Naval Handbook states that determinations of whether civilians have taken a direct part in hostilities and thus may lawfully be attacked must likewise be made by "[c]ombatants in the field," who "must make an honest determination as to whether a particular civilian is or is not subject to deliberate attack based on the person's behavior, location and attire, and other information available at the time." ICRC CIL Study, Practice, Ch. 1, ¶ 830. Canada's Law of Armed Conflict Manual states that "[a] concrete and direct military advantage exists if the commander has an honest and reasonable expectation that the attack will make a relevant contribution to the success of the overall operation." ICRC CIL Study, Practice, Ch. 4, ¶ 169.

[82] ICRC CIL Study, Practice, Ch. 2, ¶ 336 (quoting New Zealand's Military Manual) (emphasis added); *see also* ¶¶ 329, 332, 334, 337 (quoting manuals of Australia, Germany, Italy, and Spain). The United States Government likewise recognizes that "the anticipated military advantage need not be expected to immediately follow from the success of the attack, and may be inferred from the whole military operation of which the attack is a part." ICRC CIL Study, Practice, Ch. 2, ¶ 361 (quoting the Report on U.S. Practice, 1997).

[83] *See* ICRC CIL Study, Practice, Ch. 2, ¶¶ 329, 331, 336, 339 (quoting manuals of Australia, Ecuador, New Zealand, and the United States); *see also id.* ¶ 361 (noting U.S. Government's view that "[t]he foreseeable military advantage from an attack includes increasing the security of the attacking force."). *See also* Noam Neuman, *Applying the Rule of Proportionality: Force Protection and Cumulative Assessment in International Law*, 7 Yearbook of Int'l Hum. L 79,

[FOOTNOTE CONTINUED ON NEXT PAGE]

106. The manuals recognise as well that objects "normally dedicated to civilian purposes, but which are being used for military purposes" (such as houses, schools or churches) lose their protection under the applicable law, and may properly become lawful "military objectives."[84] This reality becomes particularly important when a party, in violation of its own obligations under the Law of Armed Conflict (*see* Section V.A(1)(b) below), deliberately places combatants and weaponry at or near civilian sites in order to shield them from attack, and thus exposes civilians to significant harm. As noted in the 2007 edition of the Operational Law Handbook, issued by the United States Air Force Judge Advocates Corps, "Use refers to how an object is *presently* being used."[85] Thus, as the Handbook notes, "[e]xamples of enemy military objectives which by their use make an effective contribution to the military action" would include "*an enemy headquarters located in a school, an enemy supply dump located in a residence, or a hotel which is used as billets for enemy troops.*"[86]

107. The loss of absolute protection for a civilian site when it is misused by the adversary as a locus for military operations is broadly recognised in the Law of Armed Conflict.[87] Thus, for instance, the hidden placement of a significant military asset within a civilian building or even the presence of enemy combatants can make the otherwise civilian site amenable to attack.[88] This is a harsh reality of urban warfare.

108. Attacks must not be "*indiscriminate*," that is, untargeted, launched without consideration as to where harm will likely fall.[89] As W. Hays Park has explained, "[t]his distinction is

[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]
91-96, 109, 111 (2005) ("When interpreting the term 'similar military advantage,'… it seems obvious that the lives of the soldiers must be taken into account.").

[84] ICRC CIL Study, Practice, Ch. 2, ¶ 687 (quoting Australia's Defence Force Manual, 1994); *see also* ¶¶ 688-705 (quoting other military manuals).

[85] *See* Judge Advocates Corps, U.S. Air Force, Operational Law Handbook (2007 edition), at 22 (emphasis added), available at http://www.fas.org/irp/doddir/army/law2007.pdf.

[86] *Id.* (emphasis added).

[87] *See* YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF ARMED CONFLICT (Cambridge University Press 2004), at 99 ("The real test in land warfare is whether a given place, inhabited by civilians, is actually defended by military personnel. Should that be the case, the civilian object becomes – owing to its use – a military objective.").

[88] Charles Garraway, Moderator, Panel Discussion at the U.S. Naval War College: When Civilian Objects Become Military Objectives, 78 INTERNATIONAL LAW STUDIES 214-216, Blue Book series ("[I]f a prescribed area *is defended* [by opposing military forces], any building within the area (other than an assembly point for the collection of wounded, marked as such) would be exposed to attack, irrespective of its ostensible status as a civilian object.").

[89] Additional Protocol I, art. 51(4).

not determined by the amount of the devastation or the number of deaths, but by the direction of the action itself, i.e., by what is deliberately intended and directly done."[90]

109. In keeping with this understanding in customary international law, Additional Protocol I defines indiscriminate attacks as:

> "(a) Those which are not directed at a specific military objective;
>
> (b) Those which employ a method or means of combat which cannot be directed at a specific military objective; or
>
> (c) Those which employ a method or means or combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction."[91]

110. As these provisions indicate, a commander's *intent* is critical in reviewing the principle of distinction during armed conflict. Where it is believed in good faith, on the basis of the best available intelligence, that a civilian building has been misused as a sanctuary for military fighters, military intelligence, or the storage and manufacture of military assets, the commander has a legitimate basis for using force against the site. This is so even where judgment is based on limited information in a fluid battlefield situation.

111. The definition of military targets thus could include terrorists who move rapidly throughout a neighbourhood, even where they shelter themselves in civilian dwellings. It does not relieve the commander of the obligation to judge the proportionality of his action. But it makes clear that a civilian site can be converted to a legitimate target by the conduct of the opposing force in using such places for military purposes, including the escape of armed combatants.

112. Quite apart from the tenets of legitimate targeting are the additional prerequisites of the criminal law. Mistakes made in armed conflict do not, as such, constitute war crimes. The centrality of a commander's intent means that the incidence of civilian casualties does not serve to establish a violation of the principle of distinction. And reasoning from hindsight is also not sufficient. It does not reveal what a commander could have known or forecast at the time. As two leading scholars have recognised, "[t]he prerequisite for a grave breach

[90] W. Hays Park, AIR WAR AND THE LAWS OF WAR, 32 A.F.L. Rev. 1, 5 (1990) (citing Paul Ramsey, THE JUST WAR: FORCE AND POLITICAL RESPONSIBILITY 154 (1968)).
[91] Additional Protocol I, art. 51(4).

is intent; the attack must be intentionally directed at the civilian population or individual civilians, and the intent must embrace physical consequences."[92]

113. The ICTY itself has found that for an attack to qualify as a war crime, it "must have been conducted *intentionally* in the *knowledge*, or when it was impossible not to know, that civilians or civilian property were being targeted."[93]

114. In short, military operations that cause *unintended* and unwanted damage to civilians do not constitute violations of the Law of Armed Conflict, much less a war crime.

115. While Hamas deliberately sought to harm civilians by launching rockets and mortars on towns in Southern Israel, and even boasted about directing their attacks at civilian populations,[94] the IDF carefully checked and cross-checked targets — using best available real-time intelligence — to make sure they were being used for combat or terrorist activities, and not instead solely for civilian use. In the event of reasonable doubt, the IDF refrained from attacking targets until such time as it could confirm their status as legitimate military objectives. This was consistent with the IDF's formal rules of engagement for the Gaza Operation, which ordered commanders and soldiers to direct strikes solely against military objectives and combatants,[95] and prohibited intentional strikes on civilians or civilian objects.[96]

(b) The Obligation of Parties to an Armed Conflict Not to Jeopardise Their Own Civilians

116. The principle of distinction imposes obligations on the conduct of all parties, including those controlling the territory where the hostilities take place.

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[92] Rüdiger Wolfrum & Dieter Fleck, *Enforcement of International Humanitarian Law*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 675, 697 (Dieter Fleck ed., 2d ed. 2008).

[93] *Galić,* ¶ 42 (quoting *Prosecutor v. Blaškic*; Case No. IT-95-14-T, Trial Judgment, ¶ 180 (3 March 2000)). *See also id.,* ¶ 54 (explaining that Additional Protocol I, art. 85(3)(a) "qualifies as a grave breach the act of *wilfully* 'making the civilian population or individual civilians the object of attack'). The ICRC Commentary likewise confirms that "in relation to criminal law the Protocol requires intent and, moreover, with regard to indiscriminate attacks, the element of prior knowledge of the predictable result." Yves Sandoz, Christophe Swinarski & Bruno Zimmermann, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions 12 June 1949 (International Committee of the Red Cross, 1987) (hereafter "ICRC Commentary on Additional Protocol I"), art. 51(2), at ¶ 1934.

[94] *See* Section V.B(1) below (noting, for example, statements made by Hamas officials that they were deliberately directing their rockets at Israeli population centers).

[95] Although the term "combatants" derives from the Law of Armed Conflict applicable to international armed conflicts, it is used here to describe the members of Hamas' armed force in Gaza, with no prejudice to the classification of the conflict itself.

[96] *See* Section V.C(2) below.

117. The Fourth Geneva Convention prohibits the use of civilians to shield certain areas from attack and provides that the presence of civilians does not shield an otherwise permissible military target from attack: "The presence of a protected person may not be used to render certain points or areas immune from military operations."[97] Additional Protocol I is categorical in barring the use of "human shields":

> "The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations."[98]

118. Violation of this obligation, which is a core principle of customary international law binding on both States and non-State actors, constitutes a "war crime."

119. In this case, as explained in Section V.B below, Hamas violated this core principle of customary international law. Its operatives admitted, for example, that they frequently carried out rocket fire from schools (such as the Sakhnin school in the area of Abu Halima, and another school in the al-Amal neighbourhood), precisely because they *knew* that Israeli jets would not fire on the schools.[99] They describe incidents in which Hamas activists requested children to wheel carts laden with rockets, in case IDF forces noticed them.[100] In fact, one Hamas legislator boasted on television of encouraging women, children and the elderly to form human shields to protect military sites against Israeli attack.[101] The Secretary-General of the United Nations confirmed receiving reports of Hamas using children and others as shields to prevent attacks against launch sites and other military targets.[102]

[97] Geneva Convention IV, art. 28.

[98] Additional Protocol I, art. 51(7).

[99] *See* Israel Security Agency, Selected Examples of Interrogations Following Operation Cast Lead, available at http://www.shabak.gov.il/English/EnTerrorData/Archive/Operation/Pages/cast-lead-Interrogations.aspx.

[100] *Id.*

[101] Transcript of Statement of Hamas Member of Palestinian Legislative Council, Fathi Hamad, *Al-Aqsa TV,* 29 February 2008, video available at http://www.youtube.com/watch?v=ArJbn-lUCh4.

[102] Report of the Secretary-General on Children and Armed Conflict, delivered to the Sixty-third session of the General Assembly, U.N. Doc. S/2009/158, 26 March 2009.

(2) The Principle of Proportionality

(a) The Obligation to Weigh Military Objectives Against Incidental Civilian Harm

120. In addition to the principle of distinction, customary international law bars military attacks that are anticipated to harm civilians excessively in relation to the expected military advantage. This principle, known as the "principle of proportionality," is reflected in Additional Protocol I, which prohibits launching attacks "which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."[103] The "elements of crimes" drafted in the Rome Statute of the International Criminal Court[104] implementation process and approved by the Assembly of States Parties to the Rome Statute clarifies two key matters as well — that the actionable offence of causing "excessive incidental death, injury or damage" is established only where these matters were "clearly excessive," and that excess and proportion is to be judged "in relation to the concrete and direct overall military advantage anticipated."[105] While Israel is not a party to either Additional Protocol I or the Rome Statute, it accepts these clarifications as reflective of customary international law.

121. The very notion of not inflicting "excessive" harm recognises that some civilian casualties may be unavoidable when pursuing legitimate military objectives. Numerous military manuals reflect this grim reality.[106] General A.P.V. Rogers, former Director of British Army Legal Services, has explained that:

> "Although they are not military objectives, civilians and civilian objects are subject to the general dangers of war in the sense that attacks on military personnel and military objectives may cause incidental damage. It may not be possible to limit the radius of effect entirely to the objective to be attacked, a weapon may not function properly or be deflected by defensive measures, or a civilian object may be attacked by mistake because of faulty intelligence. Similarly, civilians working in military objectives, though not themselves legitimate targets, are at risk if those objectives are attacked. Members of the armed forces are not liable for

[103] Additional Protocol I, art. 51(5)(b).

[104] Rome Statute of the International Criminal Court, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 17 July 1998.

[105] *See* Elements of Crimes, at Article 8(2)(b)(iv).

[106] Australia's Defence Force Manual states, for example, that "Collateral damage may be the result of military attacks. This fact is recognised by [the Law of Armed Conflict] and, accordingly, it is not unlawful to cause such injury and damage." ICRC CIL Study, Practice, Ch. 4, ¶ 14. *See also* ICRC CIL Study, Practice, Ch. 4, ¶ 18 (quoting Canada's Law of Armed Conflict Manual) and ¶ 48 (quoting U.S. Naval Handbook).

> such incidental damage, *provided it is proportionate* to the military gain expected of the attack."[107]

122. By definition, then, evaluation of proportionality (or excessive harm to civilians compared to military advantage) requires balancing two very different sets of values and objectives, in a framework in which all choices will affect human life. States have duties to protect the lives of their civilians and soldiers by pursuing proper military objectives, but they must balance this against their duty to minimise incidental loss of civilian lives and civilian property during military operations. That balancing is inherently difficult, and raises significant moral and ethical issues. Indeed, as the Committee established to review NATO's bombing campaign in the former Yugoslavia emphasised:

> "The main problem with the principle of proportionality is not whether or not it exists but what it means and how it is to be applied. It is relatively simple to state that there must be an acceptable relation between the legitimate destructive effect and undesirable collateral effects. … Unfortunately, most applications of the principle of proportionality are not quite so clear cut. It is much easier to formulate the principle of proportionality in general terms than it is to apply it to a particular set of circumstances because the comparison is often between unlike quantities and values."[108]

123. It is precisely because this balancing is difficult that international law confirms the need to assess proportionality from the standpoint of a "reasonable military commander," possessed of such information as was available at the time of the targeting decision and considering the military advantage of the attack as a whole. Moreover, the balancing may not be second-guessed in hindsight, based on new information that has come to light; it is a forward-looking test based on expectations and information at the time the decision was made. This perspective is confirmed by the use of the word "anticipated" within the text of the rule itself, as well as in the explanations provided by numerous States in ratifying Additional Protocol I.[109]

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[107] Major General A.P.V. Rogers, Lecture delivered at Lauterpacht Center for International Law, University of Cambridge: Command Responsibility under the Law of War (1999) available at www.lcil.cam.ac.uk/Media/lectures/doc/COMDRESP.doc (emphasis added).

[108] NATO Bombings, Final Report to the ICTY Prosecutor, ¶ 48.

[109] *See, e.g.,* ICRC CIL Study, Practice, Ch. 4, ¶ 195 (noting Austria's statement that "with respect to any decision taken by a military commander, *the information actually available at the time of the decision is determinative*" for judging proportionality in attack) (emphasis added). Numerous other States have made similar declarations. *See id.* ¶¶ 196-205. As Germany stated forcefully, "the decision taken by the person responsible has to be judged on the basis of all information available to him at the relevant time, and *not on the basis of hindsight*." *Id.* ¶ 199 (emphasis added).

124. Inevitably, different soldiers in combat make different choices in balancing competing values and interests. As the Committee Established to Review NATO Bombings in Yugoslavia explained to the ICTY Prosecutor,

> "It is unlikely that a human rights lawyer and an experienced combat commander would assign the same relative values to military advantage and injury to noncombatants. Further, it is unlikely that military commanders with different doctrinal backgrounds and differing degrees of combat experience or national military histories would always agree in close cases. It is suggested that the determination of relative values must be that of the '*reasonable military commander*'."[110]

125. Thus, the core question, in assessing a commander's decision to attack, will be (a) whether he or she made the determination on the basis of the best information available, given the circumstances, and (b) whether a reasonable commander could have reached a similar conclusion. As W. Hays Park has explained, "[u]nintentional injury is not a violation of the principle of non-combatant immunity unless, through *wilful and wanton neglect*, a commander's actions result in excessive civilian casualties that are tantamount to an intentional attack."[111]

126. The same criteria for assessing "military advantage" apply in the proportionality context, namely that the "military advantage anticipated" from a particular targeting decision must be considered from the standpoint of the overall objective of the mission.[112] In addition, it may legitimately include not only the need to neutralise the adversary's weapons and ammunition and dismantle military or terrorist infrastructure, but also — as a relevant but not overriding consideration — protecting the security of the commander's own forces.[113]

127. The standard does not penalise commanders for making close calls. Rather, it is intended to prohibit "[*m*]*anifestly* disproportionate collateral damage inflicted in order to achieve operational objectives," because this results in the action essentially being a "form of indiscriminate warfare."[114]

128. As with the principle of distinction, a showing of *intent* is required for there to have been any arguable "war crime" based on excessive civilian harm in comparison with military

[110] NATO Bombings, Final Report to the ICTY Prosecutor, ¶ 50-1 (emphasis added).
[111] W. Hays Parks, Book Review, 28 Geo. Wash. J. Int'l L. & Econ. 207, 218 (1995) (emphasis added).
[112] *See* ICRC CIL Study, Practice, Ch. 4, ¶¶ 161-165, 167-174.
[113] *See, e.g.,* ICRC CIL Study, Practice, Ch. 4, ¶¶ 161, 169.
[114] Stefan Oeter, *Methods and Means of Combat*, *in* THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 119, 135 (Dieter Fleck ed., 2d ed. 2008) (emphasis added).

objectives. As customary international law is reflected in the specific relevant section of the Rome Statute, for example, it is clear that a war crime requires the "intentional launching" of an attack "in the *knowledge* that such attack will cause incidental loss of life or injury to civilians … which would be *clearly excessive* in relation to the concrete and direct overall military advantage anticipated."[115] In other words, from this very definition, the existence of a war crime turns not on the reasonableness of the commander's weighing of military advantage against civilian harm, but on whether he or she *knew* that the attack would cause clearly disproportionate harm, but proceeded intentionally notwithstanding this knowledge.[116]

129. In other words, there is no indication of a "war crime" simply because others conclude, after the conflict, that a different decision — often, a snap decision taken on the battlefield — could have led to fewer civilian casualties. To the contrary, if the commander in the field did not intend and did not know that the attack would cause clearly excessive levels of civil harm, there is no legal basis for labelling it as war crime.

130. In this case, as demonstrated below, the IDF took extensive steps to weigh the risk of civilian harm against the existence of important military objectives, based on the information available at the time of targeting decisions. Such assessments were a significant part of IDF training and rules of engagement,[117] and they were implemented in the field. As discussed further in Section V.C(3), for attacks planned in advance, each operation and target was considered on an individual basis (and reviewed by several authorities, including legal officers) in order to ensure that it met the requirements of proportionality. The same analysis was frequently repeated in the field based on real time data, immediately prior to an attack, to confirm that excessive civilian harm was not anticipated.

131. On numerous occasions, this review led to a decision *not* to attack legitimate military targets, to avoid the possibility of civilian harm, even though such an attack might not be excessive in relation to the anticipated military advantage. As just one example of many, as documented by photographs in Section V.B(2), Israeli forces identified a rocket launcher between two school buildings on 18 January 2009, but refrained from attacking

[115] Rome Statute, art. 8(2)(b)(iv).

[116] The ICTY has adopted a similar standard, explaining that "[t]o establish the *mens rea* of a disproportionate attack the Prosecution must prove . . . that the attack was launched *wilfully and in knowledge* of circumstances giving rise to the expectation of excessive civilian casualties." *Galić,* ¶ 59 (emphasis added).

[117] *See* Section V.C(2) (quoting operational order under which legitimate military objectives should not be attacked if "the expected harm to civilians or civilian objects … would [] be excessive in relation to the military advantage anticipated").

because of its proximity to the schools. The IDF also refrained from attacking Shifa Hospital in Gaza City, despite Hamas' use of an entire ground floor wing as its headquarters during the Gaza Operation,[118] out of concern for the inevitable harm to civilians also present in the hospital. On other occasions, attacks were approved using precision guided munitions, but the missiles were diverted moments before impact, because civilians were spotted in the target area.[119] On still other occasions, as discussed in Section V.C(4), a decision was made to proceed with a strike, but only under certain specified conditions designed to minimise civilian casualties, such as the time of the attack, the type of weapons permitted, or required precautions prior to attack.[120]

(b) The Obligation of Attacking Forces to Take Feasible Precautions to Minimise Incidental Civilian Harm

132. In addition to the obligation to refrain from acts that would harm civilians disproportionately in relation to anticipated military advantage, Additional Protocol I requires both parties to a conflict to take "feasible" precautions to minimise incidental loss of civilian life.[121] From the perspective of the attacker, this means "do[ing] everything feasible to verify that the objectives to be attacked … are military objectives,"[122] and "tak[ing] all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing" civilian harm.[123] It also requires the provision of "effective advance warning … of attacks which may affect the civilian population, unless circumstances do not permit."[124]

133. In assessing the adequacy of precautions, under the provisions of Additional Protocol I, the measure is one of "feasibility," not perfection. The United States has taken the position, for example, that "measures to minimize civilian casualties and damage must be taken to

[118] A Hamas activist captured by IDF forces during the operation confirmed during his interrogation that senior Hamas members were hiding out in Shifa Hospital during the Gaza Operation. *See* Israel Security Agency, Selected Examples of Interrogations Following Operation Cast Lead, available at http://www.shabak.gov.il/English/EnTerrorData/Archive/Operation/Pages/cast-lead-Interrogations.aspx; *see also* Amir Mizroch, *Dichter: Hamas salaries paid at Shifa Hospital*, Jerusalem Post, 12 January 2009, available at http://www.jpost.com/servlet/Satellite?pagename=JPost/JPArticle/ShowFull&cid=1231424936164.

[119] *See* IDF Spokesperson Unit, *IDF VLOG: Israeli Airstrikes Aborted to Protect Civilians*, 14 January 2009, available at http://idfspokesperson.com/2009/01/14/idf-vlog-israeli-airstrikes-aborted-to-protect-civilians/.

[120] For specific examples, *see* Section V.D(2) (describing attacks approved for the middle of the night, when nearby offices would presumably be empty; attacks limited to precision munitions or utilizing delay fuses; and numerous incidents of advance warnings to civilians).

[121] *See* Additional Protocol I, art. 57(2)(a)(i), (ii).

[122] Additional Protocol I, art. 57(2)(a)(i).

[123] Additional Protocol I, art. 57(2)(a)(ii).

[124] Additional Protocol I, art. 57(2)(c).

the extent that military necessities permit under the circumstances ruling at the time."[125] Numerous other States have emphasised the limitations of practicality,[126] and that assessments consider the circumstances prevailing at the time of the decision, not after the fog of war has lifted and hindsight reveals other options and consequences.[127] In its final report to the ICTY Prosecutor in 2000, the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia stated:

> "The obligation to do everything feasible is high but not absolute…. Both the commander and the aircrew actually engaged in operations must have some range of discretion to determine which available resources shall be used and how they shall be used. Further, a determination that inadequate efforts have been made to distinguish between military objectives and civilians or civilian objects should not necessarily focus exclusively on a specific incident."[128]

134. The requirement of effective warnings to the civilian population is also tempered by the express caveat, "unless circumstances do not permit."[129] The circumstances in question include the effect on achievement of the military mission or the security of the forces. As the U.S. Naval Handbook states,

> "When circumstances permit, advance warning should be given of attacks that might endanger noncombatants in the vicinity. Such warnings are not required, however, if mission accomplishment requires the element of surprise or the security of the attacking forces would otherwise be compromised."[130]

135. The nature of the combat and the tactics of the adversary also affect the practicality of various precautions, including advance warnings. As the Canadian Judge Advocate General has explained,

> "The reality of combat must also be taken into consideration when assessing precautionary measures. As a result, the written word of the Protocols must be interpreted in the practical context within which the rules were designed to be applied. Those assessing the actions of those

[125] ICRC CIL Study, Practice, Ch. 5, ¶ 125 (citing Report on US Practice, 1997).
[126] ICRC CIL Study, Practice, Ch. 5, ¶¶ 147-158.
[127] ICRC CIL Study, Practice, Ch. 5, ¶¶ 147-158, 182-183.
[128] NATO Bombings, Final Report to the ICTY Prosecutor, ¶ 29.
[129] Additional Protocol I, art. 57(2)(c); *see also* ICRC CIL Study, Rule 20.
[130] U.S, Naval Handbook (1995), ¶ 11.2, *see also* ¶ 8.5.2; ICRC CIL Study, Practice, Ch. 5, ¶ 457.

> participating in targeting decisions must remember that "'[d]etached reflection cannot be demanded in the presence of an upturned knife.'"[131]

136. As a stark example, consider an adversary that launches mortars or anti-tank missiles from within civilian areas. There may be no choice except to return fire, even though this creates jeopardy for the civilians in the vicinity. Issuing an advance warning of the counter-fire may also be impractical, because it gives the shooter time to move. For this reason, advance warnings to the civilian population may be feasible mostly before hostilities begin in a particular area, or where the lack of surprise or speed of response does not significantly affect military advantage.

137. In certain circumstances, general warnings might be adequate in order to fulfil the obligations of the parties to an armed conflict under international law. Indeed, the U.S. Air Force Pamphlet (explains that "[t]he practice of states recognizes that warnings need not always be given. General warnings are more frequently given than specific warnings, lest the attacking force or the success of its mission be jeopardized."[132] The United States endorsed this view during hostilities in the Gulf region in 1991, stating that "*[a] warning need not be specific; it may be a blanket warning*, delivered by leaflets and/or radio, advising the civilian population of an enemy nation to avoid remaining in proximity to military objectives."[133] The ICRC has recognised that "[i]n U.S. practice, bombardment warnings have often been general in their terms, e.g. advising civilians to avoid war-supporting industries, in order not to alert the air defence forces of an impending attack on a specific target."[134]

138. During the Gaza Operation, the IDF took precautions that were consistent with the safeguards required by law or suggested by the practice of other countries. As discussed further in Section V.C(4) below, the IDF not only implemented a range of precautions related to targeting and munitions, but also used an extensive system of graduated warnings to civilians, including both general advance warnings through media broadcasts and widespread leafleting, regional warnings to alert civilians to leave specific areas before IDF operations commenced, and specific warnings to civilians in or near military targets, through telephone calls and warning shots with light weapons. While these warnings,

[131] Kenneth Watkin, *Assessing Proportionality: Moral Complexity and Legal Rules*, *in* YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 3, 25 (Timothy L.H. McCormack ed., 2005).

[132] U.S. Air Force Pamphlet (1976), ¶¶ 5-3(c)(2)(d); ICRC CIL Study, Practice, Ch. 5, ¶ 456 (emphasis added); *see also id.* ¶ 457 ("warnings may be general rather than specific lest the bombarding force or the success of its mission be placed in jeopardy").

[133] ICRC CIL Study, Practice, Ch. 5, ¶ 483 (emphasis added). The Department further insisted that "[t]he 'unless circumstances do not permit' recognizes the importance of the element of surprise. Where surprise is important to mission accomplishment and allowable risk to friendly forces, a warning is not required." *Id.*

[134] ICRC CIL Study, Practice, Ch. 5, ¶ 485.

unfortunately, could not eliminate all harm to civilians, they were frequently effective, as aerial surveillance many times was able to confirm the resulting evacuation of numerous civilians prior to an attack by the IDF.

(c) The Parallel Obligation of Those Controlling Territory to Minimise Civilian Casualties

139. The parties in control of the territory where the hostilities take place also have obligations under the Law of Armed Conflict to minimise civilian harm, including with regard to their own population. Thus, the parties to the conflict "shall, to the maximum extent feasible, take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations."[135] This means they should "*avoid locating* military objectives within or near densely populated areas,"[136] and in anticipation of hostilities, they must "*endeavour to remove* the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives."[137] To do the opposite — to place weapons systems in or near apartment buildings, schools, mosques or medical facilities, or to encourage civilians to gather in areas that are likely military targets — violates the Law of Armed Conflict, because such tactics inevitably increase civilian casualties beyond what otherwise might occur in connection with an attack on a legitimate military target.

140. Thus, combatants who choose to fight from within civilian buildings bear responsibility for the consequences, because their very presence in such structures "will make an attack against them legitimate." As the ICRC explains in its Commentary to Additional Protocol I,

> "It is clear that a belligerent who accommodates troops in purely civilian buildings, for example, in dwellings or schools, or who uses such buildings as a base for combat, exposes them and the civilians present there to serious danger: even if attacks are directed only against members of the armed forces, it is probable that they will result in significant damage to the buildings."[138]

141. During the Gaza Operation, Hamas made it a centrepiece of its military strategy to locate combat forces and weapons in civilian areas, in stark contrast to the IDF's significant efforts to minimise harm to civilians. As discussed below in Sections IV.B and V.D,

[135] Additional Protocol I, art. 58(c).
[136] Additional Protocol I, art. 58(b) (emphasis added).
[137] Additional Protocol I, art. 58(a) (emphasis added).
[138] ICRC Commentary to Additional Protocol I, art. 57(2)(a)(i), ¶ 2196.

Hamas *deliberately* exposed civilians to harm. It launched rockets from and established weapons workshops and storage sites near homes, schools, mosques and U.N. facilities; it used residences and public institutions as bases of operation; it misused medical facilities and ambulances; and it booby-trapped entire civilian neighbourhoods. The evidence is overwhelming, set forth in photographs, in independent press reports, and in Hamas' own boasts to local media.

B. Hamas' Breaches of the Law of Armed Conflict and War Crimes

142. Both prior to and during the IDF operation in Gaza, Hamas flouted the Law of Armed Conflict, terrorising Israeli citizens through an endless barrage of rocket and mortar attacks, and deliberately using Palestinian civilians, as well as protected U.N., educational, medical, administrative (so-called governmental) and religious facilities, as a cover for its operations. In adopting such methods of warfare, members of Hamas committed internationally recognised war crimes, and made it impossible for the IDF to avoid collateral damage to civilians and civilian objectives in pursuit of legitimate military objectives during the operation.

143. As the evidence discussed below illustrates, the tactics and *modus operandi* of Hamas and other terrorist organisations offend the most fundamental legal and moral norms of human behaviour.

144. While the examples of Hamas' violations of the Law of Armed Conflict cited in this report are far from exhaustive, they illustrate the extraordinary challenges that the tactics of Hamas posed for the IDF, as a military force committed to respecting its obligations under international law. As explained below, Hamas has violated a myriad of basic norms of International Humanitarian Law.

(1) Deliberate Rocket Attacks Against Israeli Population Centres

145. As described in Section IV.B above, for many years Hamas engaged in deliberate, systematic and widespread use of rocket attacks, mortar attacks and suicide bombings intentionally directed at civilian targets in Israel.[139] The international community,

[139] *See, e.g.,* Report, *Erased In A Moment - Suicide Bombing Attacks Against Israeli Civilians*, Human Rights Watch, 15 October 2002 available at http://www.hrw.org/en/reports/2002/10/15/erased-moment and Report, *Israeli civilians victims of attacks by armed Palestinian groups*, Médecins du Monde, July 2003; available at http://www.reliefweb.int/library/documents/2003/mdm-opt-21jul.pdf (which has also coined the term "democide" to name the suicide bombing attacks).

including the United Nations, the Quartet of Middle East mediators,[140] the European Union,[141] the United States,[142] the United Kingdom[143] and many other States and international bodies, have condemned Hamas' rocket attacks.

146. Hamas' rocket attacks directed at Israel's civilian population centres deliberately violated the basic principles of distinction.[144] Any doubt about this is resolved by the fact that Hamas itself has boasted of its intention to hit population centres. It is well accepted in customary international law that "[i]ntentionally directing attacks against the civilian population as such or against individual civilians not taking part in hostilities" constitutes a war crime.[145]

147. In this case, numerous international observers have recognised that Hamas was intentionally engaging in deliberate attacks, in violation of the Law of Armed Conflict. Even well before the escalation of rocket attacks in 2008, the United Nations Under-Secretary General for Political Affairs condemned Hamas rocket fire on Sderot as "legally and morally wrong."[146] The United Nations Under-Secretary General for Humanitarian Affairs stated that "there's no justification" under the law for the firing of the rockets,

[140] Quartet Joint Statement from Russian Foreign Minister Sergei Lavrov, U.S. Secretary of State Condoleezza Rice, United Nations Secretary-General Ban Ki-moon, High Representative for European Foreign and Security Policy Javier Solana, German Foreign Minister Frank-Walter Steinmeier, and European Commissioner for External Relations Benita Ferrero-Waldner, 30 May 2007, available at http://www.un.org/news/dh/infocus/middle_east/quartet-30may2007.htm: "The Quartet strongly condemned the continued firing of Qassam rockets into Southern Israel as well as the buildup of arms by Hamas and other terrorist groups in Gaza. It endorsed PA President Abbas' call for an immediate end to such violence, and called upon all elements of the PA government and all Palestinian groups to cooperate with President Abbas to that end."

[141] European Union Presidency statement, 16 May 2007: "The EU Presidency condemns in the strongest possible terms the Kassam missile attacks launched from the Gaza Strip against Israeli territory which have caused many injuries during the last few days and appeals to Palestinian leaders to do everything in their power to stop them. An escalation of violence must be prevented."

[142] State Department Daily Press Briefing by Spokesman Sean McCormack, 17 May 2007, available at http://www.imra.org.il/story.php3?id=34365: "Violence perpetrated by Hamas, as we have seen recently, doesn't further the cause of peace. What it does is result in the deaths of innocent civilians and it also underscores the importance of reaching those political accommodations on the Israeli-Palestinian track among those individuals who are committed to peace like Prime Minister Olmert, like President Abbas, and the people around him and that work directly for him. We would hope that Hamas would make another choice; in making a choice for peace, in making a choice for a Palestinian state, because the only way that they're going to see that is via the negotiating table. They're not going to see it by launching Qassam rockets into Israel. They're not going to see it by attacking the legitimate security forces of the Palestinian Authority. They're not going to see it by sending young people armed with suicide vests to blow up other Israeli youngsters." *See also* Press release, *Sderot hit by Kassam barrage from Gaza*, Israel Ministry of Foreign Affairs, 1 June 2007, available at http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Palestinian+terror+since+2000/Sderot+hit+by+Kassam+barrage+from+Gaza+-+May+2007.htm.

[143] Margaret Beckett, the British Secretary of State for Foreign and Commonwealth Affairs, said in a statement: "I also deplore rocket attacks from Gaza against Israel, attacks that are bringing suffering to Israeli civilians."

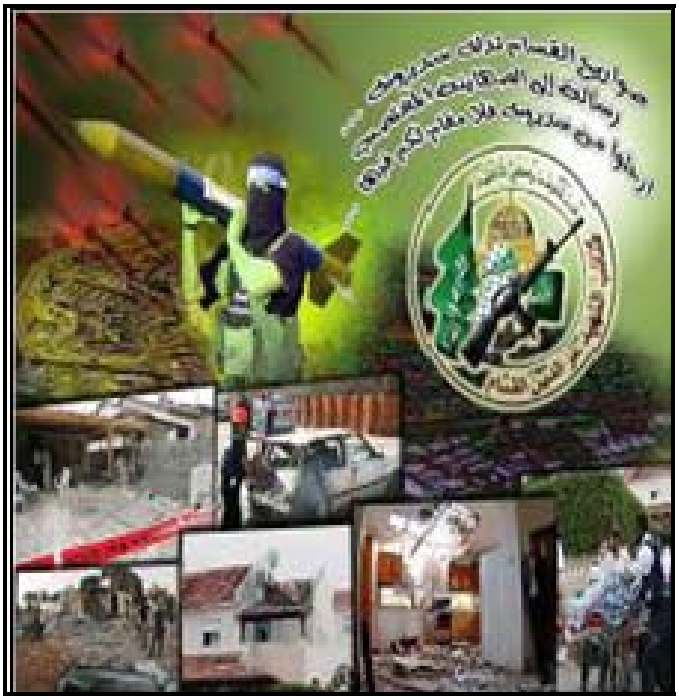
[144] Additional Protocol I, arts. 48, 51(2), 52(1).

[145] Rome Statute, art. 8(2)(b)(i).

[146] Greg Myre, *UN Official Touring Israel is Near Area Hit by Rocket*, The New York Times, 22 November 2006 (quoting Ibrahim Gambari), available at http://www.nytimes.com/2006/11/22/world/middleeast/22mideast.html?pagewanted=print.

because "[t]hey are indiscriminate, there's no military target."[147] And the U.N. Secretary-General confirmed his view that the rocket attacks in Israel were "targeting and injuring civilians."[148]

148. Hamas *deliberately* targets rockets and mortar rounds at Israeli population centres and specifically intends to cause the maximum amount of civilian death and suffering. Hamas cheers when one of its rockets or mortars succeeds in hitting a civilian target, whether that be a private home or public institution. For instance, the following Hamas poster boasts of homes destroyed by missiles in Southern Israel:



► Hamas poster depicting Israeli civilian homes destroyed by rocket fire

149. It is therefore clear that the *purpose* of Hamas' incessant rocket attacks on Israel's southern towns and cities, in addition to causing death, injury and destruction, is to spread terror among Israel's civilian population. This also constitutes a serious violation of the Law of Armed Conflict. As discussed above, it is a core principle of customary international law that:

[147] Isabel Kershner, *Israeli incursion into Gaza Strip Kills 4 militants*, The New York Times, 17 February 2008, (quoting John Holmes) available at http://www.nytimes.com/2008/02/17/world/africa/17iht-mideast.4.10121958.html.

[148] Press Release, *Secretary General Profoundly Concerned at Escalating Violence, Growing Casualties in Gaza*, Statement SG/SM/10997/PAL/2074 (Spokesman of Secretary General Ban Ki-moon), 16 May 2007, available at http://www.un.org/News/Press/docs/2007/sgsm10997.doc.htm.

> "Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited."[149]

150. In sum, in launching rocket and mortar attacks against Israeli targets, Hamas is guilty of repeated and deliberate violations of the Law of Armed Conflict — and because these violations were wilful, its leaders and operatives are guilty of committing war crimes.

(2) Abuse of Civilian Sites as Cover for Military Operations

151. The Law of Armed Conflict not only prohibits targeting an enemy's civilians; it also requires parties to an armed conflict to distinguish their combatant forces from their *own* civilians, and not to base operations in or near civilian structures, especially protected sites such as schools, medical facilities and places of worship. As the customary law principle is reflected in Article 51(7) of Additional Protocol I,

> "The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular attempts to shield military objectives from attacks or shield, favour or impede military operations."

152. This general prohibition applies with particular force to schools and other facilities regularly attended by children. Thus, "[c]hildren shall be the object of special respect and shall be protected against any form of indecent assault."[150] Medical facilities and ambulances are also singled out for special protection. Thus, "[u]nder no circumstances shall medical units be used in an attempt to shield military objectives from attack."[151] Similarly, combatants are forbidden to use places of worship such as mosques in support of military efforts.[152]

153. The reason for these rules is clear. When a party to an armed conflict uses civilian and protected spaces for military purposes, those spaces become legitimate targets for the opposing side, thereby placing civilian lives and infrastructure in grave danger.[153]

154. Despite the clear proscriptions of international law, the intentional abuse of civilian areas for military advantage is central to Hamas' battlefield strategy. During the recent conflict

[149] Additional Protocol I, art. 51(2).
[150] Additional Protocol I, art. 77(1).
[151] *Id.*, art. 12(4).
[152] *Id.*, art. 53.
[153] *See, e.g.*, ICRC Commentary on Additional Protocol I, Article 52(4)(a), ¶ 1953 (noting that "[i]n combat areas it often happens that purely civilian buildings or installations are occupied or used by the armed forces and such objectives may be attacked, provided that this does not result in excessive losses among the civilian population.").

in Gaza, as described below, Hamas launched rockets from near schools, used hospitals as bases of operation, stored weapons in mosques, and booby-trapped entire neighbourhoods, all in contravention of clear and specific prohibitions of international law. Hamas' strategy was two-fold: (1) to take advantage of the sensitivity of the IDF to civilian casualties on the Palestinian side, in an attempt to deter the IDF from attacking legitimate military targets; and (2) where the IDF did attack, to wield an excellent propaganda weapon against Israel, featuring civilian casualties as well as damage to homes and public institutions. In other words, Hamas chose to base its operations in civilian areas not in spite of, but *because of*, the likelihood of substantial harm to civilians. The tactic did succeed in causing IDF to forego attacks on legitimate military objectives in order to protect the lives of innocent Palestinians and to preserve intact important public facilities. But in many cases, the IDF could not forego a legitimate military objective without undermining its mission and jeopardising both its soldiers and Israeli civilians. In those circumstances, the result of Hamas' approach was to make it difficult, and sometimes impossible, for IDF forces to avoid harm to civilians and civilian structures.

(a) Staging of Attacks From Residential Areas and Protected Sites

155. Hamas operatives regularly fired rockets into Israel from within or near residential and public buildings, including schools, mosques and hospitals. The following images illustrate the use of this tactic in the 18 months prior to the Gaza Operation:[154]

► Left: Rockets fired at Israel from civilian areas in Beit Lahia (27 February 2008, Israeli Channel 10 TV); Right: PRC rocket fire into Israeli territory (Muqawamah Website, 27 February 2008)

[154] Numerous videos detailing this and other Hamas tactics are available on the Ministry of Foreign Affairs Video Resource Library, at http://www.mfa.gov.il/MFA/Visual+Media/The-IDF-operation-in-Gaza-14-Jan-2009.htm, as well as on the website of the Intelligence and Terrorism Information Center, at http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/html/hamas_e062.htm#a.

► A pit from which rockets were fired in the middle of a residential area (Source: IDF Spokesperson, 29 December 2008)

► Rockets positioned on the roof of a house (YouTube, 11 July 2007, picture from the Izz al-Din al-Qassam Brigades propaganda bureau); Right: Mortar launcher positioned near a house (Source: Al-Aqsa TV, 26 October 2007)

► Rocket Launching position near public buildings in the Shati Refugee Camp (Source: IDF Spokesperson)

156. On 29 October 2007, Hamas launched a mortar attack from the yard of the central building of an United Nations Relief and Works Agency (UNRWA) educational complex in the town of Beit Hanoun in the northern Gaza Strip. The Secretary-General of the U.N. condemned this incident.[155]

► Rocket launching squad positioned near the main building of an UNRWA educational complex in Beit Hanoun (Source: IDF Spokesperson, 31 October 2007)

157. A similar incident took place on 18 January 2009, immediately after Israel announced the end of its Operation in Gaza: Israeli forces identified a rocket launcher placed immediately between two school buildings. The Israeli Air Force did not attack the launcher because of its proximity to the schools, as shown on the image below.

► Firing rockets near two school buildings after Israel announced it was holding its fire (Source: IDF Spokesperson, 18 January 2009)

[155] Press Release, *Ban Ki-moon condemns rocket attack from Gaza school run by UN agency*, U.N. News Centre, 8 November 2007, available at http://www.un.org/apps/news/story.asp?NewsID=24593&Cr=palestin&Cr1.

158. Hamas activist N.A., a resident in Atatra, was arrested by the IDF during the Gaza Operation. In his investigation, N.A. admitted that Hamas operatives frequently carried out rocket fire from schools (for example, the Sakhnin school in the area of Abu Halima, and another school in the area of the al-Amal neighbourhood), precisely because they knew that Israeli jets would not fire on schools.[156]

159. During the Gaza Operation, Hamas continued to launch attacks from densely populated areas and protected sites. In fact, as IDF forces advanced into Gaza, Hamas began relying even more heavily than before on rocket and mortar launches from the midst of urban centres. Human Rights Watch, in a letter to EU Foreign Ministers, strongly condemned this practice, confirming that it has "documented cases in which Hamas fired rockets from very near populated homes or other civilian objects."[157]

160. *Newsweek* vividly described one instance of Hamas' abuse of civilian housing:

> "Suddenly there was a terrific whoosh, louder even than a bomb explosion. It was another of Hamas' homemade Qassam rockets being launched into Israel — and the mobile launchpad was smack in the middle of the four [apartment] buildings, where every apartment was full…"[158]

161. Hamas' abuse of civilian neighbourhoods resulted in significant destruction. As *Corriere della Sera* reported on 21 January 2009, quoting the testimony of "Um Abdallah":

> "Practically all of the tallest buildings in Gaza that were hit by Israeli bombs… had rocket launching pads on their roofs, or were observation decks for the Hamas. They had also put them near the big UN warehouse, which went up in flames."[159]

162. In conducting rocket attacks from within civilian sites, Hamas committed grave breaches of the principle of distinction, as well as the obligation not to put its own civilians at risk.

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[156] *See* Israel Security Agency, Selected Examples of Interrogations Following Operation Cast Lead, available at http://www.shabak.gov.il/English/EnTerrorData/Archive/Operation/Pages/cast-lead-Interrogations.aspx.

[157] Letter from Lotte Leicht to EU Foreign Ministers, 16 March 2009, available at http://www.hrw.org/en/news/2009/03/16/letter-eu-foreign-ministers-address-violations-between-israel-and-hamas (emphasis added).

[158] Rod Nordland, *Hamas and Its Discontents*, Newsweek, 20 January 2009, available at http://www.newsweek.com/id/180691/output/print.

[159] Lorenzo Cremonesi, *Così i ragazzini di Hamas ci hanno utilizzato come bersagli*, Corriere della Sera, 21 January 2009, available at http://www.corriere.it/esteri/09_gennaio_21/denuncia_hamas_cremonesi_ac41c6f4-e802-11dd-833f-00144f02aabc.shtml.

(b) Use of Civilian Homes and Public Institutions as Bases of Operation

163. In addition to staging rocket attacks from civilian areas, Hamas conducted much of its fighting during the Gaza Operation from bases within private residences and public facilities, which Hamas assumed the IDF would be reluctant to attack. As documented further detailed in subsection V.B(3) below, Hamas' main base of operations during the Gaza Operation was located inside Shifa Hospital in Gaza City, which was not attacked by Israeli forces out of concern for the inevitable harm to civilians also present in the hospital. Hamas' decision to place the lives of hundreds of patients, doctors, and nurses in danger in this manner, however, is in clear breach of the principle of distinction and its particular application in the case of medical facilities, as described above.

164. Similarly, Hamas abused the protection accorded to places of worship, making a practice of storing weapons in mosques. During the Gaza Operation, the IDF found repeated and conclusive evidence of such use. For instance, as the photographs below demonstrate, IDF forces discovered weapons in a mosque in Jabaliya:

► Weapons, including an anti-tank cannon, discovered in a Jabaliya mosque during the Gaza Operation

165. R.A., a Hamas activist arrested by the IDF during the Gaza Operation, revealed his knowledge of Hamas storage places for weapons, including the houses of activists,

tunnels, orchards and mosques. In particular, he indicated, the Salah al-Din Mosque served as a storage site for rockets and other weapons.[160]

166. In some cases, IDF forces fired on mosques known to serve as weapons storehouses and bases of operation. Further confirmation that weapons were indeed stored on the premises came in the form of large secondary explosions.[161]

167. There is also considerable evidence that Hamas misused a variety of other public institutions as operational bases. I.Y.H., a resident of Beit Hanoun, was arrested by the IDF during the Gaza Operation. I.Y.H. told IDF investigators about a Hamas training camp in Khan Younis that was located in a sports complex behind the Omar Ibn Abd al-Aziz Mosque, across from the municipality, as well as rocket firing from a grove in the area of Beit Hanoun and tunnels dug in the area of Khan Younis. He also revealed knowledge of a laboratory for manufacturing explosives and rockets, located in the civil administration complex in the Jabaliya refugee camp.[162]

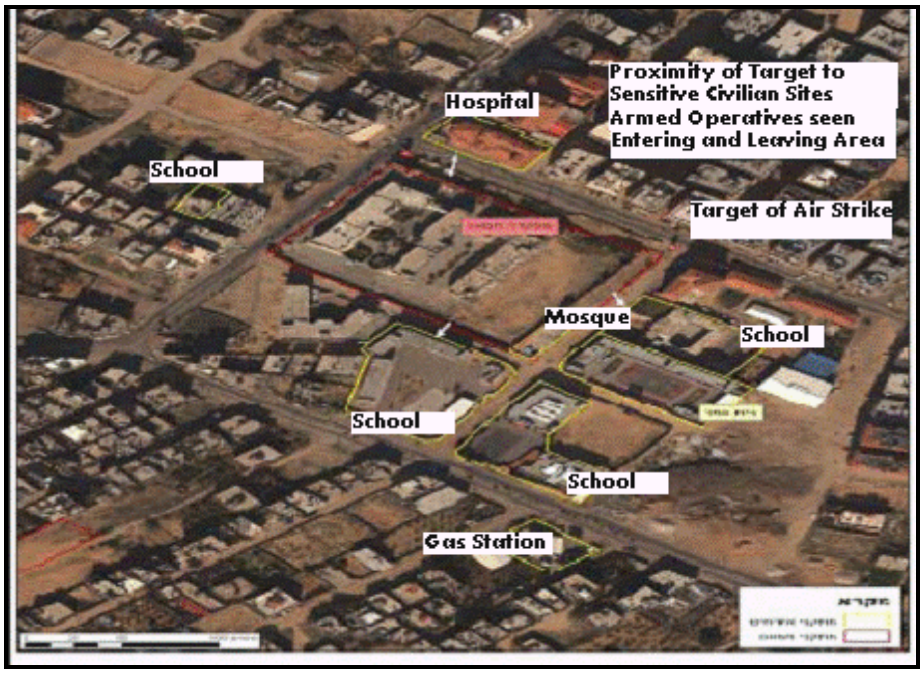
168. Hamas also intentionally located its military activities adjacent to sensitive sites, such as schools and U.N. facilities, or in the midst of residential neighbourhoods.[163] The following aerial photographs offer some examples:

[160] *See* Israel Security Agency, Selected Examples of Interrogations Following Operation Cast Lead, available at http://www.shabak.gov.il/English/EnTerrorData/Archive/Operation/Pages/cast-lead-Interrogations.aspx.

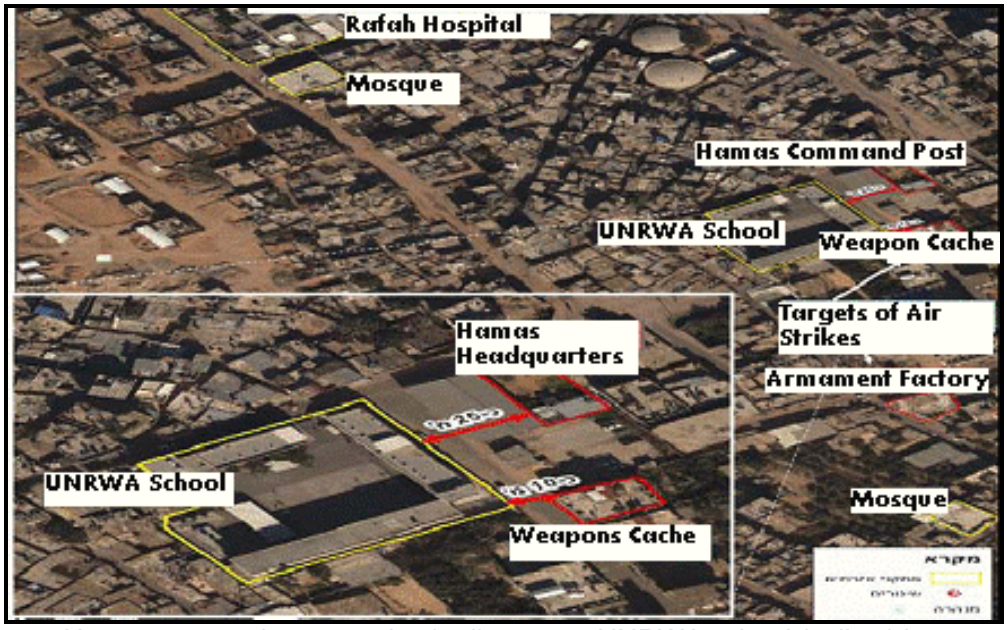
[161] See video footage showing an IAF strike sets off numerous secondary explosions, caused by munitions stockpiled in a mosque, available at http://dover.idf.il/IDF/English/News/the_Front/08/12/3102.htm.

[162] *See* Israel Security Agency, Selected Examples of Interrogations Following Operation Cast Lead, available at http://www.shabak.gov.il/English/EnTerrorData/Archive/Operation/Pages/cast-lead-Interrogations.aspx.

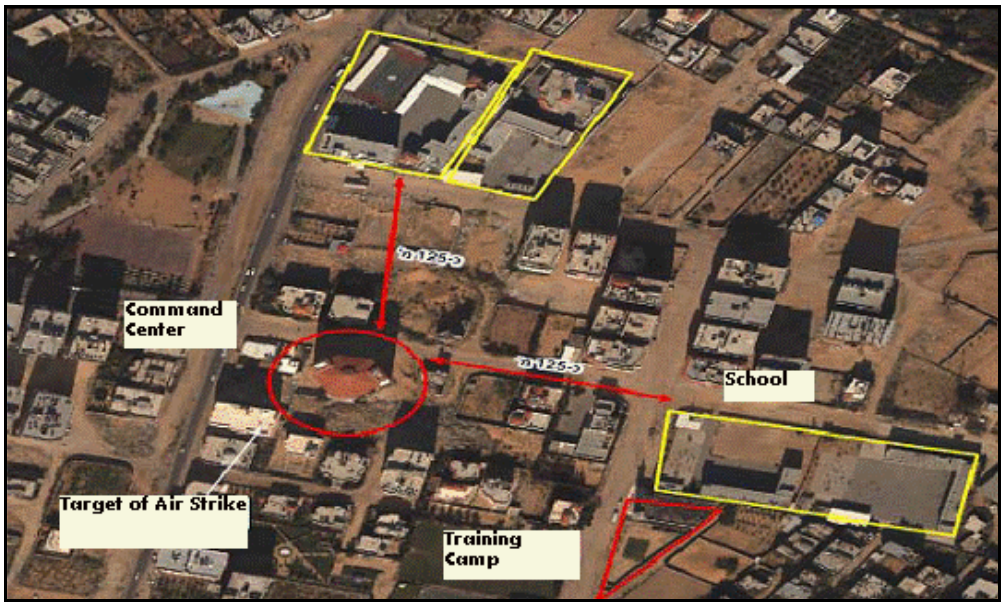
[163] Regarding the use of houses for military purposes, *see* http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/pdf/hamas_e062.pdf. For the use of mosques for military purposes, *see* http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/pdf/hamas_e059.pdf and http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/html/hamas_e059.htm. Regarding Hamas' use of schools, see http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/html/hamas_e060.htm and http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/html/hamas_e055.htm.



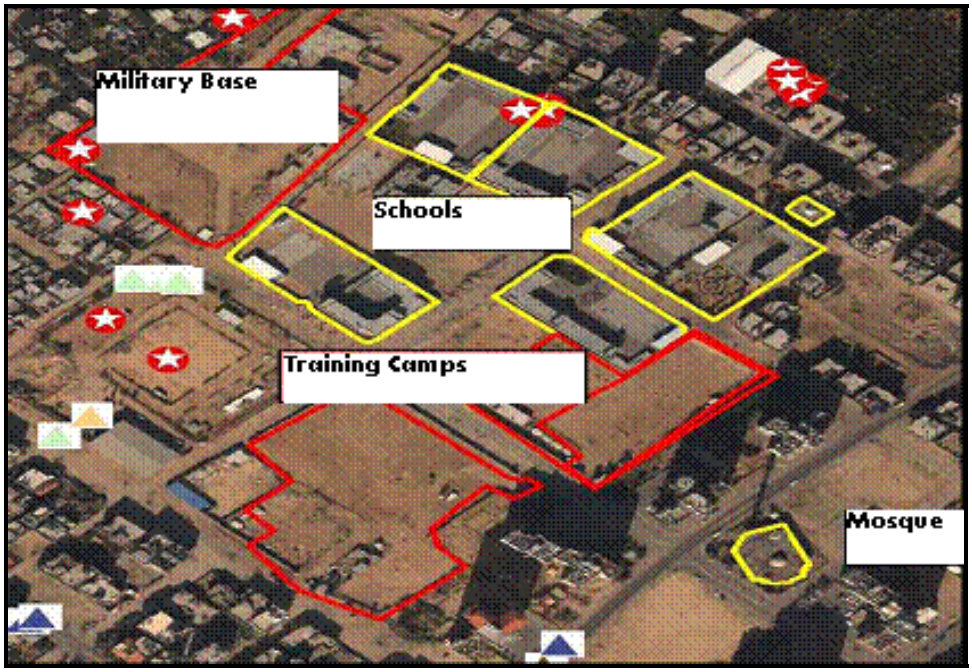
► Hamas headquarters (red) surrounded by schools (yellow) in Tel al-Hawa neighbourhood, southwest of Gaza City. In proximity to the headquarters and schools armed men were seen entering and leaving the Hamas compound (Source: IDF Spokesperson)



► Hamas post and arms cache (red) near an UNRWA school (yellow) in Rafah. The military facilities are about 25 and 10 metres from the school. The Hamas post is in the enlargement (Source: IDF Spokesperson)



► Training camp and headquarters (red) 125 metres from schools (yellow) in Gaza City (Source: IDF Spokesperson)



► Training camps and a military camp (marked in red) near schools (marked in yellow) in the Sheikh Radwan neighbourhood of Gaza City. The red dots with white stars designate launching points of rockets (Source: IDF Spokesperson)

169. During the Gaza Operation, Hamas frequently commandeered the homes of civilians as temporary bases to attack Israeli forces. A reporter from *Der Spiegel* recounted this story, based on an interview with a Palestinian who agreed to speak so long as his full name was not used, due to intimidation by Hamas:

> "Hail also found out after the cease-fire that the militants had used his house as a base for their operations. The door to his house stood open and there were electric cables lying in the hallway. When Hail followed them they led to his neighbor's house which it seems Hamas had mined. As Hail, in his mid-30s, sat on his porch and thought about what to do a man came by: He was from Hamas and had left something in Hail's home. He let him in and the man then emerged with a bullet proof vest, a rocket launcher and an ammunitions belt. An hour later a fighter with Islamic Jihad called to the door, then disappeared onto the roof and reappeared with a box of ammunition."[164]

170. According to some reports, Hamas operatives took pride in endangering the lives of civilians and refused their pleas to go away. *Panorama-Italy* described an incident at an eight-story building, home to about 170 Palestinian civilians, in the Al-Nasser neighbourhood in Gaza. When Hamas terrorists positioned themselves on the roof, a former Palestinian colonel tried to explain to them that they would draw Israeli bombs upon the children of the building. "It will be a great honour if you will die with us," replied the "defenders of Gaza." When the officer insisted that Hamas relocate, they fired a burst of Kalashnikov fire over his head to get rid of him.[165]

(3) Misuse of Medical Facilities and Ambulances

171. During the Gaza Operation, Hamas systematically used medical facilities, vehicles and uniforms as cover for terrorist operations, in clear violation of the Law of Armed Conflict. This included the extensive use of ambulances bearing the protective emblems of the Red Cross and Red Crescent to transport operatives and weaponry; the use of ambulances to "evacuate" terrorists from the battlefield; and the use of hospitals and medical infrastructure as headquarters, situation-rooms, command centres, and hiding places.[166]

172. Ismail Haniyeh, the head of Hamas in the Gaza Strip, located his Southern Command centre in one of the Shifa Hospital units, while the senior leaders of Hamas stationed themselves in another unit.[167] On the ground floor of the hospital's main building, an entire

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[164] Ulrike Putz, *Gaza in Ruins: 'Who Has Won Here?'* Spiegel Online International, 23 January 2009, available at http://www.spiegel.de/international/world/0,1518,603203,00.html.

[165] Fausto Biloslavo, *Gaza: la sporca guerra di Hamas*, Panorama-Italy, 16 February 2009, available at http://blog.panorama.it/mondo/2009/02/16/gaza-la-sporca-guerra-di-hamas/.

[166] *See* Intelligence and Terrorism Information Center, *Gazans Tell How Hamas Used Them As Human Shields*, 28 January 2009, available at http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/html/hamas_e052.htm.

[167] A Hamas activist captured by IDF forces during the operation confirmed during his interrogation that senior Hamas members were hiding out in Shifa Hospital during the Gaza Operation. *See* Israel Security Agency, Selected Examples of Interrogations Following Operation Cast Lead, available at http://www.shabak.gov.il/English/EnTerrorData/Archive/Operation/Pages/cast-lead-Interrogations.aspx; *see also* Amir Mizroch, *Dichter: Hamas salaries paid at Shifa Hospital*, Jerusalem Post, 12 January 2009, available at http://www.jpost.com/servlet/Satellite?pagename=JPost/JPArticle/ShowFull&cid=1231424936164.

wing was closed off and used solely by Hamas operatives. At the wing's entrance, Hamas military operatives blocked entry to all civilians. Hamas operatives also seized control of sections of Al-Shifa Hospital. In addition, Hamas took control of a Red Crescent medical clinic in Khan Younis, converting it into a prisoner detention facility.[168]

173. According to *Newsweek*, Palestinian gunmen admitted using the al-Quds hospital for firing at Israel:

> "One of the most notorious incidents during the war was the Jan. 15 shelling of the Palestinian Red Crescent Society buildings in the downtown Tal-al Hawa part of Gaza City, followed by a shell hitting their Al Quds Hospital next door; the subsequent fire forced all 500 patients to be evacuated… In the Tal-al Hawa neighborhood nearby, however, Talal Safadi, an official in the leftist Palestinian People's Party, said that resistance fighters were firing from positions all around the hospital. He shrugged that off, having a bigger beef with Hamas. 'They failed to win the battle.'"[169]

174. A report from *Corriere della Sera* confirms that the grounds, ambulances and uniforms of the al-Quds hospital had been hijacked by terrorist operatives:

> "Magah al Rachmah, aged 25, residing a few dozen meters from the four large buildings of the now seriously damaged health complex, says about this fact: 'The men of Hamas took refuge mainly in the building that houses the administrative offices of al Quds. They used the ambulances and forced ambulance drivers and nurses to take off their uniforms with the paramedic symbols, so they could blend in better and elude Israeli snipers.'"[170]

175. The same report also alluded to Hamas' occupation of Shifa hospital:

> "Also, Shifah, the largest hospital in the city, is far from being completely used up. It seems however that its basements are densely occupied. "Hamas had hidden there the emergency cells and the interrogation room for the prisoners of Fatah and the secular left front that had been

[168] *See PA Health Ministry: Hamas Using Hospitals as Detention Centers*, Ma'an News Agency, 7 February 2009, available at http://www.maannews.net/eng/ViewDetails.aspx?ID=208410&MARK=hospital. This practice was also used prior to the Gaza Operation. For additional accounts by Red Cross personnel of attacks on hospitals by Palestinian militants in June 2007, including killing of patients in the hospitals, see Alison Caldwell, *Hospitals offer no safety in Gaza strip*, Radio National Australia, available at http://www.abc.net.au/pm/content/2007/s1950580.htm

[169] Rod Nordland, *Hamas and Its Discontents*, *Newsweek*, 20 January 2009, available at http://www.newsweek.com/id/180691/output/print.

[170] Lorenzo Cremonesi, *Così i ragazzini di Hamas ci hanno utilizzato come bersagli*, Corriere della Sera, 21 January 2009, available at http://www.corriere.it/esteri/09_gennaio_21/denuncia_hamas_cremonesi_ac41c6f4-e802-11dd-833f-00144f02aabc.shtml.

> evacuated from the bombarded Saraja prison," say the militants of the Democratic Front for the Liberation of Palestine."[171]

176. Hamas operatives made particular use of ambulances, which frequently served as an escape route out of a heated battle with IDF forces.[172]

177. The *Sydney Morning Herald* reported an extensive interview in January 2009 with Muhammad Shriteh, an ambulance driver who evacuated wounded Palestinians from the battle zones. Mr. Shriteh stated that during most of the Gaza Operation, he would "co-ordinate with the Israelis before we pick up patients… so they would not shoot at us." The more immediate threat was from Hamas, he indicated, because they "would lure the ambulances into the heart of a battle to transport fighters to safety."[173]

178. Mr. Shriteh also reported that one night, after the first week of fighting, "there was a call from a house in Jabaliya." Because of the urgency of the call, he said, there was no time to arrange his movements with the IDF. Nevertheless, he knew the Israelis were watching him because "I could see the red laser beam on the ambulance and on me." Mr. Shriteh stated that when he entered the house in Jabaliya he saw three Hamas operatives who had taken cover inside, and that half of the building had already been destroyed. "They were very scared, and very nervous," he said. "They dropped their weapons and ordered me to get them out, to put them in the ambulance and take them away." He refused because, he said, he knew that if the IDF saw him, he would not be able to pick up any more wounded people. One of the Hamas operatives, he said, put a gun to his head but he still refused, and then they allowed him to leave.[174]

179. Mr. Shriteh added that during the Gaza Operation, Hamas operatives made several attempts to hijack the ambulance fleet of al-Quds Hospital, located in the Tel al-Hawa neighbourhood in Gaza City. To deny Hamas the use of these ambulances, medical workers "had to get in all the ambulances and make the illusion of an emergency and only come back when [Hamas] had gone."[175]

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[171] *Id.*

[172] For examples of the use made by Hamas of U.N. ambulances to evacuate armed terrorists from battle zones *see* http://www.terrorism-info.org.il/malam_multimedia/Hebrew/heb_n/pdf/hamas_028.pdf.

[173] Jason Koutsoukis, *Hamas tried to hijack ambulances during Gaza war*, Sydney Morning Herald, 26 January 2009, available at http://www.smh.com.au/news/world/hamas-tried-to-hijack-ambulances-during-gaza-war/2009/01/25/1232818246374.html.

[174] *Id.*

[175] *Id.*

180. This unlawful use of medical facilities and vehicles by Hamas endangered medical personnel as well as the sick and wounded, while severely undermining the special protections afforded by customary international law to these persons in times of armed conflict. Such acts constitute serious violations of the Law of Armed Conflict: Under Article 23(f) of the 1907 Regulations annexed to the Hague Convention IV Respecting the Laws and Customs of War on Land, which reflects customary international law, it is "especially forbidden…[t]o make improper use of a flag of truce, … as well as the distinctive badges of the Geneva Convention." Article 44 of the First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949) also provides that: "… the emblem of the Red Cross on a white ground … may not be employed, either in time of peace or in time of war, except to indicate or to protect the medical units and establishments…"[176]

(4) Booby-trapping of Civilian Areas

181. Another tactic of Hamas during the Gaza Operation involved booby-trapping of homes, roads, schools and even entire neighbourhoods with mines and explosives, in order to inflict casualties on advancing IDF forces. This practice recklessly endangered the nearby civilians and buildings, which inevitably suffered during explosions. In essence, the Hamas strategy was to transform the urban areas of the Gaza Strip into a massive death trap for IDF forces, in gross disregard for the safety of the local civilian population.[177]

182. On 6 January 2009, during IDF activity in the Zeitun neighbourhood of Gaza City, weapons were found in a zoo near a school. Detonator cables were also found, leading to a back room where weapons were located:

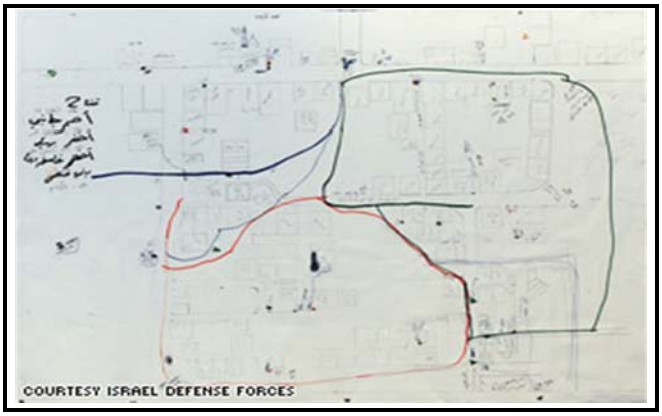
[176] Similarly, Article 38 of Additional Protocol I states that:

> (1) It is prohibited to make improper use of the distinctive emblem of the Red Cross, Red Crescent or … of other emblems, signs or signals provided for by the Conventions ….
>
> (2) It is prohibited to make use of the distinctive emblem of the United Nations, except as authorized by that Organization.

[177] *See* Intelligence and Terrorism Information Center, *Civilians as Human Shields*, 19 January 2009, available at http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/html/hamas_e046.htm.


► Left: IDF forces conducting a search near the booby-trapped school. Right: The white fuse running around the structure is visible near the wall (Source: IDF Spokesperson, 11 January 2009)

183. A Hamas operational map captured by Israeli forces during the Gaza Operation shows the locations of booby traps in homes and near gas stations, as well as sniper positions inside mosques:



► Left: A Hamas operational map captured by Israeli forces during the Gaza Operation shows the locations of booby traps in homes and near gas stations, as well as sniper positions inside mosques. Right: Booby-trapped residential building

184. The use of booby traps by Hamas often created a multiplier effect with respect to collateral damage from IDF strikes and advancing forces. Secondary blasts from Hamas explosives destroyed homes and injured civilians who would have been unharmed were it not for the use of such tactics. The booby-trap locations were unknown to the IDF and thus could not be fully accounted for in targeting decisions and during operational activities. Such harm was impossible to foresee in advance by the IDF and could not be taken into account in the proportionality analysis. Furthermore, because roads and buildings were often mined to explode, IDF forces had to target them to protect themselves, and sometimes needed to create alternative pathways through neighbourhoods that had also been heavily booby-trapped.

185. The resulting damage is a clear and predictable consequence of Hamas' decision to wrap entire communities in a "suicide belt" of explosives. Hamas' actions violate the Law of Armed Conflict, which prohibits the reckless endangerment of civilians.[178]

(5) Blending in with Civilians and Use of Human Shields

186. In addition to hiding behind civilian facilities, Hamas uses civilians themselves, including women and children, as human shields.[179] Armed operatives mingle routinely with civilians in order to cover their movements. In many instances, Hamas deliberately encouraged civilians, including children, to congregate and act as human shields in locations where the IDF had provided prior warnings to civilians of pending attacks. On 29 February 2008, Fathi Hamad, a Hamas legislator, openly boasted about the practice on al-Aqsa TV:

> "[the enemies of Allah] do not know that the Palestinian People has developed its [methods] of death and death-seeking. For the Palestinian people, death became an industry, at which women excel and so do all people on this land: the elderly excel, the mujahideen excel and the children excel. Accordingly, [Hamas] created a human shield of women, children, the elderly and the mujahideen, against the Zionist bombing machine."[180]

187. Hamas activist M.A., a resident of Jabaliya, was arrested by the IDF during the Gaza Operation. During questioning he provided information about Hamas' exploitation of the civilian population:

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[178] *See* Section V.A(1)(b).

[179] Several videos illustrating this practice are available (in Hebrew) on the website of the Intelligence and Terrorism Information Center. *See, e.g.,* Intelligence and Terrorism Information Center, *Hamas modus operandi – Terrorist shooting from a roof of a house and using children as a human shield*, 6 January 2009, available at http://www.terrorism-info.org.il/malam_multimedia/Hebrew/heb_n/video/v9.wmv (depicting terrorist shooting from roof of house, calling out to civilians to help him get out of the house, and leaving the house protected by children as shields); Intelligence and Terrorism Information Center, *Hamas modus operandi – Hamas terrorist searching for shelter after shooting rockets towards Israel*, available at http://www.terrorism-info.org.il/malam_multimedia/Hebrew/heb_n/video/v10.wmv (depicting terrorist pushing himself into a group of children after firing rocket towards Israel); Intelligence and Terrorism Information Center, *Preventing the harming of uninvolved persons – Hamas terrorists integrate with civilians in order to avoid being hit and thus endangering uninvolved civilians*, 12 January 2009, available at http://www.terrorism-info.org.il/malam_multimedia/Hebrew/heb_n/video/v11.wmv (depicting targeting of senior terrorist by IDF forces and cancellation of attack after children and woman holding a baby arrive); Intelligence and Terrorism Information Center, *Preventing the harming of uninvolved persons – Weapons and ammunition are located in the building – The IDF notified the tenants to evacuate the building – In order to prevent attack on the building, many civilians go up on the roof*, 27 December 2008, available at http://www.terrorism-info.org.il/malam_multimedia/Hebrew/heb_n/video/v12b.wmv (showing civilians arriving on roof of building containing Hamas weapons cache to protect it from announced IDF strike).

[180] Transcript of Statement of Hamas Member of Palestinian Legislative Council, Fathi Hamad, *Al-Aqsa TV,* 29 February 2008, video available at http://www.youtube.com/watch?v=ArJbn-lUCh4.

> "[M.A.] reported in his interrogation that Hamas activists exploit innocent civilians, women and children, for the sake of their activities, to avoid being targeted by IDF forces. He related, for example, that he had hidden in a house with innocent civilians and changed his clothes so as not to be arrested. He was also witness to an incident in which Hamas activists requested a 12 year old child to wheel a cart laden with rockets while they walked at a distance, in case IDF forces noticed them. He also said that Hamas instructed its members to fire from mosques and schools, on the assumption that Israel would not respond with fire to such locations; and similarly, regarding civilian lands. He noted as well that senior members of the organization ran away and hid in bunkers while they sent junior activists to fight, and that Hamas activists shot at Fatah activists on the assumption that they were pleased with the IDF forces' entrance of the Gaza Strip."[181]

188. The practices described above purposely endangered civilians and therefore breach the Law of Armed Conflict, contravening the fundamental principle of distinction between combatants and non-combatants.[182]

189. In addition to the specific violations by Hamas forces, Hamas officials in Gaza also violated their legal obligations towards the civilian population under their control.

(6) Exploitation of Children

190. In addition to employing minors as terrorist operatives and suicide bombers, Hamas routinely exploited children in military support roles for intelligence gathering, tunnel digging, weapons smuggling, collecting weapons from dead terrorists, and logistical support, all in clear violation of international law.

191. In his annual report to the Security Council on the issue of "Children and Armed Conflict," the Secretary-General of the United Nations referred to this practice, and to the difficulties in obtaining concrete information about it:

> "While there have been reported incidents of children being trained and/or used by Palestinian militant groups in Gaza, community members are reluctant to provide information on cases of children used by armed forces or armed groups for fear of reprisals. Significant progress has been made towards the implementation of an informal monitoring system on child rights violations. There are concerns that Hamas reportedly used children as shields and may have used schools and hospitals or areas in their proximity to launch rockets into

[181] *See* Israel Security Agency, Selected Examples of Interrogations Following Operation Cast Lead, available at http://www.shabak.gov.il/English/EnTerrorData/Archive/Operation/Pages/cast-lead-Interrogations.aspx.
[182] *See* Section V.A(1).

> Israel during the December 2008 and January 2009 hostilities. These concerns must be further investigated."[183]

192. The media has widely reported Hamas' recruitment and exploitation of children. *Corriere della Sera* published the testimony of Abu Issa, aged 42 and a resident of the Tel Awa neighbourhood:

> "The militiamen of Hamas tried on purpose to provoke the Israelis. Often they were young boys, aged 16 or 17, armed with submachine guns. They couldn't do anything against tanks and jet fighters. They knew they were much weaker. But they wanted them to fire on our houses so they may later accuse them [the Israelis] of war crimes."[184]

193. During the summer of 2008 Hamas organised "summer camps" for teenagers in the Gaza Strip in order to provide them with military training and militant indoctrination. As the children participated in drills resembling those of the Hamas security services, Hamas gunmen would walk among them, proclaiming that they were training tomorrow's leaders.[185] The clear intent of these training camps was the recruitment of the child participants into the Hamas organisation and its militant anti-Israeli ideology.

194. The practice of using children as fighters or for other military purposes violates the Law of Armed Conflict, including prohibitions against allowing children to take part in hostilities. As customary international law is reflected in this regard in Additional Protocol I, the parties to a conflict must take "all feasible measures" to ensure that children "do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces."[186]

(7) Interference with Humanitarian Relief Efforts

195. Far from taking measures to protect Palestinian civilians during the fighting in Gaza, Hamas forces acted in a manner that prevented humanitarian relief coordinated by the IDF with various international aid organisations from reaching its intended recipients. While the IDF observed humanitarian pauses in fighting, Hamas fired rockets during these periods, attacked crossing points into Gaza through which much-needed supplies arrived,

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[183] The Secretary-General, Report of the Secretary-General on Children and armed conflict, ¶¶ 86-87, delivered to the Security Council and the General Assembly, U.N. Doc. S/2009/158, A/63/785 (26 March 2009).

[184] Lorenzo Cremonesi, *Così i ragazzini di Hamas ci hanno utilizzato come bersagli*, Corriere della Sera, 21 January 2009, available at http://www.corriere.it/esteri/09_gennaio_21/denuncia_hamas_cremonesi_ac41c6f4-e802-11dd-833f-00144f02aabc.shtml.

[185] Associated Press, *Hamas Summer School Graduates Now Ready for Battle with Israel*, Haaretz, 11 August 2008, available at http://www.haaretz.com/hasen/spages/1010449.html.

[186] Additional Protocol I, art. 77(2).

and hijacked those supplies once they crossed the border. These actions exacerbated the suffering of the Palestinian population of Gaza.

196. All of these actions violate the Law of Armed Conflict, which requires parties to allow the entry of humanitarian supplies and to guarantee their safety. Article 59 of the Fourth Geneva Convention requires parties in an armed conflict to "permit the free passage of [humanitarian] consignments and shall guarantee their protection." Article 60 of the same Convention protects the shipments from being diverted from their intended purpose.

197. During the Gaza Operation, the IDF unilaterally implemented humanitarian pauses in fighting to allow the local population to re-supply and attend to the wounded.[187] These pauses were exploited by Hamas to fire rockets and mortars into Israel and to attack IDF forces. During the period between 8 January 2009 and 17 January 2009, Hamas fired a total of 44 rockets and mortars at Israel during humanitarian pauses. The following IDF statistics show the number rocket and mortar launches occurring during humanitarian pauses in a single three day period from 10 to 12 January 2009:

- 10 January 2009 between 13:00 and 16:00 - 5 launches;
- 11 January 2009 between 11:00 and 14:00 - 12 launches; and
- 12 January 2009 between 10:00 and 13:00 - 10 launches.

198. Hamas and other terrorist organisations have also continued a practice of launching attacks against crossing points, which provide the only entry points for humanitarian aid to the Gaza Strip. The following incidents were documented during the first eight months of 2008:

- 2 August: Sniper fire and three mortar attacks are reported at the Nahal-Oz fuel terminal into Gaza;
- 13 July: Two mortars are fired at Kibbutz Nahal-Oz, approximately 875 yards (800 metres) from fuel crossing;
- 8 July: A mortar shell fired from the Gaza Strip lands in Kibbutz Ein Hashlosha;

[187] *See* Section V.C(4)(c) below.

- 7 July: Two mortar shells are fired from Gaza fall close to Karni goods crossing and Kibbutz Nahal-Oz;

- 6 July: Armed Palestinian terrorists open fire on agricultural farmers working close to the Nahal-Oz crossing;

- 22 May: A truck bomb, containing four tons of explosives, explodes at the Erez pedestrian crossing into Gaza;

- 19 April: The Kerem Shalom goods crossing is attacked by two car bombs, wounding 13 IDF soldiers;

- 13 April: Five mortars are fired at Kerem Shalom crossing;

- 9 April: Mortars fired at Nahal-Oz terminal. Terrorists later infiltrate the crossing and shoot dead two workers;

- 23 March: Two mortars fall in close proximity to the Sufa crossing;

- 29 February: A mortar falls next to the Sufa crossing;

- 18 February: Two rockets fired towards Kibbutz Nahal-Oz, approximately 875 yards (800 metres) from fuel crossing;

- 16 February: Five rockets fired toward Kibbutz Nahal-Oz;

- 12 February: Mortars are fired which fall near Nahal-Oz fuel terminal;

- 6 February: A mortar shell is fired at Sufa goods crossing, forcing its closure;

- 18 January: Eight mortars are fired at Sufa crossing;

- 12 January: A Qassam rocket falls near Erez pedestrian crossing;

- 7 January: Palestinian Islamic Jihad attempts to bomb Erez pedestrian crossing but attack is thwarted; and

- 1 January: Five mortars are fired at Sufa goods crossing.

199. Hamas' attacks on crossing points continued during the Gaza engagement. For instance, on 12 January 2009, when the Karni crossing was opened to allow truck loads from Israel into the Gaza Strip, IDF forces searching in the area found a tunnel that was dug in the direction of the crossing for the purpose of carrying out a terrorist attack. The crossing was subsequently re-closed for fear that additional tunnels have been dug. In another incident, an explosive tunnel was discovered near the Nahal Oz fuel terminal, substantially increasing the risk of transferring industrial diesel for the Gaza power station through the Kerem Shalom crossing from Israel to Gaza.

200. Perhaps the most serious interference with humanitarian relief efforts by Hamas consisted of hijacking humanitarian supplies once they arrived in Gaza. On 12 January 2009 it was reported by the Jerusalem Post that "Hamas raided some 100 aid trucks that Israel had allowed into Gaza, stole their contents and sold them to the highest bidders."[188] Internet user Abu Mohamed of Khan Younis wrote on 9 January 2009 at 21.40 that:

> "Hamas is selling the humanitarian aid to the big merchants. They are exploiting people's suffering and do not care about the martyrs, the wounded and those who have fled their homes. They commandeered the UNRWA lorries and put the supplies in their own storehouses. Ask the chief of emergency services in Rafah, the engineer Sh'hiber. Hamas people are seizing all the goods entering Gaza and selling them to the big merchants. Ask the merchant Hamed from Khan Younes who is selling the aid from Jordan to the small merchants. Also the aid from Egypt is being sold and distributed to their people only. Everyone in Gaza knows this, but the people are silent. Only Hamas are profiting from the people's disasters. We ask that all the aid go through the above organizations."

201. A participant on a Fatah Internet forum said that:

> "The aid goes into Hamas' stores. They sell it to poor civilians … who are forced to wear green berets [identifying them with Hamas] to be able to buy it. If you don't wear a green beret, there is neither food nor drink for you in Gaza."

[188] Yaakov Katz et al., *Hamas Raids Aid Trucks, Sells Supplies*, The Jerusalem Post, 12 January 2009, available at http://www.jpost.com/servlet/Satellite?cid=1231424932109&pagename=JPost/JPArticle/ShowFull.

202. He also complained that the aid was not distributed by organisations such as UNRWA and the Red Cross, but by Hamas.[189] Another participant added that "the Hamas militias take the aid that arrives and give it to movement operatives … Hamas sells the aid … at higher than normal prices."

203. Captured Hamas activist N.A. reported to investigators that "employees of the Hamas government took the humanitarian aid sent by Israel, and that civilians did not receive the aid for free but were required to pay for it."[190] N.A. said he recognised the humanitarian aid as originating in Israel because the labels on sacks of flour were in Hebrew.[191]

204. H.S., a resident of Jabaliya, provided similar information after he was arrested by the IDF during the Gaza Operation. H.S. spoke about the Hamas control of humanitarian aid arriving in the Gaza Strip from UNRWA – a situation existing since the Hamas rise to power in Gaza. As a result, he indicated, "Fatah activists do not receive any aid, and the food and equipment are transferred directly to Hamas activists and their supporters."[192]

205. On 20 January 2009, a number of armed men seized a Jordanian aid convoy after entering the Gaza Strip via Kerem Shalom Crossing Point. The Jordan Hashemite Charity Organisation (JHCO) aid convoy, which was expected by the UNRWA, was unloaded to non-Jordanian trucks after crossing King Hussein Bridge. The armed men opened fire at drivers after crossing Kerem Shalom crossing point and forced them to head to their own warehouses.[193]

206. On 3 February 2009, UNRWA reported that Hamas armed assailants seized by force 3,500 blankets and 406 food parcels from its distribution centre at the Shati refugee camp. This action was strongly condemned by U.N. officials, who demanded an immediate return of the aid.[194] On 5 February 2009, UNRWA suspended all imports of aid into the Gaza Strip after 10 truckloads of flour (equivalent to 100 tons) and rice (equivalent to 200 tons)

[189] Fatah forum, 15 January 2009 (as cited in Intelligence and Terrorism Information Center, Evidence of Hamas Use of the Civilian Population as Human Shields, 4 February 2009, available at http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/pdf/hamas_e055.pdf.

[190] *See* Israel Security Agency, Selected Examples of Interrogations Following Operation Cast Lead, available at http://www.shabak.gov.il/English/EnTerrorData/Archive/Operation/Pages/cast-lead-Interrogations.aspx.

[191] *Id.*

[192] *Id.*

[193] *Armed men seize Jordanian aid in Gaza Strip*, Petra News Agency, 20 January 2009, available at http://www.petra.gov.jo/Artical.aspx?Lng=1&Section=&Artical=83031.

[194] Press Release, *UNRWA Condemns Confiscation of Gaza Aid and Demands its Immediate Return*, UNRWA, 4 February 2009, available at http://www.un.org/unrwa/news/releases/pr-2009/jer_4feb09.html. *See also* Intelligence and Terrorism Information Center, Tensions between Hamas and UNRWA following the theft of food and blankets and the Hamas takeover of a supply convoy, 9 February 2009, available at http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/pdf/hamas_e056.pdf.

imported from Egypt for UNRWA were taken from the Palestinian side of the Kerem Shalom Crossing into Gaza.[195]

207. All of these reports strongly suggest a pattern of Hamas actions designed to prevent international aid organisations from distributing much-needed humanitarian relief in an orderly fashion, solely because Hamas wished to be able to use the supplies to reward its supporters.

208. Hamas' interference with humanitarian relief efforts further underscores a complete lack of concern for the lives of ordinary Palestinians, on whose behalf Hamas purports to wage its terrorist campaign against Israel. Indeed, Hamas' wilful and repeated interference with the supply of essential goods and services to Gaza qualifies as a grave breach of the Law of Armed Conflict and a war crime under international law.

C. IDF's Conduct of the Operation and Procedures to Ensure Compliance with International Law

209. The inherent asymmetry between a State defending its civilians from terrorist attack and the terrorist organisations and other non-State actors raises acute dilemmas, challenges and intrinsic differences in assessing their conduct. Unlike Hamas and other terrorist organisations that Israel faces, Israel is firmly committed — as a matter of both policy and practice — to respecting its obligations under international law, including under the Law of Armed Conflict. As discussed further below, the IDF routinely undergo mandatory extensive training regimens designed to familiarise its soldiers with the laws of war, and actively involved military lawyers in advising commanders during both planning and operations, to ensure that they are aware of their obligations. Observance of the Law of Armed Conflict is also reflected in the IDF's specific orders and rules of engagement for the Gaza Operation; in the many specific precautions the IDF took during the Gaza Operation to try to minimise civilian harm; and in Israel's support for humanitarian efforts during the fighting. Finally, Israel's commitment to the rule of law with respect to the Gaza Operation is safeguarded by the extensive mechanisms it has in place, both within the IDF and outside it, to investigate alleged violations of the rules and ensure accountability for any such violations, should they occur.

[195] Press Release, *UNRWA Suspends Imports into Gaza Following Aid Confiscation*, UNRWA, 6 February 2009, available at http://www.un.org/unrwa/news/releases/pr-2009/jer_6feb09.html.

210. Each of the policies described in this section was instrumental in fulfilling IDF's obligations under the Law of Armed Conflict, as well as setting and achieving a high standard of protection for civilians during the Gaza Operation, often well in excess of the requirements of the Law of Armed Conflict. For instance, the in-depth training of IDF forces to respect the Law of Armed Conflict provided soldiers and commanders with the necessary knowledge and tools to make appropriate split-second decisions in the heat of battle, despite Hamas' attempts to deprive Israeli forces of options other than attacks that put civilians at risk. The involvement of military lawyers provided yet another layer of protection. The operational order in relation to the Gaza Operation clearly set forth the principles of distinction and proportionality, which all IDF forces were instructed to observe as an integral part of their battle orders. In practice, IDF forces imposed on themselves a multi-faceted system of early warnings, which made their operations far more complex and largely eliminated the element of surprise the IDF might have otherwise gained in its battle against Hamas. In many cases, IDF forces provided not one but multiple warnings prior to each attack and used sophisticated technology to confirm the departure of civilians and minimise collateral damage.

211. Ultimately, despite all the training, supervision and precautions, the actions of IDF forces during the Gaza Operation were not devoid of operational errors. Nevertheless, based on investigation thus far, such errors did not amount to violations of International Humanitarian Law. Israel is fully committed, however, to investigating all instances of alleged misconduct, to taking action to prosecute violations in appropriate cases and to making policy adjustments designed to prevent the repeat occurrence of unfortunate incidents. The multi-tier internal and external review procedures existing for such investigation under Israeli law are not only being fully utilised in connection with the Gaza Operation, they have been enhanced as described further below.

(1) IDF Training and Legal Supervision

(a) The IDF's Training System and Legal Supervision

212. The IDF takes substantial measures to instil awareness of and respect for international law in commanders and soldiers. The IDF Military Advocate General's Corps provides instruction in the Law of Armed Conflict to fighting forces predominantly through the IDF School of Military Law. The activities of the School in this regard are numerous and varied, including:

- Development of interactive computer software for instruction on rules of conduct in armed conflicts. Several thousand copies of this software have been distributed

throughout the forces, and it is regularly used for training instructors in Command courses, at the IDF Tactical Command College and at most of the training bases in the IDF. Several militaries around the world have expressed interest in receiving the software for their internal training purposes.

- Development of interactive software for teaching the Law of Armed Conflict. This software contains an introduction to international law and deals with subjects such as the legality of weapons, targeting, methods of warfare, international criminal law and command responsibility.

- Wide distribution within the IDF of written materials, including leaflets for commanders, instruction booklets, placards and power-point presentations, dealing with offences in armed conflict, rules of conduct and other topics.

- Regular delivery of lectures and workshops on the Law of Armed Conflict and related rules of conduct, by officers of the IDF Law School, as an integral part of the IDF's training programs for senior and junior commanders. These include lectures and workshops at the IDF Officer Training School, the Staff and Command College, Senior Command Courses and the National Security College.

- Incorporating this information in the training of combat soldiers and integration of Law of Armed Conflict norms into IDF Combat Doctrine. For example, the IDF tactical field manual on low intensity conflicts with irregular forces contains a chapter on legal and ethical aspects of military operations.

- Offering academic courses in international law, the Law of Armed Conflict and belligerent occupation, command responsibility and norms of conduct, as part of the curriculum of the IDF Tactical Command College.

- Publication of an educational booklet on the Law of War. The latest edition of this booklet was published in 2006 and distributed to all unit commanders, senior officers, military colleges and the IDF Officers' Training School.

- Production of a Comparative Manual on the Law of Armed Conflict by the School of Military Law. Unique in kind, this is a comparative guide to the military manuals of Canada, Australia, Germany, United States and the Model Manual of the International

Committee of the Red Cross, as well as the relevant international conventions relating to land, sea and air warfare.

213. The IDF also provides extensive training to inculcate moral norms in combat, based on "The Spirit of the IDF," which sets forth the Code of Ethics for IDF soldiers. The document emphasises paramount values of "Human Life" and "Purity of Arms," defined as follows:

> "Human Life" – "IDF servicemen and women will act in a judicious and safe manner in all they do, out of recognition of the supreme value of human life."
>
> "Purity of Arms" – "IDF servicemen and women will use their weapons and force only for the purpose of their mission, only to the necessary extent and will maintain their humanity even during combat. IDF soldiers will not use their weapons and force to harm human beings who are not combatants or prisoners of war, and will do all in their power to avoid causing harm to their lives, bodies, dignity and property."[196]

214. The IDF provides educational programs for soldiers on human rights issues at all stages of military service, starting with Basic Training and Combat Specialty Training Courses through courses for senior commanders. Several thousand commanders participate in such workshops every year.

215. In addition, the IDF has established a team, led by Battalion Commanders, to identify areas for improvement in these matters and to make changes where necessary. The Education Corps also analyses incidents involving ethical issues and publishes its conclusions throughout the IDF.

216. Leading up to and during the recent operations in Gaza, the IDF Military Advocate General's Corps provided legal advice on the Law of Armed Conflict to commanders at the General Staff, Regional Command and Divisional levels. The lawyers examined the legality of planned targets, participated in the operational planning process, helped direct humanitarian efforts, and took part in situation assessments, exercises and simulations. Legal advisors also assisted in drafting operational orders and procedures and in preparing legal annexes to such orders.

[196] Israel Defence Forces, Spirit of the IDF, available at http://dover.idf.il/IDF/English/about/doctrine/ethics.htm

217. IDF military lawyers were involved in advising commanders on international law aspects of the Gaza Operation. The IDF structure ensures that the IDF legal advisors can provide frank and professional advice. All legal advisers belong to the MAG Corps and are not subordinate to the commanders they advise. According to Israeli law, the head of legal services in the IDF, the Military Advocate General has an independent status outside the military hierarchy in relation to all legal issues. In principal legal aspects the MAG is subject to the guidance and supervision of Israel's Attorney-General and regularly consults with the Attorney General. In addition, IDF activities, including during active combat, as well as all MAG and Attorney General decisions are subject to judicial scrutiny and review by Israel's Supreme Court sitting as the High Court of Justice. As discussed below in Section V.C(5)(c), the High Court of Justice regularly reviews such activities and decisions, and intervenes in appropriate cases.

(b) Comparison with Other Systems of Training and Supervision

218. The training and supervision provided by the IDF with respect to the Law of Armed Conflict is similar to — and in some ways more extensive — than the training and supervision undertaken in other militaries of democratic States. Like Israel, many other countries provide their forces with training in the Law of Armed Conflict.[197] In addition, many countries have adopted training programs similar to Israel's in which forces are required not only to learn the applicable rules of the Law of Armed Conflict, but also to apply them in realistic scenarios.[198]

[197] *See, e.g.*, Canada: Law of Armed Conflict at the Operational and Tactical Levels, Joint Doctrine Manual B-GJ-005-104/FP-021 § 1503-04, 13 August 2001, available at http://www.cfd-cdf.forces.gc.ca/websites/Resources/dgfda/Pubs/CF%20Joint%20Doctrine%20Publications/CF%20Joint%20Doctrine%20-%20B-GJ-005-104%20FP-021%20-%20LOAC%20-%20EN%20(13%20Aug%2001).pdf (Canadian manual noting the Law of Armed Conflict must be included in military instruction programs and that commanders have a responsibility to ensure the forces under their command "are aware of their responsibilities related to the LOAC and they behave in a manner consistent with the LOAC"); NATO: Are Rannem Johansen, *The Final Exam*, Joint Warfare Centre Media Center, 17 June 2004, available at http://www.jwc.nato.int/article.php?articleID=37 (describing a training program in the Law of Armed Conflict provided to NATO forces); United States: IC-1 to U.S. Air Force Directive 51-401, *Training and Reporting to Ensure Compliance with the Law of Armed Conflict* ¶ 3.1 (17 December 2008) (requiring computer based training in the Law of Armed Conflict 90 days before being deployed); U.S. Air Force Policy Directive 51-4, *Compliance With the Law of Armed Conflict* ¶ 5.1 (16 April 1993) (requiring all members of the U.S. Air Force to receive instruction on the Law of Armed Conflict); Other Examples: News Release, *Switzerland: Senior Officers From 60 Countries Work On Integrating International Humanitarian Law into Military Operations*, ICRC, 6 August 2007, available at http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/promoting-ihl-news-060807 (describing the efforts of 60 European, American, African, Asian and Middle Eastern countries to integrate training of the Law of Armed Conflict into their military forces).

[198] *See* Col. Jody M. Prescott, The Development of NATO EBAO Doctrine: Clausewitz's Theories and the Role of Law in an Evolving Approach to Operations, 27 Penn. St. Int'l L. Rev. 125, 162 (2008) ("Many nations have developed complex and realistic situational training programs for soldiers that challenge them to apply what they have learned about the law of armed conflict in simulations involving living role players."); Col. Jody M. Prescott, Training

[FOOTNOTE CONTINUED ON NEXT PAGE]

219. NATO's International Security Assistance Force ("ISAF") in Afghanistan recently issued tactical directives regarding compliance with the Law of Armed Conflict which mirror many of the steps taken by Israel. One Directive, issued on 30 December 2008, directs all ISAF forces to ensure that uses of force be "proportionate" and that "the utmost of care should be taken to minimize any damage."[199] The Directive also requires military commanders to train their forces "to minimize the need to resort to deadly force" and to issue — as Israel did — repeated "general and specific warnings (visual and audible)" before using deadly force.[200] A Directive issued 6 July 2009 calls for commanders to scrutinise, as Israel does, the use of close air support ("CAS") against residential compounds and carefully to "weigh the gain of using CAS against the cost of civilian causalities."[201] The Directive further instructs commanders to ensure "complete understanding at all levels — down to the most junior soldier" regarding the proper use of force.[202]

220. Moreover, lawyers in other countries play a similar role to the role held by legal advisers for the IDF, examining the legality of planned targets, providing legal advice to commanders both in the field and during the planning stages of operations, and drafting operational orders and procedures.[203] For example, in the United Kingdom, legal advisers for the Army are normally available at the divisional level. In an air campaign, a legal adviser is normally on the staff of the theatre air commander.[204] Many other countries do not have lawyers available and involved to the degree these countries and Israel do.

[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]
in the Law of Armed Conflict — A NATO Perspective, 7 J. Mil. Ethics 66, 68-71 (2008) (describing NATO training in the Law of Armed Conflict).

[199] *See* International Security Assistance Force, Tactical Directive (30 December 2008) ¶ 4(a).

[200] *Id.* ¶ 4(c).

[201] International Security Assistance Force, Tactical Directive (6 July 2009).

[202] *Id.*

[203] *See* United States**:** U.S. Chairman of the Joint Chiefs of Staff Instruction ("CJCSI") 5810.01C ¶ 4(b) (29 January 2008) (providing that "[a]t all appropriate levels of command and during all stages of operational planning and execution of joint and combined operations, legal advisors will provide advice concerning law of war compliance"); Canada: Canadian Law of Armed Conflict at the Operational and Tactical Levels, Joint Doctrine Manual B-GJ-005-104/FP-021 § 1505 (10 June 2005), available at http://www.cfd-cdf.forces.gc.ca/websites/Resources/dgfda/Pubs/CF%20Joint%20Doctrine%20Publications/CF%20Joint%20Doctrine%20-%20B-GJ-005-104%20FP-021%20-%20LOAC%20-%20EN%20(13%20Aug%2001).pdf ("Canada has the obligation to ensure that legal advisors are available to advise military commanders on the application of the LOAC and the appropriate instruction to be given to the CF. Legal officers from within the Office of the Judge Advocate General fulfill this mandate."); *see generally* Rear Adm. Michael F. Lohr et al., Legal Support in War: The Role of Military Lawyers, 4 CHI. J. INT'L LAW 465 (2003) (describing the role of the U.S. Judge-Advocates with respect to the Law of Armed Conflict); Brig. Gen. Jerry S.T. Pitzul, Operational Law and the Legal Professional: A Canadian Perspective, 51 AIR FORCE L. REV. 311 (2001) (describing the role of the Canadian Forces Judge-Advocates with respect to the Law of Armed Conflict).

[204] UK Ministry of Defence, *The Manual of the Law of Armed Conflict* 413 n.16 (1996).

221. Israel's system for ensuring compliance with international law compares favourably to those of other countries in another respect as well. Although the head of legal services within several other countries' militaries has a status entirely independent of the military hierarchy,[205] the legal advisers in many other countries do not have such independent status.

(2) IDF Rules of Engagement During the Gaza Conflict

222. The IDF's emphasis on compliance with the Law of Armed Conflict was also directly incorporated into the rules of engagement for the Gaza Operation. The operational order for the Operation in Gaza specifically stated that "[a]ll IDF activities are subject to the principles and rules of international law." These rules and principles were further detailed in the order, which emphasised four guiding principles that applied in an integrated and cumulative manner: military necessity, distinction, proportionality and humanity:

- *Military Necessity*: "An attack shall be permitted as long as it is necessary to achieve a military purpose in the course of the military campaign," subject to the other principles and rules set forth.

- *Distinction*: "Strikes shall be directed against military objectives and combatants only. It is absolutely prohibited to intentionally strike civilians or civilian objects (in contrast to incidental proportional harm)."

- *Proportionality*: "A legitimate military objective may be attacked even if the strike would cause incidental harm to civilians or civilian objectives, provided that the expected harm to civilians or civilian objects, or a combination thereof, would not be excessive in relation to the military advantage anticipated."

- *Humanity:* "When legitimate military target is attacked, superfluous suffering to enemy combatants shall be avoided. In this context, only legal weapons, which were approved by the relevant authorities within the IDF, shall be employed."

[205] *See* Aitken Report, *An Investigation into Case of Deliberate Abuse and Unlawful Killing in Iraq in 2003 and 2004* ¶ 28 (25 January 2008) (describing the role of the Service Prosecuting Authority in the United Kingdom and its level of independence from the military hierarchy); David McNaim, The Canadian Forces' Criminal Law Firm: A Blueprint for Independence, 8 CAN. CRIM. L. REV. 329 (2004) (describing the institutional changes made in Canada to give its lawyers more independence from the chain of command).

223. The legal section of the operational order further enumerates several absolute prohibitions.[206] With respect to targeting decisions, the document set out the governing legal principles with regard to particular targets. These principles included the following:

- Only military targets shall be attacked.[207]
- Any attack against civilian objectives shall be prohibited.
- A "civilian objective" is any objective which is not a military target. In case of doubt, the forces are obliged to regard an object as civilian.
- When a civilian objective is used by the enemy for a military activity it loses its protection and immunity and becomes a legitimate military target. Nevertheless, when striking such a target, special care shall be taken to adhere to the principle of proportionality.
- The presence of civilians within a military objective or in its vicinity does not negate as such, the military character of the objective. Such a military objective may be attacked, subject to the principle of proportionality.
- A dual use objective may be attacked if reliable, conclusive and up-to-date information confirms that it serves the military activities of the enemy, and subject to the principle of proportionality. In case of doubt, such objective shall be presumed to be civilian.

224. The operational order confirmed that medical facilities and vehicles should be provided absolute protection from attack, unless they were being used by the enemy for military activities. Religious institutions were similarly protected from attack, unless they were being used for military purposes. Special precautions were to be taken when conducting military activities near U.N. or diplomatic premises, and ICRC staff were to be provided with as much freedom of movement and activity as possible, unless imperative military necessity required its limitation. Cultural property was protected from attack unless used for military activities or in the case of imperative military necessity.

[206] The absolute prohibitions included plunder, starvation of the population, poisoning of water resources, torture, rape, the taking of hostages and the use of civilians as human shields, destruction of private property other than for military necessity, and perfidy.

[207] Military targets were defined in terms similar to those used in Additional Protocol I, art. 52(2).

225. The document further confirmed the importance of minimising incidental harm to civilians and civilian facilities. The operational order provided that "[a]s far as it is possible under the existing circumstances, civilian population in the vicinity of a legitimate military objective shall be warned before an attack. Such early warning may be avoided, if it would risk the operation or the forces." In addition, "any attack on a legitimate target was to be planned to minimise collateral harm to civilians and civilian objectives, including by the determination of: the attack timing, the means of attack, the direction of attack, etc." IDF forces were to use only weapons approved as legal by IDF authorities, and such weapons were to be employed in accordance with the specific limitations and precautions applicable to each of them in the concrete professional orders.

226. The order contained numerous other provisions designed to implement the Law of Armed Conflict. Among other things, the document provided that:

- Destruction of property shall be allowed only for imperative operational necessity and provided that the damage for the property would be proportional to the military advantage gained by the destruction. The destruction of property for deterrence purposes is forbidden.

- The presence of enemy combatants among the civilian populations shall not deny the civilian character of the population.

- Precautionary measures shall be employed to minimise the risk for civilians in the course of the hostilities…. Civilians shall not be compelled to take actions that would endanger them. They shall not be used as "human shields" to render military objectives or IDF forces immune from attack. Civilians shall not be held hostages. Forceful transfer of civilians is forbidden. Collective punishment is forbidden. Special protection shall be provided to the wounded and the sick, as well as to women, children and the elderly.

227. IDF's rules of engagement strictly prohibit the use of civilians as human shields. Moreover, the Israel Supreme Court has ruled that use of civilians in any capacity for the purpose of military operations is unlawful, including the use of civilians to call terrorists hiding in buildings.[208] Following this judgment, this latter practice has also been proscribed by IDF orders. The IDF is committed to enforcing this prohibition.

228. The IDF took a variety of measures to teach and instil awareness of these rules of engagement in commanders and soldiers. As described above, these rules were delivered

[208] *Adalah - The Legal Center for Arab Minority Rights in Israel et. al. v. GOC Central Command, IDF, et. al.*, HCJ 3799/02 (6 October 2005).

through lectures and workshops on the Law of Armed Conflict and related rules of conduct, by officers of the IDF Law School, as an integral part of the IDF's training programs for senior and junior commanders. In addition, they were included in leaflets for commanders, instruction booklets, placards and power-point presentations distributed within the IDF. In the course of the operation in Gaza, whenever the legal advisers posted in the Southern Command or the Division identified a potential gap in the implementation of the said rules of engagement, they initiated the distribution of clarifications to the fighting forces.

229. While IDF's rules of engagement were fully consistent with international law, IDF demonstrated its commitment to protecting civilians by issuing new instructions and orders in the course of the operation designed to further enhance and clarify these protections. Several instructions were issued by the Southern Command and the Regional Division to all combating forces in order to emphasise and clarify important rules of engagement, for instance, with regard to the protection of ambulances and humanitarian convoys.

(3) IDF Pursuit of Legitimate Military Targets During the Gaza Conflict

230. Consistent with its rules of engagement, IDF Forces sought to maintain an equilibrium between two competing considerations: military necessity and humanitarian considerations. In the course of the Gaza Operation, IDF's military necessities included first and foremost the prevention of rocket and mortar fire against Israel and Israelis, as well as the dismantling of terrorist infrastructure, but also the protection of IDF forces operating in the Gaza Strip.

231. As described above, during the Gaza Operation, IDF troops were exposed to considerable risk by the death traps Hamas had laid for them in urban areas, using the illegal tactics described in Section V.B above. These took the form of booby-trapped and mined neighbourhoods, buildings, roads and tunnels, as well as anti-tank rockets, automatic weapons, and sniper fire from concealed positions in civilian buildings and suicide bombers dressed as civilians. In such circumstances, the risk for the safety and security of IDF troops was extremely high, and was properly taken into account.

232. However, like all other considerations of military necessity, the protection of IDF troops did not override all other factors. In accordance with the IDF's operational plans and rules of engagement, military necessity was balanced against the fundamental obligations of the

Law of Armed Conflict, through the principles of distinction, proportionality, and the obligation to take appropriate precautions to minimise civilian harm.

(a) Targeting of Hamas Terrorist Infrastructure

233. Consistent with the principle of distinction, IDF forces attacked military targets directly connected to Hamas and other terrorist organisations' military activities against Israel. For instance, IDF forces targeted Hamas rocket launchers, weapons stockpiles, command and control facilities, weapons factories, explosives laboratories, training facilities and communications infrastructure. That these objects were often concealed or embedded in civilian facilities such as residential buildings, schools, or mosques did not render them immune from attack. In accordance with the Law of Armed Conflict, civilian facilities that served military purposes did not enjoy protection from attack. Thus, a residential building that doubled as an ammunition depot or military headquarters was a legitimate military target for attack.

234. Below is an illustrative account of military targets struck by the IDF during the operation:

- Hamas' bases, posts and headquarters:
  - *Izz al-Din al-Qassam Brigades and Executive Force headquarters in the northern Gaza Strip* (struck on 27 December): Hamas commandeered the compound after it took control of the Gaza Strip in June 2007. It served to store weapons and equipment, as well as housing armoured patrol cars (confiscated from the Palestinian security services operating in the Gaza Strip before the Hamas takeover). Hamas used two of the vehicles in the attack on the Kerem Shalom crossing on 19 April 2008, during which seven IDF soldiers were wounded. The headquarters also served as a base from which terrorist attacks were dispatched. The facility was also Hamas' main interrogation facility and a holding place for Fatah prisoners.
  - *Headquarters and weapons store of the Izz al-Din al-Qassam Brigades at Tel Zaatar, in the Jabaliya area* (struck on 27 December): Hamas took control of the compound during its violent confrontations with Fatah and thereafter used it for military training.
  - *Hamas' Al-Islam post in the northern Gaza Strip* (struck on 27 December): In the past the site served the Palestinian Preventive Intelligence. Hamas commandeered the building when it took over the Gaza Strip, and it serves as a base for the

Executive Force, which was directly connected to Hamas' military wing, as described further in Section V.C(3)(b) below. It also served as a post for senior members of Hamas naval force and a facility for detaining and interrogating Fatah activists and individuals suspected of collaborating with Israel.

- *Hamas' main headquarters compound in Gaza City* (struck on 27 December): This compound served as Hamas' Gaza City headquarters, and the office of Ismail Haniya, head of the Hamas administration, is located in the compound. The headquarters also served as a point for Executive Force patrols to gather before they went out into the city. In addition, there were police cars and armoured patrol cars confiscated by Hamas when it took over the Gaza Strip.

- *Hamas post and training camp in the central Gaza Strip* (struck on 27 December): Hamas used the building to store weapons.

- *Hamas training camp in the southern Gaza Strip* (struck on 27 December): The camp also served as a central post for Hamas' auxiliary force and included a prison facility and weapons store.

- *Headquarters and weapons storage belonging to the Izz al-Din al-Qassam Brigades and the Special Force* (struck on 27 December): After Hamas took over the Gaza Strip it served as headquarters for its security services, housing a weapons store and offices. No civilians were living there. During fighting, Hamas positioned snipers in the building and rocket launchers on the roof.

- *An Izz al-Din al-Qassam Brigades training outpost in the Al-Maqusi towers in the northern Gaza Strip* (struck on 28 December): Hamas' military wing used this facility for training.

- *Ismail Haniyah's office in the Hamas compound in Gaza City* (struck on 31 December): The office of Ismail Haniyah, attacked by Israeli Air Force on the nights of 30-31 December, was used for planning, supporting, and funding terrorist activities against Israel.

- Hamas' armament production and storage sites:

  - *Research and development centre in the Islamic University in Gaza* (struck on 28 December): Hamas used the site to develop rockets with improved launching range.

- Throughout the operation, the IAF attacked dozens of workshops and weapon stores, many of them located in the houses of Hamas operatives and public buildings (including mosques).

- Rocket and mortar launch sites:

  - Throughout the operation, the IAF attacked areas regularly used to launch rockets and mortars against Israel to prevent the arrival of launch squads to those areas. See, for instance, a video of a rocket launcher ready for firing that was struck on 13 January.[209]

- Smuggling tunnels:

  - Throughout the operation, IDF attacked dozens of tunnels along the Philadelphi route used for smuggling of arms and ammunition for terrorist attacks against Israel from Sinai to the Gaza Strip. They were also used to smuggle terrorist operatives from Egypt into the Gaza Strip and vice versa.

- Mosques used by Hamas for military purposes:

  - *A Mosque in the Tel al-Hawa neighbourhood of Gaza City that served as a storehouse for armaments* (struck on 31 December): The mosque served as an arms storage facility and a launching site for terrorist activity. The strike caused a long series of secondary explosions from armaments and ammunition that were stored in the mosque (including rockets, some of which were long-range Grad rockets). The raid took place following information received prior to the attack, indicating that many fighting operations were being launched out of and in the vicinity of the mosque. For instance, the mosque was used for storing weapons, firing rockets into Israeli territory (including fire on the morning of 31 December), and providing a hiding place for terrorist operatives.

  - *Al-Khulafa mosque in Jabaliya* (struck on 1 January): The mosque was a focal point of the Izz al-Din al-Qassam Brigades' terrorist activities. It served as an important Hamas operations room where organisation meetings were held and from which operatives were dispatched to carry out terrorist attacks against Israel. In addition, it contained a rocket arsenal which included long-range standard Grad rockets. The strike on the mosque was followed by a long series of secondary

[209] Intelligence and Terrorism Information Center, video available at http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/html/tkifot_af_eng.htm.

explosions, causing the building to burn for a long time, and indicating that a large quantity of hidden weapons and ammunition had been stockpiled in it.

235. It should be noted that Israeli forces have come under criticism from various international organisations for attacking a number of Hamas targets, such as various "ministries" operated by Hamas, which were alleged to be civilian in nature. While Hamas operates ministries and is in charge of a variety of administrative and traditionally governmental functions in the Gaza Strip, it still remains a terrorist organisation. Many of the ostensibly civilian elements of its regime are in reality active components of its terrorist and military efforts. Indeed, Hamas does not separate its civilian and military activities in the manner in which a legitimate government might. Instead, Hamas uses apparatuses under its control, including quasi-governmental institutions, to promote its terrorist activity.

236. IDF took account of these realities in carrying out attacks against a number of Hamas ministries during the Gaza Operation. With respect to each particular target, IDF made the determination that the attacks were lawful under international law. Finally, it is important to point out that all of these strikes were carefully planned and executed in a manner that minimised the risk to civilians.

(b) Targeting of Terrorist Operatives

237. In addition to Hamas terrorist infrastructure, the military operatives of Hamas and other terrorist organisations were also legitimate targets for attack by the IDF. Hamas' military forces in Gaza were comprised mainly of the Izz al-Din al-Qassam Brigades, but also of other forces making up the so-called "internal security" apparatus, which perform significant military functions during intense fighting with Israel. Due to their military functions, these internal security forces were not accorded the immunity from attack generally granted to civilians.

238. Whereas members of a civilian police force that is *solely* a civilian police force, who have no combat function are not considered combatants under the Law of Armed Conflict, international law recognises that this principle does not apply where police are part of the armed forces of a party.[210] In those circumstances, they may constitute a legitimate military target. In other words, the status of the Palestinian "police" under the Law of

[210] *See, e.g.,* THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 307 (Dieter Fleck and Michael Bothe, eds., Oxford University Press 1995) ("Along with the combatant status attained through the incorporation into the armed forces, these (police) forces also become a military target (as defined by art. 52, ¶ 2 API) and are therefore subject to armed attacks by the opposing party to the conflict just like any other unit in the armed forces.")

Armed Conflict depends on whether they fulfilled combat functions in the course of the armed conflict. The evidence thus far is compelling that they are.

239. Hamas formed the Executive Force in May 2006 as a militia force loyal to Hamas and opposed to the security apparatus of the Fatah-led Palestinian Authority. Hamas drew this paramilitary force largely from its military wing, the Izz al-Din al-Qassam Brigades, and armed the members with anti-tank missiles, mortars, machine guns and grenades. The newly recruited commanders and subordinates were not obliged to give up their military wing affiliation, and continued to operate simultaneously in both functions.

240. After a series of armed clashes, Palestinian President Mahmoud Abbas outlawed the Executive Force in January 2007, accusing it of "lawlessness and assassinations."[211] Nevertheless, Hamas continued building the force and deployed it to conduct a bloody coup to replace the Palestinian Authority in Gaza several months later.

241. At that point, Hamas restructured the Executive Force and subdivided it into several units, including the "police." The newly established police force thereafter assumed many traditional law enforcement functions, to the extent enforcing the unlawful rule of a terrorist organisation over a population could be termed "law enforcement." As the leader of the Executive Force emphasised in an August 2007 interview, however, the force's members were also "resistance fighters,"[212] a common term for Hamas' military wing. Their weaponry continued to include machine guns and anti-tank weapons — not the tools of a regular civilian police force.

[211] Richard Boudreaux, *Abbas outlaws Hamas' paramilitary Executive Force,* The Boston Globe, 7 January 2007, available at http://www.boston.com/news/world/middleeast/articles/2007/01/07/abbas_outlaws_hamass_paramilitary_executive_force/.

[212] International Middle East Media Center, *Interview with the leader of the Hamas-formed Executive Force*, Palestine Newspaper, 17 August 2007, available at http://www.imemc.org/article/49939.

► Left: The Hamas Executive Force (International Middle East Media Cener, August 2007); Right: A photo of Hamas Executive Force operative shouldering a home-made anti-tank missile launcher (www.palissue.com, 13 June 2007)

242. After its transformation, the former Executive Force continued to be closely integrated with — although not formally part of — the al-Qassam Brigades. At times, the line between the two would disappear entirely, such as in the photograph below in which members of the al-Qassam Brigades pose on top of a police vehicle during training operations. As documented by the Intelligence and Terrorism Information Center and, as illustrated further below, many members of the internal security services also served directly in the al-Qassam Brigades.[213]

► Armed Izz al-Din al-Qassam Brigades operatives standing on a police car during trainings

[213] Intelligence and Terrorism Information Center, *Mounting evidence indicates that during Operation Cast Lead (and in ordinary times) members of Hamas' internal security forces served as commanders and operatives in Hamas' military wing (Izz al-Din al-Qassam Brigades)*, 24 March 2009, available at http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/html/hamas_e067.htm.

243. Even more crucially, as noted in an April 2008 Report by the Intelligence and Terrorism Information Center, the operational military plan for hostilities with Israel was that:

> "The operatives of the internal security system and of the other Palestinian terrorist organizations would integrate into the Izzedine al-Qassam Brigades, program for defence should the IDF enter the Gaza Strip."[214]

244. Indeed, several days before the ground phase of the Gaza Operation began, Hamas police spokesman Islam Shahwan said that the Hamas leadership had instructed police to fight against IDF forces. He added that senior police officers had drawn up action plans and that the police and the security forces were on high alert for a ground assault.[215] He further noted that "the police forces had received . . . instructions from the leadership to fight the enemy in [the event of] an invasion" into the Gaza Strip.[216]

245. It appears that the police in fact followed these instructions. In an interview about the functioning of the police during the Gaza Operation, Hamas police chief Jamal Jarah said that "[t]he police was able to defend the resistance home front by tracking down agents and arresting them" and that "the police took part [in the fighting] alongside the resistance and helped it defend the soil of Gaza."[217] Other leaders of Hamas' internal security forces made similar statements. Hussein Abu Azra, commander of National Security in the Gaza Strip, for example, promised that his forces would resist '"any act of aggression against the Gaza Strip' and that they would defend the civilians using all means possible."[218] All of these statements confirm the reality that Hamas intended to, and did, in fact, employ its internal security forces for military activities during the Gaza Operation. Under the Law of Armed Conflict, those security forces therefore are regarded for the purposes of the conduct of hostilities as combatants, and as combatants, they are legitimate military targets.

246. This collective role of the Gaza "police" as an integral part of Hamas armed forces is further evidenced by the fact that many Gaza "policemen" were also members of the al-

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[214] Intelligence and Terrorism Information Center, *Hamas Military Buildup in the Gaza Strip,* April 2008, available at http://www.security-review.net/News/Middle-East/Israel-and-Palestinian-territories/Hamas-Military-Strength-April-2008.

[215] Intelligence and Terrorism Information Center, *Mounting evidence indicates that during Operation Cast Lead (and in ordinary times) members of Hamas' internal security forces served as commanders and operatives in Hamas' military wing (Izz al-Din al-Qassam Brigades)*, 24 March 2009, available at http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/html/hamas_e067.htm.

[216] *Id.*

[217] *Id.*

[218] *Id.*

Qassam Brigades. The following photographs provide compelling evidence that dual membership in the al-Qassam Brigades and the police force was common, and that police officers killed during the Gaza Operation were hailed in obituaries as "martyrs of al-Qassam." They show obituaries for policemen as martyrs of the Izz al-Din al-Qassam Brigades.

► Left: Shhade Fathi al-Kurd, "a commander and martyr of [Izz al-Din] al-Qassam" "Yavne Battalion artillery unit"; Right: Fathi al-Kurd photographed in police uniform; however, the text reads, "A commander and martyr of [Izz al-Din] Al-Qassam"

► Izz al-Din al-Qassam Brigades operative Muhammad Ibrahim Abu Sha'er, killed on 6 January 2009 in the Gaza Operation. Left: the operative's body, with a headband saying "Al-Qassam Brigades." Right: the operative, called "a martyr of Al-Qassam" appears in the uniform of the Rapid Intervention Force, one of the internal security forces. According to the Hamas forum, he belonged to Hamas' artillery unit (Source: PALDF, 7 January 2009)

► Left: An obituary for Adel Abu Awn, commander of the sniper unit in the northern Radwan brigade of the Izz al-Din al-Qassam Brigades, who was also an officer in the Palestinian police. The poster shows Adel Abu Awn in police uniform, proof of his double affiliation (Source: Hamas forum, 20 January 2009). Right: the original photograph of the poster, published on the Interior Ministry website July 2008.

► Left: Muhammad Yahya Muhanna, commander in the Izz al-Din al-Qassam Brigades. Right: Muhammad Yahya Muhanna in Gaza police uniform (Source: PALDF, 30 December 2008)

247. In fact, there is evidence that an overwhelming majority of the police forces were also members of the Hamas military wing or activists of Hamas or other terrorist organisations. A recent study has reviewed a list of all the internal security services members that Hamas reported killed during the Gaza Operation — consisting of 245 names in total. It found that 75.2 percent were Hamas activists (mostly members of the al-Qassam Brigades), and the total number of terrorist activists and fighters (including members of other terrorist groups operating in Gaza) from among the number of fatal casualties of the Palestinian security forces was 311, or 90.7 percent.[219] In other words, more than nine out of every ten

[219] Jonathan Dahoah-Halevi, *Fatal Casualties of the Palestinian Security Forces — Myth vs. Reality* (24 May 2009), available in Hebrew at http://www.jcpa.org.il/JCPAHeb/Templates/showpage.asp?FID=594&DBID=1&LNGID=2&TMID=99&IID=22712.

alleged "civilian police" were found to be armed terrorist activists and combatants directly engaged in hostilities against Israel.

248. This evidence demonstrates that considering Hamas "police" casualties as civilians is inappropriate. The reality is that the internal security services have been and continue to be a cadre of terrorist operatives armed with a variety of heavy weapons including anti-tank missile launchers, with standing orders to fight Israeli forces. Under the Law of Armed Conflict, Israel is permitted to target such forces and their bases of operation.

(4) IDF Precautions During the Gaza Conflict

249. In accordance with the requirement to take precautionary measures when feasible to minimise harm to civilians in pursuing legitimate military objectives, the IDF planned its attacks carefully. Despite the enormous difficulties posed by Hamas' tactics, the IDF's efforts included not only a range of precautions related to targeting and munitions, but also an extensive system of warnings, including general advance warnings to the civilian population in the area of military operations, regional warnings and specific warnings to civilians in or near military targets (such as buildings used by terrorists for storing weapons or launching attacks). Indeed, Israel has been commended for its extensive precautions during the Gaza Operation.[220]

(a) Precautions Regarding Targeting and Munitions

250. Given the incessant rocket attacks on Israeli civilians from Gaza, Israel had no real choice but to pursue Hamas and fight such terrorism. It was clear to the IDF in planning the Operation that it would need to exercise great care given the population density of Gaza, and Hamas' tactic of purposely hiding (and committing acts of terrorism against Israeli civilians from) within that population. Advance planning was possible for some of the targets and attacks, but it was also clear that, as in all combat situations, commanders and soldiers in the field would have to make spontaneous decisions, based on Hamas actions at a given location and time.

251. For attacks planned in advance, the IDF's efforts to implement the principles of distinction and proportionality began at the initial planning stage, where each operation and target was considered on an individual basis in order to ensure that it met the requirements of

[220] As British Colonel (ret.) Richard Kemp commented on the BBC, "I don't think there has ever been a time in the history of warfare when any army has made more efforts to reduce civilian casualties and deaths of innocent people than the IDF is doing today in Gaza." *BBC: Former British Army Colonel Richard Kemp Discusses IDF Gaza Ops*, 18 January 2009, available at http://www.youtube.com/watch?v=WssrKJ3Iqcw.

distinction, proportionality and precautions in attack. Targeting decisions which were planned in advance were reviewed by several IDF authorities, including MAG officers. The decision-making process involved an in-depth analysis of all relevant considerations, which was based upon the available intelligence, including the operational needs, the anticipated damage to property and sensitive sites, the anticipated harm to civilians, and so on. Whenever possible, the IDF verified the accuracy of the information on the target by cross-checking updated and independent intelligence sources. In this process, the IDF disapproved some, approved others only under certain conditions, such as the time of the attack, the type of weapons used (in order to achieve the military goal while reducing collateral damage), or required precautions prior to attack. On numerous occasions the process resulted in rejection of proposed military operations, where, for example, the available intelligence regarding the proposed target was not sufficiently reliable or up-to-date, or where the likelihood of collateral damage to civilians and their property was considered excessive in relation to the military advantage anticipated.

252. Even where a target was authorised in advance, the IDF examined proportionality again immediately prior to the attack on the basis of real time data available to the person executing the attack. Thus, for example, when a pilot approaching a target identified the potential for disproportionate collateral damage, he or she would refrain from attacking the target or even — when possible —would divert a missile already fired, as occurred occasionally during the Gaza Operation.[221] These rules of engagement applied fully during the Gaza Operation.

253. Certain attacks could not be planned in advance, but became imperative in real time during combat, such as when ground forces came under fire from Hamas operatives. However, the commanders authorised to approve such targeting decisions act under IDF orders which, as discussed in Section V.C(2) above, set forth the rules of distinction and proportionality and emphasise the importance of appropriate precautions. Thus, pursuant to IDF standing orders, commanders in the field are expected to carefully assess both the expected military gain and the potential of collateral injury to civilians and civilian property in the area. In making this determination, the commander considers numerous factors. In assessing military advantage, for example, the commander will take into account the degree and immediacy of the threat posed by the target to the safety and security of Israeli civilians; the contribution of the target's destruction towards the accomplishment of the mission; and the threat to IDF personnel. In assessing possible

[221] *See* IDF Spokesperson Unit, *IDF VLOG: Israeli Airstrikes Aborted to Protect Civilians*, 14 January 2009, available at http://idfspokesperson.com/2009/01/14/idf-vlog-israeli-airstrikes-aborted-to-protect-civilians/.

collateral damage, the commander will consider the number of civilians near the target; whether they are exposed or protected; the expected radius of the strike's lethal effects; and whether or not the attack can be delayed or carried out effectively with a more precise or less powerful weapon in the prevailing circumstances.

254. Second, when possible, the IDF used (in real time) updated and precise intelligence available regarding target identification and the risk of incidental civilian harm. When necessary, it also cross checked intelligence sources before commencing attacks, even in cases in which delaying fire entailed additional risk to both Israeli civilians and IDF forces.

255. Third, the IDF gave considerable care to the choice of munitions. Wherever possible, and even though it is not strictly required under international law, the IDF conducted pinpoint surgical aerial strikes, using precision guided munitions. Several missiles were diverted moments before impact for this reason. In total, about 80 percent of the air missiles fired by Israel were precision guided.

256. Fourth, the IDF employed various means for monitoring the presence of civilians in areas of operation, where possible, including aerial surveillance, before conducting aerial attacks. The IDF aborted or postponed attacks on Hamas personnel and targets when it appeared that civilians were at risk, at the expense of attaining military advantage. In fact, the IDF has released video footage conclusively demonstrating the diversion of missiles during the Gaza Operation.[222]

257. Fifth, in several cases, military targets were destroyed from the ground using mechanical equipment, rather than bombed from the air, in order to minimise collateral damage. This approach enabled the orderly evacuation of civilians and kept damage to surrounding areas at a minimum, although it exposed IDF personnel to additional risk.

258. Sixth, to the extent feasible, the IDF timed attacks on targets so as to cause minimum collateral damage. For example, buildings normally occupied only during daylight hours, and military targets which were located in proximity to such buildings, were struck at night. Similarly, moving vehicles were planned to be hit when they had travelled as far away as possible from civilian bystanders.

259. Finally, the IDF took precautions regarding sensitive sites. The IDF's operational plans and rules of engagement order special precautions with regard to military activity in

[222] *Id.*

proximity to United Nations and Red Cross facilities (of which there are several hundred in Gaza), hospitals, religious sites and educational institutions — a total of almost 1,900 sensitive sites in the Gaza Strip. All these sensitive sites were clearly marked in advance on IDF operational maps and aerial photographs, according to the information available to the IDF, as provided by the different organisations. The IDF distributed these maps at all levels of command, and gave clear orders regarding the protection of facilities and vehicles of this sort. The IDF set up a special Civil Administration situation room and a centre for humanitarian coordination to facilitate cooperation between the IDF and the U.N., the Red Cross and other international organisations.

260. In spite of these numerous precautionary measures, there is no way in a rapidly changing and complex battlefield environment to absolutely guarantee the safety of all civilians, civilian objects and sensitive sites. As explained in Sections V.B(2) and V.B(3), Hamas and the other terrorist organisations operating in the Gaza Strip placed the civilian population and the facilities used by the U.N. and other international organisations and humanitarian agencies in substantial danger. With the knowledge that the IDF limits its operations in the vicinity of such facilities, Hamas terrorists intentionally conducted military activity, including the launching of rockets and mortar shells, adjacent to them. Similarly, as discussed above, Hamas terrorists located headquarters, bases, weapon storage facilities and other terrorist infrastructure close to the sensitive facilities of the U.N., Red Cross and other international organisations and even inside sensitive sites, such as Shifa hospital.

261. This mode of operation created complex operational, moral and legal challenges to the IDF, which frequently had to reconcile its commitment to minimise the risk to civilians and provide special protection to sensitive sites with military imperatives, such as the prevention of rocket launches from areas adjacent to schools and hospitals or the protection of troops under attack by Hamas terrorists operating from the vicinity of U.N. facilities. In some cases, the IDF refrained from military activities because of potential significant harm to sensitive sites. For example, the IDF did not attack Shifa hospital even though it served as the main headquarters for Hamas military leadership.[223] In other cases where it was necessary to proceed with military operations despite the risk to sensitive sites, the IDF took precautions to minimise the risk for harm.

[223] A Hamas activist captured by IDF forces during the operation confirmed during his interrogation that senior Hamas members were hiding out in Shifa Hospital during the Gaza Operation. *See* Israel Security Agency, Selected Examples of Interrogations Following Operation Cast Lead, available at http://www.shabak.gov.il/English/EnTerrorData/Archive/Operation/Pages/cast-lead-Interrogations.aspx; *see also* Amir Mizroch, *Dichter: Hamas salaries paid at Shifa Hospital*, Jerusalem Post, 12 January 2009, available at http://www.jpost.com/servlet/Satellite?pagename=JPost/JPArticle/ShowFull&cid=1231424936164.

(b) Advance Notice to Civilians

262. The IDF also made special efforts to notify civilians of impending IDF operations and to instruct them how to avoid harm. The early warnings system was comprised of several layers that were complementary to each other.

263. First, general warnings were used, calling on civilians to stay away from sites where Hamas was conducting combat activities. In addition, regional warnings were distributed in certain areas, calling on civilians to leave those areas before IDF forces operated in them. Efforts were made to include in these warnings sufficient information to the residents, including a timeframe for the evacuation and designated specific routes for this purpose leading to safe areas. Far from having no place to flee, residents could — and the vast majority did — move to safe locations. Finally, specific warnings were issued to residents of particular buildings before attack.

264. Throughout the Gaza Operation, the IDF employed a variety of methods to communicate warnings effectively. The warning techniques included:

- *Radio Broadcasts and Phone Calls*: The IDF conveyed instructions and advance warnings to residents by local radio broadcasts with IDF announcements and by about 165,000 phone calls. This involved specific notices as well as a daily news broadcast (the latter from 31 December onwards).

- *Dropping of Leaflets*: During the Gaza Operation, the IDF dropped a total of some 2,500,000 leaflets of various kinds in the Gaza Strip. Some of the leaflets warned civilians to distance themselves from military targets, including buildings containing weapons, ammunitions or tunnels, or areas where terrorist activity was being conducted.[224] Other leaflets directed residents to leave a particular location and move to a safe zone by a certain route and within a defined period of time. Such leaflets were distributed, for instance, in the northern Gaza neighbourhood of Sajaiya.[225]

[224] For example, residents of Rafah were provided with a general leaflet, stating that "[t]he IDF is conducting operations against groups who are engaged in acts of terrorism against the State of Israel. The IDF will strike and destroy any location or building containing weapons, ammunition or a tunnel. As of the distribution of this notice, the life of anyone present in a building containing weapons, ammunition or a tunnel is in danger and he should leave the location immediately for his own and his family's safety!"

[225] The text of the Sajaiya leaflet was as follows:

> **To the Residents of the Sajaiya Neighbourhood**
>
> The IDF continues to intensify its operations against Hamas terrorism and will attack any location in the Gaza Strip where terrorist operatives, tunnels or weapons are to be found. All residents of the Sajaiya Neighbourhood must leave their homes and move towards the Old City to the other

[FOOTNOTE CONTINUED ON NEXT PAGE]

While warnings were a significant tool to reduce the likelihood of civilian casualties, IDF forces did not consider the distribution of leaflets alone as sufficient to presume the absence of civilians at the relevant locations.

- *Specific Warnings Before Attacks*: In addition to the above, the IDF made specific telephone calls just before an attack was about to take place, informing residents at risk about the upcoming strike and urging them to leave the place. In certain instances, although such warnings were made, the civilians chose to stay. In such cases, the IDF made even greater efforts to avoid civilian casualties and minimise collateral damage by firing *warning shots from light weapons that hit the roofs* of the designated targets, before proceeding with the strike. These warnings were accompanied by real-time surveillance in order to assess the presence of civilians in the designated military target, despite the advance warnings. Accordingly, the commander in charge assessed whether the collateral damage anticipated, including to those who chose to stay at the premises, was not excessive in relation to the military advantage anticipated. The specific warnings were generally effective. Several such incidents are discussed in Section V.D(2), including one in which all residents of a four-story apartment building safely evacuated following a series of warnings, and another in which surveillance confirmed the evacuation of a group of residents, although apparently one family remained despite the extensive warnings.

265. While the warning systems implemented by the IDF did not provide a 100 percent guarantee against civilian casualties, they were, in fact, highly effective. Aerial video surveillance by IDF forces confirmed the departure of civilians from targeted areas prior to the attack as a direct result of the warnings.

(c) Humanitarian Efforts

266. At the same time that the IDF was taking substantial precautions to minimise civilian casualties, it was also implementing a far-reaching effort to ensure that the humanitarian

[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]

side of Salah A'Din Road, with effect as of the distribution of this leaflet and by no later than 6 hours after the distribution of this leaflet.

These instructions are in force until further notice. Adherence to IDF instructions has prevented unnecessary casualties in the past.

Please continue to follow IDF instructions for your own safety.

IDF Command

needs of the civilian population in Gaza were met during the Gaza Operation. This humanitarian effort included several components:

- Ensuring continuous supplies of humanitarian aid through the crossing points, such as food, medical supplies and fuel.

- Coordination of evacuations and other humanitarian movements within the Gaza Strip and between Gaza and Israel.

- Unilateral suspensions of military operations to enable re-supply of the population and humanitarian relief activities.

- Ensuring the functioning of essential infrastructure in the Gaza Strip.

267. A central aspect of the IDF humanitarian effort was coordination with the various humanitarian agencies and organisations. Humanitarian facilities were marked on IDF operational maps and aerial photographs according to information provided by the various organisations in advance. Furthermore, a joint coordination map was prepared, to create a common language for the IDF and the international organisations operating in Gaza.

268. On 23 December 2008, on the eve of the operation in Gaza, the Ministry of Foreign Affairs held a specific meeting with representatives of the ICRC and other organisations in order to establish clear channels of cooperation, and to ensure the continuing flow of humanitarian supply and medical assistance to Gaza during the operation. In addition, immediately upon the commencement of the Gaza Operation, the then Foreign Minister, Tzipi Livni, held a special high level meeting with representatives of ICRC, United Nations Truce Supervision Organization ("UNTSO"), UNRWA, United States Agency for International Development ("USAID"), World Food Program ("WFP") and the EU, in order to assess the needs of these organisations for the benefit of the civilian population in Gaza. Furthermore, as discussed below, a Humanitarian Coordinating cell was established during the operation in Gaza, providing real-time assistance and coordination to international organisations *vis-a-vis* the IDF and the Israeli authorities.

269. During the Gaza Operation itself, the Gaza Coordination and Liaison Administration ("CLA") operated a 24 hour operations room tasked with communicating with the IDF and international organisations to deal with real time problems and requests. The CLA coordinated close to 500 movements of international organisations' vehicles and convoys during the operation. In addition, a special Humanitarian Coordination Centre ("HCC")

was established for enhanced coordination with representatives of the international organisations working in Gaza. Representatives of the United Nations Office for the Coordination of Humanitarian Affairs ("OCHA"), UNRWA, ICRC, WFP and other international organisations met on a daily basis with IDF representatives to coordinate the entry of humanitarian aid into Gaza. There were 120 humanitarian support and liaison officers, trained in advance and deployed at all levels of field command, in order to manage implementation of the humanitarian coordination and to serve as advisers to the military commanders on humanitarian and coordination issues.

270. The IDF maintained communication with the Civil Affairs Committee of the Palestinian Authority as well as with members of the Palestinian private sector to coordinate supplies of goods and humanitarian assistance. In addition, the IDF maintained contact with the Palestinian Electricity, Water and Sewage and Communications Authorities in Ramallah and their crews in Gaza, in order to coordinate the functioning of essential utilities during the Gaza Operation.

271. A total of 1,511 trucks carrying 37,162 tons of supplies entered the Gaza Strip from Israel through the Kerem Shalom and Karni crossings from the commencement of the Gaza Operation and for its duration, as detailed below:

Kerem Shalom Crossing Humanitarian Supplies		
Item	**No of Trucks**	**Tons**
Flour	525	14,208
Rice	50	1,283
Sugar	77	2,356
Oil	56	1,308
Dairy Products	64	1,117
Legumes	15	477
Animal Feed	119	3,495
Medicines and Medical Equipment	119	1,038
Blankets	24	160
Other	364	7,824
Total	**1,413**	**33,266**

Karni Crossing Humanitarian Supplies		
Item	**No of Trucks**	**Tons**
Animal Feed	41	1,638
Corn	4	162
Soya	1	37
Wheat	50	1,975
Barley	2	84
Total	**98**	**3,896**

Transfers of Fuels and Gas to Gaza	
Diesel for Gaza Power Station	1,535,750 litres
Diesel for Transport to UNRWA	188,000 litres
Diesel for Transport	96,000 litres
Diesel to UNRWA	282, 000 litres
Cooking Gas	234 tons
Diesel for Heating	1,711,000 litres

272. The IDF coordinated the entry of 706 trucks carrying donations from international organisations and various countries as follows:

- UNRWA – 10; WFP – 25; United Nations Children's Fund ("UNICEF") – '9; Médecins Sans Frontières ("MSF") – 1; Médecins Du Monde ("MDM") – 1; Other Organisations – 7; JHCO – 116; Egypt – 43; Turkey – 16; Greece – 2; Italy – 1

273. The IDF coordinated the entry of consignments of medical supplies received from various sources during the Gaza Operation as follows:

- UNRWA – 5,606; WFP – 3,611; ICRC – 327; World Health Organisation ("WHO") – 300; UNICEF' – 166; MDM – 6; MSF – 2; JHCO – 2538; Egypt – 1183; Turkey – 273; Greece – 26; Italy – 17; Other – 58

274. In addition, a special medical coordination centre was set up in the Gaza District CLA, under an officer with the rank of Major, which dealt with assistance to civilians in danger and with evacuation of the wounded and dead from areas of hostilities. This medical situation room coordinated 150 different requests during the Gaza Operation, and all professional decisions were made by a medical doctor. As part of these efforts, the following measures were taken:

- 382 wounded Palestinians were extracted from areas of hostilities.

- 1,150 Palestinian civilians were evacuated from areas of hostilities.

- 68 chronically ill patients left Gaza via Erez Crossing for treatment in Israel/Jordan.

- A field clinic was set up at the Erez Crossing.

- 20 ambulances entered Gaza from Israel - donations from Turkey and Jordan and reinforcements from Red Crescent in West Bank (10 additional ambulances were brought in by the Red Cross after the operation).

- 37 international aid workers and medical personnel entered Gaza via the Erez Crossing.

- 17 fire engines were sent to deal with fires.

- Coordination of passage from North to South within the Gaza Strip of 500 trucks and 131 ambulances.

- In addition, several hundred humanitarian journeys were made between Egypt and Gaza through the Rafah crossing including the entry to Gaza of 25 ambulances.

275. The IDF also set up and manned (24 hours a day, 7 days a week) an Infrastructure Coordination Centre to monitor the situation in Gaza, identify needs and coordinate repairs to infrastructure in areas of hostilities. This centre handled the following matters:

- 38 infrastructure repairs were carried out by technicians in areas of hostilities.

- Direct communication was maintained between the Palestinian Energy Authority and the Israel Electric Corporation to identify problems and fix them as soon as possible, including at risk to lives of Israeli technicians. Although several of the power lines supplying electricity from Israel to Gaza were damaged in the fighting, as of 15 January 2009, nine of the ten lines were operational.

- The two power lines bringing electricity from Egypt into Gaza were operational.

- During the operation, substantial amounts of industrial diesel for the Gaza power station were transferred into Gaza from Israel. The amount of diesel was reduced after an explosive tunnel was discovered near the Nahal-Oz fuel terminal. However, in spite

of the risk, the supply of industrial diesel was renewed through the Kerem Shalom crossing.

- In addition, 200,000 litres of automotive diesel, 234 tons of cooking gas, hygiene and water purification kits and water bottles were brought into Gaza from Israel.

276. Finally, beginning 7 January 2009, the IDF unilaterally suspended military operations for at least three hours each day ("humanitarian pauses"), to enable re-supply of the population and other humanitarian relief activities. As discussed in Section V.B(7) above, while the IDF carefully observed the humanitarian pauses, Hamas abused them to launch rockets and fire mortars into Israel. During the period between 8 and 17 January 2009, Hamas fired a total of 44 rockets and mortars at Israel during humanitarian pauses.

277. Naturally, humanitarian efforts during active warfare and hostilities can always be improved. Civilian populations inevitably and tragically suffer during a time of armed combat, particularly where the combat operations take place in densely populated urban areas. This is further exacerbated when the humanitarian efforts of one party are impeded by the activities of the other party, which wishes to create a humanitarian crisis. It is important to understand that, in contrast to Hamas' actions which jeopardised the civilian populations of Gaza and obstructed the distribution of humanitarian supplies, Israel put into place significant systems and resources to try to ensure that the humanitarian needs of the civilian population were met.

278. IDF's efforts to comply with its humanitarian obligations during the Gaza Operation were reviewed by the High Court of Justice while the operation was still going on. Two petitions,[226] submitted and heard during the heat of battle, further illustrate the legal scrutiny of IDF's activities by the High Court of justice even during active fighting. As stated by the President of the Court, the Hon. Judge Beinisch:

> "Cases in which the court examines the legality of military operations while they are happening are not uncommon occurrences, in view of the reality of our lives in which we are constantly confronting terrorism that is directed against the civilian population of Israel, and in view of the need to respond to it while discharging the duties imposed by law even in times of combat. … [I]t is the role of the court, even in times of combat, to determine whether within the framework of the combat operations the obligation to act in accordance with legal guidelines — both within the

[226] *Physicians for Human Rights et. al. v. The Prime Minister et. al.*, HCJ 201/09 and HCJ 248/09, 19 January 2009, available at http://elyon1.court.gov.il/files_eng/09/010/002/n07/09002010.n07.pdf.

> context of Israeli law and within the context of international humanitarian law — is being upheld."[227]

279. The petitions were filed on 7 January 2009 and 9 January 2009. The petition in HCJ 201/09 claimed that there were delays in evacuating the wounded to hospitals in the Gaza Strip, and claimed that ambulances and medical personnel were being attacked by the IDF. The petition in HCJ 248/09 related to the shortage of electricity in the Gaza Strip, which it was claimed, prevented effective functioning of hospitals, clinics, water and sewage systems. The petitioners argued that this situation was the result of IDF actions during the Gaza operation.

280. After hearing the petitioners' claims, as well as requesting and receiving detailed responses from the IDF with regard to the various humanitarian concerns that were raised, the Court denied both petitions. It found that "[i]t was made clear to [the Court] that the IDF and the high-level command authorities acting on its behalf are aware of and prepared to carry out their humanitarian obligations."[228]

281. In particular, with regard to the first petition the Court held as follows:

> "In view of the establishment and enhancement of the humanitarian mechanisms, which it may be assumed will prove their effectiveness, in view of the statement made to us that a serious effort will be made to improve the evacuation and treatment of the wounded, in view of the setting up of a clinic in the vicinity of the Erez crossing (and to the extent that the Palestinian side will also agree to the transfer of the wounded to Israel for treatment), it is to be hoped that the humanitarian mechanisms will operate properly in accordance with the obligations of the State of Israel. In these circumstances, we see no further reason to grant relief in the form of an order *nisi* at this time."[229]

282. The Court reached a similar conclusion in the second case:

> "It can be seen that steps have been taken in order to repair the faults in the electricity network in the Gaza Strip, and despite the state of combat and the security risks, efforts have been made to facilitate the entry into the Gaza Strip of industrial diesel oil for operating the local power station in Gaza, as well as additional humanitarian requirements, such as cooking

[227] *Id.* at ¶ 12.
[228] *Id.* at ¶ 28.
[229] *Id.* at ¶.23

> gas, diesel oil for transport, water, food and medications. In these circumstances, this petition should also be denied."[230]

(5) Israel's System for Investigating Complaints

283. As discussed above in Section V.C, Israel employs extensive training to try to ensure awareness and compliance by its commanders and soldiers with international law and domestic norms and laws, issues appropriate rules of engagement, plans military operations carefully to ensure that only legitimate military objectives are targeted, and implements in the field extensive precautions designed to minimise civilian harm to the extent feasible. Equally important, Israel is committed to fully investigating alleged violations of Israel's legal obligations (including the Law of Armed Conflict), and to taking appropriate and effective action, including penalising IDF commanders or soldiers found to have committed offences. Numerous outside observers, including most recently the National Criminal Court of Appeals of Spain, have confirmed the thoroughness of Israel's system for investigating such allegations, which is on par with the investigatory systems of many other countries. Israel has already activated this system with respect to the recent operations in Gaza, and as discussed in Section V.D(1) below, investigations are now underway. The integrity of these investigations must be maintained and they should be permitted to run their course, without prejudgment of the results.

(a) The Military Justice System

284. Israel's legal and judicial apparatus is fully equipped and motivated to address alleged violations of national or international law by its commanders and soldiers. Such allegations are reviewed through a multi-tiered system of independent and impartial proceedings before Israeli investigative, administrative and judicial authorities, including Israel's highest judicial instance, the Israeli Supreme Court.

285. Israel has a military justice system that operates within the IDF but is professionally independent. The military justice system is based primarily on the Military Justice Law of 1955, a comprehensive statute which governs the investigation of misconduct and indictment and prosecution of offenders and establishes the Court Martial system. The military justice system empowers the Military Advocate General to try soldiers not only for unique "military" offences (such as absence without leave, conduct unbecoming an officer, etc), but also for ordinary criminal offences under Israel's Penal Law, 1973. Any and all allegations regarding offences committed by IDF personnel, and related to the

[230] *Id.* at ¶ 26

military, are dealt with through this multi-tiered system, including allegations regarding improper conduct on the battlefield.

286. The IDF system of review includes three main components: the Military Police Criminal Investigation Division ("MPCID"), the Military Advocate General's Corps ("MAG"), and the Military Courts. The MAG Corps and Military Courts are both independent from the IDF command hierarchy, are subject only to the law, and are also entirely independent from one another.

287. According to Article 177 of the Military Justice Law, the Military Advocate General is appointed by the Minister of Defence, by recommendation of the Chief of the General Staff of the Israel Defence Forces. The appointment of the MAG by the Minister of Defence and not by the Chief of the General Staff, (as is the case with other officers in the IDF), is intended to preserve the MAG's professional independence, in executing his authorities. The MAG's powers and authority are in accordance with the Military Justice Law, IDF standing orders (Supreme Command Order 2.0613) clearly state that in executing his powers and authority, the MAG is subject only to the law, and is not subject to the IDF chain of command. On professional matters, the MAG is guided by the Attorney General.

288. Israel is an open and democratic society which fully respects the freedom of speech, an independent and free press and an active community of non-governmental and international organisations that operate in and from Israel. In this context, information on possible misconduct of soldiers reaches the IDF authorities in various ways, including complaints by the victims themselves or family members; complaints by commanders or soldiers who witnessed an incident; complaints by human rights organisations, journalists, embassies, or international bodies; and complaints forwarded to or filed directly with the MAG by the Israel Police and other law enforcement agencies. Any person may file a complaint with the Military Police in reference to misconduct by IDF personnel at any civilian police station in the country. Gaza residents can file complaints directly in writing through a NGO acting on their behalf or via the liaison mechanism that works vis-à-vis the Palestinian civilian population.

289. Generally, the MPCID investigates allegations of criminal offences committed by soldiers. Investigations dealing with complaints of misconduct by soldiers towards Palestinians (including with respect to events in Gaza) are conducted with the assistance of Arabic-speaking interpreters, who participate in and accompany interviews of Palestinian complainants and witnesses. Criminal investigators handling complaints by Palestinians

undergo special training to equip them for dealing with these types of cases. When necessary, consultations are held with a Military Prosecutor from the MAG Corps regarding the proper handling of the case.

290. Where circumstances do not necessarily point to a criminal offence, the Military Advocate General will first review the findings of a "field investigation" — an inquiry conducted by the chain of command following operational activity, and governed by the Military Justice Law. Under the law and IDF standing orders, the findings of "field investigations" are relayed to the MAG for review, as well as any other available evidence (including information collected by NGOs), to assist him in deciding whether to order a criminal investigation. If after examining the aforementioned material, the MAG believes the facts indicate a reasonable suspicion that an offence may have been committed, which justifies the opening of a criminal investigation, he will launch a full a criminal investigation of the incident.

291. It is the common practice of the IDF that, following every military operation of any kind, a field investigation is conducted in order to examine the performance of the forces and to learn what aspects should be preserved and what aspects should be improved. The IDF conducts such field investigations on its own initiative, regardless of whether a complaint has been submitted. With regard to certain categories of cases, the IDF field commanders are under a duty to initiate and conduct specific field investigations, which are separate from the general field investigation of the operation as a whole. Such a duty exists with regards to cases that involve serious violations of the Laws of Armed Conflict, including when there are reliable reports on such cases by victims, witnesses, NGOs or the media.

292. As mentioned above, the Military Advocate General is entitled — and in some circumstances even obliged — to review the findings of such field investigations, and can, if the findings justify, order a full criminal investigation into the incident.

293. The authority to prosecute soldiers for offences connected to their military service lies with the MAG Corps. In cases where sufficient evidence has been collected according to the requirements of Israeli Penal Law, indictments are filed in the Military Courts. In the period from January 2002 through December 2008, 1,467 criminal investigations have been opened into alleged misconduct by soldiers, leading to the issuance of 140 indictments against soldiers regarding crimes committed against the Palestinian population. Of these indictments, as of December 2008, 103 defendants were convicted and ten cases are still pending. During the first six months of 2009, 123 criminal investigations were opened, with ten of them leading to indictments.

294. A significant development in the investigation of alleged wrongdoing by IDF soldiers was the establishment, in October 2007, of the Office of the Military Advocate for Operational Affairs. This office is charged with investigating cases of operational misconduct by IDF soldiers against Palestinian civilians, such as mistreatment of prisoners, pillaging or theft, use of unnecessary force, abuse of authority etc. This special military prosecution unit was established and funded to enable the Military Prosecution to deal effectively and efficiently with these offences, in light of their importance and the added value of expertise gained by transferring these cases from regional offices of the prosecution to a special unit dedicated to their investigation. It also allows the automatic opening of criminal investigations in all such cases, on the premise that these specific crimes can never be justified by military necessity.

295. The effectiveness of the Office of the Military Advocate for Operational affairs, as well as the other measures taken by the IDF to eradicate any kind of misconduct towards Palestinians (including command and educational activities, which increased the number of cases reported by soldiers), is evident, as the number of investigations launched against soldiers has roughly doubled.

Criminal Investigations Launched Related to Palestinian Civilians							
	2002	**2003**	**2004**	**2005**	**2006**	**2007**	**2008**
Crimes of Violence	52	75	104	109	96	223	211
Crimes related to Death of Civilians	17	17	22	15	19	54	18
Crimes of Property	82	54	63	31	37	74	94
Total	**151**	**146**	**189**	**155**	**152**	**351***	**323***

296. As a general rule, the rules of evidence in the military legal courts system of the IDF are similar to the rules of evidence in Israeli criminal courts. When there is sufficient evidence to establish a reasonable basis for conviction of a soldier, an indictment may be filed against the soldier. The Military Prosecution is obligated to carefully examine the evidence and may only file an indictment when the evidence justifies doing so. Moreover, in addition to the challenges that prosecutors face to meet the high evidentiary standard in criminal law cases, IDF's military prosecutors face additional unique challenges due to the lack or partial cooperation of the complainants and/or of the Palestinian Authority. Another substantial difficulty in obtaining and securing physical evidence at the place of the commission of an alleged crime stems from security risks as well as active combat in the area.

297. As a general policy, the Military Prosecution seeks substantial sentences in cases of offences against the Palestinian civilian population and in appropriate cases appeals lenient sentences to the Military Court of Appeals. Traditionally, however, the Military Courts deal sternly with soldiers convicted of offences against civilians. The gravity attached by the Military Courts to offences against civilians is illustrated in the following excerpt from the Court's judgment in C/62/03 *Military Prosecutor v. Sgt Ilin*, involving a case of looting and improper conduct:

> "A soldier committing prohibited acts during armed conflict inflicts injury upon the human dignity of the conquered as well as upon the humanity of the conqueror... It is clear therefore that the thunder of war and the heat of the battle actually demand reinforcement and amplification of the voice of morality...."

(b) Attorney General Review of Decisions of the Military Advocate General

298. The decisions of the Military Advocate General regarding the opening or non-opening of criminal investigations, as well as his decisions regarding the filing or non-filing of indictments, may be subject to further review by the Attorney General of the State of Israel, an independent figure of high authority. A complainant or non-governmental organisation may trigger the review of the Attorney General by simply sending a letter directly to the Attorney General, requesting further review of the matter.

299. With regard to the recent military operation in Gaza, it was decided that all findings of the five major field investigations, detailed in Section V.D(1) and the Military Advocate General decisions with regard to them be transferred for review by the Attorney General.

(c) Supreme Court of Israel Judicial Review of Decisions of the Military Advocate and Attorney General

300. In addition to review by the Military Advocate General and the Attorney General, complainants or non-governmental organisations who are dissatisfied with a decision of the Military Advocate General or of the Attorney General - including decisions with regard to whether to open a criminal investigation, or whether charges filed reflected the severity of the alleged crime, may file a petition directly to Israel's Supreme Court.

301. The Supreme Court regularly reviews determinations of the Military Advocate General and the Attorney General on these issues. For example, in one case the Supreme Court intervened in the Military Advocate's decision not to file criminal charges against a high

ranking field commander, resulting in the filing of such charges and ultimately in the conviction of the commander according to Israeli Penal law.[231] In another case, during the course of Supreme Court hearings, the Military Advocate General consented to open a military investigation into an incident for which investigation had not previously been conducted.[232] Just this month, on 1 July 2009, the Supreme Court intervened in a Military Advocate General decision to indict a soldier and a commander for the offence of "unbecoming conduct" under the Military Justice Law, in connection with the alleged firing of a rubber bullet at the feet of a detainee.[233] Following the judgment, the MAG issued an amended indictment, charging the commander and the soldiers involved in the incidents with more serious offences.[234]

302. The scope of judicial review of Israel's Supreme Court is very broad. According to the jurisprudence and practice of the Israeli Supreme Court, any interested party (including non-governmental organisations) or any person (including those who are neither Israeli citizens nor residents) who is affected or potentially affected by the actions of the government is entitled to directly petition the Israeli Supreme Court on any claim that a government action or an action of the IDF is *ultra vires,* unlawful or substantially unreasonable, including, *inter alia,* actions relating to the IDF military activity. In fact, in the year 2008 alone, over 2,000 petitions were filed to Israel's Supreme Court. The Supreme Court rules as a matter of routine on such petitions, and when justified, issues injunctions against the Government, or other relief as appropriate. Consequently, petitions are brought on a regular basis by Palestinian residents, as well as NGOs or persons representing their interests claiming that they have been harmed by actions taken by the Israeli security forces, including operational activities in the West Bank and the Gaza Strip.

303. The Israeli Supreme Court has declared that the situation Israel faces as the target of terrorist attacks does not lessen the obligation of the State and its security forces to abide by applicable law and humanitarian standards. To the contrary, the Court has issued

[231] *See Jamal Abed al Kader Mahmoud Zofnan et al. v. Military Advocate General,* HCJ 425/89 (1989). In other cases, after careful scrutiny of the evidence, the Supreme Court found the MAG decision not to file charges reasonable. *See, e.g., Iman Atrash v. Military Advocate General*, HCJ 10682/06 (2007).

[232] *See Brian Avery v. Military Advocate General*, HCJ 11343/04 (2005).

[233] *Ashraf Abu Rahma et al. v. Military Advocate General*, HCJ 7195/08 (1 July 2009) ("The military justice system, which is in charge of implementing the IDF's values of conduct, must send out a determined message of consistent and decisive defence of the basic values of the society and the army, and of uncompromising enforcement in all levels — educational, commanding authority and punitive — of the fundamental principles that are shared by the Israeli society and the Israeli army and give them their ethical and humane character.").

[234] The amended indictment included the charging of the commander with the offence of threats under Section 192 of Israel's Penal Law; and the soldier was charged with the crime of illegal use of a firearm in accordance with Section 85 of the Military Justice Law. Both were charged with the offence of conduct unbecoming an officer. The case is pending in the military court.

dozens of decisions addressing the issue of fighting terrorism within the law.[235] As mentioned above, during the height of the military operation in Gaza, the Supreme Court agreed to hear petitions by NGOs alleging delays in evacuating the wounded, shortage of electricity in the Gaza Strip, and other complaints about humanitarian issues purportedly resulting from IDF actions. The Court stated that it would hear the case immediately, while battles in Gaza were still raging, as it "endeavours to examine the claims in real time, so that it may grant effective relief or arrive at an agreed settlement."[236]

304. Israel's Supreme Court has earned international respect and recognition for its jurisprudence, as well as for its independence, for actions it has taken in this regard. Its landmark rulings in several cases related to the balancing of security and the protection of individuals are well regarded by jurists and academic scholars of international law, and have been cited favourably by foreign courts, including the Supreme Court of Canada, the House of Lords in the United Kingdom, and the European Court of Justice.[237] One United States court specifically rejected an argument that Israeli courts could not independently judge claims involving "serious charges … against high officials of the Israeli government," noting that "Israeli courts are entirely capable of making judgments displeasing to those in high civil or military authority."[238]

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[235] Official English translations of over twenty five cases which address this issue are available at the website of Israel's Supreme Court, http://elyon1.court.gov.il/VerdictsSearch/EnglishStaticVerdicts.html.

See, e.g., Public Committee Against Torture in Israel v. The State of Israel et. al., HCJ 5100/94 (6 September 1999); *Iad Ashak Mahmud Marab et. al. v. IDF Commander in the West Bank,* HCJ 3239/02 (6 February 2003); *Beit Sourik Village Council et. al. v. The Government of Israel et. al*., HCJ 2056/04 (30 June 2004); *Zaharan Yunis Muhammad Mara'aba et. al. v. The Prime Minister of Israel et. al.,* HCJ 7957/04 (15 September 2005); *Ahmad Issa Abdalla Yassin, Bil'in Village Council Chairman v. The Government of Israel et. al.,* HCJ 8414/05 (15 December 2008 ; *The Public Committee Against Torture in Israel et. al. v. The Government of Israel et. al.*, HCJ 769/02 (14 December 2006); *Adalah - The Legal Center for Arab Minority Rights in Israel et. al. v. GOC Central Command, IDF, et. al.*, HCJ 3799/02 (6 October 2005).

[236] *Physicians for Human Rights et. al. v. The Prime Minister et. al.*, HCJ 201/09 and HCJ 248/09, ¶ 13 (19 January 2009), available at http://elyon1.court.gov.il/files_eng/09/010/002/n07/09002010.n07.pdf. As discussed above in Section V.C(4)(c), after full public hearings and review of the available facts, the Court determined that the IDF and high level command authorities were aware of their humanitarian obligations and were making efforts to fulfill their duties according to international law.

[237] *See, e.g., Application Under S. 83.28 of the Criminal Code,* 2004 SCC 42, ¶ 7 (Supreme Court of Canada 2004) (citing the "eloquent" statements of Israel's Supreme Court on the importance of responding to terrorism within the rule of law); *A and others v. Secretary of State for the Home Department,* 2 A.C. 221, ¶ 150 (U.K. House of Lords 2005) (emphasizing importance of the U.K.'s "retain[ing] the moral high ground which an open democratic society enjoys," and thereby "uphold[ing] the values encapsulated in the judgment of the Supreme Court of Israel in *Public Committee Against Torture in Israel v. Israel* . . . [that] '[a]lthough a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand, ") (citation omitted); *Kadi v. Council of the European Union*, 3 C.M.L.R. 41, ¶ AG 45 (European Court of Justice 2008) (quoting Supreme Court of Israel regarding importance of judicial oversight of political decisions, specifically that "[i]t is when the cannons roar that we especially need the laws… It is an expression of the difference between a democratic state fighting for its life and the fighting of terrorists rising up against it. The state fights in the name of the law and in the name of upholding the law. The terrorists fight against the law, while violating it. The war against terrorism is also law's war against those who rise up against it.").

[238] *Sussman v. Bank of Israel,* 801 F. Supp. 1068, 1077 (S.D.N.Y. 1992), *aff'd* 990 F.2d 71 (2d Cir. 1993).

305. The effectiveness of Israel's own systems for investigating complaints regarding combat activities which allegedly contradicted international law was recognised most recently by the Criminal Chamber of the National Court of Spain (Audiencia Nacional), which decided on 30 June 2009 by a wide margin (14-4) — and in a written decision issued on 17 July 2009 — to discontinue a Spanish investigation into alleged war crimes in the Gaza Strip. The proceedings concerned a 2002 incident in the Gaza Strip, where the Israeli Air Force targeted Saleh Shehadeh, the head of Hamas' military wing, killing Shehadeh but also a number of civilians. A Spanish judge had opened an inquiry into the matter pursuant to Spain's Universal Jurisdiction statute.

306. The Criminal Chamber of the National Court of Spain emphasised Israel's ability to fully and fairly investigate the charges itself. It held that Israeli procedures and decisions with regard to the legality of preventive strikes under international law, and the military, civilian and judicial review in Israel of the Shehadeh incident, comport with the principle of complementarity, as the State of Israel is a democratic country where the rule of law applies. The Court stated that:

> "Furthermore, disputing the impartiality and organic and functional separation from the Executive of the Israeli Military Advocate General, the Attorney General of the State of Israel and the Investigation Commission appointed by the Israeli Government involves ignoring the existence of a social and democratic state with rule of law, where the members of the Executive and the Judiciary in question are subject to the rule of law. On the basis of those premises, there can be no doubt whatsoever with regard to the exercise of pertinent criminal actions in the event that the existence of any criminally relevant conduct on the part of the individuals who ordered, planned and carried out the bomb attack should come to light in the course of the investigations performed."[239]

(d) Comparisons with Other Investigatory Systems

307. Israel's system for investigating alleged violations of Law of Armed Conflict compares well with the rule of law of other democratic States. To respond to alleged violations of the Law of Armed Conflict other countries also rely on a combination of military, criminal,

[239] Unofficial translation of Decision no. 1/2009, 17 July 2009 (plenary), of the National Criminal Court of Appeals ("Sala de lo Penal de la Audiencia Nacional"), at 24, regarding Preliminary Criminal Proceedings no. 154/2008 of the Central Investigation Court no. 4. *See also* Appeal of the Coordinating Prosecutor (Pedro Martinez Torrijos), 6 May 2009, from the Order of the Audiencia Nacional de Madrid, 4 May 2009, in Preliminary Proceedings Case No. 157/2008 (emphasizing that Israel's investigatory system, with review by the Military Advocate General, the Attorney General and the Supreme Court, "fully satisfy" the requirements of "an independent and impartial system of justice").

and administrative investigations.[240] Likewise, criminal investigations in several other countries are conducted through a courts-martial system similar to that in place in Israel.[241]

308. For example, the United Kingdom has used both criminal investigations and independent investigations within the military to examine allegations of violations of the Law of Armed Conflict.[242] In the United Kingdom, allegations of violations within the Army are forwarded to the Army Prosecuting Authority ("APA").[243] The Director of Army Legal Services, who is appointed by the Queen, "has responsibility for decisions on whether to direct trial for all cases referred by the military chain of command, and for the prosecution of all cases tried before courts-martial, the Standing Civilian Court and the Summary Appeal Court and for Appeals before the Courts-Martial Appeal Court and the House of Lords."[244] The Director of Army Legal Services delegates these decision-making functions to "ALS officers appointed as prosecutors in the APA."[245] As is the case in Israel, "[t]he APA is under the general superintendence of the Attorney-General and is, rightly, independent of the Army Chain of Command."[246] In addition to criminal investigations, the military in the United Kingdom also investigates allegations of violations of the Law of Armed Conflict through administrative actions, independent informal investigations, or through independent formal investigations ordered by a Board of Inquiry.[247]

309. Similarly, the procedures and institutions of the United States for such investigations, for example, are quite similar to those in Israel. To respond to alleged violations of the Law of Armed Conflict, the United States established comprehensive investigation procedures, which grants multiple actors within the Department of Defense and the military branches

[240] *See* **United Kingdom**: Aitken Report, *An Investigation into Case of Deliberate Abuse and Unlawful Killing in Iraq in 2003 and 2004*, 25 January 2008, available at http://mod.uk/NR/rdonlyres/7AC894D3-1430-4AD1-911F-8210C3342CC5/0/aitken_rep.pdf (hereafter "Aitken Report") (describing the procedures for investigating violations of the Law of Armed Conflict in the United Kingdom); **United States**: Dept. of Defense Directive No. 2311.01E, *Dept. of Defense Law of War Program*, 9 May 2006 (setting forth the procedures for the investigation of "reportable incidents" regarding of the Law of Armed Conflict in the United States).

[241] *See, e.g.*, **Canada, United Kingdom, and the United States:** Victor Hansen, Changes Made in Modern Military Codes and the Role of the Military Commander: What Should the United States Learn From this Revolution, 16 Tul. J. Int'l & Comp. L. 419 (2008) (describing U.S., Canadian, and United Kingdom court martial systems).

[242] *See* Aitken Report, *An Investigation into Case of Deliberate Abuse and Unlawful Killing in Iraq in 2003 and 2004*, 25 January 2008, available at http://mod.uk/NR/rdonlyres/7AC894D3-1430-4AD1-911F-8210C3342CC5/0/aitken_rep.pdf.

[243] Aitken Report ¶ 28. The APA is in the process of being consolidated into a service-wide Prosecuting Authority in the UK, the commencement of which has been deferred until October 2009. *See* HM Crown Prosecution Inspectorate's Follow-Up Report on the Army Prosecuting Authority, February 2009, ¶ 1.11.

[244] Aitken Report ¶ 28.

[245] *Id.*

[246] *Id.*

[247] *Id.* ¶ 36.

independent authority to order an investigation.[248] Specifically, the investigatory procedures in the United States follow the same practice as in Israel, providing that when there is a "reportable incident"[249] involving the Law of Armed Conflict, the appropriate field commander has the duty to report the incident up the chain of command immediately.[250] The report then both moves up the chain of command to the relevant Commander of the Combatant Command, and goes to the appropriate military investigation agency to determine whether to initiate a criminal investigation, as well as to the General Counsel of the Department of Defense.[251]

310. Criminal procedures in the United States system are conducted through a courts-martial system similar to that in place in Israel. Military prosecutors are required to be free from command influence, although as a matter of structure they are subordinate to the field commanders, unlike in Israel. In addition, in Israel the legal adviser has the authority to order criminal investigations and to prosecute soldiers, while in the United States, the "Convening Authority"[252] has jurisdiction to refer cases to a Court-martial for trial and to approve, modify, or disapprove the findings and sentences in Court-martial proceedings, and Judge-Advocates in the United States may only advise the Convening Authority.[253] The U.S. system does not provide for independent judicial review of the decision to commence or not commence a criminal proceeding, as exists in Israel.[254]

311. While the U.K. and U.S. systems may not have the full panoply of independent investigatory and review mechanisms the Israeli system has, they nonetheless have been accepted as more than sufficient to investigate alleged abuses on their own.[255] As

[248] *See* Dept. of Defense Directive No. 2311.01E, *Dept. of Defense Law of War Program* (9 May 2006). Although the Defense Department Law of War Program Directive establishes comprehensive procedures for investigating incidents related to the Law of Armed Conflict, as developed below, investigations are typically ordered by military commanders or military investigation agencies.

[249] A "reportable incident" is defined as "[a] possible, suspected, or alleged violation of the law of war, for which there is credible information, or conduct during military operations than war that would constitute a violation of the law of war if it occurred during an armed conflict." *See* CJCSI 5810.01C ¶ 5(b).

[250] *See* Dept. of Defense Directive No. 2311.01E ¶¶ 6.3-6.8; CJCSI 5810.01C ¶ 7(a)-(b).

[251] *See* Dept. of Defense Directive 2311.01E ¶ 6.5.1-2; CJCSI 5810.01C ¶ 7(c).

[252] "Convening Authority" is defined in R.C.M. 103(6) to include "a commissioned officer in command for the time being and successors in command."

[253] *See* R.C.M. 401, 504, 505, 601, 1107.

[254] Many other countries likewise do not provide (as does Israel) for independent judicial review of either the decision to commence a criminal proceeding or the criminal proceedings themselves. *See* India: T. Padmanabha Rao, *Supreme Court Ruling on Court-Martial*, The Hindu, 17 April 2001, available at http://www.hindu.com/2001/04/17/stories/0217000p.htm (noting the lack of judicial review of court martial proceedings); Singapore: Abdul Wahab bin Sulaiman v. Commandant, Tanglin Detention Barracks, 1985-1 Malayian L.J. 418, 1985 MLJ LEXIS 37 (Sing. 1985) (noting ruling by the High Court of Singapore that it lacked authority to review decisions of the Military Court of Appeals by prerogative writ).

[255] *See, e.g.,* Remarks of Justice Richard Goldstone *quoted in* Andy Clark, *Could ICC Prosecute U.S. for Iraq Crimes?* Radio Netherlands, 18 June 2009, available at http://www.rnw.nl/id/node/6962 (noting that civilian deaths caused by the NATO bombings in Yugoslavia and by US military actions in Iraq and Afghanistan don't "come anywhere near

[FOOTNOTE CONTINUED ON NEXT PAGE]

discussed above, this was the basis on which the National Court of Spain recently discontinued an investigation regarding a 2002 incident in Gaza: the Israeli system is independent and impartial, and is fully capable of investigating the matter on its own.

D. Complaints About the IDF's Conduct of Operations

312. Israel is acutely aware of concerns raised about the IDF's conduct of operations in Gaza, prompted by the civilian deaths and injuries and the damage to property during the conflict. Israel recognises that all allegations regarding violations of international law in Gaza by any party, for which there is reliable information, must be thoroughly investigated, and where appropriate, prosecuted. The IDF therefore initiated a series of field investigations into allegations regarding its conduct, as discussed in Section V.D(1) below. As referenced in Section V.C(5), investigations of allegations in previous military operations have resulted in criminal proceedings and convictions in appropriate cases.

313. The IDF's field investigations are only the first stage in the process. The MAG and the Attorney General will examine the findings (some already rendered, others, still pending) of those inquiries. Any affected party — Israelis and Palestinians alike, as well as non-governmental organisations — can appeal the decisions of both the MAG and the Attorney General to the Supreme Court sitting as the High Court of Justice, as they frequently do in other cases. The Supreme Court's decisions are a matter of public record.

314. Until these investigations are complete, and in order to preserve the integrity and independence of the investigations currently underway in Israel, it would be premature to reach any final conclusions regarding specific complaints, either as to general IDF practice during the recent conflict or as to specific incidents and allegations.[256] Nonetheless, given extensive public discussion about these issues and the frequency with which conclusions have preceded rather than followed the evidence, this Paper sets forth below (in Sections V.D(2) and V.D(3) some initial information regarding a number of complaints. This information may be released at this stage based on what is known from the investigations thus far, and without compromising the integrity and independence of the investigations

[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]
the sorts of crimes" that merit international investigation and emphasising that democracies like the United States and EU countries have capable legal systems for investigating such complaints and pursuing sanctions as appropriate on their own).

[256] The international community and national fora must respect and support national investigations currently in progress in Israel. To the extent that external organisations have gathered information related to the Gaza Operation, in the interest of justice, they should provide the information and any evidence on which it is based to Israel to facilitate those investigations. This is the essence of the principle of complementarity.

which are in progress. It is possible that different findings will emerge as the investigations continue. Even so, even at this early stage these preliminary investigations have identified important facts that have not yet received significant public attention, but that are essential for any rigorous analysis of the Gaza Operation.

315. Any fair analysis of the Gaza Operation must also consider these facts against the broader analytical framework set out above, applicable to the Law of Armed Conflict. As indicated in Section V.A, international law does not condemn military actions simply because they resulted in unfortunate civilian casualties, as well as damage to civilian property and infrastructure. Rather, it examines whether commanders and soldiers had legitimate military objectives in their use of force, and whether they made appropriate efforts to minimise civilian casualties, based on a "reasonable commander" test and the information then available. Only if forces intentionally targeted civilians or fired indiscriminately, or struck military objectives despite knowing that (or without seeking to determine whether) they were likely to cause civilian harm that was excessive in relation to the military advantage anticipated at the time, can their actions be regarded as a violation of the law of war.

(1) The Status of Investigations

316. The IDF is in the midst of conducting comprehensive investigations, at various levels of the military justice system, regarding complaints about IDF conduct of operations in Gaza between December 2008 and January 2009. Thus far, the IDF has been examining about 100 complaints, originating from a variety of sources, including U.N. inquiries and NGO reports. Every alleged violation brought to the IDF's attention has been or will be examined.

317. The examinations have commenced with an initial assessment of whether a complaint reveals suspicions of criminal behaviour. If the complaint appears to be based on *prima facie* evidence or raises serious concerns of intentional misconduct by IDF soldiers (such as the use of civilians as human shields, pillage, or maltreatment of detainees), it is generally referred directly to the Military Police for investigation. If the complaint concerned operational activity, it is first referred to a field investigation. The findings of the field investigations are subject to review by the Military Advocate General, who in turn decides whether to order a Military Police investigation, a stage which also involves the collection of outside testimony. Further details are provided below.

318. *Field Investigations.* Following the Gaza Operation, IDF Chief of General Staff Lt. Gen. Ashkenazi appointed five Colonels who were not directly in the chain of command for the operations in question to investigate thoroughly issues raised by, among others, international and non-governmental organisations and the international and Israeli media. The decision to initiate these field investigations emanated from the IDF's professional, moral and legal obligations to examine all claims made in relation to the conduct of the warfare. The teams were tasked to deal with the following issues:[257]

- Claims regarding incidents where U.N. and international facilities were fired upon and damaged during the Gaza Operation;
- Incidents involving shooting at medical facilities, buildings, vehicles and crews;
- Claims regarding incidents in which civilians not directly participating in the hostilities were harmed;
- The use of weaponry containing phosphorous; and
- Destruction of private property and infrastructure by ground forces.

319. In accordance with standard IDF procedure for field investigations, the investigators operated independently and were provided access to all materials and the freedom to question any relevant IDF personnel. They were given the complaints received by the IDF and other Israeli authorities, interviewed many soldiers and officers, and gathered relevant documents and other materials from external sources. Each soldier whose testimony was requested was required to cooperate with the investigation, and the investigators received full cooperation.

320. The full findings of each of these five field investigations were presented to the IDF Chief of Staff, and a summary of those findings are reflected below, as representing Israel's current information about various alleged incidents and complaints. However, this does

[257] The initial field investigations examined allegations regarding the following incidents, in chronological order: (1) Imad A'kel mosque (Jabaliya, 29 Dec); (2) a truck carrying oxygen tanks (Jabaliya, 29 Dec); (3) a medical team (Gabel Kashef, 31 Dec); (4) Ibrahim al-Maqadme mosque (Gaza, 2 January); (5) a house during medical treatment of wounded civilians (Sheikh Radwan, 3 January); (6) the American College (Beit Lahia, 3 January); (7) an ambulance (Beit Lahia, 4 January); (8) an ambulance (Sheikh A'jalin, 4 January); (9) the UNRWA Asma School (Shati, 5 January); (10) the Al-Daia family residence (6 January); (11) an UNRWA school (Jabaliya, 6 January); (12) the Deeb family (Jabaliya, 6 January); (13) an UNRWA convoy in Saleh A-Din street/Ezbet Abed Rabu (8 January); (14)) a mother and child clinic (Sajaiya, 10 January); (15) the UNRWA compound (Gaza, 15 January); (16) the residence of Dr. Abu El-Eish (Jabaliya, 16 January); and (17) an UNRWA school (Beit Lahia, 17 January).

not mean the investigations are closed. Rather, in accordance with usual practice, a summary of each investigation has been presented to the Military Advocate General, who is vested with authority to decide whether additional checks need to be done, or if there is sufficient basis for opening a military police investigation. His decision is independent, and he is subject only to the law. Due to the significance of the issues involved, the conclusions of the IDF field investigations and the opinion of the Military Advocate General will also be reviewed by the Attorney General. Accordingly, the investigations constitute only the first level of examination. This process is still, therefore, underway.

321. *Field Investigations in Progress.* In addition to the five broad field investigations above, the IDF Military Advocate General is awaiting the findings of field investigations into more than sixty other incidents, acting chiefly upon reports received from local and international NGOs. These include, *inter alia*, the following cases (in chronological order, and as an illustrative list only):

- Allegations regarding an air strike on a bus station near an UNRWA college which killed 12 civilians (Gaza, 27 December).

- Allegations regarding a missile attack against residential premises that killed 3 civilians and wounded 4 civilians, all members of the Al-Abasi family (Rafah refugee camp, 29 December).

- Allegations regarding an air strike that killed three children, members of the Al-Astal family (Al-Karara village, 2 January).

- Allegations regarding an air strike that damaged the Al-Raya medical centre (Gaza, 4 January).

- Allegations regarding the firing of shells and shootings that killed and wounded members of the Samouni family (Zeitun, 4 January).

- Allegations regarding artillery strike, including shells containing white phosphorous, and additional shootings, that killed and injured members of the Al-Halima family (Safiya area, 4 January).

- Allegations regarding the firing of tank shells on civilians carrying white flags that killed two civilians (Johar A-Dic, 4 January).

- Allegations regarding the firing of Flechette rounds on an ambulance that killed one medical personnel and wounded another (Beit Lahia, 4 January).

- Allegations regarding the shooting of women carrying white flags, killing one of them (4 January).

- Allegations regarding an air strike that killed five members of the Abu-Ayisha family (A-Nasser neighbourhood, Gaza, 5 January).

- Allegations regarding the firing of Flechette rounds that killed two civilians (Izbat Beit Hanoun, 5 January).

- Allegations regarding the shooting of civilians carrying white flags, that killed one civilian (Beit Lahia, 5 January).

- Allegations regarding the firing of Flechette rounds that killed three civilians (Mugharka/Nezarim, 7 January).

- Allegations regarding the shooting of civilians carrying white flags that killed two civilians (Jabaliya, Abed Rabu neighbourhood, 7 January).

- Allegations regarding an artillery strike that damaged the European hospital (Khan Younis, 10 January).

- Allegations regarding the shooting of civilians carrying white flags that killed four civilians (Khuzaa', 13 January).

- Allegations regarding an air strike that killed 2 civilians members of the Al-Kurdi family (Gaza, 14 January).

- Allegations regarding an artillery strike, including by munitions containing white phosphorous, and tank shelling that damaged al-Quds hospital (Tel al-Hawa, 15 January).

- Allegations regarding an artillery strike, including by munitions containing white phosphorous, which killed 4 members of the Al-Khadad family.

- Allegations regarding a missile that struck the residence of the Batran family and killed 6 civilians (Al Bureij, 16 January).

- Allegations regarding an air strike on the residence of the Banar family that killed 10 civilians (Sajaiya, 16 January).

322. As explained above, after reviewing the field investigation findings, the MAG will decide whether to order Military Police investigations into the above incidents. The MAG may order criminal investigations without waiting for the results of a field investigation. Decisions of the MAG in this regard are made publicly available, and are subject to review by the Attorney General and possibly by the Supreme Court.

323. *Criminal Investigations in Progress*. In addition to these numerous field investigations, as of 1 July 2009 there were also thirteen IDF Military Police investigations currently in progress into incidents giving rise to suspicions of misconduct by IDF personnel during recent operations in Gaza.[258] The allegations referred directly to military policy investigations are as follows:

- Allegations regarding pillage (Zeitun, 3 January).

- Allegations regarding violence and maltreatment of a Palestinian detainee (Beit Lahia, 3 January).

- Allegations regarding the use of civilians as human shields (Jabaliya, 4 January).[259]

- Allegations regarding violence and pillage (Al-Atatra, 5 January).

- Allegations regarding the use of a civilian as a human shield (Beit Lahia, 5 January).

- Allegations regarding the use of civilians as human shields (Azbet Abed Rabu, 5 January).

- Allegations regarding the use of minors as human shields (Al-Atatra, 5 January).

[258] As of 28 May 2009, an indictment has been filed by the IDF Prosecution against soldiers in connection with an incident of theft from a Gaza resident during the Operation.

[259] Following the Gaza Operation several complaints were received alleging use by IDF troops of civilians in Gaza as human shields. This practice is strictly prohibited by IDF Standing Orders, as detailed above. Therefore, every complaint received in this regard was referred directly to Military Police for investigation.

- Allegations regarding violence and ill-treatment of Palestinian detainees (Al-Atatra, 5 January) (2 separate investigations).

- Allegations regarding damage to property and pillage (Al-Atatra, 5 January).

- Allegations regarding violence and maltreatment of a civilian (Zeitun, 8 January).

- Allegations regarding the use of a child as a human shield (Tel al-Hawa, 15 January).

- Allegations regarding maltreatment and use as human shields of detainees (Jabaliya, date unknown).

- Allegations regarding the use of civilians as human shields (Asmouni, date unknown).

324. *Criminal Investigation regarding the Rabin Military Preparation Center allegations.* During a conference held at the Rabin Military Preparation Center, several IDF soldiers who participated in the Operation levelled serious accusations of violations of the Law of Armed Conflict by the IDF, including intentional shooting of civilians. Due to the serious nature of these allegations, the MAG ordered a criminal investigation by the Military Police without awaiting a prior initiation of field investigations. The Military Police investigation revealed that some of the stories were based on hearsay and were not consistent with verifiable facts. Two examples, both from the Zeitun neighbourhood during the third week of the Gaza Operation, are discussed below.

325. One of the soldiers at the conference said that an order was given to open fire at an elderly woman, but later clarified to investigators that he had not personally witnessed the incident and was repeating a rumour. The investigation showed that in this case, IDF soldiers had fired at a suspected female suicide bomber who ignored numerous warnings to stop advancing in their direction.

326. The investigation revealed that IDF soldiers positioned in one of the houses in the neighbourhood were alerted that a female suicide bomber was present in the area. Soon after, they identified a woman wearing black clothes which seemed to be hiding something beneath them. She walked directly towards the house where the soldiers were present. When she reached the distance of 150 metres from the house, a number of shots were fired in the air in order to warn her from getting closer. Nevertheless, she kept walking towards the house. When the woman arrived at a distance of 60-100 metres from the house, several

additional shots were fired to a nearby point, in a manner that did not risk her, in order to deter her from getting to the house. She kept walking. At this stage, when she was close enough to be able to hear the soldiers, they called her to stop, and when that did not help, fired several shots towards her feet. Despite that, the woman kept approaching the house and only when she arrived at a distance of 20-40 metres from the house, and the soldiers were at substantial risk of being blown up, she was shot.

327. The account by a different soldier of a further incident allegedly involving the shooting of a woman and two children was also revealed to be based on hearsay. In this case, too, the Military Police probed the circumstances of the actual incident. The investigation revealed that the story originated with soldiers who mistakenly thought that one of their colleagues had opened fire on the women and children, when in fact he had fired at another target. The woman and children were unharmed.

328. The investigation revealed that a Palestinian family that was staying in a house occupied by IDF soldiers asked to leave, and was allowed to evacuate to a safe place. They were given a white flag and instructed – in Arabic – by the commander in charge as to the direction in which they should go. The commander made sure that they went to the right direction. At the same time, another soldier present in the same house identified two suspicious men walking towards the house from a different direction. They were warned to stop and ignored those warnings. The IDF soldiers therefore fired several shots towards their feet. The men were hit and evacuated to one of the houses in the neighbourhood. Based on these findings of the Military Police, the MAG decided to close the case.

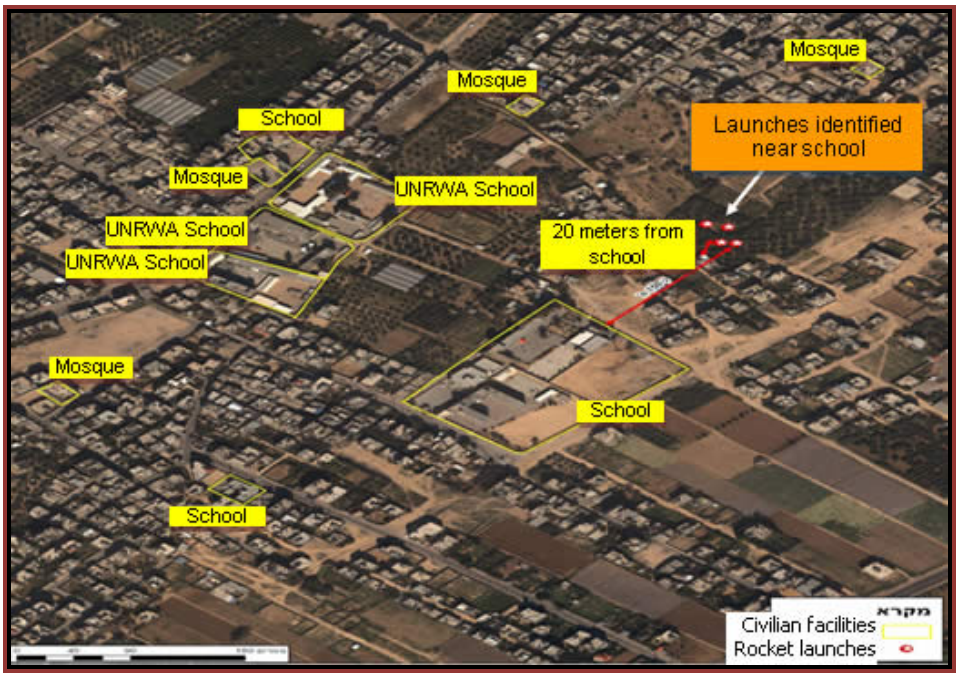
(2) Complaints about Specific Incidents

329. In this Section, the Paper addresses three broad categories of specific incidents — involving harm to U.N. or other international facilities, medical facilities and vehicles, and other specific incidents involving multiple civilian casualties — based on the findings of three of the five IDF field investigations that have now been completed, and that are under review by the Military Advocate General. Additional incidents within these categories are still under investigation at the IDF field level. The findings of the other two IDF field investigations, on more general concerns involving the IDF's use of certain munitions and destruction of private property and infrastructure, are set forth in Section V.D(3).

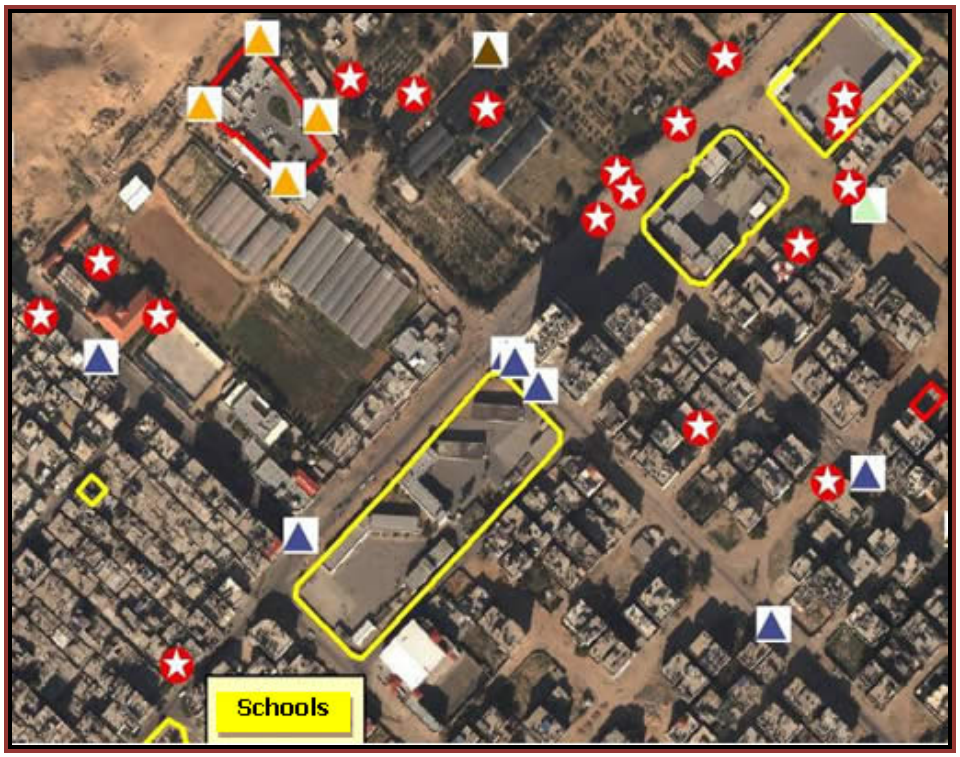
(a) Incidents Involving Harm to U.N. and International Facilities

330. During the fighting in Gaza, the IDF faced a major challenge in avoiding damage to U.N. and other international and sensitive facilities. In the densely populated Gaza Strip there are over 750 United Nations facilities, and almost 1,900 sensitive facilities in total.

331. The challenge was made many times more difficult by Hamas' strategic placement of terrorist units and missile launching squads in close proximity to these sites, as evident in the following photographs:



► Mortar shells launched near an UNRWA school in the refugee camp in the central area of Gaza City (Source: IDF Spokesperson)



► Rockets (red dot with a white star) launched near schools (yellow) in the Sheikh Radwan neighbourhood of Gaza City. In proximity to the schools there are training camps, terrorist organisation workshops for the manufacture of weapons and arms caches (red) (Source: IDF Spokesperson)

332. Notwithstanding the difficulties involved, in planning its Gaza Operation, the IDF took great care to map out these sensitive facilities, and to try to make sure they did not suffer damage during the Operation. During the Operation itself, the IDF took numerous precautions to avoid hitting facilities and vehicles affiliated with the U.N., Red Cross, Red Crescent and other international organisations. The IDF's rules of engagement included clear orders to avoid harm to these facilities and vehicles. Throughout the Operation, the IDF coordinated with the U.N. and other international organisations through a special Civil Administration situation room and a centre for humanitarian coordination established in order to help coordinate humanitarian aid day-to-day. These procedures allowed for movement of some 500 convoys and vehicles throughout the Gaza Strip, and the transfer of a substantial supply of food and humanitarian aid.

333. Despite these precautions, in a number of cases military operations resulted in damage to U.N. facilities and injuries to personnel. While the vast majority of facilities remained unharmed, Israel views the damage and injury that occurred in these cases as an extremely serious matter and is committed to investigating allegations regarding Israel's conduct in this regard. Investigations have already begun. The first step, under the procedures

outlined above, was a thorough IDF field investigation. The results of this investigation are currently under review by the Military Advocate General.

334. Independent of the IDF's own investigation, the United Nations Secretary General set up a Board of Inquiry to examine certain incidents involving U.N. facilities. While Israel viewed this inquiry as premature, pending the conclusion of its internal investigations, it nonetheless cooperated fully with the U.N. Board of Inquiry, providing it with extensive facts and pertinent information. Indeed, the Secretary General of the United Nations commended Israel for its extensive cooperation.[260] While Israel has concerns about certain aspects of the Board of Inquiry's methodology and its resulting report,[261] Israel is currently working together with the United Nations to address issues which were raised in the Inquiry. Indeed, procedures can always be improved and lessons learned. Already, in light of the incidents that did occur despite the IDF's precautions, and in parallel to the investigations undertaken thus far by Israel, IDF Chief of General Staff, Lt. Gen. Gabi Ashkenazi has re-emphasised the importance of better familiarising IDF forces at all levels with the location of sensitive facilities within their assigned combat zones. He ordered that regulations regarding safety-distances from sensitive facilities be highlighted, specifically with regard to the use of artillery, and also ordered that additional steps will be looked at to improve the coordination between the IDF and U.N. agencies in the field.

335. The following illustrative examples demonstrate both the process of investigation undertaken thus far in Israel with respect to certain incidents involving U.N. facilities, and the application of the proper legal standards to the facts currently available. As discussed above, the Law of Armed Conflict turns not on the simple fact that certain sites were damaged in the course of battlefield operations, but rather on whether military forces targeted military objectives, and whether in doing so they took into account considerations of proportionality, in weighing the possibility of incidental (but unintended) harm to civilian facilities or persons.[262]

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[260] *See Letter from the Secretary-General to the President of the Security Council*, 4 May 2009, at 2, available at http://www.unhcr.org/refworld/docid/4a292c8dd.html (expressing "appreciation for the cooperation provided by the Government of Israel to the Board").

[261] *See* Press Release, *Israel's reaction to the U.N. Board of Inquiry report*, Israel Ministry of Foreign Affairs, 5 May 2009, available at http://www.mfa.gov.il/MFA/About+the+Ministry/MFA+Spokesman/2009/Press+releases/Israel_reaction_UN_inspection_committee+report_5-May-2009.htm.

[262] This test is significantly different from the one the U.N. Board of Inquiry applied, which asked only whether the physical premises of U.N. facilities had been affected – a standard described as "inviolability" under diplomatic law. Unlike this standard adopted by the Board of Inquiry, the Law of Armed Conflict does not impute a violation from the mere fact that a particular site may have incurred damage, incidental to the targeting of a legitimate military objective.

(i) UNRWA School in Jabaliya (Fahoura School): 6 January 2009

336. In this incident, which occurred on 6 January 2009, IDF mortar shells landed outside a school being used as a UNRWA shelter. No mortar rounds hit the school itself, but landed in the road outside the school and at a nearby compound, resulting in flying shrapnel that reportedly injured several people inside the school, and killed or injured others nearby.

337. The IDF's 'investigation of the incident found that, on 6 January 2009, an IDF force operating in the El-Attatra-Jabaliya area came under an effective barrage of 120mm mortars launched from a site about 3.5 km. from the force.[263] The launching site was situated only 80 metres west of the UNRWA school. The mortar attack lasted for almost an hour, with one mortar being fired every few minutes. As reported in the media, local residents later confirmed that mortar fire was coming from the vicinity of the school.[264]

338. Soon after the source of fire was detected, a scouting unit was dispatched to confirm the location. Approximately 50 minutes after the mortar attack had begun, two independent sources cross-verified the location of the mortars. Only subsequent to this, and after verification of a safety margin of at least 50 metres between the target (i.e., the identified source of mortar fire) and the UNRWA school, did the force respond to the ongoing barrage, by using the most accurate weapon available to it — 120mm mortars.

339. The IDF force that was under attack fired four mortars, about 5-10 minutes after the cross-checked identification of the source of fire, and while Hamas mortars were still being fired towards the forces. The IDF response succeeded in stopping the Hamas mortar attack. Indeed, as a result of the response, five Hamas operatives were killed. The effectiveness of the mission in achieving its military objective is thus indisputable.

340. The IDF acted to defend the lives of soldiers under fire, in order to stop continuing mortar attack. The defensive action targeted an identified source of mortar fire which represented a concrete and immediate threat to the force. The IDF executed the responsive fire with as much precision as possible, given the available munitions. Indeed, the fact that all the

[263] The IDF internal investigation provided important context for this incident. It revealed that Hamas often used 120mm mortars to attack Israeli towns and villages near the border of Gaza. Hamas terrorists had acquired significant expertise with these weapons and improved the accuracy of their technique; this tactic was central to Hamas' method of fighting the IDF in urban areas. Hamas' use of 120mm mortars posed a serious threat to IDF ground forces. Only a day before the incident in question, Hamas mortar fire had injured 30 IDF soldiers.

[264] Associated Press, *Residents: Hamas Militants Staged Attacks from Cover of UN School*, 6 January 2009, available at http://www.wkyt.com/home/headlines/37163864.html.

Israeli shells landed *outside* the school grounds demonstrates the care Israel took *not* to hit the school itself, consistent with its obligations under the Law of Armed Conflict.[265]

(ii) UNRWA Field Office Compound: 15 January 2009

341. In this incident, it has been alleged that IDF artillery firing caused shell casings and burning white phosphorous-soaked wedges to fall within a UNRWA Field Office compound, onto a warehouse area. The incident reportedly caused injuries to one UNRWA employee and two other unidentified persons who had taken shelter in the compound, as well as damage to buildings, vehicles and supplies

342. The IDF's investigation found that this incident occurred in the Tel al-Hawa neighbourhood on the twentieth day of the Gaza Operation, during the second week of the ground manoeuvre, in which IDF forces were operating deeper in the urban areas of Gaza in order to reach Hamas' bases, positions, weaponry warehouses, rocket factories, and launching areas. On the day of the incident, IDF ground forces, including tanks, were operating in Tel al-Hawa area against Hamas and other terrorist targets. IDF forces were proceeding towards topographically superior positions overlooking the area, and were exposed to constant fire by Hamas forces. Hamas units fired at the IDF with various kinds of weaponry, including light weapons, anti-tank missiles, and sniper fire.

343. Hamas' anti-tank units, equipped with advanced anti-tank missiles, were operating in this area. These units were located mainly near the northern side of the UNRWA compound, so that the compound was placed between Hamas' anti-tank units and IDF forces. The threat to Israeli forces was credible and imminent.

344. The IDF's primary rationale for deploying smoke screening munitions containing white phosphorous was to produce a smokescreen to protect Israeli forces from the Hamas anti-tank crews operating adjacent to the UNRWA headquarters. Such a smokescreen has proven an effective response to the anti-tank threat, since it effectively blocks the enemy's

[265] The U.N. Board of Inquiry did not examine any of the critical issues required for a Law of Armed Conflict Analysis. Thus, as it admitted, it was "unable to reach any conclusion whether or not mortars were being fired and directed against the IDF from near to the school." U.N. BoI Report ¶ 23. The Board also conceded, with respect to people killed or injured outside the school, that "the extent to which they could be categorized as acting in a non-civilian capacity could not be adequately investigated within the Board's constraints." *Id.* ¶ 28. While the Board observed that in its opinion, "the means of response to an indentified source of mortar fire that would have carried the least risk to civilians and property ... would have been a precisely targeted missile strike," it conceded that "[i]t was not in a position to assess whether such a means of response was available to the IDF at the time and, if it was not, the length and consequences of any delay until it might have become available." *Id.* ¶ 24. The Board thus did not attempt to engage in the type of analysis required by the Law of Armed Conflict, which (as discussed in Section V.A above) critically depends on the tools and information available at the time of targeting decisions, not hindsight judgments about alternative strategies that may or may not have been feasible.

field of view and prevents it from using visual observation tools (including infra-red). As discussed in Section V.D(3)(a)(i) below, the IDF's use of the standard smoke projectile — which is commonly found in the arsenal of other armed forces of States worldwide — is lawful for this purpose.

345. The smokescreen created during the fighting in Tel al-Hawa was effective in achieving its military objectives. It prevented most of Hamas' attempts to launch anti-tank missiles, although one missile did hit an IDF tank. Hamas' anti-tank units, which are mobile, had to change their positions in order to be able to attack IDF forces. In the absence of the smoke-screen, the fight would have continued in this area, and the IDF would have had to use reactive fire to engage anti-tank units, with the likelihood of greater civilian harm.

346. The target zones of the smoke projectiles were determined in accordance with operational considerations, including the progress of IDF forces and the changing deployment of Hamas anti-tank units. The IDF sought to maintain a safety distance of several hundred metres from sensitive sites, including the UNRWA compound. Despite the maintenance of a safety distance, some felt wedges and other components of the projectiles apparently landed in the compound after the release of the felt wedges in the air. The IDF neither intended nor anticipated this outcome. Following a U.N. report on a fire in the compound, and in response to a request by the U.N., the IDF ceased the use of smoke projectiles in the area. In addition, the arrival of fire trucks and evacuation of tankers from the UNRWA compound was coordinated with the IDF.

347. In conclusion, the incident took place during intense fighting, which involved Hamas' deployment of anti-tank units equipped with advanced anti-tank missiles north of the UNRWA compound. Hamas thus placed the compound between themselves and the IDF forces.[266] The IDF implemented an effective smokescreen as a protective measure in response to this threat. The operational advantage of using the smokescreen was significant. The IDF anticipated that the risk to civilians and civilian objects was limited in relation to this operational advantage. Unfortunately, however, three individuals were injured and U.N. facilities were damaged.

[266] The U.N. Board of Inquiry reached its "conclusions" on the incident without fully weighing this critical fact. It acknowledged that — as with all of the incidents covered by its report — "it was not within its scope to assess general allegations or denials" regarding "possible military activity close to United Nations premises and possible military use of nearby buildings." U.N. BoI Report ¶ 97.

(iii) UNRWA Bureij Health Centre

348. In this incident, an aerial bomb hit an apartment building opposite a UNRWA health centre. There were no injuries to the occupants of the apartment building, who had vacated the building following an earlier warning. However, debris and shrapnel from the strike apparently hit the UNRWA facility across the street, causing damage to the building and certain injuries inside, as well as injuries to persons who were approaching the centre's gate.

349. The IDF's investigation of this incident found that the strike involved the targeting of a legitimate military objective: a Hamas weapons and terrorist equipment storage site that also served as a weapons workshop. The site was located on the ground floor of a four story civilian residence in a densely populated area. The residence was connected to several neighbouring buildings and was adjacent to the UNRWA medical centre, as well as to mosques and an educational institution.

350. Given the location, the IDF carefully planned the operation, including an assessment of anticipated collateral damage, in order to minimise the risk to adjacent civilian facilities. Particular consideration was given to adjacent sensitive sites, such as the UNRWA health centre, which was marked in advance on IDF operational maps and aerial photographs. The IDF took the following steps in order to minimise possible incidental harm:

- The IDF issued warnings in advance, by means of leaflets and telephone calls, advising civilians to keep away from facilities serving Hamas and other terrorist groups, such as the terrorist storage site and weapons workshop in the apartment building.

- Several minutes before the attack, phone calls were made to the residents of the targeted building, calling them to evacuate the premises. Subsequently, the IDF issued an additional early warning to the residents of the targeted building and bordering premises, with light weaponry that did not endanger the residents. This early warning was effective and clearly understood by the neighbouring residents, as confirmed by their evacuation of the building before the attack.

- The IDF used precision munitions and fired only one munition. A delay fuse was used to ensure that the detonation of the ammunition would destroy only the terrorist storage site and weapons workshop, and not the buildings connected to it. This special mechanism limited the damage to neighbouring buildings.

- The direction and the angle of the strike were calculated to minimise collateral damage.

351. The strike succeeded in achieving the military objective: it neutralised the terrorist storage site and weapons workshop, while the building itself remained standing, thus avoiding structural damage to connected and adjacent buildings. The incident thus involved the accurate targeting of a verified military target. As noted, as a result of IDF warnings there were no injuries to the occupants of the apartment building in which the weapons workshop was housed, or in the adjacent apartment buildings.

352. However no precautions are infallible, and despite the IDF's precautions in this case, the strike resulted in incidental harm to the neighbouring UNRWA centre. Israel regrets this harm, but this unfortunate fact it does not render the targeting decision in breach of the Law of Armed Conflict. Rather, the deliberate decision by Hamas to locate a weapons storage and workshop facility in a civilian building near the UNRWA medical centre, mosques, and an educational institution violated its obligations under the Law of Armed Conflict, including its obligation not to jeopardise the civilian population under its control.[267]

(iv) UNSCO Gaza Compound: 29 December 2008

353. This incident involved the aerial bombing by the IDF of a Hamas command and control centre, approximately 30 metres from a fence bordering a UNSCO compound. The attack occurred in the middle of the night when the nearby offices presumably would be empty. There were no direct hits on the UNSCO compound. However, the strike on the adjacent building reportedly caused shrapnel and concrete debris to fly into the compound, leading to physical damage to the premises, but no deaths or injuries.

354. As indicated, the operational goal of this strike was to eliminate a Hamas command and control centre and to destroy weapons and ammunition considered highly likely to be concealed beneath the building. The IDF took multiple precautions to minimise any incidental damage from this targeting of a verified military objective, including in particular the UNSCO compound, which was approximately 30 metres from the target and marked in advance as a sensitive site on IDF operational maps and aerial photographs. In particular, the IDF:

[267] The U.N. Board of Inquiry acknowledged receiving information that "some occupants of the apartment building had Hamas affiliations," but did not consider itself sufficiently informed to reach a conclusion "as to whether or not the building was being used by Hamas for operational purposes." U.N. BoI Report ¶ 35.

- Used precision munitions, and fired only three munitions on what was a very large military target. Furthermore, the IDF used a delay fuse to ensure detonation of the munitions only deep within the building, in order to limit the possibility of damage to neighbouring buildings.

- Calculated the direction and the angle of the strike to minimise collateral damage, in particular to the UNSCO compound.

- Carefully considered the timing of the strike, executing it at night to minimise civilian presence.

- Issued advance warnings through leaflets and telephone calls, advising civilians to keep away from facilities being used by Hamas and other terrorist groups, including command and control centres, such as the one at issue here.

355. These precautions were effective in ensuring that there were no deaths or injuries at the UNSCO compound. The IDF complied with both the rule of distinction (targeting a valid military objective) and the rule of proportionality, using means that eliminated the significant military objective without any injury to civilians.[268]

(v) UNRWA Asma Elementary School: 5 January 2009

356. This incident involved a missile that struck within the compound of a UNRWA school. The school itself had been closed for some time when the incident occurred, and the missile struck at night. However, earlier that day, UNRWA apparently had opened the school as an emergency shelter, although it did not so notify the IDF until the day *after* the strike. The missile strike killed three men who were outside the school building.

357. IDF's investigation of the incident revealed the following information: On the night of 5 January 2009, a terrorist unit was present in Asma School preparing to carry out military activity against IDF forces. The unit was present at night in an elementary school compound, a place where no civilians were known or presumed to be at night, especially since the school had been closed for nine days w*hen th*e incident occurred. Earlier that day, the UNRWA apparently had opened the school as an emergency shelter, although it did not so notify the IDF prior to the strike. The IDF concluded that there was no

[268] The U.N. Board of Inquiry stated that "it was unable to reach any conclusion" as to "whether Hamas might have been using the Presidential Guest House as a command and control centre or as a munitions store," although the UNSCO personnel (for their part) had "no reason to believe that it was." U.N. BoI Report ¶ 73.

reasonable explanation for the presence of the unit in the elementary school, other than their preparation for the terrorist activity. The IDF targeted the terrorist unit only after it cross-checked this information. In order to minimise incidental damage, the IDF selected and used a guided munition with a reduced warhead. In addition, visual observation was also used to ensure that no other individuals were present at the site.

358. Information regarding the School functioning as a shelter for civilians was provided by the U.N. to IDF only on 6 January 2009, the day *after* the incident had occurred. A list of facilities serving as shelters — provided by the U.N. one day earlier on 4 January 2009 — did not include UNRWA Asma School.[269]

(vi) UNRWA School: Beit Lahia Elementary School: 17 January 2009

359. This incident involved the alleged hitting of a UNRWA school being used as a shelter by white phosphorous-soaked felt wedges and certain debris. Several deaths and injuries were reported.

360. 'The IDF's investigation found that the incident occurred during a period in which IDF ground forces, including tanks, were operating in Beit Lahia against rocket-launching units and terrorist infrastructure. The forces were moving in an inferior terrain, threatened by Hamas positions located in the higher urban zone, including by Hamas' units armed with advanced anti-tank missiles. IDF forces were exposed to continuous fire from different sources.

361. In accordance with the combat doctrine for dealing with anti-tank threats, IDF forces fighting in Beit Lahia used standard smoke projectiles in order to create a protective smokescreen between themselves and Hamas' anti-tank units along the route of their progress. This smokescreen was effective and prevented Hamas from launching anti-tank missiles at IDF tanks. In the absence of such a smokescreen, it would have been necessary to use reactive fire at anti-tank units, with the likelihood of more extensive collateral damage.

[269] The U.N. Board of Inquiry confirmed these critically important facts, while contending that aerial monitoring during the day should have revealed civilians queuing to register. U.N. BoI Report, ¶ 11, 15. The Board did not suggest that aerial monitoring *in the evening*, when the missile was actually fired, should have been expected to detect a civilian presence at a site that had not yet been notified to the IDF for use as a shelter. Nonetheless, the Board concluded that "the IDF carried out a direct and intentional strike on United Nations premises." *Id.* ¶ 16.

362. The initial target zone of the smoke projectiles was located at a distance of one kilometre from the UNRWA school. The target zone was later adjusted in accordance with the progress of IDF forces, the wind direction and the deployment of Hamas anti-tank units. The nearest target zone to UNRWA school was several hundred metres from the School.

363. Despite the maintenance of an appropriate safety buffer between the nearest target zone of the smoke projectiles and the School, some felt wedges and other components of the projectiles unfortunately may have landed in the School. According to U.N. reports, such components apparently struck the roof of the School and caused significant casualties in one of the classrooms. It should be noted that such a falling of components is incidental to any use of air-burst munitions, including for the purpose of smoke screening, illumination, and so on.

364. In conclusion, the incident involved the implementation of an effective smokescreen as a protective measure, in response to concrete threats of Hamas anti-tank units against IDF tanks operating in Beit Lahia. The operational advantage of using the smokescreen was significant.[270] IDF forces had not anticipated significant collateral damage in relation to this advantage. The IDF is greatly saddened that civilians were injured, but this unfortunate fact does not render the original targeting decision a violation of the Law of Armed Conflict.

(vii) UNRWA Vehicle Convoy: 8 January 2009

365. The IDF also investigated an incident in which, according to a U.N. review, "small arms fire" was directed towards the lead car of a UNRWA convoy in the Ezbet Abed Rabu area, which was then occupied by the IDF.

366. According to initial findings, on the same day of the incident, there were three different U.N. movements coordinated with the IDF in the area of Ezbet Abed Rabu. There may have been a mutual misunderstanding concerning the coordination, which might have

[270] The U.N. Board of Inquiry reached its "conclusions" regarding the incident without making any findings "as to whether Hamas units were present in the Beit Lahia neighbourhood …, [or] whether IDF forces were exposed to fire or whether the laying of a smokescreen or other reactive measures were necessary in consequence." U.N. BoI Report ¶ 64. Yet these factors are essential for any proper analysis of distinction or proportionality, because (as explained in Section V.A above), both tests require consideration of legitimate military objectives. Proportionality in particular requires the weighing of the importance of such objectives against the likelihood of civilian harm, from the perspective of a "reasonable commander" at the time. Nor did the Board apparently consider any precautions taken by the IDF to minimize civilian casualties. Instead, the Board simply concluded that "whatever precautions were taken by the IDF in the current case, they were clearly inadequate in relation to the use of an extremely dangerous substance in a populated urban area." *Id.* ¶ 67.

provided the relevant ground force with inaccurate information regarding the concrete movement.

367. The IDF has been concerned that errors in communication may have led to this incident, even though no injuries occurred. Accordingly, immediate steps were taken to rectify the situation, including providing credible assurances that the security of United Nations personnel, installations and humanitarian operations would be fully respected and that there would be undertakings for improved liaison and more effective internal coordination within the IDF.

(viii) UNRWA Vehicle: 14 January 2009

368. The IDF also conducted a field investigation into a complaint that a UNRWA vehicle came under fire in the Tel al-Hawa neighbourhood on 14 January 2009. The investigation found that the vehicle bore no U.N. markings at the time of the firing, and was travelling in an area that international organisations had been told was forbidden for movement. Most importantly, the vehicle was transporting a Hamas anti-tank squad, in clear violation of the prohibition on using humanitarian vehicles to support military operations. Immediately after discharging the anti-tank squad, the vehicle proceeded erratically toward the IDF forces. The IDF had due cause to think the vehicle was a Hamas car bomb, raising legitimate concerns about the security of its own forces.

369. The IDF's use of force against an unmarked vehicle carrying a Hamas anti-tank unit comported with the Law of Armed Conflict. The IDF did not deliberately target a U.N. vehicle; indeed, the vehicle bore no U.N. markings. Furthermore, Hamas had turned the vehicle into a legitimate target by conscripting it for use in combat operations. In addition, it was fully appropriate for the IDF to take into account the security of its forces, in assessing the legitimacy of the target, as discussed in Section V.A.

(b) Incidents Involving Medical Facilities, Vehicles and Personnel

370. Israel is firmly committed to the protection of medical staff and facilities during armed conflict. The IDF operated a medical situation room in the Gaza District Coordination and Liaison, which coordinated the evacuation from the combat zone of wounded and trapped civilians. During the Gaza Operation, the medical situation room coordinated 150 different requests.

371. In addition to the general precautions followed to avoid civilian casualties described in Section V.C above, IDF trains forces at all levels to exercise extra caution to avoid harming medical crews and facilities. In the Gaza Operation, the IDF reinforced those instructions. In many cases IDF forces suspended their operations against legitimate military objectives when a medical vehicle or medical staff were in the vicinity. In some of these instances, the IDF refrained from attacking medical vehicles *even* in cases where Hamas and other terrorist organisations were using them for military purposes. Such restraint was not required under the Law of Armed Conflict, under which protection to medical vehicles may cease if the vehicles are being "used to commit, outside their humanitarian function, acts harmful to the enemy."[271] Indeed, as discussed in Section V.B above, Hamas itself was violating the Law of Armed Conflict by using ambulances to transport terrorist operatives and weaponry and to evacuate non-wounded terrorists from the battlefield, and by using hospitals and medical infrastructure as headquarters, situation-rooms, command centres and hiding places.[272]

372. The IDF launched an investigation into allegations about harm to medical facilities, vehicles and crews. The investigation resulted in initial findings, which are now subject to review by the Military Advocate General and the Attorney General, and possibly the ultimate review by the Israeli Supreme Court. The IDF Chief of the General Staff, Lt. Gen. Gabi Ashkenazi, has accepted the investigating colonel's recommendations for further improvement of training and procedures, including practice by all forces in "incidents and responses" drills involving prevention of harm to medical crews, facilities and vehicles. The Chief of the General Staff also ordered an examination of the operation of the humanitarian corridors opened for the benefit of the local population during the fighting.

373. In the meantime, the IDF received additional allegations, which it is investigating. Many of the specific incidents mentioned by NGOs are still under investigation. However, certain information is presently available, as summarised below.

[271] Additional Protocol I, art. 13(1).

[272] *See, e.g.,* Additional Protocol I, art. 12(4) ("Under no circumstances shall medical units be used in an attempt to shield military objectives from attack"); art. 58 ("The Parties to the conflict shall, to the maximum extent feasible: (a) . . . endeavor to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives; (b) Avoid locating military objectives within or near densely populated areas; (c) Take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.").

(i) Medical Facilities

374. The IDF investigated an incident that occurred on 10 January 2009, in which a building housing a mother-and-child clinic was damaged. The operation targeting the building caused physical damage to the structure, but no injuries to anyone. The operational goal was to destroy a Hamas storage site located in the same the building, which contained weapons and military equipment. Hamas used this site in gross violation of its duty not to jeopardise civilians and medical facilities. The first floor of the building served as a mother-and-child clinic, but there was no sign indicating the presence of the clinic, and its location had not been reported or otherwise known to the IDF prior to the military operation against the weapons depot.

375. The IDF carefully planned the operation, including by assessing any possible collateral damage to adjacent civilian facilities. The IDF undertook the following measures in order to minimise possible incidental harm:

- Issued warnings in advance, by means of leaflets and telephone calls, calling on civilians to keep away from facilities serving Hamas and other terrorist groups, such as the said terrorist storage site and weapons workshop.

- Issued, in addition, several minutes before the strike, an additional and effective early warning to the residents of the targeted building, by use of light weaponry in a manner not endangering those residents. This early warning was effective and clearly understood by the residents, as confirmed before the strike and by the fact the there were no casualties.

- Used a precision munition and fired only one munition.

- Calculated the direction and the angle of the strike to minimise collateral damage.

- A direct hit on the target was verified, *inter alia*, by secondary explosions that indicated there were, in fact, a substantial amount of explosives inside the building.

376. The IDF has also been criticised for attacking the Khan Younis European Hospital on 8 January 2009, resulting in damage to the generator but no injuries. This incident is currently under field investigation, as are allegations concerning damage to infrastructure (but no injuries) at al-Quds hospital.

(ii) Medical Vehicles

377. The IDF investigated a number of reported cases involving attacks on medical vehicles. Some of these cases involved vehicles being driven in a suspicious manner, often at night, without prior coordination with IDF forces and without clear markings of medical use (for example, through flashing lights). In these situations, IDF soldiers were concerned that the vehicles might be used for military purposes, such as a suicide attack, and in many cases fired warning shots, consistent with applicable procedures under the Law of Armed Conflict.[273] The IDF investigation concluded that IDF forces were mistaken in some of these assessments. However, as discussed in Section V.A, the standard against which the action is gauged is one of reasonableness of the commander making decisions in real time. Under this standard, the conduct of IDF forces was reasonable and did not demonstrate the intent or recklessness necessary to elevate such action to the level of violation of the Law of Armed Conflict.

378. One incident, for instance, took place on 4 January 2009, around 11:00 p.m., near the neighbourhood of A'ghalin. A vehicle was travelling without flashing lights on a main road that the IDF was monitoring in an effort to prevent terrorist movements. The vehicle drove toward an IDF tank. The soldiers in the tank had no way of knowing the vehicle was an ambulance, and suspected that it was a car bomb. Accordingly, these soldiers tried to stop the vehicle by using a number of warning measures, including firing warning shots in the air, followed by warning shots near the vehicle. When the ambulance was only 100 metres away from the tank, posing a potentially serious threat to the IDF force, the force opened fire, in a manner that minimised the risk to its passengers.[274] After these warning shots, the vehicle turned around and drove away.

379. Another incident occurred on 13 January 2009 in the Zeitun neighbourhood, around 3:30 p.m. An IDF force sheltering in a structure, north of the Nezarim junction, received a credible warning that a terrorist squad intended to attack the structure. Shortly after the warning, the force identified an ambulance driving quickly towards the junction, bypassing a roadblock established on the road and turning toward the structure. The soldiers took a number of warning measures, including firing warning shots in the air, in order to stop the vehicle. Despite these warnings, the ambulance continued toward the structure. The ambulance came within 50 metres of the structure, at which point the IDF soldiers fired at

[273] Additional Protocol I, art. 13(1) (protection to medical vehicles may cease if they are being used outside their humanitarian purpose, and after "a warning has been given setting, whenever appropriate, a reasonable time-limit, and after such warning has remained unheeded").

[274] Usually, warning shots are fired first in the air or to an object, such as a wall, near the vehicle, and only thereafter to the rear of the vehicle or another part that will not endanger the passengers.

the driver. The vehicle then turned around and drove off. No casualties were reported in this incident.

(iii) Medical Personnel

380. IDF investigations into allegations regarding health service staff wounded or killed during the Gaza Operation revealed that some of the reported cases were based on false information. For instance, Palestinians reported that a member of a Palestinian medical team was killed as a result of IDF strike on 3 January 2009, on the residence of the Dababish family in the Sheikh Radwan neighbourhood. The IDF investigation found that the person reported killed was in fact alive. Similarly, the IDF received reports that an IDF helicopter had fired on an ambulance in Beit Lahia, near the Abu-Ubeida School, on 4 January 2009 and killed the ambulance driver and two paramedics. In this case, the "deceased" ambulance driver was interviewed on a Hamas website a few days after the incident. The IDF investigation found that the only Palestinian killed in that incident was in fact a Hamas operative.

(c) Incidents Involving Multiple Civilian Casualties

381. The IDF acknowledges a number of unfortunate incidents during the Operation in Gaza, in which multiple civilians were harmed. Consistent with the high standards to which it holds its armed forces, Israel is rigorously investigating these incidents, and will continue to do so with respect to additional incidents brought to its attention.

382. As a first step, the IDF conducted a field investigation examining seven incidents in which the IDF allegedly harmed civilians. With respect to these specific incidents, the investigation concluded that IDF operations did harm civilians who were not directly participating in the fighting. The IDF is deeply saddened by the deaths and injuries of all civilians and especially of children. The harm to these individuals was not intentional, and based on the facts currently known — and subject to the pending review of the Military Advocate General and the Attorney General — there appears no basis for the serious charges advanced by some.

383. To the contrary, where the risk of unintentional harm to civilians could be foreseen, the IDF fully complied with the Law of Armed Conflict by taking many measures to minimise this risk, including using precise intelligence and providing warnings prior to the attack. That harm occurred despite these precautions is extremely unfortunate, but it does not constitute a violation of law attributable to the IDF. To the contrary, a significant proportion of the incidents occurred as a result of Hamas' illegitimate use of Palestinian

civilians, taking cover amongst the civilian population and using civilian facilities and structures as part of its terrorist operation against Israel.

384. Investigation of the following incidents reached the following preliminary conclusions (other incidents are still under investigation).

(i) The Al-Daia Family Residence, Zeitun Neighbourhood: 6 January 2009

385. During this extremely unfortunate incident, members of the Al-Daia family were killed when the Israeli Air Force bombed their house.

386. The IDF has concluded that this tragic event was the result of an operational error. An investigation determined that the IDF intended to strike a weapons' storage facility located in a building next to this residence. However, the IDF erroneously targeted the Al-Daia residence, rather than the weapons storehouse. Although the IDF did provide warning shots to the roof of the Al-Daia residence, other warnings (such as the warning phone call) were made to the building *actually* containing the weapons, not the Al-Daia residence.

387. The IDF is examining how the unfortunate operational error occurred, in order to reinforce safeguards and to prevent its recurrence. Israel deeply regrets the tragic outcome. This is the kind of mistake that can occur during intensive fighting in a crowded environment, against an enemy that uses civilian neighbourhoods as cover for its operations. IDF forces did not intentionally target civilians. This lack of unlawful intent has been a critical factor, in past incidents involving operational mistakes by other armies (such as NATO's erroneous bombing of the Chinese Embassy in the former Yugoslavia), in determining that no violation of the Law of Armed Conflict occurred.[275] Similarly, although its attack on the Al-Daia residence was a tragic error, it did not constitute a violation of the laws of war.

(ii) The House of Nazar Ri'an: 1 January 2009

388. During this episode, which was widely reported by NGOs, Ri'an and members of his family were killed in an aerial strike that hit their home. Ri'an was a senior Hamas operative, but he was not the target of the attack, although the IDF legitimately could have treated him as a military target due to his central role in planning and executing terrorist

[275] NATO Bombings, Final Report to the ICTY Prosecutor, ¶¶ 80-85 (noting that "[b]y the admission of US Government sources, the Chinese Embassy compound was mistakenly hit," due to operational mistakes in target location, and declining to assign criminal responsibility either to the aircrew involved in the attack or to senior leaders, in the absence of any unlawful intent).

attacks. Instead, the operational goal of the strike was to destroy Hamas' central compound in the Jabaliya refugee camp. The compound included several buildings that served as storage sites for large quantity of sophisticated weapons. The IDF limited the planned attack to the weapons storage site and did not seek to injure or harm Ri'an or, of course, any members of his family.

389. In an effort to ensure that it destroyed only the storage facilities, and did not harm civilians residing in the buildings, the IDF issued several warnings before the attack. These included not only general leaflets and telephone calls, alerting civilians to avoid facilities serving Hamas and other terrorist groups, but specific phone calls to the residents of the targeted buildings, notifying them of the planned strike and warning them to evacuate the premises. The IDF also fired two separate rounds of preliminary warning shots with light weapons, 13 minutes and 9 minutes before the strike, providing sufficient time for residents to evacuate. The residents evidently understood these early warnings, as a group of them did leave the building, a fact confirmed by IDF surveillance before proceeding with the strike. The IDF observed this group evacuation and drew the reasonable conclusion that the buildings (including Ri'an's house) were empty. Only then did the IDF launch the strike.

390. Following the strike, secondary explosions were visible. This confirmed that Hamas used the buildings for weapons storage, and therefore it was a legitimate military objective according to the Law of Armed Conflict. Only later was it discovered that, Ri'an and his family chose to remain in the building after others had evacuated, leading to their death.

391. The deaths of the Ri'an family members were tragic. Even so, it must be underscored that the IDF took appropriate steps to tailor its military strike to a proper military objective (the weapons storage site) under the cover of a civilian residence, and to extricate civilians from possible harm. To that end, the forces complied with international norms by giving effective advance warnings to at-risk civilians. That some civilians heeded these warnings, while the Ri'an family apparently did not, does not render the IDF's action unlawful.

(iii) The House of Dr. Abu el Eish: 17 January 2009

392. The IDF thoroughly investigated this incident, in which the doctor's three daughters were killed. The investigation concluded that an IDF tank fired two shells, which resulted in these unfortunate casualties.

393. The investigation found that the IDF force operated in the area of Sajaiya for several days, during which they were engaged in face to face combat within short range of Hamas terrorist units. The IDF forces discovered tunnels used for ambushing and attacking IDF forces, and identified homes that were booby-trapped.

394. On Friday, 16 January 2009, the IDF force came under sniper and mortar fire in an area laden with explosives and IEDs. The IDF force identified and located the source of fire as a house adjacent to that of the doctor's. The IDF returned fire and then saw several figures moving suspiciously in the upper level of a house nearby, which was in fact, Dr. Abu El-Eish's house. The IDF troops concluded that these figures were spotters directing the arms fire of the snipers. Hamas had used this method of target location throughout the Gaza Operation. Still, under heavy fire, the commander of the force waited about 20 minutes in an effort to ensure that the suspicious figures were in fact Hamas operatives, and that civilians would not be at risk before ordering the attack on the house. Only then did he give the order to open fire on the presumed spotters.

395. Following the firing of shots, the IDF soldiers heard screams from the direction of the house, and immediately halted all fire. When contact was made with the doctor, the IDF force made sure that ambulances could evacuate the injured via the Erez Crossing for immediate emergency medical treatment in Israel.

396. In the days leading up to the incident, officers in the Coordination and Liaison Administration had contacted Dr. Abu El-Eish several times to urge him to temporarily evacuate his home, as many others in the neighbourhood already had, because of Hamas operations and the intense fighting that was already taking place in that area for several days. In addition to the personal contact made directly with Dr. Abu El-Eish, the IDF issued warnings to the residents of Sajaiya by dropping thousands of leaflets as well as issuing warnings via Palestinian media outlets. Dr. Abu El-Eish chose to remain in the house, with his family, despite the specific personal warnings he received and the evident risks associated with Hamas sniper activity from the adjacent building.

397. The IDF regrets the tragic deaths of Dr. Abu El-Eish's daughters. However, considering the constraints of the battle scene, the threats endangering IDF forces and the reasonable estimation of the forces that the house was being used to direct sniper fire, the decision to target the building was intended only to respond to a perceived threat, and in no way breached the Law of Armed Conflict.

(iv) Attack on Truck Carrying Oxygen Tanks: 29 December 2008

398. This incident took place during the first stage of the Gaza Operation, in the area of the Jabaliya refugee camp. IDF surveillance identified a truck carrying objects that looked like Grad rockets based on their size and shape. The objects were being loaded into the truck next to a recognised Hamas rocket manufacturing site, and close to Hamas' central base. The loading point was also near an area frequently used by Hamas to launch rockets towards Israel.

399. On the basis of this information, the IDF concluded that the truck was carrying rockets from the Hamas rocket manufacturing facility to a launch site. In fact, the truck was carrying oxygen tanks and not rockets. The strike against the truck, together with the secondary explosions of the oxygen tanks, killed four Hamas operatives and four civilians.

400. Though there was misidentification of the oxygen tanks as rockets, the error was caused by the proximity to terrorist sites used for rocket launches. There was no intent to attack a civilian object or to place civilians in undue danger.[276] Destroying rockets before they reach a launch site was considered an urgent operational objective.

(v) Alleged Attacks on Mosques

401. In accordance with the Law of Armed Conflict, IDF rules of engagement expressly forbid attacks directed against sacred places, unless they are used for military purposes. As explained in details above, Hamas frequently used mosques for such purposes, in particular for the storage of weapons and munitions. As part of the investigation into civilian-related incidents, the investigating Colonel examined allegations regarding alleged IDF attacks on two religious sites, in which it was claimed that civilians were injured or killed.

402. One incident involved an alleged attack against Maqadme Mosque in Beit Lahia on 3 January 2009. The IDF inquiry revealed that the mosque was not attacked at all. The individuals reported as killed in this incident were in fact killed in other incidents not

[276] The incident resembles to a certain extent the one which took place during the NATO bombing campaign in Yugoslavia, where pilots bombed a convoy that they believed consisted of military vehicles, but which later turned out to be tractors carrying Albanian refugees. Some 75 people were killed and 100 injured, but the NATO Prosecutor declined to proceed with any charges. The assessment was that "civilians were not deliberately attacked in this incident," and that "it is difficult for any aircrew operating an aircraft flying … at a substantial height to distinguish between military and civilian vehicles in a convoy." Further, while in hindsight "the aircrews could have benefitted from lower altitude scrutiny of the target in an early stage, … neither the aircrew nor their commanders displayed the degree of recklessness in failing to take precautionary measures" which could amount to a violation of applicable law. NATO Bombings, Final Report to the ICTY Prosecutor, ¶¶ 63-70.

involving the mosque. Further, the supposed "civilians" who were casualties of the attack were in fact Hamas operatives killed while fighting against the IDF.

403. The second incident involved alleged strikes against the Rabat Mosque in Beit Lahia on 9 January 2009. The IDF investigation found no evidence that such a strike took place.

(3) General Concerns about IDF Operations

404. In addition to the three IDF field investigations regarding specific incidents, discussed above, the IDF also examined two broad areas of concern about IDF operations, involving the use of munitions containing white phosphorous and damage to infrastructure and destruction of buildings by ground forces. The findings of those investigations (which remain subject to review by the Military Advocate General and the Attorney General) are discussed below. This Section also addresses the lawfulness of the IDF's limited use of flechette munitions.

(a) The Use of Munitions Containing White Phosphorous and Flechettes

405. The IDF uses only weapons and munitions defined as legal under international law and authorised as such by the relevant IDF authorities, including MAG officers. In this regard, the IDF complies strictly with the applicable restrictions governing the use of certain weapons and munitions. Furthermore, all weapons and munitions are employed in accordance with the general rules of International Humanitarian Law such as distinction and proportionality. Of the many types of munitions employed by IDF forces during the Gaza Operation, international organisations have largely focused their criticism on munitions containing white phosphorous and flechettes.

(i) Use of Munitions Containing White Phosphorous

406. During the Gaza Operation, IDF forces used munitions containing white phosphorous, which is in common use by militaries worldwide. In particular, IDF used two different types of munitions containing white phosphorous – exploding munitions and smoke projectiles.

407. *Exploding munitions containing white phosphorous.* A small number of exploding munitions containing white phosphorous were used by the IDF during the Operation as mortar shells fire by ground forces and as rounds from naval vessels. These munitions were fired only at open unpopulated areas and were used only for marking and signalling

rather than in an anti-personnel capacity. In one single incident, in an open uninhabited area, ammunition containing phosphorous was used by ground forces to uncover tunnel entrances that served for terrorist purposes. No exploding munitions containing white phosphorous were used in built-up areas of the Gaza Strip or for anti-personnel purposes. The restrictions on the use of incendiary weapons under Protocol III (relating to Incendiary Weapons) to the Convention on Certain Conventional Weapons ("CCW Protocol III")[277] were observed at all times, even though Israel is not a party to the Protocol (for further elaboration, see below).

408. None of the instances in which exploding munitions containing white phosphorous were used by the IDF during the Gaza Operation has given rise to particular criticism. Still, on 7 January 2009, although not required under international law, it was decided as a precautionary measure, in order to minimise the risk to civilians, that the IDF would cease to use such exploding munitions during the Gaza Operation. IDF forces fighting in Gaza were instructed to act accordingly.[278]

409. *Smoke projectiles containing white phosphorous.* The second and main type of munitions containing white phosphorous employed by the IDF during the Gaza Operation was smoke screening projectiles. In the course of the ground manoeuvre, the IDF used smoke shells containing felt wedges dipped in white phosphorous. These shells contained relatively small amounts of white phosphorous and were used exclusively to create smoke screens for military requirements, such as camouflaging armoured forces from anti-tank squads deployed by Hamas in Gaza's urban areas. Smokescreens are an indispensable tool in ground manoeuvres and were extremely effective during the Gaza Operation in protecting IDF forces from Hamas' anti-tank capabilities.

410. In fact, these smoke-screening projectiles are designed to create a protective smoke screen for battlefield purposes, and were used exclusively for this purpose by the IDF during the Gaza Operation. The smoke projectiles may, on occasion, produce incidental incendiary effects, but this does not make them incendiary weapons for purposes of international law.

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[277] Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects as amended on 21 December 2001(hereafter "Convention on Conventional Weapons" or "CCW"), art. 1, available at http://www.unog.ch/80256EDD006B8954/(httpAssets)/40BDE99D98467348C12571DE0060141E/$file/CCW+text.pdf. Israel is not a party to CCW Protocol III.

[278] The investigation discovered that exploding munitions containing phosphorous were used after 7 January 2009 on two occasions, by ground forces and the Israel Navy, for marking purposes. The investigation of these two exceptions found that, while there was a deviation from the IDF precautionary instruction, in neither incident had there been a breach of international law.

(a) International Law Applicable to the Use of Incendiary Weapons

411. The use of munitions containing white phosphorous is not prohibited by any international treaty, including CCW Protocol III. Article I of CCW Protocol III defines "incendiary weapon" as "…any weapon or munition which is primarily designed to set fire to objects or to cause burn injury to persons through the action of flame, heat, or combination thereof, produced by a chemical reaction of a substance delivered on the target." Article I further expressly excludes from its purview: "…Munitions which may have incidental incendiary effects, such as illuminants, tracers, smoke or signalling systems."

412. Accordingly, although Israel is not a party to CCW Protocol III, it is clear that the use of munitions containing white phosphorous as a smokescreen is not regulated nor prohibited by it.

413. The fact sheet on white phosphorous by the Federation of American Scientists rates the lethality of white phosphorus as "low" and notes its current status as being "in use around the world," including by the U.S. and other military forces, for a variety of purposes.[279] Although certain NGOs criticised use of weapons containing white phosphorous by U.S. forces in Iraq, senior U.S. officials made clear that U.S. use was consistent with international law and State practice.[280]

414. Although the use of weapons containing white phosphorous for smoke-screening purposes is not prohibited by any international treaty, it is still subject to the applicable norms of the Law of Armed Conflict, including the principles of distinction and proportionality, which regulate the employment of any types of weapons during an armed conflict.

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[279] Federation of American Scientists, *White Phosphorous Fact Sheet*, 9 July 2009 (Sources: American Chemical Society, CDC, eMedicine, NATO, U.N. Department of Disarmament Affairs, U.S. Army, USGS), available at http://www.fas.org/programs/ssp/bio/factsheets/whitephosphorusfactsheet.html. Peter Herby, head of the Red Cross mines-arms unit, has likewise confirmed that "[i]n some of the strikes in Gaza it's pretty clear that phosphorus was used … *But it's not very unusual to use phosphorus to create smoke or illuminate a target.* We have no evidence to suggest it's being used in any other way." Associated Press, *IDF white phosphorus use not illegal*, The Jerusalem Post, 13 January 2009 (emphasis added), available at http://www.jpost.com/servlet/Satellite?pagename=JPost/JPArticle/ShowFull&cid=1231866575577; *see also* Human Rights Watch, *Q & A on Israel's Use of White Phosphorus in Gaza*, 10 January 2009, available at http://www.hrw.org/en/news/2009/01/10/q-israel-s-use-white-phosphorus-gaza (similar).

[280] *US general defends phosphorus use*, BBC News, 30 November 2005 (noting that white phosphorus is a "legitimate tool of the military" and that it "is not a chemical weapon. It is an incendiary. And it is well within the law of war to use those weapons as they're being used, for marking and for screening"), available at http://news.bbc.co.uk/2/hi/americas/4483690.stm. In addition, when the United States submitted CCW Protocol III to its Senate for advice and consent in 2008, Department of Defense witnesses testified that use of white phosphorous was permissible under the Protocol.

(b) Compliance With the Principle of Distinction

415. The obscurant smoke shells were used by the IDF for military purposes only (*e.g.* camouflaging armoured forces from anti-tank squads deployed by Hamas in Gaza's urban areas), and were not aimed at civilians. The use of smoke obscurants proved to be highly effective at cloaking IDF forces and obstructing enemy lines of sight. At no time did IDF forces have the objective of inflicting any harm on the civilian population.

416. Some have suggested that air-burst white phosphorous munitions are by nature indiscriminate because they are designed to scatter over a wide area and therefore cannot be targeted precisely at a military objective. However, smoke projectiles are not designed or intended to be lethal or destructive, and as a result they are not used for targeting purposes. Rather, they are intended to disorient and neutralise the enemy by creating obscuration of the enemy's field of view (and therefore the objective in using them depends to a large degree on achieving a wide area of effect). Indeed, white phosphorous smoke screen projectiles worked well in serving their intended objective of protecting Israeli troops during the conflict. Therefore, smoke obscurants containing white phosphorous were not used for targeting purposes and cannot be classified as an indiscriminate weapon; otherwise, any smoke-screening means would be prohibited, in contrast to the well-established practice of militaries worldwide.

(c) Compliance with the Duty to Minimise the Risk to Civilians

417. During the Gaza Operation, the IDF used smoke-screening projectiles containing white phosphorous in a manner corresponding with its duty to minimise the risk to civilians. Abstaining from using smokescreens in densely populated areas of Gaza, *i.e.* precisely in those areas where Hamas deployed most of its forces, would undoubtedly have compromised the safety of Israeli troops and would increase the risk for civilians, as a result of cross-fire. Indeed, in one incident during the combat in Tel al-Hawa on 15 January, IDF forces came under fire from both anti-tank and small arms fire, and an IDF armoured bulldozer suffered a direct hit from an anti-tank weapon. The attack was possible because no white phosphorous smokescreen had been deployed. In cases where smoke obscurants were used, they proved to be a very effective means of protecting Israeli forces and in many cases prevented the need to use explosive munitions whose impact would have been considerably more dangerous.

418. Some have suggested that IDF could have used less harmful munitions, or used the munitions in a less harmful manner, to achieve the same military objective, for example,

by using smoke munitions without white phosphorous or by firing the munitions as ground-burst rather than air-burst projectiles. However, neither of these alternatives provides the same military advantages. White phosphorous munitions have significant battlefield advantages such as the speed of deployment and the effectiveness of blocking observation and targeting systems. Targeting the munitions at the ground rather than exploding them high in the air would fail to achieve the area of dispersal required for military purposes and would actually result in much more severe damage to buildings and persons on the ground.

419. The IDF took several precautions and other measures that were appropriate with respect to these particular munitions. First, the munitions were used only for the purpose for which they were designed, *i.e.* to create smoke screens, rather than to attack personnel or destroy buildings, purposes for which IDF has a variety of more effective munitions. Second, the use of felt wedges soaked in white phosphorous tends to further reduce dispersal of the substance and its incendiary side effects as compared to exploding munitions containing white phosphorous. Third, the smoke projectiles were employed using delay fuses which release the felt components of the projectile at a distance of at least 100 metres above the ground. This method (as opposed to the use of contact fuses), is consistent with the use of the projectiles for smoke-screening purposes only. Furthermore, air-bursting the munitions at a considerable distance above ground meant that it was less likely that any person or building would be harmed by the explosions. Fourth, after reports of an incident on 15 January 2009 during combat in Tel al-Hawa in which white phosphorous smoke projectiles set fire to a UNRWA warehouse, an IDF directive was issued, effective through the end of the Gaza Operation, establishing a safety buffer of several hundred metres from sensitive sites when using smoke projectiles.

420. All these precautions may not have eliminated the risk of civilian casualties, but the Law of Armed Conflict does not require such a result. It only requires parties to minimise the risk to civilians to the extent possible, subject to the legitimate military necessities. As explained above, the use of smoke obscurants by IDF fully complied with this rule.

(d) Compliance With the Principle of Proportionality

421. The issue of proportionality turns on the reasonableness of a commander's decision to use a particular munition in a particular context, taking into account the expected military benefit and the expected collateral damage. Second-guessing the reasonableness of a commander's decision in a rapidly evolving and complex battlefield situation should not be done lightly, and must take into account the information available to the commander at

the time of the decision (not what actually occurred) and the value of the military objective to a reasonable commander (rather than to a third-party observer). In the case of smoke munitions containing white phosphorous, the expected military benefit was that they would protect Israeli forces from attack: a compelling military objective. Against this objective, one must weigh the anticipated risk of harm to civilians and property from the use of smoke munitions, which are designed to be a non-lethal type of munition.

422. The non-lethal nature of smoke screens when compared to the effect of explosive munitions was particularly important, given that Hamas and other terrorist organisations sought to blend in with the civilian population, making it difficult or impossible to use explosive munitions without inflicting substantial civilian casualties.

423. One particularly well-known incident, involving the UNRWA warehouse facility in Tel al-Hawa, is discussed in detail in subsection V.D(2)(a)(ii) above. The incident demonstrates the reasonableness of the decision to use smoke-screening munitions containing white phosphorous in that instance, despite the fact that it ended up causing unintended collateral harm to the U.N. facility.

424. While the actual (as opposed to the anticipated) extent of damage caused by the use of munitions containing white phosphorous is not clear, Israel recognises the unfortunate reality that a number of civilians and civilian structures might have been harmed by such use during the Gaza Operation. Israel sincerely regrets every civilian injury that may have occurred, but notes that evidence regarding the extent of collateral damage caused by these munitions in Gaza is unclear.

425. Several civilians appear to have been harmed by falling white phosphorous shell casings. Absent a technical malfunction, such a shell falls empty and contains no white phosphorous or explosive mechanism. Nevertheless, a direct hit by such an object may cause injury or even death. It should be noted that IDF forces are not immune from this risk. Indeed, a few years ago an IDF soldier was killed when a shell casing from an air-burst (non-phosphorous) munition landed on him.

426. There appears to be insufficient evidence to conclude that white phosphorous caused extensive injuries to civilians in the course of the Gaza Operation.[281] While this may, in

[281] There appear to have been no documented deaths in Gaza resulting from exposure to white phosphorous itself. There have been reports of civilians receiving non-lethal burns from white phosphorous, although the number of such cases and the manner in which such burns were received is unclear. For instance, while statements by Gaza hospital officials express suspicions of white phosphorous burns in patients, they do not specify the number of cases, and acknowledge that physicians did not have the means necessary to distinguish white phosphorus burns from other types

[FOOTNOTE CONTINUED ON NEXT PAGE]

fact, have occurred in some cases, it is not clear to what extent this may have happened. However, concrete complaints on damages and harm caused by the use of smoke munitions containing white phosphorous are still being investigated by the IDF and any definite conclusions in this regard would be premature.

427. Finally, in addition to some civilian injuries, the use of smoke projectiles containing white phosphorous appear to have set fire to a number of civilian buildings, causing damage to several of them. Such fires were an unwelcome effect of IDF's operations, similar to other damage caused when densely populated areas become a battlefield. However, given the fact that thousands of smoke screen projectiles were launched by IDF, each projectile with 116 felt wedges, it does not appear that the damage from this use can be regarded as excessive.

428. Overall, the operational benefits of the smokescreens in protecting the safety and security of IDF troops far outweighed the anticipated risk to civilians entailed by their use. It is with regard to these expected effects, rather than the actual harm, that the proportionality analysis must be conducted. In any event, the scope of casualties and damage actually resulting from use of the smokescreen projectiles appears to have been relatively limited compared to the significant military advantage gained by smoke-screening.

(e) Investigations and Lessons Learned

429. In light of claims that the IDF made illegal use of munitions containing white phosphorous during the Gaza Operation, the IDF launched a field investigation into this matter. The investigation has now been completed and has uncovered no violations of international law, although – as explained in Section V.C(5) above – further stages of the review are ongoing.

430. After reviewing the conclusions of the investigation, the Chief of the General Staff emphasised the importance of a clear doctrine and orders on the issue of various munitions which contain phosphorous. In particular, Lt. Gen. Ashkenazi ordered that any use of phosphorous for purposes other than smoke obscuration be treated as exceptional, in order to minimise the risk to civilians. These instructions are currently being implemented in IDF orders and operational plans.

[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]
of burns. *See* Sebastian Van As et al., *Final Report: Independent Fact-Finding Mission Into Violations of Human Rights in the Gaza Strip During the Period 27.12.2008 – 18.01.2009*, Physicians for Human Rights-Israel, April 2009, at 32.

(ii) The Use of Munitions Containing Flechettes

431. Flechettes — anti-personnel darts typically dispersed by means of an explosive shell — were also used by IDF forces during the Gaza Operation to a very limited extent. Flechettes are a legal munition, and are not prohibited under the Law of Armed Conflict or under specific conventional prohibitions or restrictions. Many armies in the world have employed them in a variety of armed conflict situations. Despite the fact that these munitions have been in widespread use around the world for decades, governments have never reached agreement to ban or even restrict the use of such weapons.[282]

432. Naturally, the use of flechettes (as all other weapons) must comply with the general requirements of the Law of Armed Conflict discussed above. Accordingly, the use of flechette munitions is regulated both by the IDF standing rules of engagement, as well as by specific professional instructions. These instructions are designed to ensure respect for the legal requirements of distinction and proportionality, as well as the requirement to minimise the risk to civilians.

433. In 2002, the issue of employing flechette munitions by the IDF in the course of military operations in the Gaza Strip was brought before the Israeli Supreme Court (sitting as the High Court of Justice).[283] The allegation before the Court was that flechette munitions were by nature indiscriminate and therefore illegal under international law. The Court squarely rejected this argument, finding that flechettes were not covered by the CCW. More generally, the Court found that "a prohibition against the use of flechette shells has never received significant international support." It therefore concluded that this type of weapon was not illegal under the Law of Armed Conflict.

434. The Court also refused to prohibit IDF's use of flechettes in the Gaza Strip. In doing so, the Court observed that IDF "directives restrict the use of flechettes to circumstances under which there exists no significant chance of injuring innocent civilians, and they may only be used against those suspected of activities that will injure the IDF forces or Israeli civilians." The Court observed that the decision whether or not to use flechettes in concrete circumstances would therefore be made by the competent field commander taking these restrictions into consideration.

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[282] W. Hays Parks, "Means and Methods of Warfare," 38 Geo. Wash. Int'l L. Rev. 511, at 1 (2006).

[283] *Physicians for Human Rights v.OC Southern Command*, HCJ 8990/02 (27 April 2003), available at http://www.icrc.org/IHL-NAT.NSF/46707c419d6bdfa24125673e00508145/668f8bdcfda7c7a3c12575c3002e2106/$FILE/HCJ%208990.02.%20PDF.pdf (English translation).

435. Subsequent to this decision, IDF forces continued to make limited use of flechette munitions in the Gaza Strip, including during the Gaza Operation. Following the Operation, several complaints have been made concerning their use in particular instances. These claims are currently being examined by the relevant IDF authorities, and it is therefore premature to comment on those incidents. As with all other IDF investigations, however, it is certain that any findings shall be subject to review by the MAG, the Attorney General, and possibly an ultimate review by the Israeli courts.

(b) Destruction of Private Property

436. Some destruction of private property and infrastructure is an unfortunate but inescapable by-product of every armed conflict. While recognising this reality, the Law of Armed Conflict requires that the damage be justified by military necessity. For instance, Article 23(g) of the Hague Regulations of 1907 states that it is forbidden "to destroy or seize the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war."

437. The investigations thus far reveal that although IDF forces were instructed to operate carefully at all times and to minimise collateral damage to civilian property to the extent possible, extensive damage to civilian infrastructure and personal property did occur in the course of the Gaza Operation. Much of the damage was demanded by the necessities of war and was the outcome of Hamas' mode of operating.

438. As explained in Section V.B above, Hamas based its main line of defence on civilian infrastructure in the Gaza Strip (*i.e.* buildings, infrastructure, agricultural lands etc.), and specifically on booby-trapped structures (mostly residential), the digging of explosive tunnels and tunnels intended for the moving of fighters and weaponry. This created an above-ground and underground deployment by Hamas in the Gaza Strip's urban areas. During the Gaza Operation, IDF troops were forced not only to fight the terrorists themselves, but also to deal with the physical infrastructure prepared in advance by Hamas and other terrorist organisations.

439. As part of this challenge, IDF forces demolished structures that threatened their troops and had to be removed. These included (1) houses which were actually used by Hamas operatives for military purposes in the course of the fighting, (2) other structures used by Hamas operatives for terrorist activity, (3) structures whose total or partial destruction was imperatively required for military necessities, such as the movement of forces from one area to another (given that many of the roads were booby-trapped), (4) agricultural

elements used as cover for terrorist tunnels and infrastructure, and (5) infrastructure next to the security fence between Gaza and Israel, used by Hamas for operations against IDF forces or for digging tunnels into Israeli territory.

440. Despite the enormous efforts made by Hamas and other terrorist organisations, who rigged a substantial number of buildings to explode in the areas where IDF forces were present, IDF actions to destroy such buildings in advance successfully prevented their detonation while IDF forces were in them

441. In the context of this complex battlefield, Israeli forces were instructed to operate carefully at all times, and to minimise collateral damage to the extent possible. For purposes of the Law of Armed Conflict, the extent of the damage to private property and infrastructure is not itself indicative of a violation. Rather, as already explained, in each case it must be considered whether a legitimate military purpose existed and if the damage to property was proportional to this aim. Furthermore, unanticipated damage and damage caused by Hamas cannot be blamed on Israeli forces.

442. In light of the multiple allegations raised against the IDF in connection with the destruction of residential and public buildings during the conflict, the IDF launched a full investigation into allegations of excessive damage to civilian objects during the Gaza Operation. The IDF investigation (which is now being examined by the Military Advocate General) confirmed that although relatively extensive damage was caused to private property, the IDF's activities which caused this damage complied with the Law of Armed Conflict. The Law of Armed Conflict allows the destruction of private property where, as here, it is a matter of military necessity. With the exception of a single incident, which was immediately halted by the relevant Commander and was dealt with using disciplinary measures, the investigation did not find any incidents in which structures or property were damaged as "punishment" or without an operational justification.

443. The investigation showed that in all the areas of operation, the decision to authorise the demolition of houses was made only by high ranking officers. In addition, the destruction of buildings was only initiated after it was determined by the forces that they were vacant in order to minimise civilian casualties. Accordingly, as far as the investigation was able to determine, no civilians were harmed during the demolition of infrastructure and buildings by IDF forces.

444. The investigation showed that, in many cases, the preparations made by Hamas and other terrorist organisations were responsible for the significant damage caused to houses. As

explained above, unanticipated damage to some buildings occurred due to the existence of subterranean tunnels that were unknown to IDF forces. In other cases, the damage was due to the secondary explosions caused by the detonation of explosive devices or weaponry placed by Hamas within the structures. This was illustrated by an incident in which a building in one of Gaza's northern neighbourhoods was fired upon, resulting in the unexpected detonation of a chain of explosive devices planted by Hamas, damaging many other buildings in the neighbourhood.

445. It should be emphasised that IDF orders and directions, dealing with the destruction of private property and applicable in the Gaza Operation, stressed that all demolition operations should be carried out in a manner that would minimise to the greatest extent possible the damage caused to any property not used by Hamas and other terrorist organisations in the fighting. Nevertheless, due to the complex dilemmas commanders faced with regard to decisions on destruction of property in the course of fighting in Gaza, as a result of Hamas' mode of operations, one of the lessons learned was that there should be a set of clear rules in this regard that will assist commanders in taking such decisions in the future. Accordingly, the Chief of the General Staff instructed the creation of such clear regulations and orders, as well as a clear combat doctrine, with regard to demolition of infrastructure and structures.

VI. CONCLUSION

446. One of the fundamental duties of a sovereign nation is to safeguard its citizens from attack. For eight years, Israel suffered from rocket and mortar attacks by Hamas — thousands of them, directed at no one and everyone, at children and the elderly, at schools and at hospitals. In 2008, Hamas increased the range of its attacks, bringing more than 1 million Israelis within striking distance of its terrorist tactics. Israel sought repeatedly to stop these assaults, exhausting several non-military options. But, in line with its stated goals and terrorist credo, Hamas would not desist. Finally, to keep faith with its citizenry, Israel could endure these attacks no longer, and it launched the Gaza Operation to stop them. Under international law, Israel had every right to use military force to defend its civilians against Hamas' ongoing rocket and mortar attacks.

447. Israel has deep respect for the principles of international law, and for the sanctity of human life. Though the use of military force was necessary to protect its own population, the IDF still did its best to minimise civilian casualties and damages to civilian property and sensitive sites. To that end, it adopted strict and specific rules of engagement to avoid — whenever feasible — operations that could harm civilians. It issued written warnings to civilians to stay away from areas where Hamas was active. It made telephone calls to warn occupants of buildings to leave before impending attacks. It fired warning shots. It double-checked targeting decisions. It used precision weapons.

448. The scope and rigor of these precautions was extraordinary, but they were not foolproof. Under the best of circumstances, they would not have worked perfectly. And, by Hamas' specific design, the IDF did not confront the best of circumstances. It faced a systematic strategy by Hamas to put Gaza's civilian population at risk for military and political gain, to inhibit Israel from pursuing its military objectives by intermingling civilians with military targets, and to achieve propaganda gains when Israel did pursue those objectives and civilian casualties resulted.

449. International law recognises the tragic reality that innocent civilians suffer in armed conflicts. This reality is reflected in the principles of distinction and proportionality in the Law of Armed Conflict. The very fact of inquiries into those principles presupposes that civilian casualties have occurred. But the Law of Armed Conflict also recognises that soldiers and commanders in combat must make split second decisions, often in the heat of battle, with limited information, with their lives at risk. The law recognises that they sometimes make errors in judgment. And it recognises that they make errors in implementation. With the clarity of hindsight, these errors may provoke severe criticism,

particularly when the results are tragic. But as distressing, as tragic, as many of those errors may be, they are not violations of international law — much less war crimes — so long as the soldiers and commanders were seeking legitimate military objectives, and took appropriate precautions to avoid excessive harm to civilians, based on what they knew and under the conditions they faced at the time. Israel's investigations are in progress, but the evidence thus far reflects that the IDF pursued legitimate objectives, with appropriate precautions.

450. The legality of the Gaza Operation, however, does not negate the suffering of the people of Gaza. Israel had no wish to worsen their plight. The people of Israel have great sympathy for the civilians and the families of civilians in Gaza who died or were injured, for those who lost their property and livelihoods. Israel made great efforts to avoid that harm. Unfortunately, Hamas tried in every way to increase it. By hiding its operatives and weaponry amidst the civilian population, Hamas presented Israel with a sombre choice: allow Hamas to escalate its rocket and mortar attacks on Israeli civilians or try to stop those attacks, even though Hamas' tactics created serious risks of civilian casualties in Gaza. Israel's choice to protect its citizens was warranted under international law.

451. This is no assertion of infallibility. Israel does not shy away from investigating its operations, or from filing criminal complaints where they are warranted. Since the Gaza Operation ended in January 2009, Israel has conducted extensive and comprehensive investigations into the various allegations about the conduct of its forces. These investigations continue and their findings will be subject to independent review by the MAG and the Attorney General, and also may be subject to a review by the Supreme Court. Israel is committed to holding accountable individuals who have committed offences constituting a breach of international or Israeli laws or rules, as well as to making appropriate changes in its military operations in the future. That is the appropriate course, not a rush to judgment by partisans, not the propagation of assumed or mandated conclusions, but rather a methodical exposition of the facts and a rigorous application of the law.

452. This Paper has been prepared now as part of such an exposition of the facts and application of the law, to provide important information and analysis regarding the Gaza Operation. Israel will continue to make additional information public.

VII. INDEX OF TERMS

Additional Protocol I…… Additional Protocol I to the Geneva Convention of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts, 8 June 1977

ALS…… Army Legal Service (United Kingdom)

APA…… Army Prosecuting Authority (United Kingdom)

CAS…… Close Air Support

CCW…… Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects as amended on 21 December 2001 (also referred to as the "Convention on Conventional Weapons")

CCW Protocol III …… Protocol III (relating to Incendiary Weapons) to the CCW

CIL…… Customary International Law

CLA…… Coordination and Liaison Administration

EU…… European Union

Geneva Convention I…… First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949)

Geneva Convention IV…… Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949)

Hague Convention IV…… Fourth Hague Convention Respecting the Laws and Customs of War on Land (1907)

HCC…… Humanitarian Coordination Centre

HCJ…… High Court of Justice

IAF…… Israel Air Force

ICJ…… International Court of Justice

ICRC …… International Committee of the Red Cross

ICTY …… International Criminal Tribunal for the former Yugoslavia

IDF	Israel Defence Forces
IED	Improvised Explosive Device
ISAF	International Security Assistance Force
JHCO	Jordan Hashemite Charity Organisation
MAG	Military Advocate General
MDM	Médecins du Monde
MPCID	Military Police Criminal Investigation Division of the IDF
MSF	Médecins Sans Frontières
NATO	North Atlantic Treaty Organisation
OCHA	United Nations Office for the Coordination of Humanitarian Affairs
OTP	Office of the Prosecutor of the ICTY
Rome Statute	Rome Statute of the International Criminal Court (1998)
U.N. BoI Report	United Nations Board of Inquiry Report into certain incidents in the Gaza Strip, 15 May 2009, U.N. Doc A/63/855–S/2009/250
UNICEF	United Nations Children's Fund
UNRWA	United Nations Relief and Works Agency for Palestine Refugees in the Near East
UNSCO	United Nation Special Coordinator Office
UNTSO	United Nations Truce Supervision Organisation
USAID	United States Agency for International Development
WFP	United Nations World Food Program
WHO	World Health Organisation