



INTERNATIONAL  
COMMISSION  
OF JURISTS

## United Nations Human Rights Council ICJ Submission to the United Nations Fact Finding Mission on the Gaza Conflict

*June 2009*

### **Introduction**

The International Commission of Jurists (ICJ) welcomes this opportunity to address the International Independent Fact Finding Mission (the Mission), established by the President of the Human Rights Council (HRC) pursuant to Resolution S-9/1 of the HRC, to *“investigate all violations of International Human Rights Law and International Humanitarian Law that might have been committed at any time in the context of the military operations that were conducted in Gaza during the period from 27 December 2008 to 18 January 2009 whether before during or after”*.

These military operations have claimed lives of more than 1,400 Palestinians, most of them civilians, including some 300 children, and have wounded around 6,000 others. Three Israeli civilians were killed during these operations. Most of the attacks were indiscriminate or disproportionate; failed to spare civilians and civilian objects; and thus violate the laws of the war. Other serious breaches of International Humanitarian Law (IHL) and violations of International Human Rights Law (IHRL) were also committed during these operations, including the use of powerful shells and phosphorus bombs in areas with a concentration of civilians, attacks against medical facilities and United Nations (UN) staff, vehicles and other facilities; the killing of a large numbers of civilians who were not taking direct part in hostilities, including police officers; and the detention and transfer to Israel of Palestinian combatants, considered by Israeli Government as *“unlawful combatants”*.

It is of great importance that the Mission has mandate to investigate all IHRL and IHL violations committed by the Israeli Defense Forces (IDF) and Palestinian Armed Groups, especially with regard to the conclusion of the Internal Israeli military investigations that the IDF had committed no violations of the laws of the war during the operations in Gaza, except rare and unavoidable mistakes. This conclusion contradicts the consistent reports that the ICJ received about the IDF indiscriminate and/or disproportionate attacks that caused the deaths and injury of many civilians and the large-scale destruction of civilian infrastructures. It also contradicts testimonies from Israeli soldiers claiming they committed serious abuses against civilians during the military operations in Gaza, including the shooting of unarmed women and children<sup>1</sup>, as well as the conclusions of the United Nations Board of Inquiry into Israeli attacks on United

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<sup>1</sup> *IDF in Gaza: Killing civilians, vandalism, and lax rules of engagement*, available at <http://www.haaretz.com/hasen/spages/1072040.html>

Nations (UN) staff and facilities in Gaza that *"IDF actions involved varying degrees of negligence and recklessness with regard to United Nations premises and the safety of United Nations staff and other civilians within those premises, with consequent deaths, injuries and extensive physical damage and loss of property."*<sup>2</sup>

It is also to be highlighted that the ruling Hamas Government in Gaza has failed to investigate the indiscriminate rockets attacks in the south of Israel.

In this submission, the ICJ wishes to draw the attention of the Commission to the most pertinent legal issues under IHL and IHRL in relation to the context of the military operations in Gaza; the applicable law; the conduct of hostilities; and the legal status of Palestinian civilians and members of Palestinian armed groups, who have been detained during the military operations in Gaza as *"unlawful combatants"*, and transferred for interrogation to Israel where they face incommunicado detention.

### **1. Context of the Military Operations in Gaza**

The Israeli Government argued that military operations in Gaza came in response to indiscriminate rocket attacks by Palestinian armed groups into southern Israel. Indiscriminate attacks against civilians are prohibited under international humanitarian law and constitute a serious breach of the laws of war. Rockets used by Palestinian armed groups are inherently indiscriminate since they cannot be accurately guided to distinguish between military and civilian objectives. Even if they intend to attack military installations in Israel, using these weapons violates the principle of distinction between civilians and military objectives, which is considered by the International Court of Justice one of the *"intransgressible principles of international customary law"*<sup>3</sup>. These attacks put Israeli civilians at risk and impose a state of permanent fear. As the rockets are sometimes launched from civilian areas in Gaza, these attacks also put the lives of Palestinian civilians at risk from IDF reprisals.

Israel cannot target civilians and civilian objects, in violation of the international law principles of distinction and proportionality, to stop these rocket attacks. IHL is not based on reciprocity, as one violation of the laws of armed conflict by one party cannot justify another violation by the opposing party, including acts of retaliation, retribution or reprisal against civilians. Such acts are prohibited under international humanitarian law.<sup>4</sup> The Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) stated *"the fact that the adversary engages in unlawful behavior and persecutes or kills civilians cannot be a justification for similar and reciprocal conduct"*<sup>5</sup>. The chamber concluded in this regard, *"the irrelevance of reciprocity, particularly in relation to obligations found within international humanitarian law which have an absolute and non-*

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<sup>2</sup> The full report has not been published. See the letter dated 4 May 2009 from the Secretary-General addressed to the President of the Security Council, transmitting the Secretary-General's Summary of the Report of the United Nations Headquarters Board of Inquiry into certain incidents in the Gaza Strip between 27 December 2008 and 19 January 2009.

<sup>3</sup> International Court of Justice, Advisory Opinion of 8 July 1996, *Legality of the Threat or Use of Nuclear Weapons*, para. 79.

<sup>4</sup> Article 1 common to the four Geneva Conventions; Article 3 common to the four Geneva Conventions; the U.N. General Assembly Resolution 2675 (XXV) of 9 December 1970 (*"civilian populations, or individual members thereof, should not be the object of reprisals"*); Vienna Convention on the Law of Treaties (Article 60.5).

<sup>5</sup> The International Criminal Tribunal for the former Yugoslavia, Judgment of 14 May 2000, *The Prosecutor v. Vlatko Kupreskic and others*, Case No. IT-95-16-T, para. 125

*derogable character. It thus follows that the tu quoque defence has no place in contemporary international humanitarian law. The defining characteristic of modern international humanitarian law is instead the obligation to uphold key tenets of this body of law regardless of the conduct of enemy combatants.”*<sup>6</sup>

During the military operations in Gaza, Palestinian civilians were killed, residential structures unlawfully demolished and non-military objectives targeted. In many cases, the IDF use of force was disproportionate to the direct military advantage to be gained. Gaza’s civilians, under permanent siege since 2007, have also been denied by Israel their basic civil, economic, social and cultural rights, including access to food, healthcare, and deprived of other essential means of subsistence, such as fuel and electricity. These sanction measures were provided for by the September 2007 Cabinet Decision<sup>7</sup>, which declared Gaza a hostile territory and called for sanction measures that effectively punish indiscriminately the civilian population, and thus constitute collective punishment prohibited by IHL, in particular by Article 33 of the Fourth Geneva Convention, which states, “no person may be punished for an offence he or she has not personally committed. Collective punishments and likewise all measures of intimidation or of terrorism are prohibited.”

It is to be highlighted that this Israeli policy has failed to stop the rocket attacks or to achieve any direct military advantage.

## **2. Applicable Law to the military operations in Gaza**

Obligations stipulated by IHL and IHRL are concurrently applicable to the Gaza Strip and the military operation in Gaza. Israel is bound and has obligations as a State Party to the Geneva Conventions of 1949, most notably the Fourth *Geneva Convention relative to the Protection of Civilian Persons in Time of War*<sup>8</sup>. Customary International Humanitarian Law, including the Hague Conventions and Regulations respecting the Laws and Customs of War on Land of 1907 and to a large extent, the Additional Protocols to the Geneva Conventions of 1977, also binds Israel. The customary nature of IHL has been recognized by the Israeli Supreme Court decision 7015/02 *Ajuri v. IDF Commander in the West Bank* of September 2002<sup>9</sup>. The Court also recognized that the laws of armed conflict are entrenched in the *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977. In its ruling on the “targeted killing policy”, the Court reiterated that though, “Israel is not party to that protocol, and it was not enacted in domestic Israeli legislation [...] the customary provisions of the First Protocol are part of Israeli law.”<sup>10</sup>

However, the Israeli Government has argued that since the September 2005 disengagement from Gaza, the military government that previously existed in that territory was dissolved by the disengagement decision of the Israeli Government, and

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<sup>6</sup> *Ibid.*, para 511. See also para. 528 (“It cannot be denied that reprisals against civilians are inherently a barbarous means of seeking compliance with international law.”).

<sup>7</sup> Security Cabinet declared the Gaza Strip hostile territory on 19 September 2007. <http://www.mfa.gov.il/MFA/Government/Communiques/2007/Security+Cabinet+declares+Gaza+hostile+territory+19-Sep-2007.htm>

<sup>8</sup> Ratification on 6 July 1951.

<sup>9</sup> See *Ajuri v. IDF Commander in West Bank*, Case N° HCJ 7015/02 [2002], Israel Law report 1, Supreme Court of Israel, 3 September 2002, para. 13

<sup>10</sup> Israeli Supreme Court Ruling on Targeted Killings, December 14, 2006. Case N° HCJ 769/02, the *Public Committee against Torture in Israel v. The Government of Israel*, available at: [elyon1.court.gov.il/Files\\_ENG/02/690/007/.../02007690.a34.pdf](http://elyon1.court.gov.il/Files_ENG/02/690/007/.../02007690.a34.pdf)

therefore, under these circumstances, the State of Israel cannot be any longer considered an occupying power and bears no general obligation to ensure the appropriate living conditions and welfare of the civilians in the Gaza Strip. The ICJ absolutely rejects this position and recalls Article 42 of the Hague Regulations that *“Territory is considered occupied when it is actually placed under the authority of the hostile army.”*<sup>11</sup> Indeed, despite the disengagement of its troops in 2005, the Israeli army continues to exercise effective control over the airspace and territorial waters of Gaza Strip, not allowing any movement of people or goods in or out of the Strip, and continues to control most aspects of day-to-day life in Gaza, including electricity, water, telecommunications networks and population registry.

Israel also contests the *de jure* applicability of the Geneva Conventions to Gaza and other OPT, referring in particular to the lack of a recognized sovereign over these territories, and thus considers it not to be a territory of a High Contracting Party as required by the four Geneva Conventions<sup>12</sup>. This position contradicts IHL. Common Article 2 of the four Geneva Conventions sets out the scope of application in the following way: *“In addition to the provisions which shall be implemented in peace-time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them... The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance(...).”* In Addition, Article 4 of the Fourth Geneva Convention, applies to persons *“who, at any moment, and in any manner whatsoever, find themselves in case of a conflict or occupation, in the hands of a party to the conflict or Occupying Power of which they are not nationals”*.

The *de jure* applicability of the Fourth Geneva Convention to Gaza and other OPT has been consistently expressed by the international community as a whole through numerous resolutions of the United Nations Security Council<sup>13</sup>, the General Assembly<sup>14</sup>, the former Commission on Human Rights<sup>15</sup>, and the International Committee of the Red Cross (ICRC)<sup>16</sup>. The International Court of Justice stated that *“according to the first paragraph of Article 2 of the Fourth Geneva Convention, that Convention is applicable when two*

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<sup>11</sup> Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907. Available at:

<http://www.icrc.org/ihl.nsf/385ec082b509e76c41256739003e636d/1d1726425f6955aacc125641e0038bfd6>

<sup>12</sup> See on this position: Summary of legal position of the Government of Israel, Report of the Secretary General prepared pursuant to General Assembly Resolution ES-10/13, Annex 1.

<sup>13</sup> See, in particular, Security Council Resolutions: 252 (1968) of 21 May 1968; 267 (1969) of 3 July 1969; 298 (1971) of 25 September 1971; 446 (1979) of 22 March 1979; 476 (1980) of 30 June 1980; and 478 (1980) of 20 August 1980.

<sup>14</sup> See, General Assembly Resolutions: 36/120 E of 10 December 1981; 37/123 C of 16 December 1982 ; 38/180 C of 19 December 1983 ; 39/146 C of 14 December 1984 ; 40/168 C of 16 December 1985 ; 41/162 C of 4 December 1986 ; 42/209 D of 11 December 1987 ; 43/54 C of 6 December 1988 ; 44/40 C of 4 December 1989 ; 45/83 C of 13 December 1990 ; 46/82 B of 16 December 1991 ; 47/63 B of 11 December 1992 ; 48/59 A of 14 December 1993 ; 49/87 A of 16 December 1994 ; 50/22 A of 4 December 1995 ; 51/27 of 4 December 1996 ; 52/53 of 9 December 1997 ; 53/37 of 2 December 1998 ; 54/37 of 1 December 1999; 54/77 of 6 December 1999; 55/50, 1 December 2001; 55/131 of 8 December 2000; 56/60 of 10 December 2001; and 57/125 of 11 December 2002 .

<sup>15</sup> See for example, Resolution 2003/6 “Question of the violation of human rights in the occupied Arab territories, including Palestine” of 15 April 2003, and Resolution 2003/7 “Israeli settlements in the occupied Arab territories” of 15 April 2003.

<sup>16</sup> Conference of High Contracting Parties to the Fourth Geneva Convention: Statement by the International Committee of the Red Cross, Geneva, 5 December 2001, para. 2 available at <http://www.icrc.org/web/eng/siteeng0.nsf/iwpList325/D86C9E662022D64E41256C6800366D55#2>.

*conditions are fulfilled: that there exists an armed conflict (whether or not a state of war has been recognized); and that the conflict has arisen between two contracting parties. If those two conditions are satisfied, the Convention applies, in particular, in any territory occupied in the course of the conflict by one of the contracting parties.*"<sup>17</sup>

Israel is also bound by international human rights law as it is party to core UN human rights treaties, including the *International Covenant on Civil and Political Rights (ICCPR)*<sup>18</sup>, the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*<sup>19</sup>, the *International Convention on the Elimination of All Forms of Racial Discrimination (CERD)*<sup>20</sup>, the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)*<sup>21</sup>, the *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*<sup>22</sup>, and the *Convention on the Rights of the Child (CRC)*<sup>23</sup>.

The Israeli Government argues that the protection granted in a conflict situation should be found in humanitarian law, whereas human rights treaties are intended to protect citizens from their own government in times of peace<sup>24</sup>. This position is inconsistent with international law human rights, which can apply in times of war and also extra-territorially.

Concerning the issue of the application of ILHR in time of war, in time of both international or non-international armed conflict, individuals enjoy dual legal protection from both international human rights law and international humanitarian law. As the International Criminal Tribunal for the Former Yugoslavia has stated, "[t]he general principle of respect for human dignity is [...] the very *raison d'être* of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law".<sup>25</sup>

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<sup>17</sup> Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* of 9 July 2004, para. 95.

<sup>18</sup> Israel signed the *International Covenant on Civil and Political Rights* on 19 December 1966 and ratified it on 3 October 1991.

<sup>19</sup> Israel signed the *International Covenant on Economic, Social and Cultural Rights* on 19 December 1966 and ratified it on 3 October 1991.

<sup>20</sup> Israel signed the *International Convention on the Elimination of All Forms of Racial Discrimination* on 7 March 1966 and ratified it on 3 January 1979. It made a reservation on Article 22.

<sup>21</sup> Israel signed the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* on 22 October 1986 and ratified it on 3 October 1991. It made reservations on Articles 20 and 30, para. 1 the competence of the Committee against Torture and to the competence of the International Court of Justice in case of a dispute concerning the application or interpretation of the Convention.

<sup>22</sup> Israel signed the *Convention on the Elimination of all Forms of Discrimination against Women* on 17 July 1980 and ratified it on 3 October 1991.

<sup>23</sup> Israel signed the *Convention on the Rights of the Child* on 3 July 1990 and ratified it 3 October 1991. In addition, it has signed the *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* and *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict* on 14 November 2001. ratification on 23 July 2008 (OP `Sale Child) and 18 July 2005 (OP child armed conflict)

<sup>24</sup> See Summary legal position of the Government of Israel in the Report of the Secretary-General prepared pursuant to General Assembly Resolution ES-10/13, UN Doc. A/ES-10/248, 24 November 2003, p 8, para. 4. See also Second Periodic Report of Israel to the Human Rights Committee, CCPR/C/ISR/2001/2, 4 December 2001, para. 8.

<sup>25</sup> Trial Chamber, Judgment of 10 December 1998, *Prosecutor v. Arto Furundizija*, case No. IT/95-17/I-T, para. 183.

The International Court of Justice confirmed that “[t]he protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency”.<sup>26</sup> The Committee also stated in its General Comment N° 31 that “ a State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.”<sup>27</sup> In particular, the Committee clarified that “the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.”<sup>28</sup>

Indeed, there is today ample authority at the universal and regional level that human rights treaties apply wherever a State “exercises jurisdiction”. The test is whether a State “exercises effective (not necessarily sovereign) control over a territory”. Human rights treaties can therefore also apply extra-territorially. The International Court of Justice has taken the view that the *International Covenant on Civil and Political Rights* (ICCPR), the *International Covenant on Economic, Social and Cultural Rights* and the *Convention on the Rights of the Child* apply when a State acts in the exercise of its jurisdiction outside its own territory.<sup>29</sup>

The Human Rights Committee<sup>30</sup>, the Committee on Economic, Social and Cultural Rights<sup>31</sup>, the Committee on the Elimination of Racial Discrimination<sup>32</sup>, the Committee on the Rights of the Child<sup>33</sup>, the Committee on the Elimination of Discrimination against Women<sup>34</sup> and the Committee against Torture<sup>35</sup> hold Israel responsible under the respective Human Rights Treaties in the Occupied Palestinian Territory, and have reaffirmed not only the extra-territorial applicability of these treaties but have rejected Israel’s argument that the law of armed conflict supersedes their applicability. The Human Rights Committee has consistently concluded, “Nor does the applicability of the regime of international humanitarian law preclude accountability of States Parties under article 2, para. 1 of the Covenant for the actions of their authorities outside their own territories, including in occupied territories. The Committee therefore reiterates that, in the current circumstances, the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by the State Party’s authorities or agents in those territories

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<sup>26</sup> International Court of Justice, Advisory Opinion on *The Legality of the Threat or Use of Nuclear Weapons*, of 8 July 1996, International Court of Justice Reports 1996, para. 25.

<sup>27</sup> General Comment N° 31, *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, para. 10.

<sup>28</sup> *Ibid.*, para. 11.

<sup>29</sup> Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* of 9 July 2004, paras. 111, 112 and 113.

<sup>30</sup> See *Concluding Observations of the Human Rights Committee: Israel*, CCPR/CO/78/ISR of 21 August 2003, para. 11, and *Concluding Observations of the Human Rights Committee: Israel*, CCPR/C/79/Add.93, 18 August 1998, para. 10.

<sup>31</sup> *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel*, E/C.12/1/Add.90, 26 June 2003, para. 15.

<sup>32</sup> *Concluding observations of the Committee on the Elimination of Racial Discrimination: Israel*, CERD/C/ISR/CO/13 of 14 June 2007, para. 32.

<sup>33</sup> *Concluding observations of the Committee on the Rights of the Child: Israel*, CRC/C/15/Add.195 of 9 October 2002.

<sup>34</sup> *Concluding comments of the Committee on the Elimination of Discrimination against Women: Israel*, A/60/38, paras. 243 and 244.

<sup>35</sup> *Conclusions and recommendations: Israel*, A/57/44, para. 5, 6 and 7.

*that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of State responsibility of Israel under the principles of public international law.*"<sup>36</sup>

### 3. Conduct of Hostilities

It is undisputed that the principle of distinction between civilians and combatants and between civilian objects and military objectives; the prohibition of indiscriminate attacks; the principle of proportionality in attack; the obligation to take feasible precautions in attack and against the effects of attack; the obligation to respect and protect medical and religious personnel, medical units and transport, are norms of customary international law and they must be respected by all parties to an international armed conflict whilst conducting military operations and hostilities. Intentional indiscriminate attacks are absolutely prohibited under Customary International Humanitarian Law.<sup>37</sup> According to the ICRC *Study on Customary International Humanitarian Law*, indiscriminate attacks are those:

- (a) which are not directed at a specific military objective;*
- (b) which employ a method or means of combat which cannot be directed at a specific military objective; or*
- (c) which employ a method or means of combat the effects of which cannot be limited as required by international humanitarian law; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.*"<sup>38</sup>

Indiscriminate attacks include also "*Attacks by bombardment by any method or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects are prohibited.*"<sup>39</sup>

Under Customary International Humanitarian Law, indiscriminate attacks are war crimes.<sup>40</sup>

Disproportionate attacks are also prohibited under Customary IHL.<sup>41</sup> A party is required to calculate the consequences of a military attack (against a legitimate objective) on civilians and civilian infrastructures.

Carrying out an attack where it is possible to foresee that disproportionate harm is likely to be caused to civilians and civilian property compared to the military advantage anticipated from the attack as a whole is also prohibited.

During the military operations in Gaza, both IDF and Palestinian armed groups failed in their legal obligations to take constant care to spare civilians and civilian objects from attack. The Israeli Government argued that attacking civilians was not the military

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<sup>36</sup> *Concluding Observations of the Human Rights Committee: Israel*, CCPR/CO/78/ISR of 21 August 2003, para. 11. See also, *Concluding Observations of the Human Rights Committee: Israel*, CCPR/C/79/Add.93, 18 August 1998, para. 10.

<sup>37</sup> Rule 11, *Customary International Humanitarian Law, Volume I: Rules*; ICRC and Cambridge University Press, 2005, p. 37 *et seq.* See also: Article 51(4) of Additional Protocol I of the Geneva Convention.

<sup>38</sup> *Ibid.*, Rule 12 p.40.

<sup>39</sup> *Ibid.*, Rule 13 p. 43.

<sup>40</sup> *Ibid.*, Rule 156, p. 589 and Article 8(2)(b) of Rome Statute of the International Criminal Court.

<sup>41</sup> Rule 14.

objective of its military operations in Gaza. According to Israeli Defense Minister Ehud Barak "*The fundamental objective (is) to change the reality of security in the south,*"<sup>42</sup> and "*to hit Hamas infrastructure as much as we can,*" according to another senior Israeli military official.<sup>43</sup>

However, the casualties amongst civilians, including children and women, and the large-scale destruction of civilian infrastructures were highly excessive in relation to the achievement of this very broad military objective, or the direct military advantage to be gained from such operations. Israel maintained that in responding to an existential threat, the military advantage is to be measured against the military operation as a whole. The consequences of applying such extensive interpretation explains the excessive number of civilians killed and injured during the military operations in Gaza, and the magnitude of the destruction of civilian infrastructures. Indeed, during the hostilities, a senior official of the Israeli army confirmed "*that anyone who is involved with terrorism within Hamas is a valid target. This ranges from the strictly military institutions and includes the political institutions that provide the logistical funding and human resources for the terrorist arm.*"<sup>44</sup>

This definition undermines civilians' right to be protected under the principle of distinction, which is a cornerstone of IHL, and which expressly distinguishes between combatants and civilians. Under Customary International Humanitarian Law, civilians are protected against attack, unless and for such time as they take a direct part in hostilities.<sup>45</sup> Combatants are by their nature legitimate targets for military attacks. Civilians, likewise by their nature, enjoy comprehensive protection from such attacks. However, a civilian might become a legitimate target for attack and lose the protection provided for by Customary International Humanitarian Law if he is taking a direct part in the hostilities, but only if the attack against him is carried out during such time of participation, for example when he shoots a gun or positions a bomb. Under Customary International Humanitarian Law, "*in case of doubt whether a person is a civilian, that person shall be considered to be a civilian.*"<sup>46</sup>

The IDF launched repeated attacks on civilian installations related to Hamas, killing and injuring large numbers of civilians and destroying civilian infrastructures. IDF gave no credible evidence that such presumptively civilian objects were used for military purposes to attack the IDF, Israeli civilians or civilian objects, and thus could be subject to legitimate attack. This violates Israel's obligation under IHL. Under this law, civilian objectives "*are all objects which are not military objectives.*" Military objectives are, "*those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.*"<sup>47</sup> In cases where it is unclear whether a target is used for military purposes, "*it shall be presumed not to be so used*" (Article 52(3)).<sup>48</sup>

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<sup>42</sup> Statement available at: [http://news.bbc.co.uk/2/hi/middle\\_east/7821512.stm](http://news.bbc.co.uk/2/hi/middle_east/7821512.stm)

<sup>43</sup> [http://www.reuters.com/article/idUSL5329771\\_CH\\_2400](http://www.reuters.com/article/idUSL5329771_CH_2400)

<sup>44</sup> [http://news.bbc.co.uk/2/hi/middle\\_east/7811386.stm](http://news.bbc.co.uk/2/hi/middle_east/7811386.stm)

<sup>45</sup> Rule N° 6, *Customary International Humanitarian Law, Volume I: Rules, op. cit.*, p. 19; Article 51(3) of the 1977 Additional Protocol I of the Geneva Conventions.

<sup>46</sup> Article 50 of the Additional Protocol I of the Geneva Conventions.

<sup>47</sup> Article 52(1) of Additional Protocol I.

<sup>48</sup> The authoritative ICRC Commentary on the Additional Protocols to the Geneva Conventions interprets the expression "*definite military advantage anticipated*" by stating that, "*it is not legitimate to launch an attack which only offers potential or indeterminate advantages.*"



The UN Board of Inquiry into Israeli attacks on UN staff and facilities in Gaza concluded, in the Case of the *IDF attack against the UNRWA Jabalia Preparatory Boys "C" School* on January 6, 2009, that contrary to Israeli spokespersons claims that the IDF had responded to mortar fire directed at IDF troops from within the school, *"no mortars had been fired from within the compound and no explosives were found in the school."*<sup>49</sup>

During the military operations in Gaza, IDF disproportionate artillery and mortar attacks and shelling from tanks and from naval ships into densely populated residential areas in Gaza caused the lives of hundreds of civilians and the extensive destruction of civilian infrastructures, including power stations, roads, university buildings and other civilian installations. Such destruction is a grave breach of IHL that cannot be justified by military necessity. Civilian casualties were also highly excessive in relations to direct military advantage anticipated. This is particularly true with regard to the killing of almost 300 children. Under Article 38 of the *Convention on the Rights of the Child*, which Israel has ratified and is obliged to uphold, *"States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child,"* and in accordance with their obligations under IHL to protect the civilian population in armed conflicts, they *"shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict."*

The ICJ is deeply concerned about other serious breaches of IHL committed during the conduct of hostilities in the military operations in Gaza, including the restrictions of movement of medical personnel and ambulances to carry out their duties. Under IHL, parties to a conflict must allow and facilitate the rapid and unimpeded passage of medical staff and ambulances to the population in need for medical care. From 3 to 7 January 2009, IDF prevented ICRC and Palestine Red Crescent Society (PRCS) from access to wounded adults and children of the Samouni and Daya families in the Zeitoun neighbourhood, who were left among their dead relatives' bodies in collapsed houses. According to ICRC officials, *"the Israeli military must have been aware of the situation but did not assist the wounded. Neither did they make it possible for us or the Palestinian Red Crescent to assist the wounded."*<sup>50</sup> Such practice violates Israel obligations under Customary IHL, in particular the ICRC Rule 87 which specifically stipulates that *"Civilians and persons hors de combat must be treated humanely."* The ICRC Rule 109 also stipulates that *"whenever circumstances permit, and particularly after an engagement, each party to the conflict must, without delay, take all possible measures to search for, collect and evacuate the wounded, sick and shipwrecked without adverse distinction."*

Not only did the IDF deny access to wounded and other people in need of medical care, but also emergency medical rescue workers and ambulances were repeatedly coming under IDF attacks while carrying out their duties. Under IHL, medical personnel and medical establishments, transport and equipment must be spared. The UN Board of Inquiry into Israeli attacks on UN staff and facilities in Gaza confirmed attacks against an UNRWA convoy in the Ezbet Abed Rabou area on 8 January 2009, during an attempt to move the body of an UNRWA staff. The convoy consisted of two UN vehicles and an ambulance. Such attacks violate Israel's obligations under IHL, in particular Article 24 of

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<sup>49</sup> Summary of the report available at:

[http://www.idi.org.il/sites/english/ResearchAndPrograms/NationalSecurityandDemocracy/Terrorism\\_and\\_Democracy/Newsletters/Pages/5th%20Newsletter/2/ReportoftheUNBoardofInquiryonOperationCastLead.aspx#p4](http://www.idi.org.il/sites/english/ResearchAndPrograms/NationalSecurityandDemocracy/Terrorism_and_Democracy/Newsletters/Pages/5th%20Newsletter/2/ReportoftheUNBoardofInquiryonOperationCastLead.aspx#p4)

<sup>50</sup> Statement by Pierre Wettach, ICRC chief for Israel and the Occupied Palestinian Territory, available at: [http://news.bbc.co.uk/2/hi/middle\\_east/7817926.stm](http://news.bbc.co.uk/2/hi/middle_east/7817926.stm)

the First Geneva Convention, which specifically stipulates that *“Medical personnel exclusively engaged in the search for, or the collection, transport or treatment of the wounded or sick, or in the prevention of disease, staff exclusively engaged in the administration of medical units and establishments, as well as chaplains attached to the armed forces, shall be respected and protected in all circumstances.”*

The ICJ is particularly concerned that during the conduct of hostilities, both Palestinian armed groups and IDF failed to use weapons that might prevent harm to civilians. As mentioned above, rockets used by Palestinian armed groups are inherently indiscriminate, cannot be accurately guided to distinguish between military and civilian objectives, and thus harm civilians. The IDF disproportionate artillery and mortar attacks and shelling from tanks and naval ships also harmed Gaza civilians.

This is particularly true with regard to the use of white phosphorous weapons by Israel during military operations in Gaza. White phosphorous weapons are highly incendiary; ignite civilian structures; and cause horrific burns, penetrating through muscle and bone. Basic rules and Principles of IHL regulate the use of such weapons, impose on parties to a conflict to discriminate between military objectives and civilians and civilian objects in using such arms, and requires them to take all feasible precautions to prevent harm to civilians and civilian objects that can result from the use of such weapons. Thus, the use of white phosphorous weapons on areas concentrated with civilians or in densely populated residential areas is clearly prohibited. The ICRC Rule 84 stipulates that *“if incendiary weapons are used, particular care must be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects.”* The ICRC Rule 85 also stipulates that *“the anti-personnel use of incendiary weapons is prohibited, unless it is not feasible to use a less harmful weapon to render a person hors de combat.”*

The Israeli Government has denied using white phosphorous. On January 7, 2009 a military spokesman said that the shells used by the IDF had *“no explosives and no white phosphorus”*.<sup>51</sup> However, Major-General Dan Harel, the IDF Deputy Chief of Staff, confirmed that the IDF issued an order on 7 January 2009 *“to stop using white phosphorus shells,”* arguing that, *“these shells were used only to create smokescreens, in keeping with international law.”*<sup>52</sup>

#### **4. Unlawful Combatants**

The ICJ is particularly concerned that during the military operations in Gaza, a substantial number of Palestinians had been detained as *“unlawful combatants”* and transferred for interrogation to Israel where they faced incommunicado detention. Local NGOs reported that many of these detainees, minors as well as adults, *“were held for many hours – sometimes for days - in pits dug in the ground, exposed to bitter cold and harsh weather, handcuffed and blindfolded. These pits lacked basic sanitary facilities which would have allowed the detainees appropriate toilet facilities, while food and shelter, when provided, were limited, and the detainees went hungry.”* Furthermore, *“some of the detainees were held near tanks and in combat areas, in gross violation of international humanitarian law which prohibits holding prisoners and captives in areas exposed to danger.”*<sup>53</sup>

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<sup>51</sup> Statement available at: [http://www.timesonline.co.uk/tol/news/world/middle\\_east/article6150448.ece](http://www.timesonline.co.uk/tol/news/world/middle_east/article6150448.ece)

<sup>52</sup> *Ibid.*

<sup>53</sup> Public Committee Against Torture in Israel, *“Israel held many Gaza prisoners in harsh and humiliating conditions and threatened their lives and their health”*, January 2009, available at: <http://www.stoptorture.org.il/en/node/1384> [accessed 17 March 2009]

These detainees were arrested and transferred to Israel under the *Detention of Unlawful Combatants Law*.<sup>54</sup> The original law passed in 2002 allows 'foreign nationals' who are subsequently classified by Israel as "unlawful combatants" to be held in indefinite administrative detention without a trial until the state of hostilities is over. Under this law, an 'unlawful combatant' is a "person who took part in hostilities against the State of Israel, whether directly or indirectly, or who is a member of a force carrying out hostilities against the State of Israel, who does not satisfy the conditions granting a prisoner of war status under international humanitarian law, as set out in article 4 of the Third Geneva Convention of 12 August 1949 relative to the Treatment of Prisoners of War".

As amended in July 2008, the law now permits holding a detainee for up to 14 days before bringing him in front of a District Court judge to determine whether his status is that of an "unlawful combatant", and permits preventing the detainee from seeing a lawyer for up to 21 days. The amendment further establishes a military court of review and a military court of appeals to handle all procedures relating to "unlawful combatants" in periods of large-scale military operations between Israel and organizations to which "unlawful combatants" belong.

The Israeli Supreme Court delivered a decision on 11 June 2008 upholding the constitutionality of this law. The Court ruled that the purpose of the law was a proper one and that it complied with IHL.<sup>55</sup> "Like all protected human rights, the right to personal liberty is not absolute and a violation of the right is sometimes required in order to protect essential public interests," the Court stated. In such circumstances, "the extent of the violation of the constitutional right to personal liberty is significant and even severe. Notwithstanding, the legislative purpose of removing 'unlawful combatants' from the cycle of hostilities in order to protect state security is essential in view of the reality of murderous terrorism that threatens the lives of the residents and citizens of the State of Israel,"<sup>56</sup> the Court added.

The Court went further in legitimizing the excessive use of the administrative detention under this law by contrast to criminal trials. "As a rule, the use of the extreme measure of administrative detention is justified in circumstances where other measures, including holding a criminal trial, are impossible, because of the absence of sufficient admissible evidence or the impossibility of revealing privileged sources, or when holding a criminal trial does not provide a satisfactory solution to averting the threat presented to the security of the state in circumstances where after serving the sentence the person concerned is likely to become a security danger once again,"<sup>57</sup> the Court concluded.

This ruling justifies the excessive use of administrative detention, as a satisfactory solution to protect the "State's security", when there is insufficient secret evidence that the detainee constitutes a real threat to State's security, or when a criminal proceeding fails to eliminate the threat the detainee constitutes against the State's security. Thus, the judgment upholds the Israeli policy of indefinite administrative detention, and violate Israel's obligation under IHL. The Fourth Geneva Convention, which Israel has ratified

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<sup>54</sup> *Detention of Unlawful Combatants (Amendment and Temporary Provision) Law*, 2008, enacted 30 July 2008, available at: [http://www.knesset.gov.il/privatelaw/data/17/3/375\\_3\\_1.rtf](http://www.knesset.gov.il/privatelaw/data/17/3/375_3_1.rtf)), [accessed 17 March 2009]

<sup>55</sup> Criminal Appeal 6659/06, *A and B v. State of Israel*, judgment of 11 June 2008, available at: [http://elyon1.court.gov.il/files\\_eng/06/590/066/n04/06066590.n04.htm](http://elyon1.court.gov.il/files_eng/06/590/066/n04/06066590.n04.htm) [accessed 17 March 2009]

<sup>56</sup> *Ibid.*, para. 31

<sup>57</sup> *Ibid.*, para 33

and is obliged to uphold, specifically stipulates that recourse to administrative detention may be had only when the security of the state makes it "*absolutely necessary*" (Article 42) or for "*imperative reasons of security*" (Article 78). To the contrary of the judgment's conclusion, administrative detention cannot be used, under IHL, indefinitely and consequently, as an alternative to criminal proceedings.

Indeed, IHL contains numerous special rules relating to detention in time of an international armed conflict. It regulates the detention of prisoners of war, who can be interned to keep them away from the battlefield for the duration of the hostilities, though they must be held under a special regime that is different to that used for criminals.<sup>58</sup> Civilians can be placed in so-called 'internment' only on security grounds under the strict conditions established in the *Fourth Geneva Convention*<sup>59</sup> and subject to the specific rules on internment.<sup>60</sup> Administrative detention or internment of civilians during an international armed conflict is regulated under international humanitarian law as an exceptional measure to be applied particularly when other less restrictive measures of control are inadequate. Civilians who are interned have the right of appeal to a court or administrative board and their internment must be reviewed at least every six months.<sup>61</sup> The ICRC has commented that administrative boards must offer "the necessary guarantees of independence and impartiality".<sup>62</sup>

In the case of administrative detention of civilians in occupied territory, IHL establishes *inter alia* the following safeguards and guarantees:

- Internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the Fourth Convention.<sup>63</sup> The ICRC pointed out that its rules "set forth the procedural safeguards which are designed to ensure that the principles of humanity will be borne in mind when people are interned [...] It is for the Occupying Power to decide on the procedure to be adopted; but it is not entirely free to do as it likes; it must observe the stipulations in Article 43 [of the Fourth Geneva Convention], which contains a precise and detailed statement of the procedure to be followed when a protected person who is in the territory of a Party to the conflict when hostilities break out, is interned or placed in assigned residence. The persons subjected to these measures are not, in theory, involved in the struggle. The precautions taken with regard to them cannot, therefore, be in the nature of a punishment."<sup>64</sup>
- This procedure shall include the right of appeal for the parties concerned.<sup>65</sup> The ICRC pointed out that, "the acknowledged right of those concerned to appeal

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<sup>58</sup> See Article 24 and following of Third Geneva Convention.

<sup>59</sup> Article 79 of Fourth Geneva Convention.

<sup>60</sup> Articles 41 *et seq.*, Articles 79 *et seq.*, and Article 126 of the Fourth Geneva Convention.

<sup>61</sup> Articles 43 and 78 of the Fourth Geneva Convention.

<sup>62</sup> *ICRC Commentary to IV Geneva Convention* (ed. by Jean Pictet, ICRC, Geneva 1960), p. 260.

<sup>63</sup> Article 78 of the Fourth Geneva Convention.

<sup>64</sup> ICRC, Commentary on Article 78 of the Fourth Geneva Convention.

<http://www.icrc.org/ihl.nsf/b466ed681ddfcd241256739003e6368/d794403e436f0823c12563cd0042cf9a?OpenDocument>

<sup>65</sup> Article 78 of the Fourth Geneva Convention.

against any decision to intern them or place them in assigned residence is a further safeguard, and an important one.”<sup>66</sup>

- Appeals shall be decided with the least possible delay, and in the event of the decision being upheld, it shall be subject to periodical review, if possible every six months, by a competent body set up by the said Power.<sup>67</sup> The ICRC pointed out that, “the details given concerning the practical application of the appeal procedure -- including the recommendation that decisions which are upheld should be reviewed every six months -- show that the authors of the Convention took every possible care to prevent any form of abuse. They did, however, leave it to the Occupying Power to entrust the consideration of appeals either to a “court” or a “board”. That means that the decision will never be left to one individual. It will be a joint decision, and this offers the protected persons a better guarantee of fair treatment.”<sup>68</sup>

The Appeals Chamber of the International Tribunal for the Former Yugoslavia has stated that “the involuntary confinement of a civilian where the security of the Detaining Power does not make this absolutely necessary will be unlawful. Further, an initially lawful internment clearly becomes unlawful if the detaining party does not respect the basic procedural rights of the detained persons and does not establish an appropriate court or administrative board as prescribed in Article 43 of Geneva Convention IV”.<sup>69</sup> The Appeals Chamber recalls that Articles 5 and 43 of Fourth Geneva Convention, “reinforces the principle behind Article 42, that restrictions on the rights of civilian protected persons, such as deprivation of their liberty by confinement, are permissible only where there are reasonable grounds to believe that the security of the State is at risk.”<sup>70</sup>

In the case of occupied territories, the administrative detention or internment of civilians can only proceed “for imperative reasons of security”.<sup>71</sup> The ICRC has pointed out that “[i]n occupied territories the internment of protected persons should be even more exceptional than it is inside the territory of the Parties to the conflict; for in the former case the question of nationality does not arise. That is why Article 78 speaks of imperative reasons of security; there can be no question of taking collective measures: each case must be decided separately”.<sup>72</sup> The ICRC also specifies that “they can therefore only be interned, or placed in assigned residence, within the frontiers of the occupied country itself. In any case, such measures can only be ordered for real and imperative reasons of security; their exceptional character must be preserved”.<sup>73</sup>

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<sup>66</sup> ICRC, Commentary on Article 78 of the Fourth Geneva Convention.

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<sup>67</sup> Article 78 of the Fourth Geneva Convention.

<sup>68</sup> ICRC, Commentary on Article 78 of the Fourth Geneva Convention.

<http://www.icrc.org/ihl.nsf/b466ed681ddfcfd241256739003e6368/d794403e436f0823c12563cd0042cf9a?OpenDocument>

<sup>69</sup> ICTY, Appeals Chamber, Judgment of 20 February 2001, *Prosecutor v. Zejnil Delalic and Others*, case No. IT-96-21-A, para. 320.

<sup>70</sup> *Ibid.*, para. 321.

<sup>71</sup> Article 78 of the Fourth Geneva Convention.

<sup>72</sup> ICRC, Commentary on Article 78 of the Fourth Geneva Convention (<http://www.icrc.org/ihl.nsf/b466ed681ddfcfd241256739003e6368/d794403e436f0823c12563cd0042cf9a?OpenDocument>).

<sup>73</sup> *Ibid.*

## **5. Conclusions and Recommendations**

The Gaza Strip continues to be under the effective control of the Israeli army. Under international law, Israel, as an occupying power, has obligations to protect the civilian population in Gaza. Serious breaches of IHL that amount to war crimes and gross violations of IHRL were committed during the Military operations in Gaza. Deliberate, indiscriminate, and disproportionate attacks harming civilians are war crimes under IHL. The use of weapons that are likely to cause unnecessary loss or excessive suffering of civilians is also a war crime.

There has been no accountability for crimes that indiscriminately and disproportionately killed hundreds of civilians and injured many more. Individuals carrying out such war crimes or ordering, facilitating, aiding them or acquiescing in them must be held criminally responsible. Military and civilian leaders may also be prosecuted for war crimes as a matter of command responsibility. Under this doctrine, a superior is responsible for the criminal acts of his subordinates if he or she knew or had reason to know that his or her subordinates were about to commit such acts or had done so, and the superior failed to take necessary and reasonable measures to prevent such acts or to punish the perpetrators.

Internal Israeli military investigations concluded that the IDF had committed no violations of the laws of the war during the operations in Gaza, except rare and unavoidable mistakes. The Hamas ruling Government in Gaza has failed to investigate indiscriminate rockets attacks against civilians and civilian objects in southern Israel.

**The Commission must therefore:**

- i) Ensure thorough and comprehensive investigations of all human rights and humanitarian law violations committed by all parties in the context of the military operations in Gaza;**
- ii) Take appropriate actions to hold criminally liable those responsible for serious breaches of IHL and gross violations of IHRL during the conduct of hostilities;**
- iii) Provide recommendations as to the appropriate reparation mechanism for victims of such violations;**

**The Israeli Government and Palestinian armed groups must:**

- i) Fully cooperate with the mission and to grant its team prompt access to Gaza and the south of Israel;**
- ii) Provide the mission with specific, detailed information about the targets, the weapons and methods of attack used during the military operations;**
- iii) Hold accountable those responsible of serious breaches of IHL and gross violations of IHRL during the military operations in Gaza;**
- iv) Refrain from any act of intimidation or reappraisal against victims and witnesses who cooperate with the mission;**

**The UN Security Council and the UN Secretary General must also:**

- i) Fully support the mission and its findings;**
- ii) Ensure that both the Israeli and the Palestinian sides comply with recommendations of the mission;**
- iii) Ensure that both parties comply with their obligations under international human rights and humanitarian law.**