

**WHITE PAPER ON THE LEGAL ISSUES  
IMPLICATED IN THE MOST RECENT ISRAELI ATTACKS ON GAZA**



**PREPARED BY THE INTERNATIONAL ASSOCIATION OF  
DEMOCRATIC LAWYERS (IADL) AND THE INTERNATIONAL COMMITTEE OF  
THE NATIONAL LAWYERS GUILD**

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For Further Information Contact IADL President Jitendra Sharma [jsharma@vsnl.com](mailto:jsharma@vsnl.com) or  
Jeanne Mirer, Secretary General of IADL and Co-Chair of the National Lawyers Guild  
International Committee [mirerfam@earthlink.net](mailto:mirerfam@earthlink.net) Visit us at [www.iadllaw.org](http://www.iadllaw.org)

## Executive Summary

During the bombardment and invasion of Gaza by Israel in December 2008 and January 2009 the International Association of Democratic Lawyers condemned Israeli actions in Gaza. We issued statements that these actions violated international law, the laws of war and international humanitarian law. IADL also called for Israel to be held accountable for these violations.

The discourse surrounding this bombardment and invasion, however, has included terms not generally understood by and confusing to both the general public and to many lawyers. For example, Israel claimed a right of self defense against rockets from Gaza. Hamas claimed the rockets were sent to break the blockade of Gaza imposed by Israel and the "Quartet." The Palestinians and much of the world community have claimed that despite Israel's withdrawal of troops and settlements in 2005, Gaza remains occupied and controlled by Israel, giving rise to the right to resist occupation and fight for self determination. In that regard, the blockade is not only an act of aggression, it and other actions aimed at controlling the population also violate duties owed to an occupied population under the Fourth Geneva Convention. The massive bombardment and invasion in December 2008 and January 2009 have also been called disproportionate and illegal collective punishment.

This White Paper focuses on Israeli actions for the following reasons. First as a matter of law, there is no parity between occupied and occupier. As an occupied people the Palestinians have the right to resist occupation and, although that right is not unlimited and the use of rockets that strike civilian populations are not condoned, the characterization of Israel's bombardment and invasion as legitimate self defense improperly implies a fight between countries of equal status. As no equality exists, the legal analysis must be tailored to the conditions. Furthermore, there is an asymmetry in power relations between Israel and the Palestinians in Gaza. Israel's military might is unparalleled both in the region and in most parts of the world. In comparison to Hamas the Israeli army and its superiority, both in weaponry and technology, make Israel the Goliath in this conflict.

Therefore, we issue this White Paper to explain the legal implications of the bombardment and invasion so that the reasons and legal bases for our condemnation of Israeli bombardment and invasion are clearly understood.

This White Paper is different from other reports on Gaza which have in large measure analyzed the bombardment and invasion of Gaza only from the perspective of the methods used by the Israeli military and whether civilians were illegally targeted or whether weapons used violated laws of war. It seeks to put Israel's actions into a broader context providing the reader with:

- A. An analysis of Israel's obligations under the United Nations Charter to have sought a peaceful resolution to this crisis and concluding that having used military force to attack Gaza Israel violated those obligations;
- B. An analysis of the Nuremberg Principles on wars of aggression and the definition of aggression contained in UN General Assembly Resolution 3314, and how the aggression against the people of Gaza violated those principles;
- C. A detailed analysis as to why Israel's actions do not meet the standards under Article 51 of the UN Charter, for exercising the right of self defense making the bombardment and invasion an illegal aggression;
- D. An analysis of the proportionality principle and apparent violations of that principle along with a description of apparent violations of Human Rights Law, International Humanitarian Law and International Criminal Law; and
- E. The legal duties the international community have to ensure Israel does not enjoy impunity for its actions.

Photos by Jessie Boylan <http://www.jessieboylan.com>

Destroyed School Photo by Reem Salahi from the National Lawyers Guild delegation to Gaza

## Introduction

The International Association of Democratic Lawyers (IADL) has condemned Israeli actions in Gaza as violating international law, the laws of war and international humanitarian law.<sup>1</sup> IADL has called for Israel to be held accountable for these

violations. The discourse surrounding this aggression, however, has included terms not generally understood by and confusing to the general public, as well as many lawyers. IADL has called the actions against Gaza illegal aggression. Israel claims a right of self defense against rockets from Gaza. Hamas claims the rockets were sent to break the blockade of Gaza imposed by Israel and the Quartet. The Palestinians and much of the world community have claimed that despite the withdrawal of troops and settlements from Gaza in 2005, Gaza remains occupied and controlled by Israel so that the blockade and other actions aimed at controlling the population violate the duties owed to an



occupied population under the Fourth Geneva Convention. The massive bombardment and invasion in December 2008 and January 2009 have been called disproportionate and illegal collective punishment. We explain in this White Paper<sup>2</sup> the legal issues involved in this crisis so that the reasons and legal bases for our condemnation of Israeli bombardment and invasion are clearly understood. We hope that this paper will also contribute to the discourse on this

subject.

First, however, it is necessary to state some of the facts regarding Gaza.

The current crisis in Gaza has its roots in the 1948 war and the Israeli occupation which began in 1967 and has never ended. Gaza is a small strip of land on the Mediterranean approximately 140 square miles in area. Its southern border is Egypt. The rest of the strip is surrounded by Israel and enclosed by a 25 foot high fence. Approximately 1.5 million people live there. It has the highest population density in the world with more than 9,000 people per square mile. Half of its population is made up of refugees or descendants of those who became refugees when the State of Israel was established in 1948. About 800,000 are under 18 years old and close to one million are registered with the UN for aid. While unemployment is very high, and malnutrition plagues the children, the literacy rate remains high at 92 percent. The population is impoverished and reliant on aid from the United Nations and Israel for supplies, energy water and other necessities. Over 300,000 Palestinians in Gaza have been arrested or detained by Israel since it took control in 1967.

Israel's bombardment and invasion, which began on December 27, 2008, is part of a campaign against Gaza which escalated substantially after the Hamas electoral victory in 2006. The blockade which ensued was followed by rocket fire from Hamas into Israel. In June 2008 a six month truce was negotiated, but one of the terms was that Israel would lift the blockade, which it did not. Hamas adhered to the cease fire until after November 4 when, in a major breach of the truce, Israel attacked Gaza and killed several Hamas members. While both Israel and Hamas claim that the other used the truce for political reasons seizing the time to rebuild and rearm and that each intended to escalate the violence even before the truce was entered into, the asymmetry in the power relations between Israel and the Palestinians, mandates that Israel's actions warrant discussion in terms of violations of international law. Although this paper will refer to violations of international humanitarian law arising from by Hamas' use of rockets which do not discriminate between civilian and military targets, (see endnote 32), Israel's actions must be the focus. It would be an error to assume parity between the Palestinians and the Israelis as there can be no parity between occupied and occupier.

## The Legal Status of Gaza

Is Gaza a part of a sovereign state of Palestine, or is it part of the Occupied Palestinian Territories? The Israeli position is that it is neither, which would put Gaza into a legal no man's land or black hole. By claiming the West Bank and Gaza are disputed rather than occupied,<sup>3</sup> Israel disavows any responsibility to the Palestinians under the Fourth Geneva Convention.<sup>4</sup> By denying that the Palestinians have any right to sovereignty, Israel claims its behavior is not governed by rules that apply to international relations between sovereign states. Also, having never signed the 1977 Protocols to the Geneva Conventions which specifically define military and civilian targets, and deem civilian targets illegal, Israel claims it is not bound by its provisions. By declaring no law can govern its actions Israel claims it is free to do whatever it wants without legal constraints. This paper posits the Occupied Palestinian Territories, including Gaza, while having some characteristics of statehood,<sup>5</sup> remains occupied and the people of Palestine have the right to self determination and to resist occupation.

It further asserts that the status of Gaza whether it is an occupied territory or is a part of a sovereign state, **should not determine whether international law has been violated.** That is, **just as nature abhors a vacuum so does the law preclude the creation of legal black holes where no law applies.** Therefore, the Palestinians should be ascribed the status which *most promotes* the fulfillment and achievement of the **purposes** of the

United Nations Charter, the Nuremberg principles, international human rights law, international humanitarian law, and international criminal law.

## **Violations of the United Nations Charter**

The United Nations was formed in the crucible of the Second World War, and was specifically created to “save succeeding generations from the scourge of war”. With the signing of the United Nations Charter in 1945 the all member states agreed to outlaw recourse to war as a means of resolving international disputes.<sup>6</sup>

The Charter reaffirms the faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small; it was designed to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, as well as to promote social progress and better standards of life in larger freedom.<sup>7</sup>

Article 2 of the Charter sets forth the principles to be followed to achieve the purposes of the UN Charter. Sub-sections 3 and 4 state as follows:

2(3) All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

2(4) All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

Chapter VI of the UN Charter in Articles 33 to 38 sets forth the mechanisms, with Security Council or General Assembly assistance, through which states may peacefully settle disputes. These include “negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.”<sup>8</sup>

Israel has been a member of the United Nations since 1949. Indeed, Israel owes its existence to UN resolutions which created it.<sup>9</sup> By virtue of its membership, Israel is obligated, as are all member countries, to follow the Charter and forswear the use of force or the threat of the use of force in any of its disputes. The Charter, as a treaty, replaced prior practice which was not rules-based, but provided the opportunity for



countries to began wars to increase power and empire. The Charter also replaced notions of reprisal or retaliation which lead to wars. By its terms, the Charter does not allow any violations. In particular, it does not permit a country to violate it because it has superior military capability than its adversary, and believes it can win a war. Nor does Israel have the right to ignore its obligations under the Charter because the UN has been critical of Israeli actions in the past.

Israel as a member state had an obligation to follow the Charter requirement that it seek peaceful resolution of its disputes, and compromise when necessary to avoid war. Israel cannot claim, based on Gaza not being a fully developed state, that it does not have any duties to toward Gaza under Articles 2(3) or 2(4) as this would undermine the purposes of the Charter. Section 2(3) does not apply only to states, but to the settlement of international disputes. While Article 2(4) refers to the use of force against any state, the provision is broader in that it says the member cannot act in any other manner inconsistent with the Charter. As the purpose of the Charter includes ending armed conflict, the threat or use of force against an occupied territory would also be prohibited. Furthermore, because the Israeli Supreme Court in the Targeted Killings<sup>10</sup> case recognized the dispute between Israel and the Palestinians to be of an international character Israel cannot use the Palestinians' lack of statehood to justify its use of force.

On the other hand, because Palestine is not a full member state in the UN, it is not bound by the full duties imposed on states by the Charter. Palestinians should nonetheless act consistently with the purposes of the Charter to seek peaceful resolution of disputes.

There is no question that Israel used armed force against Gaza and that Israel failed to use the mechanisms in the Charter for resolving the conflict or even seeking to extend the June 2008 truce. In so doing it is evident that it violated its obligations under the UN Charter.

## **Violation of the Nuremberg Principles: War Of Aggression is A Crime Against Peace**

The war crimes trials against Nazi leaders and abettors after World War II were based on the Nuremberg Charter. Thereafter, the United Nations, under General Assembly Resolution 177 (II), paragraph (a), directed the International Law Commission to "formulate the principles of international law recognized in the Charter and in the judgment of the Tribunal."<sup>11</sup> The report of the Law Commission stated the principles of the Nuremberg Charter under international law. The Nuremberg Principles apply to all "persons" (not states). Persons who violate the principles, violate international law.

Principle VI is most relevant for this paper. It states: The crimes hereinafter set out are punishable as crimes under international law:

Crimes against peace: Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;

The prohibition on engaging in wars of aggression, in the opinion of most scholars, has achieved the status of a "peremptory norm" also known as *jus cogens*.<sup>12</sup> As a peremptory norm it is a rule of international law which does not allow any exemptions and it cannot be modified by law. (See Article 53 of the Vienna Convention of the Laws of Treaties).

The definition of aggression appears in United Nations General Assembly (UNGA) Resolution 3314 (XXIX) of 1974. The general definition of aggression is "the first use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition." Specific examples of aggression are set forth in Article 3 of this resolution.<sup>13</sup>

While the definition of aggression in the UN Resolution refers to the use of armed force against another state, whether Gaza is a sovereign state is of no consequence as, again, the definition of aggression refers to use of force in any manner inconsistent with the Charter. Since the purpose of the Charter is to promote peaceful resolutions of disputes, first use of force against the people in Gaza by Israel would be an act of aggression and the continued bombardment and invasion is to be considered a war of aggression. To the extent Israel has engaged in a war of aggression against the people of Gaza, its



actions and the actions of its leaders are crimes against peace in violation of the Nuremberg Principles.<sup>14</sup>

## **Israel's Actions are Not Legitimate Self Defense**

Israel's stated justification for its aggression was to defend itself against rockets fired into Israel by Hamas in Gaza. Israel has therefore invoked the doctrine of self defense to justify its actions.

The law of self defense is set forth in Article 51 of the Charter. Article 51 recognizes the inherent right of self defense. Article 51 is the one exception in the Charter which allows for temporary individual or collective use of force. But, the right is limited to situations in which there is an armed attack.<sup>15</sup> A state engaging in armed force to repel an armed attack must report its actions to the Security Council and the defensive use of armed force is permissible only until the Council has taken measures necessary to maintain international peace and security. Rules of proportionality also apply. (See below)

Israel has couched its actions in Gaza in the rhetoric of self defense, but for the reasons stated below Israel cannot lawfully convert its aggression into protected self defense.

1. Experts on the use of self defense note that for an armed attack to give rise to the right of self defense, it must be directed from outside the territory under the control of the defending state. Therefore, a state should not be allowed to invoke the right of self defense to defend against an attack which originates inside a territory it occupies.<sup>16</sup> Thus, because Israel has continued to occupy Gaza it has given up its right to claim that it is **acting in Article 51 sanctioned self defense** in response to the rockets sent into Israel from Gaza. Israel remains an occupying power in Gaza despite its unilateral removal of settlements.<sup>17</sup> Since the election of Hamas Israel has imposed a blockade against Gaza which is specifically listed as an act of aggression under in UNGA Resolution 3314. Actions taken by Hamas or any other Palestinians to resist the blockade are not "acts of aggression", so they do not allow Israel to claim its actions were taken in self defense. (See number 2)

2. Article 7 of UNGA Resolution 3314 recognizes the right of people to fight for self determination<sup>18</sup> from colonial and racist regimes or other forms of alien domination". In affirming that the definition of aggression does not prejudice the right of people to struggle for self determination it specifically exempts from the definition of

aggression actions taken in furtherance of the right to self determination. While, Resolution 3314 defines aggression as actions between states, the rule of interpretation found in Article 8 of the Resolution,<sup>19</sup> would ensure that acts of aggression against an occupied area would still be aggression, while military actions by an occupied people to promote the right to self determination are not considered aggression.<sup>20</sup> Under these circumstances there can be no armed attack by Gaza against Israel from which the right of Israel to act in self defense would arise.

3. Israel's actions against the occupied Palestinian territories reflects the types of reprisals prevalent in the of the pre Charter period, wherein prior to 1945 wars often began in response to actions taken by one country (or King) to which punitive reprisals were launched. Eventually, reprisals became regulated under rules articulated in the *Naulilaa* arbitration.<sup>21</sup> In 1945 with the formation of the UN and the adoption of the Charter, reprisals were prohibited by Article 2(3) which requires peaceful settlement of disputes. The UN 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the U.N. Charter also specifically prohibits reprisals.

While the occupation and the rights of the Palestinians to self determination make the paradigm of the *Naulilaa* arbitration and reprisal inapplicable to this conflict, the modus operandi of Israeli forces throughout the occupation and in recent years, has been to use disproportionate armed force to try to crush the resistance of the Palestinians to the occupation. To the extent the Israelis try to couch their actions in terms of self defense, they are in fact taking prohibited reprisals against Palestinians, who seek the right of self determination. Even if some of the actions taken by the Palestinians in their resistance are illegal under international humanitarian law, there is no legal justification for Israel to claim it is acting in self defense under Article 51.<sup>22</sup>

4. While Israel has stated its actions are **defensive**, not all defensive measures are legally considered measures taken in **self defense under Article 51 of the UN Charter**. Self defense is a justification regarding resort to force in the first instance. Because Gaza is occupied, the laws of belligerent occupation apply to conflict in the occupied Palestinian Territories.<sup>23</sup> Under the laws of belligerent occupation the appropriate legal framework is the "**laws of war**" (*jus in bello*) not laws which govern the lawful use of force in the first instance. (*jus ad bellum*). Thus, Israeli claims of taking defensive measures cannot transform aggression, and violations of the laws of war, (see below), into self defense allowed under Article 51 of the charter.<sup>24</sup>

## The Proportionality Principle

The laws of war govern the prosecution of war whether or not the war is legal. The bombardment and invasion of Gaza resulted in the deaths of at least 1,285 Palestinians. Of this number 895 were civilians and 167 civil police officers. The civilian victims include 280 children and 111 women. 4,336 Palestinians, mostly civilians, including 1,133 children and 735 women, have been wounded.<sup>25</sup> As will be discussed below, Israel attacked and destroyed many non military targets, including mosques, government buildings, schools and private homes. On the Israeli side the numbers of dead is in the teens.



Many have criticized Israel for its disproportionate response to the rocket attacks comparing the dead and wounded in Israel villages from these attacks with the numbers of dead and wounded in Gaza. The proportionality principle is not, however, measured in these terms. The proportionality principle addresses whether civilian injuries/deaths are excessive in relation to anticipated military advantage gained in the attack.<sup>26</sup> It is a principle of distinction between civilian and military targets as well as the amount of firepower used in the attack. Conducting hostilities in an urban area requires an increased duty of diligence to spare civilians from their effects. Israel's widespread use of heavy artillery, tanks and F-16 fighter jets against civilian population centers in the Gaza Strip resulted in the enormous number of deaths and injuries to civilians and damage to civilian objects in breach of the principles of proportionality and distinction. Disproportionate use of force is illegal whether or not the war itself is legal.<sup>27</sup> The proportionality principle is a central focus of international humanitarian law. (See below).

## International Humanitarian Law and International Human Rights Law

The purpose of international humanitarian law is to lessen the destructive impact of war especially on non-combatants (i.e. civilians). This law developed over time<sup>28</sup> both before and after the UN Charter.<sup>29</sup> After World War II the 1949 codification of the Geneva Convention created safe neutral zones where belligerents could station injured and sick combatants and noncombatants, protected civilian hospitals organized to give care to the sick and wounded, and under the Fourth Geneva Convention Relative to the Protection of Civilian Persons in the Time of War, directed an occupying power to provide food and medical supplies to civilian populations under its control.

The modern proportionality principle is contained in the 1977 Additional Protocols to the Geneva Convention. While civilians received protections under the Geneva Conventions and The Hague Conventions of 1899, 1907 and “in a much more comprehensive way, under the Fourth Geneva Convention of 1949, Protocol I **“codified, for the first time, the established rule that civilians must not be the object of attack.”**” It also provides that those responsible for grave breaches must be held accountable.

Even if the invasion of Gaza could be in any way legally justified, nothing justifies violations of international humanitarian law. Similarly, if Israel’s bombardment and invasion of Gaza were consistent with rules of proportionality and distinction, proportional attacks cannot transform an illegal war of aggression into a legal war, and Israel must be held accountable for engaging in an illegal war of aggression.

Human rights law is complementary to international humanitarian law and is applicable during armed conflict. Israel is bound by its obligations under the international human rights treaties that it has ratified, as well as customary rules of international human rights law in the Occupied Palestinian Territories. Israel has ratified: the International Covenant on Economic, Social and Cultural Rights (ICESCR); the International Covenant on Civil and Political Rights (ICCPR); the International Convention on the Elimination of All Forms of Racial Discrimination; the UN Convention on the Elimination of All Forms of Discrimination against Women; and the UN Convention on the Rights of the Child.

Amnesty International in its report “The Conflict in Gaza: A Briefing on Applicable Law, Investigations and Accountability,” issued on January 19, 2009, notes that all provisions of these treaties apply in the occupied territories. Amnesty’s report also describes some

of the violations of these treaties during this aggression. These will not be repeated here.

## **Provisions of International Humanitarian Law And International Criminal Law Implicated In the Bombardment and Invasion of Gaza by Israel**

The Palestinian Center for Human Rights, (PCHR) throughout the 22 day offensive in Gaza, attempted to document the scope of the destruction and has taken statements from victims and their families. The statistics of those killed and injured were stated above.

The National Lawyers Guild sent a delegation to Gaza and there are many others who are seeking to send official fact finding missions to collect evidence and develop a full record of the devastation. On February 9, 2009 the PCHR began releasing testimonies from the survivors. The report from February 19, 2009 provided a preliminary list of the destruction of civilian property:



Operation Cast Lead, Israel's 22 day offensive on the Gaza Strip between 27 December 2008 and 18 January 2009 had a devastating impact on Gaza's physical infrastructure. The preliminary list of damage to civilian property includes:

- 2,400 homes destroyed, and at least 12,000 homes damaged.
- 60 police stations and 30 mosques completely destroyed.
- 21 private enterprises, including cafeterias, wedding halls and hotels damaged or destroyed.
- 28 public civilian facilities, including ministry buildings, municipalities and fishing harbours damaged or destroyed.
- 121 industrial/commercial workshops destroyed and at least 200 damaged.
- 5 concrete factories and one juice factory destroyed.



- 5 media and 2 health institutions destroyed.
- 29 educational facilities including schools damaged or destroyed.
- 1000's of dunums (approximately a quarter acre) of agricultural land razed to the ground.

Based on these reports, there are many identifiable provisions of International Humanitarian Law and the Rome Statute governing the International Criminal Court implicated in the Israeli offensive into Gaza. Based on the preliminary information from PCHR and others, Israel's bombardment and invasion of Gaza resulted in violations of the Geneva conventions, in particular Protocol I, as well as provisions of the Rome Statute. The most prominent of the apparent violations are listed below:



**1. Parties To a Conflict are Required to Distinguish Between Military and Civilian Objects**

Article 48, of Protocol I(3) of the Geneva Convention provides: In order to ensure respect for and protection of the civilian population and civilian objects, 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."<sup>30</sup> Intentionally directing attacks against the civilian population as such or against individual civilians not taking a direct part in hostilities is a war crime. (Rome Statute, Article 8 (2) (b) (I).

**2. Military Objectives Defined, Targeting Civilians and Civilian Objects Is Prohibited**

Article 52 of Protocol I prohibits deliberate attacks on civilian targets and defines the difference between military and civilian targets. Military targets are defined as "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." All other targets are civilian targets.<sup>31</sup> Intentionally directing attacks against civilian objects is a war crime (ICC Statute, Article 8 (2) (b) (ii)). The above list of property and targets destroyed shows Israel targeted civilian objects including police stations and government offices as well as private homes, and destroyed civilian infrastructure in Gaza. To the extent that the destruction of infrastructure has devastating consequences on the civilian population these attacks are disproportionate. According to the report of Al Haq issued on January 7 2009 "A characteristic example of an attack on a civilian object is the 6 January 2009 aerial bombardment on the Asma' Bint Baker school, a facility of the United Nations Relief and Works Agency for Palestinian Refugees (UNRWA)." Four days prior to the attack, UNRWA officials provided GPS coordinates to Israeli authorities of 23 UNRWA installations that were to be used as shelters for fleeing civilians. The location of the Astma' Bint Baker School was one of the 23 coordinates provided. Three civilians were killed in the attack on the school.

### **3. Civilians Are Not to Be Used As Shields While Presence of Non-civilians Within Civilian Populations Does not Deprive the Population Its Civilian Character**

Article 50(3) of Protocol I states that: "The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character." Protocol I requires each party to avoid locating military objectives within or near densely populated areas (Article 58 (b).). Protocol I, Article 57 (1) also expressly prohibits the use of tactics such as using "human shields" to prevent an attack on military targets. However, the Protocol also makes it clear that even if one side is shielding itself behind civilians, such a violation of international law "...shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians." Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations is a war crime. (ICC Statute, Article 8 (2) (b) (xxiii)). While Israel claimed that Hamas was launching its rockets from civilian areas and hiding among civilian populations, and hiding rockets in mosques, this did not release Israel from its obligation to avoid military action against civilian objects.

#### 4. Indiscriminate and Disproportionate Attack

Article 51 (4) of Protocol I prohibits indiscriminate attacks, including those which use methods which cannot be directed at a specific military objective, or employ methods or means of combat the effects of which cannot be limited. Article 51(5) defines a disproportionate indiscriminate attack as one 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. Intentionally launching a disproportionate attack is a war crime (ICC Statute, Article 8 (2) (b) (iv)). Launching an indiscriminate attack resulting in loss of life or injury to civilians or damage to civilian objects is a war crime. Although Israel claimed it was engaging in surgical strikes on military targets in Gaza, the death toll and damage to civilian infrastructure shows that many of the attacks have been indiscriminate.<sup>32</sup>

#### 5. When Nature of Objects Is Unclear, It is Presumed to Be A Civilian Object

Article 57 of Protocol I describes precautions which must be taken to spare the civilian population, civilians and civilian objects. Pursuant to Article 52(3) of Protocol I **if it is unclear whether a target is a military or civilian, it is presumed not to be a military object, and is is presumed to be a civilian object.** Article 57 (2) specifies precautionary measures to be used to prevent civilian casualties. The Article requires warnings to the civilian population of the imminence of an attack. Destroying a civilian residential building after someone who launched a rocket from the roof is gone does not make it a military target. While it was reported that Israel gave some warning to the civilian populations of impending attacks, giving warnings does not relieve it from taking other required precautions to ensure its attacks do not target civilians or civilian objects. It appears in fact that where the nature of a particular attack was unclear, Israel assumed it to be a military, not civilian, object.

#### 6. Humanitarian Access Required

Protocol I Articles 15, 21, 54 (1,2) and Article 70 require promotion of humanitarian access, and prohibit starvation of the civilian population as an allowable method of warfare. Attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population is also prohibited (Protocol I, Article 54 (1,2)). Using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including by willfully impeding relief supplies, is a war crime. (ICC Statute, Article 8 (2) (b) (xxv)). Intentionally directing

attacks against humanitarian personnel, installations, material, units or vehicles is a war crime. (ICC Statute, Article 8 (2) (b) (iii)). Making medical or religious personnel, medical units or medical transports the object of attack is a war crime (Article 8 (2) (b) (ix and xxiv)). Throughout the offensive there were ongoing reports that medical supplies were not being allowed into Gaza and humanitarian aid was impeded. The ongoing investigations will have to address this issue.

## 7. Collective Punishment Prohibited

Israel's retaliation against the Palestinians in Gaza constitutes collective punishment<sup>33</sup> which is prohibited specifically prohibited by Article 33 of the Fourth Geneva Convention and is a war crime. See also Hague Regulations, Article 50.

## 8. Weapons Which Cause Superfluous Injury Prohibited

The Hague Regulations of 1907 prohibits the use of weapons that cause superfluous injury or unnecessary suffering (e.g. blinding laser weapons). They should not be used to target civilians and should not be used in indiscriminate or disproportionate attacks. There are reports that Israel has used incendiary weapons, such as white phosphorous shells, in attacks in Gaza. The International Committee of the Red Cross (ICRC) with respect to the use of these weapons states:

The use of weapons containing white phosphorous is, like the use of any other weapon, regulated by the basic rules of international humanitarian law. These require parties to a conflict to discriminate between military objectives on the one hand and civilians and civilian objects on the other. The law also requires that they take all feasible precautions to prevent harm to civilians and civilian objects that can result from military operations. Attacks which cause "disproportionate" damage to civilians and to civilian objects are prohibited. Using white phosphorous as an **incendiary weapon**, i.e. to set fire to military targets, is subject to further restrictions. The use of such white phosphorous weapons against any military objective within concentrations of civilians is prohibited unless the military objective is clearly separated from the civilians. The use of **air-dropped incendiary weapons** against military objectives within a concentration of civilians is simply prohibited.

See also, Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons (a Protocol additional to the 1980 UN Convention on the Prohibition or Restrictions on the Use of Certain Conventional Weapons.)<sup>34</sup>

There may be more provisions of international humanitarian law implicated in the Israeli offensive in Gaza and in the ongoing siege and blockade. The failure of the international community to take steps to address or repress these violations will inevitably ensure they continue unabated.

## **Accountability**

IADL called for the establishment of a tribunal under Article 22 of the Charter to investigate and prosecute Israel for its violations of law. This call is consistent with all of the principles of the Charter, the Geneva Conventions, as well as the basic principles that violations of law must be remedied in some fashion.

The right to an effective remedy for violations of human rights law is enshrined in many international instruments. These include Article 2(3) of the International Covenant on Civil and Political Rights (ICCPR), Article 8 of the Universal Declaration of Human Rights, Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, Article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 39 of the Convention on the Rights of the Child, Article 3 of the 1907 Hague Convention concerning the Laws and Customs of War on Land, Article 91 of the Protocol I Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), Article 75 of the Rome Statute of the International Criminal Court and Article 7 of the African Charter on Human and Peoples' Rights.

In December 2005 the General Assembly passed a resolution titled: Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. UNGA Res 60/140, 16 December 2005. This resolution reaffirms the rights in the instruments mentioned above and in Principle VII explains:

Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victims right to the following as provided for under international law: (a) Equal

and effective access to justice; (b) Adequate, effective and prompt reparation for harm suffered; and (c) Access to relevant information concerning violations and reparations mechanisms.

Consistent with this resolution and the above named provisions, Article 146 of the Fourth Geneva Convention provides: “The High Contracting Parties are required to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article” and “Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.”

Article 85 of Protocol I defines many of the grave breaches of the Protocol, and is part of the section which requires repression of grave breaches. This section establishes that grave breaches includes (a) making the civilian population or individual civilians the object of attack; (b) launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57.

Article 86(1) of Additional Protocol I requires that: “[P]arties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches of the [1949 Geneva] Conventions or of this Protocol which result from a failure to act when under a duty to do so.”

Article 89 of the Protocol pledges the High Contracting Parties to act jointly or individually with the United Nations and in Conformity with the UN charter. Article 90 of the Protocol creates an International Fact Finding Commission.

Unfortunately, the High Contracting Parties to the Geneva Conventions have not acted to try to hold Israel accountable for any grave breaches despite repeated requests to do so. Israel rebuffed the Security Council when on January 9, 2009, it called on the parties declare a cease fire and for Israel to open the borders and allow humanitarian aid to enter.<sup>35</sup> Israel has not joined the International Criminal Court. The Palestinians, who had not previously sought accession to the International Criminal Court, have asked to

accede to the Court and for indictments for violations of international criminal law which occurred on Palestinian soil. The prosecutor is examining that question in light of whether Palestine can be considered a state for this purpose. As noted at the outset Palestine has many of the hallmarks of statehood, and should be considered a state for the purpose of ensuring the purposes of the UN Charter and other laws are upheld.

Israel invaded Lebanon in 2006 and destroyed significant civilian objects and killed many people. Yet nothing was done. The fact that the international community did not demand Israel abide by international law enhances the perception that Israel is above the law, and can violate it with impunity. While nations may refuse to provide further military aid to Israel or groups in different countries engage in litigation or boycotts, unless the world community is willing to say enough is enough, Israel will interpret failure to act as a green light for further violations.



This is why IADL, along with thousands of other individuals and organizations including the National Lawyers Guild, has requested the General Assembly under Article 22 of the Charter, which allows the General Assembly to create subsidiary bodies as necessary, to establish a tribunal to investigate and prosecute those responsible for the grave breaches of the charter, the Nuremberg principles, international

human rights and international humanitarian law, as well those crimes recognized under the Rome statute, and to provide compensation to for those injured by illegal Israeli actions.



1. The question of whether the rockets sent by Hamas into Israel violate international humanitarian law is addressed below, but the the focus of this paper is on Israel due to the scope of the invasion and for the reasons set forth in the executive summary.

2. Ironically, the first White Paper ever issued on any subject was issued in 1922 by the UK government which addressed policy controversies arising in Palestine and the impact of the 1917 Balfour Declaration on the eventual independence of Palestine.

<sup>3</sup> Specifically as to Gaza, the claim is that the 2005 withdrawal of troops ended any claim that Israel continues to occupy Gaza. (But see endnote )

<sup>4</sup> The Fourth Geneva Convention is entitled, “Convention Relative to the Protection of Civilian Persons in Time Of War, 12 August 1949”, see *infra*.

<sup>5</sup> There are normally four constituent elements of a state: territory, population, government, and the capacity to enter into international relations with other states. When the PLO declared statehood for Palestinians (in the West Bank and Gaza), over 100 countries recognized it.

<sup>6</sup> The UN Charter was a successor to the League of Nations Charter, which did something to promote the Kellogg-Briand Pact which outlawed recourse to war as well.

<sup>7</sup> To these ends the Charter requires states to practice tolerance and live together in peace with one another as good neighbors, and to unite our strength to maintain international peace and security, and to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and to employ international machinery for the promotion of the economic and social advancement of all peoples, Article 1 sets forth the purposes of the United Nations:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and

4. To be a centre for harmonizing the actions of nations in the attainment of these common ends.

<sup>8</sup> Article 33: The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.

Article 34: The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.

Article 35: Any Member of the United Nations may bring any dispute, or any situation of the nature referred to in Article 34, to the attention of the Security Council or of the General Assembly.

A state which is not a Member of the United Nations may bring to the attention of the Security Council or of the General Assembly any dispute to which it is a party if it accepts in advance, for the purposes of the dispute, the obligations of pacific settlement provided in the present Charter. The proceedings of the General Assembly in respect of matters brought to its attention under this Article will be subject to the provisions of Articles 11 and 12.

Article 36: The Security Council may, at any stage of a dispute of the nature referred to in Article 33 or of a situation of like nature, recommend appropriate procedures or methods of adjustment. The Security Council should take into consideration any procedures for the settlement of the dispute which have already been adopted by the parties.

In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.

Article 37: Should the parties to a dispute of the nature referred to in Article 33 fail to settle it by the means indicated in that Article, they shall refer it to the Security Council.

If the Security Council deems that the continuance of the dispute is in fact likely to endanger the maintenance of international peace and security, it shall decide whether to take action under Article 36 or to recommend such terms of settlement as it may consider appropriate.

Article 38: Without prejudice to the provisions of Articles 33 to 37, the Security Council may, if all the parties to any dispute so request, make recommendations to the parties with a view to a pacific settlement of the dispute.

<sup>9</sup> See UNGA Resolutions 181 and 194

<sup>10</sup> HCJ 769/02 the Public Committee Against Torture in Israel v. The Government of Israel

11 Principle I: Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.

Principle II: The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.

Principle III: The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.

Principle IV: The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.

Principle V: Any person charged with a crime under international law has the right to a fair trial on the facts and law.

Principle VI: The crimes hereinafter set out are punishable as crimes under; international law:

a. Crimes against peace:

- Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;
- Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).

b. War crimes:

Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave-labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war, of persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.

c. Crimes against humanity:

Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.

Principle VII See also later discussion on the issue of the definition of self defense used to justify "anticipatory aggressive acts".

Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principles VI is a crime under international law.

- 12 Jus Cogens is latin for higher or compelling law.
- 13 Article 3 defines certain acts to generally qualify as acts of aggression. These include in relevant part: (a) an invasion or attack by an armed force....; (b) bombardment by armed forces of a state.....(c) blockade of the ports or coast by the armed forces of a State... This definition states:". Article 2 of the this Resolution, however, qualifies the general definition of aggression to state that not all first use of armed force will be found by the Security Council to be an act of aggression, because the council may find that the acts or their consequences are not of sufficient gravity
- 14 While the definition of aggression in Resolution 3314 refers to acts taken by one state against another state, the Nuremberg principles refer to "persons". See also discussion below regarding whether 3314 would include armed actions by an occupied people in furtherance of their right to self determination.)
- 15 See also later discussion on the issue of the definition of self defense used to justify "anticipatory aggressive acts".
- 16 While Article 51 does not specifically require the armed attack to be from a "state", allowing for the possibility of including within its reach groups of non-state actors engaging in acts of aggression, this is different from armed attacks which arise from an occupied people. See, e.g., the Chatham House Principles of International Law on the Use of Force in Self-Defense (Chatham House is a UK-based think tank on issues of International Law which states: "An armed attack is an attack directed from outside territory controlled by the State). In its Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, the International Court of Justice's observations may be read as reflecting the obvious point that unless an attack is directed from outside territory under the control of the defending state the question of self-defense in the sense of Article 51 does not normally arise".
- 17 Although Israel relocated its troops from Gaza in August-September, 2005, there is general consensus among international lawyers and the UN that Gaza remains occupied because it is under effective Israel control, to wit: Israel controls all of Gaza's entry and exit points, its airspace, its territorial waters, and population registry. UN Security Council Resolution 1860 states, "the Gaza Strip constitutes an integral part of the territory occupied in 1967 and will be a part of the Palestinian state". The Israelis and the Israeli army is able to block humanitarian access, to close the border crossings at will, to control the supply of food, fuel and electricity, as well as bar all foreign correspondents from entering the Strip it had prior to the latest conflagration. See, e.g., Professor Iain Scobbie of the School of Oriental and African Studies, "An Intimate Disengagement: Israel's Withdrawal from Gaza, the Law of Occupation and of Self-Determination" in Victor Kattan (ed). *The Palestine Question in International Law* (London: British Institute of International and Comparative Law, 2008, p. 637).
- 18 Resolution 3314 references UNGA Res. 2625 (XXV), which is the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, which affirmed the right of self-determination; UNGA 2649 (XXV) also reaffirmed the right of self determination.

19 "In their interpretation and application the above provisions are interrelated and each provision should be construed in the context of the other provisions".

20 This does not mean that actions by an occupied people which violate international humanitarian law would be legal. (See discussion below).

21 The Naulilaa case grew out of Portugal's neutrality during World War I. In October of that year, German officials entered Portuguese Angola to secure the purchase of supplies. As a result, misunderstandings ensued, a Portuguese man fired a weapon, killing three Germans. German troops, in reprisals, destroyed forts and posts in Angola. In 1928, the Arbitral Tribunal found the reprisals illegal because the Portuguese act was a misunderstanding that was not in violation of international law, the German government did not make any demand on the Portuguese government prior to the reprisals, the reprisals actually consisted of six separate acts, and they were not proportionate to the prior offending act. After the Naulilaa opinion, reprisals under customary international law were delineated as generally comprising these elements:

A. Prior Illegal Act (violation of international law) - The "offending state must have committed an act contrary to international law."

B. Unsatisfied Demand Reprisals should only be used after the injured state has attempted to resolve the matter (made demands) with the offending state and the attempt has failed.

C. Proportionate Response, that is [R]eprisals should be pro-portionate to the initial violation of international law."

22 While Israel may describe its actions as countermeasures to terrorist actions, the actions are still not protected under Article 51 as such "countermeasures" are in fact prohibited reprisals.

23 The Laws of Belligerent Occupation are found in articles 43 and 43 of the 1907 Hague Convention on the "Laws and Customs of War on Land" and the Fourth Geneva Convention. (See more discussion infra re: duties of an occupying power under these laws.)

24 See, Professor Victor Kattan, of the Center for International Studies and Diplomacy made this point in his January 19, 2009 article in JURIST: "Gaza: Not A War of Self-Defense".

25 This was reported by the Palestinian Center for Human Rights, (PCHR) on January 22, 2009.

26 These statistics are often used to claim Israel had not suffered an "armed attack" to justify self defense under Article 51. As noted above, this argument misses the mark since Israel's actions were not legitimate self defense.

27 In a recent television interview, Thomas Friedman was asked whether or not Israel's response to the rockets was disproportionate. Friedman dismissed the notion completely by saying proportionality means nothing to him, that "wars are fought for political ends, and Israel was "in it to win it".

28 From the beginning of warfare to the advent of contemporary humanitarian law, over 500 cartels, codes of conduct, covenants and other texts designed to regulate hostilities have been recorded. They include the Lieber Code, which came into force in April 1863 and is important in that it marked the first attempt to codify the existing laws and customs of war. Unlike the first Geneva Convention (adopted a year later), however, the Code did not have the status of a treaty as it was intended solely for Union soldiers fighting in the American Civil War. (ICRC: "What are the Origins of International Humanitarian Law).

29 The Lieber Code introduced the concept of military necessity, but cautions against "wanton" destruction. In the late 19th and early 20th centuries, the Hague Conventions of 1899 and 1907 on the Laws and Customs of War on land, formally introduced concepts of civilian immunity through their explicit definition of belligerents, and prohibit unnecessary destruction of property, bombardment of undefended towns, villages or buildings, and mandated that militaries spare, as much as practicable, buildings dedicated to art, religion, science, and historic monuments and hospitals. The Hague rules also recognize the important role that civilian property plays in protecting civilians from unnecessary suffering. By singling out unnecessary destruction of property as prohibited, the drafters indirectly protected civilian persons.

30 Although Israel has not acceded to Protocol I, because 163 countries out of 192 UN member states have ratified it, the provisions of Protocol I have ripened into customary international law and are therefore binding. Furthermore in the Targeted Killings case, the Israeli Supreme Court acknowledged that the Protocol is customary international law.

31 While Israel and others may argue that the definition of "military advantage" includes infrastructure which has dual use, any over-broad reading of the term must be avoided since, as commentary in the German Military Manual explains "If weakening the enemy population's resolve to fight were considered a legitimate objective of armed forces, there would be no limit to war." Where there is an issue of dual use, the rule of proportionality governs.

32 This stands in contradistinction to Hamas' actions. Hamas used rockets which were so primitive that their strikes mainly landed in open fields. While technically the use of indiscriminate rockets would violate this protocol, whether these attacks should even be investigated is questionable in light of the almost complete lack of civilian casualties.



<sup>33</sup> Article 33 of the Fourth Convention states: "No protected person may be punished for an offense he or she has not personally committed", and "collective penalties and likewise all measures of intimidation or of terrorism are prohibited." By collective punishment, the drafters of the Geneva Conventions had in mind the reprisal killings of World Wars I and II. In the First World War, Germans executed Belgian villagers in mass retribution for resistance activity. In World War II, Nazis carried out a form of collective punishment to suppress resistance. Entire villages or towns or districts were held responsible for any resistance activity that took place there. The conventions, to counter this, reiterated the principle of individual responsibility. The International Committee of the Red Cross (ICRC) Commentary to the conventions states that parties to a conflict often would resort to "intimidatory measures to terrorize the population" in hopes of preventing hostile acts, but such practices "strike at guilty and innocent alike. They are opposed to all principles based on humanity and justice." The law of armed conflict applies similar protections to an internal conflict. Common Article 3 of the four Geneva Conventions of 1949 requires fair trials for all individuals before punishments; and Additional Protocol II of 1977 explicitly forbids collective punishment.

<sup>34</sup> There have been reports that the use of a weapon known as DIMES has been used in Iraq, and that Gaza was the first test of the bomb in a densely populated environment. The specific weapon—the *GBU-39*— is a Dense Inert Metal Explosive (DIME) and was developed by the U.S. Air Force, Boeing Corporation, and University of California's Lawrence Livermore National Laboratory in 2000. The weapon wraps the high explosives HMX or RDX with a tungsten alloy and other metals like cobalt, nickel or iron, in a carbon fiber/epoxy container. When the bomb explodes, the container evaporates and the tungsten turns into micro-shrapnel that is extremely lethal up to about 60 feet.

<sup>35</sup> See Resolution 1860 (2009) which passed 14-0 with the US abstaining, not vetoing.