Al-Haq Brief:

Legal Aspects of Israel's Attacks on the Gaza Strip during "Operation Cast Lead"

7 January 2009

> *"We are hitting not only terrorists and launchers, but also the whole Hamas government and all its wings […] After this operation there will not be one Hamas building left standing in Gaza, and we plan to change the rules of the game."*[1]
>
> \- *Brigadier General Dan Harel*

1. Introduction

1.1 On 27 December 2008, Israel, the Occupying Power in the OPT (the West Bank, including East Jerusalem, and the Gaza Strip) launched "Operation Cast Lead," a large-scale aerial offensive in the Gaza Strip. The continuing air strikes have now been followed by Israeli ground troops, which invaded the Gaza Strip on the night of 3 January 2009. Within eleven days, Israeli occupying forces have killed at least 671 Palestinians,[2] 547 of whom were civilians, including 155 children, and injured at least 3,000.

1.2 Israel's wilful misinterpretation of international law has led it to conclude that "anything affiliated with Hamas is a legitimate target,"[3] resulting not only in the aforementioned civilian deaths and injuries, but in the destruction of a wide range of civilian objects, terrorising the civilian population and leaving them with the feeling that there is no safe haven from attack. Simultaneously, Israeli authorities have claimed that the potential harm to civilians is taken into account during the planning and execution of military operations. However, the choice of targeted areas, methods of attack and the number of civilians killed and injured clearly indicate a reckless disregard for civilian life synonymous with intent. Yet, these attacks have been met with little or no concrete action by the international community.

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[1] Tova Dadon, "Deputy chief of staff: Worst still ahead"; *Y-net News*, 29 December 2008, available at: http://www.ynet.co.il/english/articles/0,7340,L-3646462,00.html.

[2] This number refers to the casualties documented by Al-Haq field researchers in the Gaza Strip and does not include the number of bodies which could not be identified or retrieved under the ruins of destroyed buildings. The number of casualties published by the Palestinian Ministry of Health greatly exceeds Al-Haq's registered data. Unless otherwise specified, numbers and incidents referred to in this paper are based on information gathered by Al-Haq's field researchers in the Gaza Strip and are accurate as of noon on 7 January 2009.

[3] Major Avital Liebowitz, Spokesperson for the Israeli Occupying Force, quoted in "B'Tselem to Attorney General Mazuz: Concern over Israel targeting civilian objects in the Gaza Strip," B'Tselem, 31 December 2008, available at: http://www.btselem.org/English/Gaza_Strip/20081231_Gaza_Letter_to_Mazuz.asp.

2. The facts: Israel's attacks on civilians and civilian objects

"They [Hamas] don't make a distinction, and neither should we."[4]
- Israeli Foreign Minister Tzipi Livni

2.1 Israel's assumption that anything is a legitimate military target has had devastating consequences on the ground. More than 80% of the 671 Palestinians already killed were civilians[5] (many of whom were killed in direct attacks). Israel has directly targeted and completely or partially destroyed 13 mosques, two schools, one university, numerous government buildings, including different ministries and 40 civil police compounds, a medical storage centre, three money exchange facilities and three chicken farms, all of which Israel alleges were used by Hamas for military purposes. Israel's air strikes and ground incursions have to date resulted in the total destruction of at least 300 houses and damage to 3,800 more.

2.2 The attacks during "Operation Cast Lead" have had a disturbing impact on the already dire health conditions in the Gaza Strip. Despite Israeli Foreign Minister Tzipi Livni's denial of a humanitarian crisis in the area, the situation on the ground is worse than ever before. Gaza's borders have remained mostly closed during the attacks, with essential commodities such as basic food stuffs, fuel, electricity, medicine and medical equipment near depletion. Hospitals are attempting to function on only 6 – 8 hours of electricity per day and are severely overcrowded. Moreover, due to lack of space and medical personnel, hospitals have been forced to turn away the sick, pregnant and lightly wounded in order to attend to those who are critically injured. Regular rooms are being turned into unsanitary operation rooms and yards into morgues. As a result, the whole medical system in the Gaza Strip is on the verge of a complete break down.

3. Legal analysis

3.1 As Israel exercises effective control over the Gaza Strip through its dominion over airspace, territorial waters, land borders and the population registry, it remains the Occupying Power. The legal framework governing its actions in relation to the Gaza Strip is therefore international humanitarian and human rights law. The main principles of international humanitarian law applicable to the conduct of the current hostilities shall be briefly illustrated below.

3.2 *Distinction: civilians*

3.2.1 Contrary to Israel's stated policy and demonstrated practice of considering any person or object affiliated in any capacity with the "Hamas government and all its wings"[6] as a legitimate military target, international humanitarian law clearly

[4] Amnon Meranda, "Tibi: politicians counting Palestinian bodies"; *Y-net News*, 29 December 2008, available at: http://www.ynetnews.com/articles/0,7340,L-3646487,00.html.
[5] It should be noted that the civilian casualty statistics from the United Nations Relief Works Agency for Palestinian Refugees (UNRWA), which are repeatedly referred to in international media sources, indicate that 25% of the Palestinians killed are civilians. However, this statistic only comprises women and children and does not include the number of male non-combatants killed during Israeli attacks.
[6] See *supra* note 1.

defines who and what can be legitimately targeted during an attack. The fundamental principle of distinction enshrined in customary and conventional international humanitarian law demands that the parties to a conflict "must at all times distinguish between the civilian population and combatants and between civilian objects and military objectives,"[7] and may only target the latter. Civilians are persons who are not members of the armed forces of a Party to the conflict and therefore shall not be made the object of attack, unless and for such time as they take direct part in hostilities.[8]

3.2.2 Among the thousands of Palestinian civilians killed and injured are members of the Civil Police and representatives of the political wing of the *de facto* Hamas government. International humanitarian law holds that members of the Civil Police who are engaged in regular police duties such as ordinary internal law enforcement or traffic regulation, are civilians.[9] Separate from both the Hamas Internal Security Forces and the National Security Forces, the Civil Police is comprised of civilian police officers whose primary task, similar to any civilian police force, is the maintenance of civic order within the Gaza Strip. They serve no military function and are therefore not combatants. As such, unless police officers are formally incorporated into the Hamas armed forces and are taking a direct part in hostilities, they are to be afforded civilian protection and may not be targeted.[10] In the event of police incorporation into Hamas' armed forces and their direct participation in hostilities, their immunity from attack is suspended only for the duration of each specific act that qualifies as direct participation in hostilities. An example of an attack on the Civil Police is the 27 December 2008 aerial bombardment of the Civil Police compound in Gaza City, which killed 65 out of 70 police officers who were involved in a training course.

3.2.3 Under international humanitarian law, representatives of the political wing of the *de facto* Hamas government who play no part in commanding or controlling the military wing of Hamas and who do not take direct part in hostilities are civilians and not a legitimate military target. An example of an attack on political representatives of the *de facto* Hamas government is the 1 January 2008 aerial bombardment of the Jabaliya refugee camp home of Nizar Rayyan, which killed him and 15 members of his family (including 11 of his children), injured other family members and neighbours and destroyed ten adjacent houses.

3.2.4 Attacks on civilians not taking direct part in hostilities that result in deaths constitute wilful killing, a war crime amounting to a grave breach of the Fourth Geneva Convention. This entails the individual criminal responsibility of those Israeli officials who planned, ordered or executed such attacks. The widespread

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[7] Jean-Marie Henckaerts and Louise Doswald-Beck, *International Committee of the Red Cross (ICRC) Customary International Humanitarian Law*, Cambridge University Press, 2005, Rule 7, p. 25.
[8] *Ibid*., Rule 6, p. 19.
[9] *Ibid*., Rules 4, 5 and 6, pp. 14 -24.
[10] *Ibid*., Rule 6, p. 19. This notion was confirmed by the Israeli High Court of Justice in H.C. 769/02, *The Public Committee Against Torture in Israel et al. v. The Government of Israel et al., 14 December 2006.* An English language translation of the decision is available at: http://elyon1.court.gov.il/files_eng/02/690/007/A34/02007690.a34.htm.

and systematic nature of such attacks during "Operation Cast Lead" may constitute the crime against humanity of murder.

3.3 *Distinction: civilian objects*

3.3.1 Article 52 of the First Additional Protocol to the Geneva Conventions, which is established as customary international law, defines civilian objects as "all objects which are not military objectives." Only in the event that civilian objects are used for military purposes, and the destruction of these objects, in the circumstances ruling at the time, makes "an effective contribution to military action," and their destruction, capture or neutralisation "offers a definite military advantage," may they be a lawful object of attack. In all circumstances, the principle of proportionality in attacks must be observed, and in case of doubt, an object shall be presumed to be civilian. Accordingly, civil police compounds, government buildings, medical storage units and farms must be presumed to be civilian objects in the absence of evidence to the contrary and cannot categorically be considered legitimate military targets. Israel's extensive and wanton destruction of civilian property not justified by military necessity is a war crime amounting to a grave breach of the Fourth Geneva Convention.

3.3.2 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 Asma' Bint Baker School was one of the 23 coordinates provided. Three civilians were killed in the attack on the school.

3.4 Proportionality

3.4.1 The principle of distinction must be read in conjunction with the principle of proportionality. In its authoritative study on customary international humanitarian law, the International Committee of the Red Cross held the latter principle to dictate that launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians or damage to civilian objects, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.[11]

3.4.2 Under the principle of proportionality, when conducting hostilities in an urban area, the combating parties hold an increased duty of diligence to spare civilians from the effects of hostilities. Israel's widespread use of heavy artillery, tanks and F-16 fighter jets against civilian population centres in the Gaza Strip, one of the most densely populated areas on earth, typically results in excessive incidental deaths and injuries to civilians and damage to civilian objects in flagrant breach of the principles of proportionality and distinction, and is therefore unlawful under international humanitarian law.

3.4.3 Examples of disproportionate use of force by the Israeli occupying forces include the attack on the house of Hamas political representative Nizar Rayyan in a densely populated neighbourhood in Jabaliya refugee camp. Not only was

[11] *Ibid.,* Rule 14, p. 46.

Rayyan – as established above – not a legitimate military target, but the attack also resulted in the killing of 15 civilian family members (including 11 children), the complete destruction of ten adjacent houses and damage to several others. On 29 December 2008 in the same neighbourhood, Israeli air strikes targeted the 'Imad 'Aqel Mosque, killing five sisters aged between four and 17 in their home and completely destroying the mosque as well as nine other adjacent houses.

3.4.4 The extent of civilian casualties and the systematic and extensive destruction of civilian objects, coupled with the declared intention of Brigadier-General Dan Harel to destroy every single Hamas-affiliated building, reveals a clear intention to disregard the principle of proportionality. As the number of civilian casualties continues to rise dramatically, Israeli justifications for the casualties become legally indefensible.

3.5 *Precautions in attack*

3.5.1 The principle of precautions in attack, codified in Article 57 of the First Additional Protocol to the Geneva Conventions, and reflective of customary international humanitarian law, determines that in the conduct of military operations constant care must be taken to spare the civilian population, civilians and civilian objects. Each party to a conflict must provide "effective advance warning" of attacks which may affect the civilian population, "do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects" and "take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimising, incidental loss of civilian life, injury to civilians and damage to civilian objects."[12]

3.5.2 In contrast to such obligations, Israel launched "Operation Cast Lead" without warning, at 11:30 am, a time when urban centres across the Gaza Strip are most populated and when children are changing shifts at school.[13] Other attacks timed with an obvious expectation of devestating civilian losses include the attack on the Ibrahimi Mosque, in the middle of the densely populated Jabaliya refugee camp, which was hit during prayer time when it was crowded with worshippers and attacks on some Hamas officials at times when they were surrounded by their family members. Given the location and timing of the vast majority of successive strikes over the past eleven days, it is logical to conclude that the attacks have been conducted in expectation of incidental loss of civilian life, injury to civilians and damage to civilian objects. The Israeli occupying power has thus failed to spare the civilian population from the effects of the attacks, in blatant violation of international humanitarian law.

4. Israel's right to self-defence

4.1 Although Israel claims to be carrying out its attacks in self-defence against Hamas rocket fire, Israel, as the Occupying Power, is the initial aggressor and "Operation Cast Lead" is not an isolated example of Israel's practices during the 42 years of its occupation of the OPT. Military raids in urban areas resulting in

[12] *Ibid.,* Rule 15, p. 51.
[13] Due to the lack of educational resources, the education system runs in shifts, with some children attending school in the morning and some in the afternoon.

similar injury and killing of civilians have been a sadly recurrent feature of the occupation. These raids along with the upholding of sanctions on the supply of essential utilities and the prolonged closure of the border crossings amount to collective punishment and unlawful reprisals under international humanitarian law and do not constitute legitimate means of self-defence.

4.2 Al-Haq acknowledges that rocket attacks by Palestinian armed groups, including Hamas, against civilian population centres within Israel are in violation of international humanitarian law. However, while Israel has the right and duty to protect its civilian population from such attacks, any response to Palestinian rocket attacks must respect the fundamental international humanitarian law principles of military necessity, proportionality and distinction. The conduct of hostilities during "Operation Cast Lead" can under no circumstances be considered to be in accordance with these principles.

5. Legal responsibilities of third parties

5.1 Israel's ongoing siege of and attack on the civilian population of the Gaza Strip gives rise to legal responsibilities of third parties. The UN Security Council, for example, must transcend the political gridlock that has characterised its engagement in the Israeli/Palestinian conflict by adopting concrete collective measures, such as the imposition of sanctions, in order to ensure Israel's compliance with its obligations under international humanitarian and human rights law.

5.2 In the event of the Security Council's continued failure to take decisive action, the UN General Assembly, in accordance with the UN Charter, must convene an emergency session under General Assembly Resolution 377, *Uniting for Peace*, with a view towards the adoption of collective measures against Israel, on the basis that its ongoing attacks against the Gaza Strip constitute a threat to international peace and security.

5.3 On the basis of the obligation "to ensure respect" for the provisions of the Geneva Conventions, as stipulated in their Common Article 1, the High Contracting Parties must take appropriate measures to compel Israel to abide by its obligations under international humanitarian law.

5.4 As per Article 146 of the Fourth Geneva Convention, the High Contracting Parties further have a responsibility to effectively search for and bring before their courts persons committing, or ordering to be committed, grave breaches of the Fourth Geneva Convention, such as the wilful killing of civilians and the extensive destruction of property not justified by military necessity and carried out unlawfully and wantonly.

5.5 European Union (EU) institutions and member states should make effective use of the European Union Guidelines on Promoting Compliance with International Humanitarian Law (2005/C 327/04) to ensure Israel complies with international humanitarian law under paragraph 16 (b), (c) and (d) of these guidelines, including through the adoption of immediate restrictive measures and sanctions.

6. Concluding remarks

6.1 During "Operation Cast Lead" Israel has not only publicly expressed but also effectively demonstrated its unwillingness to distinguish between civilians and combatants on the one hand and between civilian objects and military objectives on the other. Acting upon a legally false claim that anything allegedly affiliated with Hamas – be it a home, school, mosque or a chicken farm – is a legitimate military target, Israel attempts to create a legal façade for its unlwaful attacks on the Gaza Strip. Further, by disguising its offensive in the form of claimed self-defence, Israel seeks to legitimise the killing of almost 700 Palestinians, the vast majority of whom were civilians (including many children), and the injury of more than 3,000, in addition to the destruction of hundreds of homes and the damage of thousands.

6.2 This cynical manipulation of the letter and spirit of international law has made way for an international discourse which risks reinterpreting and therefore compromising the most fundamental principles of international law for the sake of political interests. This in turn has resulted in the continuing failure of the international community, including the High Contracting Parties of the Geneva Conventions, the UN Security Council and General Assembly and the EU to effectively engage their own clearly defined legal obligations to ensure respect for international humanitarian law and amounts to tacit acquiescence to Israel's calculated and systematic disregard for international humanitarian law.

6.3 The cost of international inaction is being born by a terrorised Palestinian civilian population who has no safe haven. It is therefore necessary for the international community to reaffirm its commitment to the fundamental principles of international humanitarian law and to create the necessary political will to take effective measures against those who ridicule and blatantly violate them.

6.4 Any genuine international intervention that aims at achieving a just and durable solution to the conflict must above all acknowledge international law as the basis of any agreement and address the root cause of the conflict, the Israeli occupation.