

## I. The Report of the Israeli Ministry of Foreign Affairs - Paras 28 to 169

N.B. As per the **disclaimer**, neither the ICRC nor the authors can be identified with the opinions expressed in the **Cases and Documents**. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven**; nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

[Source: “The Operation in Gaza, Factual and Legal Aspects”, Report, Israeli Ministry of Foreign Affairs, July 2009, available at <http://www.mfa.gov.il> (footnotes omitted)]

### THE OPERATION IN GAZA

27 DECEMBER 2008 – 18 JANUARY 2009

#### Factual and Legal Aspects

[...]

### III. THE APPLICABLE LEGAL FRAMEWORK

[...]

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

many years and intensifying in recent years as Hamas tightened its unlawful grip on Gaza.

2. Generally, international law recognises two kinds of armed conflicts: “international armed conflict” and “non-international armed conflict.” Each has its own rules, although many of the basic provisions are common to both. It is not yet settled which regime applies to cross-border military confrontations between a sovereign State and a non-State terrorist armed group operating from a separate territory.
3. In this case, the Gaza Strip is neither a State nor a territory occupied or controlled by Israel. In these *sui generis* circumstances, Israel as a matter of policy applies to its military operations in Gaza the rules of armed conflict governing both international and non-international armed conflicts. At the end of the day, classification of the armed conflict between Hamas and Israel as international or non-international in the current context is largely of theoretical concern, as many similar norms and principles govern both types of conflicts.
4. Some of the rules governing the use of force in armed conflicts are set forth in treaties, such as the Geneva Conventions of 1949 and the Regulations annexed to the Fourth Hague Convention of 1907. Others have gained acceptance by the practice of the international community and become part of customary international law. The Israeli High Court has ruled that these customary international law rules bind Israel under both international law and Israeli law. In particular, Israel’s High Court of Justice has confirmed that in the ongoing armed conflict with Palestinian terrorist organisations, including Hamas, Israel must adhere to the rules and principles in (a) the Fourth Geneva Convention, (b) the Regulations annexed to the Fourth Hague Convention (which reflect customary international law), and (c) the customary international law principles reflected in certain provisions of Additional Protocol I to the Geneva Conventions on 1949. Israel is not a party to the Additional Protocol I, but accepts that some of its provisions accurately reflect customary international law.

[...]

## IV. THE CONTEXT OF THE OPERATION

### A. The Ongoing Armed Conflict with Hamas

1. Israel has been engaged in an ongoing armed conflict with Hamas and other Palestinian terrorist organisations since the massive outbreak of armed terrorist violence and hostilities in October 2000, what the Palestinians have termed the *Al Aqsa Intifadah*. [...]
2. Hamas has chosen, in particular, to launch extensive and almost incessant rocket and mortar attacks against civilian communities in Southern Israel. For the eight years preceding the Gaza Operation at issue in this Paper, Hamas and other terrorist organisations (such as “Palestinian Islamic Jihad” and the “Popular Resistance Committees”) launched more than 12,000 rockets and mortar rounds from the Gaza Strip at the towns in Southern Israel. The daily attacks began in 2000 and have continued since that time with only brief respites in the violence.
3. In August 2005 Israel withdrew from the Gaza Strip, terminating its civilian and military presence there. Hamas exploited this disengagement to promote its terrorist agenda and publicly endorsed terrorism as the preferred tool for achieving its political goals. For instance, on 30 March 2007 Hamas spokesman Ismail Radwan issued a call to “liberate Palestine” by attacking and killing Jews rather than by engaging in diplomatic efforts.
4. In June 2007 Hamas executed a violent and bloody *coup d’état* in the Gaza Strip, [...] neutralising the Palestinian Authority’s military and political power and setting up a radical Muslim entity in its place. [...]

## B. Hamas' Increasing Attacks on Israel During 2008

1. Following Hamas' violent takeover of the Gaza Strip, the frequency and intensity of rocket and mortar attacks on Israel increased dramatically. In 2008 alone, nearly 3,000 rockets and mortars were fired, despite the six relatively calm months of the lull ("*Tahadiya*") [...].
2. On Friday, 19 December 2008, Hamas unilaterally announced the end of the *Tahadiya*, launching dozens of Qassam and longer-range Grad rockets against Israeli population centres. [...] On [...] 24 December 2008, thirty more rockets were launched into Israel. [...]
3. In these circumstances, there is no question that Israel was legally justified in resorting to the use of force against Hamas. As explained above, this resort to force occurred in the context of an ongoing armed conflict between a highly organised, well-armed, and determined group of terrorists and the State of Israel. The Gaza Operation was simply the latest in a series of armed confrontations precipitated by the attacks perpetrated without distinction against all Israeli citizens by Hamas and its terrorist allies. In fact, over the course of this conflict, Israel conducted a number of military operations in the West Bank and the Gaza Strip, to halt terrorist attacks.

[...]

## E. Stages of the Operation

1. On 27 December 2008, after exhausting other alternatives and after issuing warnings that Israel would attack if the rocket and mortar assault from Gaza did not stop, the IDF launched a military operation against Hamas and other terrorist organisations in the Gaza Strip. The Operation was limited to what the IDF believed necessary to accomplish its objectives: to stop the bombardment of Israeli civilians by destroying and damaging the mortar and rocket launching apparatus and its supporting infrastructure, and to improve the safety and security of Southern Israel and its residents by reducing the ability of Hamas and other terrorist organisations in Gaza to carry out future attacks. The Gaza Operation did not aim to re-establish an Israeli presence in the Gaza Strip.
2. The Gaza Operation commenced with aerial operations on 27 December 2008. These focused on Hamas terrorist infrastructure, as well as rocket and mortar launching units. The Israel Air Force ("IAF") targeted military objectives, including the headquarters from which Hamas planned and initiated operations against Israel, command posts, training camps and weapons stores used in the planning, preparation, guidance and execution of terrorist attacks. [...]
3. On 3 January 2009, one week into the Gaza Operation and facing the continued rocket and mortar attacks on Israeli civilians, the IDF commenced a ground manoeuvre. Despite initial reluctance, a ground manoeuvre was necessary because, despite the Israeli aerial attacks, Hamas refused to stop firing on Israeli localities. [...] Ground forces entered the Gaza Strip with naval and air support. The objectives of this manoeuvre included undermining Hamas' terrorist infrastructure, taking control of rocket and mortar launching sites and reducing the number of attacks on Israeli territory. The IDF expanded the ground manoeuvre on 10 January 2009, entering deeper into the Gaza Strip, with the objective of dismantling terrorist infrastructure and taking control of rocket launching sites in the heart of the urban areas.
4. The Gaza Operation ended on 17 January 2009 (after 22 days in all) with Israel's implementation of a unilateral ceasefire. Subsequently, IDF troops began their withdrawal from the Gaza Strip, which they completed on 21 January 2009 in accordance with Security Council Resolution 1860. [...]

## V. THE USE OF FORCE

### A. The Legal Framework

1. Even where resort to force is justified, [...] customary law limits the manner in which a State can exercise force (*jus in bello*). The two critical aspects of this limitation – the principle of distinction and the principle of proportionality – are both designed to protect civilians not taking direct part in the hostilities and civilian objects, while taking into account the military necessities and the exigencies of the situation.
2. The fact of civilian casualties in an armed conflict, even in significant numbers, does not in and of itself establish any violation of international law. In fact, the doctrine of “proportionality operates in scenarios in which incidental injury and collateral damage are the foreseeable, albeit undesired, result of attack on a legitimate target.” [...]
3. [...] [O]ne cannot jump from the unfortunate occurrence of civilian harm to the unfounded conclusion that the attacks were illegal. The critical but often omitted link in determining the legality of an attack – even an attack that results in death or injury to civilians – is whether the attacking forces sought to observe the rules of the Law of Armed Conflict, and in particular the principles of distinction and proportionality. This analysis depends on the particular facts of each incident. When individual attacks are legitimate, “the mere cumulation” of such instances, all of which are deemed to have been lawful, “cannot *ipso facto* be said to amount to a crime.”

[...]

#### (1) The Principle of Distinction

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

##### (a) *The Obligation Not to Target the Adversary’s Civilians*

1. It is unlawful to deliberately make civilians the object of attack. As the customary international law principle is reflected in Additional Protocol I, “[t]he civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the *primary purpose* of which is to spread terror among the civilian population are prohibited.” Rather, “[a]ttacks shall be limited strictly to military objectives.”
2. It is important to make clear what this principle does *not* require. First, by definition, the principle of distinction does not forbid the targeting of combatants, nor the targeting of civilians who take a direct part in the hostilities.
3. Second, this principle addresses only deliberate targeting of civilians, not incidental harm to civilians in the course of striking at legitimate military objectives. This understanding of customary international law was made explicit by numerous States in their ratifications of Additional Protocol I, and many other States have officially adopted this interpretation.
4. Direct participation in hostilities has been interpreted by Israel’s High Court of Justice as involving all

persons that perform the function of combatants, including “a civilian bearing arms (openly or concealed) who is on his way to the place where he will use them against the army, at such place, or on his way back from it,” as well as “a person who collected intelligence on the army, whether on issues regarding the hostilities . . . or beyond those issues . . . ; a person who transports unlawful combatants to or from the place where the hostilities are taking place; a person who operates weapons which unlawful combatants use, or supervises their operation, or provides service to them, be the distance from the battlefield as it may.” [See Israel, The Targeted Killings Case, paras 34-35]

5. Fourth, more broadly, the presence of *civilians at a site* (whether voluntarily or involuntarily) does not by itself forbid an attack on an otherwise legitimate military target. [...]
6. The determination of what is a lawful “military objective” turns on an assessment of “military advantage.” Additional Protocol I reflects customary international law in defining “military objectives” as “those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage.” The tactics and strategy of the opposing force can transform sites that may once have been purely civilian into legitimate military objectives. [...]
7. The military manuals of many States also confirm that the relevant “military advantage” defining a “military objective” relates to “the military campaign or operation of which the attack is a part considered as a *whole* and not only from isolated or particular parts of that campaign or operation.” Further, the “security of the attacking forces” is a proper consideration in assessing military advantage.
8. The manuals recognise as well that objects “normally dedicated to civilian purposes, but which are being used for military purposes” (such as houses, schools or churches) lose their protection under the applicable law, and may properly become lawful “military objectives.” [...]
9. The loss of absolute protection for a civilian site when it is misused by the adversary as a locus for military operations is broadly recognised in the Law of Armed Conflict. Thus, for instance, the hidden placement of a significant military asset within a civilian building or even the presence of enemy combatants can make the otherwise civilian site amenable to attack. This is a harsh reality of urban warfare.

[...]

1. [...] [A] commander’s *intent* is critical in reviewing the principle of distinction during armed conflict. Where it is believed in good faith, on the basis of the best available intelligence, that a civilian building has been misused as a sanctuary for military fighters, military intelligence, or the storage and manufacture of military assets, the commander has a legitimate basis for using force against the site. This is so even where judgment is based on limited information in a fluid battlefield situation.
2. The definition of military targets thus could include terrorists who move rapidly throughout a neighbourhood, even where they shelter themselves in civilian dwellings. It does not relieve the commander of the obligation to judge the proportionality of his action. But it makes clear that a civilian site can be converted to a legitimate target by the conduct of the opposing force in using such places for military purposes, including the escape of armed combatants.

[...]

## (2) The Principle of Proportionality

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

1. In addition to the principle of distinction, customary international law bars military attacks that are anticipated to harm civilians excessively in relation to the expected military advantage. [...]
2. The very notion of not inflicting “excessive” harm recognises that some civilian casualties may be unavoidable when pursuing legitimate military objectives. [...]
3. By definition, then, evaluation of proportionality (or excessive harm to civilians compared to military advantage) requires balancing two very different sets of values and objectives, in a framework in which all choices will affect human life. States have duties to protect the lives of their civilians and soldiers by pursuing proper military objectives, but they must balance this against their duty to minimise incidental loss of civilian lives and civilian property during military operations. That balancing is inherently difficult, and raises significant moral and ethical issues. [...]
4. Thus, the core question, in assessing a commander’s decision to attack, will be (a) whether he or she made the determination on the basis of the best information available, given the circumstances, and (b) whether a reasonable commander could have reached a similar conclusion. [...]
5. The same criteria for assessing “military advantage” apply in the proportionality context, namely that the “military advantage anticipated” from a particular targeting decision must be considered from the standpoint of the overall objective of the mission. In addition, it may legitimately include not only the need to neutralise the adversary’s weapons and ammunition and dismantle military or terrorist infrastructure, but also – as a relevant but not overriding consideration – protecting the security of the commander’s own forces.

[...]

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

1. In addition to the obligation to refrain from acts that would harm civilians disproportionately in relation to anticipated military advantage, Additional Protocol I requires both parties to a conflict to take “feasible” precautions to minimise incidental loss of civilian life. [...]
2. In assessing the adequacy of precautions, under the provisions of Additional Protocol I, the measure is one of “feasibility,” not perfection. [...]

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

[...]

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

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

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

[...]

1. The reason for these rules is clear. When a party to an armed conflict uses civilian and protected spaces for military purposes, those spaces become legitimate targets for the opposing side, thereby placing civilian lives and infrastructure in grave danger.
2. [...] Hamas' strategy was two-fold: (1) to take advantage of the sensitivity of the IDF to civilian casualties on the Palestinian side, in an attempt to deter the IDF from attacking legitimate military targets; and (2) where the IDF did attack, to wield an excellent propaganda weapon against Israel, featuring civilian casualties as well as damage to homes and public institutions. In other words, Hamas chose to base its operations in civilian areas not in spite of, but because of, the likelihood of substantial harm to civilians. The tactic did succeed in causing IDF to forego attacks on legitimate military objectives in order to protect the lives of innocent Palestinians and to preserve intact important public facilities. But in many cases, the IDF could not forego a legitimate military objective without undermining its mission and jeopardising both its soldiers and Israeli civilians. In those circumstances, the result of Hamas' approach was to make it difficult, and sometimes impossible, for IDF forces to avoid harm to civilians and civilian structures.

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

[...]

1. During the Gaza Operation, Hamas continued to launch attacks from densely populated areas and protected sites. In fact, as IDF forces advanced into Gaza, Hamas began relying even more heavily than before on rocket and mortar launches from the midst of urban centres. [...]
2. In conducting rocket attacks from within civilian sites, Hamas committed grave breaches of the principle of distinction, as well as the obligation not to put its own civilians at risk.

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

1. In addition to staging rocket attacks from civilian areas, Hamas conducted much of its fighting during the Gaza Operation from bases within private residences and public facilities, which Hamas assumed the IDF would be reluctant to attack. [...]
2. During the Gaza Operation, Hamas frequently commandeered the homes of civilians as temporary bases to attack Israeli forces.

[...]

## **Paras 230 to 265**

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



[...]

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

1. Consistent with its rules of engagement, IDF Forces sought to maintain an equilibrium between two competing considerations: military necessity and humanitarian considerations. In the course of the Gaza Operation, IDF's military necessities included first and foremost the prevention of rocket and mortar fire against Israel and Israelis, as well as the dismantling of terrorist infrastructure, but also the protection of IDF forces operating in the Gaza Strip.
2. [...] IDF troops were exposed to considerable risk by the death traps Hamas had laid for them in urban areas [...]. These took the form of booby-trapped and mined neighbourhoods, buildings, roads and tunnels, as well as anti-tank rockets, automatic weapons, and sniper fire from concealed positions in civilian buildings and suicide bombers dressed as civilians. In such circumstances, the risk for the safety and security of IDF troops was extremely high, and was properly taken into account.
3. However, like all other considerations of military necessity, the protection of IDF troops did not override all other factors. In accordance with the IDF's operational plans and rules of engagement, military necessity was balanced against the fundamental obligations of the Law of Armed Conflict, through the principles of distinction, proportionality, and the obligation to take appropriate precautions to minimise civilian harm.

#### **(a) Targeting of Hamas Terrorist Infrastructure**

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

[...]

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



the Gaza Operation. With respect to each particular target, IDF made the determination that the attacks were lawful under international law. [...]

**(b) Targeting of Terrorist Operatives**

1. In addition to Hamas terrorist infrastructure, the military operatives of Hamas and other terrorist organisations were also legitimate targets for attack by the IDF. Hamas' military forces in Gaza were comprised mainly of the Izz al-Din al-Qassam Brigades, but also of other forces making up the so-called "internal security" apparatus, which perform significant military functions during intense fighting with Israel. Due to their military functions, these internal security forces were not accorded the immunity from attack generally granted to civilians.
2. Whereas members of a civilian police force that is solely a civilian police force, who have no combat function are not considered combatants under the Law of Armed Conflict, international law recognises that this principle does not apply where police are part of the armed forces of a party. In those circumstances, they may constitute a legitimate military target. In other words, the status of the Palestinian "police" under the Law of Armed Conflict depends on whether they fulfilled combat functions in the course of the armed conflict. The evidence thus far is compelling that they are.
3. Hamas formed the Executive Force in May 2006 as a militia force loyal to Hamas and opposed to the security apparatus of the Fatah-led Palestinian Authority. Hamas drew this paramilitary force largely from its military wing, the Izz al-Din al-Qassam Brigades, and armed the members with anti-tank missiles, mortars, machine guns and grenades. The newly recruited commanders and subordinates were not obliged to give up their military wing affiliation, and continued to operate simultaneously in both functions.

[...]

1. [...] Hamas restructured the Executive Force and subdivided it into several units, including the "police." The newly established police force thereafter assumed many traditional law enforcement functions, to the extent enforcing the unlawful rule of a terrorist organisation over a population could be termed "law enforcement." As the leader of the Executive Force emphasised in an August 2007 interview, however, the force's members were also "resistance fighters," a common term for Hamas' military wing. Their weaponry continued to include machine guns and anti-tank weapons – not the tools of a regular civilian police force.
2. After its transformation, the former Executive Force continued to be closely integrated with – although not formally part of – the al-Qassam Brigades. [...] As documented by the Intelligence and Terrorism Information Center [...], many members of the internal security services also served directly in the al-Qassam Brigades.
3. Even more crucially, as noted in an April 2008 Report by the Intelligence and Terrorism Information Center, the operational military plan for hostilities with Israel was that:

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

1. Indeed, several days before the ground phase of the Gaza Operation began, Hamas police spokesman

Islam Shahwan said that the Hamas leadership had instructed police to fight against IDF forces. He added that senior police officers had drawn up action plans and that the police and the security forces were on high alert for a ground assault. He further noted that “the police forces had received ... instructions from the leadership to fight the enemy in [the event of] an invasion” into the Gaza Strip.

2. It appears that the police in fact followed these instructions. In an interview about the functioning of the police during the Gaza Operation, Hamas police chief Jamal Jarah said that “[t]he police was able to defend the resistance home front by tracking down agents and arresting them” and that “the police took part [in the fighting] alongside the resistance and helped it defend the soil of Gaza.” Other leaders of Hamas’ internal security forces made similar statements. [...] All of these statements confirm the reality that Hamas intended to, and did, in fact, employ its internal security forces for military activities during the Gaza Operation. Under the Law of Armed Conflict, those security forces therefore are regarded for the purposes of the conduct of hostilities as combatants, and as combatants, they are legitimate military targets.
3. This collective role of the Gaza “police” as an integral part of Hamas armed forces is further evidenced by the fact that many Gaza “policemen” were also members of the al-Qassam Brigades. [...]
4. In fact, there is evidence that an overwhelming majority of the police forces were also members of the Hamas military wing or activists of Hamas or other terrorist organisations. A recent study has reviewed a list of all the internal security services members that Hamas reported killed during the Gaza Operation – consisting of 245 names in total. It found that 75.2 percent were Hamas activists (mostly members of the al-Qassam Brigades), and the total number of terrorist activists and fighters (including members of other terrorist groups operating in Gaza) from among the number of fatal casualties of the Palestinian security forces was 311, or 90.7 percent. In other words, more than nine out of every ten alleged “civilian police” were found to be armed terrorist activists and combatants directly engaged in hostilities against Israel.
5. This evidence demonstrates that considering Hamas “police” casualties as civilians is inappropriate. The reality is that the internal security services have been and continue to be a cadre of terrorist operatives armed with a variety of heavy weapons including anti-tank missile launchers, with standing orders to fight Israeli forces. Under the Law of Armed Conflict, Israel is permitted to target such forces and their bases of operation.

#### **(4) IDF Precautions During the Gaza Conflict**

[...]

##### **(b) Advance Notice to Civilians**

1. The IDF [...] made special efforts to notify civilians of impending IDF operations and to instruct them how to avoid harm. The early warnings system was comprised of several layers that were complementary to each other.
2. First, general warnings were used, calling on civilians to stay away from sites where Hamas was conducting combat activities. In addition, regional warnings were distributed in certain areas, calling on civilians to leave those areas before IDF forces operated in them. Efforts were made to include in these warnings sufficient information to the residents, including a timeframe for the evacuation and designated

specific routes for this purpose leading to safe areas. Far from having no place to flee, residents could – and the vast majority did – move to safe locations. Finally, specific warnings were issued to residents of particular buildings before attack.

3. Throughout the Gaza Operation, the IDF employed a variety of methods to communicate warnings effectively. The warning techniques included:
  - *Radio Broadcasts and Phone Calls*: The IDF conveyed instructions and advance warnings to residents by local radio broadcasts with IDF announcements and by about 165,000 phone calls. This involved specific notices as well as a daily news broadcast (the latter from 31 December onwards).
  - *Dropping of Leaflets*: During the Gaza Operation, the IDF dropped a total of some 2,500,000 leaflets of various kinds in the Gaza Strip. Some of the leaflets warned civilians to distance themselves from military targets, including buildings containing weapons, ammunitions or tunnels, or areas where terrorist activity was being conducted. Other leaflets directed residents to leave a particular location and move to a safe zone by a certain route and within a defined period of time. Such leaflets were distributed, for instance, in the northern Gaza neighbourhood of Sajaiya. While warnings were a significant tool to reduce the likelihood of civilian casualties, IDF forces did not consider the distribution of leaflets alone as sufficient to presume the absence of civilians at the relevant locations.
  - *Specific Warnings Before Attacks*: In addition to the above, the IDF made specific telephone calls just before an attack was about to take place, informing residents at risk about the upcoming strike and urging them to leave the place. In certain instances, although such warnings were made, the civilians chose to stay. In such cases, the IDF made even greater efforts to avoid civilian casualties and minimise collateral damage *by firing warning shots from light weapons that hit the roofs* of the designated targets, before proceeding with the strike. These warnings were accompanied by real-time surveillance in order to assess the presence of civilians in the designated military target, despite the advance warnings. Accordingly, the commander in charge assessed whether the collateral damage anticipated, including to those who chose to stay at the premises, was not excessive in relation to the military advantage anticipated. The specific warnings were generally effective. [...]
4. While the warning systems implemented by the IDF did not provide a 100 percent guarantee against civilian casualties, they were, in fact, highly effective. Aerial video surveillance by IDF forces confirmed the departure of civilians from targeted areas prior to the attack as a direct result of the warnings.

[...]

## **II. The Report of the United Nations Fact-Finding Mission - Paras 1 to 392**

[Source: “Report of the United Nations Fact-Finding Mission on the Gaza Conflict”, Human Rights Council, Doc. A/HRC/12/48, 25 September 2009, available at :

<http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf>, footnotes omitted]

## Report of the United Nations Fact-Finding Mission on the Gaza Conflict

[...]

### EXECUTIVE SUMMARY

#### A. Introduction

1. On 3 April 2009, the President of the Human Rights Council established the United Nations Fact Finding Mission on the Gaza Conflict with the mandate “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 and 18 January 2009, whether before, during or after.”

[...]

### PART ONE: METHODOLOGY, CONTEXT AND APPLICABLE LAW

[...]

#### IV. APPLICABLE LAW

1. The Mission’s mandate covers all violations of international human rights law (IHRL) and international humanitarian law (IHL) that might have been committed at any time, whether before, during or after, in the context of the military operations that were conducted in Gaza during the period from 27 December 2008 to 18 January 2009. The Mission has therefore carried out its task within the framework of general international law, in particular IHRL and IHL.

[...]

#### B. International humanitarian law

[...]

1. The legal framework applicable to situations of occupation includes provisions contained in the Hague Regulations (especially articles 42-56), the Fourth Geneva Convention (especially articles 47-78) and Additional Protocol I, and customary international law. [...]
2. Article 42 of the Hague Regulations, regarded as customary international law, prescribes that “territory is considered occupied when it is actually placed under the authority of the hostile army”. The occupying authority so established shall take all measures in its power “to restore, and ensure, as far as possible, public order and safety” in the occupied area (art. 43). These provisions call for an examination of whether there was exercise of authority by Israel in the Gaza Strip during the period under investigation.
3. While the drafters of the Hague Regulations were as much concerned with protecting the rights of the State whose territory is occupied as with protecting the inhabitants of that territory, the drafters of the Fourth Geneva Convention sought to guarantee the protection of civilians (“protected persons”) in times

of war regardless of the status of the occupied territories. That the Fourth Geneva Convention contains requirements in many respects more flexible than the Hague Regulations and thus offering greater protections was recognized by the International Criminal Tribunal for the former Yugoslavia in the Naletelic case, where the Trial Chamber applied the test contained in article 6 of the Fourth Geneva Convention: the protections provided for in the Fourth Geneva Convention become operative as soon as the protected persons fall “in the hands” of a hostile army or an occupying Power, this being understood not in its physical sense but in the broader sense of being “in the power” of a hostile army. The Trial Chamber concluded that: “the application of the law of occupation as it effects ‘individuals’ as civilians protected under Geneva Convention IV does not require that the occupying Power have actual authority”.

4. Israel has without doubt at all times relevant to the mandate of the Mission exercised effective control over the Gaza Strip. The Mission is of the view that the circumstances of this control establish that the Gaza Strip remains occupied by Israel. The provisions of the Fourth Geneva Convention therefore apply at all relevant times with regard to the obligations of Israel towards the population of the Gaza Strip.
5. Despite Israel’s declared intention to relinquish its position as an occupying Power by evacuating troops and settlers from the Gaza Strip during its 2005 “disengagement”, the international community continues to regard it as the occupying Power.
6. Given the specific geopolitical configuration of the Gaza Strip, the powers that Israel exercises from the borders enable it to determine the conditions of life within the Gaza Strip. Israel controls the border crossings (including to a significant degree the Rafah crossing to Egypt, under the terms of the Agreement on Movement and Access) and decides what and who gets in or out of the Gaza Strip. It also controls the territorial sea adjacent to the Gaza Strip and has declared a virtual blockade and limits to the fishing zone, thereby regulating economic activity in that zone. It also keeps complete control of the airspace of the Gaza Strip, inter alia, through continuous surveillance by aircraft and unmanned aviation vehicles (UAVs) or drones. It makes military incursions and from time to time hit targets within the Gaza Strip. No-go areas are declared within the Gaza Strip near the border where Israeli settlements used to be and enforced by the Israeli armed forces. Furthermore, Israel regulates the local monetary market based on the Israeli currency (the new sheqel) and controls taxes and custom duties.
7. The ultimate authority over the Occupied Palestinian Territory still lies with Israel. Under the law and practice of occupation, the establishment by the occupying Power of a temporary administration over an occupied territory is not an essential requirement for occupation, although it could be one element among others that indicates the existence of such occupation. [...] Although Israel has transferred to the Palestinian Authority a series of functions within designated zones, it has done so by agreement, through the Oslo Accords and related understandings, keeping for itself “powers and responsibilities not so transferred”. When Israel unilaterally evacuated troops and settlements from the Gaza Strip, it left in place a Palestinian local administration. There is no local governing body to which full authority has been transferred. In this regard, the Mission recalls that the International Court of Justice, in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, regards the transfer of powers and responsibilities by Israel under various agreements with the Palestine Liberation Organization (PLO) as having “done nothing” to alter the character of Israel as an occupying Power.

[...]

1. The developments that have taken place in the past two decades, in particular through the jurisprudence of international tribunals, have led to the conclusion that the substantive rules applicable to either international or non-international armed conflicts are converging. The Mission nonetheless recognizes that certain differences exist in relation to the regime of enforcement established by treaty law, in particular the regime of “grave breaches” contained in the Geneva Conventions.
2. Military hostilities took place between the Israeli armed forces and the military wing of Hamas (al-Qassam Brigades) and of other Palestinian factions, including the al-Aqsa Martyrs’ Brigades, loosely affiliated with the Fatah movement in control of the Palestine Authority. The Israeli Supreme Court has seen the confrontation between Israeli armed forces and what it calls “terrorist organizations” active in the Occupied Palestinian Territory as an international armed conflict on two grounds: the existing context of the occupation and the cross-border nature of the confrontation. Nonetheless, as the Government of Israel suggests, the classification of the armed conflict in question as international or non-international, may not be too important as “many similar norms and principles govern both types of conflicts”.
3. It is common for armed conflicts to present elements of an international as well as of a non-international character. The rules contained in article 3 common to the four Geneva Conventions, regarded as customary international law, are the baseline rules applicable to all conflicts. The concern for the protection of civilians and those *hors de combat* in all kinds of conflicts has led to an increasing convergence in the principles and rules applicable to international and non-international armed conflicts, as was authoritatively held by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia in the *Tadić* case. [...]

## **PART TWO: OCCUPIED PALESTINIAN TERRITORY**

### **THE GAZA STRIP**

#### **Section A: Military operations**

#### **V. THE BLOCKADE: INTRODUCTION AND OVERVIEW**

1. The military operations of 28 December to 19 January 2009 and their impact cannot be fully evaluated without taking account of the context and the prevailing living conditions at the time they began. In material respects, the military hostilities were a culmination of the long process of economic and political isolation imposed on the Gaza Strip by Israel, which is generally described as a blockade. [...]
2. The blockade comprises measures such as the closure of border crossings, sometimes completely for a number of days, for people, goods and services, and for the provision of fuel and electricity. The closure has had severe effects on trade and general business activity, agriculture and industry in the Gaza Strip. Electricity and fuel that are provided from Israel are essential for a broad range of activities from business to education, health services, industry and agriculture. Further limits to the fishing area in the sea adjacent to the Gaza Strip were fixed and enforced by Israel, negatively impacting on fishing activities and the livelihood of the fishing community. Israel also established a buffer zone of variable and uncertain width along the border, together with a sizeable no-go area in the northern part of the Gaza Strip where some Israeli settlements used to be situated. This no-go area is in practice an enlarged buffer zone in the northern part of the Gaza Strip where people cannot go. The creation of the buffer zone has forced the relocation of a number of factories from this area closer to Gaza City,



causing serious environmental concerns and potential health hazards for the population. People's movements have also been drastically restricted, with only a few businesspeople allowed to cross on a very irregular and unpredictable basis.

3. Because of the occupation, which created so many ties of dependence, and for other geographic, political and historical reasons, the availability of goods and services as well as the carrying-on of daily life in the Gaza Strip are highly dependent on Israel and its policies regarding the area. Food and other consumable items as well as fuel, electricity, construction materials and other items are traded from or through Israel. Israel also serves as the communication channel for the population of Gaza with the rest of the Occupied Palestinian Territory and the world, including for purposes of education and exchange programmes. [...]
4. In effect, economic activity in the Gaza Strip was severely affected because of the blockade. Since the military operation, the economy has almost come to a standstill. The private sector, particularly the manufacturing industry, has suffered irreparable damage.

[...]

1. The Mission holds the view that Israel continues to be duty-bound under the Fourth Geneva Convention and to the full extent of the means available to it to ensure the supply of foodstuff, medical and hospital items and others to meet the humanitarian needs of the population of the Gaza Strip without qualification. Furthermore, the Mission notes the information it received regarding the lack of compliance by the Government of Israel even with the minimum levels set by the Israeli Court, and in this regard observes that the Government retains wide discretion about the timing and manner of delivering fuel and electricity supplies to the Gaza Strip, and that this discretion appears to have been exercised capriciously and arbitrarily. [See Israel, Power Cuts in Gaza]

[...]

## **VII. ATTACKS ON GOVERNMENT BUILDINGS AND POLICE**

### **A. Deliberate attacks on Gaza government infrastructure**

#### **1. Overview of damage to Gaza government buildings**

1. In its early recovery and reconstruction plan for Gaza, the Palestinian Authority states that “seven government institutions were either completely or partially levelled (including the Government Palace, the Archives building, the General Personnel Council, and the Presidential Compound), and the Ministries of Interior, Justice and Culture were either partially or entirely destroyed, along with their associated compounds. In addition, 19 municipal facilities were damaged and 11 were totally destroyed, including commercial centres such as markets, slaughterhouses and stores.”

#### **2. The Israeli air strikes on the Gaza main prison and on the Palestinian Legislative Council building**

1. The Mission visited two locations where government buildings were destroyed by Israeli air strikes: the



Palestinian Legislative Council building and the main prison in the al-Saraya complex in Gaza City. [...]

2. The main prison was located in a densely built-up area of Gaza City in the al-Saraya complex of buildings occupied by government departments, including the Ministries of Education, Transport and the Interior. The prison itself was an old building, several stories high, reportedly used as a prison by successive authorities in charge of Gaza during the previous and present centuries. It held both common offenders and political detainees.
3. While there were some discrepancies in the different accounts of this incident, the Mission was able to ascertain that the complex was attacked at 11 a.m. on 28 December 2008, on the second day of the air strikes by Israel. At the time of the attack between 200 and 300 prisoners were held in the facility, most of the almost 700 prisoners having been released in the days before the strike. [...] The guards had opened the prison doors immediately after the first strike. Others reported that “some prisoners were killed in the bombing, while others escaped the destroyed building.” [...]
4. Despite the limited number of casualties that may have occurred, the high probability of more serious loss of life and of injuries in an attack on a populated prison facility could not have been discounted by the Israeli forces. The Mission has taken note of the assessment of the Israeli air force that 99 per cent of the strikes it carried out were accurate. In the light of this claim and in the absence of explanations to the contrary from the Israeli Government, it can only be concluded that the prison was the intended target of the strike. There is no indication from the information gathered on the incident and an inspection of the site that there was any cause for considering the prison building a “military objective”.
5. The Palestinian Legislative Council building in central Gaza City was, according to information provided by the Israeli armed forces on their official web site, attacked on 31 December 2008. Mr. Ahmad Bahr, then Acting Speaker of the Palestinian Legislative Council in Gaza, stated to the Mission that it was hit by three missiles launched from fighter planes. The Mission [...] saw the rubble of the severely damaged three-storey building of the Parliament, which had been completed two years before. It was explained to the Mission that the new building contained a videoconferencing room which allowed the Gazan parliamentarians to hold joint sessions with the members of Parliament based in Ramallah. No casualties as a result of the strike on the Legislative Council building were reported to the Mission.

[...]

### **3. The position of the Government of Israel**

1. The Mission observes that the Government of Israel is not alleging that any Hamas military activity, such as launching of rockets, storage of weapons or planning of operations, was carried out in the Legislative Council building, the Ministry of Justice or the main prison. The justification of the Government of Israel for the strike on the Palestinian Legislative Council is that it is a “Hamas Government site”, and that such sites “serve as a critical component of the terrorist groups’ infrastructure in Gaza” and “constitute part of Hamas’s mechanism of control”.

[...]

### **4. Factual findings**

[...]

1. The factual question of whether these two institutions and their buildings served a military purpose must be considered with regard to the legal definition of military objectives. [...]

## 5. Legal analysis

1. In assessing the Israeli strikes against the Legislative Council building and the main prison, the Mission first of all notes that Hamas is an organization with distinct political, military and social welfare components.
2. Since July 2007 Hamas has been the *de facto* government authority in Gaza. As recognized by the Israeli Government, the Hamas-led authorities in Gaza have been responsible for the civilian administration of Gaza. For instance, they employ civil servants and workers, run schools, hospitals, traffic police and the administration of justice. The fact that these institutions and the buildings housing them have been administered by authorities led by Hamas since July 2007, and no longer by a government composed of both Hamas and Fatah members has, in the view of the Mission, no bearing on the continued civilian character of these institutions. [...]
3. [...] While Hamas constitutes the *de facto* authority in Gaza, the buildings attacked and destroyed served a public purpose that cannot be regarded as “promoting Hamas terrorist activity”.
4. The fundamental rule of international humanitarian law applicable to attacks against buildings and infrastructure is enshrined in article 52 of Additional Protocol I [...]. This provision is generally recognized as codifying customary law applicable to both international and non-international armed conflicts [...].
5. The statement by the Israeli Government concerning the attack on the Legislative Council building and the Ministry of Justice does not suggest any “effective contribution to military action” that the buildings might have been making. No reference is made to any “definite military advantage” that their destruction would offer. Instead, the explanation is that government buildings constitute “part of Hamas’s mechanism of control”, that they “serve as a critical component of the terrorist groups’ infrastructure in Gaza” and that “ostensibly civilian elements of [the Hamas] regime are in reality active components of its terrorist and military efforts.”
6. The Mission observes that there is nothing unique in the fact that in Gaza ministries and prisons are part of the government’s “mechanism of control” and that the legislature’s assembly hall and administrative buildings are a critical component of the government infrastructure. That is not, however, the test applied by international humanitarian law and accepted State practice to distinguish between civilian and military objects. [...]
7. The Mission further notes that international humanitarian law also recognizes a category of civilian objects which may nonetheless be targeted in the course of armed conflict to the extent that they have a “dual use”. Examples often made for such dual-use objects, which serve both civilian and military purposes, are civilian infrastructures such as telecommunications, power-generating stations or bridges, *in so far as they are used by the military in addition to their civilian use*. There is no indication, nor any allegation of any such dual use of the Legislative Council building or of the Gaza main prison.
8. There is an absence of evidence or, indeed, any allegation from the Israeli Government and armed forces that the Legislative Council building, the Ministry of Justice or the Gaza main prison “made an

effective contribution to military action.” On the information available to it, the Mission finds that the attacks on these buildings constituted deliberate attacks on civilian objects in violation of the rule of customary international humanitarian law whereby attacks must be strictly limited to military objectives.

9. In the Mission’s view these facts further indicate the commission of the grave breach of extensive destruction of property, not justified by military necessity and carried out unlawfully and wantonly, as defined in article 147 of the Fourth Geneva Convention.
10. The Mission rejects the analysis of present and former senior Israeli officials that, because of the alleged nature of the Hamas government in Gaza, the distinction between civilian and military parts of the government infrastructure is no longer relevant in relation to Israel’s conflict with Hamas. [...]
11. The Mission is of the view that this is a dangerous argument that should be vigorously rejected as incompatible with the cardinal principle of distinction. International humanitarian law prohibits attacks against targets that do not make an effective contribution to military action. Attacks that are not directed against military (or dual use) objectives are violations of the laws of war, no matter how promising the attacker considers them from a strategic or political point of view. [...]

## **B. Deliberate attacks on the Gaza police**

1. Information received by the Mission indicates that 248 members of the Gaza police were killed in the course of Israel’s military operations. In other words, more than one out of every six casualties was a member of the Gaza police.

[...]

1. The attacks investigated by the Mission were all directed against facilities used by the police force called shurta (police) in official documents of the Gaza authorities and referred to as “civil police” in many English reports.

[...]

## **2. Conflicting characterizations of the Gaza security forces**

### **(a) The approach of the Government of Israel**

1. The position of the Government of Israel is that “due to their military functions, these internal security forces were not accorded the immunity from attack generally granted to civilians.” [...] [See *supra* Part I, “The View of the Israeli Ministry of Foreign Affairs”, paras 237-248]

### **(b) The approach of the Gaza authorities**

1. The characterization of the Gaza internal security forces by the Government of Israel differs sharply from the tasks of the police as they are described on the official website of the Gaza Ministry of Interior, in orders to the police issued by the Minister of Interior which the Mission has reviewed, and in the interviews with the Director of Police and the police spokesman conducted by the Mission.

[...]

1. According to the police spokesperson, during the military operations the mandate of the police was firstly to “protect the internal front”, i.e. ensure that the relationship between the civilian population and the authorities stayed “intact”. Secondly, the police were to monitor the distribution of humanitarian goods to the civilian population. Thirdly, they were to continue regular law-enforcement duties, with a particular focus on combating looting and speculation on prices.

### **3. The Mission’s assessment of the role and composition of the police**

1. In order to shed some light on where the truth might lie between these two conflicting descriptions of the police, the Mission finds it necessary to examine the development of the security forces linked to Hamas after its election victory in January 2006. When Mr. Said Seyam, a senior Hamas representative, took office as the Palestinian Authority’s Minister of Interior in April 2006, he found that he had little or no control over the Palestinian Authority’s security forces, which were put under the control of the President of the Palestinian Authority and of officials loyal to him. On 20 April 2006, he announced the formation of a new security force reporting directly to him. This was the Security Forces Support Unit, also known as the Executive Force (*al-Quwwa al-Tanfiziyya*). The new security force appears to have had a double function as both a law-enforcement agency and, at least potentially, a military force. It was officially charged with enforcing public security and protecting property. At the same time, he appointed Mr. Jamal Abu Samhadana, commander of the Popular Resistance Committees, as the head of the Executive Force and announced that it would be composed of 3,000 new recruits from various Palestinian armed groups, including al-Qassam Brigades. The newly appointed commander reportedly declared: “[The Executive Force] will be the nucleus of the future Palestinian army. The resistance must continue. We have only one enemy. ... I will continue to carry the rifle and pull the trigger whenever required to defend my people. We are also a force against corruption. We are against thieves, corrupt officials and law breakers.”
2. In August 2007, following the June 2007 Hamas seizure of full control over Gaza, the current Director of the Gaza authorities’ civil police, then head of the Executive Force, Gen. Abu Obeidah, described the planned reorganization of the security services in Gaza. Executive Force members were to be integrated into the civil police. He reportedly stated that Hamas was “working hard to retrain Executive Force members to perform police duties” and that the “Force will be in charge of chasing drug dealers and lawless residents”. At the same time, he stated that “members of the Force are religious, and are resistance fighters.”
3. In October 2007, the security services operating in Gaza were reorganized. The previous Palestinian Authority’s police agencies in Gaza were merged with the Executive Force. The security forces under the control of the Ministry of Interior emerging from this reorganization comprise the Civil Police, the Civil Defence, the Internal Security (an intelligence agency) and the National Security. Their mandates, according to the Gaza authorities’ Ministry of Interior’s website, are differentiated.
4. The National Security force is given specific military tasks, such as “the protection of the State from any foreign aggression” and “responsibility for the defence of the Palestinian homeland in the face of external and internal threats”. It is thus plainly a military force whose members are, under international humanitarian law, combatants. [...]

5. On 1 January 2009, during the Israeli military operations in Gaza, the police spokesperson, Mr. Islam Shahwan, informed the media that the police commanders had managed to hold three meetings at secret locations since the beginning of the armed operations. He added that “an action plan has been put forward, and we have conducted an assessment of the situation and a general alert has been declared by the police and among the security forces in case of any emergency or a ground invasion. Police officers received clear orders from the leadership to face [...] the enemy, if the Gaza Strip were to be invaded.” Confirming to the Mission that he had been correctly quoted, Mr. Shahwan stated that the instructions given at that meeting were to the effect that in the event of a ground invasion, and particularly if the Israeli armed forces were to enter urban settlements in Gaza, the police was to continue its work of ensuring that basic food stuffs reached the population, of directing the population to safe places, and of upholding public order in the face of the invasion. Mr. Shahwan further stated that not a single policeman had been killed in combat during the armed operations, proving that the instructions had been strictly obeyed by the policemen.
6. The Mission notes that there are no allegations that the police as an organized force took part in combat during the armed operations. On the basis of the information provided by the Gaza authorities [...], it would appear that 75 per cent of its members killed in the course of the military operations died as a result of the air strikes carried out during the first minutes of the Israeli attack. These men had not engaged in combat with the Israeli armed forces.

[...]

1. Except for the statements of the police spokesperson, the Israel Government has presented no other basis on which a presumption can be made against the overall civilian nature of the police in Gaza. It is true that the police and the security forces created by Hamas in Gaza may have their origins in the Executive Force. However, while the Mission would not rule out the possibility that there might be individuals in the police force who retain their links to the armed groups, it believes that the assertion on the part of the Government of Israel that “an overwhelming majority of the police forces were also members of the Hamas military wing or activists of Hamas or other terrorist organizations”, appears to be an overstatement that has led to prejudicial presumptions against the nature of the police force that may not be justified.

[...]

## 5. Legal analysis

### (a) *The applicable rules of international humanitarian law*

1. The general rule of international humanitarian law is that members of law-enforcement agencies are considered part of the civilian population, unless they have been incorporated into the armed forces of a party to the conflict. This principle is accepted by the Israeli Government. The obligation to distinguish at all times between the civilian population and combatants and to direct attacks only against military objectives (the principle of distinction) therefore generally prohibits attacks against members of the law-enforcement agencies. In its Advisory Opinion of 8 July 1996 on the Legality of the Threat or Use of

Nuclear Weapons, the International Court of Justice recognized the principle of distinction as an “intransgressible” principle of customary international law. [See ICJ, Nuclear Weapons Advisory Opinion, para. 79]

2. There are three situations in which direct attacks against members of police forces would not constitute a violation of the principle of distinction. First, if the law-enforcement agency or the unit to which the policeman belongs has been “incorporated” into the armed forces, thus conferring combatant status upon its members. Second, if individual members of the law enforcement agency are at the same time members of an armed group, they would be combatants. Thirdly, individual members of the law-enforcement agency, like any civilians, may not be targeted “unless and for such time as they take a direct part in hostilities.” Finally, as with civilians generally, policemen might be indirectly injured or killed in an attack which is directed at a military objective, as long as the attack complies with the principle of proportionality.

**(b) Conclusion**

1. The Mission will now draw conclusions with regard to each of these grounds potentially justifying the attacks against the police.
2. First, as already noted above, the Mission finds that there is insufficient information to conclude that the Gaza police as a whole had been “incorporated” into the armed forces of the Gaza authorities. Accordingly, the policemen killed cannot be considered to have been combatants by virtue of their membership in the police.
3. Second, the Mission finds that the policemen killed on 27 December 2008 cannot be said to have been taking a direct part in hostilities. Thus, they did not lose their civilian immunity from direct attack as civilians on this ground.
4. Third, the Mission examined whether the attacks on the police stations could be justified on the basis that there were, allegedly, members of Palestinian armed groups among the policemen. The question would thus be one of proportionality. The principle of proportionality is reflected in Additional Protocol I, which prohibits launching attacks “which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”
5. The Mission has earlier accepted that there may be individual members of the Gaza police that were at the same time members of al-Qassam Brigades or other Palestinian armed groups and thus combatants. Even if the Israeli armed forces had reliable information that some individual members of the police were also members of armed groups, this did not deprive the whole police force of its status as a civilian law-enforcement agency.
6. From the facts available to it, the Mission finds that the deliberate killing of 99 members of the police at the police headquarters and three police stations during the first minutes of the military operations, while they were engaged in civilian tasks inside civilian police facilities, constitutes an attack which failed to strike an acceptable balance between the direct military advantage anticipated (i.e. the killing of those policemen who may have been members of Palestinian armed groups) and the loss of civilian life (i.e. the other policemen killed and members of the public who would inevitably have been present or in the vicinity). The attacks on the Arafat City police headquarters and the Abbas Street police station, al-Tuffah police station and the Deir al-Balah investigative police station constituted disproportionate attacks in violation of customary international humanitarian law.



[...]

## Paras 439 to 536

### VIII. OBLIGATION ON PALESTINIAN ARMED GROUPS IN GAZA TO TAKE FEASIBLE PRECAUTIONS TO PROTECT THE CIVILIAN POPULATION

1. An assessment of the events occurring during the military operations in Gaza in December 2008 – January 2009 requires an investigation of the tactics used both by the Israeli armed forces and by the Palestinian armed groups in the context of their obligations under international humanitarian law to take constant care to minimize the risk of harm to the civilian population and to civilian objects. [...] In this chapter, the Mission examines allegations that the conduct of the Palestinian armed groups placed the civilian population of Gaza and civilian objects at risk of attack.

[...]

#### G. Factual findings

1. On the basis of the information it gathered, the Mission finds that there are indications that Palestinian armed groups launched rockets from urban areas. The Mission has not been able to obtain any direct evidence that this was done with the specific intent of shielding the rocket launchers from counterstrikes by the Israeli armed forces. The Mission also notes, however, that Palestinian armed groups do not appear to have given Gaza residents sufficient warning of their intention to launch rockets from their neighbourhoods to allow them to leave and protect themselves against Israeli strikes at the rocket launching sites. The Mission notes that, in any event, given the densely populated character of the northern half of the Gaza Strip, once Israeli forces gained control of the more open or outlying areas during the first days of the ground invasion, most – if not all – locations still accessible to Palestinian armed groups were in urban areas.
2. The Mission finds that the presence of Palestinian armed fighters in urban residential areas during the military operations is established. [...] While reports reviewed by the Mission credibly indicate that members of Palestinian armed groups were not always dressed in a way that distinguished them from civilians, the Mission found no evidence that Palestinian combatants mingled with the civilian population with the intention of shielding themselves from attack.

[...]

#### H. Legal findings

1. Customary international humanitarian law establishes that all “parties to the conflict must take all feasible precautions to protect the civilian population and civilian objects under their control against the effects of attacks.” [See ICRC, Customary International Humanitarian Law, Rule 22]
2. Each party to the conflict must, to the extent feasible, avoid locating military objectives within or near densely populated areas. Each party to the conflict must, to the extent feasible, remove civilian persons and objects under its control from the vicinity of military objectives.



3. These rules of customary international law are reflected in article 57 (1) of Additional Protocol I: “In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.” The following paragraphs of article 57 set forth the specific precautions to be taken by a party launching an attack.
4. In addition to the general duty to take constant care to spare the civilian population in the conduct of military operations, international humanitarian law establishes a specific prohibition against the use of civilians as human shields. Article 28 of the Fourth Geneva Convention specifically addresses this issue: “The presence of a protected person may not be used to render certain points or areas immune from military operations”. This is reinforced by article 51 (7) of Additional Protocol I:

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

These provisions reflect rules of customary law.

1. The Mission finds it useful to clarify what is meant, from a legal perspective, by using civilians or a civilian population as a human shield. Parties to a conflict are not permitted to use a civilian population or individual civilians in order to render certain points or areas immune from military operations. It is not in dispute that both Palestinian armed groups and Israeli forces were fighting within an area populated by civilians. Fighting within civilian areas is not, by itself, sufficient for a finding that a party is using the civilian population living in the area of the fighting as a human shield. As the words of article 57 (1) show (“shall not be used to render”, “in order to attempt to shield”), an intention to use the civilian population in order to shield an area from military attack is required.
2. From the information available to it, the Mission found no evidence to suggest that Palestinian armed groups either directed civilians to areas where attacks were being launched or forced civilians to remain within the vicinity of the attacks.
3. The reports received by the Mission suggest that it is likely that the Palestinian armed groups did not at all times adequately distinguish themselves from the civilian population among whom the hostilities were being conducted. Their failure to distinguish themselves from the civilian population by distinctive signs is not a violation of international law in itself, but would have denied them some of the legal privileges afforded to combatants. What international law demands, however, is that those engaged in combat take all feasible precautions to protect civilians in the conduct of their hostilities. The Mission found no evidence that members of Palestinian armed groups engaged in combat in civilian dress. It can, therefore, not find a violation of the obligation not to endanger the civilian population in this respect.
4. The conduct of hostilities in built-up areas does not, of itself, constitute a violation of international law. However, launching attacks – whether of rockets and mortars at the population of southern Israel or at the Israeli armed forces inside Gaza – close to civilian or protected buildings constitutes a failure to take all feasible precautions. In cases where this occurred, the Palestinian armed groups would have unnecessarily exposed the civilian population of Gaza to the inherent dangers of the military operations taking place around them. This would have constituted a violation of the customary rules of international

humanitarian law referred to above. [...]

## **IX. OBLIGATION ON ISRAEL TO TAKE FEASIBLE PRECAUTIONS TO PROTECT CIVILIAN POPULATION AND CIVILIAN OBJECTS IN GAZA**

1. This chapter focuses on incidents where the Mission considered compliance by Israel with its obligations under the Fourth Geneva Convention and customary rules of international law in relation to taking feasible precautions. [...]

### **A. Warnings**

1. The Israeli Government has stated that it took the following steps to warn the civilian population of Gaza [...]. [See *supra* Part I, “The View of the Israeli Ministry of Foreign Affairs”, paras 264]

[...]

#### **1. Telephone calls**

1. The Mission received first-hand information about some of these methods in its interviews with witnesses in Gaza. In the report on the attack at al-Fakhura Street junction [...], the Mission notes the credible account of Mr. Abu Askar of the telephone warning he received as a result of which he was able to evacuate up to 40 people from his and other houses. He received that call at around 1.45 a.m. and Israeli forces destroyed his house with a missile strike seven minutes later.
2. The Mission is also aware of circumstances in which telephone warnings may have caused fear and confusion. Al-Bader Flour Mills Co. [...] received two recorded messages indicating the mill was to be destroyed, but neither of these was acted upon. Five days later the mill was struck in the early hours of the morning with no warning whatsoever. The owners of the business and their staff suffered anxiety by having to evacuate the premises on two occasions as a result of receiving such messages when no strikes took place.

[...]

#### **2. Roof-knocking**

1. The Israeli Government describes that in certain circumstances its armed forces fired “warning shots from light weapons that hit the roofs of the designated targets” – a practice referred to as roof-knocking. The Israeli Government indicates that this practice was used when it appeared that people had remained in their houses despite being given some previous warning. It is not clear whether this was the only circumstance in which this method was employed. [...] The Mission [...] saw in the Sawafeary house [...] that a missile had penetrated the rear of the house on the wall near the ceiling, gone through an internal wall and exited through the wall at the front of the house near the windows. At the time (around 10 p.m. on 3 January 2009) there were several family members in the house, who happened to be lying down. The Mission cannot say what size of weapon was used on this occasion, although it was sufficiently powerful to penetrate three walls, or whether it was intended as a warning.

### **3. Radio broadcasts and leaflet dropping**

1. The radio broadcasts that the Mission listened to appeared to be generic. For example, on 3 January 2009 a radio broadcast made the following points:
  - Gaza residents are welcome to receive food and medical supplies, delivered via the Rafah, Karni and Kerem Shalom passages, at the UNRWA [United Nations Relief and Works Agency] centres throughout the Gaza Strip;
  - Israel calls on the population to move to city centres for its own safety.

This warning preceded the ground phase of the military operations. Its language clearly indicates that UNRWA centres should be regarded as places of safety and civilians may collect food from them.

1. Leaflets dropped appear to fall into a number of categories. One leaflet did not deal with attacks on a particular place but on the storage of weapons and ammunition:

To the residents of the Gaza Strip;

The IDF will act against any movements and elements conducting terrorist activities against the residents of the State of Israel;

The IDF will hit and destroy any building or site containing ammunition and weapons;

As of the publication of this announcement, anyone having ammunition and/or weapons in his home is risking his life and must leave the place for the safety of his own life and that of his family;

You have been warned.

1. In some areas specific warnings were sometimes given. One example of a sufficiently specific warning is that issued to the residents of Rafah:

Because your houses are used by Hamas for military equipment smuggling and storing, the Israeli Defense Forces (IDF) will attack the areas between Sea Street and till the Egyptian border...

All the Residents of the following neighbourhoods: Block O – al-Barazil neighbourhood – al-Shu'ara' – Keshta – al-Salam neighbourhood should evacuate their houses till beyond Sea Street. The evacuation enters into force from now till tomorrow at 8 a.m.

For your safety and for the safety of your children, apply this notice.

### **4. Factual findings**

1. Whether a warning is deemed to be effective is a complex matter depending on the facts and circumstances prevailing at the time, the availability of the means for providing the warning and the evaluation of the costs to the purported military advantage.
2. Israel was in a strong position to prepare and issue effective warnings. The preparations for its military operations were “extensive and thorough.” Israel had intimate knowledge and sophisticated up-to-date intelligence in its planning. It had the means to use the landlines and mobile telephone networks. It had complete domination of Gaza’s airspace. In terms of the practical capabilities of issuing warnings, it is perhaps difficult to imagine more propitious circumstances.
3. The Mission accepts that the element of surprise that was sought in the initial strikes might well have provided a degree of justification for not giving any advance notice of the time the strikes would take place or the buildings that would be struck.

**(a) *The question of whether civilians could be expected to respond to the warnings to leave their homes***

1. The Mission recognizes that leaflets dropped from the air can have some direct benefit in assisting the civilian population to get out of harm’s way. The effectiveness will depend on three considerations: the clarity of the message, the credibility of the threat and the possibility of those receiving the warning taking action to escape the threat.
2. [...] At the beginning of the land-air phase of the operations, the Israeli armed forces [...] dropped leaflets and made broadcasts advising people to move towards city centres.
3. There had been an intense aerial campaign from 27 December 2008 until 3 January 2009 that had seen hundreds of buildings destroyed in built-up areas of city centres. Civilians not living in city centres were being asked to leave their homes to go to places that as far as they could reasonably assess were already in much more danger than they were in their own homes. In order for the warning to be effective there had to be an objective basis to believe that they would be safer elsewhere. The Mission does not consider that such an objective evaluation could reasonably have been made by civilians in the Gaza Strip.

[...]

**(c) *The inference that those who did not go to the city centres must be combatants***

1. The warning to go to city centres came at the start of the ground invasion. In the Mission’s view it was unreasonable to assume, in the circumstances, that civilians would indeed leave their homes. As a consequence, the conclusion that allegedly formed part of the logic of soldiers on the ground that those who had stayed had to be combatants was wholly unwarranted. There are many reasons why people may not have responded. In several cases the Mission heard from witnesses about people who were physically disabled, too frail or deaf so that it was difficult or impossible to respond to the warning. In other cases, as outlined above, civilians who could have responded may have had legitimate reasons not to do so. The issuance of warning is one measure that should be taken wherever possible. The fact that a warning was issued does not, however, relieve a commander or his subordinates from taking all other feasible measures to distinguish between civilians and combatants.

2. Israeli armed forces had created the circumstances in which civilians could not reasonably believe the city centres were safe. An effective warning had to make clear why, even in those circumstances, it was better for civilians to leave than to stay in their homes.

[...]

## **6. Legal findings**

1. Chapter IV of Additional Protocol I to the Geneva Conventions addresses the issue of precautionary measures that must be taken. Article 57 (1) states that “in the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.”
2. Article 57 (2) (c) requires that “effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.”
3. The Mission regards both these provisions to be norms of customary international law. In addition, Israel appears to consider itself bound by the obligation to provide effective warnings under customary law.
4. The determination of whether the circumstances permit a warning must be made in the context of a good-faith attempt to adhere to the underlying duty to minimize death and injury to civilians or damage to civilian objects. The key limitation on the application of the rule is if the military advantage of surprise would be undermined by giving a warning. The same calculation of proportionality has to be made here as in other circumstances. The question is whether the injury or damage done to civilians or civilian objects by not giving a warning is excessive in relation to the advantage to be gained by the element of surprise for the particular operation. There may be other circumstances when a warning is simply not possible.
5. Article 57 (2) (c) requires the warning to be effective. The Mission understands by this that it must reach those who are likely to be in danger from the planned attack, it must give them sufficient time to react to the warning, it must clearly explain what they should do to avoid harm and it must be a credible warning. The warning also has to be clear so that the civilians are not in doubt that it is indeed addressed to them. As far as possible, warnings should state the location to be affected and where the civilians should seek safety. A credible warning means that civilians should be in no doubt that it is intended to be acted upon, as a false alarm or hoax may undermine future warnings, putting civilians at risk.

### **(a) *Pre-recorded generic telephone calls***

1. As regards the generic nature of some pre-recorded phone messages, the Mission finds that these lacked credibility and clarity, and generated fear and uncertainty. In substance, there is little difference between telephone messages and leaflets that are not specific. The Mission takes the view that pre-recorded messages with generic information may not be considered generally effective.

### **(b) *Warning shots delivered to roofs***

1. The Mission is doubtful whether roof-knocking should be understood as a warning as such. In the context of a large-scale military operation including aerial attacks, civilians cannot be expected to know whether a small explosion is a warning of an impending attack or part of an actual attack. In relation to the incident at the Sawafeary house recounted above, the Mission cannot say for certain if this missile

was meant to warn or to kill. It notes that, if this was meant as a warning shot, it has to be deemed reckless in the extreme.

2. The legal requirement is for an effective warning to be given. This means that it should not require civilians to guess the meaning of the warning. The technique of using small explosives to frighten civilians into evacuation, even if the intent is to warn, may cause terror and confuse the affected civilians.
3. The Mission does not have sufficient information to assess the accuracy of the Israeli Government's claim that the warning shot method was used only when previous warnings (leaflets, broadcasts or telephone calls) had not been acted upon. However, in many circumstances it is not clear why another call could not be made if it had already been possible to call the inhabitants of a house. The Mission notes that these warnings all took place in situations where the view appears to have been reached that those in the house are civilians or predominantly civilians. If the choice is between making another call or firing a light missile that carries with it a significant risk of killing those civilians, the Mission is not convinced that it would not have been feasible to make another call to confirm that a strike was about to be made.
4. Finally, apart from the issue of fear and ambiguity, there is the question of danger. The idea that an attack, however limited in itself, can be understood as an effective warning in the meaning of article 57 (2) (c) is rejected by the Mission.

### **(c) Leaflets**

1. The leaflets and radio broadcasts that told people to leave their homes and head towards city centres were in most cases lacking in specificity and clarity: people could not be certain that the warnings were directed at them in particular, since they were being issued as far as they could tell to almost everyone, and they could not tell when they should leave since there was rarely an indication of when attacks would take place. Furthermore, in the circumstances created by the Israeli armed forces, people could not reasonably be expected to flee to what appeared to be even less safe places on the basis of such non-specific warnings. Therefore, the Mission does not consider such warnings to have been the most effective possible in the circumstances and, indeed, doubts that many were effective at all.

[...]

## **Paras 913 to 1344**

### **XIII. ATTACKS ON THE FOUNDATIONS OF CIVILIAN LIFE IN GAZA: DESTRUCTION OF INDUSTRIAL INFRASTRUCTURE, FOOD PRODUCTION, WATER INSTALLATIONS, SEWAGE TREATMENT PLANTS AND HOUSING**

#### **A. The destruction of el-Bader flour mill**

1. The Mission visited the site of the air strikes and surveyed the surrounding area in Sudaniyah, west of Jabaliyah. It met and interviewed the Hamada brothers, joint owners of the el-Bader flour mill, on four occasions. [...]
2. The Hamada brothers are well-established businessmen and hold Businessman Cards, issued by the Israeli authorities to facilitate business travel to and from Israel. [...]

[...]

1. On 9 January, at around 3 or 4 a.m., the flour mill was hit by an air strike, possibly by an F-16. The missile struck the floor that housed one of the machines indispensable to the mill's functioning, completely destroying it. The guard who was on duty at the time called Mr. Hamada to inform him that the building had been hit and was on fire. He was unhurt. In the next 60 to 90 minutes the mill was hit several times by missiles fired from an Apache helicopter. These missiles hit the upper floors of the factory, destroying key machinery. Adjoining buildings, including the grain store, were not hit. The strikes entirely disabled the factory and it has not been back in operation since. A large amount of grain remains at the site but cannot be processed.
2. The Israeli armed forces occupied the disabled building until around 13 January. Hundreds of shells were found on its roof after the soldiers left. They appeared to be 40-mm grenade machine-gun spent cartridges.
3. The Hamada brothers rejected any suggestion that the building was at any time used for any purpose by Palestinian armed groups. They pointed out that all of the buildings and factories were surrounded by a high wall and manned by at least one guard at night. In addition, the Israeli authorities knew them as businessmen and they would not have been given Businessman Cards had there been any reason for the Israeli Government to suspect that they were involved with or supported armed groups. They were both adamant that their interest was and always had been industrial and commercial, and that the last thing they were prepared to do was put their business at risk.

[...]

## **2. Legal findings**

1. In considering the degree to which there may have been violations of international humanitarian law, the Mission refers to article 52 of Additional Protocol 1 [...]. The Mission also considers the following provisions to be relevant to its deliberations: Article 54 (1) and (2) of Additional Protocol I [...], Article 147 of the Fourth Geneva Convention [...].
2. No other buildings in the industrial compound belonging to the Hamadas were damaged at the time of the strikes. It appears that the strikes on the flour mill were intentional and precise.

[...]

1. The nature of the strikes on the mill and in particular the precise targeting of crucial machinery on one of the mid-level floors suggests that the intention was to disable its productive capacity. There appears to be no plausible justification for the extensive damage to the flour mill if the sole objective was to take control of the building. It thus appears that the only purpose was to put an end to the production of flour in the Gaza Strip.
2. From the facts it ascertained, the Mission finds that there has been a violation of the grave breaches provisions of the Fourth Geneva Convention. Unlawful and wanton destruction which is not justified by military necessity would amount to a war crime.
3. Having concluded that the strikes were without any military justification, and therefore wanton and unlawful, the Mission finds it useful to consider if there was any non-military purpose to the strikes.



4. The aim of the strike, if not military, could only have been to destroy the local capacity to produce flour. The question is whether such deliberate destruction of the sole remaining flour-producing capacity in the Gaza Strip can be described as having been done for the purpose of denying sustenance to the civilian population.
5. Article 54 (1) and (2) of Additional Protocol I reflect customary international law. Article 54 (2) prohibits acts whose specific purpose is the denial of sustenance for whatever reason, including starvation, forced displacement or anything else. In short, the motive for denying sustenance need not be to starve the civilian population. Indeed, the motive is irrelevant.

[...]

1. From the facts ascertained by it, the Mission finds that the destruction of the mill was carried out for the purpose of denying sustenance to the civilian population, which is a violation of customary international law as reflected in article 54 (2) of Additional Protocol I and may constitute a war crime.

[...]

## **B. The destruction of the Sawafeary chicken farms**

[...]

1. Sameh Sawafeary is a chicken farmer. His family has been in the egg production business for many years. He indicated that he, his brothers and his children owned 11 chicken farms in Zeytoun as of December 2008. The farms housed more than 100,000 chickens.

[...]

1. For the purposes of this section the Mission refers to the information it received about the systematic destruction that occurred for several days and which the witnesses were able to see during the time they were forced by the circumstances to remain in the [nearby] house of Mr. Mughrabi.
2. Mr. Sawafeary and Mr. Mughrabi informed the Mission that they had watched Israeli armoured bulldozers systematically destroy land, crops, chickens and farm infrastructure. Mr. Mughrabi stated that he watched the bulldozers plough through fields with crops and trees, destroying everything in their path. [...]
3. [...] [W]hen [M. Mughrabi] was able to return to his home after the Israeli withdrawal all 31,000 of his chickens had been killed and the coops systematically flattened.
4. [...] He pointed out that, in addition to the loss of livestock, the farm had been completely automated with significant investment in machinery, all of which had been destroyed, as had the plant for packaging the eggs. [...]
5. Mr. Sawafeary told the Mission that he and his family together supplied approximately 35 per cent of the egg market in Gaza. His own farms supplied over 10 per cent. He noted that it was not only his farms that had been destroyed but also most of his family's farms had been destroyed in the same way as his. He estimated that close to 100,000 chickens were killed in the process.

[...]

## **1. Factual findings**

[...]

1. From the facts ascertained by it, the Mission finds that the Sawafeary chicken farms, the 31,000 chickens and the plant and material necessary for the business were systematically and deliberately destroyed, and that this constituted a deliberate act of wanton destruction not justified by any military necessity.

## **2. Legal findings**

1. The Mission makes the same findings regarding article 147 of the Fourth Geneva Convention and article 54 (2) of Additional Protocol I [...] as it made above in relation to the el-Bader flour mill.

## **C. The destruction of water and sewage installation**

### **1. The Gaza wastewater treatment plant, Road No. 10, al-Sheikh Ejlin, Gaza City**

[...]

1. The Gaza wastewater treatment plant is located in the coastal area south-west of Gaza City in the al-Sheikh Ejlin neighbourhood. It was built in 1977 and expanded with support from development cooperation. It consists of a number of installations, including offices, tanks and lagoons to store raw sewage.
2. At some point between 3 and 10 January, a large missile hit the northernmost wall of lagoon No. 3, causing a massive outflow of raw sewage, which travelled a distance of 1.2 kilometres and damaged 5.5 hectares of land, including agricultural land [...].

[...]

## **Factual findings**

[...]

1. Notwithstanding the possible military advantage offered to the Israeli armed forces by the plant's location, the Mission cannot find any justification for striking the lagoon with what must have been a very powerful missile, sufficient to cause a breach 5 metres deep and 22 metres wide. It is highly unlikely that Palestinian armed groups could have taken up positions in or around the lagoon after the initial occupation of the area by Israeli armed forces: any such groups would have been exposed in the open area. The fact that the lagoon wall was struck precisely there where it would cause outflow of the raw sewage suggests that the strike was deliberate and premeditated.

## 2. Namar wells group, Salah ad-Din Street, Jabaliyah refugee camp

[...]

1. The wells group stood approximately 50 metres from the Jabaliyah refugee camp's administration building, which was also destroyed. A crater (approximately five metres wide) was still visible in the grounds belonging to the civil administration, with at its bottom the case of a rocket.
2. This was a complex of two water well pumps, one in operation and another next to it as standby. [...] [The] water well [...] produced more than 200 cubic metres per hour of the best-quality water in the area. The well supplied water to some 25,000 people in eastern and central Jabaliyah. The standby well pump was capable of pumping some 100 cubic metres of water. Both were completely destroyed on 27 December by an airstrike.
3. In the Namar water wells complex there were not only pumping machines but also a 180 kg generator, a fuel store, a reservoir chlorination unit, buildings and related equipment. These were also destroyed.
4. The operator, Mr. Abdullah Ismail al-Zein, was killed in the air strike while he was working at the station. [...]
5. The strike also blew up the pipes connecting the wells to other water wells; incoming water spilled into the area for some 10 days before the pipes could be shut off.

[...]

### Factual findings

[...]

1. The question remains as to whether the Israeli air strikes on the Namar wells group were deliberate or made in error. The Mission notes that the deployment systems and aircraft used in the strikes of 27 December (principally F-16 fighter jets and UAVs) are capable of a high degree of precision. It notes also that, by all accounts, a great deal of preparation had been put into determining and designating the targets of air strikes. The Mission considers it unlikely that a target the size of the Namar wells could have been hit by multiple strikes in error, given the nature of the deployment systems and the distance between the wells and any neighbouring buildings. The facts thus indicate that the strikes on the Namar wells group were intentional.
2. The Mission found no grounds to suggest that there was any military advantage to be gained from hitting the wells. There was no suggestion that Palestinian armed groups had used the wells for any purpose.

### 3. Legal findings

1. From the facts ascertained by it, the Mission makes similar findings to those set out regarding the violation of article 147 of the Fourth Geneva Conventions and article 54 (2) of Additional Protocol I in relation to the destruction of the el-Bader flour mill.
2. The right to food clearly includes the right to have adequate access to water. The Mission finds that this

was denied to the people served by the Namar wells. It took some 75 days to repair them.

3. The Mission also finds that the killing of Mr. Abdullah Ismail al-Zein was unlawful [...]. Since targeting the wells constituted an act of wanton destruction, the incidental loss of life cannot be justified with regard to any military advantage.

[...]

## **XVII. THE IMPACT OF THE BLOCKADE AND OF THE MILITARY OPERATIONS ON THE PEOPLE OF GAZA AND THEIR HUMAN RIGHTS**

[...]

### **K. Legal analysis**

1. [...] The protections owed under international humanitarian law to the civilian population of the Gaza Strip by all parties to the conflict include the duty to allow the free passage of humanitarian medical supplies, as well as consignments of essential foodstuffs and clothing for children, pregnant women and mothers at the earliest opportunity (article 23 of the Fourth Geneva Convention). Article 70 of Additional Protocol I provides that parties to a conflict are obliged to allow the passage of articles that are essential for the civilian population, at the earliest opportunity and without delay.
2. The relevant provisions of the Fourth Geneva Convention relating to the duties of an occupying Power should also be taken into consideration, in particular the obligations contained in articles 50 (duty to facilitate the working of care and education institutions), 55 (duty to ensure food and medical supplies to the population), 56 (duty to ensure and maintain medical and hospital establishments and services), 59 (duty to agree on relief schemes if the occupied territory is not well supplied) and 60 (duty to continue performing obligations even if third parties provide relief consignments). [...]
3. The Mission considers that the closure of or the restrictions imposed on border crossings by Israel in the immediate period before the military operations subjected the local population to extreme hardship and deprivations that are inconsistent with their protected status. The restrictions on the entry of foodstuffs, medical supplies, agricultural and industrial input, including industrial fuel, together with the restrictions on the use of land near the border and on fishing in the sea have resulted in widespread poverty, increased dependence on food and other assistance, increased unemployment and economic paralysis. The Mission can conclude only that Israel has and continues to violate its obligations as an occupying Power under the Fourth Geneva Convention.
4. The Mission has given consideration to the argument put forward by the Israeli Government that the above policies and restrictions are being imposed as a form of sanction. However, such blanket sanctions are not permitted under international law. [...]
5. The Mission also notes that reprisals and collective penalties are prohibited under international humanitarian law.
6. The Mission has considered the question of military security. As serious as the situation that arises when rockets and mortars are fired on or near border crossings may be, the Mission considers that it does not justify a policy of collective punishment of the civilian population of the Gaza Strip. The Mission is aware of the Government of Israel's declaration of the Gaza Strip as a "hostile territory". Again, for the Mission, such a declaration does not relieve Israel of its obligations towards the civilian population of the

Gaza Strip under international humanitarian law.

7. Moreover, the Mission takes note that following the decision of the Supreme Court of Israel in what is known as the Fuel and electricity case, Israel reconsidered its obligations relating to the amounts and types of humanitarian supplies that it allowed into the Gaza Strip to meet “vital humanitarian needs”. Whatever that somewhat vague standard may be, the Mission stresses that Israel is bound to ensure supplies to meet the humanitarian needs of the population, to the fullest extent possible. [See Israel, Power Cuts in Gaza]
8. In sum, the Mission restates its view that Israel has not fulfilled its duties as an occupying Power in relation to the Gaza Strip.

[...]

1. The Mission has also given consideration to the extent and type of military operations conducted by Israel in the Gaza Strip between 27 December 2008 and 18 January 2009. As mentioned earlier, provisions of the Fourth Geneva Convention and of Additional Protocol I that reflect international customary law apply to those operations. Their obligations include that under the Fourth Geneva Convention [...] to allow the free passage of all consignments of medical and hospital objects, food and clothing subject to certain conditions (art. 23). [...]
2. The Government of Israel has provided information about the actions it took to ensure the supply of humanitarian assistance to the Gaza Strip and to ensure that medical relief and rescue as well as essential facilities would function during the hostilities. These actions allegedly comprised: the continuous supply of humanitarian aid through the crossings; coordination of evacuation within the Gaza Strip and outside; a unilateral suspension of military operations each day to enable the resupply of assistance for the population and actions to ensure the functioning of essential infrastructure in the Gaza Strip. To this end, the Government of Israel reported that it established a number of coordinating and liaison bodies with Palestinian authorities and organizations, the United Nations agencies on the ground and humanitarian agencies, such as ICRC. The Government also reported that a number of trucks carrying humanitarian goods from Israel and from other countries, including from international organizations, were given passage.
3. In response, the Mission draws attention to the fact that no consideration was given to the situation that prevailed in the Gaza Strip before the military operations. In particular, the Mission notes that the amounts and types of food, medical and hospital items and clothing were wholly insufficient to meet the humanitarian needs of the population. Given that since the end of the operations the number of truckloads allowed through the crossings has again fallen, the humanitarian supplies are even less sufficient.

[...]

1. From the facts it ascertained and the foregoing analysis, the Mission finds that Israel has violated its obligation to allow the free passage of all consignments of medical and hospital stores and objects, food and clothing (article 23 of the Fourth Geneva Convention).

[...]

1. The Mission also considered whether the Gaza population was subject to collective punishment or penalty. According to article 33 of the Fourth Geneva Convention, “collective penalties and likewise all measures of intimidation or of terrorism are prohibited”. Article 75 (2) (d) of Additional Protocol I includes collective punishment as an act that is “prohibited at any time and in any place whatsoever”. Reprisals against protected persons are also prohibited under article 33. These prohibitions are part of customary international law.
2. [...] The cumulative effect of the blockade policies, with the consequent hardship and deprivation among the whole population, and of the military operations coupled with statements by Israel made to the effect that the whole of the Gaza Strip was a “hostile territory” strongly suggest that there was an intent to subject the Gaza population to conditions such that they would be induced into withdrawing their support from Hamas. [...]
3. The facts ascertained by the Mission, the conditions resulting from the deliberate actions of the Israeli armed forces and the declared policies of the Israeli Government – as they were presented by its authorized representatives – with regard to the Gaza Strip before, during and after the military operation, cumulatively indicate the intention to inflict collective punishment on the people of the Gaza Strip. The Mission, therefore, finds a violation of the provisions of article 33 of the Fourth Geneva Convention.

[...]

#### **XVIII. THE CONTINUING DETENTION OF ISRAELI SOLDIER GILAD SHALIT**

1. The Mission notes the continued detention of Gilad Shalit, a member of the Israeli armed forces, captured in 2006 by Palestinian armed groups during a cross-border operation. [...]
2. Israeli Government officials have repeatedly stated that the easing of the blockade on the Gaza Strip [...] is linked to the release of Gilad Shalit. In February 2009, it appeared that the Israeli Government had dropped its demand for Palestinian militants to release Gilad Shalit before it would end the blockade.

[...]

#### **Legal findings and conclusions**

1. The Mission is of the opinion that, as a soldier who belongs to the Israeli armed forces and who was captured during an enemy incursion into Israel, Gilad Shalit meets the requirements for prisoner-of-war status under the Third Geneva Convention. As such, he should be protected, treated humanely and be allowed external communication as appropriate according to that Convention. ICRC should be allowed to visit him without delay. Information about his condition should also be provided promptly to his family.
2. The Mission is concerned by the declarations referred to above, made by various Israeli officials, who have indicated the intention of maintaining the blockade of the Gaza Strip until the release of Gilad Shalit. The Mission is of the opinion that this would constitute collective punishment of the civilian population of the Gaza Strip.

#### **Discussion**

## I. Qualification of the conflict and applicable law

(Israeli report, paras 28-67; UN Mission, paras 273-283)

1. How does the Israeli report qualify the operation in Gaza in the winter of 2008-2009? How does the UN Mission qualify it? According to each of the two reports, which law is applicable?
2. (Israeli report, paras 36 and 67) Do you agree with the Israeli report that there has been a single armed conflict between Israel and the Palestinian armed groups since 2000? May Operation Cast Lead be considered part of a continuing armed conflict despite the *Tahadiya*? Is it preferable to apply the laws on the conduct of hostilities to every clash between the Israeli armed forces and the Palestinian armed groups, rather than law enforcement rules? Which regime would be more protective?
3.
  - a. (Israeli report, paras 29-30) Do you agree that “[i]t is not yet settled which regime applies to cross-border military confrontations between a sovereign State and a non-State terrorist armed group operating from a separate territory”? Do you agree that the qualification of the conflict between Israel and the Palestinian armed groups is merely of “theoretical concern”? As IHL stands today, does it make a difference whether the law of international armed conflict or the law of non-international armed conflict applies? Do you agree that similar rules apply to both types of conflict? Even concerning the obligations of Israel as an occupying power (of the Gaza Strip as a whole or of places reoccupied during the operation)? Even concerning the status and treatment of Gilad Shalit? May we conclude that, because the same customary norms may apply in both types of conflict, there are no longer any differences between the two regimes?
  - b. (UN Mission, paras 273-283) Do you agree with the Mission that there still is a situation of occupation in Gaza? Can it be a situation of occupation when the occupying forces are no longer present in the occupied territory and are involved in full-scale combat operations against organized armed groups from that occupied territory? Is the classification by the ICJ of the territory on which Israel built the Wall/Security Fence (UN Mission, para. 279) conclusive for the classification of the Gaza Strip? If the Gaza Strip is no longer considered an occupied territory, does GC IV nevertheless apply to some aspects of the operation? (HR, Art. 42; GCI-IV, Art. 2)

## II. Conduct of hostilities – military objectives

- a.
  - a. (Israeli report, paras 101-105) How does the report define a military objective? Does the determination of what a military objective is depend solely on an assessment of military advantage? What other elements are included in the definition of a military objective? Does the report take them into account? (PI, Art. 52(2); CIHL, Rule 8)
  - b. (Israeli report, para. 105) May the notion of military advantage be understood, for the purposes of Art. 52(2) of P I, as encompassing the results of a military campaign as a whole? Is this in accordance with the terms of P I, Art. 52(2)? What are the dangers of such an approach? (PI, Arts 51(5)(a) and 52; CIHL, Rules 8 and 13)
1. (Israeli report, para. 105) Do you agree that the security of the attacking forces “is a proper consideration in assessing military advantage”? What are the dangers of relying extensively on this consideration?
  - a. (Israeli report, paras 106-111, 233) When may a civilian object be a direct target for attack? Is it sufficient that the civilian object is being used for military purposes? Does a civilian object lose



- “absolute protection” when it is used for military purposes? (PI, Art. 52; CIHL, Rules 7-10)
- b. (*Israeli report, para. 110*) Is it sufficient that a civilian object is believed to be used for military purposes for it to be lawfully targeted? Is there a presumption of civilian character for objects “normally dedicated to civilian purposes? (P I, Art. 52(3))
  - c. (*Israeli report, paras 153-154*) Does a civilian area automatically become a military objective because the enemy is launching attacks from it? May the entire area be considered a military objective? Is the fact that the area is used by the enemy to launch attacks sufficient to allow the other party to launch a counter-attack directly targeting that area? (PI, Arts 52 and 57; CIHL, Rules 7-10, 15)
  - d. (*Israeli report, paras 159-169*) Does the launching of attacks from civilian-populated areas, or from within private residences, amount to a violation of the principle of distinction? Is it a grave breach? (PI, Arts 48, 52 and 85; CIHL, Rule 1)
2. (*UN Mission, para. 495*) Is there an obligation under IHL for combatants and fighters to distinguish themselves from the civilian population? Do you agree with the Mission’s report that the failure to do so does not amount to a violation of IHL? When are combatants and fighters required to distinguish themselves? Is the denial of combatant privileges the only consequence for a combatant who does not do so? (PI, Arts 44(3) and 48; CIHL, Rule 1)
  3. (*Israeli report, para. 235; UN Mission, paras 365-392*) Do you agree that the ministries operated by Hamas may be considered as legitimate targets for attack? Does the question of who owns or administers a building have any bearing on its possible qualification as a military objective? May all objects somehow related to, owned by, or associated with the enemy party be collectively considered as military objectives? Would this approach be in accordance with the principle of distinction? Similarly, may all civil servants and employees of official buildings of the enemy be considered as part of the enemy’s force and thus be lawfully targeted? (PI, Arts 50-52; CIHL, Rules 1-10)
  4. (*UN Mission, paras 365-392*)
    - a. Was the Gaza prison a military objective? May the targeting of a prison be justified under IHL? Do you agree with the Mission that the attack on the prison may amount to a grave breach of GC IV? Was the prison property protected by GC IV? (GC IV, Art. 147; PI, Art. 52; CIHL, Rules 7-10)
    - b. Was the Palestinian Legislative Council building a military objective? May legislative buildings in general be considered military objectives? Did the Palestinian Legislative Council building become a military objective merely because of the presence of a “video-conferencing room which enabled the Gazan parliamentarians to hold joint sessions with the members of Parliament based in Ramallah”? Could this be considered as making an effective contribution to Hamas’ military activity? (PI, Art. 52; CIHL, Rules 7-10)
  5. (*Israeli report, para. 237-248; UN Mission, paras 393-437*)
    - a. What is the Israeli report’s conclusion with regard to the status of the Palestinian police? What is the UN Mission’s conclusion in that regard? On which elements does the Israeli report base its conclusion that the police were a legitimate target? According to the UN Mission’s description of the police duties during Operation Cast Lead, would you say that the police took on a military function? (*UN Mission, paras 412-419*)
    - b. Do you agree that the Palestinian police as a whole should be regarded as “combatants” and therefore as legitimate targets? Assuming that some of the policemen were also members of Hamas’ military wing, would this mean that they may be directly targeted? May they be targeted because they may potentially engage in combat operations against the IDF? May they be targeted

on that basis even when not yet engaged in such operations?

- c. Assuming that some of the policemen were also members of Hamas' military wing, would this mean that the police group they belonged to became a legitimate target? May the entire group of policemen lose their protection if it were established that some members were actually taking direct part in hostilities with the al-Qassam brigades against the IDF?
6. (*UN Mission, paras 913-989*) May the flour mill be considered as a military objective? May the chicken farms be considered as such? May the water and sewage installations be considered as such? In which circumstances may these objects and buildings become military objectives? May they be considered as objects indispensable to the survival of the civilian population? Do you agree with the Mission that the destruction of these objects and buildings amounted to grave breaches of GC IV? Was the destruction of any of these objects and buildings extensive enough to amount to a grave breach? When the chicken farm was destroyed, could it be considered as property protected by GC IV? Even if the Gaza Strip as a whole was not considered as an occupied territory? (GC IV, Art. 147; PI, Arts 52 and 54; CIHL, Rules 8, 53 and 54)

### **III. Conduct of hostilities – principle of proportionality**

(*Israeli report, paras 120-126, 230-232*)

1. How does the Israeli report assess proportionality? Which are the two elements to be balanced? How does the report define the “military advantage anticipated”? For the purposes of IHL, does the notion include the protection of a party’s own forces? (P I, Art. 51(5)(b); CIHL, Rule 14)
2. Do you agree that the notion of “military advantage anticipated” must be considered “from the standpoint of the overall objective of the mission” rather than from the standpoint of every single attack? Would this approach be in accordance with the literal meaning of P I, Art. 51(5)(b)?

### **IV. Conduct of hostilities – precautionary measures**

1. (*Israeli report, paras 132-133*) Do you agree with the Israeli report that the obligation to take precautionary measures is a question of “feasibility” and not one of perfection? Considering the paragraphs on Israel’s conduct of operations (*paras 230-265*), and more specifically the issuance of warnings, do you think that Israel always took all feasible precautions before launching attacks? Should it be considered that when a precautionary measure has proved inefficient, no other precautions need be taken? (P I, Art. 57; CIHL, Rules 15-21)
2. (*UN Mission, para. 529*) Do you agree that the phrase “unless circumstances do not permit” in P I, Art. 57(2)(c), encompasses the military advantage of surprise? Do you agree that the principle of proportionality should be applied here to balance the potential injury to civilians or damage to civilian objects against the anticipated advantage to be gained by the element of surprise? (P I, Art. 57(2)(c); CIHL, Rule 20)
3. (*Israeli report, paras 151-169; UN Mission, paras 439-498*)
  - a. Does IHL explicitly prohibit the launching of attacks from within civilian-populated areas? Are such attacks prohibited only when their purpose is to prevent counter-attacks or shield fighters or military objectives? When do civilians living in an area from which an attack is launched become human shields? (PI, Arts 51(7), 57(1) and 58; CIHL, Rules 22-24)
  - b. May a party launch attacks from within a civilian-populated area if it has given sufficient advance

warning to local residents? If it removes the civilian population from the area beforehand? (PI, Arts 57(2)(c) and 58(a); CIHL, Rules 20, 23-24)

- c. (*UN Mission, para. 492*) Is Hamas bound by Art. 28 of GC IV in respect of Palestinian civilians? Is it bound at least if the Gaza Strip is considered to be an occupied territory?
4. (*Israeli report, paras 262-265; UN Mission, paras 499-536*)
  - a. (*UN Mission, paras 530-536*) How do you assess the effectiveness of a warning (*para. 503*)? What can you say about the effectiveness of a warning when the attack occurs only seven minutes later (*para. 515*)? What can you say about a warning advising civilians to reach places that they know have been subject to attacks? Do you agree with the Mission that most of Israel's warnings cannot be regarded as effective? What could Israeli forces have done to make them effective? (PI, Art. 57(2)(c); CIHL, Rule 20)
  - b. (*UN Mission, para. 522*) Does the issuance of warnings relieve a party from taking other precautionary measures before launching an attack? Could it be argued that the persons who stayed after a warning has been issued must be combatants or directly participating in hostilities and may therefore be directly targeted? Which other precautionary measures, if any, should be taken? (PI, Art. 57; CIHL, Rules 15-21)
  - c. (*UN Mission, paras 532-535*) Can the firing of shots be considered a warning? Can this method be used when there has been no response to preliminary warnings? What are the dangers of using warning methods that can be equated with attacks?

## V. Blockade

1. Is a blockade a lawful method of warfare? Does IHL regulate blockades? (GC IV, Art. 23; P I, Art. 70)
2. (*UN Mission, paras 311-326, 1305-1331*)
  - a. What is the UN mission's conclusion about the consequences of the blockade? What were Israel's obligations, if any, regarding the provision of foodstuffs, medical items, and agricultural and industrial supplies? Did the establishment of the blockade violate these obligations? (GC IV, Arts 23 and 59; PI, Arts 54(1), 69 and 70; CIHL, Rules 54 and 55)
  - b. Assuming that Israel had some obligations towards the Gazan population regarding humanitarian assistance before the beginning of Operation Cast Lead, did these obligations still apply once the hostilities had started? What were Israel's obligations towards the Gazan population during military operations? (GC IV, Arts 23 and 59; PI, Arts 54(1), 69 and 70; CIHL, Rules 53 and 55)
3. (*UN Mission, paras 311-326, 1305-1331*)
  - a. Is it realistic to assume that Israel was the occupying power in Gaza? Do you agree with the Commission that Israel was bound by GC IV and the provisions on humanitarian assistance? Before Operation Cast Lead? During Operation Cast Lead?
  - b. Assuming that Israel was no longer the occupying power, can it be argued that some of the obligations assigned to occupying powers still applied because of the level of control exercised by Israel over Gaza? If yes, which obligations were still binding for Israel? Did the blockade violate them?
  - c. If none of the obligations in(*UN Mission, paras 1306, 1328-1331*)cumbent on occupying powers applied, did some rules of IHL nevertheless oblige Israel to let humanitarian assistance through to Gaza (GC IV, Arts 23 and 59; PI, Art. 70; CIHL, Rules 53 and 55)
4. May Israel impose restrictions on humanitarian supplies as a sanction against the attacks launched by

Palestinian armed groups? Do you agree with the UN Mission that this may amount to reprisals or collective punishments? Are reprisals always prohibited by IHL? Are collective punishments always prohibited by IHL? Are they prohibited only when they concern humanitarian supplies? (GC IV, Art. 33; P I, Arts 20, 51(6), 52(1), 54(4), 75; CIHL, Rule 103)

## **VI. Detention of Gilad Shalit**

1. (*UN Mission, paras 1336-1344*)
  - a. Is Gilad Shalit a prisoner of war? Is he in the power of the enemy in an international armed conflict? If he is not a prisoner of war, is he necessarily a hostage? (GC III, Arts 2, 3 and 4; PII, Art. 5)
  - b. Until when may he be detained? Has the ICRC a right to visit him? Must information about his condition be given to his family? (GC III, Arts 3, 118, 122, 123 and 126; CIHL, Rules 99, 124, 125 and 128)
  - c. May Israel maintain a blockade of the Gaza Strip? At least until Gilad Shalit is released? (GC IV, Arts 23, 33, 55-59; CIHL, Rules 53, 55 and 103)

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