

**THE GOLDSTONE REPORT: POLITICIZATION OF THE
LAW OF ARMED CONFLICT AND THOSE LEFT BEHIND**

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I don't think any country would find it acceptable to have missiles raining down on the heads of their citizens. The first job of any nation-state is to protect its citizens. And so I can assure you that if . . . somebody was sending rockets into my house, where my two daughters sleep at night, I'm going to do everything in my power to stop that. And I would expect Israelis to do the same thing.¹

I. Introduction

Fractured streets lined with the debris of shattered buildings. Families rummaging through the bits and pieces of the remnants of their broken homes, searching for anything they can salvage from the piles of crushed cement and rebar. Women and children, walking behind donkey carts, horses, and battered pick-up trucks on their way to a safer place.²

These images are an all too familiar sight on the international twenty-four hour news cycle. Civilians caught in the crossfire of a deadly struggle between their governments and fundamentalist insurgent groups employing terror tactics. The images are too common in modern

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¹ Senator Barack Obama, Speech in Sderot, Israel (Jul. 23, 2008), *available at* <http://www.nytimes.com/2008/07/23/us/politics/23text-obama.html>.

² *See* Videotape: An Uneasy Calm in Gaza (New York Times 2009), http://www.nytimes.com/2009/01/20/world/middleeast/20gaza.html?pagewanted=2&_r=1&ref=gaza_strip (last visited Nov. 24, 2010).

asymmetric warfare; whether it is an Afghan refugee cradling her recently deceased child, or a New York City firefighter rummaging through the wreckage of a fallen skyscraper. In this case, the images described above relate to the most recent conflict in the Palestinian Territories³ (“Territories”), known to the Israeli Defense Forces (“IDF”) as Operation Cast Lead.

In the wake of repeated failed attempts at diplomacy, with lasting political peace a seemingly unattainable goal, civilians on both sides of the Israel-Palestine conflict are suffering. Since 2001, armed groups within the Gaza Strip (hereinafter Gaza) have fired thousands of rockets into Israel, conducted suicide bombings, and staged vehicular assaults, killing nearly 1,200 Israeli residents and wounding nearly 10,000 more.⁴ Indiscriminate rocket attacks are the daily reality of over 950,000 Israelis currently living within the range of mortar, Qassam rocket, and M-210F (a.k.a., “Grad”) rocket attacks fired from Gaza.⁵ Many civilians have only fifteen seconds to find a safe place to take cover following warnings of an impending attack.⁶ Daily life for Gaza’s Israeli neighbors is inundated “with frequent sirens, crowded shelters, frightened children, considerable danger, trauma and stress.”⁷

In 2007, the living conditions for civilians in both southern Israel and Gaza took a dramatic turn for the worse. After years of restlessness with the stagnant political process, in-fighting among Palestinian sects led to a bloody *coup d’état*, with Hamas⁸ taking *de facto*⁹ administrative control

³ Parties, on each end of the political spectrum, have referred to the areas known as the Gaza Strip and West Bank as the Occupied Territories and/or Administered Territories. See, e.g., Human Rights Council, Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact Finding Mission on the Gaza Conflict, U.N. Doc. A/HRC/12/48 (Sept. 15, 2009) [hereinafter Goldstone Report]. Since the legal status of the Palestinian territories as “occupied areas” is a largely unsettled and politically charged topic, this article instead refers to these areas as the “Territories.”

⁴ See *Rockets from Gaza: Harm to Civilians from Palestinian Armed Groups’ Rocket Attacks*, HUM. RTS. WATCH (Aug. 6, 2009), <http://www.hrw.org/en/reports/2009/08/06/rockets-gaza?>; *International Law Series: The Right to Self Defense*, NGO-MONITOR.ORG, <http://www.hrw.org/en/reports/2009/08/06/rockets-gaza-0> (last visited Feb. 22, 2012).

⁵ *Rocket Attacks Toward Israel*, IDFSPOKESPERSON.COM, <http://idfspokesperson.com/facts-figures/rocket-attacks-toward-israel> (last visited Nov. 17, 2010).

⁶ *Id.*

⁷ Steven Erlanger, *Israel’s Dilemma in Response to Rockets*, N.Y. TIMES, Dec. 19, 2007, available at [http://www.nytimes.com/2007/12/19/world/middleeast/19mideast.html?](http://www.nytimes.com/2007/12/19/world/middleeast/19mideast.html?_r=1)

⁸ *Id.*

⁹ The U.S. State Department provides the following description of Hamas:

of Gaza.¹⁰ Under Hamas's regime, increased rocket attacks became the daily reality for southern Israel.¹¹ In 2008, Israel struck back in order to "bring about an improvement in the security reality of the residents of the south of the country."¹² The military offensive, entitled Operation Cast Lead, was designed to "stop the bombardment of Israeli civilians by destroying and damaging the mortar and rocket launching apparatus and its supporting infrastructure."¹³ Over the course of twenty-two days, the Israeli Defense Force conducted both aerial and land military operations against Hamas command posts, training camps, weapons caches, and rocket and mortar launching sites.¹⁴

According to Palestinian figures, Operation Cast Lead resulted in 1,300 deaths, 5,300 injuries, and two billion dollars of damage to critical infrastructure. Living conditions in Gaza deteriorated as food prices soared to three times the pre-conflict level, damage to water wells and pipes led to water shortages, and hospitals—damaged during the

HAMAS possesses military and political wings, and was formed in late 1987 at the onset of the first Palestinian uprising, or Intifada, as an outgrowth of the Palestinian branch of the Muslim Brotherhood. The armed element, called the Izz al-Din al-Qassam Brigades, conducts anti-Israeli attacks, previously including suicide bombings against civilian targets inside Israel . . . [a]fter winning Palestinian Legislative Council elections in January 2006, HAMAS seized control of significant Palestinian Authority (PA) ministries in Gaza, including the Ministry of Interior. HAMAS subsequently formed an expanded, overt militia called the Executive Force, subordinate to the Interior Ministry. This force and other HAMAS cadres took control of Gaza in a military-style coup in June 2007, forcing Fatah forces to either leave Gaza or go underground.

Country Reports on Terrorism 2009, STATE.GOV (Aug. 5, 2010), <http://www.state.gov/s/ct/rls/crt/2009/140900.htm>.

⁹ BLACK'S LAW DICTIONARY 427 (7th ed. 1999) (defining *de facto* as "[E]xisting in fact; having effect even if not formally or legally recognized").

¹⁰ See ISRAEL MINISTRY OF FOREIGN AFF., THE OPERATION IN GAZA: FACTUAL AND LEGAL ASPECTS para. 40 (Jul. 29, 2009) [hereinafter *The Operation in Gaza*], available at http://www.mfa.gov.il/MFA/Terrorism+Obstacle+to+Peace/Hamas+war+against+Israel/Operation_in_Gaza-Factual_and_Legal_Aspects.htm.

¹¹ *Id.* at 16–19.

¹² Press Release, Israel Ministry of Foreign Affairs, PM Olmert Press Briefing on IDF Operation in the Gaza Strip (Dec. 27, 2008), available at http://www.mfa.gov.il/MFA/Government/Speeches+by+Israeli+leaders/2008/PM_Olmert_press_briefing_IDF_operati_on_Gaza_Strip_27-Dec-2008.htm.

¹³ *The Operation in Gaza*, *supra* note 10, at 32.

¹⁴ *Id.*

fighting—struggled to treat the massive amount of injuries with diminished availability of space and supplies.¹⁵

The United Nations (UN) Human Rights Council reacted to this humanitarian crisis by establishing a fact-finding mission (“Mission”) with the directive 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 December 27, 2008, and January 18, 2009, whether before, during, or after.”¹⁶ The Mission’s report, entitled *Human Rights in Palestine and Other Occupied Arab Territories* (hereinafter Goldstone Report), found that “serious violations of international human rights and humanitarian law were committed by Israel . . . and that Israel committed actions amounting to war crimes, and possibly crimes against humanity.”¹⁷

The findings and recommendations of the Goldstone Report—which will be discussed in detail in the sections that follow—are suspect for a number of reasons. First, the Goldstone Report based its findings on a restrictive interpretation of international humanitarian law¹⁸ (“IHL”) that is not only in sharp contrast to the legal approach maintained by Israel and its court system, but also a departure from well-settled international legal norms. In addition, the Goldstone Report’s application of the law is predicated on biased assumptions that ignore the fragile security situation endured by the government of Israel over the past six decades, and Israel’s right to take measures in self-defense in accordance with the UN Charter.¹⁹ Finally, the Mission’s one-sided, capability-based analysis of Israel’s military operation—a nation struggling to protect its people from

¹⁵ See *Gaza: Humanitarian Situation*, BBCNEWS.COM (Jan. 30, 2009), http://news.bbc.co.uk/go/pr/fr/-/2/hi/middle_east/7845428.stm.

¹⁶ See Goldstone Report, *supra* note 3.

¹⁷ Press Release, Head of UN Fact Finding Mission on the Gaza Conflict Urges Accountability for War Crimes; Insists Impunity Undermines Peace Process and Encourages Violence (Sept. 29, 2009), United Nations Press Release, <http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/factfindingmission.htm>.

¹⁸ INT’L COMMITTEE OF THE RED CROSS, WHAT IS INTERNATIONAL HUMANITARIAN LAW? (2004), available at www.icrc.org/eng/documents/legal-fact-sheet/humanitarian-law-factsheet.htm (defining international humanitarian law as “a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict. It protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare. International humanitarian law is also known as the law of war or the law of armed conflict”).

¹⁹ See generally UN Charter art. 51.

a terrorist organization that places its own people in harm's way to achieve its political objectives—could set a dangerous and untenable precedent. The Mission's "Monday morning quarterback"²⁰ interpretation of the law, if applied to similar counterinsurgency (COIN) operations, could serve to inhibit nation-states from executing their sovereign responsibility to protect their populace from threats to their national security, while also empowering an enemy who deliberately blurs the line between combatant and civilian.

This article will not address whether Israel's policies with respect to the Territories are effective in conducting a COIN operation, nor will it offer a resolution for the troubling humanitarian situation that has continued to plague Gaza since Hamas took power. Only time will tell whether Operation Cast Lead will bring about an improved security reality for the parties to this conflict. Likewise, this article will not discuss the controversial issue of applying international human rights law during a period of armed conflict – yet another controversial assumption relied upon in the Goldstone Report.²¹ Instead, this article will address the legal issues specifically pertaining to Operation Cast Lead in Gaza, and the Mission's troubling analysis thereof. Ultimately, the article will conclude that the Mission's one-sided analysis of Operation Cast Lead overshadows the very real and pressing effects of war on the civilian populations of both Israel and Gaza. By superimposing a capabilities-based paradigm on international humanitarian law—holding the attacker to a higher legal standard than the defender in an armed conflict—the Mission creates an environment that encourages non-state actors to circumvent the law, while rendering adherence to the law for nation-states nearly impossible.

²⁰ DICTIONARY.COM, <http://dictionary.reference.com/browse/Monday+morning+quarterback> (last visited Feb. 22, 2012) (defining Monday morning quarterback as "[a] person who criticizes the actions or decisions of others after the fact, using hindsight to assess situations and specify alternative solutions").

²¹ There exists a split in opinion regarding where, and when, human rights law applies. Whereas both the United States and Israel maintain that international humanitarian law (IHL) is the *lex specialis* in time of armed conflict, many European nations, the International Court of Justice and the International Committee for the Red Cross, all argue that Human Rights Law and IHL apply concurrently to all conflicts, without regard to the nature or status of the hostilities. *See generally* Françoise J. Hampson, *The Relationship Between International Humanitarian Law and Human Rights Law from the Perspective of A Human Rights Treaty Body*, 871 INT'L REV. OF THE RED CROSS 459, 550 (2008); GARY D. SOLIS, *THE LAW OF ARMED CONFLICT* 24 (2010). Since this article concerns itself primarily with the application of the LOAC to the conflict in question, the application of Human Rights Law to this conflict is unnecessary.

First, a historical context of the conflict and the applicable law will be reviewed, providing a backdrop for the military operation and its causes. This background will be followed by a discussion of the legal standards that apply to Operation Cast Lead under IHL. The article will then address the Goldstone Report's strengths and weaknesses, to include a critique of select findings of the Mission as they relate to the IHL. Finally, this article will conclude with a discussion of the value of the Goldstone Report as a whole, rejecting the politicization of asymmetric warfare²² (epitomized in the Goldstone Report) as counter-productive to achieving the intent of the IHL: to respect a nation-state's military necessities while at the same time protecting non-combatants caught between adversaries on the field of battle.²³

II. From Occupation to Confrontation

A cursory review of the historical context of the Israeli-Palestinian conflict is important for three reasons. First, since the application of IHL depends primarily on the type of conflict (e.g., international vs. internal armed conflict) and the type of person (e.g., combatant vs. non-combatant), a historical analysis is necessary to determine the normative framework for Operation Cast Lead. This legal framework will focus the subsequent analysis of the Mission's findings. Second, since Operation Cast Lead is only the most recent clash in the Israeli-Palestinian conflict, a brief review of the hostilities between these rivals is necessary to place this significant clash in historical context. Finally, a review of Israel's control over the Territories is vital to determining whether Israel was an occupant of Gaza at the time of Operation Cast Lead. This assumption, relied upon heavily in the Mission's findings that Israel violated its obligations under IHL, has crucial implications for the validity and bias illustrated in the Goldstone Report.²⁴

²² Asymmetric warfare is "leveraging inferior tactical or operational strength against the vulnerabilities of a superior opponent to achieve disproportionate effect with the aim of undermining the opponent's will in order to achieve the asymmetric actor's strategic objectives." Kenneth F. McKenzie, Jr., *The Rise of Asymmetric Threats: Priorities for Defense Planning*, QUADRENNIAL DEF. REV. 75, 76 (2001).

²³ See SOLIS, *supra* note 21, at 7 (stating that "modern LOAC has been largely driven by humanitarian concerns").

²⁴ See *infra* Part V.A (for a discussion on Israel's controversial status as an occupying force).

The debate and confusion concerning Israeli sovereignty over the Territories began as early as 1947 in Israel's War of Independence.²⁵ In the aftermath of that war, Gaza and the West Bank—previously controlled by Egypt and Transjordan, respectively—fell under Israeli control. As a result, Israel's government became responsible for land “three times larger than its previous borders . . . with the responsibility for an additional one million Arab residents.”²⁶ Unfortunately, the 1949 Israel-Egypt and Israel-Jordan Armistice Agreements did not resolve *de jure*²⁷ sovereignty over the newly administered areas,²⁸ leaving governance over the Territories an unanswered question.

The issue was not clarified in the wake of the “Six Day War” of 1967. After that violent clash with Jordan and Egypt, Israel found itself in *de facto* control of Gaza, the West Bank, and the Sinai Peninsula. Although Israel, pursuant to the 1979 Israel-Egypt Peace Treaty, subsequently relinquished control of the Sinai Peninsula to Egypt, it retained control of the Territories and, to date, “[n]o international agreement has yet settled the question of sovereignty over the Gaza Strip and ‘West Bank.’”²⁹

At this point, Israel asserted that the Territories were neither an independent state nor an occupied territory.³⁰ Despite denying, as a matter of law, that the Territories were occupied, Israel elected to “govern the Territories *de facto* under the provisions of customary international law applicable to belligerent occupation.”³¹ In doing so, Israel managed to avoid any admission that it should be bound by international law as applicable to belligerent occupation³² while at the same time steering clear of any interpretation that Israel was renouncing any claim of sovereignty over the Territories.³³

²⁵ UZI AMIT-KOHN ET AL., ISRAEL, THE “INTIFADA” AND THE RULE OF LAW 19–22 (1993).

²⁶ Uri Shoham, *The Principle of Legality and the Israeli Military Government in the Territories*, 153 MIL. L. REV. 245, 248 (1996).

²⁷ BLACK'S LAW DICTIONARY 437 (7th ed. 1999) (defining *de jure* as “[e]xisting by right or according to law”).

²⁸ AMIT-KOHN ET AL., *supra* note 25, at 20 (referring to the Egypt-Isr. Armistice Agreement, art. V., Feb. 23, 1949, available at <http://unispal.un.org/UNISPAL.NSF/0/9EC4A332E2FF9A128525643D007702E6>).

²⁹ *Id.*

³⁰ See *The Operation in Gaza*, *supra* note 10, at 11.

³¹ Shoham, *supra* note 26, at 250 (observing that Israel would apply the Hague Convention IV provisions concerning “Military Authority over the Territory of the Hostile State”).

³² *Id.* at 249.

³³ AMIT-KOHN ET AL., *supra* note 25, at 21.

The practical effect of this course of action was a *de facto* application of Article 43 of the Convention (IV) Respecting the Laws and Customs of War on Land (hereinafter Hague IV), which requires an occupying force to “take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.”³⁴ The Territories were thereafter governed by the IDF under a military chain of command, acting as both the executive and legislative authority. Despite the law of the Territories being the existing Egyptian or Jordanian law in force prior to June 7, 1967, the military administration amended it through extensive proclamations and orders.³⁵ Although formation of governance by the military administration was intended as a stopgap measure until such time that political compromise could be accomplished, it became a daily reality for the Palestinian people for two decades.³⁶

The military administration of the Territories “w[as] marked by relative quiet” until December of 1987.³⁷ Fueled by escalating nationalist sentiments and dissatisfaction with the stagnant political process, among other things, a Palestinian uprising began “as a mass outburst against the realities of life—political, economic and social—that existed in the territories.”³⁸ The so-called Intifada³⁹ was, in essence, the violent by-product of the extended occupation and the failure of the political process to bring an end to the Israeli Administration of the Territories.⁴⁰

The outcome of the bloody⁴¹ six-year conflict was considered a stalemate, “with the Palestinians unable to eject the Israelis from the territories and the Israelis unable to stop the violence.”⁴² The Intifada

³⁴ Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter Hague IV].

³⁵ See Shoham, *supra* note 26, at 253.

³⁶ *Id.* at 251–54.

³⁷ AMIT-KOHN ET AL., *supra* note 25, at 27.

³⁸ *Id.* at 30.

³⁹ It was Palestine Liberation Organization leader Yassir Arafat who, in December 1987, coined the term “al Intifada” (the “shaking off” or “casting off”), an expression that in Arabic normally connotes a passing outburst of revolutionary violence rather than a sustained struggle.” *Id.* at 30. Where does this quote begin?

⁴⁰ *Id.* at 28–30 (outlining theories for the causes of the uprising).

⁴¹ See *Fatalities in the First Intifada*, B’TSELEM.COM, http://www.Btselem.org/English/statistics/first_intifada_tables.asp (last visited Dec. 28, 2010) (providing statistics that the first intifada claimed the lives of 1551 Palestinians and 422 Israelis between December 9, 1987 and September 28, 2000).

⁴² BENNY MORRIS, *RIGHTEOUS VICTIMS: A HISTORY OF THE ZIONIST-ARAB CONFLICT, 1881–1998*, at 596 (2001).

was, however, instrumental in changing the political situation in the Middle East at large:

Spurred largely by the uprising, Jordan definitively renounced its theoretical role as agent for the Palestinians; the Palestine Liberation Organization declared itself definitively in favor of a two-state solution, *recognizing Israel's right to exist . . . and renounced terrorism*; and the United States agreed to open official contacts with the PLO.⁴³

The first intifada ultimately ended with political compromise and the hope of a two-state solution. In 1993, the leadership of the Palestinian Liberation Organization (PLO) and government of Israel signed the “Declaration of Principles on Interim Self-Government Arrangements” (hereinafter Oslo Accords).⁴⁴ The Oslo Accords⁴⁵ established: (1) a Palestinian authority, marking the beginning of an end to the Israeli military administration, (2) the handover of specified lands to Palestinian control, and (3) the formation of the Palestinian security forces.⁴⁶ The Oslo Accords did not, however, resolve issues such as “[control over] Jerusalem, refugees, settlements, security arrangements, borders, relations and cooperation with other neighbors.”⁴⁷ Instead, the parties agreed upon a five-year, three-tiered, transitional period during which the parties would hold negotiations addressing such unresolved issues.⁴⁸

The promise of Oslo was not to be. Even though the parties engaged in sporadic negotiations since Oslo,⁴⁹ the peace process was shattered by

⁴³ Michael C. Hudson, *The Transformation of Jerusalem, 1917-1987*, in *JERUSALEM IN HISTORY* (Ed. K. J. Asali ed., 1989) (emphasis added).

⁴⁴ See Declaration of Principles on Interim Self-Government Arrangements, Isr.-P.L.O., Sept. 13, 1993 [hereinafter The Oslo Accords], available at <http://www.jewishvirtuallibrary.org/jsource/Peace/dop.html> (last visited Feb. 22, 2012).

⁴⁵ To include its successor, the Interim Agreement on the West Bank and the Gaza Strip (popularly known as Oslo II), wassigned in 1995. See Interim Agreement on the West Bank and the Gaza Strip, Isr.-P.L.O., Sept. 28, 1995, available at http://www.knesset.gov.il/docs/heskemb_eng.htm.

⁴⁶ See The Oslo Accords, *supra* note 44.

⁴⁷ *Id.* art. V.

⁴⁸ *Id.*

⁴⁹ See, e.g., Protocol Concerning the Redeployment in Hebron, Isr.-P.L.O., Jan. 17, 1997, available at <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Protocol+Concerning+the+Redeployment+in+Hebron.htm>, Wye River Memorandum, Isr.-P.L.O., Oct. 23, 1998, available at <http://www.mfa.gov.il/mfa/peace%process/guide>

failures on both sides to adhere to the tenets of the agreements. The Palestinian Authority was either unwilling or unable to curb terrorist operations from the Territories; in the five years following the 1993 Oslo Accords, 279 Israeli citizens were killed in 92 terrorist attacks.⁵⁰ This led critics to conclude that Oslo was merely a “Trojan Horse” and that “[t]he entire intent of the Oslo Accords, on the part of the Palestinian people, on the part of Arafat, was to . . . accept any piece of territory in Palestine from which to wage the war.”⁵¹ Israel was also blamed for Oslo’s failure. Critics regarded Israel’s continued expansion of settlements in Palestinian areas, and failure to re-deploy its troops from the West Bank, as a show of bad faith.⁵²

Prompted by the failed peace process—and exacerbated by a boom in Israeli settlements in both Gaza and the West Bank⁵³—a second uprising,

%20to%20the%20peace%20process/the%20wye%20river%20memorandum, Sharm al-Sheik Memorandum, Isr.-P.L.O., Sept. 4, 1999, *available at* <http://www.jewishvirtuallibrary.org/jsource/Peace/sharm0999.html>, the Camp David Summit in 2000, and the Taba Talks in 2001.

⁵⁰ *More Israelis Have Been Killed by Palestinian Terrorists Since Oslo*, ISRAEL MINISTRY OF FOREIGN AFF. (1998), https://www.mfa.gov.il/MFA/MFAArchive/1990_1999/1998/9/More%20Israelis%20Have%20Been%20Killed%20by%20Palestinian%20Terr.

⁵¹ Dr. Charles Krauthammer, Address at the Hudson Institute Forum: Whither the Road Map on the Middle East Peace (Sept. 25, 2003) (transcript available at http://mes.hudson.org/index.cfm?fuseaction=publication_details&id=3049&pubType=mes_speeches).

⁵² The Palestinian frustration with continued Israeli settlements can be summarized as follows:

Although the language [of the Oslo Agreements] did not promise a settlement freeze, the understanding on the Palestinian side was that Oslo would eventually lead to Israeli withdrawal from the territories. In fact, the accords turned into a *state-run land grab of astounding proportions*, leaving many Palestinians feeling that the Israelis had bargained in bad faith. In the eight years since the first Oslo agreement, according to the Washington, DC-based Foundation for Middle East Peace, the population of the settlements has grown by 100 percent, to reach some 200,000 (not including East Jerusalem). Housing units have jumped by 50 percent. About forty new settlements were built between 1996 and the 1999 election, the vast majority of them rising after the fall of 1998.

Robert I. Friedman, *And Darkness Covered the Land*, THE NATION.COM, <http://www.thenation.com/article/and-darkness-covered-land> (last visited Feb. 22, 2012).

⁵³ Jeremy Pressman, *The Second Intifada: Background and Causes of Israeli-Palestinian Conflict*, J. CONFLICT STUD. 114, 120 (2003). Pressman states:

the al-Aqsa Intifada, erupted.⁵⁴ This rebellion, significantly more violent than its predecessor, would have profound effects on the course of the peace process, daily life for civilians in and around the Territories, and the internal politics of both Israel and Palestine in important ways.

If the first intifada brought Israel and Palestine closer to a political compromise and final status determination, the al-Aqsa Intifada had the opposite effect. The rapid increase in violence made continued status negotiations impossible.⁵⁵ Shortly after his election as Israel's Prime Minister, Ariel Sharon "discontinued any direct contacts with the Palestinian leadership, in effect putting an end to talks on the final status."⁵⁶ In addition, Israel began to take graduated steps designed to improve its security situation, such as the construction of the "security fence" around the West Bank in 2003⁵⁷ and unilateral disengagement

From 1993 to 2000, the number of Israeli settlers increased by at least 117 percent in Gaza and at least 46 percent in the West Bank . . . [i]n 2000, seven years after Oslo I, Israel still fully controlled East Jerusalem, 20 percent of Gaza land, and about 59 percent of the West Bank land.

Id.

⁵⁴ *Id.*

⁵⁵ It is difficult to determine the exact number of casualties resulting from the violence associated with the al-Aqsa intifada. This is due in large part to ambiguity regarding when the conflict began and ended, as well as the difficulty in distinguishing civilians from combatants in an insurgency. It is clear, however, that both sides suffered from "Israel's heavy-handed response [to Palestinian uprisings] and the Palestinian leadership's inability to rein in militants." *Id.* at 133. Israel claimed the "deaths of 1,100 Israelis, the wounding of thousands more, and the terrorisation of millions." The Operation in Gaza, *supra* note 10, at 14. The Israel Security Agency, one of Israel's three secret service agencies, maintains a list of Palestinian deaths with 2,124 names. Palestinian sources, on the other hand, put the number of Palestinian casualties at 2736. Ze'ev Schiff, *Israeli Death Toll in Intifada Higher Than Last Two Wars*, HAARETZ.COM (Aug. 24, 2004), <http://www.haaretz.com/print-edition/news/Israeli-death-toll-in-intifada-higher-than-last-two-wars-1.132555> (last visited Feb. 22, 2012). Statistics regarding the civilian impact of the al-Aqsa Intifada are even harder to ascertain. According to B'Tselem, an Israeli non-governmental organization, Israeli civilians represented 68.3% (719 of 1053) of Israeli deaths, compared to 46.4% Palestinian civilians killed (2204 of 4789). B'TSELEM.ORG, <http://www.btselem.org/English/Statistics/Casualties.asp> (last visited Jan. 5, 2011). *But see In 2007, B'Tselem Casualty Count Doesn't Add Up*, CAMERA.ORG (Nov. 2, 2008), http://www.camera.org/index.asp?x_content=9999&x_article=1533 (last visited Feb. 22, 2012) (challenging B'Tselem's statistical methodology).

⁵⁶ Goldstone Report, *supra* note 3, para. 184.

⁵⁷ Israel Ministry of Foreign Affairs, *Saving Lives - Israel's Security Fence* (2003), http://www.mfa.gov.il/mfa/mfaarchive/2000_2009/2003/11/ (last visited Feb. 22 2012) [hereinafter Israel Ministry of Foreign Affairs].

from the Territories in 2005.⁵⁸ Finally, in the vacuum left by the Israeli disengagement, a bloody civil war resulted in deep and lasting divisions within the Palestinian population itself. It was during this period of turmoil and uncertainty that Hamas began its rise to power in Gaza, setting the stage for Operation Cast Lead.

In 2003, Israel made its first attempt at severance from the Territories with the construction of a security fence around much of the West Bank. The government of Israel maintained that the construction of the fence was a defensive measure, intended to “keep the terrorists out and thereby save the lives of Israel’s citizens, Jews and Arabs alike.”⁵⁹ This approach was met with mixed reception; some considered the fence a legitimate exercise in self-defense, while others maintained that the fence was, in fact, an attempt by Israel to annex Palestinian lands, which thereby exacerbated the humanitarian situation in the Territories.⁶⁰ Despite the divergence in public opinion, the security fence proved to be effective, significantly reducing the number of suicide bombings and deaths attributed to Palestine militants in the year that followed its construction.⁶¹ Incidentally, the security fence was among many of Israel’s measures in self-defense that the Mission would criticize in the

⁵⁸ See *Israel’s Disengagement Plan: Renewing the Peace Process*, MINISTRY OF FOREIGN AFF. (2005) [hereinafter *Disengagement Plan*], available at <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Israels+Disengagement+Plan+-+htm>.

⁵⁹ Israel denied that the fence was intended as a border, “which is to be determined by direct negotiations between Israel and the Palestinians.” Israel Ministry of Foreign Affairs, *supra* note 57. It is also interesting to note that Israel had experienced success with a similar wall, erected on the Gaza border, in 1995. See also Major General Doron Almog, *Lessons of the Gaza Security Fence for the West Bank*, JCPA.ORG (Dec. 23, 2004), <http://www.jcpa.org/brief/brief004-12.htm> (last visited Feb. 22, 2012) (providing an after-action review of security improvements and lessons learned from erection of the Gaza security fence after Oslo).

⁶⁰ See Neil Bar-Or, *Israel Begins to Fence Borders*, PORTSMOUTH HERALD (Aug. 18, 2003), <http://archive.seacoastonline.com/2003news/08182003/world/45482.htm> (indicating that “many in [the U.S.] Congress feel the fence is an important contributor to preventing acts of terror.”). But see *Illegal Israeli Actions in Occupied East Jerusalem and the Rest of the Occupied Palestinian Territory*, G.A. Res. ES-10/13, U.N. Doc. A/RES/ES-10/13 (Oct. 27, 2003) (demanding that Israel cease construction of the fence, as it “could prejudice future negotiations and make the two-State solution physically impossible to implement and would cause further humanitarian hardship to the Palestinians.”).

⁶¹ See Dion Nissenbaum, *Death Toll of Israeli Citizens Killed by Palestinians Hit a Low in 2006*, MCCLATCHY NEWSPAPERS, June 14, 2007, <http://www.mcclatchydc.com/2007/06/14/15469/death-toll-of-israeli-civilians.html>.

Goldstone Report as an unlawful act directed at Palestinian civilians. This issue is discussed in greater depth in Part V of this article.⁶²

Following the death of PLO leader Yasser Arafat in 2004, and the subsequent election of Mahmoud Abbas as the Prime Minister of the Palestinian Authority in 2005, a renewed sense of hope and reconciliation between Israel and Palestine began to emerge.⁶³ Israel, in an attempt to “reduce friction with the Palestinian population,”⁶⁴ initiated its disengagement plan. The plan involved removing 8,000 Jewish settlers from twenty-one different settlements within the Territories and, most importantly, “ended its 38-year-long military presence in Gaza.”⁶⁵ The Palestinian Authority, joined by Egypt and Jordan, subsequently endorsed Israel’s disengagement plan at the Sharm el-Sheikh Summit on February 8, 2005. Another outcome of the summit was a cease-fire between the Palestinian Authority and Israel, “formally ending more than four years of violence and terrorism.”⁶⁶ Despite the Israeli government and Supreme Court’s claims to the contrary, Israel’s disengagement did not resolve the question of its status as an occupant. As will be discussed in Part III of this article, this question—a hotly contested issue with important implications to the allegations of the Goldstone Report—remains the subject of scholarly debate in the international legal community even today.⁶⁷

Unfortunately, Israel’s disengagement from Gaza did not produce the desired end result of reduced friction and renewed negotiations. Instead, economic hardship in the Territories combined with escalating political instability in the wake of Yasser Arafat’s death led to Palestinian infighting “pit[ting] Fatah’s secular democratic nationalism against Hamas’

⁶² See *infra* pp. 91–116 (for a detailed discussion of the Goldstone Report’s shortcomings).

⁶³ See generally *Disengagement Plan*, *supra* note 58. See also Ephraim Sneh, *The Partner Who Had No Partner*, HAARETZ.COM (Nov. 11, 2009), <http://www.haaretz.com/print-edition/opinion/the-partner-who-had-no-partner-1.4591> (characterizing Mahmoud Abbas as a Palestinian leader who took a courageous stand on peace, “condemn[ing] the second intifada, which was then raging full force,” and speaking out “strongly against the senseless use of terrorism and call[ing] for a return to negotiations”).

⁶⁴ *Disengagement Plan*, *supra* note 58.

⁶⁵ Dr. Mohammed Samhoury, *Gaza Economic Predicament One Year After Disengagement: What Went Wrong?*, Brandeis Univ. Middle East Brief, Nov. 2006, at 1, <http://www.brandeis.edu/crown/publications/meb/MEB12.pdf>.

⁶⁶ *Disengagement Plan*, *supra* note 58, at 14.

⁶⁷ See *infra* pp 94–98.

radical Islam.”⁶⁸ Ultimately, Hamas would prevail over Fatah both on the battlefield and at the polls, taking political control of Gaza.⁶⁹ The rise of Hamas to political power in Gaza did not resolve the Palestinian civil war; instead, it claimed the lives of 616 Palestinians between January 2006 and June 2007.⁷⁰ By June 2007, Hamas’s military arm succeeded in defeating the remaining Palestinian troops loyal to Mahmoud Abbas—Chairman of the Palestine Liberation Organization and President of the Palestinian National Authority—thereby consolidating its control of Gaza.⁷¹

Not surprisingly, rocket attacks increased considerably following Hamas’ assumption of control of Gaza. In 2006, 1,130 missiles were fired from Gaza toward Israel. In 2007, the year following Hamas’ takeover, 2,433 rockets were launched from Gaza, more than double the amount of the previous year. The trend continued upward in 2008 when Hamas militants launched 3,278 rockets into Israel.⁷² These attacks did not cease until the “Tahadiya,” or “lull arrangement” on June 19, 2008.⁷³

The Tahadiya called for Hamas to cease all terrorist acts in return for an end to Israeli Defense Force counter-terrorist operations in Gaza, as well as the opening of the points of entry from Gaza into Israel.⁷⁴ The cessation of hostilities was initiated in order to “re-launch the Egyptian-brokered negotiations on the release of Israeli captive soldier Gilad Shalit (as demanded by Israel) and promote dialogue on opening the Rafah Crossing between the Gaza Strip and Egypt (as demanded by Hamas).”⁷⁵

⁶⁸ Ronny Shaked, *Religious War in Gaza*, YNETNEWS.COM (Apr. 2, 2007), <http://www.ynetnews.com/articles/0,7340,L-3360655,00.html>.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Timeline and Causes of “Operation Cast Lead” in Gaza*, CAMERA.ORG (Jan. 6, 2009), http://www.camera.org/index.asp?x_context=7&x_issue=52&x_article=1581.

⁷² See *Rocket Attacks Towards Israel*, *supra* note 5.

⁷³ *Tahadiya*, GLOBALJIHAD.NET, http://www.globaljihad.net/view_page.asp?id=989 (defining Tahadiya as “the Arabic term for calm and relaxation”).

⁷⁴ See *One Month Into the Lull in the Fighting: An Interim Report*, TERRORISM-INFO.ORG.IL (Jul. 27, 2008), http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/html/hamas_e001.htm.

⁷⁵ *Id.* See also *Gilad Shalit: In Terrorist Captivity Since 25 June 2006*, MFA.GOV.IL (Jun. 24, 2010), <http://www.mfa.gov.il/MFA/About+the+Ministry/Behind+the+Headlines/Behind+the+Headlines+Six+months+in+terrorist+captivity+11-Jan-2007.htm> (explaining the circumstances of Israeli Defense Force (IDF) Corporal Shalit’s abduction and captivity).

Although the Tahadiyah brought about a temporary interruption in the daily rocket fire from Gaza, it would eventually break down prior to its six-month expiration date.⁷⁶ This was due, in large part, to a lack of progress in negotiations for the release of Corporal Shalit and stalled negotiations for the opening of the Rafah Crossing.⁷⁷ After five months of relative tranquility, the peace was broken by an Israeli military incursion into Gaza on November 4, 2008.⁷⁸ The IDF claimed that they were “acting on intelligence that Palestinian militants were poised to infiltrate Israel,”⁷⁹ maintaining that the “target of the raid was a tunnel that . . . Hamas was planning to use to capture Israeli soldiers.”⁸⁰ The attack resulted in deaths to six Hamas gunmen and injuries to four Israeli soldiers.⁸¹ Despite Hamas’s retaliatory attacks—firing a considerable barrage of rockets into Southern Israel—Israeli officials maintained that “[t]here [was] no intention to disrupt the ceasefire, rather the purpose of the operation was to remove an immediate and dangerous threat posed by the Hamas terror organisation.”⁸² This view was not shared by Hamas. At the conclusion of the skirmish, a Hamas representative issued a warning, stating, “[t]he Israelis began this tension and they must pay an expensive price . . . [t]hey cannot leave us drowning in blood while they sleep soundly in their beds.”⁸³

Hamas made good on their threat just ten days later. On November 14, 2008, Hamas fired a wave of rockets at southern Israel, injuring

⁷⁶ In the first month following the Tahadiya, rocket and mortar attacks fell from 237 between June 1–18 to only eight between June 19–30, 2008. In July, only twelve attacks were recorded. Interestingly, these attacks were not attributed to Hamas, but rather to rogue Palestinian armed groups with suspected Fatah loyalties. See generally *One Month Into the Lull in the Fighting*, *supra* note 74. In the five-month ceasefire, only 362 rockets and mortar shells were fired at Israel. See *Timeline and Causes of “Operation Cast Lead” in Gaza*, *supra* note 71.

⁷⁷ See *One Month Into the Lull in the Fighting*, *supra* note 74 (explaining that the increase in hostilities has also been linked to internal pressures experienced by Hamas in its continuing turmoil with its Fatah rival).

⁷⁸ See Rory McCarthy, *Gaza Truce Broken as Israeli Raid Kills Six Hamas Gunmen*, *GUARDIAN.CO.UK* (Nov. 5, 2008, 2:32 PM), <http://www.guardian.co.uk/world/2008/nov/05/israelandthepalestinians> (last visited Mar. 26, 2012).

⁷⁹ *Timeline and Causes of “Operation Cast Lead” in Gaza*, *supra* note 71.

⁸⁰ See McCarthy, *supra* note 78.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

eighteen Israelis.⁸⁴ Once again, both sides blamed each other for the renewed hostilities. Israel claimed that the tunnels were a grave breach of the truce. Hamas, on the other hand, justified its attack as retaliation against Israel's recent military incursion, the resulting deaths of Palestinian militants, and increased closure of crucial crossings from Gaza into Israel, which was decreasing already depleted levels of fuel and supplies.⁸⁵

On December 19, 2008, after a volley of political rhetoric and threats from both sides, Hamas declared the Tahadiyah officially over and only five days later commenced "Operation Oil Stain," which resulted in a launch of a total of eighty-seven mortars and rockets at southern Israel in just twenty-four hours.⁸⁶ Following this attack, news reports announced that on December 24, 2008, the IDF received approval "for a number of [military] operations that would likely include heavy air strikes against Hamas and Islamic Jihad targets, as well as pinpoint ground operations against terrorist infrastructure."⁸⁷ Operation Cast Lead began in earnest on December 27, 2008.⁸⁸

III. The Normative Framework

The determination as to what laws apply in a given conflict is based on three key factors: first, whether the parties to the conflict are signatories to the relevant treaties; second, whether or not the conflict is considered international armed conflict; and third, whether any other international humanitarian law is applicable due to its status as customary international law ("CIL").⁸⁹ This is not an easy task when

⁸⁴ Ethan Bronner & Taghreed El-Khodary, *Cease Fire Unravels as Hamas Fires Rockets on Israel*, N.Y. TIMES, Nov. 14, 2008, available at <http://www.nytimes.com/2008/11/14/world/africa/14iht-15gaza.17839437.html>.

⁸⁵ *Id.*

⁸⁶ *Hamas: 87 Shells Fired at Israeli Targets in 24 Hours*, MAANNEWS.NET (Dec. 25, 2008 10:19 AM), <http://www.maannews.net/eng/ViewDetails.aspx?ID=207221>.

⁸⁷ Yaakov Katz & Herb Keinon, *IDF Gets Green Light to Strike Hamas After Rocket Barrage*, JPOST.COM (Dec. 24, 2008 7:46 AM), <http://www.webcitation.org/5dSq9wqKW>.

⁸⁸ *Timeline and Causes of "Operation Cast Lead" in Gaza*, *supra* note 71.

⁸⁹ See generally SOLIS, *supra* note 21. Although this article addresses the split in international opinion regarding whether Gaza remains occupied—due to the implications that such a conclusion has on the Goldstone Report's findings and recommendations—it will not address the human rights law as it relates to IHL. For the purposes of this article, the analysis will assume that the IHL is the *lex specialis* in times of armed conflict.

discussing the Israel-Palestine conflict—a sixty-year-old state of affairs involving countless skirmishes and a myriad of Israeli administrations, Palestinian leaders, Islamic militant groups, and international actors.⁹⁰ Further, since “war is only a continuation of state policy by other means,”⁹¹ it should not be surprising that the application of the law of war is equally political. In the sections that follow, this article will demonstrate how the parties to this controversial and emotionally charged conflict—to include critics such as the UN Human Rights Council—tend to interpret, or completely disregard existing laws to meet their political agendas and desired end-state.⁹² What results is a piecemeal application of the IHL to the modern asymmetrical fight.

Fortunately, the parties to this contentious conflict agree for the most part on the fundamentals of the applicable law. Israel’s Supreme Court, sitting as the High Court of Justice, has held that the normative system that applies is the law as it pertains to international armed conflict. This law applies even where there is a belligerent occupation; as long as international borders are crossed, the law of international armed conflict is the *lex specialis*.⁹³ In addition, CIL applies, subject to Israeli statutes to the contrary. The court also held that public Israeli law authorizes the IDF to “do all acts necessary and legal, in order to defend the State and public security.” The court found the following treaties to be applicable to Israel’s use of force in the Territories:

- a. Hague IV: even though Israel is not a party, it will adhere to its tenets as a reflection of CIL;
- b. Geneva Convention Relative to the Protection of Civilian Persons in Time of War (hereinafter Geneva IV): to which Israel is a party;
- c. Protocol Additional to the Geneva Conventions of 12 August 1949 (hereinafter AP I): Although Israel is not

⁹⁰ See *supra* text accompanying notes 4–11.

⁹¹ GENERAL CARL VON CLAUSEWITZ, *ON WAR* (Colonel J. J. Graham trans., Kegan Paul, Trench, Trubner & Co. 2d ed., 1908), available at <http://www.gutenberg.org/files/1946/1946-h/1946-h.htm>.

⁹² See generally *infra* Part IV.

⁹³ DEFINITIONS.USLEGAL.COM, <http://definitions.uslegal.com/l/lex-specialis/> (last visited Feb. 27, 2011) (defining *lex specialis* as “law governing a specific subject matter The doctrine states that a law governing a specific subject matter overrides a law that only governs general matters”).

a party to AP I, it will comply with provisions of AP I that are accepted as CIL; and

- d. Although the government of Israel does not apply the rules of belligerent occupation in Geneva IV, it will honor the humanitarian provisions thereof.⁹⁴

The Mission arrived at a similar conclusion regarding the normative framework, concurring with Israel's contention that the distinction between international and non-international armed conflict is "largely of theoretical concern, as many norms and principles govern both types of conflicts."⁹⁵ As such, this article will apply the previously referenced legal framework to the analysis of the Goldstone Report's allegations against Israel's operation in Gaza.

Any agreement between Israel and the Mission ends abruptly when the legal analysis turns to the issue of *when* the aforementioned framework is triggered. International humanitarian law draws a distinction between those actions that a nation-state takes prior to armed conflict, *jus ad bellum*⁹⁶ (JAB), and the legal constraints that apply to a nation-state's use of force after the conflict has begun, *jus in bello*⁹⁷ (JIB). Drawing a line between these two important concepts—to determine where peace ends and the armed conflict begins—has important implications regarding responsibilities of both the attacker and defender under IHL.

Under the Geneva tradition, the IHL is triggered where two or more nation-states are engaged in armed conflict with each other.⁹⁸ Under

⁹⁴ See HCJ 769/02 The Pub. Comm. Against Torture in Isr., et. al. v. Gov't of Israel 57(6) IsrSC 285, P21 [2006] (Isr.).

⁹⁵ Goldstone Report, *supra* note 3, at 87 (citing The Operation in Gaza, *supra* note 10, at 11).

⁹⁶ INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, U.S. ARMY, LAW OF WAR DESKBOOK 7 (2010) [hereinafter LOW DESKBOOK] (defining *jus ad bellum* as "the law dealing with conflict management, and how States initiate armed conflict (i.e., under what circumstances the use of military power is legally and morally justified)").

⁹⁷ *Id.* (defining *jus in bello* as "the law governing the actions of States once conflict has started (i.e., what legal and moral restraints apply to the conduct of waging war)").

⁹⁸ SOLIS, *supra* note 21, at 150.

“Common Article 2”⁹⁹ of the Geneva Conventions, IHL applies to “all cases of declared war *or of any other armed conflict* which may arise between two or more of the *High Contracting Parties*, even if the state of war is not recognized by one of them.”¹⁰⁰ Additional Protocol I takes this definition a step further by applying the IHL to some conflicts previously considered non-international in nature, to include “armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self determination.”¹⁰¹ The protections of IHL cease upon the general close of military operations.¹⁰²

Prior to the commencement of Operation Cast Lead on December 27, 2008,¹⁰³ the conflict between Israel and Hamas could be classified in one of three ways: (1) as a time of relative peace marked by discrete armed conflicts short of war, governed under the JAB paradigm; (2) as a continuation of an ongoing international armed conflict,¹⁰⁴ subject to the IHL and, therefore viewed under a JIB paradigm; or (3) as a state of belligerent occupation, also viewed under the JIB paradigm as a subset of Geneva IV.¹⁰⁵

Drawing a line is difficult in the instant case. As demonstrated in Part II,¹⁰⁶ the Israel-Palestinian borders have been the sites of immeasurable clashes of varying degrees throughout the years. Further, other than Israel, none of the parties to the ongoing conflict (e.g., Fatah, Hamas and other Jihadist militant groups) are high-contracting parties to the IHL.

⁹⁹ The term “common article” refers to “a certain number of articles that are identical in all four of the 1949 Geneva Conventions . . . [n]ormally these relate to the scope of application and parties’ obligations under the treaties.” *Supra* note 92, at 19.

¹⁰⁰ See Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 2, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV].

¹⁰¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 1(4), June 8, 1977, 1125 U.N.T.S. 3, 37–38 [hereinafter AP I]. Like the United States, Israel does not consider Art. 1(4) a reflection of CIL.

¹⁰² GC IV, *supra* note 100, art. 6.

¹⁰³ Based on the stated intent of the parties, it appears as though the beginning of the armed conflict—for legal purposes—could have either been with Hamas’s Operation Oil Stain or even on Dec. 4, when the IDF attacked the Hamas tunnel systems. Since both Israel and the Mission agree that *jus in bello* is the applicable law to all actions thereafter, this issue need not be definitively resolved for the purposes of this article.

¹⁰⁴ See generally SOLIS, *supra* note 21, at 149–69 (discussing the complexities surrounding a determination of conflict status under IHL).

¹⁰⁵ *Id.*

¹⁰⁶ See *supra* text and accompanying notes 4–11.

Finally, at no time have either Israel or Hamas made a clear declaration of war, affirmatively acknowledging the application of the IHL to Operation Cast Lead.

In more traditional situations, where high-contracting parties engage in war with each other, the line between war and peace is determined by a *de facto* standard, rendering the subjective goals of the respective parties irrelevant.¹⁰⁷ In situations such as Operation Cast Lead, where the line between continued armed “incidents” and armed conflict (i.e., war) is difficult to discern, the specific intentions of the parties become a determining factor.¹⁰⁸

Based on these guidelines, it is not likely that Operation Cast Lead was simply a continuation of an ongoing Common Article 2 conflict. After Hamas’s rise to control over Gaza’s government and military in 2007, Israel was facing a new adversary. As such, any analysis of the applicable legal framework between Israel and Hamas should be viewed accordingly.

Although hostilities intensified in the years following Hamas’s takeover, the Tahayidah marked nearly five months of relative peace. It was not until December 2008 that hostilities amounting to an armed attack interrupted this lull in hostilities. After its military attack of Hamas’s tunnels on December 4, Israeli officials specifically indicated that it did not intend to break the ceasefire or engage in a protracted military operation.¹⁰⁹ Hamas was, however, unequivocal in its intent following the IDF’s December 4 attack and made its intent to engage in an armed attack against Israel abundantly clear with Operation Oil Stain.¹¹⁰ Likewise, the government of Israel’s response to the press, authorizing sustained military operations against Hamas and its infrastructure, made its intent clear.¹¹¹ Whether the IHL was triggered after Hamas’s Operation Oil Stain in December 2008, or Israel’s commencement of Operation Cast Lead later that same month, there is no debate regarding its application to all operations thereafter.

¹⁰⁷ LOW DESKBOOK, *supra* note 96, at 20.

¹⁰⁸ SOLIS, *supra* note 21, at 152 (“An armed conflict is characterized by the specific intention of one state to engage in armed conflict against another state . . . an armed *incident*, even when between two states, is not sufficient to constitute an armed conflict in the sense of common Article 2.”).

¹⁰⁹ McCarthy, *supra* note 78.

¹¹⁰ *Id.*

¹¹¹ Bronner & El-Khodary, *supra* note 84.

The Goldstone Report disagrees with the conclusion that the JIB framework applies only after the aforementioned December 2008 demarcation between peace and armed conflict, concluding instead that since the commencement of Israel's occupation of Gaza, the provisions of Geneva IV apply to all actions undertaken with regard to Gaza, whether before, during, or after the military operation.¹¹² This contentious issue will be discussed at length in Part V below.¹¹³

IV. What the Mission Got Right

The Goldstone Report is not without merit. The Goldstone Report is effective in portraying the general terror and fear experienced by civilians caught in the crossfire of a violent struggle.¹¹⁴ Through extensive interviews with Gazan citizens, the Mission highlights a tragic and deteriorating humanitarian situation in Gaza,¹¹⁵ recounting vivid, heartbreaking tales of entire families wiped out in the hostilities,¹¹⁶ as well as scarcity of food, resources, and adequate healthcare faculties.¹¹⁷ From a humanitarian point of view, these dire images are effective in calling into question whether Israel's arguably heavy-handed COIN tactics are potential violations of international human rights law.

From a legal perspective, the Mission made a number of factual findings that, if true, could aid Israel in holding members of its ranks accountable for allegations of both human rights law and IHL. An example of this is the shocking first hand accounts of potential IHL violations committed by IDF personnel during the detentions of Gazan citizens.¹¹⁸ The Mission made findings that Israel detained unarmed civilians, including women and children, "in degrading conditions, deprived of food, water and access to sanitary facilities, and exposed to the elements in January without any shelter . . . [t]he men were

¹¹² See generally Goldstone Report, *supra* note 3.

¹¹³ See *infra* pp. 94–98.

¹¹⁴ See generally Goldstone Report, *supra* note 3.

¹¹⁵ *Id.* para. 1632.

¹¹⁶ See *id.* para. 841–49 (detailing the destruction of the al-Daya family house, killing twenty-two civilian family members).

¹¹⁷ See *Gaza: Humanitarian Situation*, BBCNEWS.CO.UK (Jan. 30, 2009, 10:55 AM), http://news.bbc.co.uk/2/hi/middle_east/7845428.stm.

¹¹⁸ See generally Goldstone Report, *supra* note 3, paras. 1103–61.

handcuffed, blindfolded and repeatedly made to strip, sometimes naked, at different stages of their detention.”¹¹⁹

Israel, in order “to assess certain allegations discussed in the Human Rights Council Fact-Finding Report,” has addressed these alleged transgressions of violence and maltreatment of detainees by appointing several special command and criminal investigations, the results of which have not yet been released.¹²⁰ In fact, of the thirty-four incidents of potential violations addressed by the Mission, “[t]he [Goldstone] Report brought . . . 12 incidents to the IDF’s attention for the first time—10 of which involved alleged damage to property and 2 of which involved alleged harm to civilians.”¹²¹ Thus, the Goldstone Report has proven influential in encouraging Israel’s accountability for violations of the law by IDF personnel.¹²²

The Mission also devoted at least a portion of its findings to admonishing Hamas and other Palestinian armed groups for potential violations of IHL and human rights law. To its credit, the Mission—despite being “faced with a certain reluctance by the persons it interviewed in Gaza to discuss the activities of the [Palestinian] armed group”¹²³—investigated the following crucial points: (1) the extent to which Palestinian armed groups took adequate precautions to protect civilian populations and property,¹²⁴ (2) the continuing detention of IDF Corporal Gilad Shalit,¹²⁵ and (3) the indiscriminate attacks upon the civilian population of southern Israel.¹²⁶ Despite the obvious disparity in

¹¹⁹ *Id.* para. 57.

¹²⁰ ISRAELI MINISTRY OF FOREIGN AFFAIRS, GAZA OPERATIONS INVESTIGATIONS: AN UPDATE, January 2010, at 122, [hereinafter Gaza Update], available at http://www.mfa.gov.il/MFA/Terrorism+Obstacle+to+Peace/Hamas+war+against+Israel/Gaza_Operation_Investigations_Update_Jan_2010.htm at 122.

¹²¹ *Id.* at 36.

¹²² See generally *id.* (discussing the Israeli military justice system and its investigations into numerous allegations of IHL and human rights violations by IDF personnel). But see, 18 Jan. '12: Three Years Since Operation Cast Lead: Israeli Military Utterly Failed to Investigate Itself, B'TSELEM.COM, http://www.btselem.org/gaza_strip/20120118_3_years_after_cast_lead (last visited Feb. 22, 2012) (highlighting perceived shortfalls in the known results of Israel’s investigations into misconduct within its ranks during Operation Cast Lead).

¹²³ See Goldstone Report, *supra* note 3, at 12.

¹²⁴ *Id.* at 76–106 (detailing Israel’s emphasis on legal training, supervision, implementation of rules of engagement, and precautions to protect the civilian population in an effort to adhere to the requirements of IHL).

¹²⁵ *Id.* at 25.

¹²⁶ *Id.* at 31–33.

the Mission's emphasis on Israel's shortcomings, it is worth noting that the Mission's attempt at even-handedness in this regard was a clear deviation from its mandate, which required no inquiry into Hamas's violations whatsoever.¹²⁷

The horror suffered by the people of Gaza cannot be denied and adherence to the law demands that culpability be placed upon those who violate it. It does not follow, however, that the sins of a few can be attributed either to the IDF's overall adherence to the IHL or to Operation Cast Lead as a whole. As will be discussed below, the Goldstone Report does just that. By relying upon the suffering of civilians as proof that IHL violations were willfully committed by Israel's forces as a whole, the Mission's fallacious analysis overshadows the otherwise valid concerns and allegations that are contained in the report. Ultimately, the suffering of the Gazan people is obscured by the Mission's skewed interpretation of the law.

V. Goldstone's Shortcomings

Many argue that the Goldstone Report was biased from the start. The mandate to investigate "[t]he grave violations of human rights in the Occupied Palestinian Territory, particularly due to the recent Israeli military attacks against the occupied Gaza Strip,"¹²⁸ was adopted by the UN Human Rights Council on January 12, 2009. This UN body has been criticized for its unequal treatment of Israel. One critic summarizes the historical tension between Israel and the Human Rights Council as follows:

Among the nearly 200 nations represented at the UN, only Israel has ever been assigned special—reduced—membership privileges, its ambassadors formally barred, for 53 straight years ending only recently, from election to the Security Council. Meanwhile, and right up to the present day, that same Security Council has devoted fully a third of its energy and criticism to the policies of a single country: Israel. The UN Commission on Human Rights, which regularly—and unrepvingly—accepts

¹²⁷ See *infra* pp. 105–16.

¹²⁸ UN HRC, 9th Special Sess., U.N. Doc. A/HRC/S-9/2 (Jan. 12, 2009) [hereinafter A/HRC/S-9/2].

delegations from any number of homicidal tyrannies across the globe, has issued fully a quarter of its official condemnations to a single (democratic) country: Israel.¹²⁹

The mandate is filled with presuppositions that find voice in the Goldstone Report. First, the mandate assumes the status of the Territories as occupied and, therefore, that IHL (i.e., JIB) is the applicable framework for all actions taken by Israel in response to Hamas's acts of belligerency. This assumption is reinforced by the Human Rights Council's recognition that the "Israeli siege imposed on the occupied Gaza Strip, including the closure of border crossings and the cutting of the supply of fuel, food and medicine, constitutes *collective punishment* of Palestinian civilians."¹³⁰ This statement alleges that Israel's actions were willfully indiscriminate and, therefore, in violation of the IHL before any evidence had been gathered. Finally, while explicitly condemning the Israeli military operation for the effects that the conflict has had on the Palestinian populace, the Mandate makes no mention of acts of terrorism emanating from the Territories or Israel's right to self-defense from such aggression.¹³¹ These one-sided themes echo through the findings and recommendations of the Goldstone Report, casting doubt on the veracity of this fact-finding mission from its very commencement.¹³²

¹²⁹ The article goes on to cite examples of clear human rights violations that have occurred since Israel's recognition as a sovereign state, to include "a genocide in Rwanda, an ethnic cleansing in Yugoslavia, periodic and horrifying communal "strife" in Indonesia's East Timor, the "disappearance" of a few hundred thousand refugees in the Congo, a decades-long and culturally devastating occupation of Tibet by the People's Republic of China." Ironically, unlike Israel on multiple occasions, none of these countries have received the "rebukey" of a UN General Assembly "emergency special session." David Tell, *The U.N.'s Israel Obsession*, WEEKLYSTANDARD.COM (May 6, 2002), <http://www.weeklystandard.com/Content/Public/Articles/000/000/001/186drluv.asp>.

¹³⁰ See A/HRC/S-9/2, *supra* note 128 (emphasis added).

¹³¹ *Id.*

¹³² To his credit, Richard Goldstone claims to have agreed to lead the Mission only after the mandate was expanded to look at the conduct of all parties to the conflict, acknowledging that "[t]he issue is deeply charged and politically loaded." Richard Goldstone, *Justice in Gaza*, NEWYORKTIMES.COM, http://www.nytimes.com/2009/09/17/opinion/17goldstone.html?_r=1 (last visited Mar. 26, 2012). Interestingly, no such language ever found its way into the mandate and no revised mandate was ever approved or released by the Human Rights Council. See UN Watch, *UN Human Rights Council fails to Ratify Changes to Goldstone Mission*, BLOG.UNWATCH.ORG (Jul. 5, 2009), <http://blog.unwatch.org/?p=409>. Critics have also questioned the composition of the Mission in alleging further bias. This article will not concern the alleged personal biases

Although the Goldstone Report claims to place importance on “understanding . . . the situation, the context, impact and consequences of the conflict on people . . . to assess violations of international law,”¹³³ faulty assumptions, suspect methodology and misapplication of IHL are further evidence of partiality on the part of the Mission.

The first of these issues is the Mission’s failure to fully address recent historical events that shed new light on the status of Israel’s sovereignty over the Territories. Instead, the Mission bases its findings on an assumption that the Territories remain occupied by Israel, without providing sufficient context for the controversial nature of this issue.

Second, by ignoring these historical developments and their effects on Israel’s responsibilities vis-à-vis Gaza, the Goldstone Report downplays the security threat Hamas poses to southern Israel and Israel’s right to self-defense in light of persistent terrorist attacks from Gaza. Not once does the Mission reference Israel’s right under the UN Charter or CIL to resort to force in order to protect both its citizenry and sovereignty. Further, instead of viewing Israel’s actions leading up to Operation Cast Lead and its justification for resort to force through the lens of JAB, the Goldstone Report alleges that the same acts are violations of JIB, thereby further justifying its provocative allegations.

Third, this section will discuss the Mission’s allegation that IDF forces committed grave breaches of AP I by violating the doctrine of distinction. The Goldstone Report makes reference to numerous targeting decisions made by the IDF that resulted in the unfortunate deaths of Palestinian civilians. In doing so, however, the Mission departs from the accepted standards in IHL, making findings based on information collected after the fact instead of ascertaining the intelligence known by military commanders at the time. The Goldstone Report continues with its retrospective analysis of Israel’s attempts to warn the Gazan population while, at the same time, giving very little attention to Hamas’s own failures to protect its populace. In doing so, the Mission

of the individuals comprising the Mission. Such an analysis has led to personal attacks and allegations of political posturing in the media. Instead, the legal analysis and conclusions of the Mission are sufficient to support this article’s conclusions. *See generally Establishment of the Mission*, GOLDSTONE REPORT.ORG, <http://www.goldstonereport.org/controversies/establishment-of-mission> (last visited Feb. 22, 2012) (providing a discussion surrounding the establishment of the mission and allegations of bias in both mandate and composition, including links to treatment of this topic in the media).

¹³³ Goldstone Report, *supra* note 3, para. 163.

employs a capability-based analysis. While the Mission requires a heightened adherence to IHL for Israel due to its advanced technology and perceived tactical ability to notify civilians in the line of fire, the Mission also downplays Hamas's responsibilities as a defender under IHL.

The mission's misapplication of the law unduly limits a counterinsurgent's ability to respond to threats, while ignoring or downplaying the obligations of the defender. Not only does this method of analysis expose the bias inherent in the Goldstone Report, but the long-term effects of this UN-sanctioned interpretation could prove an untenable precedent for countries attempting to protect their populace against modern terrorism. By casting the traditional understanding of IHL aside, the Goldstone Report's misguided analysis manipulates the plight of civilians and discards the concept of reciprocity in adherence to IHL.

A. Status of Israel As Occupant of Gaza

The Goldstone Report bases many of its conclusions regarding Israel's actions in Operation Cast Lead on the assumption that the Territories are "occupied" as a matter of law, requiring Israel to adhere to the framework of belligerent occupation.¹³⁴ This is a common theme throughout the document that has its genesis in the Mission's mandate.¹³⁵ The plain language of the report indicates that "[t]he Mission is of the view that the circumstances . . . establish that the Gaza Strip remains occupied by Israel."¹³⁶ The Mission makes dozens of references throughout the Goldstone Report referring to Israel as an occupier, or the Territories as occupied.¹³⁷

The significance of attaching the term occupation to a given international dispute cannot be understated since application of this framework has far-reaching effects on both the occupant and occupier. Generally, the law of occupation requires the occupant to, *inter alia*: (1) "take all measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented,

¹³⁴ *Id.* para. 276.

¹³⁵ A/HRC/S-9/2, *supra* note 128.

¹³⁶ Goldstone Report, *supra* note 3, para. 276.

¹³⁷ *See generally id.*

the laws in force in the country,”¹³⁸ (2) respect the “[f]amily honour and rights, the lives of persons, and private property, as well as religious convictions and practice,”¹³⁹ and (3) refrain from imposing any “general penalty, pecuniary or otherwise . . . upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible.”¹⁴⁰ In addition to the prohibitions contained in the Hague Convention, the Fourth Geneva Convention affirmatively requires occupying forces to “bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate.”¹⁴¹ Most important: because an occupying force is bound by the IHL, it is restricted by the JIB standards. Thus, it logically follows that an occupant no longer maintains the right to resort to military force in self-defense under the JAB framework.

Despite the importance of this legal distinction in terms of the rights and responsibilities of the parties involved, and the fact that violations of the requirements of the law of belligerent occupation make up much of the Goldstone Report’s criticisms of Israel, the Mission takes for granted that an occupation actually existed in the Gaza Strip during the relevant period of time, only briefly offering counterpoints to this assumption. The Mission devotes little attention to significant events such as Israel’s unilateral disengagement from Gaza in 2005,¹⁴² its declaration of Gaza as a ‘hostile territory’ in 2007,¹⁴³ and Operation Cast Lead itself, all of which represents an evolution in the role of Israel in the day-to-day governance of Gaza over the past decade and calls into question the legal conclusion that Gaza remains occupied.

As explained in Part II, Israel has “not formally claimed sovereignty over . . . the Gaza Strip,” and “has zealously avoided any action which could be interpreted as renunciation of its own possible status as a repository of sovereignty over the Territories in question.”¹⁴⁴ Since the Palestinian authority has demonstrated an “unwillingness to pursue a

¹³⁸ Convention (IV) Respecting the Laws and Customs of War on Land, art. 43, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter Hague IV].

¹³⁹ *Id.* art. 46.

¹⁴⁰ *Id.* art. 50.

¹⁴¹ *Id.* art. 55.

¹⁴² See generally *Disengagement Plan*, *supra* note 58.

¹⁴³ *Israelis Declare Gaza ‘Hostile,’* BBC NEWS (Sept. 19, 2007), <http://news.bbc.co.uk/2/hi/7002576.stm>.

¹⁴⁴ Goldstone Report, *supra* note 3, at 21.

unilateral route to statehood,”¹⁴⁵ and no lasting political compromise has been reached to date, there exists no clear answer regarding sovereignty of the territories.

In the years leading up to Operation Cast Lead, Israel deliberately distanced itself from the Territories by redeploying its military forces from both Gaza and the West Bank and placing the day-to-day administration of the Territories in the hands of the Palestinian elected authorities.¹⁴⁶ The Israeli Supreme Court held that:

[S]ince September 2005 Israel no longer has effective control over what happens in the Gaza Strip. Military rule that applied in the past in this territory came to an end by a decision of the government, and Israeli soldiers are no longer stationed in the territory on a permanent basis, nor are they in charge of what happens there. In these circumstances, the State of Israel does not have a general duty to ensure the welfare of the residents of the Gaza Strip or to maintain public order in the Gaza Strip according to the laws of belligerent occupation in international law.¹⁴⁷

Numerous international law scholars have concurred with this supposition, agreeing that following the disengagement, the conclusion that Gaza is occupied is no longer valid.¹⁴⁸

In addition, Israel’s declaration of Hamas as hostile represented yet another step away from Gaza. This designation arguably justifies Israel’s reluctance to become involved in Gaza’s internal politics, or to provide

¹⁴⁵ Pressman, *supra* note 53, at 117.

¹⁴⁶ See generally *Disengagement Plan*, *supra* note 58.

¹⁴⁷ HCJ 9132/07 Bassiouni v. Prime Minister [2008] (Isr.), para. 12.

¹⁴⁸ See generally Ruth Lapidoth, *Unity Does Not Require Uniformity*, BITTERLEMONS.ORG (Aug. 22, 2005), <http://www.bitterlemons.org/previous/b1220805ed30.html#pal2b1220805ed30.html#pal2> (arguing that “[t]he drastic restriction of Israel’s powers in the Gaza Strip will terminate the application of the rules on occupation”), Solon Solomon, *The Great Oxymoron: Jus in Bello Violations as Legitimate Non-Forcible Measures of Self-Defense*, 9 CHINESE J. INT’L L. 501, 523 (2010) (stating that, “[t]he legal certainty around the status of the Gaza Strip as that of an Israeli occupation ended in 2005). *But see generally*, Shane Darcy & John Reynolds, ‘*Otherwise Occupied*’: *The Status of the Gaza Strip from the Perspective of International Humanitarian Law*, 15 J. CONFLICT & SECURITY L. 211 (2010) (concluding that Gaza remains occupied despite Israel’s Disengagement, Declaration of Hamas as hostile, and Operation Cast Lead).

fuel and electricity that could potentially be used against them in furtherance of hostile acts. Common sense dictates that a party to any conflict cannot be expected to take actions that could serve to strengthen its opponent.

Finally, in order to curb the rocket attacks fired by Palestinian armed groups, Israel's resort to military force in Gaza is further evidence that Israel does not have effective control over the region. Combined with the disengagement and declaration of Hamas as hostile, this loss of control over Gaza is final proof that Israel no longer meets the criteria of an "occupier" in accordance with the relevant international law.

The Goldstone Report summarily disregards the significance of these events, relying on the fact that "the Israeli armed forces continued to maintain control over Gaza's borders, coastline and airspace . . . telecommunications, water, electricity and sewage networks, as well as the population registry, and the flow of people and goods into and out of the territory while the inhabitants of Gaza continued to rely on the Israeli currency."¹⁴⁹ This argument is persuasive on its face, given the fact that the existence of a belligerent occupation in Gaza was a largely settled issue until 2005.¹⁵⁰

The Mission seems to ignore the plain language of Article 42 of the Hague IV, which sets forth the definition of belligerent occupation. Article 42 specifies that an occupation exists where the actual authority of a hostile army over territory has been established and is capable of being exercised.¹⁵¹ The facts in this case clearly do not meet the customary definition of Article 42. After Israel's disengagement in 2005, no military presence remained in Gaza and the Palestinian Authority assumed responsibility for the day-to-day governance of the region. Second, even though Israel maintains military control over Gaza's borders—thereby controlling the resources that enter and exit those borders—it does not necessarily follow that this constitutes Gaza's being

¹⁴⁹ Goldstone Report, *supra* note 3, para. 187.

¹⁵⁰ See generally Daniel Benoliel & Ronen Perry, *Israel, Palestine and the ICC*, 32 MICH. J. INT'L L. 73, 105 (2010). See also Elizabeth Samson, *Is Gaza Occupied?: Redefining the Status of Gaza Under International Law*, 25 AM. U. INT'L L. REV. 915 (2010) (outlining the legal status of Gaza over time and concluding that, since Israel's disengagement in 2005, Gaza should be considered "a 'sui generis territory' for the intermediate period between the previous Palestinian occupation and any prospective future statehood.").

¹⁵¹ Hague IV, *supra* note 135, art. 42.

placed under the “authority of the hostile army.” In fact, if Operation Cast Lead has proven anything, it has shown that Israel has very limited potential to exercise effective control over the Gaza Strip. As stated above, the fact that Israel had to commence an extensive military operation to curb rocket attacks from Gaza is evidence that the Israeli Defense Force no longer has the ability to control Gaza or its population. Finally, the Goldstone Report downplays the fact that Hamas, with its organized governmental bodies and substantial security personnel, “exercises effective governmental powers in the Strip without significant external intervention.”¹⁵²

The Mission’s decision to ignore the plain language of Hague IV and disregard facts that support a conclusion that an occupation no longer exists appears political in nature. Conceding that an occupation no longer exists in Gaza would relieve Israel from allegations that it ignored its human rights obligations to the Palestinian people (e.g., by failing to keep law and order and providing basic services). The Mission’s acceptance of this alternate theory would weaken many of its inflammatory assertions. Its cursory treatment of this issue is, therefore, self-serving.

Further prejudice is apparent in the Mission’s reliance upon Security Council Resolution 1860 for the proposition that “the international community continues to regard [Israel] as the occupying Power.”¹⁵³ In fact, the cited resolution makes no assertion that Gaza remains an occupied territory. To the contrary, the Security Council affirmatively avoided any such pronouncement by rejecting a Libyan draft of the resolution that emphasized Israel’s continuing occupation of Gaza.¹⁵⁴ Although this does not necessarily mean that the UN’s official position is not in line with the Mission’s view, reliance on this particular Security Council Resolution to support its point is perplexing and arguably indicative of a preconceived conclusion on the issue. Unfortunately, the self-serving presumption regarding Gaza’s status as occupied is only one indicator of partiality contained in the Goldstone Report.

¹⁵² Benoliel & Perry, *supra* note 150, at 109.

¹⁵³ Goldstone Report, *supra* note 3, at 277.

¹⁵⁴ *Initial Response to Report of the Fact Finding Mission on Gaza Established Pursuant to Resolution S-9/1 of the Human Rights Council*, ISRAEL MINISTRY OF FOREIGN AFF. (Sept. 24, 2009), <http://www.mfa.gov.il/MFA/Terrorism+Obstacle+to+Peace/Hamas+war+against+Israel/Initial-response-goldstone-report-24-Sep-2009.htm>.

B. Omission of Israel's Right to Self-Defense

The Goldstone Report's legal conclusion that Gaza remains occupied conveniently allows the Mission to exclude any mention that Israel's resort to force against Hamas was legally justified in accordance with both the UN Charter and CIL. This omission is telling. Instead of acknowledging Israel's attempts to take gradual, deliberate steps—such as security fences and economic sanctions—in order to avoid a full-scale military operation, the Goldstone Report paints a picture of Israel as a callous reactionary force. The reality is that Israel, in accordance with the UN Charter, appealed to the UN Security Council repeatedly over the course of nearly a decade to obtain assistance in deterring the rockets targeted at its citizens.¹⁵⁵ It was only after lesser means of force, years of failed negotiation, and continued security threats from Hamas, that Israel resorted to full-scale conventional warfare.¹⁵⁶ This account of Israel receives no voice in the Goldstone Report.

The Goldstone Report's bias is most obvious in the Mission's criticism of Israel's blockade (i.e., control of both the navigable waters and entry points) of Gaza's borders. The Mission views the blockade through the lens of the JIB framework, alleging that the measures and effects thereof are violations of the principle of distinction (i.e., that they were intended to target the civilian population of the Territories) and, therefore, grave breaches of IHL.¹⁵⁷ In so doing, the Mission ignores the fact that these same measures, viewed in a JAB context, are not only legal acts in self-defense, but also the preferred approach in international law. The Mission's application of this law is not only a departure from international norms, but completely ignorant of the realities faced by the government of Israel in attempting to mitigate a deadly threat to its population.

The Goldstone Report alleges that Israel's blockade surrounding Gaza, was “intended to inflict collective punishment on the people of the Gaza Strip in violation of *international humanitarian law*.”¹⁵⁸ The Mission found that the blockade denies “Palestinians in the Gaza Strip of their means of sustenance, employment, housing and water . . . freedom of movement and their right to leave and enter their own country,”

¹⁵⁵ The Operation in Gaza, *supra* note 10, at 19-21.

¹⁵⁶ *Id.* at 32-33.

¹⁵⁷ See generally Goldstone Report, *supra* note 3.

¹⁵⁸ *Id.* para. 74 (emphasis added).

concluding that these effects on the population “could amount to persecution, a crime against humanity.”¹⁵⁹ Despite the persistent terrorist attacks emanating from the Territories, the Mission summarily rejects Israel’s justifications, stating “[w]hile the Israeli Government has sought to portray its operations as essentially a response to rocket attacks in the exercise of its right to self defence, the Mission considers the plan to have been directed, at least in part, at a different target: the people of Gaza as a whole.”¹⁶⁰

The interesting yet troubling aspect of this provocative allegation is the Mission’s invocation of IHL in its conclusion that Israel targeted civilians, couching its analysis in the JIB framework. As discussed above, this conclusion can either be predicated on the assumption that an armed conflict had already begun, thus triggering the application of the IHL,¹⁶¹ or on the Mission’s assumption that Gaza remains occupied.¹⁶² Since the blockade began in September 2007,¹⁶³ more than a year before the initiation of hostilities in Operation Cast Lead, it is reasonable to conclude that the Mission’s analysis is based on an assumption that Gaza remains occupied, thereby viewing Israel’s actions under the JIB framework applied to measures taken during a situation of belligerent occupation.¹⁶⁴ As indicated above, this assumption may no longer hold ground in post-disengagement Gaza. Moreover, the Mission’s conclusion that these economic sanctions should be viewed as IHL violations is not only unfounded in law, but represents additional evidence of the Mission shaping its legal analysis to meet its political agenda.

Although it is true that Israel began restricting the passage of people and goods—most notably fuel and electricity supplies—to and from Gaza, these measures are more appropriately viewed under JAB standards. Israel’s attempts to curb the rocket attacks from within Gaza without resort to a full military operation are not only “not *a priori* illegal, but they could be also deemed preferable as a non-violent solution to a military operation in the strip that would leave behind many

¹⁵⁹ *Id.* para. 75.

¹⁶⁰ *Id.* para. 1680.

¹⁶¹ *See infra* pp. at 84–89 (discussing the normative framework and implications on application of IHL to Operation Cast Lead).

¹⁶² *See infra* pp. at 94–98 (discussing Israel’s status as a potential occupant of Gaza and the legal implications thereof).

¹⁶³ *See* Solomon, *supra* note 148, at 518.

¹⁶⁴ Noura Erakat, *Operation Cast Lead: The Elusive Quest for Self Defense under International Law*, 36 RUTGERS L. REC. 164, 165 (2009).

victims.”¹⁶⁵ This viewpoint is supported by Article 41 of the UN Charter which states that “[t]he Security Council may decide what measures *not involving the use of armed force* are to be employed . . . and it may call upon the Members of the United Nations to apply such measures.”¹⁶⁶ It is only until Article 42, after non-lethal methods fail, that the UN advocates the use of force. Although the UN was not the proponent of the economic sanctions at issue in the Goldstone Report, the UN Charter indicates that “resort to non-violent defensive measures does not constitute a mere option available to international leaders, but the option primarily envisioned by the drafters of the international legality after World War II.”¹⁶⁷ The Mission hangs its hat on the fact that civilians were severely affected¹⁶⁸ as proof that Israel intended to harm the Gazan population in its blockade. Although the Goldstone Report clearly establishes the deleterious effects such sanctions had on the residents of Gaza, it provides no independent evidence to support the assertion that Israel intended any such harm.

The Mission made similar arguments about Israel’s resort to the use of force in Operation Cast Lead, once again ignoring well-settled standards within international law. The UN Charter, considered the primary source of modern IAB,¹⁶⁹ “provides two bases for the resort to force: Chapter VII enforcement actions under the auspices of the UN Security Council, and self-defense pursuant to Article 51 (which governs acts of both individual and collective self-defense).”¹⁷⁰ Chapter VII states that the Security Council “shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken . . . to maintain or restore international peace and security.”¹⁷¹

Despite continuous efforts by Israel to effectuate UN intervention prior to escalation to the level of a full-scale military operation, the Security Council took no substantial action under Chapter VII of the UN Charter to mitigate tensions in Israel and the Territories.¹⁷² According to Israel’s Ministry of Foreign Affairs, Israel sent “dozens of letters to the

¹⁶⁵ Solomon, *supra* note 147, at 523 (emphasis added).

¹⁶⁶ U.N. Charter art. 41 (emphasis added) .

¹⁶⁷ Solomon, *supra* note 147, at 523.

¹⁶⁸ *See generally* Goldstone Report, *supra* note 3.

¹⁶⁹ LOW DESKBOOK, *supra* note 96, at 25–36.

¹⁷⁰ *Id.*

¹⁷¹ U.N. Charter art. 39.

¹⁷² *See* The Operation in Gaza, *supra* note 10, at 19–21.

Secretary General of the UN and the President of the Security Council, describing the Qassam rocket shelling of Israeli town[s] [sic] and cities and suicide attacks on Israeli civilians.”¹⁷³ These letters, sent between October 3, 2000, and December 24, 2008, documented the deteriorating security situation in the region and “referenced Israel’s inherent right to defend itself and its citizens.”¹⁷⁴ In addition, Israeli representatives engaged in repeated diplomatic overtures with the UN, to include the Security Council, in order to “exhaust all diplomatic channels prior to its realisation that it was necessary to launch a wide-ranging military operation in Gaza.”¹⁷⁵ Still, the UN refused to intervene.

Even as the security situation deteriorated, the UN remained hopeful for a peaceful resolution. On December 16, 2008, the Security Council issued Resolution 1850, calling for “intensification of diplomatic efforts to foster . . . peaceful coexistence between all states in the region in the context of achieving a comprehensive, just and lasting peace in the Middle East.”¹⁷⁶ This was not to be. Just three days later, Hamas “unilaterally announced the end of the *Tahadiyah*, launching dozens of Qassam and longer-range Grad rockets against Israeli population centres.”¹⁷⁷ Notwithstanding Secretary General Ban Ki Moon’s condemnation of the recommencement of rocket attacks, and plea for Hamas “to ensure that rocket attacks from Gaza cease immediately,”¹⁷⁸ no affirmative measures were taken by the UN to quell the hostilities or otherwise authorize Israel to use force in accordance with the UN Charter.

In the absence of a resolution under Chapter VII, Article 51 of the UN Charter recognizes a right to self-defense: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”¹⁷⁹ As such, the UN Charter

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 21 (“In 2008 alone, Israel sent 29 letters to the U.N. Secretariat.”).

¹⁷⁵ The Operation in Gaza, *supra* note 10, at 21.

¹⁷⁶ S.C. Res. 1850, U.N. Doc. S/RES/1850 (Dec. 16, 2008).

¹⁷⁷ The Operation in Gaza, *supra* note 10, at 23.

¹⁷⁸ Statement Attributable to the Spokesperson for the Secretary-General on the Situation in Gaza and Southern Israel (Dec. 24, 2008), <http://www.un.org/apps/sg/sgstats.asp?nid=3631>.

¹⁷⁹ U.N. Charter art. 51.

seems to support Israel's resort to the use of force, even where no affirmative UN intervention or formal sanction took place.

Even if resorting to the use of force is unlawful under the UN Charter, Israel was likely justified to act in accordance with the CIL right to self-defense.¹⁸⁰ Although the plain language of Article 51 seems clear, the legal interpretation of this verbiage has been subject to much dispute in the international legal community, particularly among non-governmental organizations ("NGOs").¹⁸¹ This matter has been further complicated by, among other things, dispute over: (1) the extent to which the UN Charter has impinged on the CIL meaning of self-defense, (2) the meaning of "armed attack," and (3) the increased incidence of non-state actors in modern asymmetric warfare. Non-governmental organizations such as Al Haq and the Palestinian Center for Human Rights claim that Article 51 is inapplicable to the situation in Israel and the Territories because Palestinian Armed groups are non-state actors.¹⁸² This argument does not hold true, as the right to self-defense is not a construct of the UN Charter alone:

Most States now agree that a State's ability to defend itself is much more expansive than the provisions of the Charter seem to permit based upon a literal reading. This view is based on the conclusion that the inherent right of self-defense under customary international law was *supplemented, not displaced,* by the Charter.¹⁸³

As such, CIL may provide a justification for self-defense even if Article 51 does not apply.

Israel supports its contention that a "State's right to self-defense extends beyond attacks by other states"¹⁸⁴ by citing the UN's invocation of the right of self-defense "in the wake of the September 11 [2001] attacks on the United States, calling upon the international community to

¹⁸⁰ The Operation in Gaza, *supra* note 10, at 29.

¹⁸¹ See *International Law Series: The Right to Self Defense*, *supra* note 4 (criticizing some non-governmental organizations of wrongfully claiming that Israel does not have the right to self defense under IHL, and others for acknowledging Israel's right to self-defense, but consistently judging every action taken by Israel as a violation of international law).

¹⁸² *Id.*

¹⁸³ The Operation in Gaza, *supra* note 10, at 15 (emphasis added).

¹⁸⁴ *Id.* at 27.

combat such terrorism perpetrated by non-state actors.”¹⁸⁵ Interestingly, this conclusion was supported by the U.S. House of Representatives, which declared Operation Cast Lead a legitimate act in self-defense, as authorized under the UN Charter.¹⁸⁶

From both a legal and common sense perspective, Operation Cast Lead was a necessary measure in self-defense. Continued inaction would have likely resulted in claims that Israel failed to protect its citizenry. Further, if Israel continued to wait for UN intervention, the constant and imminent threat posed by Hamas to nearly one million Israeli citizens may have continued indefinitely. Faced with the constant barrages of missile and mortar fire, Operation Cast Lead is exactly the type of response envisioned by Article 51 of the UN Charter.

C. Misapplication of the Doctrine of Distinction

Whether or not Israel was justified in resorting to the use of force, Israel was nevertheless obliged to comply with the IHL in its military operations. The principle of distinction, just one of many core principles within IHL, exists to maintain the delicate balance between military necessity and the adverse impact on civilians and protected property that inevitably accompanies armed conflict. Although the Goldstone Report has also been criticized for its legal analysis of JIB proportionality¹⁸⁷—another core principle in IHL—this section will focus solely on the Goldstone Report’s treatment of the doctrine of distinction.

The IDF was faced with unprecedented operational obstacles in Operation Cast Lead. In order to “destroy the sophisticated infrastructure of an organization that built between 600-800 tunnels, built and stored thousands of missiles and fired 6,000 missiles,” while at the same time

¹⁸⁵ *Id.* See also S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001).

¹⁸⁶ Noura Erakat, *Operation Cast Lead: The Elusive Quest for Self Defense under International Law*, 36 RUTGERS L. RECORD 164, 165 (Oct. 29, 2009). Note that for the act of self-defense to be deemed legitimate, it must be both necessary (a last resort after peaceful measures have failed) and proportionate (“limiting force in magnitude, scope and duration to that which is reasonably necessary to counter a threat or attack”). LOW DESKBOOK, *supra* note 96 at 5. Although many may disagree about whether Israel’s actions meet these criteria, this article is more concerned with the fact that the Mission completely ignored any arguments that Israel had a right to self-defense at all.

¹⁸⁷ Laurie R. Blank, *The Application of IHL in the Goldstone Report: A Critical Commentary*, YEARBOOK OF INTL. HUMANITARIAN L. 347, 357 (2009).

“seeking to minimize the loss of life to innocent individuals,”¹⁸⁸ the IDF would undertake numerous preventative measures and engage in extensive planning to avoid unnecessary civilian casualties.

Numerous factors made minimizing injuries and death to civilians and destruction of protected places an almost impossible task. First, there is evidence that Hamas and other Palestinian armed groups used nefarious and indiscriminate methods to achieve its ends. Even the Goldstone Report acknowledged “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.”¹⁸⁹ Second, the nature of Hamas as both a governing body and recognized terrorist organization necessitated attacking the organization as a whole, including “objects [that] were often concealed or embedded in civilian facilities such as residential buildings, schools, or mosques.”¹⁹⁰ This created situations in which otherwise protected property became a valid military objective. Finally, the conflict took place in Gaza, “the most densely populated piece of land on earth.”¹⁹¹ Taken together, these operational challenges placed Gazan citizens directly in the crossfire throughout Operation Cast Lead.

1. Double Standard in Measures Used to Warn Civilians

In order to overcome the increased operational obstacles inherent in fighting an insurgency, the IDF implemented “operational plans and rules of engagement, [wherein] 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 minimize civilian harm.”¹⁹²

The IDF used numerous methods, and mediums, of communication to warn civilians of impending attacks. First, the IDF inundated Gaza with nearly 2,500,000 leaflets “warn[ing] civilians to distance themselves from military targets, including buildings containing weapons,

¹⁸⁸ Amos Guiora, Response to *Was the Gaza Campaign Legal*, Am. Bar Ass’n, NAT’L SECURITY L. REP. 8 (2009).

¹⁸⁹ Goldstone Report, *supra* note 3, para. 493.

¹⁹⁰ The Operation in Gaza, *supra* note 10, at 86.

¹⁹¹ Blank, *supra* note 187, at 357.

¹⁹² The Operation in Gaza, *supra* note 10, at 85–86.

ammunitions or tunnels, or areas where terrorist activity was being conducted.”¹⁹³ Second, the IDF “conveyed instructions and advance warnings to residents by local radio broadcasts with IDF announcements and by about 165,000 phone calls,” thereby providing daily updates regarding operational activity affecting civilian areas.¹⁹⁴ Third, the IDF made targeted phone calls to specific Gazan population centers prior to attacks, “informing residents at risk about the upcoming strike and urging them to leave the place.”¹⁹⁵ Finally, the IDF used cutting-edge technology to provide up-to-date information to military planners regarding civilian presence in the vicinity of military objectives. Each IDF brigade combat team had an unmanned aerial vehicle squadron assigned to it, not only for providing troops on the ground with timely close air support,¹⁹⁶ but also for supplying commanders with real-time intelligence intended “to assess the presence of civilians in the designated military target, despite the advance warnings.”¹⁹⁷ The IDF confirmed the efficacy of these measures, witnessing on numerous occasions “the departure of civilians from targeted areas prior to the attack as a direct result of the warnings.”¹⁹⁸

Whether these warnings complied with international law is at issue in the Goldstone Report. Additional Protocol I (hereinafter AP I) requires an attacking force to provide advance warning of attacks that may affect the civilian population, as long as circumstances permit such warning.¹⁹⁹ In recent years, this standard has been interpreted further, imposing a feasibility test on the measures employed by attacking forces. Thus, an attacking force is only required to take all measures to warn civilian populations “that are practicable or practically possible, taking into account all circumstances ruling at the time.”²⁰⁰

Instead of focusing on the AP I requirement that warnings be given when feasible, the Goldstone Report imposes an additional efficacy-

¹⁹³ *Id.* at 99.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ David Eshel, *New Tactics Yield Solid Victory in Gaza*, AVIATIONWEEK.COM (Mar. 11, 2009), <http://www.aviationweek.com/aw/generic/story-channel.jsp?channel=defense&id=news/gaza031109.xml>.

¹⁹⁷ The Operation in Gaza, *supra* note 10, at 100.

¹⁹⁸ *Id.*

¹⁹⁹ See AP I, *supra* note 101, art. 57(2)(c).

²⁰⁰ Blank, *supra* note 187, at 384 (citing Arbitral Award of December 19, 2005, ‘Ethiopia v. Eritrea, Western and Eastern Fronts, Ethiopia’s claims 1 & 3,’ para. 33, *available at* <http://www.pca-cpa.org>).

based requirement on Israel as the attacking force. The Mission asserted that Israel's warning measures were inadequate because they were not effective, further finding the IDF's leaflets to be insufficiently clear and the telephone calls to be generic and unspecific. Ultimately, The Mission concluded that the IDF's warnings failed to adequately communicate critical information, resulting in fear and ambiguity rather than effective results.²⁰¹

In reaching this conclusion, the Mission explains its interpretation of the AP I standard:

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 of [sic] hoax may undermine future warnings, putting civilians at risk.²⁰²

Although seemingly reasonable on its face, the Mission ignores the standard's emphasis on feasibility rather than efficacy in its conclusions of law, choosing instead to focus on the capability of the IDF to issue more effective warnings, and arriving at its adverse findings based on information gathered after the fact. This shift in emphasis imposes a narrower standard on Israel than is required by IHL, placing undue significance on absolute efficacy, rather than the practicability and military considerations known to commanders at the time of the attack.

First, the Mission places heavy emphasis on Israel's failure to live up to its potential by issuing more effective warnings, stating that "[i]n terms of the practical capabilities of issuing warnings, it is perhaps difficult to imagine more propitious circumstances."²⁰³ The Mission

²⁰¹ Goldstone Report, *supra* note 3, at 151–62.

²⁰² *Id.* para. 528.

²⁰³ *Id.* para. 509.

bases this conclusion on Israel's extensive planning, preparations, technological capabilities, and control over Gaza's airspace and telephone networks.²⁰⁴ This conclusion wrongfully assumes that compliance with the IHL is based on the attacker's relative abilities. In other words, since Israel has greater ability to issue more effective warnings, it should be held to a higher standard than Hamas or other Palestinian Armed Groups. In fact, no such standard exists in AP I or in CIL. Such a standard would require Israel to exhaust *all* warning measures prior to attacking, rather than those measures that are feasible under the circumstances. This type of criticism is typical of the capabilities-based paradigm and a departure from the IHL standard that all parties to an armed conflict—regardless of their relative resources or abilities—are held to the same legal standard.²⁰⁵ Critics of the capability-based model argue that not only is such a standard more stringent than the existing law, but there is a danger that “states simply will not issue warnings because no warnings will meet these standards and still enable effective military operations.”²⁰⁶

Second, the Goldstone Report focuses its criticism on the IDF's warnings on the effect that they had on civilians receiving the warnings, in determining whether the warnings were, in fact, effective. The Mission offers only two after-the-fact accounts to support its conclusion that the Israeli efforts of warning by telephone were not adequately sufficient. In one account, the Mission interviewed Mr. Abu Askar, a Palestinian resident whose house was hit by an Israeli strike just seven minutes after he received a telephone warning,²⁰⁷ thus indicating that the warning, although specific and targeted at Mr. Askar, gave too little notice. In another interview concerning the Al-Bader Flour Mills Co., a business owner and his staff suffered from fear and confusion after receiving two recorded messages indicating that their mill was to be targeted. Although the mill was not attacked immediately following the phone warning, it was attacked five days later with no additional

²⁰⁴ *Id.*

²⁰⁵ M.N. Schmitt, *Asymmetrical Warfare and International Humanitarian Law*, in W. Heintschel von Heinegg & V. Epping, eds., *International Humanitarian Law Facing New Challenges*, Symposium in Honour of Knut Ipsen (Berlin, Springer 2007), at 36 (“The more a military is capable of conducting ‘clean’ warfare, the greater its legal obligations, and the more critical the international community will be of any instance of collateral damage and incidental injury.”); *see also* Blank, *supra* note 187, at 386.

²⁰⁶ Blank, *supra* note 187, at 181. *See also* Schmitt, *supra* note 205, at 11.

²⁰⁷ Goldstone Report, *supra* note 3, paras. 501–02.

notification.²⁰⁸ Aside from the fact that both of these warnings apparently proved to be effective in putting the civilians on notice of an impending attack, thereby seeking to avoid unnecessary death or injury, reliance on these accounts reveals a misunderstanding on the part of the Mission that the impact on civilians receiving the warnings is a consideration in the legal standard. In fact, the only legal issue that is relevant is whether the warnings were effective in transmitting a warning, and whether the warning “generally informed civilians that they were at risk and should seek shelter.”²⁰⁹ Ironically, the instances cited by the Mission to prove the IDF measures as ineffective seem to meet the legal requirements of AP I.

Finally, despite extensive criticism of Israel’s failures to adequately warn civilians in the area of military operations, the Goldstone Report places very little emphasis on Hamas’s failures toward its own civilians. AP I requires the defending force in a conflict to act as follows:

[E]ndeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives; avoid locating military objectives within or near densely populated areas; and take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.²¹⁰

Although the Goldstone Report acknowledges “that the launching of attacks from or in the vicinity of civilian buildings and protected areas are serious violations of the obligation on the armed groups to take constant care to protect civilians from the inherent dangers created by military operations,” its legal findings regarding Hamas’s abuses of their obligations as defenders receives little attention in the Goldstone Report.²¹¹ By placing disproportionate emphasis on the obligations of the

²⁰⁸ *Id.*

²⁰⁹ Blank, *supra* note 187, at 387.

²¹⁰ AP I, *supra* note 101, art. 58 (a)–(c).

²¹¹ Blank, *supra* note 187, at 388 (noting that “the [Goldstone] report gives the defending party’s obligations short shrift”). This dynamic will be further developed in the discussion in the next section of the article, discussing allegations that Israel violated the principle of distinction by engaging Hamas in the vicinity of the al-Qud Hospital. As will be seen, the Mission rushes to a conclusion that Israel violated its obligations, while ignoring evidence that Hamas violated its own responsibilities under IHL.

attacker (IDF) over the defender (Hamas and other Palestinian armed groups), the Goldstone Report “creates perverse incentives for the defender to use the civilian population as a shield.”²¹²

2. Questionable Criticism of Israeli Defense Forces Targeting Decisions

Unfortunately, the precautions and preventative measures utilized by the IDF ultimately did not prevent more than a thousand unintended civilian deaths. The Goldstone Report addresses these deaths and the destruction of civilian or governmental infrastructure, alleging grave breaches of AP I.²¹³ The Mission made this finding despite Israel’s refusal to cooperate. As such, the Mission did not possess and lacked the means to obtain crucial information regarding civilian impact anticipated by commanders and military planners in their targeting process. Instead of simply gathering the available facts, as required by its mandate, the Mission used the insufficient facts accessible to it to arrive at legal conclusions. In doing so, the Goldstone Report distorts the IHL by placing more restrictive standards where there are none in an effort to assess responsibility to Israel’s actions.

Although all violations of the doctrine of distinction are grave breaches of Article 85 of AP I, not all civilian casualties and deaths are violations of the doctrine of distinction.²¹⁴ To the contrary, the IHL “operates in scenarios in which incidental injury and collateral damage are the foreseeable, albeit undesired, result of attack on a legitimate target.”²¹⁵ The doctrine of distinction, codified in AP I and applied to Israel as a reflection of CIL, states 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.”²¹⁶ It is well settled in international law that the doctrine of distinction applies to both

²¹² *Id.* at 388.

²¹³ See generally Goldstone Report, *supra* note 3.

²¹⁴ Blank, *supra* note 187, at 355.

²¹⁵ The Operation in Gaza, *supra* note 10, at 35 (citing Schmitt, *supra* note 205, at 150).

²¹⁶ AP I, *supra* note 101, art. 48. See also HCJ 769/02 The Pub. Comm. Against Torture in Isr., et. al. v. Gov’t of Israel 57(6) IsrSC 285, P21 [2006] (Isr.) (discussing the doctrines of distinction and proportionality as applicable to Israel through CIL).

international and internal armed conflict.²¹⁷ As such, any lingering controversy regarding the status of Gaza as occupied, and the accompanying normative framework, is irrelevant to this particular issue.

The question of who, or what, qualifies as protected people or property is a difficult issue in modern asymmetrical warfare. The belligerents launching rocket attacks against Israel during the al-Aqsa Intifada were neither representatives of a “high contracting party,” as envisioned by the Geneva Conventions, nor were they acting as part of any internationally accepted nation-state.²¹⁸ These individuals often do not wear distinctive insignia, openly carry arms, or make any effort to distinguish themselves from civilians around them.²¹⁹ Instead, many Palestinian extremist groups actively abuse IHL by using civilian populations as cover, conducting operations in and around civilian communities, and storing their implements of warfare in highly populated civilian areas.²²⁰

Creating confusion between civilians and combatants and protected property, a primary tactic of insurgents in asymmetric warfare, presents a challenge not only for opposing forces seeking to achieve military objectives without running afoul of international law, but also for those assessing the legality of military operations in the framework of IHL. Additional Protocol I attempts to provide guidance in these situations by extending protections to civilian persons “unless and for such time as they take direct part in hostilities.”²²¹ Similarly, AP I allows the targeting of otherwise protected civilian structures when the structure “by [its] nature, location, purpose or use make[s] an effective contribution to military action and whose total or partial destruction, capture or neutralization, *in the circumstances ruling at the time*, offers a definite military advantage.”²²²

²¹⁷ Blank, *supra* note 187, at 355. *See also* Prosecutor v. Dusko Tadic, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, para. 110, 127 (citing U.N. GAOR Res. 2675, U.N. Doc. A/RES/2675(XXV) (Dec. 9, 1970)).

²¹⁸ *See generally* AMIT-KOHN ET AL., *supra* note 25.

²¹⁹ *See generally* The Operation in Gaza, *supra* note 10.

²²⁰ *Id.* paras. 186–89.

²²¹ AP I, *supra* note 101, art. 51(3) (defining “direct part” as “acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces”).

²²² *Id.* art. 45(2) (emphasis added).

Distinguishing between combatants and civilians is even more complex for Israel because its enemy, Hamas, is both an elected government body—carrying on the daily civil administration in Gaza—and an internationally recognized terrorist organization that has taken credit for multiple terrorist attacks and whose political campaign platform lists national liberation by armed struggle against Israel among its top priorities.²²³ *The Operation in Gaza: Factual and Legal Aspects*, Israel's after-action report to Operation Cast Lead (hereinafter AAR), succinctly summarizes this dynamic:

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.²²⁴

The Goldstone Report's criticism of Israel's targeting decisions against Gazan hospitals is a helpful illustration of the Mission's flawed analysis under this legal framework. The Mission dedicates a full eight pages²²⁵ to the partial destruction of the al-Quds hospital by an Israeli attack on January 15, 2009, noting that "[t]he devastation caused to . . . the hospital buildings . . . and the ambulance depot was immense, as was the risk to the safety of the patients."²²⁶ The Goldstone Report concludes that by striking the hospital and the adjoining ambulance depot, the IDF violated Article 18 of Geneva IV.²²⁷

In the eight-page narrative, the Mission continued the trend that it used throughout the report: focusing primarily on the actual effects of attacks rather than the intelligence relied upon by the IDF in its targeting

²²³ *Hamas—2006 Electoral Campaign Platform*, List for Change and Reform, available at <http://Israeli.palestinian.procon.org/view.additional-resource.php?resourceID=646> (last visited Feb. 22, 2012).

²²⁴ *The Operation in Gaza*, *supra* note 10, para. 235 (emphasis added).

²²⁵ *See generally* Goldstone Report, *supra* note 3, at 174–82.

²²⁶ *Id.* at 177.

²²⁷ *Id.* at 182.

decision. The Mission made no reference to any information that it independently collected regarding the nature, location, purpose, or use of the hospital under the IHL framework. Instead, it concludes, based on information gathered after the fact, that “the hospital could not be described in any respect at that time as a military objective.”²²⁸

Although Israel—refusing to cooperate with the Mission’s investigation—has never publicly revealed the nature of its military intelligence possessed prior to the attack, it cited two sources of information that confirmed its intelligence that the building had been used for cover by Palestinian militants and had therefore lost its protected status. The first piece of information relied upon was a *Newsweek* magazine article that contained a quote from a representative of the Palestinian People’s Party, indicating that during the attack “resistance fighters were firing from positions all around the hospital.”²²⁹ The IDF also cited the account of a local man who confirmed that “[t]he men of Hamas took refuge mainly in the building that houses the administrative offices of al Quds . . . [t]hey used the ambulances and forced ambulance drivers and nurses to take off their uniforms with the paramedic symbols, so they could blend in better and elude Israeli snipers.”²³⁰ The Goldstone Report directly addresses Israel’s reliance on the *Newsweek* article, stating:

The Mission understands that the Israeli Government may consider relying on journalists’ reporting as likely to be treated as more impartial than reliance on its own intelligence information. The Mission is nonetheless struck by the lack of any suggestion in Israel’s report of July 2009 that there were members of armed groups present in the hospital *at the time*.²³¹

²²⁸ *Id.* at 181.

²²⁹ The Operation in Gaza, *supra* note 10, at 65 (citing Rod Nordland, *Hamas and Its Discontents*, *NEWSWEEK* (Jan. 20, 2009), <http://www.newsweek.com/2009/01/19/hamas-and-its-discontents.html>).

²³⁰ Lorenzo Cremonesi, *Così I Ragazzini di Hamas Ci Hanno Utilizzato Come Bersagli*, *CORRIERE DELLA SERA*, 21 January 2009, http://www.corriere.it/esteri/09_gennaioio_21/denuncia_hamas_cremonesi_ac41c6f4-e802-11dd-833f-00144f02aabc.shtml (last visited Feb. 22, 2012). The *Corriere della Sera* is a reputable daily newspaper published in Milan, Italy, since 1876. The translation of this article can be found in The Operation in Gaza, *supra* note 10, at 218.

²³¹ Goldstone Report, *supra* note 3, para. 614 (emphasis added).

This comment is disconcerting for two reasons. First, in discrediting the *Newsweek* account, the Mission completely disregarded the additional, corroborating evidence offered by Israel. Second and more troubling, the analysis increases the requirements imposed by IHL by insinuating that the only circumstance in which an attacker can attack a civilian object is where the structure is being misused at the time of an attack. In fact, current use is only one criterion to be considered by commanders when determining whether or not to attack an otherwise protected object. As stated above, both the “nature” and “purpose” of a civilian object may also be considered when determining whether or not “military necessity ‘imperatively demands’ that the structure be targeted.”²³² The aforementioned news articles are evidence that the hospital had been used to shield Palestinian militants from attack both in the past and at time of the attack. Assuming that Israel possessed similar evidence prior to the attack regarding the nature, purpose, and use of the hospital, a finding that the hospital’s protected status had been negated may have been legally justified. Since the Mission did not have access to Israel’s intelligence and admitted that it could not “discount the possibility that Palestinian armed groups were active in the vicinity of such . . . hospitals,”²³³ its conclusion seems to be a rush to judgment and a distortion of the legal precepts applied to such situations.

Despite its reliance on Israel’s justifications in its AAR to support the conclusions in the Goldstone Report,²³⁴ the Mission discounts other sections of the same document that do not fit neatly within its finding that Israel violated Article 18 of Geneva IV. In the case of the al-Shifa Hospital, Israel claimed to possess intelligence that Hamas was making “use of an entire ground floor wing [of the hospital] as its headquarters during the Gaza Operation.”²³⁵ Notwithstanding this intelligence, Israel refrained from targeting the structure “out of concern for the inevitable harm to civilians also present in the hospital.”²³⁶ It is worth noting that despite the gravity of Israel’s accusation of grave breaches of IHL by Hamas, the Mission did not even investigate this alleged abuse of the al-

²³² See LOW DESKBOOK, *supra* note 96, at 131 (referencing the AP I commentary interpretation of items which, by their very nature, are military objectives: “all objects directly used by the armed forces: weapons, equipment, transports, fortifications, depots, buildings occupied by armed forces, staff headquarters, communications centres, etc.”).

²³³ Goldstone Report, *supra* note 3, at 13.

²³⁴ See *id.* at 178.

²³⁵ The Operation in Gaza, *supra* note 10, at 48.

²³⁶ *Id.*

Shifa Hospital.²³⁷ It is no surprise, therefore, that “the Mission did not find any evidence to support the allegations made by the Israeli Government.”²³⁸

It is understandable that, in the absence of Israeli military cooperation with the UN mandate, the Mission would be forced to make findings based on information collected after the fact. After all, the Mission did not have access to the vital information relied upon by IDF commanders at the time of the targeting decisions in question. What is troubling is that instead of accepting the restraints caused by restricted access to crucial information, the Mission makes findings and conclusions based only upon the limited information gathered during its investigation, “accept[ing] claims of atrocities at face value,” and “attribut[ing] them to deliberate policy rather than the mistakes, negligence, and misconduct out of which most wartime violations are compounded.”²³⁹ Through its selective use of evidence provided in Israel’s AAR, and failure to investigate allegations of grave violations by Hamas, the Mission further detracts from the perceived veracity and validity of its findings.

Further, such application of the doctrine of distinction based solely on information gathered after the fact sets a dangerous precedent. It is unreasonable to expect that military planners would have the capability to definitively determine the exact number of casualties or civilian property damage a military operation will cause. Commanders, engaged in urban warfare, would be deterred from initiating military operations, fearing that allegations of war crimes may be leveled against them. This approach is clearly another departure from the intent of the IHL contained within the Goldstone Report.

These issues, taken together, evoke serious concerns upon the ultimate findings of the Goldstone Report, and further support a conclusion that the Mission engaged in a biased evaluation of Israel’s actions. By narrowing and misapplying accepted legal principles, the Goldstone Report creates its own legal framework—one that imposes nearly impossible standards for the attacker in an armed conflict, while

²³⁷ Goldstone Report, *supra* note 3, at 143.

²³⁸ *Id.*

²³⁹ Alan Dowty, *Bungled Again: Israel and Goldstone*, Middle East Strategy at Harvard Blog (Nov. 3, 2009), <http://blogs.law.harvard.edu/mesh/2009/11/bungled-again-israel-and-goldstone/>.

ignoring or downplaying the obligations of those who defend against military operations such as Operation Cast Lead.

VI. Conclusion

Although the Goldstone Report succeeded in telling the compelling tale of civilians caught in the crossfire of a seemingly everlasting battle—demonstrating that this chapter in the Israeli-Palestinian conflict is far from over—its account is incomplete. Without information regarding the information used by IDF commanders, and facts known only by Israeli planners and politicians—both prior to and during Operation Cast Lead—the Mission was hamstrung with insufficient information with which to make a reasoned and unbiased analysis. Instead of recognizing these constraints and responding to the Human Rights Council with only those facts which could be readily ascertained, the Mission took its mandate a dangerous step further, making findings and recommendations that fill in the blanks. In doing so, the Mission contorts international law by taking a selective, narrow, and misguided approach that resonates with bias and politically charged sentiment. The unsound analysis not only cuts against the Mission's own findings and recommendations, but ignores the most important, and tragic, aspect of this conflict: the dire effects of an insurgency on the civilian population.

The Goldstone Report also represents a missed opportunity to provide much needed guidance to those engaged in COIN operations. The rise in global terrorism and accompanying increase in incidence of asymmetric tactics brings with it new challenges to the modern battlefield. Clearly, terrorism is not a problem endemic to Israel or the Middle East. In fact, many scholars believe that there is a global jihad.²⁴⁰ Whether or not

²⁴⁰ David Kilcullen—who has shaped COIN doctrine as a writer for the Quadrennial Defense Review at the Pentagon and has worked as a chief counter-terrorism strategist at the U.S. State Department, the senior COIN advisor to General David Petraeus, and the U.S. Secretary of State's Special Advisor for COIN—argues that Osama Bin Laden's 1998 declaration "World Islamic Front Declaration of War against Jews and Crusaders" was "a fatwa to all Muslims calling for Jihad," and has cited numerous examples of cooperation between Al Qa'eda and its affiliates worldwide to illustrate "that Islamist groups . . . follow general ideological or strategic approaches that conform to the pronouncements of Al Qa'eda and share a common tactical style and operational lexicon." He bolsters this argument by demonstrating familial, financial, operational, planning, propaganda, and tactical ties that suggest that there is, in fact, a global community of decentralized, self-sustaining and semi-dependant Islamist groups that comprise the global insurgency. *See* DAVID KILCULLEN, COUNTERINSURGENCY 168 (2010)

Hamas is part of this network is uncertain. What is clear, however, is that terrorism and asymmetric warfare are here to stay.

Since global terrorism is a threat to the security of the United States and her allies, the legal framework for fighting COIN operations must be a chief concern. For the law to stay relevant, it must evolve to meet the needs of nations fighting this enemy. As described in Part II, Israel, throughout its existence, has at times selectively applied the IHL to mitigate the ever-present terrorist threat to its populace. The United States has also taken similar liberties with IHL in its policies of pre-emption and detention of “unlawful enemy combatants.” Many in the international legal community have called for review and amendment of the normative framework to recognize the challenges of asymmetrical warfare and provide a meaningful response to the problem of global terrorism. In the absence of a new solution, nation-states like Israel and the United States will continue to do what is necessary to fulfill their obligations to protect their people, even if that means testing the boundaries of existing international law.

The Goldstone Report’s flawed interpretation of IHL does little to clarify the law. As demonstrated in Part V, the Mission tends to impose stricter standards on the IDF than are required by international law. At the same time, the Mission devotes very little attention or criticism to the acts or omissions of Hamas as the governing body of Gaza. This interpretation of the law empowers non-state actors by imposing more restrictive legal paradigms upon nation-states—thereby providing a disincentive for nation-states to react to security threats to protect their citizens—while turning a blind eye to the violations of those who seek to circumvent the law as a matter of course.

This Goldstone Report did little to halt the cycle of conflict between Israel and Hamas. If anything, the Goldstone Report is a reflection of the reluctance of international bodies to recognize the new reality of global terrorism, and the tendency of third parties to fill the vacuum in the IHL with lawfare and controversy. Until there is a realization that politicization of such conflicts only stalls progress in addressing the very real threat of global terrorism, or a new legal framework that recognizes

(citing WORLD ISLAMIC FRONT, WORLD ISLAMIC FRONT DECLARATION OF WAR AGAINST JEWS AND CRUSADERS, 23 February 1998, <http://www.mideastweb.org/osamabinladen2.htm>).

the challenges of the global terrorism is enacted, civilians will continue to suffer the tragic consequences of war and lasting political peace will remain but a dream.

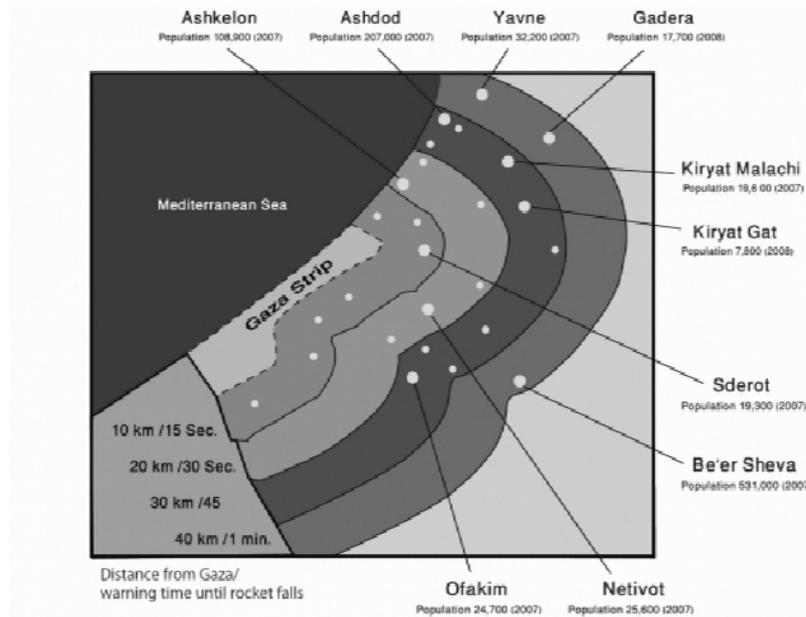
Appendix A

Map of Israel²⁴¹



²⁴¹ *CIA Map of Israel*, WORLDATLAS.COM, <http://www.worldatlas.com/webimage/countrys/asia/ciamaps/il.htm> (last visited Mar. 26, 2012).

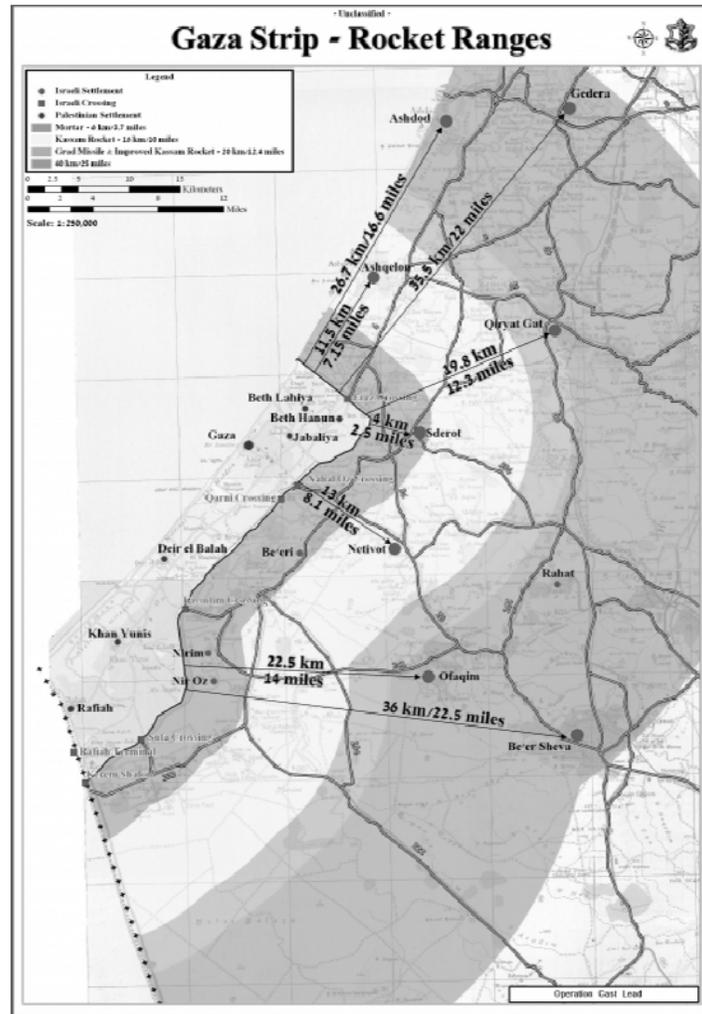
Appendix B

Rocket Attack Civilian Populations Affected²⁴²

²⁴² See *Rocket Attacks*, *supra* note 5.

Appendix C

Rocket Ranges to Israeli Civilian Communities²⁴³



²⁴³ *Id.*