

# The Gaza War of 2009: Applying International Humanitarian Law to Israel and Hamas

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## I. INTRODUCTION

Throughout 2008 Palestinian terrorists in Gaza continued to launch rocket and mortar attacks on Israeli civilians, and, in response, Israel re-closed the border at Gaza.<sup>1</sup> At times Israel responded to the projectile and terrorist attacks emanating from Gaza by reducing the fuel and electricity that it supplies to that region. There was also renewed speculation of intensified Israeli military action.<sup>2</sup>

As with every flare-up of the Arab-Israeli conflict, the air is thick with accusations of violations of international law. The halls of the United Nations resound with voices objecting to the alleged illegality of Israel's behavior, and legal "experts" have taken to the airwaves to raise accusations

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1. Amos Harel, *Israel to Shut Gaza Border Crossings Following Qassam Strike*, HAARETZ, Aug. 23, 2008, <http://www.haaretz.com/hasen/spages/1015144.html>.

2. Isabel Kershner, *Fuel Shortage Shuts Gaza Power Plant, Leaving City Dark*, N.Y. TIMES, Jan. 21, 2008, at A7, available at <http://www.nytimes.com/2008/01/21/world/middleeast/21mideast.html?scp=6&sq=gazafuel&st=cse>.

of wrongdoing.<sup>3</sup> For instance, U.N. Under Secretary General for Humanitarian Affairs, John Holmes asserted that “the effective Israeli isolation of Gaza . . . amounts to collective punishment and is contrary to international humanitarian law.”<sup>4</sup> Similarly, organizations such as Amnesty International have issued erroneous and misguided criticism, including “condemning” Israel’s imposition of all “blockades” on the Gaza Strip as “collective punishment.”<sup>5</sup> Jeremy Hobbs, Director of Oxfam International, called on Israel “immediately [to] lift its inhumane and illegal siege.”<sup>6</sup>

This article explores the many international legal issues raised by the Palestinian–Israeli tension along Gaza’s borders. It first examines legal issues raised by Palestinian conduct and then turns to legal issues raised by Israeli conduct. As will be demonstrated, criticisms of Israeli behavior, such as those mentioned above, lack any basis in international law. By contrast, Palestinian behaviors that are rarely criticized constitute severe violations of international law.

## II. PALESTINIAN ATTACKS FROM GAZA

Since Israel’s withdrawal from the Gaza Strip in August 2005, Palestinian groups, including Hamas, Fatah, Palestine Islamic Jihad, the Popular Front for the Liberation of Palestine, the Democratic Front for the Liberation of Palestine, and the Popular Resistance Committees have launched more than 6,000 mortar bombs and rockets on Israel.<sup>7</sup> With no more than a handful of possible exceptions, virtually all the attacks have been on civilian targets.<sup>8</sup>

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3. Carolynne Wheeler & Megan Levy, *U.N. Condemns Israel’s Deadly Attack on Gaza*, TELEGRAPH, Mar. 3, 2008, <http://www.telegraph.co.uk/news/worldnews/1580480/UN-condemns-Israel's-deadly-attack-on-Gaza.html>.

4. *Middle East Peace Process Needs Changes on the Ground to Succeed—UN Envoy*, U.N. NEWS CENTRE, Feb. 26, 2008, <http://www.un.org/apps/news/story.asp?NewsID=25767&Cr=palestin&Cr1>.

5. *Gaza Blockade: ‘Collective Punishment’ Condemned*, AMNESTY INTERNATIONAL UK, Jan. 21, 2008, <http://www.amnesty.org.uk/newsdetails.asp?NewsID=17616>.

6. *Israel’s Blockade Poses Immediate Threat to the Lives of Gaza’s Sick and Elderly*, *Says Oxfam*, OXFAM INT’L, Jan. 25, 2008, <http://www.oxfam.org/en/node/266>.

7. *The Hamas War Against Israel*, ISRAEL MINISTRY OF FOREIGN AFFAIRS, Sept. 3, 2008, <http://www.mfa.gov.il/MFA/Terrorism+Obstacle+to+Peace/Palestinian+terror+since+2000/Missile+fire+from+Gaza+on+Israeli+civilian+targets+Aug+2007.htm>.

8. Over the past seven years hundreds of people were hurt and a number killed by Qassam rockets fired into the western Negev town of Sderot and the city of Ashkelon, including Roni Yihye, 47, father of four and a student at Sapir College, killed on February 27, 2008, when a Qassam rocket exploded in a parking lot near the campus in Sderot. Thirty-five-year-old Shir-El Friedman was killed on May 21, 2007; Jacob

A cease-fire agreement between Israel and Hamas from June 19 to December 19, 2008, greatly reduced, but failed to eliminate entirely, attacks on Israeli civilian targets. During the cease-fire, Palestinian terrorists launched 329 Qassam rocket and mortar bomb and missile attacks.<sup>9</sup> Infolive.tv reported on July 7, 2008, that Hamas spokesman Fawzi Barhoum had declared an end to the cease-fire,<sup>10</sup> although this declaration was clearly premature.<sup>11</sup>

While several Israeli cities and towns have been attacked, the brunt of the Palestinian assault has been borne by the town of Sderot, which has been bombarded by terrorist projectiles an average of more than twice a day during the last two and a half years.<sup>12</sup> The attacks have killed several residents and injured dozens of others. The attacks have destroyed houses and public buildings such as kindergartens. The residents are so traumatized that three-quarters of all Sderot children between the ages of four and eighteen suffer from post-traumatic anxiety.<sup>13</sup>

### III. ILLEGALITY OF PALESTINIAN ATTACKS UNDER THE LAWS OF WAR AND TERRORISM

While Palestinian attacks from Gaza clearly violate many provisions of international law, the attacks have drawn little more than pro forma objections from international observers. For instance, a search of the U.N. UNISPAL database (the United Nations Information System on the Question of Palestine) reveals dozens of U.N. documents issued in the last year concerning Gaza. Yet only one document was discovered, a

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Jacobov was killed on November 21, 2006, and Ohsri Oz was killed on the 27th of the same month. Nine-year-old Osher Twito lost his leg in an attack on February 10, 2008. See Mijal Grinberg & Avi Issacharoff, *Woman Killed, Two Wounded in Qassam Rocket Strike on Sderot*, HAARETZ, May 22, 2007, <http://www.haaretz.com/hasen/spages/861946.html>; Shelly Paz, *A Man of Courage*, JERUSALEM POST, May 28, 2007, <http://www.jpost.com/servlet/Satellite?cid=1178708695334&pagename=JPost%2FJPArticle%2FShowFull>; *The Hamas War Against Israel: A Diary—February 2008*, ISRAEL MINISTRY OF FOREIGN AFFAIRS, Feb. 29, 2008, <http://www.mfa.gov.il/MFA/Terrorism>.

9. Intelligence and Terrorism Information Center at the Israel Intelligence Heritage and Commemoration Center, *The Six Months of the Lull Arrangement*, Dec. 2008, [http://www.terrorism-info.org.il/malam\\_multimedia/English/eng\\_n/pdf/hamas\\_e017.pdf](http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/pdf/hamas_e017.pdf).

10. *Hamas Says Truce is Over*, (Infolive.tv broadcast July 7, 2008) <http://www.infolive.tv/en/infolive.tv-25286-israelnews-exclusive-hamas-says-truce-over>.

11. Intelligence and Terrorism Information Center at the Israel Intelligence Heritage and Commemoration Center, *supra* note 9.

12. See Steven Erlanger, *At Gaza's Edge, Israelis Fear Rockets' Whine*, N.Y. TIMES, Jan. 9, 2008, at A1, available at <http://www.nytimes.com/2008/01/09/world/middleeast/09israel.html>; The Sunday Times, *Close to the Edge*, THE TIMES ONLINE, Sept. 2, 2007, [http://www.timesonline.co.uk/tol/news/weather/world/middle\\_east/article2347909.ece](http://www.timesonline.co.uk/tol/news/weather/world/middle_east/article2347909.ece).

13. Mijal Grinberg & Eli Ashkenazi, *Study: Most Sderot Kids Exhibit Post-Traumatic Stress Symptoms*, HAARETZ, Jan. 17, 2008, <http://www.haaretz.com/hasen/spages/945489.html>.

letter from Israeli diplomats to senior U.N. officials following a Palestinian terror attack,<sup>14</sup> of which the primary and direct focus was Palestinian violations of international law.<sup>15</sup> This disturbing silence cannot be justified on the grounds that controversy exists regarding the legality of Palestinian actions since it is abundantly clear that the Palestinian attacks are contrary to the standards of international law.

The Palestinian attacks violate one of the most basic rules of international humanitarian law: the rule of distinction, which requires combatants to aim all their attacks at legitimate targets—enemy combatants or objects that contribute to enemy military actions.<sup>16</sup> Violations of the rule of distinction—attacks deliberately aimed at civilians or protected objects as such—are war crimes.<sup>17</sup>

One of the corollaries of the rule of distinction is a ban on the use of weapons that are incapable, under the circumstances, of being properly aimed only at legitimate targets.<sup>18</sup> The rockets and projectile weapons being used by the Palestinian attackers are primitive weapons that cannot be aimed at specific targets and must be launched at the center of urban areas. This means that the very use of the weapons, under current circumstances, violates international law.

Consequently, each one of the 10,000 terrorist rockets and mortars<sup>19</sup> by Palestinian terrorists on civilian targets in Israeli towns is a war crime. The terror squads carrying out the attacks, as well as their commanders, bear criminal responsibility for these war crimes. Indeed,

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14. U.N. GAOR, 62nd Sess., U.N. Doc. A/62/857-S/2008/367 (June 6, 2008).

15. *Id.*

16. See YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT*, 82 (Cambridge Univ. Press 2004).

17. *Id.* at 115. For ICRC's study of the rule of distinction, see JEAN-MARIE HENCKAERTS & LOUISE DOSWARD-BECK, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW* (Cambridge Univ. Press 2005) [hereinafter ICRC Rules]. While it is not clear that there is a state of Palestine or that the Palestinian attacks may be attributed to state actors, the Palestinian attackers are still bound by international humanitarian law. It is generally acknowledged that non-state actors are bound by the rules of law such as distinction and proportionality. See LISBETH ZEGVELD, *ACCOUNTABILITY OF ARMED OPPOSITION GROUPS IN INTERNATIONAL LAW* (2002).

18. See DINSTEIN, *supra* note 16, at 55. For a commonly cited version of this application of the rule of distinction, see Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art 52, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Geneva Protocol].

19. Steve Huntley, *U.S. Tough on Israel, Light on Palestinians*, CHICAGO SUN-TIMES, May 15, 2009, at 26, available at <http://www.suntimes.com/news/huntley/1574877,CST-EDT-hunt15.article>.

criminal responsibility for these crimes extends up the chain of command to the most senior officials in the terror groups who have approved these rocket attacks. Under the rules of command responsibility, senior Hamas leaders, such as Khaled Mashal, who insisted on a continuation of the rocket attacks in response to “Zionist crimes,”<sup>20</sup> are among the parties guilty of war crimes.<sup>21</sup>

The Palestinian attacks, because they are intended to kill or seriously injure civilians in order to intimidate a population, are also terrorist acts within the scope of the International Convention for the Suppression of the Financing of Terrorism.<sup>22</sup> So long as the acts are committed by non-nationals of the target state,<sup>23</sup> Articles 2(4)-(5) extend liability to all those who:

- attempt to commit;
- participate as accomplices;
- direct or organize terrorist acts; or
- contribute to acts by terrorist groups with the knowledge of the groups’ intent to commit terror or with the aim of furthering their goals.

Thus, international law considers a large number of Palestinians related to the attacks to be terrorists; including the squads of militants actually carrying out the rocket attacks, all those who assist the squads with organization or financing, and all those who finance the terrorists—

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20. Ian Black, *Defiant Hamas Leader Says Attacks on Israel Will Go on Despite Heavy Human Cost in Gaza*, THE GUARDIAN, May 30, 2007, <http://www.guardian.co.uk/world/2007/may/30/israel>.

21. Command responsibility extends to those who command subordinates committing crimes where the commander orders the war crimes, or has actual or constructive knowledge of the crimes and fails to intervene. See Geneva Protocol, *supra* note 18, at arts. 86–87. In this case, superiors in the Hamas organization certainly have actual knowledge of the terrorist actions to be committed by subordinates, and even where they did not directly order the attacks, they failed to intervene.

22. Article 2(1)(b) of the Convention includes in the definition of terrorist acts those “intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population.” International Convention for the Suppression of the Financing of Terrorism art. 2, Jan. 10, 2000, 39 I.L.M. 270 [hereinafter *Suppression of Financing Terrorism*].

23. Article 3 includes in the scope of the Convention all terrorist acts except those “where the offence is committed within a single State, the alleged offender is a national of that State and is present in the territory of that State and no other State has a basis under Article 7, paragraph 1, or Article 7, paragraph 2, to exercise jurisdiction.” *Suppression of Financing Terrorism, supra* note 22, art. 3. Gazan terrorists should not be considered as being present or carrying out the offense solely within the territory of Israel, but even if one were to dispute this contention, Article 3 would still consider the acts as within the scope of the convention since Gazan Palestinians are not nationals of Israel.

such as the Palestinian Authority—are considered terrorists because they are aware of the intent of the terror squads to carry out terrorist acts.

The Palestinian attacks must also be seen as terrorist attacks under a related international convention: the International Convention for the Suppression of Terrorist Bombings. This convention makes it a crime to bomb public places (such as city streets) with the intent to kill civilians. This Convention relates to bombings carried out by persons that are non-nationals of the state of which the victims are nationals.<sup>24</sup> Also under this Convention, the Palestinian attackers are considered international terrorists and Israel is required to assume criminal jurisdiction over them. Additionally, other states party to the Convention, such as the United States, Russia, Turkey and France, must cooperate to help combat such Palestinian terrorist acts.

Palestinian authorities in Gaza also violate anti-terrorism provisions of international law by providing a safe haven for Palestinian terrorists. U.N. Security Council Resolution 1566, which was adopted by the authority granted in Chapter VII of the U.N. Charter, and is therefore binding international law for all states, requires states to deny safe haven to “any person who supports, facilitates, participates or attempts to participate in the financing, planning, preparation or commission of terrorist acts or provides safe havens.”<sup>25</sup> Similarly, Security Council Resolution 1373, also a Chapter VII resolution, requires states to “deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens.”<sup>26</sup> Together, these documents establish that, under international law, providing a safe haven for terrorists is itself a criminal terrorist act. Thus, all Palestinian governing authorities in Gaza, whether directly involved in terror attacks or not, are criminal terrorists under international law by virtue of their willing provision to provide a safe haven for terrorists.

Palestinian war crimes do not end with terrorism and violations of the rules of distinction. As will be discussed in section VI below, Palestinian terrorists and fighters in Gaza have almost certainly violated the international humanitarian rule against perfidy.<sup>27</sup> In addition, a consortium

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24. International Convention for the Suppression of Terrorist Bombings art. 6, Dec. 15, 1997, 37 I.L.M., 249.

25. S.C. Res. 1566, ¶ 2, U.N. Doc. S/RES/1566 (Oct. 8, 2004).

26. S.C. Res. 1373, ¶ 2, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

27. Perfidy is defined as “[a]cts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of

of Palestinian terrorist groups have held Israeli soldier Gilad Shalit incommunicado and out of reach of the International Committee of the Red Cross since 2006. This is a clear violation of international law concerning prisoners of war.

#### IV. ILLEGALITY OF PALESTINIAN ATTACKS UNDER THE GENOCIDE CONVENTION

In carrying out their attacks on Israeli Jews as part of a larger aim to kill Jews, as demonstrated by the Hamas Covenant, also known as the Hamas Charter, many of the Palestinian terrorists are also violating the Convention on the Prevention and Punishment of Genocide. Under Article 1 of the Genocide Convention, Israel and other signatories are required to “prevent and punish”<sup>28</sup> persons who carry out such genocidal acts, and those who conspire with them, incite them to kill, and are complicit with their actions.<sup>29</sup> The Convention thus requires Israel to prevent and punish both the terrorists themselves and leading figures that have publicly supported the Palestinian attacks. Article 2 of the Convention defines any killing with intent “to destroy, in whole or in part, a national, ethnical, racial or religious group, as such” as an act of genocide.<sup>30</sup>

The Hamas attacks fall within this definition of genocide. The Covenant of Hamas explicitly advocates a religious holy war aimed at creating a regional Islamic entity encompassing the territory of Israel and the disputed areas.<sup>31</sup> The Hamas Covenant not only calls for the movement to liberate Palestine, and in so doing to “raise the banner of Allah over every inch of Palestine” (Article 6),<sup>32</sup> but also demonstrates anti-Semitic, murderous intent. Article 7, for instance, states “the Day of Judgment will not come about until Moslems fight the Jews [killing the Jews], when the Jew will hide behind stones and trees. The stones and trees will say O Moslems, O Abdulla, there is a Jew behind me, come and kill him.”<sup>33</sup> The text is infused with repulsive terminology such as, for example, the reference to “Zionist Nazi[s].”<sup>34</sup> The Covenant’s Preamble

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international law applicable in armed conflict, with intent to betray that confidence . . .”  
*See* Geneva Protocol, *supra* note 18, art. 37.

28. Convention on the Prevention and Punishment of the Crime of Genocide art. 1, Dec. 9, 1948, 78 U.N.T.S. 277.

29. *Id.* art. 6.

30. *Id.* art. 2.

31. *The Covenant of the Islamic Resistance Movement (Hamas)*, HAMAS CHARTER, Aug. 18, 1988, art. 6, <http://www.mideastweb.org/hamas.htm>.

32. *Id.*

33. *Id.*

34. *Id.* art. 31.

also assures the world that “our struggle against the Jews is very great and very serious,” forecasting “Israel will exist and will continue to exist until Islam will obliterate it, just as it obliterated others before it.”<sup>35</sup>

The murderous intent of Hamas has been translated into a political program openly aimed at obliterating the Jewish state, as well as a constant stream of terrorist murders. During the three and a half years of fighting from September 2000 until March 2004, Hamas perpetrated 425 terrorist attacks. From those attacks, 377 Israelis were murdered and 2,076 civilians and soldiers were wounded.<sup>36</sup> Among the most infamous of these atrocities were: the June 1, 2001, suicide bombing of a Tel Aviv discotheque, in which twenty-one people were murdered and 120 were wounded; and the March 27, 2002, suicide bombing of a hotel in Netanya on the first night of Passover, in which thirty people were murdered and 140 were wounded.<sup>37</sup> In this context it is not surprising that Hamas has failed to prevent projectile attacks during the six-month period of calm (*Tahadiya*).<sup>38</sup>

#### V. LIMITED ISRAELI COUNTER-MEASURES

In contrast to the illegal Palestinian attacks from Gaza and the international silence that has greeted them, Israeli counter-measures have been both legally and, paradoxically, widely condemned. This regrettable pattern of largely overlooking actual Palestinian wrongdoing under international law, while vigorously condemning supposed Israeli wrongdoing, is tragically not unique to the situation in Gaza, but rather a persistent theme in the broader Arab–Israeli conflict.

Israel’s responses to Palestinian terrorist attacks and war crimes have been limited to far less than the full measure of actions Israel could have legally undertaken. Indeed, as will be demonstrated, Israel’s responses may be properly criticized on the grounds of international law, if at all, for being insufficient rather than excessive.

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35. *Id.* at pmb1.

36. *Hamas terrorist attacks*, ISRAELI MINISTRY OF FOREIGN AFFAIRS, Mar. 22, 2004, <http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Terror+Groups/Hamas+terror+attacks+22-Mar-2004.htm>.

37. *Id.*

38. “A *tahadiya* is roughly defined [in Arabic] as a temporary cessation of violence that can be ended at any time for any reason.” Frank Salvato, *Ceasefires in Islam: Not Always What They Seem to Be*, BASICSPROJECT.ORG, [http://www.basicsproject.org/radical\\_islam\\_terrorism/ideology/tahadiya\\_houdna.htm](http://www.basicsproject.org/radical_islam_terrorism/ideology/tahadiya_houdna.htm) (last visited Sept. 21, 2009) (emphasis added).

Israel's primary measures of defending itself against Palestinian attacks from Gaza have included:

- sealing off its borders with the Gaza Strip;
- use of naval forces to monitor for and protect against terrorist attacks;
- small-scale infantry and armored incursions to combat Palestinian snipers and bombers;
- targeted air strikes on a small number of support, command, and control targets;
- economic sanctions such as the withholding of Israeli fuel; and
- refusal to permit the use of Israel as a transit point for most non-emergency items.

Although there have been Palestinian casualties, most of the casualties have been Palestinian combatants.<sup>39</sup> In addition, Israel continues, as it has since its withdrawal from the Gaza Strip (and prior to that, by agreement with the PLO under the Oslo Accords), to maintain control of Gaza's airspace and coastal waters. By agreement with the Palestinian Authority and with third parties, Israel also maintains a closed-circuit camera at the Palestinian–Egyptian border crossing at Rafah to monitor entries and exits into the Gaza Strip.<sup>40</sup> For its part, Egypt has generally kept the border closed between itself and the Gaza Strip, except for extensive arms smuggling through tunnels under the border.<sup>41</sup>

Remarkably, even while engaged in these limited measures against Palestinian attacks from the Gaza Strip—notwithstanding the fact that the Gaza Strip is under the control of a terrorist organization as defined by the U.S. Department of State—Israel has continued to supply economic and humanitarian aid to Gaza. Israel provides fuel, electricity and water to the Gaza Strip, as well as medical services to seriously ill Gaza residents.<sup>42</sup> Israel has facilitated the travel of Gazans, such as students,<sup>43</sup> to Europe and other destinations by permitting them to enter

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39. Rory McCarthy, *19 Palestinians Killed in Raid on Gaza*, THE GUARDIAN, Jan. 16, 2008, <http://www.guardian.co.uk/world/2008/jan/16/international.mainsection1>.

40. Erik Schechter, *Prisoners of Gaza*, JERUSALEM POST, Jan. 21, 2008, <http://www.jpost.com/servlet/Satellite?pagename=JPost%2FJPArticle%2FShowFull&cid=1200572509800>.

41. *Egypt Finds Seven Smuggling Tunnels, Arms Cache Near Gaza Border*, HAARETZ, June 25, 2008, <http://www.haaretz.com/hasen/spages/996189.html>.

42. *EU: Israel Resumes Supply of Fuel to Gaza Power Plant*, HAARETZ, Mar. 16, 2008, <http://www.haaretz.com/hasen/spages/975620.html>; ISRAEL MINISTRY OF FOREIGN AFFAIRS, HUMANITARIAN AID TO GAZA DURING IDF OPERATION (Jan. 18, 2009), [http://www.mfa.gov.il/MFA/Government/Communiques/2009/Humanitarian\\_aid\\_to\\_Gaza\\_following\\_6\\_month\\_calm.htm](http://www.mfa.gov.il/MFA/Government/Communiques/2009/Humanitarian_aid_to_Gaza_following_6_month_calm.htm).

43. A brief contretemps erupted in May 2008, when U.S. officials revoked Fulbright scholarships to Palestinian students in Gaza on the grounds that Israel was not permitting the

Israeli territory and use Israeli transit facilities.<sup>44</sup> Israel has also provided funds to the Palestinian Authority, which has, in turn, disbursed them in Gaza.<sup>45</sup>

Unfortunately, Hamas and other Palestinian terrorist groups utilized the cease-fire, as well as the limited nature of Israeli counter-strikes, to arm themselves for future terrorist strikes against Israeli Jews and armed actions against Israel.<sup>46</sup> It is therefore quite possible that Israel will be forced to engage in more intense counter-measures in the future.

## VI. FLAWED CRITICISMS MADE BY OPPONENTS OF ISRAEL

Traditional opponents of Israel have criticized Israel for alleged violations of international law. One of the strongest sources of criticism

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students to travel through Israeli territory in order to travel abroad. Ethan Bronner, *Confined, Gazans Lose Their Funds For Study in U.S.*, N.Y. TIMES, May 30, 2008, at A1, available at [http://www.nytimes.com/2008/05/30/world/middleeast/30gaza.html?\\_r=1&scp=1&sq=U.S.%20Withdraws%20Fulbright%20Grants%20to%20Gaza,%20&st=cse](http://www.nytimes.com/2008/05/30/world/middleeast/30gaza.html?_r=1&scp=1&sq=U.S.%20Withdraws%20Fulbright%20Grants%20to%20Gaza,%20&st=cse) (titled *U.S. Withdraws Fulbright Grants to Gaza*). Ironically, one of the reasons U.S. officials wanted the Gazan students to enter Israeli territory was in order to examine their eligibility for travel visas to the U.S. at the U.S. Consulate in Jerusalem. Adam Entous, *Israel Eases Restrictions on Gaza Fulbright Students*, REUTERS, June 4, 2008, <http://www.reuters.com/article/latestCrisis/idUSL0488937> [hereinafter, Entous, *Israel Eases Restrictions*]. The irony here is that the U.S. stopped interviewing Palestinian students in Gaza in 2003 when Palestinian terrorists attacked a delegation of U.S. diplomats travelling through Gaza to interview Fulbright applicants, killing three. Nidal Al-Mughrabi, *Gaza Bomb Kills 3 Americans*, CNN.COM, Oct. 16, 2003, <http://www.cnn.com/2003/WORLD/meast/10/15/mideast.blast/>. Disturbingly, American officials neglected to note this very salient fact while poo-hooing Israeli security concerns about travel by Gazans through Israel. Israel permitted four of the seven students to travel through Israel, denying the other three entry on security grounds. The State Department publicly lambasted Israel and sent officials to interview the remaining three at the border of Gaza. All seven received visas, and Israel permitted all seven to exit Gaza through Israeli territory. Yet on August 5, 2008, the State Department cancelled the visas for the three Gazans whom Israel had fingered as having security issues. The authors have been unable to find evidence of any apology by the State Department to Israel for the unfounded accusations. Ashraf Khalil, *Gaza Strip: The Fulbright mystery*, L.A. TIMES, Aug. 30, 2008, <http://latimesblogs.latimes.com/babylonbeyond/2008/08/gaza-strip-the.html>. However, the State Department did admit that its initial revocation of the scholarships had not been due to Israeli refusal of an American request to allow the students transit and that, rather, the State Department “had erred by not approaching the Israeli government earlier to help the seven students.” See Entous, *Israel Eases Restrictions supra*.

44. Griff Ritte, *Israel Revisits Limitations on Gaza Students*, WASH. POST, May 31, 2008, at A10.

45. *Hamas: Our forces paid from tax revenue transferred by Israel*, HAARETZ, Mar. 13, 2007, <http://www.haaretz.com/hasen/spages/837063.html>.

46. *Hamas: Arms smuggling to continue despite gaza truce*, HAARETZ, June 20, 2008, <http://www.haaretz.com/hasen/spages/994790.html>.

has been the Office of the “Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967” in the U.N. Human Rights Council. The Special Rapporteur’s office was created by the Human Rights Commission (since replaced by the Human Rights Council) in 1993 to issue one-sided criticisms of Israel; the mandate specifies that the Rapporteur is “[t]o investigate Israel’s [alleged] violations of . . . international law, international humanitarian law and the Geneva Convention . . . in the Palestinian territories occupied by Israel since 1967,” but does not request that he also investigate Palestinian violations.<sup>47</sup> The Rapporteur has used the one-sidedness of this mandate to justify anti-Israel bias in his reporting and has publicly and repeatedly interpreted his mandate as requiring him to criticize only Israel.<sup>48</sup> As befits the Rapporteur’s bias, the Rapporteur has ignored the fact that he has no jurisdiction to investigate alleged Israeli wrongdoing in Gaza. Since Israel’s withdrawal from Gaza in 2005, no credible legal argument can be made that Gaza is a “Palestinian territor[y] occupied by Israel since 1967.” The Rapporteur, therefore, lacks jurisdiction.

Nonetheless, the Rapporteur’s reports have been replete with inaccurate and biased criticism of alleged Israeli wrongdoing in Gaza. John Dugard, who served as the Special Rapporteur from the inception of the post in 1993 until 2008, issued a statement on January 18, 2008, criticizing Israeli defense measures as illegal. Firstly, Dugard claimed that Israel’s attack on a Hamas headquarters in a Palestinian Interior Ministry building in Gaza was illegal because the target was “near a wedding venue with what must have been foreseen loss of life and injury to many civilians.”<sup>49</sup> However, the Palestinian Interior Ministry building was certainly a legitimate target under the rules of distinction since it makes a definite contribution to Hamas’ hostilities. The fact that one Palestinian civilian lost her life in the Israeli strikes is unfortunate,<sup>50</sup> but certainly not a violation of the rule of proportionality, which authorizes collateral damage to civilians where justified by military necessity.<sup>51</sup>

Secondly, Dugard asserted that Israel’s closure of its borders at the Gaza Strip constitutes illegal “collective punishment.”<sup>52</sup> Yet, there is

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47. U.N. Econ. & Soc. Council [ECOSOC], Comm’n on Human Rights Res. 1993/3, 49th Sess., U.N. Doc. E/CN.4/RES/1993/2 (A+B) (Feb. 19, 1993).

48. *Anti-Israel Resolutions at the HRC*, U.N. WATCH, <http://www.unwatch.org/site/c.bdKKISNqEmG/b.3820041>.

49. Isabel Kershner, *Israeli Airstrike in Gaza Kills 2 Hamas Members*, N.Y. TIMES, Jan. 20, 2008, at A14, available at <http://www.nytimes.com/2008/01/20/world/middleeast/20mideast.html?scp=4&sq=raid%20on%20gaza%20interior%20ministry%20building&st=cse>.

50. *Id.*

51. See, e.g., JUDITH GARDAM, NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES, 88–108 (Cambridge Univ. Press 2004).

52. *Id.*

nothing in international law that requires Israel to maintain open borders with a hostile territory, whatever its sovereign status. Similarly, as will be discussed in section VI below, exercising legal counter-measures against a hostile entity does not constitute “collective punishment” under international law. Dugard’s refusal to level the same charge against Egypt, which also closes its borders at the Gaza Strip, at times, underlines the bias that accompanies this legally inaccurate statement.

At the same time, in sharp contradiction to the dictates of international law, Dugard offered several invalid excuses for Palestinian terrorism. In his report of January 21, 2008, Dugard wrote that:

[c]ommon sense . . . dictates that a distinction must be drawn between acts of mindless terror, such as acts committed by Al Qaeda, and acts committed in the course of a war of national liberation against colonialism, apartheid or military occupation . . . . They must be understood as being a painful but inevitable consequence of colonialism, apartheid or occupation.<sup>53</sup>

Dugard failed to mention that such a distinction is forbidden by international law. Security Council Resolution 1566 specifically states that illegal terrorist acts “are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious, or other similar nature.”<sup>54</sup>

In a similar vein, in the same report, Dugard attempted to downplay Palestinian terrorism by omitting all mention of international conventions and resolutions violated by Palestinian terrorism. Instead, he inaccurately accused Israel of committing illegal terrorism by, for example, targeting military strikes at Palestinian terrorists and flying planes at supersonic speed.<sup>55</sup> Needless to say, there is no international law treaty, U.N. resolution, or international legal custom that renders such Israeli acts as “terrorism,” or illegal in any other way.

Difficult as it is to envisage, Richard Falk, Dugard’s successor to the post of Special Rapporteur, has continued in Dugard’s path in bias and

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53. John Dugard, *Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967*, ¶ 4, U.N. Doc. A/HRC/7/17 (Jan. 21, 2008) (prepared by John Dugard).

54. S.C. Res. 1566, ¶ 3, U.N. Doc. S/RES/1566 (Oct. 8, 2004).

55. Special Rapporteur, *Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967*, ¶¶ 13–14, delivered to the Human Rights Council and the General Assembly, U.N. Doc. A/HRC/7/17 (Jan. 21, 2008).

legal inaccuracy.<sup>56</sup> Falk has repeatedly and outrageously accused Israel of genocide, claiming in 2002 that “Israel is seeking to obliterate the existence of the Palestinian people,”<sup>57</sup> and in 2007 that he felt “compelled to portray the ongoing and intensifying abuse of the Palestinian people by Israel”; Falk has compared Israel’s actions to the Holocaust because Israeli policies “express so vividly a deliberate intention on the part of Israel and its allies to subject an entire human community to life-endangering conditions of utmost cruelty.”<sup>58</sup> Shortly after his appointment to the post of Special Rapporteur on March 26, 2008,<sup>59</sup> Falk defended the appropriateness of his comparisons of Israeli treatment of Gazans to genocidal Nazi policies.<sup>60</sup>

To their credit, some foreign officials, such as Franco Frattini (until recently the European Commissioner for Justice, Freedom and Security), have correctly defended the legality of the Israeli actions.<sup>61</sup> Others, such as Dutch Foreign Minister Maxime Verhagen, have criticized U.N. bias against Israel.<sup>62</sup>

#### A. Criticism of Operation Cast Lead of December 2008 to January 2009

Israel was widely criticized for violating international law in the recent IDF Operation, known as Operation Cast Lead, which intended to halt the onslaught of Hamas-fired rockets on Israel. Two of the strongest allegations were that Israel reacted disproportionately, and that the use of white phosphorous (see immediately below) violated international law.

Though Hamas militants are still firing rockets on Israel, the onslaught of these rockets has been substantially reduced since the IDF operation. The IDF often used white phosphorous in areas the IDF had deemed that it would not contaminate its own soldiers. Further, the use of white

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56. See Statement by Richard Falk, *Special Rapporteur for Human Rights in the Occupied Territories*, U.N. High Commissioner for Human Rights (Dec. 27, 2008).

57. Editorial, *Falk’s Law*, JERUSALEM POST, July 23, 2008, <http://www.jpost.com/servlet/Satellite?cid=1215331076115&pagename=JPost%2FJPArticle%2FShowFull>.

58. Richard Falk, *Slouching toward a Palestinian Holocaust*, THE TRANSNATIONAL FOUNDATION FOR PEACE AND FUTURE RESEARCH, June 29, 2007, [http://www.transnational.org/Area\\_MiddleEast/2007/Falk\\_PalestineGenocide.html](http://www.transnational.org/Area_MiddleEast/2007/Falk_PalestineGenocide.html).

59. Press Release, Human Rights Council, Human Rights Council Elects Advisory Committee Members and Approves a Number of Special Procedures Mandate Holders (Mar. 26, 2008), <http://domino.un.org/unispal.nsf/9a798adbf322aff38525617b006d88d7/Oda4ba56ade85249852574190058d462!OpenDocument>.

60. See Tim Franks, *U.N. Expert Stands by Nazi Comments*, BBC NEWS, Apr. 8, 2008, [http://news.bbc.co.uk/2/hi/middle\\_east/7335875.stm](http://news.bbc.co.uk/2/hi/middle_east/7335875.stm).

61. See Barak Ravid, *Italy FM: EU Stance on Israel in Past Swayed by Intolerance of Jews*, HAARETZ, June 21, 2008, <https://www.haaretz.co.il/hasen/spages/994084.html>.

62. Cnaan Liphshiz, *Dutch FM Says Israel Unfairly Singled Out for Criticism by UN*, HAARETZ, Jan. 22, 2008, <http://www.haaretz.com/hasen/spages/947090.html>.

phosphorous is quite legal under international law, is used legitimately for illumination, and is not seen as a potential cause of death or injury. It is a good smokescreen to conceal one's forces from one's enemy.

## VII. LEGAL STANDARDS APPLICABLE TO ISRAELI COUNTER-MEASURES

It is difficult to evaluate legal objections to Israel's actions since they are often made in conclusive fashion, and without reference to legal doctrines or materials that support the charges. They are also often raised out of context. Additionally, many of the legal criticisms are implicitly based upon misinterpretations of the relevant international law, but without explicit assertions of the proposed legal doctrine. Moreover, many of the charges are disingenuously based upon misstatements of fact or misuse of legal terminology.

Nonetheless, this essay attempts to construct a rational legal basis for criticisms of Israeli behavior and to evaluate these criticisms. It examines, in turn, the four distinct bodies of law that could potentially affect the legality of Israeli counter-strikes:

- the laws of initiating hostilities (*jus ad bellum*);
- international humanitarian law, which governs the conduct of military actions;
- the laws of occupied territory, which some have argued applies to Israeli actions against Gaza-based terrorists; and
- human rights laws.

A careful examination of the relevant law demonstrates that the Israeli counter-strikes to date, and the potential future counter-strikes (both economic and military), conform to the requirements of international law.

### A. *The Legality of Israeli Military Actions under Jus ad Bellum*

The law of *jus ad bellum*, as codified by the U.N. Charter, bars the use of military force against other states under most circumstances.<sup>63</sup> Article 51 of the Charter recognizes the inherent right to self-defense, notwithstanding the general ban on the use of force.<sup>64</sup>

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63. U.N. Charter art. 2, para. 4.

64. *Id.* art. 51.

*Jus ad bellum* does not restrict the use of force in non-international conflicts.<sup>65</sup> The uncertain legal status of the Gaza Strip<sup>66</sup> makes it difficult to determine the basis on which Israel's actions should be analyzed. However, it is certain that Israel has the right to use force in defending itself against Palestinian attacks from Gaza.

Let us suppose that Gaza is an independent sovereignty, and entitled to all the rights of states under *jus ad bellum*, including the general right to immunity from armed attacks from other states. In that case, Israel would be entitled to use force against Gaza by authority of the inherent right to self-defense, as referenced by Article 51 of the U.N. Charter. Gaza would have lost its general immunity from attack by repeatedly striking at its neighbor state and Israel's use of force would therefore be permissible on the grounds of self-defense.

Alternatively, if Gaza is not an independent sovereignty, it can claim no rights to immunity from attack under the law of *jus ad bellum*. Israel would not need (though it may be able)<sup>67</sup> to invoke the right of self-defense.

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65. See YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENSE, 213–221 (3d ed. 2001).

66. The Gaza Strip can plausibly be described as sovereign territory of a state of Palestine, territory of the Mandate of Palestine without a current sovereign, sovereign territory of the State of Israel, or territory without any sovereign whatsoever. It may be subject to a claim of self-determination by the Palestinian Arab people, or by the Jewish people (by virtue of the Articles of the Mandate of Palestine). As is noted elsewhere, implausible claims have also been raised that Gaza is under Israeli occupation. See discussion *infra* Part VII.C.1.

67. As evidenced by the world's response to the terrorist attacks on the United States on September 11, 2001, most states recognize a right of self-defense against attacks from non-sovereign actors, even where the attacks originate and culminate on domestic soil (the 9/11 attackers launched their attack from U.S. soil). In its rightly pilloried advisory opinion on Israel's security barrier, the International Court of Justice correctly noted that the Green Line—the cease-fire line separating Jordan and Israel prior to 1967—was not an international border. See Advisory Opinion, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (July 9, 2004), at 34, available at <http://www.icj-cij.org/docket/files/131/1671.pdf>. It then concluded, without analysis and contrary to international practice, that Israel lacked a right of self-defense against attacks crossing that line. See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion (July 9, 2004), at 63, available at <http://www.icj-cij.org/docket/files/131/1671.pdf>. By that logic, at least until 2005 when Israel withdrew from Gaza, there was no international boundary between Israel and Gaza, and therefore Gaza would not be able to claim the benefits of *jus ad bellum*. The I.C.J. decision also, incorrectly, implies that Israel lacked a right of self-defense against Gazan attacks prior to 2005; however, this implication is not terribly important since Israel would not need the benefit of self-defense to have the right to use force in Gaza. *Id.*

*B. Legality of Israeli Military Actions under International  
Humanitarian Law*

International humanitarian law regulates the use of force once military action is under way, irrespective of its legality under *jus ad bellum*. The two most basic principles of international humanitarian law are the rules of distinction and proportionality;<sup>68</sup> Israel's counter-strikes have abided by both.

*1. Distinction and Proportionality*

The rule of distinction, as noted previously, requires aiming attacks only at legitimate (e.g., military and support) targets.<sup>69</sup> The rule of distinction includes elements of intent and expected result; so long as one aims at legitimate targets, the rule of distinction permits the attack, even if the attack is expected to cause collateral damage to civilians, and even if, in retrospect, the attack was a mistake based on faulty intelligence.<sup>70</sup>

Israel has aimed its strikes at locations from which rockets have been fired,<sup>71</sup> Palestinian combatants bearing weapons and transporting arms,<sup>72</sup> Palestinian terrorist commanders,<sup>73</sup> and support and command and control centers.<sup>74</sup> Locations such as Interior Ministry buildings, from which Hamas directs some military activities,<sup>75</sup> clearly make a contribution to Hamas' military actions; they are therefore legitimate targets, even though they also have civilian functions.

The rule of proportionality operates in conjunction with the rule of distinction to limit collateral damage. While most kinds of collateral damage to civilian and other protected targets are permitted according to the rule of distinction, the rule of proportionality forbids collateral

68. See DINSTEIN, *supra* note 16, at 225.

69. *Id.* at 115.

70. *Id.*

71. See Shmulik Hadad, *Israel Strikes Qassam Launchers Following Rocket Attack*, YNET, June 20, 2007, <http://www.ynetnews.com/articles/1,7340,L-3415347,00.html>.

72. See IDF Spokesperson, *IDF Targets Hamas Cell in the Southern Gaza Strip*, INDEPENDENT MEDIA REVIEW ANALYSIS, Sept. 5, 2006, <http://www.imra.org.il/story.php3?id=30840>.

73. Yuval Azoulay, *Abbas: IDF Operations Prevent Progress in Peace Talks*, HAARETZ, Aug. 22, 2007, <http://www.haaretz.com/hasen/spages/896224.html>.

74. IDF Spokesperson, *IDF Targets Main Islamic Jihad Weapons Manufacturing Facility*, July 25, 2006, <http://www.imra.org.il/story.php3?id=30264>.

75. Ken Ellingwood, *Israeli Airstrike Sets Ministry in Gaza on Fire*, L.A. TIMES, June 30, 2006, at 5, available at <http://articles.latimes.com/2006/jun/30/world/fg-gaza30>.

damage that is expected to be excessive in relation to the military need.<sup>76</sup> Prosecutions for war crimes on the basis of disproportionate collateral damage are rare, and it is difficult to see how a credible claim can be made that any of Israel's counter-strikes have created disproportionate collateral damage. Certainly, there is no record of any conviction of an attacker for excessive collateral damage resulting from attacks like those carried out by Israel. Moreover, as with distinction, the rule of proportionality relies upon intent.<sup>77</sup> If Israel plans a strike without expected excessive collateral damage, the rule of proportionality justifies it, even if, in retrospect, Israel erred in its damage estimates.

All reported Israeli strikes in the December 2008–January 2009 round of fighting have been aimed at legitimate targets and none has caused excessive collateral damage. Legal advisors attached to Israeli military units review proposed military actions.<sup>78</sup> They apply an extremely restrictive standard of both distinction and proportionality, in accordance with intrusive Israeli Supreme Court rulings that have imposed far stricter legal standards on the Israeli military than those found in international law.<sup>79</sup> It is thus likely that future Israeli measures will continue to abide by the rules of distinction and proportionality.

## 2. *Perfidy and Civilian Shields*

At the same time, it is clear that Palestinian actions in conducting military operations from within built-up civilian areas, thereby increasing Palestinian casualties, constitute war crimes. It is important to note that Israel is not required to refrain from attacking Palestinian combatants simply because they have chosen to hide behind civilians. As Article 28 of the Fourth Geneva Convention makes clear, the presence of civilians “may not be used to render certain points or areas immune from military operations.”<sup>80</sup> The article also makes Palestinian attempts to use civilian shields unlawful.

Additionally, the fact that Palestinian terrorists dress as civilians in carrying out attacks does not render them immune from attack; it simply makes them lawful targets who are also violating international law.

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76. See DINSTEIN, *supra* note 16, at 120.

77. *Id.* at 122.

78. IDF, Chief Military Advocacy, <http://dover.idf.il/IDF/English/units/other/advocate/Headquarters/default.htm>.

79. See, e.g., HCJ 3278/02 Center for the Defense of the Individual v. Commander of IDF Forces in the West Bank [2002] IsrSC 57(1) 385, ¶ 23 (requiring Israel Defense Forces to abide by standards of Standard Minimum Rules for Treatment of Prisoners, even though Israel is not bound by treaty to such rules and they have not been demonstrated to be a part of customary international law).

80. See Geneva Protocol, *supra* note 18, art. 28.

International humanitarian law forbids perfidy, which, for example, means that it is forbidden to feign civilian status while actually being a combatant.<sup>81</sup> The fact that Palestinian terrorists often dress as, and pretend to be, civilians while carrying out attacks makes it highly likely that many innocent Palestinian civilians will be accidentally killed in the crossfire. These war crimes are Palestinian, and not Israeli.

### *3. Retorsion and Collective Punishment*

In addition to directly regulating the use of force with the rules of distinction and proportionality, international humanitarian law also provides important rules regarding military acts, such as blockades and the imposition of punishment. Israel's actions abide by these rules as well.

Israel's imposition of economic sanctions on the Gaza Strip, such as partially withholding fuel supplies and electricity, does not involve the use of military force and is therefore a perfectly legal means of responding to Palestinian attacks, despite the effects on innocent Palestinian civilians. The use of economic and other non-military sanctions as a means of disciplining other international actors for their misbehavior is a practice known as "retorsion."<sup>82</sup> It is generally acknowledged that any country may engage in retorsion.<sup>83</sup> Indeed, it is acknowledged that states may even go beyond retorsion to carry out non-belligerent reprisals—non-military acts that would otherwise be illegal (such as suspending flight agreements) as counter-measures.<sup>84</sup> Since Israel is under no legal obligation to engage in trade of fuel (or anything else with the Gaza Strip) or to maintain open borders with the Gaza Strip, it may withhold commercial items and seal its borders at its discretion, even if intended as "punishment" for Palestinian terrorism.

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81. *Id.* While Israel is not a party to the Protocol, the definition of perfidy is considered to reflect customary international law. See DINSTEIN, *supra* note 16, at 198.

82. Karl Josef Partsch, *Retorsion*, ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 335, 335–37 (1986); L. OPPENHEIM, INTERNATIONAL LAW 134 (Hersche Lauterpacht ed., 7th ed. 1952) (1906).

83. See ELISABETH ZOLLER, PEACETIME UNILATERAL REMEDIES: AN ANALYSIS OF COUNTERMEASURES 7 (1984).

84. See generally Lori Fisher Damrosch, *Retaliation or Arbitration—or Both? The 1978 U.S.–France Aviation Dispute*, 74 AM. J. INT'L L. 785 (1980).

While international law bars “collective punishment,”<sup>85</sup> none of Israel’s combat actions and retorsions may be considered collective punishment. The bar on collective punishment forbids the imposition of criminal-type penalties on individuals or groups on the basis of another’s guilt, or the commission of acts that would otherwise violate the rules of distinction and proportionality, or both.<sup>86</sup> None of Israel’s actions involve the imposition of criminal-type penalties or the violation of the rules of distinction and proportionality. It is striking that there has never been a prosecution for the war crime of collective punishment on the basis of economic sanctions. Indeed, many of the critics calling Israel’s withdrawal of economic aid “collective punishment” call, or have called, for the imposition of economic sanctions or the withdrawal of economic aid against Israel and other countries<sup>87</sup> or, at least, claim to have “no position on [the legality of] punitive economic sanctions and boycotts.”<sup>88</sup>

Examples of retorsions are legion in international affairs. The U.S., for example, froze trade with Iran after the 1979 Revolution<sup>89</sup> and with Uganda in 1978 following accusations of genocide.<sup>90</sup> In 2000, fourteen European states suspended various diplomatic relations with Austria in protest of the participation of Jorg Haider—believed to be a racist—in the government.<sup>91</sup> Numerous states suspended trade and diplomatic relations with South Africa as punishment for apartheid practices.<sup>92</sup> In none of these cases was the charge of “collective punishment” raised. “Punishing” a country with restrictions on international trade is not identical to carrying out “collective punishment” in the legal sense.

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85. See Geneva Protocol, *supra* note 18, art. 75(4)(b). While Israel is not a party to the Protocol, the prohibition on collective punishment is considered to reflect customary international law. See DINSTEIN, *supra* note 16, at 21.

86. See Geneva Protocol, *supra* note 18, art. 75(4)(b).

87. See, e.g., Amnesty International, *Sudan: Joint Letter to U.N. Security Council*, AI Index AFR 54/025/2006, May 25, 2006; Amnesty International, *Nepal: Heads of Three Human Rights Organizations Call for Targeted Sanctions*, AI Index ASA 31/019/2006, Apr. 18, 2006; Amnesty International, *Cuba: Questions and Answers on the Work of Amnesty International*, AI Index AFR 25/003/2002, July 15, 2002 (claiming disingenuously that “Amnesty International takes no general position on the legitimacy of economic sanctions against governments or armed groups anywhere in the world”).

88. Amnesty International, *Sierra Leone: Cutting the Link Between Diamonds and Guns*, AI Index AFR 51/027/00, May 31, 2000.

89. GEOFF SIMONS, IMPOSING ECONOMIC SANCTIONS 147 (1999).

90. *U.S. Policy Toward Uganda: Hearing Before the Subcomm. on Africa of the Comm. on Foreign Affairs*, 96th Cong. 1 (1979); see also Ralph D. Nurnberger, *The U.S. and Idi Amin: Congress to the Rescue*, 25 AFR. STUD. REV. 49, 49 (1982).

91. William Pfaff, *Right Turn In Austria—The Haider Chronicles*, 127 COMMONWEAL 8, 8–9 (2000).

92. See SIMONS, *supra* note 89, at 78.

#### 4. Closed Borders and Blockades

Israel is similarly accused of collective punishment for refusing to admit to the State of Israel persons from Gaza—both Palestinians and foreigners.<sup>93</sup> These criticisms have no basis in international law. There is no recorded case of any prosecution for the war crime of collective punishment on the basis of refusing a person entry into a country. Indeed, there is no general requirement anywhere in international law that a state admit foreigners into its borders. It is acknowledged that there are sources in international law that arguably require states to admit their own citizens.<sup>94</sup> However, Palestinian residents and other non-Israelis in Gaza are not Israeli citizens and have no right to enter the State of Israel.

Israel's right to refuse entry to Palestinians and other foreigners is particularly obvious if Gaza is a separate sovereignty. No state need admit citizens of another state into its borders. But even if Gaza were considered sovereign Israeli territory, Israel would be able to control entry from Gaza into Israel proper. This issue is considered below in the examination of human rights law. Similarly, in the next section, we consider the potential rights of Gaza residents and foreigners under the law of occupation (if one maintains, implausibly, that Gazan territory is occupied by Israel); here, too, there is no source of any right to enter Israeli territory.

Israeli control of Gazan airspace and waters is also legal under international law. States generally have the right to claim sovereign control over their territorial air and coastal waters.<sup>95</sup> For this reason, naval blockades—such as the one Egypt imposed on Israel in 1967, leading to the Six Day War<sup>96</sup>—are considered to be affronts to the sovereignty of states and acts of war.<sup>97</sup> However, as previously argued, if Gaza is a separate sovereignty, it

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93. Philip O'Connor, *Israeli Collective Punishment of People of Gaza Must be Ended*, IRISH TIMES, Aug. 21, 2008, <http://www.irishtimes.com/newspaper/opinion/2008/0821/1219243749183.html>.

94. International Covenant on Civil and Political Rights, G.A. Res. 2200A, at 89, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966).

95. Third United Nations Conference on the Law of the Sea: Final Act, art. 17–26, U.N. Doc. A/CONF.62/121 (Oct. 21, 1982).

96. Israel Ministry of Foreign Affairs, *Events Leading to the Six Day War*, <http://www.mfa.gov.il/MFA/Facts+About+Israel/Israel+in+Maps/> (follow “Events leading to the Six Day War” (1967) hyperlink).

97. See, e.g., Definition of Aggression, GA Res. 3314, U.N. GAOR, 29th Sess., U.N. Doc. A/9631 (Dec. 14, 1974).

has attacked Israel, giving Israel the right to engage in acts of war as self-defense. This means that Israel has the right to blockade Gaza, so long as it abides by the general humanitarian rules of blockades, which are discussed below.

Moreover, the Oslo Accords, the 1990s interim peace agreements between the PLO and Israel, specify continued Israeli security control over Gazan airspace and coastal waters, granting the PLO only limited boating and fishing rights in Gazan territorial waters.<sup>98</sup> Even if Gaza became an independent sovereign state, it is arguably still bound to its prior agreements with Israel respecting Israeli security control.

Critics of Israel who seek to avoid these obvious legal conclusions are forced to adopt contradictory positions. Thus, for example, a group of pro-Palestinian activists calling themselves the “Free Gaza” movement organized the passage of boats to Gaza in opposition to Israeli security control on the grounds that Gaza has a sovereign right to its territorial waters with which Israel cannot interfere.<sup>99</sup> In other words, the activists argued that since Gaza is an independent sovereign, they had the right to enter Gaza without asking permission from Israel. However, when one of the activists (Lauren Booth<sup>100</sup>) decided to exit Gaza by land, she found, to her chagrin, that neither Israel nor Egypt was prepared to open its borders for her. She then demanded entry to Israel on the grounds that international law guarantees her freedom of movement within a country to exit Gaza via Israeli territory.<sup>101</sup> In other words, for purposes of her sea passage, she argued that Gaza was an independent state; for purposes of her land passage, she argued that Gaza was nothing more

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98. THE ISRAELI-PALESTINIAN INTERIM AGREEMENT ON THE WEST BANK AND THE GAZA STRIP, ANNEX I PROTOCOL CONCERNING REDEPLOYMENT AND SECURITY ARRANGEMENTS (Sept. 28, 1995), <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/THE+ISRAELI-PALESTINIAN+INTERIM+AGREEMENT+-+Annex+I.htm>.

99. News Agencies, ‘Free Gaza’ Blockade-Busting Boats Planning a Second Voyage, HAARETZ, Aug. 30, 2008, <http://www.haaretz.com/hasen/spages/1016517.html>.

100. Booth is Tony Blair’s sister-in-law and a “media personality” who labels herself a human rights activist. See Lauren Booth, <http://homepage.mac.com/lauren.booth/lauren/lauren.html> (last visited Sept. 21, 2009). Her human rights activism appears to consist primarily of anti-Israeli, pro-Palestinian activity, as well as general opposition to the “war on terror.” Booth’s story of her “imprisonment” in Gaza was contradictory, although in all its versions, it placed the blame on Israel. Booth claimed that Israel said it was impossible for her to leave through Israel and that Egyptian officials were ready to permit her transit through Egypt. Tim Butcher, *Lauren Booth Still ‘Trapped’ in Gaza After Protest*, TELEGRAPH, Sept. 3, 2008, <http://www.telegraph.co.uk/news/worldnews/middleeast/palestinianauthority/2674870/Lauren-Booth-still-trapped-in-Gaza-after-protest.html>. Simultaneously, Booth claimed that Israeli puppet-masters were responsible for the “lowly” Egyptian “official’s” decision to deny her transit, as she had “heard through contacts Egypt was under pressure from Israel to act that way.” *Egypt Won’t Let Blair’s Sister-in-Law Leave Gaza By Land*, REUTERS, Sept. 3, 2003, <http://www.haaretz.com/hasen/spages/1017539.html>.

101. See Butcher, *supra* note 100.

than a part of Israel. Booth eventually exited Gaza through a border crossing with Egypt,<sup>102</sup> inadvertently underlining the vacuous nature of her claim that Israel controls Gaza's borders and that "[i]t could be days, weeks or years before I can leave, depending on the mood of the Israeli authorities."<sup>103</sup>

International humanitarian law does place additional duties on parties engaging in a boycott to permit transit of relief supplies. However, as will be seen below, these duties are very limited and Israel has abided by them.

### *C. The Legality of Israeli Military Actions under the Laws of Occupation*

#### *1. Is Gaza Occupied?*

Some groups have claimed that the Gaza Strip is "occupied" by Israel according to the Fourth Geneva Convention, in which case Israel would be required to "ensure the food and medical supplies of the population" as well as "agree to relief schemes on behalf of the . . . population" and maintain "public health and hygiene."<sup>104</sup>

However, there is no legal basis for maintaining that Gaza is occupied territory. The Fourth Geneva Convention refers to territory as occupied where the territory is of another "High Contracting Party" (i.e., a state party to the Convention) and the occupier "exercises the functions of government" in the occupied territory.<sup>105</sup> Yet, the Gaza Strip is not territory of another state party to the Convention; Egypt, which previously controlled Gaza, is a party to the Convention, but Gaza was never Egyptian territory. And, Israel does not exercise the functions of government—or, indeed, any significant functions—in the territory. It is clear to all that the elected Hamas government is the de facto sovereign of the Gaza Strip and does not take direction from Israel, or any other state.

102. A.F.P., *Blair's Sister-in-Law Finally Leaves Gaza*, Sept. 20, 2008, [http://afp.google.com/article/ALeqM5iimV\\_FzSFDI6xcZ\\_nnqLYptVnhlQ](http://afp.google.com/article/ALeqM5iimV_FzSFDI6xcZ_nnqLYptVnhlQ).

103. Orly Halpern, *Lauren Booth, Tony Blair's Sister-in-Law, Stuck in Gaza Strip*, TIMES (London), Sept. 3, 2008, [http://www.timesonline.co.uk/tol/news/world/middle\\_east/article4668250.ece](http://www.timesonline.co.uk/tol/news/world/middle_east/article4668250.ece).

104. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 55–59, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

105. *Id.* at arts. 2–4.

Some have argued that states can be considered occupiers—even of areas where they do not declare themselves in control—as long as the putative occupiers have effective control. For instance, in 2005, the International Court of Justice opined that Uganda could be considered the occupier of Congolese territory, over which it had “substituted [its] own authority for that of the Congolese Government,” even in the absence of a formal military administration.<sup>106</sup> Some have argued that this shows that occupation may occur even in the absence of a full-scale military presence, thus claiming that this renders Israel an occupier under the Fourth Geneva Convention.<sup>107</sup> However, these claims are clearly without merit. First and foremost, Israel does not fulfill the conditions of being an occupier; in particular, Israel does not exercise the functions of government in Gaza, and it has not substituted its authority for the de facto Hamas government. Secondly, Israel cannot project effective control in Gaza. Indeed, Israelis and Palestinians know well that projecting such control would require an extensive military operation amounting to the armed conquest of Gaza. In the recent War in Gaza, Israel targeted a Hamas presence in Gaza and did not attempt to, nor did it, occupy Gaza as a whole.

Military superiority over a neighbor does not itself constitute occupation. If it did, the United States would have to be considered the occupier of Mexico and Canada, Egypt the occupier of Libya, Iran the occupier of Afghanistan, and Russia the occupier of Latvia, among many others.

Moreover, it is difficult to avoid the conclusion that foes of Israel that claim that Israel has legal duties as the “occupier” of Gaza are insincere in their legal analysis. If Israel were indeed properly considered an occupier, under Article 43 of the Regulations attached to the Fourth Hague Convention of 1907, Israel would be required to take “all the measures in [its] power to restore, and ensure, as far as possible, public order and safety.”<sup>108</sup> Thus, those who contend that Israel is in legal occupation of Gaza must also support, and even demand, that Israelis conduct military operations in order to disarm Palestinian terror groups and militias.

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106. Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. No. 116 (Dec. 19), available at <http://www.icj-cij.org/docket/files/116/10455.pdf?PHPSESSID=ad1c883c1ab2b3e16bfed34ad53663d5>.

107. HARVARD PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, REVIEW OF THE APPLICABILITY OF INTERNATIONAL HUMANITARIAN LAW TO THE OCCUPIED PALESTINIAN TERRITORY (July 2004), <http://opt.ihlresearch.org/index.cfm?fuseaction=Page.viewPage&pageId=768>.

108. Convention Respecting the Laws and Customs of War on Land and its Annex, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539. The French text is authoritative and uses the relevant phrase “*l'ordre et la vie publics*.” Adam Roberts & Richard Guelff, Documents on the Laws of War 68 (3d ed. 2000).

Additionally, claims of occupation necessarily rely upon a belief that the occupying power is not the true sovereign of the occupied territory. For that reason, those who claim that Israel occupies Gaza must believe that the border between Israel and Gaza is an international border between separate sovereignties. Yet, many of those claiming that Gaza is occupied, such as John Dugard and Richard Falk, simultaneously and inconsistently claim that Israel is legally obliged to open the borders between Israel and Gaza. However, no sovereign state is required to open its international borders.

## *2. Israeli Duties Regarding the Supply of Gaza*

In any event, due to internal political considerations, as well as several rulings by the Israeli Supreme Court, Israel continues not only to maintain the flow of basic humanitarian supplies such as food, medicine, and water to the Palestinian population of Gaza, but, in many cases, Israel supplies the items itself. In the case *Al-Bassiouni Ahmed v. Prime Minister*,<sup>109</sup> the Israeli Supreme Court implied that it interpreted domestic administrative law as requiring the Israeli government to maintain a minimum flow of necessary, Israeli-supplied humanitarian goods when engaging in retorsional acts, such as cutting off the Israeli electricity supply to Gaza. Contrary to widespread allegations, Israel has not cut off 100 percent of the fuel previously delivered to Gaza, but according to the Defense Ministry, by January 6, 2008, Israel had curtailed it by approximately thirteen percent.<sup>110</sup> Indeed, it is estimated that Israel still provides \$500 million worth of goods and services to the Gaza Strip each year.<sup>111</sup>

Aside from the laws of occupation, there may be duties to permit the passage of relief supplies to Gaza, but Israel abides by these duties as well, as will be demonstrated later in this section.

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109. HCJ 9132/07 *Al-Bassiouni Ahmed v. The Prime Minister* [Jan. 30, 2008] (Unpublished).

110. Nidal al-Mughrabi, *Palestinians Ration Gaza Power After Fuel Cuts*, REUTERS, Jan. 6, 2008, <http://www.reuters.com/article/latestCrisis/idUSL06549779>.

111. Michael I. Krauss, *Collective Punishment and Newspeak*, AMERICAN THINKER, Feb. 24, 2008, [http://www.americanthinker.com/2008/02/collective\\_punishment\\_and\\_newspeak.html](http://www.americanthinker.com/2008/02/collective_punishment_and_newspeak.html).

### 3. Article 23 of the Fourth Geneva Convention

Article 23 of the Fourth Geneva Convention requires parties to certain conflicts to permit transit to enemy civilian populations of a limited number of items and under a limited set of conditions.<sup>112</sup> However, the fighting in and around the Gaza Strip is not a conflict covered by the Fourth Geneva Convention; the conflict is not between state parties to the Convention, and Gaza is not occupied territory.<sup>113</sup> Therefore, Israel is not bound by Article 23.

Even if Israel were bound by the Fourth Geneva Convention, Israel would be acting in full compliance with international law. Article 23 of the Fourth Geneva Convention permits states such as Israel to cut off fuel supplies and electricity to territories such as Gaza. Article 23 only requires a party to permit passage of food, clothing, and medicines intended for children under fifteen, expectant mothers, and maternity cases.<sup>114</sup> Were Article 23 to apply, Israel would still be under no obligation to permit the passage of electricity, fuel, or any items other than food, clothing, or medicine. Moreover, under Article 23, Israel would be under no obligation to provide anything itself; Israel would only be required not to interfere with consignments of food and so forth sent by others for the benefit of children under the age of fifteen, mothers of newborns, and pregnant women.<sup>115</sup>

Finally, under Article 23, a party can block passage even of food, clothing, and medicine—even for the aforementioned population groups—if it has serious grounds for suspecting that the items would be intercepted before reaching their destination, or that the items may benefit the enemy's economy by substitution.<sup>116</sup> Israel has excellent grounds for fearing both of these results, especially after Hamas seized fourteen Red Crescent trucks carrying humanitarian aid on February 7, 2008, on the pretext that only Hamas may decide how to distribute aid in Gaza (Hamas redistributed the food products and medical supplies to Hamas-run ministries).<sup>117</sup>

Additionally, critics of Israel tend to ignore Hamas' continued mismanagement of the aid and fuel supplies that it does receive. Hamas

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112. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 23, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

113. *Id.* art. 2.

114. *Id.* art. 23.

115. *Id.*

116. *Id.*

117. Associated Press, *Hamas Seizes Convoy of Food Meant for Palestinian Red Crescent*, JERUSALEM POST, Feb. 7, 2008, <http://www.jpost.com/servlet/Satellite?cid=1202246347331&pagename=JPost%2FJPArticle%2FShowFull>.

misuses some of the fuel that Israel supplies to it. The fuel is not only used to power factories manufacturing projectiles,<sup>118</sup> but is also used, for example, to illuminate the underground tunnels which are used to smuggle in weaponry from Egyptian Sinai. The Israeli-supplied fuel is then used to target Israeli residential, commercial, and industrial areas.<sup>119</sup> The IDF even caught terrorists attempting to smuggle potassium nitrate—which is used to manufacture explosives and Qassam rockets—into Gaza in large sacks labeled as EU humanitarian aid; the sacks were branded “EEC 2 Sugar Exported From EU.”<sup>120</sup>

Hamas has also attacked Israeli vehicles delivering aid even where it had no intent to divert the aid. On April 27, 2008, Hamas militiamen attacked aid trucks filled with fuel at the Nahal Oz crossing between Israel and Gaza, forcing the trucks to turn around.<sup>121</sup>

Furthermore, the Jerusalem Post reported eyewitnesses in Gaza who explained that, on at least four occasions, Hamas militiamen attacked and confiscated trucks loaded with fuel as they made their way from the Nahal Oz crossing to Gaza City. The eyewitnesses added that the fuel supplies were taken to Hamas-controlled security installations throughout the city.<sup>122</sup> Commenting on such attacks, Tony Blair, former British Prime Minister and current Quartet peace envoy, explained that “most people don’t understand—that we’re trying to urge Israel to get fuel into Gaza, and then the extremists come and kill the people bringing the fuel in. It’s a crazy situation.”<sup>123</sup> Thus time and time again, the aid that Israel has allowed to enter Gaza fails to reach the intended recipients: Palestinian civilians in need.<sup>124</sup>

118. Rebecca Anna Stoil et al., *Senior Official: Iran Behind Rocket Fire*, JERUSALEM POST, Mar. 3, 2008, <http://www.jpost.com/servlet/Satellite?pagename=JPost%2FJPArticle%2FShowFull&cid=1204546390634>.

119. Matthew Levitt, *Hamas’ Hidden Economy*, L.A. TIMES, July 3, 2007, at A19.

120. Herb Keinon, *EU Slams Terrorists’ Use of Phony Sugar Sacks*, JERUSALEM POST, Dec. 30, 2007, <http://www.jpost.com/servlet/Satellite?cid=1198517245928&pagename=JPost%2FJPArticle%2FPrinter>.

121. Khaled Abu Toameh, *PA: Hamas Disrupting Fuel Supplies to Gaza*, JERUSALEM POST, Apr. 28, 2008, at 2.

122. *Id.*

123. Tom Gross, *Mideast Dispatch Archive*, May 18, 2008, <http://www.tomgrossmedia.com/mideastdispatches/archives/000947.html>.

124. Deutsche Presse Agentur (DPA), *Hamas Confiscates Aid Trucks to Gaza*, RELIEFWEB, Feb. 7, 2008, <http://www.reliefweb.int/rw/rwb.nsf/db900SID/MMAH-7BM8XT?OpenDocument>.

#### 4. Article 70 of the First Protocol Additional to the Geneva Conventions of 1977

Article 70 of the First Protocol Additional to the Geneva Conventions of 1977 creates a slightly broader duty regarding the provision of food, medical supplies, clothing, bedding, means of shelter, and “other supplies essential to the survival of the civilian population.”<sup>125</sup> Israel, however, is not a party to the First Protocol, and is therefore not bound by the provisions of Article 70.

Even if Israel were so bound, Article 70 does not list fuel and electricity as items for which passage must be permitted. Moreover, Article 70 does not place any duty on warring parties to supply the required items. It imposes a general duty on all states to organize “relief actions,” and requires warring parties not to interfere with the actions. Thus, under Article 70, Israel would have no obligation to provide fuel or electricity; indeed, it would not even have any particular duty to provide food and medicine. At most, Article 70 would require Israel to permit transit to others’ shipments of food and medicine, which Israel already does without reference to Article 70.

#### 5. Customary Duties

More generally, the Israeli Justice Ministry has acknowledged a duty under customary international law not to interfere with the supply of basic humanitarian items such as food and medicine. The Israeli Supreme Court has also enforced this duty in several decisions (for instance, *Al-Bassiouni Ahmed v. Prime Minister*,<sup>126</sup> on January 30, 2008).

Regrettably, some Israelis have summarized this acknowledged duty expansively and inaccurately, requiring that Israel ensure a minimum necessary supply of food, fuel, and electricity to prevent starvation or a humanitarian crisis.<sup>127</sup> Even if the duty were as broad as this misstatement suggests, Israel has not breached its duty by cutting off Israeli fuel; Israel has only reduced supplies, while Gaza maintains more than sufficient supplies for basic humanitarian needs.

Israel is not required by its customary general humanitarian duties to itself provide required items, only not to interfere with their passage. Moreover, fuel and electricity are almost certainly not items that Israel

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125. See Geneva Protocol, *supra* note 18, art. 70.

126. HCJ 9132/07 Al-Bassiouni Ahmed v. The Prime Minister [Jan. 30, 2008] (Unpublished).

127. Robbie Sabel, *Analysis: Is Gaza Blockade a Legitimate Tool of War?*, JERUSALEM POST, Feb. 11, 2008, <http://www.jpost.com/servlet/Satellite?c=JPArticle&cid=1202657415718&pagename=JPost%2FJPArticle%2FShowFull>.

or other warring parties are required to supply. Additionally, Israel is not the sole available source of fuel and electricity to Gaza; certainly Egypt, for example, is available to provide these resources. Therefore, even if it were true that, as British Foreign Secretary David Miliband and Development Secretary Douglas Alexander stated, “without a steady supply of electricity hospitals cannot function, pumping stations and sewage systems fail, and access to clean water is denied,”<sup>128</sup> Israel would not be required to permit passage of fuel and electricity. Moreover, given the likelihood of Hamas diversions of assistance, even the customary rule permits Israel to interfere with the passage of humanitarian items to ensure that they do not reach the wrong hands or benefit the armed efforts or economy of the enemy.

Beyond these customary duties, one Israeli wrote that “the international community . . . regards Israel as continuing to have some responsibility for ensuring supplies to the civilian population” because Gaza “depends” on Israel for its electricity and water after local Palestinian mismanagement of water supplies, several decades of Israeli military administration, Israeli control of Gazan airspace, and continuing military clashes. However, there is no legal basis for the stated expectations of the “international community.”<sup>129</sup>

None of the grounds referenced provide a legal basis for claiming that Israel must supply Gaza with electricity or the like:

- Dependence on foreign supply—whether it be Gazan dependence on Israeli electricity, European dependence on Arab oil, or Somali dependence on foreign food aid—does not create a legal duty to continue the supply. Absent specific treaty requirements, countries may cut off oil sales to other states at any time;
- Neither Israel, nor any other country, is required to supply goods in response to its foes’ resource mismanagement or lack of natural bounty;
- There is no precedent or legal text that creates legal duties on the basis of a former military administration. For instance, as the above quoted Israeli wrote, no one has ever argued that

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128. Karin Laub, *Electricity Key Weapon in Gaza War*, USA TODAY, Feb. 9, 2008, [http://www.usatoday.com/news/world/2008-02-09-1257011926\\_x.htm](http://www.usatoday.com/news/world/2008-02-09-1257011926_x.htm).

129. See Sabel, *supra* note 127.

Egypt has legal duties to supply goods to Gaza due to its former nineteen-year military occupation of the Gaza Strip;<sup>130</sup>

- Control of airspace does not create a legal duty to supply goods. For instance, U.N. Security Council-ordered no-fly zones in Iraq,<sup>131</sup> Libya<sup>132</sup> and Bosnia<sup>133</sup> were not seen as the source of any legal duty to supply those countries with electricity, water, or other goods; and
- Military clashes do not themselves create a legal duty to supply goods. Only occupation as described by the Fourth Geneva Convention requires an occupier to ensure the supply of certain goods. In cases of military clashes, the parties' duty is limited to not interfering with the passage of certain humanitarian goods, as described above.

It is noteworthy that British Foreign Secretary Miliband and Development Secretary Alexander, while condemning a roughly contemporaneous Palestinian terrorist bombing in Dimona,<sup>134</sup> were not reported as having referred to the illegality of the Palestinian attack under international law, nor, indeed, to have made any reference whatsoever to the continued illegal Palestinian rocket attacks on Israeli towns like Sderot. This is unfortunate, as the Dimona bombing and rocket attacks are clearly war crimes and illegal acts of terror under customary international law and international treaties such as the International Convention for the Suppression of Terrorist Bombings.

#### 6. *Imminent Humanitarian Crisis*

The legal arguments of the critics of Israel's economic policies towards Gaza are baseless, and so too are the accompanying factual ones. While the critics claim that Israeli policies are leading to calamitous results, the facts say otherwise.

Israel's critics have become increasingly vocal. Predictions of an "imminent humanitarian crisis" in Gaza have been made at least as far back as 1996.<sup>135</sup> In the year 2000, various Non Governmental Organizations (NGOs) turned up the heat on Israel by claiming the Jewish state was

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130. *Id.*

131. S.C. Res. 686, U.N. Doc. S/RES/686 (Mar. 2, 1990).

132. S.C. Res. 686, U.N. Doc. S/RES/748 (Mar. 31, 1992).

133. S.C. Res. 686, U.N. Doc. S/RES/781 (Oct. 9, 1992).

134. Yaakov Katz and Rebecca Anna Stoil, *Hamas: Dimona Bombers Came from Hebron*, JERUSALEM POST, Feb. 4, 2008, <http://www.jpost.com/servlet/Satellite?cid=1202064579209&pagename=JPost%2FJPArticle%2FShowFull>.

135. HUMAN RIGHTS WATCH, *ISRAEL'S CLOSURE OF THE WEST BANK AND GAZA STRIP*, Vol. 8, No. 3(E) (July 1996), <http://hrw.org/reports/1996/Israel1.htm>.

responsible for the “imminent humanitarian crisis/disaster” in the Gaza Strip.<sup>136</sup> Such terminology was mobilized again in 2001,<sup>137</sup> and annually since then: in 2002,<sup>138</sup> 2003,<sup>139</sup> 2004,<sup>140</sup> 2005,<sup>141</sup> 2006,<sup>142</sup> 2007<sup>143</sup> and 2008.<sup>144</sup> How has the Gaza Strip been “on the verge” of a humanitarian crisis for more than ten years?

It is interesting to compare the use of the term “humanitarian crisis” as applied to the Gaza Strip with other locations described in the same manner—post-cyclone Myanmar, for example. The cyclone was a true disaster, which left “upwards of one million people . . . in need of shelter and life-saving assistance.”<sup>145</sup> Another use of the term “imminent humanitarian crisis/disaster” was used in relation to Darfur, where 300,000 were murdered and 2.5 million people fled their homes.<sup>146</sup> Needless to say, any suffering in Gaza resulting from Israeli defensive measures pales in comparison.

136. See, e.g., NADIA HAJAB, *Gaza's humanitarian crisis: Who's to blame for what*, MIDDLE EAST CHILDREN'S ALLIANCE <http://www.mecaforpeace.org/article.php?id=267>.

137. Frank Gardner, *Crisis Looms in Gaza*, BBC.COM, June 15, 2001, [http://news.bbc.co.uk/2/hi/middle\\_east/1389843.stm](http://news.bbc.co.uk/2/hi/middle_east/1389843.stm).

138. See, e.g., Press Release, United Nations Relief and Works Agency, UNRWA Launches \$94 Million Appeal for West Bank and Gaza No. HQ/G/25/2002, (Dec. 10, 2002), <http://www.un.org/News/Press/docs/2002/PAL1932.doc.htm>.

139. See, e.g., the Electronic Intifada website, which wrote, “investigation into the extent and causes of Palestinian poverty, in January 2003, the humanitarian situation in the Occupied Palestinian Territories has deteriorated sharply. Poverty levels and unemployment are now reaching crisis proportions creating a humanitarian crisis, the levels of which . . . ha[ve] not been seen in fifty years.” CHRISTIAN AID, THE ELECTRONIC INTIFADA, THE HUMANITARIAN CRISIS AND PROSPECTS FOR THE ROADMAP TO PEACE (July 28, 2003), <http://electronicintifada.net/v2/article1757.shtml>.

140. BBC, U.N. WARNS OF ‘GROWING GAZA CRISIS’ (Oct. 7, 2004), [http://news.bbc.co.uk/2/hi/middle\\_east/3723850.stm](http://news.bbc.co.uk/2/hi/middle_east/3723850.stm).

141. See, e.g., CARE, PALESTINIANS’ ONGOING HUMANITARIAN CRISIS DEEPENING IN GAZA (Aug. 24, 2005), [http://www.jerusalemite.org/press\\_release/2005/24-8-2005.htm](http://www.jerusalemite.org/press_release/2005/24-8-2005.htm).

142. See, e.g., B’TSELEM, GAZA HUMANITARIAN CRISIS—A JOINT STATEMENT BY ISRAEL’S LEADING HUMAN RIGHTS ORGANIZATIONS (Nov. 16, 2006), [http://www.btselem.org/English/Gaza\\_Strip/20061116\\_Brief\\_on\\_Gaza.asp](http://www.btselem.org/English/Gaza_Strip/20061116_Brief_on_Gaza.asp).

143. See, e.g., B’TSELEM, PRESS RELEASE, URGENT APPEALS FROM ISRAELI HUMAN RIGHTS GROUPS TO ISRAELI DEFENSE MINISTER: OPEN GAZA’S BORDERS TO PREVENT A HUMANITARIAN CRISIS (June 17, 2007), [http://www.btselem.org/english/press\\_releases/20070617.asp](http://www.btselem.org/english/press_releases/20070617.asp).

144. CNN, RIGHTS GROUPS: HUMANITARIAN ‘IMPLOSION’ GRIPS GAZA (Mar. 6, 2008), <http://edition.cnn.com/2008/WORLD/meast/03/06/gaza.crisis/?iref=hpmostpop>. In one of the few instances in which Israel was allowed to reply, the CNN noted, “Israel denounced the 16-page report, saying it is merely defending itself and calling the notion of a humanitarian crisis ‘fabricated.’”

145. ITV, BURMA DEATH TOLL ‘COULD BE 100,000’ (May 7, 2008), <http://www.itv.com/News/Articles/Burma-humanitarian-crisis-grows-646089661.html>.

146. CBC NEWS, THE CRISIS IN DARFUR, A TIMELINE (July 14, 2008), <http://www.cbc.ca/news/background/sudan/darfur.html>.

Moreover, Israel has gone to extraordinary lengths to protect the citizens of Gaza, having established the “Gaza Coordination and Liaison Administration” (CLA), where representatives of the IDF and government ministries work day and night to provide for the humanitarian needs of the Gaza citizens.<sup>147</sup> During the recent operation in Gaza this past winter, for example, CLA officials worked with representatives from international organizations and the Israeli government to coordinate medical aid and distribute food and equipment including 37,159 tons of food, medical supplies, and medications.<sup>148</sup>

CLA commander Col. Nir Press spoke candidly of Hamas’ “well-oiled media and propaganda machine, which has succeeded in creating humanitarian ‘crises’ out of thin air.”<sup>149</sup> He gave as an example Israel’s decision to suspend fuel supplies in early 2008 after a Palestinian attack on the Nahal Oz fuel depot.<sup>150</sup> Before restricting the supply, Israel filled all gas tanks in Gaza to their maximum. Yet, “taking advantage of this as a PR opportunity,” Hamas refused to draw on the fuel and “sent hundreds of people to gas stations in Gaza to stand with buckets in a long line, giving the impression that there was a fuel shortage in the Strip.”<sup>151</sup> The stunt was only called off after journalists “contacted Palestinian newspapers and Gaza-based industrialists to explain that the tankers were, in fact, full, but that Hamas was purposely not drawing the fuel. As a result, internal Palestinian pressure mounted, and Hamas had no choice but to distribute the fuel.”<sup>152</sup>

The conflated message of the NGOs and the Hamas authorities in Gaza manipulates a difficult situation to reap political and financial gains. Some of the alarmism regarding the humanitarian crisis in Gaza can be attributed to the pecuniary interests of the various charities and political interest groups that have made Gaza their primary cause. Still, it is striking how, year after year, in almost verbatim fashion, donor-states, NGOs, and well-meaning individuals are persuaded to donate extraordinarily outsized sums to forestall an “imminent humanitarian crisis/disaster” that never actually materializes. In fact, “since 1993,

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147. Yaakov Katz, *Security and Defense: A Colonel of Hope*, JERUSALEM POST, Aug. 1, 2008, <http://www.jpost.com/servlet/Satellite?cid=1215331161934&pagename=JPost%2FJPArticle%2FShowFull>.

148. ISRAEL MINISTRY OF FOREIGN AFFAIRS, HUMANITARIAN AID TO GAZA DURING IDF OPERATION (Jan. 18, 2009), [http://www.mfa.gov.il/MFA/Government/Communiques/2009/Humanitarian\\_aid\\_to\\_Gaza\\_following\\_6\\_month\\_calm.htm](http://www.mfa.gov.il/MFA/Government/Communiques/2009/Humanitarian_aid_to_Gaza_following_6_month_calm.htm).

149. Justus Weiner, *A Free Lunch for Hamas*, THE JERUSALEM POST, Feb. 8, 2009, <http://www.jpost.com/servlet/Satellite?cid=1233304710842&pagename=JPArticle%2FShowFull>.

150. *Id.*

151. *Id.*

152. *Id.*

Palestinians have received more than \$1.3 billion in U.S. economic assistance via USAID projects” alone.<sup>153</sup> In fact, the Palestinians are the largest per capita recipients of foreign aid worldwide.<sup>154</sup>

In addition, the Washington Institute for Near East Policy has pointed out that as of 2002, based upon contemporary prices, Palestinians in the West Bank and Gaza have received “\$161 per person per year compared to \$68 per person annually (at today’s prices) under the four-year Marshall Plan, meaning the Palestinians have gotten more than twice as much aid for twice as long as Europe received under the Marshall Plan.”<sup>155</sup> Commenting on the figures, Deputy Director for Research Patrick Clawson explains that “[t]he biggest single barrier to Palestinian growth is their violence against Israel, which forces Israel to impose closures and curfews.”<sup>156</sup> An old joke is that the definition of *chutzpah* is murdering one’s parents and then begging the court’s mercy on the grounds that the defendant is an orphan.<sup>157</sup> A new definition might be initiating a war while violating international humanitarian law and then claiming victimhood on the grounds of the suffering resulting from said war.

The “imminent humanitarian crisis/disaster” chorus is not only exaggerated, but it is also completely wrong. In the words of the Israeli Foreign Ministry, the critics “should point their criticism toward the Hamas terrorist organization that controls the Gaza Strip.” A ministry spokesman stated that Israel allows shipments of food, medicine, fuel and electricity to Gaza because it doesn’t want a humanitarian crisis, but . . . there is “foolproof” evidence that Hamas diverts supplies for “terrorist use.” He continued, “[i]f only the Palestinians choose to cease their pointless and indiscriminate firing of rockets against hundreds of thousands of Israeli civilians, the entire region would return to . . . normal.”<sup>158</sup>

153. USAID TRANSFERS \$20 MILLION TO PALESTINIAN AUTHORITY (Dec. 30, 2004), <http://domino.un.org/unispal.nsf/fd807e46661e3689852570d00069e918/ebafd5513e30952b85256f80005734be!OpenDocument>.

154. Paul Morro, CRS Report RS22370 U.S. Foreign Aid to the Palestinians (Dec. 22, 2006), <http://www.coherentbabble.com/CRS/CRS-RS22370.pdf>.

155. Patrick Clawson, *The Palestinians’ Lost Marshall Plans*, THE WASHINGTON INSTITUTE FOR NEAR EAST POLICY, Aug. 9, 2002, <http://www.thewashingtoninstitute.org/templateC06.php?CID=406>.

156. *Id.*

157. JACK ACHIEZER GUGGENHEIM, JEWISH LAW COMMENTARY, THE SUPREME CHUTZPA, <http://www.jlaw.com/Commentary/SupremeChutzpah.html> (last visited Sept. 21, 2009).

158. CNN, *Rights Groups: Humanitarian ‘implosion’ Grips Gaza*, Mar. 6, 2008, <http://edition.cnn.com/2008/WORLD/meast/03/06/gaza.crisis/?iref=hpmostpop>.

In the wake of Israel's withdrawal from Gaza in 2005, the Palestinian Authority (PA) rejected "the opportunity to consolidate real economic and political authority"<sup>159</sup> and thereby declined to "stimulate progress towards peace in the region."<sup>160</sup> Instead, the PA permitted armed gangs to destroy 200 *dunams*<sup>161</sup> of greenhouse space, as well as computers and advanced irrigation systems that Israel left behind following its withdrawal.<sup>162</sup> Palestinian militants firebombed churches, kidnapped journalists, and even kidnapped foreign aid workers. In October 2003—prior to Israel's departure from Gaza—terrorists ambushed and murdered three Americans who accompanied U.S. government officials who came to Gaza to interview Palestinian applicants for the prestigious Fulbright student scholarship.<sup>163</sup> These violent activities culminated with the Hamas terrorists who took control over Gaza, throwing rival PA gunmen off rooftops to their deaths.<sup>164</sup>

Two relatively unknown features of Gaza are worthy of mention in relation to the alleged perpetual "humanitarian crisis" that is supposedly about to erupt. First, Gaza's offshore gas deposits (confirmed with British Gas) are worth an estimated \$2 billion<sup>165</sup> (even prior to the upsurge in the price of fossil fuels during the past years). If the Hamas government can stabilize the political situation long enough to install platforms to bring the gas to the surface, Hamas can reap the benefits of these offshore gas deposits. Secondly, the population of Gaza is comparatively healthy and well educated. In fact, classic indicators of the standard of living place Gaza in a reasonably strong position. Life expectancy in the Gaza Strip is 72.16 years,<sup>166</sup> higher than Russia (65.94 years),<sup>167</sup> the Bahamas,

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159. Aaron David Miller, *Why Gaza May Spell a New Start*, INT'L HERALD TRIB., May 5, 2005, at 7.

160. G8 Statement: Gaza Withdrawal and the Road Ahead to Middle East Peace, 1 PUB. PAPERS 1019, 1019–20 (June 10, 2004).

161. The dunam is a unit of land area equivalent to one thousand square meters or approximately one-fourth acre. The Israel Project, <http://www.theisraelproject.org/site/apps/nl/content2.asp?c=hsJPKOPIJpH&b=886017&ct=1181575> (last visited July 25, 2009).

162. Arnon Regular, *Palestinian Militants Ransack Former Gush Katif Greenhouses*, HAARETZ, Feb. 10, 2006, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=681271&contrassID=1&subContrassID=1>.

163. Fox News, *Explosion in Gaza Strip Kills Three Americans*, Oct. 15, 2003, <http://www.foxnews.com/story/0,2933,100102,00.html>.

164. Eric Westervelt, *Fatah, Hamas Battle in Gaza Threatens Government*, NPR, June 12, 2007, <http://www.npr.org/templates/story/story.php?storyId=10988462>.

165. Tim Butcher, *Gaza Doesn't Need Aid: It Has a £2bn Gas Field*, THE DAILY TELEGRAPH, Nov. 7, 2007, <http://www.lexisnexis.com.sally.sandiego.edu/us/lnacademic/results/docview/docview/co?docLindInd>.

166. CIA, THE WORLD FACTBOOK 2008 236 (2008), available at <https://www.cia.gov/library/publications/the-world-factbook/index.html>.

167. Miguel Barrientos, *Life Expectancy at Birth—Country Comparison*, Jan. 1, 2008, <http://www.indexmundi.com/g/r.aspx?t=50&v=30>.

(65.72 years),<sup>168</sup> India (69.25 years),<sup>169</sup> Ukraine (68.06 years),<sup>170</sup> and Glasgow East (in Scotland), where male life expectancy is 69.3 years.<sup>171</sup> Similarly, Gaza has a much lower infant mortality rate (21.88 deaths/1,000 live births)<sup>172</sup> than Angola (182.31 deaths/1,000 live births),<sup>173</sup> Iran (36.93 deaths/1,000 live births),<sup>174</sup> India (32.31 deaths/1,000 live births),<sup>175</sup> Egypt (28.36 deaths/1,000 live births),<sup>176</sup> and Brazil (26.67 deaths/1,000 live births).<sup>177</sup> Perhaps the most astonishing fact, in light of the sensationalist media coverage damning Gaza's chances for a better future, is that literacy in Gaza stands at a staggering 92.4%.<sup>178</sup> This is far higher than India (47.8%),<sup>179</sup> Egypt (59.4%),<sup>180</sup> and even wealthy Saudi Arabia (70.8%).<sup>181</sup>

Likewise, contrary to common mythology that the Gaza Strip is “the most densely populated territory in the world,”<sup>182</sup> the Gaza Strip is unequivocally less densely populated than an array of other locales around the world, including a number of economic success stories. According to the Statistical Abstract of the United States: 2004–2005, the population per square mile in the Gaza Strip was 8,666, while Monaco had a population density of 41,608 per square mile, Singapore,

168. *Id.*

169. Miguel Barrientos, *India Life Expectancy at Birth*, Jan. 1, 2008, [http://www.indexmundi.com/india/life\\_expectancy\\_at\\_birth.html](http://www.indexmundi.com/india/life_expectancy_at_birth.html).

170. Miguel Barrientos, *Ukraine Life Expectancy at Birth*, Jan. 1, 2008, [http://indexmundi.com/ukraine/life\\_expectancy\\_at\\_birth.html](http://indexmundi.com/ukraine/life_expectancy_at_birth.html).

171. FactCheck: Glasgow Worse than Gaza?-Channel 4 News, July 7, 2008, <http://www.channel4.com/news/articles/society/health/factcheck+glasgow+worse+than+gaza/2320267>.

172. The World Factbook, *supra* note 166.

173. Miguel Barrientos, *Infant Mortality Rate—Country Comparison*, Jan. 1, 2008, <http://indexmundi.com/g/r.aspx?c=tp&v=29>.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. The World Factbook, *supra* note 166.

179. Miguel Barrientos, *Literacy—Country Comparison*, Jan. 1, 2008, <http://www.indexmundi.com/g/r.aspx?c=in&v=39>.

180. *Id.*

181. *Id.*

182. Andrew Kennis, *The World's Largest Prison*, CUNY GRADUATE CENTER ADVOCATE, Dec. 2008, <http://web.gc.cuny.edu/advocate/DEC03ISSUE/dec03%20articles%20web%20format/Dec03Gaza.htm>. See also BBC, *Key Maps (Israel and the Palestinians in Depth)*, available at [http://news.bbc.co.uk/2/shared/spl/hi/middle\\_east/03/v3\\_israel\\_palestinians/maps/html/population\\_settlements.stm](http://news.bbc.co.uk/2/shared/spl/hi/middle_east/03/v3_israel_palestinians/maps/html/population_settlements.stm) (referring to Gaza as “one of the most densely populated tracts of land in the world”).

17,751; Gibraltar, 11,990; Hong Kong, 17,833; and Macau had a population density nearly ten times that of the Gaza Strip (71,466) in 2003.<sup>183</sup>

#### *D. Legality of Israeli Military Actions under International Human Rights Law*

Under the International Covenant on Civil and Political Rights, Israel is required to ensure the protection of certain rights “within its territory,”<sup>184</sup> including the right to life.<sup>185</sup> The application of these rights to Gaza is far from clear. Israel does not exercise authority or control over Gaza. Thus, unless Gaza is part of the sovereign territory of Israel, it is impossible to argue that Gaza is Israeli “territory,” in which case the rights under the Covenant clearly do not apply.

Moreover, even if Gaza is part of the sovereign territory of Israel, and therefore subject to the Covenant, Israel has abided by its legal duties. For instance, Article 12 guarantees liberty of movement.<sup>186</sup> However, the same article also authorizes subjecting the liberty of movement to restrictions “necessary to protect national security, public order, public health or morals or the rights and freedoms of others.”<sup>187</sup> Thus, it is clear that Israel may block the travel of Gazans for security reasons.

More broadly, it has been recognized that the Covenant has little application in combat. Some argue that human rights law is displaced altogether by a situation of war.<sup>188</sup> Others claim that human rights law continues to apply, but admit that the meaning of such rights must be established by the rules of international humanitarian law.<sup>189</sup> Either way, Israel is protecting the human rights of the Palestinian residents of the Gaza Strip by abiding by international humanitarian law.

#### *E. Other Israeli Duties under International Law*

Some provisions of international law impose upon Israel duties to act against Gaza and the Palestinian terrorists who are based there.

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183. Alex Safian, *Why Palestinians Still Live in Refugee Camps*, CAMERA, Aug. 14, 2005, [http://www.camera.org/index.asp?x\\_context=7&x\\_issue=52&x\\_article=960](http://www.camera.org/index.asp?x_context=7&x_issue=52&x_article=960).

184. Sarah Joseph et al., *Article 2.1* in *THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS*, (2nd ed. 2004).

185. *Id.* art. 6.1.

186. *Id.* art. 12.1.

187. *Id.*

188. Mary O’Connell, *War Crimes Research Symposium: The Role of Justice in Building Peace: To Kill or Capture Suspects in the Global War on Terror*, 35 *CASE W. RES. J. INT’L L.* 325, 328, 330–32 (2003).

189. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9, 2004).

First, as noted above, Israel has the duty to act to prevent and punish Palestinian acts of genocide covered by the Genocide Convention.

Second, Israel has the duty, under Security Council Resolution 1373 (a Chapter VII resolution), to take various steps against Palestinian terrorists. In addition to the required steps “the Council decided that all states should prevent and suppress the financing of terrorism, as well as criminalize the willful provision or collection of funds for such acts,” and the freezing of funds and financial assets “of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts.” Israel’s duties to prevent funding of terrorists are far-reaching. Under Resolution 1373, states must “refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts.” Thus, arguably, Israel is forbidden to supply aid to the Palestinian Authority, knowing that part of it will be diverted to Hamas and other terrorist groups and will, therefore, become passive support for persons involved in terrorist acts. Additionally, Israel is required by Resolution 1373 to “[p]revent the movement of terrorists or terrorist groups by effective border controls.” This means that Israel is arguably required to continue maintaining strict controls on the passage of persons from Gaza to Israel.<sup>190</sup>

These duties do not fall solely upon Israel. Other states also are required to prevent and punish Palestinian acts of genocide and, pursuant to Resolution 1373, to “[c]ooperate, particularly through bilateral and multilateral arrangements and agreements, to prevent and suppress terrorist attacks and take action against perpetrators of such acts.”<sup>191</sup>

#### VIII. CONCLUSION

The Palestinian–Israeli fighting in Gaza has been characterized by the extensive commission of war crimes, acts of terrorism, and acts of genocide by Palestinian fighters. On the other hand, Israeli counter-measures have conformed with the requirements of international law, with the possible exception that Israel may be legally required to cut off aid to the Palestinians. Israel may continue to impose economic sanctions and engage in military strikes including a full-scale assault on the Gaza Strip, as long as it continues to abide by the basic humanitarian rules of distinction and proportionality.

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190. S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

191. *Id.*

Other states can, and must, do more to encourage compliance with international legal standards by fulfilling their own legal obligations, while refraining from raising specious charges against Israel. International law requires Israel and other states to take measures to bring Palestinian war criminals and terrorists to justice, to prevent and punish Palestinian genocidal efforts, and to block the funding of Palestinian terrorist groups and those complicit with them.