Bachelor Thesis

Besiegement and the Conduct of Hostilities in the Gaza Strip

Applying International Humanitarian Law to Israeli Actions in the Hamas-Israel Conflict

Justin Whitton MacDowell
4207106

Supervisor: Dr. Hanne Cuyckens
Department of Law / Universiteit Utrecht
Department Fellow: Dr. Bald de Vries

Fall Semester 2016

Table of Contents

Referencing: Oxford Standard for Citation of Legal Authorities 4th Edn*

*www.law.ox.ac.uk/sites/files/oxlaw/oscola_4th_edn_hart_2012.pdf

Table of Jurisprudence, Treaties, and UN Documents

International Jurisprudence

International Court of Justice (ICJ)

- *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) [2005] ICJ Rep 168 (*Armed Activities Case*)
- *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43 (*Genocide Case*)
- *Case Concerning Barcelona Traction, Light, and Power Co., Ltd (Belgium v Spain)* (Judgment) [1970] ICJ Rep 3
- *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* (Judgment) [1986] ICJ Rep 14 (*Nicaragua Case*)
- *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 19

International Criminal Tribunal of the Former Yugoslavia (ICTY)

- *Prosecutor v Duško Tadić aka 'Dule'* (Opinion and Judgment) ICTY-94-1-T (7 May 1997) (*Tadić Case*)
- *Prosecutor v Stanilav Galic* (Judgment) IT-98-29-T (5 December 2003)
- *Tadić Case* (Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction) (2 October 1995)
- *Prosecutor v Ljube Boškoski and Johan Tarčulovski*, (Judgment) ICTY-04-82-T (10 July 2008)
- *Prosecutor v Zoran Kupreskic et al* (Judgment) ICTY-95-16 (14 January 2000)

International Military Tribunal at Nuremberg (IMTN)

- U*nited States of America v Wilhelm List et al* 11 LRTWC 1230 (1948) (*Hostages*)
- *United States of America v Wilhelm von Leeb et al* 12 LRTWC 1 (1949) (*High Command*)

Special Court for Sierra Leone (SCSL)

- *Prosecutor v Alex Tamba Brima et al* (Judgment) SCSL-2004-16-T (20 June 2007)

Israeli Jurisprudence and Bilateral Treaties

- Annex I to the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (Israel-Palestine Liberation Organization) (Oslo II Annex 1)
- CA 6821/93 **United Mizrahi Bank v Migdal Cooperative Bank** (Versa)
- CA 6659/06 **Anonymous v State of Israel** (Elyon) (*Anon v Israel*)
- HCJ 102/82 **Zemel v Minister of Defense et al** 37(3) IsrSC 365
- HCJ 11120/05 **Hamdan et al v Commander of the Southern Region et al** (Hamoked)
- HCJ 201/09 **Physicians for Human Rights v Prime Minister of Israel** (Versa) *(Physicians v PM)*
- HCJ 7015/02 **Ajuri v The Military Commander of the Judea and Samaria Area** (Hamoked)
- HCJ 769/02 **Public Committee Against Torture v Government of Israel** (Elyon) (*Targeted Killings)*
- HCJ 9132/05 **Ahmed et al v Prime Minister of Israel** (Versa) (*Ahmed v PM*)
- HCJ 9132/07 **Jaber al-Bassiouni Ahmed and Others v Prime Minister and Minister of Defense** (Elyon)
- Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (Israel-Palestine Liberation Organization) (Oslo II)

Multilateral Treaties and Conventions

Classic Treaty Series

- Convention Concerning the Opening of Hostilities 20 CTS 263 (1907) (Hague III)
- Regulations Concerning the Laws and Customs of War on Land 187 CTS 227 (1907) (Hague IV Annex)

United Nations Treaty Series

- Charter of the United Nations 1 UNTS XVI (1945) (UN Charter)
- Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 75 UNTS 31 (1949) (GC 1)
- Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea 75 UNTS 85 (1949) (GC 2)
- Convention Relative to the Protection of Civilian Persons in Time of War 75 UNTS 287 (GC 4)
- Convention Relative to the Treatment of Prisoners of War 75 UNTS 135 (GC 3)
- Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts 1125 UNTS 3 (1978) (AP 1)
- Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts 125 UNTS 609 (1978) (AP 2)

United Nations Resolutions/Reports/Other Documents

- Report of the Secretary-General, 'Panel of Inquiry on the 31 May 2010 Flotilla Incident' (2011) (Palmer Report)
- Report of the Secretary General, 'Summary by the Secretary-General of the Report of the United Nations Headquarters Board of Inquiry into Certain Incidents that Occurred in the Gaza Strip between 8 July 2014 and 26 August 2014' (2015) UN Doc S/2015/286 (Board of Inquiry Report)
- *San Remo Manual on International Law Applicable to Armed Conflicts at Sea, 12 June 1994* [1995] 309 IRRC 583UNGA 'Report of the Committee on the Exercise of the Inalienable Rights of the Palestinian People' UN GAOR 61st Session Supp No 35 UN Doc A/61/35 (2006)
- UNHRC, Twenty-First Special Session 23 July 2014 'Report of the Human Rights Council on its Twenty-First Special Session' (9 September 2014) UN Doc A/HRC/S-21/2
- UNHRC 'Report of the Commission of Inquiry on Lebanon Pursuant to Human Rights Council Resolution S-2/1' (23 November 2006) UN Doc A/HRC/3/2 (UNCIL)
- UNHRC 'Report of the Detailed Findings of the Independent Commission of Inquiry Established Pursuant to Human Rights Council Resolution S-21/1427' (24 June 2015) UN Doc A/HRC/29/52 (UNCIG)
- UNHRC 'Report of the International Fact-Finding Mission to Investigate Violations of International Law, including International Humanitarian and Human Rights Law, Resulting from the Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance' (2010) UN Doc A/HRC/15/21
- UNHRC 'Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict – Executive Summary' (23 September 2009) UN Doc A/HRC/12/48 (Goldstone Report)
- UNSC 'Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 78 – Annex VI [B]: The Battle of Sarajevo and the Law of Armed Conflict' (28 December 1994) UN Doc S/1994/674/Add.2.
- UNSC Res 478 (20 August 1980) UN Doc S/RES/478
- UNSC Res 521 (19 September 1982) UN Doc S/RES/521

List of Abbreviations

AI – Amnesty International
AJIL – American Journal of International Law
AP 1 – First Additional Protocol to the Geneva Conventions
AP 2 – Second Additional Protocol to the Geneva Conventions
CUP – Cambridge University Press
CTS – Classic Treaty Series
DoD – Department of Defense (US)
EECC – Ethiopia-Eritrea Claims Commission
EU – European Union
FAO – Food and Agricultural Organization (UN)
GCs – 1949 Geneva Conventions
GC 1 – First Geneva Convention
GC 2 – Second Geneva Convention
GC 3 – Third Geneva Convention
GC 4 – Fourth Geneva Convention
Hamas - Harakat al-Muqawamah al-ʾIslamiyyah (Arabic acronym for Islamic Resistance Movement)
HCJ – High Court of Justice (Supreme Court of Israel)
HRW – Human Rights Watch
IAF – Israel Air Force
ICJ – International Court of Justice
ICL – International Criminal Law
ICRC – International Committee for the Red Cross
ICTY – International Criminal Tribunal for the Former Yugoslavia
IMTN – International Military Tribunal at Nuremburg
IDF – Israel Defense Forces
IHL – International Humanitarian Law
IO – International organization
IRRC – International Review of the Red Cross
JPS – Journal of Palestine Studies
LNTS – League of Nations Treaty Series
LOAC – Law of Armed Conflict
LOO – Law of Occupation
MAG – Military Advocate General (Israel)
MFA Israel – Ministry of Foreign Affairs (Israel)
MoD – Ministry of Defense (UK)
NGO – Non-governmental organization
nm – Nautical mile
NOTMAR – Notice to Mariners
OCHA – United Nations Office for the Coordination of Humanitarian Affairs in the Occupied Palestinian Territories
OPT – Occupied Palestinian Territories
OUP – Oxford University Press
PA – Palestinian (National) Authority
PCHR – Palestinian Center for Human Rights
PIJ – Palestinian Islamic Jihad
PLO – Palestine Liberation Organization
SCSL – Special Court for Sierra Leone
TRC – Truth and Reconciliation Commission
UK – United Kingdom of Great Britain and Northern Ireland
UN – United Nations
UNCIG – United Nations Commission of Inquiry on Gaza
UNCIL – United Nations Commission of Inquiry on Lebanon
UNGA – United Nations General Assembly
UNHRC – United Nations Human Rights Council
UNRWA – United Nations Relief Works Agency
UNSC – United Nations Security Council
UNTS – United Nations Treaty Series
USAF – United States Armed Forces
USC – United States Code
US – United States of America

Justin MacDowell
Supervisor: Dr. Hanne Cuyckens
Department of Law / Universiteit Utrecht
Fall 2016

Besiegement and the Conduct of Hostilities in the Gaza Strip
Applying International Humanitarian Law to Israeli Actions in the Hamas-Israel Conflict

Abstract: The main aim of this bachelor thesis is to prove that Israel is breaching International Humanitarian Law (IHL) in its ongoing conflict with Hamas through their siege and military campaigns. My primary research question that guides this thesis is, 'In what ways is Israel breaching IHL in its conflict with Hamas?' I believe there are two levels to this conflict and therefore two levels within which breaches occur: outside of military engagment via besiegement and within military engagement via the conduct of hostilities. Thus, I will be examining Israel's siege of Gaza and their most recent military engagement in 2014. I start by asking 'Which laws of war apply to Israel in its armed conflict with Hamas forces – international or non-international, and why?' I posit that it is an international armed conflict, specifically because Israel is occupying Gaza despite officially terminating the occupation in 2005. I also argue that it should be classified as such even if one rejects that an occupation exists. This analysis helps us deterimine which humanitarian laws are applicable to both levels of the conflict.

The armed conflict between Hamas and Israel occurs outside of the conduct of hostilities via the besiegement of the Strip so I begin the analysis from this level. My mission in that chapter is to prove that the siege of the Strip breaches IHL – notably the customary rules regarding sieges and blockades. The application of the LOO to the siege and conflict as a whole is outside the ambit of this thesis. I also seek to show that it breaches customary and treaty-based rules regarding collective punishment and indiscriminate attacks, breaching the fundamental IHL principles of distinction and proportionality. The final chapter turns toward the most recent war – Operation Protective Edge – to analyze Israel's conduct of hostilities through a lens of distinction and proportionality. I aim to prove, through 3 events involving numerous civilian deaths and damage to civilian objects, that Israel breached critical IHL obligations. Finally, I impart a few closing remarks on the search for accountability, IHL enforcement, and recommendations for further research.

Justin MacDowell
Supervisor: Dr. Hanne Cuyckens
Department of Law / Universiteit Utrecht
Fall 2016

Introduction

On the evening of August 26th, 2014, the State of Israel and the Gaza-based Islamic Resistance Movement (Hamas) accepted an Egyptian-brokered ceasefire to end a devastating armed conflict that erupted seven weeks earlier. Over a thousand Palestinian civilians lost their lives and hundreds of thousands became displaced, with the United Nations Office for the Coordination of Humanitarian Affairs in the Occupied Palestinian Territories (OCHA) commenting, 'The scale of damage resulting from the 50-day escalation in hostilities is unprecedented since the beginning of the Israeli occupation in 1967.'[1] Two years prior, an eight-day armed conflict between the same two belligerents rocked the Gaza Strip and opened the wounds left by the first Gaza War of 2008. As of today, the 2014 clashes were the last war waged between the two adversaries but the conflict rages on through besiegement.

When approaching this conflict, critical legal questions arise. The main question in this thesis is, 'In what ways is the State of Israel breaching International Humanitarian Law (IHL)?' I believe there are two levels of breaches occuring, outside of military engagment via besiegement and within military engagement via the conduct of hostilities. Thus, I will be examining Israel's siege of Gaza and their most recent military engagement in 2014. I start off the thesis by asking, 'Which laws of armed conflict (LOAC) apply to Israel in its armed conflict with Hamas forces – international or non-international, and why?' I push that it is must be classified as an international armed conflict because there exists a belligerent occupation of Gaza – and I also argue it should be classified as such if we accept the occupation no longer endures. This will guide us to the applicable LOAC relevant to the analyses of the siege and the 2014 conduct of hostilities.

I then move to the besiegement, a controversial and ancient method of warfare. My mission in Chapter 2 is to prove that the siege of the Strip breaches IHL and the rules regarding sieges and blockades. The application of the law of occupation (LOO) to the siege and conflict as a whole is outside the ambit of this thesis. I will prove the siege is collective punishment and an

[1] OCHA, 'Gaza Emergency Situation Report' (4 September 2014) accessed 29 August 2016.

indiscriminate attack. After, I turn to the most recent military engagement in Gaza, known by Israel as Operation Protective Edge, to analyze Israel's conduct of hostilities by highlighting and examining their military actions in order to determine whether they adhere to IHL or not. This chapter seeks to prove that Israel's conduct of hostilities in the 2014 Gaza War contain breaches of customary and treaty-based IHL and the principles of distinction and proportionality. Finally, I impart a few closing remarks on my findings, the path towards accountability, and suggestions for further research.

Why choose this particular subject? It is an exciting and at times, controversial area of study. The international humanitarian legal aspects of the Israel-Hamas conflict are complex, numerous, and by no means apolitical. International law itself is difficult if not impossible to separate from politics,[2] and few countries attract persistent controversy domestically and internationally quite like Israel. That being said, with untold thousands suffering on both sides for decades I believe it is crucial for academics to shed light on situations like this in order to work to protect those most vulnerable to the horrors being faced on the ground. As will be discussed in this thesis's conclusion – one purpose of this legal survey is to promote the search for accountability and to encourage the shift of public opinion toward coveting an enforcement mechanism of IHL. Non-criminal and criminal mechanisms are briefly explored.

To further outline this bachelor thesis, it will be broken up into three chapters, excluding this introduction and the denouement's concluding remarks. In Chapter 1, I will be analyzing the scope of IHL applicable to Israel in its armed conflict with Hamas forces. I ask whether the conflict international or non-international, and why. I prove that it is an international armed conflict, similar to what Israel's Supreme Court has ruled, but contrary to Israel's position, I propose that it is because an occupation exists. From here, we can determine which laws are applicable to Israel in their conflict with Hamas – for the purposes of this paper, the besiegement and conduct of hostilities are the only relevant aspects therefore only the laws relating to each will be covered. Although proving the conflict was international based on occupation would mean the LOO applies, application of such falls outside the ambit of this thesis and will not be touched upon. I also prove that the conflict shall be classified as an international armed conflict

[2] Jan Klabbers, *International Law* (CUP 2013) 12-14.

even if we accept the Israeli position that an occupation in Gaza no longer exists. I use a test provided by the Israeli High Court of Justice (HCJ) to determine this unique conflict's international character. Although, it will be stressed that its application should be envisaged as important future research in the concluding remarks.

Chapter 2, 'Collective Punishment: Examining the Lawfulness of the Besiegement of the Gaza Strip', seeks to prove that the siege is in breach of treaty-based and customary rules regarding sieges and blockades. The siege is made up of three interlaced blockades, whose methods I contend transgress IHL. I also push that the siege itself is a dereliction from LOAC being a collective punishment and an indiscriminate attack, serious violations of the principles of distinction and proportionality.

In approaching Chapter 3, 'Distinction and Proportionality: Analyzing the Israeli Conduct of Hostilities in the 2014 Gaza War', the second level of the conflict will be confronted. In this chapter I ask what, if any, alleged violations of IHL occurred in the war and seek to examine the lawfulness of 3 events resulting in civilian deaths, paying particular attention to the principles of distinction and proportionality given their non-adherence in the besiegement. Customary rules regarding the conduct of hostilities, applicable treaty-based rules, jurisprudence, and the work of IHL scholars will be applied to 3 actions chosen, found in government investigations, United Nations and NGO reports, and independent eyewitness analyses of the 2014 war in Gaza.

Finally, I will end this bachelor thesis with remarks on the findings within and suggestions for further research, primarily in the realm of IHL enforcement and accountability.

Chapter 1 – The Scope of International Humanitarian Law in the Hamas-Israel Conflict, an International Armed Conflict

Introduction (1.0): What kind of conflict exists between Hamas and Israel? Is it international in character or can it be considered more of a domestic insurgency? Does it affect which laws are applied to military actions, or how the enemy is classified? In this chapter, I will be discussing the scope of IHL applicable to Israel in its conflict with Hamas. The main questions of this

chapter are, 'What kind of armed conflict, if any, exists between Hamas and Israel?' and 'Which laws apply to the actions in this legal survey?' To do this I must answer how to classify this armed conflict: international or non-international, and why. This chapter seeks to prove that the Hamas-Israel Conflict is an international armed conflict because Israel is occupying Gaza. IHL states that in situations of occupation, the laws regarding international armed conflict apply.[3]

The application of the criteria of belligerent occupation to the situation in Gaza will demonstrate that it is an international armed conflict. Classification of the conflict matters greatly as it leads to the application of the relevant law to the different analyses of the dual levels of the conflict. After qualifying the conflict as international (both in the event of an occupation and in the event there is none) the relevant laws and principles applicable to this thesis will be outlined.

The Scope of IHL in the Hamas-Israel Conflict – Conflict Classification (1.1): The roots of the conflict between Hamas and Israel lead us back to Israel conquering and subsequently occupying the Egyptian-occupied Gaza Strip in 1967. The founding of Hamas, originally an Islamic charity that slowly grew during the early years of the Israeli occupation of Gaza, worked to counter the brewing secular nationalism of the Palestine Liberation Organization (PLO). It became a formidable enemy in the 1990s when Hamas formed their military wing. It became a major enemy of Israel after Israel withdrew its settlers and armed forces from Gaza in 2005,[4] ending the Second Intifada. When Hamas won parliamentary elections and successfully expelled the PLO's dominant party Fatah, it set off a chain of events that led to Israel declaring the Strip a 'hostile entity'[5] and set the stage for direct military confrontations. These hostilities have occurred since 2006 with Operation Summer Rains and thus far, three major engagements have transpired in 2008-9, 2012, and 2014. The conflict continues at the time of writing.

[3] Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (GC 1) art 2.
[4] An event hereafter known as 'The Disengagement'.
[5] B'Tselem, 'Gaza Strip: The Siege on Gaza' (1 January 2011) <www.btselem.org/gaza_strip/siege> accessed 2 October 2016.

Although an armed conflict between Israel and Palestinian militant groups has been recognized by the HCJ has having existed since the First Intifada (1987-1991),[6] there has been uneasiness by the Court to go more in depth to the exact type of armed conflict that exists between Israel and Hamas. Israel classifies Hamas a non-State terrorist organization (TO) and yet the HCJ does not classify the conflict as non-international in character as one might presume, but international. Before we tackle that, we must ask, when does an armed conflict exist, and does one exist in this case?

A definition of the term 'armed conflict' in IHL, which replaced 'war',[7] appears in *Prosecutor v Tadić*. An armed conflict exists as soon as there is a 'resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State,' and IHL applies the second force is initiated and even beyond the end of a conflict.[8] The threshold for an international armed conflict is quite low since one exists whenever there is a resort to armed force and does not require a certain number of casualties or duration.[9] There is, however, a higher threshold for armed conflicts of a non-international character, requiring a certain level of intensity and protracted length, as local law would apply to the actions not meeting the threshold.[10]

While the Hague Regulations[11] mention the LOAC applies at the commencement of a formal declaration of war,[12] declarations of war are uncommon in present times and has not since the Second World War (WWII). We look instead to the 1949 Geneva Conventions and their First

---

[6] HCJ 769/02 **Public Committee Against Torture v Government of Israel** (Versa), para 16 *(Targeted Killings Case)*

[7] Christopher Greenwood, 'Scope of Application of Humanitarian Law' in Dieter Fleck, *The Handbook of International Humanitarian Law* (OUP 2008) 45-46.

[8] One stops applying IHL when a 'general conclusion of peace is reached', see *Prosecutor v Duško Tadić aka 'Dule'* (Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction) ICTY-94-1-T (2 October 1995) (*Tadić Case*) para 70.

[9] Dapo Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts' in Elizabeth Wilmshurst, *International Law and the Classification of Conflicts* (OUP 2012) 41.

[10] ibid 42.

[11] The 1899 Hague Regulations were six groundbreaking treaties and more was later accomplished when they were updated in the 1907 Hague Regulations, consisting of fourteen conventions; The International Military Tribunals at Nuremberg and Tokyo declared the 1899 and 1907 Hague Regulations customary international law by the time WWII broke out, see Lawrence D Egbert (ed), 'Judicial Decisions: International Military Tribunal (Nuremberg), Judgment and Sentences - October 1, 1946' [1947] 41(1) AJIL 172, 248.

[12] Convention Concerning the Opening of Hostilities 20 CTS 263 (1907) (Hague III) art 1.

Additional Protocol to tell us when the LOAC applies to conflicts of an international character. Common Article 2 to the Geneva Conventions state,

> In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance. Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.[13]

And Article 1(4) of the First Additional Protocol to the Geneva Conventions (AP 1)[14] include,

> [A]rmed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.[15]

Does a conflict exist in our case? Yes, an armed conflict exists between Israel and Hamas and Israel recognizes its existence.[16] It has intensified since the Disengagement. Paramilitary groups in Gaza large and small, emboldened by the departure of the IDF, continued their armed

[13] GC 1 (n 3) art 2.
[14] Israel is not a party to AP 1 but accepts the provisions that reflect custom, and most of AP 1's provisions have been found to be custom at this point in time, see Christopher Greenwood, 'Historical Development and Legal Basis' 30, in Fleck (n 7).
[15] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts 1125 UNTS 3 (1978) (AP 1) art 1(4).
[16] HCJ 7015/02 **Ajuri v The Military Commander of the Judea and Samaria Area** (Hamoked) para 1.

resistance by firing mortars and rockets indiscriminately towards Israeli territory, firing 222 rockets[17] and launching 2 cross-border suicide attacks in the 3 months after Israel disengaged alone.[18] It is difficult to deny an armed conflict's existence and its growing intensity post-Disengagement. The question now is, 'Is the conflict international or non-international?' That is where we will turn our attention.

International or Non-International Conflict? (1.2): In 2008, Israel, in a report on the 2008-9 Gaza War said of their conflict with Hamas, 'It is not yet settled [which IHL regime] applies to cross-border military confrontations between a sovereign State and a non-State terrorist armed group operating from a separate territory.'[19] Due to this, the Israeli government chooses to apply the rules governing both international and non-international conflicts in what it says are '*sui generis* situations', claiming that the classification is 'largely of theoretical concern.'[20] Israel appears to refrain altogether from classifying the conflict and seeks to apply - to any action they take in regards to the conflict - whichever set of rules it desires.

I disagree with Israel that classification is only of theoretical concern and that applying a mix of IHL regimes is appropriate. Regarding the latter, Israel is wrong to apply a mix because the Gaza Strip is being occupied by Israel through their besiegement of the territory. As such the conflict should be accepted as an international armed conflict and the applicable laws applied. However, the Israeli government does not believe Gaza to be occupied. Regarding the former disagreement, classification is not only of a theoretical concern, it is precisely what guides the correct application of law. Before it is proven that there exists an occupation and thus provides the conflict an international character, it will be demonstrated that even in the event that Gaza is

[17] MFA Israel, 'The Hamas Terror War Against Israel' (March 2011) <www.mfa.gov.il/mfa/foreignpolicy/terrorism/palestinian/pages/missile%20fire%20from%20gaza%20on%20israeli%20civilian%20targets%20aug%202007.aspx> accessed 28 September 2016.
[18] UNGA 'Report of the Committee on the Exercise of the Inalienable Rights of the Palestinian People' UN GAOR 61st Session Supp No 35 UN Doc A/61/35 (2006) para 23.
[19] MFA Israel, 'The Operation in Gaza: 27 December 2008 – 18 January 2009, Factual and Legal Aspects' (July 2009) para 29 <www.jewishvirtuallibrary.org/jsource/Peace/GazaOpReport0709.pdf> accessed 15 November 2016.
[20] 'In this case, the Gaza Strip is neither a State nor a territory occupied or controlled by Israel. In these *sui generis* circumstances, Israel as a matter of policy applies to its military operations in Gaza the rules of armed conflict governing both international and non-international armed conflicts. At the end of the day, classification of the armed conflict between Hamas and Israel as international or non-international in the current context is largely of theoretical concern, as many similar norms and principles govern both types of conflicts', see ibid para 30.

not accepted to be occupied, the conflict may then be *sui generis* but should still be considered an international armed conflict and the mixed approach's application avoided.

The Extraterritorial Hamas-Israel Conflict is *Sui Generis* (1.3): IHL literature suggests that in conflicts involving non-State actors, it is difficult to ascribe any classification but non-international conflict status onto it, as inter-State conflicts are the 'quintessential international armed conflicts.'[21] Dapo Akande discusses that there are at least two extraterritorial situations involving non-State actors where the law of international armed conflict applies.[22] The first one relates to what we saw in Lebanon in 2006 when Israel and Hezbollah were at war. Israel only fought against Hezbollah, a Lebanese militia and political party, but it took place in the territory of Lebanon (without Lebanon's consent or army's involvement). Israel considered the conflict international because they believe Hezbollah to be inextricably apart of the Lebanese State.[23] Other scholars would consider it an international armed conflict simply because one State (Israel) used force on another (Lebanon), despite the targets being non-State (Hezbollah).[24]

The UN Commission of Inquiry on Lebanon's (UNCIL) findings on the Hezbollah-Israel War were applied in 2008 by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in *Prosecutor v Ljube Boškoski and Johan Tarčulovski* to decide whether the conflict between Macedonia and Albanian separatists was an international armed conflict,

> *'[T]he hostilities that took place [between Israel and Hezbollah] constitute an international armed conflict'*, but [the UN Commission] noted 'its *sui generis* nature in that active hostilities took place only between Israel and Hezbollah fighters' […] the Commission stated that the fact that Israel considered Hezbollah to be a terrorist organization and its fighters terrorists did not influence its qualification of the conflict (emphasis added).[25]

---

[21] Akande (n 9) 71.
[22] ibid 73.
[23] UNHRC 'Report of the Commission of Inquiry on Lebanon Pursuant to Human Rights Council Resolution S-2/1' (23 November 2006) UN Doc A/HRC/3/2 (UNCIL) para 9.
[24] Greenwood (n 7) 46; Akande (n 9) 74.
[25] *Prosecutor v Ljube Boškoski and Johan Tarčulovski*, (Judgment) ICTY-04-82-T (10 July 2008) para 189, in

The second situation Akande describes involves occupation – when a State occupies another State with the aim of confronting a third non-State group.[26] The ICJ handled this type of situation between Uganda and the Democratic Republic of Congo and ruled that its belligerent occupational nature made it a Common Article 2 conflict.[27]

However, it appears neither of the extraterritorial situations are applicable to the situation at hand. Regarding the former, Gaza would have to be considered a State and Hamas a non-State actor operating inside the State, like in the case of Hezbollah. In regards to the latter, the occupation of Gaza is not an occupation by a State (Israel) of another State (Gaza) with the aim of confronting a third non-State group (Hamas), so it cannot fit the situation found in Uganda. In fact, this extraterritorial conflict appears to be as Israel describes: *sui generis,* but it should not mean a mix of IHL regimes is appropriate to apply. It will now be proven that even if the Israeli legal perspective is adhered to, i.e. there is no occupation, Israel is wrong to apply a mixed regime to this extraterritorial, *sui generis* conflict, because of the conflict's cross-border element.

The Hamas-Israel Conflict is an International Armed Conflict based on its Cross-Border Element (1.4): When Israel stated in 2008 that conflicts like the one between them and Hamas had not been settled by law, they were ignoring a crucial HCJ ruling that indeed settled the matter of extraterritorial conflicts with non-State armed groups and introduced a necessary requirement.

The HCJ ruled in 2005, just 3 months after the Disengagement, on cross-border conflicts – specifically between Israel and Hamas. It was stated that the requirement for an armed conflict to be considered international is the cross-border element. Essentially, if it crosses the border of one State, its international.

Marco Sassòli, Antoine A Bouvier, and Anne Quintin, *How Does Law Protect in War?: Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law* (3rd edn ICRC 2011) vol 3, 426.
[26] Akande (n 9) 73.
[27] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) [2005] ICJ Rep 168, para 218-219.

> What is the normative system that applies in the case of an armed conflict between Israel and the terrorist organizations acting in [the Palestinian Territories]? The normative system which applies to the armed conflict between Israel and the terrorist organizations in [the Palestinian Territories] is complex. In its center stands the international law regarding international armed conflict. Professor [Antonio] Cassese discussed the international character of an armed conflict between the occupying state in an area subject to belligerent occupation and the terrorists who come from the same area, including the armed conflict between Israel and the terrorist organizations in [the Palestinian Territories], stating: 'An armed conflict which takes place between an Occupying Power and rebel or insurgent groups – whether or not they are terrorist in character – in an occupied territory, amounts to an international armed conflict'[28] This law includes the laws of belligerent occupation. *However, it is not restricted only to them*. *This law applies in any case of an armed conflict of international character – in other words, one that crosses the borders of the state – whether or not the place in which the armed conflict occurs is subject to belligerent occupation* (emphasis added).[29]

Indeed, the HCJ reiterated that there exists an international armed conflict between Israel and armed Palestinian groups in the occupied territories of the West Bank (referred to by Israel as Judea and Samaria) due in fact to its subjection to belligerent occupation. But more importantly it stated that the law of international armed conflicts is not restricted only to that situation. Instead that IHL regime also applies to situations that cross the borders of the state *whether or not* the place where the conflict occurs is occupied. This is a critical statement which also introduced the test for transborder conflicts as international conflicts: it must cross the border of *a* state. What is on the other side of that border does not change its international character.

By applying an amalgam of non-international and international law of armed conflict, Israel was ignoring the HCJ's classification. In fact, even though Gaza had just been disengaged,

---

[28] Antonio Cassese, *International Law* (2nd edn OUP 2005) 420, quoted in *Targeted Killings Case* (n 6) para 18.
[29] ibid para 17-18.

the Court stated that the conflict between Hamas and Israel being international had been its stance for years and that it would continue to approach the conflict on the basis that its of an international character.[30] This is despite the Court admitting that this classification 'raises several difficulties'.[31]

Is the Israeli government ignoring their Supreme Court's classification and actually pushing towards the Court's suggestion for a new one – State-TO conflicts – which would encourage a mixed application?

The New Classification of State–Terror Organization Conflicts (1.5): The HCJ in *Targeted Killings* suggested that a new category of conflicts had been developing since the mid-90s[32] - State-TO conflicts - and it will be demonstrated now that acceptance of this new classification risks the formation of new practices that contradict IHL.[33]

Israel applying the two currently accepted IHL regimes opens up the question whether they are treating clashes with Hamas as isolated events and if they use Hamas's TO status to deny international LOAC application to particular actions. The latter occurred in 2006 in Lebanon: Using Hezbollah's TO classification, Israel labeled all civilian infrastructure as legitimate targets.[34] International law suggests that qualifying an armed group's actions solely as terrorist activities removes the requirement of IHL application to all actions taken against them,

---

[30] 'As stated, for years the starting point of the Supreme Court – and also of the State's counsel before the Supreme Court – is that the armed conflict is of an international character. In this judgment we continue to rule on the basis of that view', see *Targeted Killings Case* (n 6) para 21.
[31] HCJ 201/09, **Physicians for Human Rights v Prime Minister of Israel** (Versa) para 14 (*Physicians v PM*)
[32] '[A] new category of armed conflict which has been developing over the last decade in international law – a category of armed conflicts between states and terrorist organizations', see ibid para 11.
[33] Israel and the US have used this burgeoning idea to push a new state practice – expanding combatant classifications to include 'unprivileged enemy belligerents' and 'unlawful enemy combatants'; Gary Solis says that the former are defined as civilians who engage in combat and therefore are not entitled to POW treatment and 'lose their civilian immunity' and are eligible to be targeted lawfully; The latter are terrorists, defined as criminals who engage in combat and shall be tried in domestic or military courts, see Gary Solis, *The Law of Armed Conflict* (CUP 2010) para 6.12.
[34] 'IDF effectively changed the status of all civilian objects by alleging that they might be used by Hezbollah. Further, the Commission is convinced that damage inflicted on some infrastructure was done for the sake of destruction,' see UNCIL report (n 24) para 21.

> In an armed conflict of an internal *or mixed character*, […] criteria [for intensity and organization of belligerents] are used solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law (emphasis added).[35]

The jurisprudence of the ICTY suggests that using TO labels to ignore the principle of distinction is not legal, so Israel would not be allowed to rule all Hamas actions as terror activities in order to keep them out of the determination of whether IHL applied[36] nor could they count the events between them and Hamas as isolated since duration is the superior requirement.[37] Therefore, the conflict must be approached as a series of events and that Hamas's TO status should not remove the obligation to apply international law.

As has been argued, the mixed approach of applying both IHL regimes creates 'a crazy quilt of norms that would be applicable in the same conflict'[38] with an arduous requirement of determining for each action whether it had internal dimensions or not.[39] What the intent of the application of the mixed approach arguably may be, in a State that is considering the existence and playing with the legality of a new classification of State-TO conflicts, is acting as a mask. The classifications of 'mixed' and 'State-TO' may be argued as one in the same. The Israeli mixed approach, forming into what will be the State-TO approach, opens up opportunities to commit more violence and provides less protection for civilians in the densely populated 24 square mile Gaza Strip.

How is the mix of the two IHL regimes forming its own regime dangerous? First, the two regimes are indeed different. While the principles of the current two IHL regimes may be similar

---

[35] *Tadić Case* (Opinion and Judgment) (7 May 1997) para 562.
[36] *Prosecutor v Boškoski* (n 26) para 184.
[37] 'What matters is whether the acts are perpetrated in isolation or as part of a protracted campaign that entails the engagement of both parties in hostilities,' see ibid para 185.
[38] Theodor Meron, 'Classification of Armed Conflict in the Former Yugoslavia: *Nicaragua's* Fallout' [1998] 92 AJIL 236, 238, quoted in Akande (n 10) 63-64.
[39] Akande (n 10) 63.

and certain customary rules merge[40] (custom regarding conduct of hostilities applies to both types of conflict)[41] generally they are 'regulated by a different set of rules'.[42] The scope of violence permitted is also different. Take the example Human Rights Watch gave, which 'relates to reprisals, which are permitted in very limited circumstances during international armed conflicts but not in non-international armed conflicts.'[43] Thus, the formation and application of the State-TO IHL regime, basically the combination of non-international and international LOAC (favoring the former), is wrong for it opens up the possibility to commit violent acts otherwise precluded by international LOAC.

The Supreme Court of Israel's classification of the conflict as international will be adhered to for all intents and purposes of this paper. However, it will be because there exists an occupation of Gaza, not solely based on the existence of a cross-border element. Before it is proved that the conflict is international because there exists an occupation, it will be briefly discussed whether Hamas's acts can actually be attributable to a State and which regime of IHL they apply to their conflict with Israel.

Attributing Hamas's Acts to a State and Hamas's Application of IHL (1.6): The other way outside of the HCJ's cross-border approach and an occupation to find an international armed conflict involving a non-State actor would be to find their acts attributable to a State. The test the ICJ has laid out is strict, having stated such groups or persons may 'be equated with State organs […] provided that in fact the persons, groups, or entities act in "complete dependence" on the State' of which they are used.[44] So, if we could attribute Hamas's actions to that of a State, in our

[40] UN Human Rights Office of the High Commissioner, 'International Legal Protection of Human Rights in Armed Conflict' (UN 2011) UN Doc HR/PUB/11/01, 24.
[41] HRW, 'Why They Died: Civilian Casualties in Lebanon during the 2006 War' (5 September 2007) <www.hrw.org/report/2007/09/05/why-they-died/civilian-casualties-lebanon-during-2006-war> accessed 17 November 2016.
[42] Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (2nd edn CUP 2010) 26.
[43] HRW (n 41).
[44] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ Rep 43 (*Genocide Case*) para 392.

case the PLO,[45] then it may work. This, of course, is not the case – Hamas cannot be linked to the PLO. Hamas should therefore continue to be considered as a non-State actor and their status as TO by Israel should play no role in classifying the conflict.

Being considered a TO by any number of states does not change Hamas's obligations under international law. The LOAC binds all armed groups and individuals so the Israeli push to distinguish between TO and non-State actor is of little importance in the eyes of the law.[46] While Israel is free to consider Hamas a TO, it should not be used to influence which IHL regime is applied to the armed conflict, as it does not influence the TO's own application.

Israel's preference for a State-TO/mixed approach is based on the self-proclaimed loss of their status as Occupying Power after withdrawal from the Strip, thus removing the non-negotiable international character of the conflict. This stance, it is posited, is detached from the facts on the ground. Next, it will be shown that the Hamas-Israel conflict is an international armed conflict due to the occupation of Gaza having never ended. This is argued on two separate grounds: Israel's grip over the Strip as fitting the criteria for belligerent occupation and on treaty law stipulating that the status of the West Bank and Gaza Strip as one territorial unit (Palestine) cannot be unilaterally changed.[47] Concerning the latter, it means since no unilateral change in their status can occur[48] the withdrawal from Gaza was only a partial withdrawal from Palestine and thus the occupation technically continues.[49]

The Hamas-Israel Conflict is International because Israel is Occupying Gaza (1.7):

Belligerent occupation is described as 'the situation in which a power exercises a certain authority over a territory to which it does not hold title, without the consent of the legitimate owner of said territory.'[50] Eyal Benvenisti states that 'occupation does not transfer sovereignty

[45] The PLO is recognized as a state by 139 nations, see 'U.N. Security Council to send Palestinian State Bid to Admissions Committee' *CNN* (26 September 2011) <www.edition.cnn.com/2011/09/26/world/un-palestinian-statehood/index.html> accessed 16 November 2016.
[46] Emily Crawford and Alison Pert, *International Humanitarian Law* (CUP 2015) 34.
[47] Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (Israel-Palestine Liberation Organization) (Oslo II) art 11(1).
[48] ibid art 31(7).
[49] Yoram Dinstein, *The International Law of Belligerent Occupation* (CUP 2009) 277.
[50] Hanne Cuyckens, 'The Law of Occupation' 417, in Jan Wouters, Philip de Man, and Nele Verlinden (eds), *Armed Conflicts and the Law* (Intersentia 2016).

over the territory to the occupying power' but instead the occupier essentially holds the land in trust.[51] 'The law authorizes the occupant to safeguard its interests while administering the occupied area, but also imposes obligations on the occupant to protect the life and property of the inhabitants and to respect the sovereign interests of the ousted government.'[52] How does one figure out whether an occupation exists? Benvenisti mentions[53] that most scholars have accepted the test in *US v List* (*Hostages Case*).[54] This is a test of effective territorial control, and scholars like Lassa Oppenheim have said that the test contains the requirements of actual control over the territory and potential control of the population.[55] Others push a more 'functional' test, claiming that an occupation exists 'whenever the foreign force *is capable of* exercising some of the authorities that law expects'.[56]

The Gaza Strip is still occupied and the object of this section is to prove that an occupation does indeed exist. This is with the aim of applying the law of international armed conflict to the Hamas-Israel conflict for the analyses in the succeeding chapters. This is a controversial subject but as will be shown, the idea that Gaza is still undergoing an occupation despite the (as Bienvenisti puts it, 'so-called')[57] Disengagement is accepted by what appears to be a majority of IHL scholars. For some, it is because Israel meets the test of effective control. Others, like Dinstein, suggest an interesting technicality that implies that the occupation of the West Bank and the Gaza Strip is one occupation, so if the occupier withdraws from either, it does not actually terminate the regime of occupation and the conflict continues to contain an international character.

In 2008, Israeli jurisprudence suggested that Israel is no longer occupying Gaza, because it no longer has the *potential* to exert control over the population. It refers to Israel's inability to

---

[51] Eyal Benvenisti, 'Occupation, Belligerent' *Max Planck Encylopedia of Public International Law* (*MPEPIL*) <http://opil.ouplaw.com.proxy.library.uu.nl/view/10.1093/law:epil/9780199231690/law-9780199231690-e359?rskey=fl0IEb&result=2&prd=EPIL> accessed 19 November 2016.
[52] ibid.
[53] Eyal Benvenisti, *The International Law of Occupation* (2nd edn OUP 2013) 47.
[54] *United States of America v Wilhelm List et al* 11 LRTWC 1230 (1948) (*Hostages Case*).
[55] Lassa Oppenheim, *International Law: A Treatise – War and Neutrality* (2nd edn Longmans, Green, & Co 1912) vol 2, 171.
[56] Robert Kolb and Sylvain Vité, *Le Droit de L'Occupation Militaire: Perspectives Historiques et Enjeux Juridiques Actuels* (Bruylant 2009) 143-149, cited in Benvenisti (n 53) 48.
[57] Benvenisti (n 53) 49.

carry out the most important duties of the LOO, namely 'maintaining public order and security' and the lack of physical Israeli presence in the Strip,

> [I]t should be noted that since the end of Israeli military rule in the Gaza Strip in September 2005, the State of Israel has no permanent physical presence in the Gaza Strip, and it also has no real possibility of carrying out the duties of an occupying power under international law, including the main duty of maintaining public order and security. Any attempt to impose the authority of the State of Israel on the Gaza Strip is likely to involve complex and prolonged military operations. In such circumstances, where the State of Israel has no real ability to control what happens in the Gaza Strip in an effective manner, the Gaza Strip should not be regarded as a territory that is subject to belligerent occupation from the viewpoint of international law, even though the unique situation that prevails there imposes certain obligations on the State of Israel vis-a-vis the inhabitants of the Gaza Strip.[58]

The ICJ would agree with the Israeli courts that Gaza is unoccupied, as the ICJ has gone so far as to suggest that potential control of civilians is not enough – an occupier needs *actual* control of the territory and its people.[59] This is not a usual interpretation of the law, according to Benvenisti[60] and most scholars, like Cuyckens, choose to go the route of *potential control*.[61] Is there a time constraint on the occupier to exert control when necessary? 'It is generally accepted that it is sufficient that the occupying force can, *within a reasonable time,* send detachments of troops to make its authority felt within the occupied area.'[62] This idea adds a new dimension – a timeframe of effective control.

The question now is, can we apply the test for effective control to our case to show that Israel is occupying Gaza? The requirement of the test of effective control, as mentioned, is the

---

[58] CA 6659/06 **Anonymous v State of Israel** (Elyon) para 11 (*Anon v Israel*).
[59] *DR Congo v Uganda* (n 27) para 173.
[60] Benvenisti (n 53) 50.
[61] This is to prevent an occupier from having the choice of whether it wants to be bound to the LOO or not, see Cuyckens (n 50) 424-425.
[62] Benvenisti (n 53) 51.

ability, or potential, to assume physical control of any part of the occupied territory,[63] in other words, for the occupier to have the 'capability' to 'enter into the shoes' of the territory's indigenous administration,[64] but *within a reasonable time.*

Cuyckens stands with the HCJ in believing that a physical presence of troops needs to be *in* the occupied territory for control to potentially be exerted. This thesis will utilize Dinstein's argument that troops can be in *or near* the territory. Scholars like Benvenisti, [65] Cuyckens, Elizabeth Samson,[66] and some others[67] agree with Israel that the occupation is over and that Israel 'no longer has effective control ovcr Gaza in place of the "legitimate" authority'[68] and that their military campaigns against Hamas only prove that point.[69] The contrary will now be demonstrated.

Applying the Test for Effective Control (1.7.1): Does Israel have control over the territory – actual or potential? Israel:

- Retains complete control over Gaza's waters, airspace, borders;[70]
- Enforces buffer zones on land and in the water;[71]
- Provides sewage removal and the services just mentioned are all under the control and administration of the Israeli government and Israeli companies;[72]

[63] *US v List* (n 54) para 56, quoted in Cuyckens (n 50) 423.
[64] HCJ 102/82 **Zemel v Minister of Defense et al** 37(3) IsrSC 365, 373.
[65] 'If there was a question, the war in Gaza in 2008-9, during which despite heavy fighting the [IDF] did not gain control of most of the Gaza Strip, demonstrated that Israel was no longer exercising effective control of Gaza,' see Benvenisti (n 53) 211-212.
[66] Elizabeth Samson, 'Is Gaza Occupied?: Redefining the Status of Gaza Under International Law' [2010] 25(5) Am Uni Intl Law Rev 915-967.
[67] Abraham Bell and Dov Shefi, 'The Mythical Post-2005 Israeli Occupation of the Gaza Strip' [2010] 16(2) Israeli Affairs 268-296.
[68] Cuyckens (n 50) 425-426, note 45.
[69] ibid 426.
[70] HRW, 'Israel/Egypt: Choking Gaza Harms Civilians: US, EU, Security Council Should Demand Greater Access for Food and Fuel' (18 February 2009) <www.hrw.org/news/2009/02/18/israel/egypt-choking-gaza-harms-civilians> accessed 19 November 2016.
[71] See Appendix 1.
[72] HRW (n 70).

- Supplies Gaza with electricty and fuel (which pumps its water and provides telecommunication services and heat);[73]
- Israel has also reserved the right to enter into Gaza and has the capability to make its power known in any section of the Strip.[74]
- Israel also maintains the population registry of Gazans and acts as the tax collecting authority for the PA and also forces its own taxes on items headed for Gaza passing through Israeli ports[75] (the blockades of the air and sea force all goods shipments to Gaza to land first in Israel and the list of items allowed inside of Gaza and contraband is held in secret by Israel).[76]

Dinstein points out that the control over the air, water, borders, electricity and fuel amounts to 'core ingredients of effective control'.[77] If there is no occupation, Dinstein asks, then why in the world would a party to a conflict supply fuel and electricity to its enemy? 'The sole reason for the existence' of this new obligation imposed on it by the HCJ,[78] 'is that the occupation is not over.'[79] What about Israel's control over the airspace, borders, and territorial waters, i.e. what about the siege of Gaza? How does it contribute to effectively controlling Gaza?

Via Israel's border control, they already have effective control of almost one-fifth of Gaza. According to the FAO, the 'buffer zone' established by Israel inside the separation fence around Gaza effectively bars farmers from a third of all the arable farming land in Gaza.[80] It was established in 2005 when Israel disengaged. In 2013, the buffer zone extended 300 meters into Gazan territory. IDF 'attacks against civilians take place anywhere up to approximately 1.5 kilometers inside the border fence. This constitutes approximately 17% of the total territory of

[73] HRW (n 70).
[74] Dinstein (n 49) 279.
[75] B'Tselem, 'The Scope of Israeli Control in the Gaza Strip' (5 Jan 2014) <www.btselem.org/gaza_strip/gaza_status> accessed 19 November 2016.
[76] The BBC was able to form their own (partial) list via 'confidential information from international groups', see 'List of Commercial Goods Allowed for Import into Gaza, April 2010' *BBC News* (April 2010) <www.news.bbc.co.uk/2/shared/bsp/hi/pdfs/05_05_10_gazaimports.pdf> accessed 9 October 2016.
[77] Dinstein (n 49) 278.
[78] HCJ 9132/05 **Ahmed et al v Prime Minister of Israel** (Versa) para 12 (*Ahmed v PM*).
[79] Dinstein (n 49) 279.
[80] FAO 'Impact of Gaza Crisis' (2 March 2009) 15 <www.apis.ps/documents/AGR%20Sector%20Gaza%20Report_final.pdf> accessed 19 November 2016.

the Gaza Strip.'[81] Israel regularly destroys civilian crops near the fence because the land near it is considered a 'combat zone', but the zones size changes on a whim.[82]

Oslo II gave Israel completely unfettered control over Gaza's territorial waters and airspace.[83] where they have established a security zone that is strictly monitored. There is also a fishing zone for Gaza's fishermen. The zone was meant to be 20 nautical miles (nm) according to Oslo II,[84] but Israel, in the beginning, enforced about half that length. After Hamas was elected, it was moved down to 3nm, which proved detrimental to the industry, primarily hurting civilians.[85] It was extended to 6nm as part of the 2014 ceasefire with Hamas and as of April 2016, the zone is extended to 9nm.[86] However, fishermen have reported since the blockade began that there are no markers and that they must use GPSs (which are scarce) and that they are shot at by Israeli naval forces well within the zone.[87] Israel is able to make its presence known and enforce its authority in Gaza's territorial water. The naval blockade forces all goods destined for Gaza to go through Israel – where they collect a tariff. It is difficult to separate the control Israel has over the borders, sea, and air as the blockades are intertwined.[88]

Israel, like Gaza's waters, controls the airspace above the Strip. Daily UAV surveillance occurs. This is the part of Israel's effective control where their power is always felt. 'However, air superiority alone would not constitute an effective occupation,' according to the US

---

[81] 'PCHR-Gaza: Israeli Buffer Zone Policies Typically Enforced with Live Fire' *International Middle East Media Center* (11 May 2015) <http://imemc.org/article/71548/> accessed 16 October 2016; Palestinian Center for Human Rights, 'The Buffer Zone in the Gaza Strip' (1 April 2012) <http://pchrgaza.org/en/?p=5019> accessed 16 October 2016.

[82] 'For example, the military has shot farmers who were working on their land under the mistaken impression that they were permitted to enter the area. This reality leaves the farmers in a state of constant uncertainty as to where they are permitted to farm and what level of danger they face,' see B'Tselem, 'Israel Sprays Gazan Farmland Close to Border Fence, Destroying Crops and Causing Heavy Losses' (4 February 2016) <www.btselem.org/gaza_strip/20160204_crops_sprayed_with_herbicide> accessed 16 October 2016.

[83] Annex I to the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (Israel-Palestine Liberation Organization) (Oslo II Annex 1) art 13-14.

[84] ibid art 14.

[85] B'Tselem (n 5).

[86] Majd al-Waheidi and Isabel Kershner, 'Israel Expands Palestinian Fishing Zone Off Gaza's Coast' *New York Times* (3 April 2016) <www.nytimes.com/2016/04/04/world/middleeast/israel-expands-palestinian-fishing-zone-off-gazas-coast.html> accessed 9 October 2016.

[87] ibid.

[88] Turkish National Commission of Inquiry, 'Report on the Israeli Attack on the Humanitarian Aid Convoy to Gaza on 31 May 2010' (February 2011) (Turkish Report) 76-77.

Department of Defense (DoD).[89] The DoD Law of War Manual states, 'It is sufficient that the occupying force can, within a reasonable time, send detachments of forces to enforce its authority within the occupied district. Military occupation does not require the presence of military forces in every populated area.'[90] The drones that fly over Gaza keep constant eye over every nook and cranny in the Strip. If there is something happening on the ground in Gaza, an Israeli drone pilot knows about it. The constant buzzing in the sky has been known to cause psychological damage to the civilian population, who are made aware of Israel's omniscient presence.[91] While not all UAVs are armed with strategic missiles, they can be outfitted with them, thus Israel can wield full control over the ground via the air to enforce its authority in any district.

Finally, we will discuss the ability that Israel has to incur into Gaza to enforce its authority. This is the most 'telling aspect' of the continuing occupation, as Israel can and has incurred into Gaza a number of times to either destroy missile installations or to arrest Gazans to bring back to Israel.[92] Essentially, Israel can achieve law and order whenever it needs. It has the technology to coordinate operations involving the takeover of an area or capture of a person and it does. Israel constantly makes its authority felt – in 2016 alone, Israel incurred into Gaza over 50 times.

One point of contention from those who disagree there is an occupation is that during the wars in Gaza, Israel had a difficult time up against the fierce resistance of Hamas. This should not be construed as Israel being unable to take actual control when it needs to. Israel's goals in the last three military campaigns have not been to retake Gaza and hold the territory. The goals were to destroy Hamas infrastructure – specifically rocket installations and tunnels that lead into Israel – and they have claimed after each campaign that their missions were accomplished. It may take several weeks, if the goal is to take actual control over the territory, but Israel is

[89] US Department of Defense (DoD), *Law of War Manual* (Office of the General Counsel of the DoD 2016) para 11.2.2.1 <http://www.defense.gov/Portals/1/Documents/DoD_Law_of_War_Manual-June_2015_Updated_May_2016.pdf> accessed 17 September 2016.
[90] ibid.
[91] Max Blumenthal, *The 51-Day War: Ruin and Resistance in Gaza* (Nation Books 2015) 85.
[92] Dinstein (n 49) 279.

capable *within a reasonable time* and what matters is potentiality. During the 2014 war, Israel was able to issue directions to Gazan civilians and actually enforce them.[93]

The IDF goes to extreme measures to protect itself,[94] so if taking actual control of Gaza is not necessary to Israeli security, it will not be done. The wars, I contend, have not demonstrated their inability to exert authority in the Strip. The point here is whether Israel is capable of filling Hamas's shoes as the legitimate power in Gaza if it needs to.

Even hypothetically, if Gaza City or any other defended city in Gaza was still controlled by Hamas as Israel incurred into the Strip is immaterial to the existence of an occupation,[95] as contested territory is not counted as occupied.[96] All Israel needs to do is be capable of exerting its control over the remainder of the territory,[97] a fifth of which it does automatically via the buffer zone.

The Disengagement was Only a Partial Withdrawal of Palestine (1.7.2): An occupation can be demonstrated through another ground, viewing the territory's of the West Bank and Gaza as a single territorial unit. Oslo II established this fact[98] and the HCJ reaffirmed it in *Ajuri v Military Commander* when they ruled that 'the area of Judaea and Samaria and the area of the Gaza Strip should not be regarded as territories foreign to one another, but they should be regarded as one territory.'[99] Oslo II also stipulates that 'Neither side shall initiate or take any step that will change the status of the West Bank and the Gaza Strip pending the outcome of the permanent status negotiations,'[100] a provision that appears to be breached via the Disengagement.

According to Article 2 common to the Geneva Conventions, 'The Convention shall also apply to all cases of partial or total occupation,' so in the event that we accept that Israel does not effectively control Gaza, 'the two areas are part of mandatory Palestine'[101] and therefore even a

---

[93] Conal Urquhart, 'The Call that Tells You: Run, You're About to Lose Your Home and Possessions' *The Guardian* (28 July 2006) <www.theguardian.com/world/2006/jul/28/israel> accessed 20 November 2016.
[94] Blumenthal (n 91) 98-101.
[95] DoD (n 89) para 11.2.2.1.
[96] Hans-Peter Gasser, 'Protection of the Civilian Population' 276, in Fleck (n 7).
[97] DoD (n 89) para 11.2.2.1.
[98] Oslo II (n 47) art 11(1).
[99] **Ajuri v Military Commander** (n 16) para 22.
[100] Oslo II (n 47) art 31(7).
[101] **Ajuri v Military Commander** (n 16) para 22.

partial occupation of mandatory Palestine means there is an occupation and the LOO must be applied to all of the territory of mandatory Palestine. Dinstein points out that the HCJ reiterated[102] that despite the reality of the two areas (West Bank and Gaza) being separate, and the prospect of them being separate for a while, the 'concept of unity' is still relevant.

Applicable LOAC to the Thesis (1.8): Now that thte Hamas-Israel Conflict has been qualified as an international armed conflict, the applicable law of international armed conflict utilized for the purposes of this thesis can be outlined. The applicable treaty law includes:

- The four Geneva Conventions of 1949: The Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GC 1), the Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea (GC 2), the Convention Relative to the Treatment of Prisoners of War (GC 3), and the Convention Relative to the Protection of Civilian Persons in Time of War (GC 4); All of which Israel is a party to.
- Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (AP 1); Israel is not a party to this treaty but the provisions found to be customary are binding, as is all other customary international law.[103]

The sources of custom and other international humanitarian legal sources referred to in this thesis are as follows,

- Although their methodology has been criticized in literature,[104] the ICRC's comprehensive customary IHL rulebook will be applied to both the besiegement and conduct of hostilities. It is a useful restatement, with many of its provisions found in the

[102] HCJ 11120/05 **Hamdan et al v Commander of the Southern Region et al** (Hamoked) para 14, cited in Dinstein (n 49) 277.
[103] *Targeted Killings Case* (n 6) para 4.
[104] Solis (n 33) para 1.3.5 and note 80.

above treaties, along with the 1899/1907 Hague Regulations. It will be pointed out, if necessary, if a particular ICRC Rule being applied is contested as custom.

- Section 2, Articles 93-107 of the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (San Remo Manual) will be applied to the siege, specifically its naval and air blockades. These provisions of the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (San Remo Manual/San Remo) restate all customary international law regarding blockades[105] and will be applied to determine whether Israel's naval blockade adheres to its binding customary legal obligations.[106]
- Israeli and international jurisprudence
- Works from highly qualified publicists
- The fundamental principles of IHL. The MoD's law of war manual lists the four basic principles. These principles underlie all customary and treaty rules of IHL, meant to 'help practitioners interpret and apply specific treaty or customary rules; provide a general guide for conduct during war when no specific rule applies; and work as interdependent and reinforcing parts of a coherent system'.[107] To quickly survey them:
    - The first principle is military necessity of the use of force,[108] which incorporates four requirements: The use of force must be controlled, it cannot excuse a departure from LOAC, it is necessary to achieve 'as quickly as possible' the submission of the enemy, and is unlawful if it is unnecessary as that 'involves

[105] The San Remo Manual contains customary LOAC at sea, 'The purpose of the Manual is to provide a contemporary restatement of international law applicable to armed conflicts at sea. The Manual includes a few provisions which might be considered progressive developments in the law but most of its provisions are considered to state the law which is currently applicable', see ICRC, 'San Remo Manual on International Law Applicable to Armed Conflicts, 12 June 1994' <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=5B310CC97F166BE3C12563F6005E3E09> accessed 7 October 2016.

[106] According to the ICRC, before San Remo, treaty provisions regarding blockades and the law of war at sea were deemed in need of a modern restatement (the last manual doing such was from 1913). Thus, while Israel may not be party to any treaty on the subject, they are bound by custom and this is why when analyzing the blockades, we are only concerned with the relevant customary law.

[107] DoD (n 89) para 2.1.2.

[108] UK Ministry of Defense (MoD), *The Manual of the Law of Armed Conflict* (OUP 2005) 21-23.

wanton killing or destruction.'[109] The use of force must be directed at military objectives.[110]

- The second is the principle of humanity, which seeks to put a limit on the approach of total war by prohibiting 'the infliction of suffering, injury, or destruction not actually necessary' when using force.[111]
- The principle of distinction or identification,[112] including its 'sub-' principle of discrimination,[113] 'separates combatants from non-combatants' as well as 'legitimate military targets from civilian objects.'[114] This is a critical principle since IHL demands military action only occur between the belligerents to a conflict. Only combatants may be legitimate targets. Civilians may never become a target[115] so long as they do not become a direct participant in hostilities (DPH).[116] This will be a principle paid specific attention to in the following chapters along with the following principle of proportionality.
- The principle of proportionality, containing a sub-principle of precaution, is the final basic principle here and a link to the others. The principle 'requires that the losses resulting from a military action should not be excessive in relation to the expected military advantage.'[117] Entwined is the principle of precaution. Although precautionary measures utilized are at a commander's discretion, his or her legal obligation is to 'choose the least damaging method compatible with

[109] DoD (n 89) para 2.2.1.
[110] Israel's manual on the laws of war outlines legitimate military objectives, which includes 'depots, factories, mobilization centers and communications. A soldier understandably constitutes a military target, as do weapons, bases, installations, airfields and army vehicles', see MAG Corps Command, *Rules of Warfare on the Battlefield* (2nd edn IDF School of Military Law 2006) 23.
[111] Israel connects the principles of humanity to their state's character, 'Even in wartime, the IDF shall act humanely, as part of Israel's heritage as a Jewish and democratic state and a member of the family of civilized nations', see MAG (n 110) 49.
[112] MoD (n 108) 24.
[113] Crawford (n 46) 43.
[114] MoD (n 108) 24.
[115] AP 1 (n 15) art 51(2).
[116] ibid art 51(3).
[117] MoD (n 108) para 2.6.

military success'.[118] If there are multiple targets offering the same military advantage, he or she must choose the least damaging option.[119]

Conclusion (1.9): In this chapter, I approached the Hamas-Israel Conflict as an international armed conflict due to the enduring occupation of Gaza and was able to additionally demonstrate that it was of the same classification under the Israeli premise that there is no occupation. The latter was done by applying the HCJ's simple cross-border test in *Targeted Killings*. It was also demonstrated that the application by Israel of both the laws of non-international and international armed conflict, in a bid to avoid classifying the conflict, may be the beginning of the establishment of a new category suggested by the HCJ – State-TO conflicts. The mixed regime approach, whether or not an attempt at forming a State-TO conflict classification, was ultimately rejected due to its excessive flexibility that may allow ignorance of humanitarian measures otherwise employed in international armed conflicts. Afterwards, it was proven that Israel is effectively controlling Gaza and that the existence of an occupation means the legal framework of international armed conflicts must apply. The argument brought by Dinstein which pointed out the territorial unity of Palestine and pushed that the now partial occupation of mandatory Palestine still means that an occupation exists was also introduced. It was then made clear which laws of armed conflict will be applied to this thesis.

In the next chapter, the goal of this thesis – to uncover and analyze Israeli breaches of the Hamas-Israel Conflict on its two distinct levels: the besiegement and the conduct of hostilities – will begin to be sought. In Chapter 2, 'Collective Punishment: Examining the Lawfulness of the Besiegement of the Gaza Strip', it will be proven that the siege is in breach of treaty-based and customary rules regarding sieges and blockades and that it is a collective punishment and an indiscriminate attack. The siege is made up of three interlaced blockades, whose methods I contend transgress IHL.

[118] MoD (n 108) 25.
[119] ibid.

Chapter 2 – Collective Punishment: Examining the Lawfulness of the Besiegement of the Gaza Strip

Introduction (2.0): On September 1st, 2005, Israel demolished the last home in Gush Katif, the Israeli settlement bloc in Gaza and unilaterally withdrew all forces from the Strip a couple weeks later.[120] Oslo II had given Israel complete control over Palestinian airspace, border crossings, and territorial waters 'for defense against external threats'[121] ten years prior to the Disengagement and it continued after withdrawal.[122] In November, Egypt handed over their Gaza border crossing in Rafah over to PA and EU monitors but it remained subject to Israeli commands.[123] The IDF tightens border crossings in response to Palestinian violence[124] and did so in the Strip as Hamas continued their armed struggle. Two months later, Palestinian Legislative Council (PLC) elections were held and Hamas dominated on an anti-PA-corruption platform, sealing the territory's fate.

This chapter deals primarily with the Israeli siege of the Gaza Strip. This is how the conflict is fought outside of direct military engagement and it is important to examine this level of the conflict as this level uniquely fuels the conflict - it simmers tensions and leads to a cycle of military engagement – three in six years. I will prove that the siege breaches IHL – not because sieges are criminalized[125] - but because it is a collective punishment and an indiscriminate attack. Like a belligerent occupation, a siege is not inherently illegal, but it is difficult to conduct one within the confines of IHL as 'these ways of conducting war are primarily damaging to the civilian population' and subject to the customary provisions

---

[120] 'Demolition of Gaza Homes Completed' *Ynet* (1 September 2005) <www.ynetnews.com/articles/0,7340,L-3136516,00.html> accessed 28 September 2016.
[121] Oslo II (n 47) art 12(1).
[122] Linda Butler, 'Gaza at a Glance' [2009] 38 JPS 3, 93 <http://jps.ucpress.edu/content/38/3/93.full.pdf+html> accessed 28 September 2016.
[123] UNGA 'Report of the Committee on the Exercise of the Inalienable Rights of the Palestinian People' UN GAOR 61st Session Supp No 35 UN Doc A/61/35 (2006) para 25.
[124] B'Tselem, 'Restriction of Movement: Closure' (1 January 2016) <www.btselem.org/freedom_of_movement/closure> accessed 28 September 2016.
[125] Dinstein is of the opinion that AP 1's articles relating to besiegement effectively criminalizes them, see Yoram Dinstein, 'Siege Warfare and the Starvation of Civilians' in Astrid JM Delissen and Gerard D Tanja (eds), *Humanitarian Law of Armed Conflict Challenges Ahead: Essays in Honor of Frits Kalshoven* (Martinus Nijhoff Publishers 1991) 145.

originating from the AP 1.[126] Pre-AP 1, sieges were not subject to a lot of humanitarian provisions. For example, starving a population out with the object of forcing enemy surrender via siege was lawful.[127] I also seek to uncover whether the blockades breach Israel's IHL obligations.

Are the means and methods of Israel's siege proportionate to the IDF's anticipated concrete military advantage? How has the military objective of the blockades evolved over the years? How do the three blockades that make up the siege function and are any conducted in breach of IHL? These are all questions I aim to answer here and they all lead back to our primary focus – proving that the siege is a collective punishment[128] and an indiscriminate attack.

First, 'blockade' and 'siege' will be defined before discussing the military objectives of the case. Then the chapter toward the gears that power the siege: the Oslo II blockades. While the existence of these blockades are legal under Oslo II for the purpose of external security, the siege has changed the objectives and may not be implemented and enforced in adherence to obligations under customary and general LOAC, and the intent is to uncover whether there are such breaches.

Defining 'Siege', 'Blockade', and the Objectives Guiding the Siege of Gaza (2.1): In the news[129] and human rights group reports[130] the terms 'siege' and 'blockade', when used in relation to Gaza, tend to be used interchangeably. In any report relating to Gaza, the UN appears to only use the term 'blockade'. There are legal differences between the terms,

---

[126] Stephen Oeter, 'Methods and Means of Combat' 136, in Fleck (n 7).
[127] Instructions for the Government of Armies of the United States in the Field (approved 24 April 1863) General Orders No. 100 (Lieber Code) art 17 <https://is.gd/6jC7Rt> accessed 17 September 2016; Oppenheim (n 55) para 155, 157; UNSC 'Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 78 – Annex VI [B]: The Battle of Sarajevo and the Law of Armed Conflict' (28 December 1994) UN Doc S/1994/674/Add.2, part 8.
[128] Collective punishment is precluded in international armed conflicts according to the Regulations Concerning the Laws and Customs of War on Land 187 CTS 227 (1907) (Hague IV Annex) art 50; GC 3 art 87(3); GC 4 art 33(1); AP 1 (n 15) art 75(2)(d); AP 1's provision is considered customary by the ICRC in Rule 103, see Jean-Marie Henckaerts, 'List of Customary Rules of International Humanitarian Law' 242, in Wouters (n 50).
[129] David Poort, 'History of Israeli Blockade on Gaza' *Al Jazeera* (2 November 2011) <www.aljazeera.com/indepth/features/2011/10/20111030172356990380.html> accessed 2 October 2016.
[130] B'Tselem (n 5).

> Blockade is the blocking by men-of-war of the approach to the enemy coast or a part of it for the purpose of preventing ingress and egress of vessels of all nations. *Blockade must not be confounded with siege, although it may take place concurrently with siege*. Whereas siege aims at the capture of the besieged place, blockade endeavors merely to intercept all intercourse, and especially commercial intercourse, by sea between the coast and the world at large (emphasis added).[131]

So, while a comprehensive blockade had been established during the original occupation and after the Disengagement by Israel for the purpose of external security, it was not yet a military siege with a military objective.[132] The change from blockade to siege occurred in 2009 but can be traced to the tightening of the border crossings that occurred in response to Hamas rockets in 2006. These rockets were launched in retaliation for tightening restrictions and arrests of Hamas members of the PLC (MPLCs) in the West Bank.[133] A few months later in the summer of 2006, Hamas commandos stormed an Israeli military base via a tunnel, killing a couple soldiers and kidnapping Corporal Gilad Shalit, leading to Israel's first post-Disengagement invasion of Gaza.

The situation only intensified after the incursions to find Shalit failed. After being tipped off of an imminent US/Israel-backed coup d'état,[134] Hamas expelled the PA from the Strip in June 2007. Israel then classified Gaza as a 'hostile entity'.[135] Israel completely sealed the border in January 2008 and Egypt did the same a month later. Despite this, the blockades were still not

---

[131] Oppenheim (n 55) para 368; On the distinction between siege and blockade, see MoD (n 108) 87-88, 363-364; Dinstein (n 42) para 539, 551; The Turkish Commission stated that the land and sea blockades constitute one single blockade, see Turkish Report (n 88) 76-77.

[132] A blockade is defined by Merriam-Webster solely as an act meant 'to stop people or supplies from entering or leaving (a port or country) especially during a war' while Oppenheim defines siege as 'the surrounding and investing of an enemy locality by an armed force, cutting off those inside from all communication for the purpose of starving them into surrender or for the purpose of attacking the invested locality and taking it by assault', see Oppenheim (n 55) para 157.

[133] David Rose, 'The Gaza Bombshell' *Vanity Fair* (3 March 2008) <www.vanityfair.com/news/2008/04/gaza200804> accessed 29 September 2016.

[134] ibid.

[135] B'Tselem (n 5).

aligned with the present siege's military objectives of the surrender and disarmament of Hamas.[136]

The rest of 2008 saw a ceasefire agreement that eased movement restrictions[137] (to secure Shalit's return) and its subsequent breakdown as the IDF launched incursions into Gaza to destroy tunnels that November.[138] This led to the 2008-9 Gaza War. It began at the end of December, continued for three weeks, and saw the complete encirclement of Gaza by IDF and sea restrictions tightened. The siege had begun.

The objectives of the siege have evolved over the years. 'The blockade has taken on many shapes and forms over the years,' with it being 'tightened, eased and tightened again.'[139] In 2010, the siege's objectives were Shalit's release and Hamas's capitulation to the PA.[140] After his release a year later, the objectives changed. The disarmament and surrender of Hamas have become the overall objectives of the siege.[141] This is the first listed objective of a siege according to Oppenheim.[142] The Israelis will not accept anything less than Hamas's surrender, having even told the PA, who have dabbled in reconciling with Hamas to form a unity government, that they cannot have their cake and eat it too. As far as Israel is concerned, the PA only has a choice between collaboration with Israel or collaboration with Hamas.[143]

Next, I will cover each blockade – air, sea, and land, and outline and analyze their establishments, objectives, implementation, and enforcement in order to answer whether they breach the LOAC applicable to blockades.

---

[136] 'Hamas Leader: No to Israel's Disarmament Demand' *Times of Israel* (5 September 2014) <www.timesofisrael.com/hamas-leader-no-to-israels-disarmament-demand> accessed 2 October 2016.
[137] Because of the ceasefire, the land blockade had eased and '[a] daily average of 80-90 trucks passed through the crossings,' see Intelligence and Terrorism Information Center at the Israel Intelligence Heritage & Commemoration Center, 'The Six Months of the Lull Arrangement' (December 2008) para 25 <www.terrorism-info.org.il/data/pdf/PDF_08_300_2.pdf> accessed 2 October 2016.
[138] ibid para 6-7.
[139] Poort (n 129).
[140] The late Israeli President Shimon Peres had said that if Hamas listened to Israel's demands there would be 'no need for a siege *or* a blockade (emphasis added)', see 'Peres: We'll End Siege if Gaza Rulers Abandon Terror, release Shalit' *Ynet* (2 June 2010) <www.ynetnews.com/articles/0,7340,L-3907624,00.html> accessed 2 October 2016.
[141] Times of Israel (n 136).
[142] Oppenheim (n 55) para 157.
[143] Herb Keinon, 'Netanyahu: Abbas Must Choose, Peace with Israel or Reconciliation with Hamas' *Jerusalem Post* (23 April 2014) <www.jpost.com/Diplomacy-and-Politics/Netanyahu-Abbas-must-choose-peace-with-Israel-or-reconciliation-with-Hamas-350159> accessed 2 October 2016.

The Blockade of the Gaza Strip's Territorial Waters (2.2): The Israeli naval blockade of the Gaza Strip's coastline has been ongoing since Oslo II, which gave Israel control of maritime activities for reasons of external security.[144] A 20nm zone off the coast was set up for Gazan maritime activity but only movement through half of that length was allowed.[145] In 2007, when Gaza was declared to be a 'hostile territory',[146] the 20nm zone was included.[147] It was included when Gaza was declared a 'combat zone' in 2008 and a 'military enclosure' i.e., under besiegement, since the end of the first Gaza War in 2009.[148]

What is a naval blockade? It is a blockade meant to prevent the 'ingress and egress of vessels or aircraft of all states' and these vessels are liable to be 'attacked an sunk' and aircraft 'shot down'.[149] If even one ship is allowed through, the blockade is no longer a blockade.[150]

San Remo provisions on blockades, stated in Articles 93-107, will now be discussed. According to the San Remo Manual, first, a blockade itself must not only be declared[151] but also its 'commencement, duration, location, and extent'.[152] Any 'cessation, temporary lifting, re-establishment, extension or other alteration' must also be declared as well.[153] The blockade must also be effective and the test for this is a 'question of fact'.[154] When it comes to launching attacks at merchant vessels, a warning must be given first.[155] Civilians are covered in Articles 102-104. These provisions prohibit blockades if its 'sole purpose' is to starve the civilian population *or*

[144] Oslo II (n 47) art 12(1); Hague IV Annex (n 128) art 14.
[145] Al-Waheidi and Kershner (n 86).
[146] When the Ministerial National Security Committee 'declared Gaza a "hostile territory"', they 'instructed the security establishment to impose "additional restrictions" in the civilian sphere, including with regard to the passage of goods, the supply of oil and electricity and the movement of persons', see the Public Commission to Examine the Maritime Incident of 31 May 2010 (January 2011) (Türkel Report) 30.
[147] Turkish Report (n 88) 75.
[148] ibid.
[149] Dinstein (n 42) 224.
[150] Oppenheim (n 55) para 370.
[151] *San Remo Manual on International Law Applicable to Armed Conflicts at Sea, 12 June 1994* [1995] 309 IRRC 583, art 93.
[152] ibid art 94.
[153] ibid art 101.
[154] ibid art 95.
[155] ibid art 98; There is no definition of a 'merchant vessel' in IHL but it is said that it is any ship that is not a warship and seeks to obtain profits, see WH von Heinegg, 'The Law of Armed Conflict at Sea' 479, in Fleck (n 7).

deny it other 'objects essential for its survival' and if the damage to civilians is excessive and disproportionate to military needs.[156] Starving enemy forces, however, is said to be lawful.[157]

San Remo also demands that if food and others essentials are 'inadequately provided' then they must be allowed in (subject to search) and preferably delivered by the ICRC (or any other neutral party).[158] Israel must also allow medical supplies not only for civilians but also for sick and wounded members of Hamas.[159] If the blockaded area is established as a 'zone', like the 'fishing zone' off Gaza's coast, then the same rules apply in addition to a prohibition on precluding neutral vessels and aircraft from passage in the zone.[160]

What trusted reports, if any, offer guidance on this particular naval blockade?

The Blockade Reports (2.2.1): Three major reports have been released from three institutions on the Israeli naval blockade of Gaza because of the 2010 Mavi Marmara incident when a humanitarian aid convoy flying the Turkish flag attempted to reach Gaza's shores in order to break the blockade and bring aid to civilians. These reports were released five years ago and remain the only international organization (IO) and state-sponsored reports that specifically discuss in great detail the Israeli naval blockade of Gaza and its legality. I will be referencing the UN report (Palmer Report), Turkey's governmental report (Turkish Report), and Israel's own investigative report (Türkel Report). I will not be discussing the Mavi Marmara incident in this thesis.

The idea now is to apply the relevant laws found in the San Remo Manual and apply them to the facts of the blockade. Beginning with Dinstein's 'four cumulative conditions' that the establishment of a blockade is subject to, covered by San Remo Articles 93 and 95, [161] a legal survey of the naval blockade will now proceed.

---

[156] San Remo Manual (n 151) art 102.
[157] DoD (n 89) para 5.19.1.
[158] San Remo Manual (n 151) art 103.
[159] ibid art 104.
[160] ibid art 105-107; The MAG at the time of Israel's establishment of the 2008 maritime zone admitted the Israeli government did not know what establishing such a zone might entail legally, saying that there was a 'dispute on the question of what are the powers given to a State that declares such a maritime zone', see Türkel Report (n 146) 35.
[161] These are 'the issuance of a proper declaration and notification', i.e. San Remo Manual Article 93, 'maintaining an effective – as distinct from a "paper" – blockade (although the force maintaining the blockade may be stationed at some distance)', per Article 95, 'impartiality in application of the blockade to vessels of all States', and the last

The Establishment of the Naval Blockade (2.2.2): The first condition that the blockade's establishment is subject to is the 'issuance of a proper declaration and notification',[162] including declaration for any alteration made.[163] Israel declared a blockade the year of Disengagement,[164] in 2008,[165] and most recently in 2009 when the military siege was fully in place following the first Gaza War.[166] Since each declaration of a blockade is made as if a new blockade, it is appropriate to focus on one, and since the focus of this analysis is primarily on the siege, then the 2009 Notice to Mariners (NOTMAR) is the relevant NOTMAR for this analysis. The 2009 NOTMAR was transmitted to affected mariners in a clear and effective fashion,[167] but there are some issues that may breach customary rules found in San Remo.

While the commencement, extent, and locations were posted in the NOTMAR, the duration was not.[168] The problem lies with the ambiguous 'until further notice' at the end of the declaration.[169] While Turkey stated that this made the blockade invalid, the UN found this argument unpersuasive.[170] The UN mistakenly insisted that the 'notice does specify a duration'[171] when upon inspection, it does not. The phrase 'until further notice' is not a specification of a duration of time.[172] The UN mentioned that the uncertainty of the conflict with Hamas meant Israel was not required to give a timeframe, but the Turkish Commission brought

---

condition, irrelevant in our case, refers to the 'non-prevention of access to the ports and coasts of neutral states,' see Dinstein (n 42) para 552.

[162] San Remo Manual (n 151) art 93.

[163] ibid art 93.

[164] Turkish Report (n 88) 64.

[165] Türkel Report (n 146) para 25.

[166] 'Notice to Mariners No 1/2009 Blockade of Gaza Strip' (6 January 2009, Ministry of Transport Administration of Shipping and Ports <http://asp.mot.gov.il/en/shipping/notice2mariners/547-no12009> accessed 7 October 2016; This is also when Gaza was announced as a 'military enclosure', confirming the existence of a siege.

[167] '[T]his notice was broadcast twice a day on the emergency channel for maritime communications to ships that sailed at a distance of up to 300 km from the Israeli coast,' see Türkel Report (n 146) para 26.

[168] Leaving it open-ended 'risks arbitrariness […] not consistent with international law', see Turkish Report (n 88) 65.

[169] Notice to Mariners No 1/2009 (n 166).

[170] Report of the Secretary-General, 'Panel of Inquiry on the 31 May 2010 Flotilla Incident' (2011) (Palmer Report) para 75.

[171] ibid.

[172] Israel says that even if stating the duration is customary international law, 'great weight is not attached' to such an obligation and therefore 'satisfies the legal requirement,' see Türkel Report (n 146) para 59; This does not seem, to me, as very sound reasoning, since the 'weight' of the obligation is not defined anywhere.

up an interesting point: Aren't all armed conflicts open ended?[173] That being said, I do not believe this renders the blockade invalid, per the Turkish stance, but it is a breach of custom.[174] Extensions of blockades are legal, although they require a new NOTMAR to be issued, so why not simply issue, for example, annual NOTMARs to abide by customary law?

The Naval Blockade's Effectiveness and its Effect on Civilians (2.2.3): Since 2009, no vessels have been allowed to dock in Gaza's ports[175] and all who have attempted have been successively diverted peacefully, with the exception of the Mavi Marmara incident. The blockade has also been impartial to all vessels in the area. It is also hard to argue that the naval blockade is ineffective in its achieving its objectives when one of Hamas's most important conditions in their 2014 proposal for a ten-year truce was the lifting of the naval blockade and the establishment of a seaport.[176]

The questions now turn to the blockade's effect on civilians. Is the sole purpose of the blockade to starve them or to deny them objects essential to their survival? Israel has stated that the primary purpose is for Israel's security[177] and in other instances have stated that it is 'to pressure Hamas' to surrender,[178] per the military objective of the siege. I do not believe that the sole purpose of the blockade is starvation as no one has actually died from starvation in Gaza. That is the test for civilian starvation in sieges.[179] However, while it may not have been the sole purpose, starving civilians may have been one purpose. Before the siege was in place and only the sea and air blockades were being enforced, the Disengagement's architect, senior Israeli

[173] Turkish Report (n 88) 64.
[174] San Remo Manual (n 151) art 94.
[175] Palmer Report (n 170) para 76.
[176] Assaf Gabor, 'Hamas Truce Terms: Airport, Seaport, Entrance to Al-Aqsa' *Ma'ariv* (Original Hebrew) (16 July 2014) <www.nrg.co.il/online/1/ART2/597/047.html?hp=1&cat=666&loc=2> accessed 9 October 2016; For English version see Ira Glunts, 'Report: Hamas Offers Israel 10 Conditions for a 10 Year Truce' *Mondoweiss* (16 July 2016) <www.mondoweiss.net/2014/07/report-israel-conditions/> accessed 9 October 2016.
[177] UNHRC 'Report of the International Fact-Finding Mission to Investigate Violations of International Law, including International Humanitarian and Human Rights Law, Resulting from the Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance' (2010) UN Doc A/HRC/15/21, para 33.
[178] Timothy Franks, 'Details of Gaza Blockade Revealed in Court Case' *BBC News* (3 May 2010) <www.news.bbc.co.uk/2/hi/middle_east/8654337.stm> accessed 9 October 2016.
[179] UNSC (n 127) part 9A.

official Dov Weisglass remarked, 'The idea is to put the Palestinians on a diet, but not to make them die of hunger.'[180]

Is the Naval Blockade Lawful and is it Conducted Lawfully? (2.2.4): The Palmer Report agrees with Israel that the blockade is lawful for the purpose of Israel's self-defense against Hamas.[181] This does not reflect other UN findings: The UN Human Rights Council found the blockade to be unlawful, saying that whereas a dire humanitarian crisis existed in Gaza prior to the 2009 blockade's imposition, imposing it was unreasonable and excessive in relation to the damage done to the Gazan population versus the military gains.[182] This is a breach of the IHL principle of proportionality.

Is the naval blockade conducted lawfully? There are some reports of behavior possibly in breach of IHL conducted via the blockade's implementation,

- The lists of banned and permitted goods is a state secret;[183] are arbitrary,[184] and changed frequently,[185] making it nearly impossible for aid groups to coordinate deliveries that will be approved by Israeli authorities thus denying (albeit indirectly) objects essential for civilian survival,[186] per Articles 102 and 104 of the San Remo Manual[187] and a treaty-based provision found in GC 4.[188]
    - This is also contrary to Article 94 of the San Remo Manual as this action means that the full extent of the blockade has not been declared. Some items are known

[180] Conal Urquhart, 'Gaza on Brink of Implosion as Aid Cut-Off Starts to Bite' *Guardian* (16 April 2006) <www.theguardian.com/world/2006/apr/16/israel> accessed 9 October 2016.
[181] Palmer Report (n 170) para 72.
[182] UNHRC (n 177) para 260-261.
[183] BBC News (n 76).
[184] Founder of Israeli human rights organization Gisha, Sari Bashi, said, 'I certainly don't understand why cinnamon is permitted, but coriander is forbidden. Is there something more dangerous about coriander? Is coriander more critical to Gaza's economy than cinnamon? This is a policy that appears to make no sense,' see Franks (n 180).
[185] Türkel Report (n 146) para 19; Franks (n 178).
[186] UNHRC 'Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict – Executive Summary' (23 September 2009) UN Doc A/HRC/12/48 (Goldstone Report) para 316.
[187] San Remo Manual (n 151) art 102, 104.
[188] GC 4 (n 128) art 23.

publicly to be banned, most critically concrete and building supplies.[189] This is said by Israel to be 'dual-purpose',[190] meaning it can be used for non-violent means (building houses) or violent means (like building tunnels into Israel from which attacks are staged) but this most certainly affects civilians on a far grander scale. Since the last war in Gaza in 2014, only 9% of destroyed houses have been rebuilt[191] – primarily because Israel's ban on dual-purpose items. This issue also directly relates to the land blockade as all items that enter Gaza even by sea must divert and enter via Israeli-controlled crossings only.

- The only maritime activity Israel allows Gazans to partake in is fishing but the zone established by Israel is arbitrarily implemented. While the San Remo Manual lays out rules for zones, most have been found to be illegal[192] and legitimate purposes of zones are not actually defined in law, even in military manuals.[193] See Section 1.6.1 for further explanation on the fishing zone.

The Blockade of the Gaza Strip's Airspace (2.3): The LOAC at Sea's scope of application does not just include the waters belonging to the belligerents (inland or otherwise) and the high seas, but it also extends to the airspace above the aforementioned areas.[194] This extension comes from the perceived 'similarities between airspace and the sea, and from the fact that in many countries the air force is seen as necessary for extending naval power over land, beyond the confines of the coastal strip.'[195] The definition of an air blockade is found in the definition of a naval blockade, mentioned in Section 2.2. There are no reports regarding the blockade of Gaza's airspace. In fact, nothing in my research has shown that the air blockade's establishment or

[189] Turkish Report (n 88) 73.
[190] Israeli National Security Council 'Resolution B/44: Application of Border Crossing Policy in Relation to Gaza Strip' (20 June 2010) cited in Türkel Report (n 146) 32.
[191] Fraus Masri, 'How to Revive the Stalled Reconstruction of Gaza' *Brookings Institution* (27 April 2016) <www.brookings.edu/blog/markaz/2016/04/27/how-to-revive-the-stalled-reconstruction-of-gaza/> accessed 9 October 2016.
[192] WH von Heinegg (n 155) 540.
[193] ibid 544-545.
[194] WH von Heinegg (n 155) 482.
[195] Francisco Javier Guisández Gómez, 'The Law Air Warfare' [1998] 323 IRRC <www.icrc.org/eng/resources/documents/article/other/57jpcl.htm> accessed 16 October 2016.

conduct violates any customary rules regarding the laws of armed conflict at sea or general principles of international humanitarian law and is infrequently enforced.[196]

The Blockade of the Gaza Strip's Border Crossings (2.4): Israel reserves the right to broadly limit the movement of people in and out of the Gaza Strip since Oslo II stipulates that '[t]he provisions of this Agreement shall not prejudice Israel's right, for security and safety considerations, to close the crossing points to Israel and to prohibit or limit the entry into Israel of persons and of vehicles from the West Bank and the Gaza Strip.'[197]

It is critical to note that the land blockade and naval blockade are entwined and should be approached as such. The Turkish Commission stated that since ships cannot dock at any port in Gaza, '[a]ll shipments must be unloaded in Ashdod [Israel] and can only then be transported to Gaza by land,' thus 'the two [blockades] must be examined in tandem.'[198] Since naval and airspace blockades fall under the same laws and such blockades are an 'integral part' of the land blockade, then this analysis is right to lump the three blockades together as forming one siege.

The Turkish Commission noted that according to Israel, the land blockade has three purposes, [199]

1) Limitation of the flow of goods to Gaza;
2) Security;
3) Restriction on the movement of people.

The limitation of the flow of goods affects the entire civilian population of Gaza, which numbers nearly 2 million, 1.24 million being refugees.[200] The limitation has brought the Strip's

[196] The most recent recorded enforcement of the air blockade was on 20 September 2016 when an Israeli Air Force jet shot down a Hamas UAV, about 14 months since the last incident, see Judah Ari Gross, 'Israel Shoots Down Hamas Drone Off the Gaza Coast' *Times of Israel* (20 September 2016) < www.timesofisrael.com/israel-shoots-down-palestinian-drone-off-the-gaza-coast/> accessed 16 October 2016.
[197] Oslo II Annex I (n 85) art 9(d).
[198] Turkish Report (n 88) 76.
[199] ibid 76.
[200] OCHA 'The Gaza Strip: The Humanitarian Impact of the Blockade' (July 2015) 2 <www.ochaopt.org/documents/ocha_opt_gaza_blockade_factsheet_July_2015_english.pdf> accessed 16 October 2016.

GDP down by 50% and overall unemployment is the highest on Earth at 43%.[201] As of June 2015, 1% of construction materials needed was allowed in and the percentage at which folks enter and exit Gaza is 2% of what it was in 2000.[202] Israel, which was the main provider of electricity, cut it off when Hamas did not pay the bills[203] (foreseeable, given the existing ban on exports and freeze on funds from the PA since their forced exile from the Strip) and bombed their only power plant in the 2014 war.[204] Gazan residents experience daily blackouts more than 16 hours[205] and people have died as a direct result of no electricity.[206] Israeli bombs led to the contamination of the aquifer in Gaza and sells only a 'minimal quantity' of water to the Strip, leaving the PA and Arab nations to pledge to build expensive desalinization plants – which of course cannot be built because of the restrictions on dual-use materials.[207]

As for security, the buffer zone around Gaza's borders is a 'no-go zone' for Palestinians and totals almost a fifth of Gaza's land. B'Tselem recently reported that even outside the buffer zone farmers' crops are routinely destroyed,

> Israel has undertaken similar spraying operations once or twice a year. In previous years, the military used bulldozers to flatten vegetation and land along the border. Until now, the spraying did not cause serious damage to crops as it was done in areas that were barely farmed. This year, however, extensive areas of farmland were affected, causing serious damage […] Within several days, the leaves of some plants withered completely.

---

[201] OCHA (n 200) 1.
[202] ibid.
[203] Amira Hass, 'Think of the Gaza Strip the Next Time You Drink Tap Water' *Haaretz* (22 March 2016) <www.haaretz.com/opinion/.premium-1.710413> accessed 16 October 2016.
[204] Mersiha Gadzo, 'Gaza Electricity Crisis: "People are Dying Daily"' *Al Jazeera* (7 January 2016) <www.aljazeera.com/news/2016/01/gaza-electricity-crisis-people-dying-daily-160106071146327.html> accessed 16 October 2016.
[205] ibid; The hours that electricity is cut off is sporadic, 'Last week we finally got some electricity for two hours at 2am so I woke up quickly to switch on the washing machine,' see Oxfam International 'Electricity Crisis Brings Dark Times for Women in Gaza' <http://oxf.am/ueb> accessed 16 October 2016.
[206] A Canadian doctor working in Gaza said, 'People are dying in Gaza quite often, regularly, every single day because of the lack of electricity,' see Gadzo (n 206).
[207] Hass (n 203).

> Moreover, due to the prevailing winds at the time of the spraying, extensive damage was also caused to farmland as far as 300 meters from the fence.[208]

Regarding the third purpose of restricting people, while 26,000 folks used to leave Gaza daily into Israel in 2000, barely 450 are allowed to leave daily in 2015.[209] Although Israel does not list who leaves Gaza and for what reasons, I will presume the small number being allowed to leave are those in need of medical assistance and other reasons as *suggested* by GC 4 Article 17.[210] While Israel may argue that because of the siege, they are lawfully not obliged to allow the evacuation of civilians,[211] the situation has nothing to do with *evacuating* civilians. Gazan civilians do not want to evacuate into Israel or Egypt, they want to freely move in and out of their territory as they had since the 1967 war and as prescribed by Oslo II.[212]

The issues mentioned in Section 2.2.5 on the lawfulness of the naval blockade certainly can be applied to this blockade as well. Whether it is the list of goods being secret (and arbitrary) or the buffer zone that places a fifth of Gazan land under permanent IDF control, the land blockade is disproportionate and excessive in damage, allowing for no distinction between combatants and civilian.

The Legality of the Siege (2.5): I will now discuss the lawfulness of sieges. I will posit that the Israeli siege of Gaza is not lawful and breaches customary and treaty-based rules on collective punishment and indiscriminate attacks.

Siege warfare is a classical tactic of warfare, performed by surrounding an 'enemy military concentration, a strategic fortress or any other location defended by the enemy' and cutting it off from the outside world.[213] The essence of siege warfare, Dinstein tells us, rests in an objective to capture the surrounded enemy area specifically 'through starvation and thirst.'[214]

---

[208] B'Tselem (n 85).
[209] OCHA (n 200) 1.
[210] Article 17 of the GC 4 specifically says that the parties 'shall endeavor', not 'are required', to come up with agreements to let certain folks in need out of besieged areas, see GC 4 (n 128) art 17.
[211] Dinsten (n 42) para 541.
[212] Oslo II Annex 1 (n 83) art 9.
[213] Dinstein (n 125) 145.
[214] ibid.

Although assaulting or bombarding enemy positions under besiegement may lead them to surrender, our situation in Gaza involves a specific method of siege warfare based on withholding essential supplies – vital nutrition, fuel, medicine, and water – promoting the suffering of hunger. Which sources of law can we apply to the siege?

Nuremburg jurisprudence stated in the *High Command Case*[215] that the German siege of Saint Petersburg was lawful, including the shelling of fleeing civilians, '*We might wish the law were otherwise but we must administer it as we find it.* Consequently, we hold no criminality attached on this charge (emphasis added).'[216] That wish came true years later.

When looking for treaty sources regarding rules of siege warfare, we can start with GC 4, which aims to protect civilians other vulnerable non-combatants. There are a few provisions that relate to sieges and blockades. Article 17 specifically mentions 'besieged or encircled areas' when requesting that belligerents 'endeavor' to make agreements that allow vulnerable civilians in need of medical care to leave such areas. Article 23, typically a naval blockade regulation, prohibits withholding 'essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases.'[217] Overall, GC 4 does not prohibit sieges but instead applies pressure to the parties of a conflict to work together to allow vulnerable civilians out but does require that essentials be allowed into besieged territory.

Israel may be in breach of both provisions in GC 4 related to sieges. Based on the analysis in Section 2.2.4, Israel appears to be in breach of GC 4 Article 23. Section 2.4 reveals Israel may be in breach of GC 4 Article 17.

AP 1, on the other hand, works to curtail a military's ability to initiate starvation through a siege. It should be stressed that Israel is not a party to AP 1, but applies provisions deemed customary, [218] as customary law is binding in Israel. A majority of AP 1 is seen nowadays as

---

[215] *United States of America v Wilhelm von Leeb et al* 12 LRTWC 1 (1949) (*High Command).*
[216] ibid 84; The quoted piece of the judgment comes from Charles C Hyde, *International Law* (2nd edn Little Brown and Co 1945) vol 3, 1802-1803.
[217] GC 4 (n 128) art 17, 23; Although Dinstein makes it clear that Article 23 was designed as a naval blockade regulation, he does mention an exception - if you want to apply it beyond a maritime siege to a siege in land warfare there exists no rule to allow foodstuff and other essentials in for the civilian population at large. Instead, it would be allowed for only those 'deemed particularly vulnerable', see Dinstein (n 203) 148.
[218] *Ahmed v PM* (n 80) para 14-15; Türkel Report (n 146) para 41, 75.

customary.[219] Article 54(1) is quite clear, outlawing the 'starvation of civilians as a method of warfare' and Article 54 (2) removes any doubt that the rule is inflexible, as it precludes attacking, destroying, removing, or rendering useless 'objects indispensable to the survival of the civilian population' like 'foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations'.[220] This means that just because Hamas may potentially use a food supply does not mean that the food supply forfeits its immunity. In fact, Hamas must be the exclusive user of a food/water supply for it to lose its immunity to attack. In addition, AP 1 Article 70 takes GC 4's naval blockade-related Article 23 and applies it to all forms of blockades. As was touched upon in Section 2.2.3 but will be further expounded on in 2.5.1, Israel may be in breach of AP 1 Article 54(1) and in regards to the land blockade discussed in 2.4, AP 1 Article 70.

Dinstein is one IHL scholar who remains angered by AP 1's rules, asking how a siege could be a siege if its essence is lost (its essence being the use of starvation). He labeled the prohibition on starving civilians under siege in AP 1 Article 54(1) as 'utopian' and 'unjustifiable'.[221] Regardless of Dinstein's thoughts, these rules are held to be customary and seen as an 'articulation of a basic humanitarian principle', namely 'the principle that civilians are not legitimate targets in their own right.'[222] But, as far as Dinstein is concerned, there is 'no other method of warfare' that allows a defended area to be captured, and given AP 1's prohibitions, Dinstein feels the First Additional Protocol criminalized sieges.[223]

---

[219] For an early study on the customary status of AP 1, see Christopher Greenwood, 'Customary Law Status of the 1977 Geneva Protocols' 93-114, in Delissen (n 125); According to the US, 'Significant portions [of AP 1]…reflect customary international law. While there is no current authoritative list of the AP I articles the U.S. currently views as either customary international law… The U.S. has recently stated it considers almost all of AP II to reflect customary international law. In March 2011, President Obama announced his continued support of AP II and urged the Senate to act "as soon as practicable" on AP II. At that same time, President Obama announced that the United States would comply with a certain provision of AP I [Article 75 which provides fundamental guarantees for persons in the hands of opposing forces in an international armed conflict] "out of a sense of legal obligation." […] Although the U.S. has never ratified either AP I or AP II, their relevance continues to grow. *These treaties bind virtually all our coalition partners* (emphasis added),' see David Lee (ed), *Law of Armed Conflict Deskbook* (5th edn Judge Advocate General's Legal Center and School 2015) 21-22.
[220] AP 1 (n 15) art 54(2).
[221] Dinstein (n 125) 152.
[222] Greenwood (n 221) 110.
[223] Dinstein (n 125) 151.

Dinstein fails to take into account that in our advanced military warfare era, it is possible for militaries to develop a method of besiegement that adheres to all regulations in AP 1. Starvation *is not* the essence of siege warfare as he believes, but is actually *isolation*. In the modern era where human rights have drastically expanded and the laws of war have become more protective, belligerents must accept that if their siege does starve civilians then it is unlawful under AP 1 Article 54.

In the next section, I will contend that the intent of imposing the siege was the underlying desire to collectively penalize Palestinian civilians in Gaza for promoting the rise of Hamas through its election and general support for their armed struggle. I also believe that the siege's tactics are indiscriminate, affecting without regard every inhabitant of the Strip. This is despite the Palmer Report's insistence that Israel's primary stated military objectives are what matter 'regardless of what considerations might have motivated Israel in restricting the entry of goods to Gaza via the land crossing'.[224] It appears that those considerations that 'might have motivated' Israel are the most critical when we look at potential cases of collective punishment. No belligerent force will come out and clearly state that they are imposing a collective penalty on civilians so the considerations that might have motivated Israel will certainly be taken into account.

The Siege of the Gaza Strip is a Collective Punishment (2.5.1): The Hague Regulations,[225] Geneva Conventions,[226] their additional protocols,[227] customary IHL,[228] and military manuals[229] all outlaw collective punishment in armed conflict. A collective punishment is a punishment

[224] Palmer Report (n 170) para 77.
[225] Hague IV Annex (n 128) art 50.
[226] In regards to prisoners of war, GC 3 states 'Collective punishment for individual acts […] are forbidden,' see GC 3 (n 128) art 87; In regards to civilians, GC 4 states, 'No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited,' see GC 4 (n 128) art 33.
[227] AP 1 (n 15) art 75(2)(d).
[228] The ICRC's study of customary international humanitarian law describes the ban on collective punishment in Rule 103, 'This prohibition is an application, in part, of Rule 102 that no one may be convicted of an offence except on the basis of individual criminal responsibility. However, the prohibition of collective punishments is wider in scope because it does not only apply to criminal sanctions but also to "sanctions and harassment of any sort, administrative, by police action or otherwise,"' see Henckaerts (n 128) 252.
[229] MAG (n 110) 34; Aside from the MAG manual, MFA Israel bluntly stated in 2009, 'Collective punishment is forbidden', see MFA Israel (n 19) para 226.

inflicted by a party to a conflict on prisoners of war or folks *hors de combat* ('outside the fight') for an act committed by an individual or the enemy party to the conflict. Is the siege on Gaza a collective punishment?

The ICRC,[230] the UN Security-General Ban Ki-Moon,[231] OCHA,[232] UNRWA,[233] and UNHRC[234] have all labeled the siege on Gaza as a collective punishment. The UN's Goldstone Report on the 2008-9 Gaza War reported that collective punishment was being inflicted on civilians, saying their condition resulted 'from deliberate actions' of the IDF and the 'declared policies' of the Israeli government.[235] The ICRC, referred to by scholars as the 'guardian of IHL',[236] '[P]ointed to the restrictions on the Israeli "buffer zone," which has restricted access to farmland, the three-mile restriction on fishing off the coast of Gaza and the power shortages that have crippled the Gazan health care system as instances of this collective punishment.'[237] The Turkish Commission Report also came to a similar conclusion.[238] The Israeli Türkel Report vehemently responded to the accusations, insisting there is 'no evidence' that Israel's actions are meant to punish civilians.[239]

---

[230] '[O]ne of the main aims of the blockade [having been] to punish the population of the Gaza Strip for having elected Hamas,' see ICRC, 'Israel, Blockade of Gaza and the Flotilla Incident - 13-08-2015 Case Study: Discussion' (13 August 2015) para 5C <https://casebook.icrc.org/casebook/doc/case-study/israel-blockade-of-gaza-and-the-flotilla-incident.htm> accessed 17 October 2016.

[231] 'The closure of Gaza suffocates its people, stifles its economy and impede reconstruction effort, it is a collective punishment for which there must accountability,' see 'UN Chief Ban Ki-Moon Calls for Israel to End "Collective Punishment" Blockade of Gaza' *Haaretz* (29 June 2016) <www.haaretz.com/middle-east-news/1.727871> accessed 17 October 2016.

[232] OCHA (n 200) 1.

[233] UNRWA, 'Restrictions on Freedom of Movement Waiting for a Miracle' (16 June 2016) <www.unrwa.org/newsroom/features/restrictions-freedom-movement-waiting-miracle> accessed 17 October 2016.

[234] The UNHRC '[d]emands that Israel, the occupying Power, immediately and fully end its illegal closure of the occupied Gaza Strip, which in itself amounts to collective punishment of the Palestinian civilian population, including through the immediate, sustained and unconditional opening of the crossings for the flow of humanitarian aid, commercial goods and persons to and from the Gaza Strip, in compliance with its obligations under international humanitarian law', see UNHRC, Twenty-First Special Session 23 July 2014 'Report of the Human Rights Council on its Twenty-First Special Session' (9 September 2014) UN Doc A/HRC/S-21/2, 6, para 6.

[235] Goldstone Report (n 188) para 74.

[236] Stefaan Ghesquiere, 'The Implementation of International Humanitarian Law and the International Committee of the Red Cross' 477, in Wouters (n 50).

[237] Dwyer Arce, 'Gaza Blockade Violates International Law: ICRC' *JURIST* (14 June 2010) <www.jurist.org/paperchase/2010/06/gaza-blockade-violates-international-law-icrc.php> accessed 17 October 2016.

[238] Palmer Report (n 170) para 23d.

[239] ibid para 47e.

The Palmer Report, in favor of the Israelis, only focused on the naval blockade and found that it alone was not a collective punishment.[240] The report stated that the only reason the UNHRC and the Turkish Commission found it to be a collective penalty is because they held that 'the naval blockade formed an indivisible part of Israel's land restrictions policy' which is 'a factual conclusion that the [Palmer Report] Panel does not share'.[241] As discussed above, it is difficult to distinguish the blockades as separate, distinct policies when they are as intertwined as they are. Sea and air blockades fall under the exact same laws of armed conflict at sea, and given that all goods must go through Israeli land due to there being no sea or airport in Gaza, the naval and air blockades are an 'integral' part of the land blockade. The three acting together form the siege, thus I seriously disagree with the Palmer Report's 'factual conclusion'.

The Palmer Report also made clear that the naval blockade could not be collective punishment for Hamas's election because the blockade had been in place long before as a result of Oslo II. This is a factual conclusion that I do not share. What they fail to mention are the increased restrictions that were put in place after the 2006 PLC elections and the broadening scope of restrictions after Hamas's hostile takeover. They tighten borders to hold back essential civilian goods and refuse exit permits to civilians after a Hamas attack. It is difficult to see how Israel's actions are not found to fit the definition of collective punishment as 'sanctions and harassment of any sort, administrative, by police action or otherwise' put on the population as a whole for acts Hamas commits.

In addition, the report's assertion that the blockade's existence before the PLC elections precludes the accusation of collective punishment for such elections is not solid. Israel has declared new blockades since the imposition of the Oslo II ones, most recently in 2009. Each declaration is made as if it is a new blockade, even if followed concurrently, and the Hamas elections were in 2006. Thus, all NOTMARs made after the election can be construed as new blockades, originally put in place to punish Gazans for sweeping Hamas into the PLC, and re-issued in 2009 to punish civilians for their unwavering support of Hamas's armed struggle.

[240] Palmer Report (n 170) para 77.
[241] ibid para 81.

As stated, in the Israeli Türkel Report, their only rebuttal to a growing number of accusations of collective penalty is that there is 'no evidence'.[242] This is an unconvincing argument. What Israel might mean by 'no evidence' is that there is no 'smoking gun' that directly implicates their government in a deliberate plot to punish Palestinian civilians for voting for Hamas, a stance the Palmer Report agreed with when saying that underlying motivations do not matter but the stated military objective. A smoking gun, however, is not required as we move onto the test of collective punishment later on. Next, I will prove that even if we accept collective punishment is not occurring, Israel is attempting to starve Gaza in breach of AP 1 Article 54(1).

If Not Collective Punishment, Still Starvation (2.5.2): Let us agree with Israel for a moment and say there is no smoking gun and Israel cannot be found to be collectively punishing Gaza. We should then seek to analyze Israel's specific method of siege of withholding essential supplies, as bombardment and assault are methods of siege infrequently applied in our case. Is Israel starving the people of Gaza, or trying to? In other words, is Israel in breach of AP 1's Article 54(1)? Israel points out that,

> There is no formal definition of the concept of 'starvation' in international humanitarian law. However, the term 'causing starvation' should not be understood to simply cause hunger. The Commentary on article 54(1) of the First Additional Protocol states that the use of starvation as a means of warfare implies '... to provoke it deliberately, causing the population to suffer hunger, particularly by depriving it of its sources of food or of supplies' and that '... starvation is referred to here as a method of warfare, i.e., as a weapon to annihilate or weaken the population.' The [Türkel] Commission found no evidence […] to the effect that Israel is trying to deprive the population of the Gaza Strip of food *or* to annihilate or weaken the population by means of starvation (emphasis added).[243]

[242] Türkel Report (n 146) para 76.
[243] ibid para 76.

There may be no *formal* definition of the concept of 'starvation' in IHL like Israel states but the ICRC defines it as '[a] forbidden method of warfare consisting in deliberately depriving civilian persons of food.'[244] That being said, when the UN examined the siege of Sarajevo, they found that it would be hard to pin starvation accusations on the besieging party when no one had actually died of starvation.[245] If we instead look at causing starvation as a deliberate act to provoke the population to *suffer hunger* by depriving it of its sources of food as the Commentary to AP 1 states, Israel can be said to be engaging in it. Eighty percent of Palestinians exist solely off of international aid.[246] When Israel refuses aid to be allowed in, changes which items are allowed with no warning or announcement, or withholds the list of contraband, it is deliberately depriving Palestinians of their sources of food thereby deliberately provoking the suffering of hunger, directly contradicting AP 1 Article 54(1), restated in the ICRC collection as Rule 53. When Israel increases the buffer zone and renders useless the arable farm land that provides sustenance to civilians or by spraying destructive pesticides on farmland in and around the zone, it is deliberately provoking the suffering of hunger. By doing that as well, Israel breaches AP 1 Article 54(2), enshrined in customary IHL Rule 54.

In addition, there is no legitimate security measure that should prevent the ICRC from bringing in aid once Israel has searched it. By doing so, Israel breaches GC 4 Article 23 as a treaty-based rule and AP 1 Article 70 as a customary one. Customary IHL Rules 55-56 tie closely to these provisions.

Applying the Test for Collective Punishment (2.5.3): I still contend that the siege is a collective punishment on two levels: What I aim to prove is that the siege of Gaza was imposed as a collective punishment for the voting in of Hamas and its continuance is owed to Gaza's unwavering support for Hamas.

[244] ICRC, 'Glossary: Starvation' (29 May 2012) <https://casebook.icrc.org/casebook/doc/glossary/starvation-glossary.htm> accessed 19 October 2016.
[245] UNSC (n 127) part 8A.
[246] OCHA (n 200) 1.

The Special Court for Sierra Leone (SCSL) lays out the elements of the crime of collective punishment and *chapeau* requirements for the charge to be made in an international court.

For requirements, the first is that an armed conflict must have been occurring whether international or non-international.[247] This was handled in Chapter 1 when we found the conflict to be of an international character. Next, there must be a connection between the armed conflict and the alleged crime.[248] This is satisfied 'where the perpetrator acted in furtherance of or under the guise of the armed conflict.'[249] Given the perpetrator in this instance is a belligerent party to the armed conflict, it is easy to make such a connection. The third *chapeau* requirement is that the victims were not direct participants in hostilities (DPHs).[250] The GCs and their Additional Protocols 'protect only those persons who take no active or direct part in the hostilities, and those who have ceased to take part therein and are therefore placed *hors de combat* by sickness, wounds, detention or any other cause.'[251] Therefore, to satisfy this requirement, I would have to gather 'relevant facts of each victim with a view to ascertain whether that person was actively involved in the hostilities at the relevant time'.[252] Of course, given the restraints of this thesis, it would be virtually impossible to compile the testimonies of each and every victim of the alleged collective punishment and distinguish them from DPHs. That being said, protected persons far outnumber DPHs in Gaza and can be distinguished. It is estimated that there are only 15-20,000 DPHs in Gaza out of nearly 2 million people.[253]

There are two elements to the crime of collective punishment. First, it must be a punishment 'imposed indiscriminately and collectively upon persons for acts that they have not committed' and second there must be intent on the 'part of the perpetrator to indiscriminately and collectively punish the persons for acts which form the subject of the punishment.'[254] Even if

---

[247] *Prosecutor v Alex Tamba Brima et al* (Judgement) SCSL-2004-16-T (20 June 2007) (*AFCR Case*) 93.
[248] ibid 94.
[249] ibid para 246.
[250] ibid 94.
[251] ibid para 248.
[252] ibid.
[253] Shlomi Eldar, 'Hamas: The First Palestinian Army' *Al-Monitor* (23 July 2014) <www.al-monitor.com/pulse/originals/2014/07/hamas-terror-organization-recruit-army-gaza-is-idf-tunnels.html> accessed 20 October 2016.
[254] *AFCR Case* (n 247) para 676.

the IDF accuses the victims of the collective punishment of involvement, support, or collusion in Hamas activities, we are not obligated to prove whether the victims were/are involved or not. The Prosecution in the *AFCR Case* stated '[c]ivilian victims were punished arbitrarily […] because part of the population was […] supposedly failing to support [the perpetrators]'.[255] This argument can be applied to the IDF's siege on Gaza.

I believe it is easy to prove the first element that the punishment must be imposed indiscriminately upon non-DPHs, given that the siege targets the entire territory, affecting everyone inside. The question now is whether we can prove the second element of intent, which is more difficult to demonstrate.

Christian Science Monitor reported in 2007 on an Israeli newspaper report from Haaretz that the designation of Gaza as a 'hostile entity' was 'part of new Israeli measures designed to create hardship in Gaza that might lead average citizens to turn against Hamas. Israel said it would disrupt power and fuel supplies, but would not cut off water.'[256] This was seen as a damning report, which is why the authorities censored[257] the parts that mentioned 'civilian levers'.[258] However, news agencies like Christian Science Monitor that picked up the story at the time kept the now-censored quote: 'The security cabinet unanimously approved a number of sanctions to be imposed on the Gaza Strip should the rocket fire on southern Israel continue. The steps are designed to create "civilian levers" that will pressure Gaza's Hamas rulers to bring the rocket fire to a halt.'[259] In the same Haaretz article, government officials are reported to have been trying to figure out how to formulate their policy against Hamas. Surprisingly, they actually admitted that their first option was collective punishment, so they tried to tone it down in their accepted second option:

---

[255] *AFCR Case* (n 247) para 677.
[256] Dan Murphy, 'Israel Calls Gaza a "Enemy Entity"' *Christian Science Monitor* (19 September 2007) <www.csmonitor.com/2007/0919/p99s01-duts.html> accessed 20 October 2016.
[257] Israel's Military Censor is infamous for censoring media reports, even Facebook users and bloggers, see Gil Cohen, 'Israel's Military Censor Takes on Dozens of Bloggers, Facebook Pages' *Haaretz* (4 February 2016) <www.haaretz.com/israel-news/.premium-1.701462> accessed 20 October 2016.
[258] Michael Brull, 'Civilian Levers' (2 June 2010) <https://michaelbrull.wordpress.com/2010/06/03/civilian-levers/> accessed 20 October 2016; Michael Brull, 'Israel's World Vision Allegation, Part 2: Shin Bet And The Civilians Of Gaza' *New Matilda* (15 August 2016) <https://newmatilda.com/2016/08/15/israels-world-vision-allegation-part-2-shin-bet-and-the-civilians-of-gaza/> accessed 20 October 2016.
[259] Murphy (n 256).

> A senior government official said that two approaches were presented during the meeting. One was to cut off electricity in response to every rocket. *This approach was found to be problematic in terms of international law because it would constitute collective punishment.* The second approach, which the ministers accepted, was to compromise the ability of Hamas to govern in Gaza as the quality of life deteriorated. *'We will reduce the amount of mega-wattage we provide to the Strip, and Hamas will have to decide whether to provide electricity to hospitals or weapons lathes,'* the official said (emphasis added).[260]

It would appear then that electricity was used to threaten and target those who are sick, wounded, and other protected persons in *hospitals.* This breaches customary IHL Rule 28 which assigns respect and protection to medical units in all circumstances. According to the SCSL, '[P]unishments imposed upon protected persons who are not individually responsible' for acts of the belligerent (Hamas rockets) 'which forms the object of the punishment are absolutely prohibited.'[261] The ICRC Commentary of Article 75(2)(d) of AP 1 advocates an extensive interpretation of the crime of collective punishments, to include "'not only penalties imposed in the normal judicial process, but also any other kind of sanction (such as confiscation of property) [...]. [I]t is based on the intention to give the rule the widest possible scope, and to avoid any risk of a restrictive interpretation."'[262] It would certainly appear that the Israeli government intended to punish civilians but actually went out of their way to form a new option which put the problem on Hamas's shoulders, putting medical units in serious danger.

Israel's stated intentions may have been security or the desire to put Hamas down by any means, but the facts show that the siege is provoking starvation, indiscriminately targeting every inhabitant of the Strip. The imposition of the siege in 2009 was due to Hamas's election and their

[260] Barak Ravid, 'IDF Formulates Plan to Limit Services to Civilians in Gaza' *Haaretz* (19 September 2007) <www.haaretz.com/news/idf-formulates-plan-to-limit-services-to-civilians-in-gaza-1.229602> accessed 20 October 2016.
[261] *AFCR Case* (n 247) para 679.
[262] ibid para 681.

takeover of Gaza – punishing Gazans for their tacit (and by voting – explicit) support of Hamas. Finally, I will work to show that the siege on Gaza is an indiscriminate attack.

The Siege is an Indiscriminate Attack on the Gaza Strip (2.6): What is an indiscriminate attack, and is the siege on Gaza one? An indiscriminate attack is defined by the ICRC as customary IHL Rule 12, stating it is,

> '[a]n attack of a nature to strike military objectives and civilians or civilian objects without discrimination, i.e. an attack which a) is not directed at a specific military objective (or person); b) employs a method or means of warfare which cannot be directed at a specific military objective (or person); or c) employs a method or means of combat the effects of which cannot be limited as required by international humanitarian law. Indiscriminate attacks are prohibited and include: a) an attack by bombardment, by any means or method which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing similar concentration of civilians or civilian objects; [and] b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the tangible and direct military advantage anticipated.'[263]

Indiscriminate attacks are prohibited under AP 1 Article 51(4)[264] and customary IHL Rules 11-12.[265]

I believe that the siege on Gaza is an indiscriminate method of warfare fitting ICRC's Rule 12(A)-(B): It is A) a siege of an entire territory and is not directed at a more specific military objective (Gaza as a whole is not a military base); B) a siege that is employed in such a way that it cannot be directed at a more specific military objective.

---

[263] Henckaerts (n 125) 242.
[264] AP 1 (n 15) art 51(4).
[265] Henckaerts (n 125) 242.

A 'military objective' in this case is not a term synonymous with 'military goal/aim'. Article 52(2) of AP 1 defines a military objective as objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.'[266] In this case, the Gaza Strip is the IDF's 'military objective', which should not be construed as a legitimate military objective given that partial or total destruction of it would mean substantial and excessive loss of civilian life. To avoid being an indiscriminate attack, it would have to be recommended that Israel's siege be directed towards specific military objectives inside Gaza and not the entire territory as any capture or neutralization of this so-called military objective will not offer a definite military advantage. Instead, it opens Israel up to heavier armed resistance, insecurity, a possible armed front in the West Bank, and disproportionate loss of life.

In *Prosecutor v Kupreskic*[267], they stated repeated attacks that cause incidental loss of civilian life, 'all or most of them falling within the grey area between indisputable legality and unlawfulness…might be warranted to conclude that the cumulative effect of such acts entails that they may not be in keeping with international law. Indeed, this pattern of military conduct may turn out to jeopardize excessively the lives and assets of civilians, contrary to the demands of humanity.'[268] Given that the siege, meant to be a temporary method of warfare, has been prolonged and intensified throughout nearly a decade, it could be viewed as equivalent to repeated indiscriminate attacks. Thus, Israel is in breach of AP 1 Article 51(4) and customary IHL Rules 11-12(A)-(B).

Conclusion (2.6): In this chapter, I approached the siege on Gaza as made up of three interlocking blockades, two of which – the naval and land blockades - were found to breach certain customary rules. More importantly, it was envinced that the siege of Gaza is both a

[266] ICRC, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts – Report Prepared by the International Committee of the Red Cross for the 28th International Conference of the Red Cross and Red Crescent, 2-6 December 2003' (24 January 2012) para A <https://casebook.icrc.org/casebook/doc/case-study/icrc-challenges-conflicts-case-study.htm> accessed 21 October 2016; AP 1 (n 15) art 52(2).
[267] *Prosecutor v Zoran Kupreskic et al* (Judgment) ICTY-95-16 (14 January 2000).
[268] ibid para 526.

collective punishment, imposed on the people of Gaza for electing Hamas and continued for their support. It was stated that the naval blockade breached a few customary provisions of the San Remo Manual, notably Articles 94 and 102. In addition it was found that the siege breached AP 1 Articles 51(4) and 54(1) and 54(2), found in customary IHL Rules 12, 53, and 54 respectively. It also breaches two humanitarian treaty-based rules in GC 4 Articles 17 and 23 and the provision of AP 1 Article 70 as custom.

Being a collective punishment it breached customary IHL and treaty provisions found in GC 3 Article 87, GC 4 Article 33, and AP 1 Article 75(2)(d). What I also showed was that the collective punishment of besiegement was also an indiscriminate attack – prolonged and intensified at certain points that we should equate it as repeated indiscriminate attacks – this breaches customary IHL Rules 11-12 and AP 1's Article 51(4).

However, this is only the Hamas-Israel Conflict on one level. On the second, more violent level, are the direct military engagements. I intend to approach one of those militart engagements in the next chapter. What this chapter reveals, though, is that *on this level of the conflict there is a lack of adherence to the core IHL principles of distinction and proportionality*.

Focusing on these principles is the direction the next chapter will venture in when approaching the 2014 Gaza War. Given the constraints of this thesis, all 51 days of the war cannot be analyzed. Instead, the thesis will compress its analysis to a focus on three significant and well-investigated events involving the Israeli conduct of hostilities that draw focus to the principles of distinction and proportionality. I will outline the methods and means used and discuss each Israeli action before applying the relevant LOAC and findings, if any, from UN, Hamas, indepenent, and Israeli investigators.

Chapter 3 – Distinction and Proportionality: Analyzing the Israeli Conduct of Hostilities in the 2014 Gaza War

Introduction (3.0): In regards to Israel's conduct of hostilities in their 2006 war with Hezbollah, UNCIL stated that '[t]he conduct of Israel demonstrates an overall lack of respect for the cardinal principles regulating the conduct of armed conflict, most notably distinction, [and]

proportionality.'[269] As we tackled the besiegement of the Hamas-administered Gaza Strip in the last chapter, what was proven was that the siege of Gaza is both a collective punishment and an indiscriminate attack. Even outside of direct military confrontation, committing these particular acts violates those same cardinal principles of the LOAC breached in Lebanon: distinction and proportionality. It would appear then, that this 'overall lack of respect' for these basic principles found in Israeli actions in Lebanon may also be found in Israeli actions in Gaza, so far proven to exist on the level of besiegement. Does it stretch to the other level of conflict, the conduct of hostilities in Gaza? This chapter aims to prove that it does.

First, these principles will be briefly expounded on. Afterwards, in regards to our case, it must be asked if these same principles were violated in the conduct of hostilities in Gaza in 2014 and how. I will ask 'Which LOAC, customary and treaty-based, do these actions breach, if any?' Suggestions for how Israel could have conducted their hostilities differently to be in accordance with these core IHL principles if they are found to have not adhered to them may be added.

Which actions in this war, though, will be discussed? The hostilities lasted for 51 days, July 8th to August 26th, 2014. I intend to analyze three events involving the Israeli conduct of hostilities that bring attention to the principles of distinction, discrimination, proportionality, and precaution. The first case involves the Israeli shelling of a UNRWA school – the Beit Hanoun Elementary Co-Ed 'A' and 'D' School. The second case involves the IAF toppling of a 9 story tower in downtown Gaza City. The final case relates to the events of August 1st in Rafah, known in Gaza and Israel as Black Friday.

What started this military engagement? The war erupted after a chain of violent individual events. During al-Nakba Day (May 15) protests in Ramallah (the *de facto* capital of the PA), Israeli Border Patrol shot and killed two teenaged Palestinians.[270] On June 12, three teenaged Israeli settlers south of Jerusalem were kidnapped and murdered by an independent cell of Palestinians.[271] This led to IDF incursions (Operation Brothers Keeper) into the West Bank to conduct mass arrests and detentions and in response, Hamas began rocket operations. On July 2,

[269] UNCIL (n 24) para 80.
[270] Jack Khoury, Chaim Levinson, Nir Hasson, 'Two Palestinian Teens Killed at Nakba Day Protest in West' *Haaretz* (15 May 2014) <www.haaretz.com/israel-news/1.590861> accessed 30 November 2016.
[271] Amos Harel, 'Notes From an Interrogation: How the Shin Bet Gets the Lowdown on Terror' *Haaretz* (2 September 2014) <www.haaretz.com/israel-news/.premium-1.613576> accessed 1 December 2016.

a teenaged Palestinian in East Jerusalem was kidnapped and immolated by a group of Israelis. On July 7, the Israeli Knesset agreed to resort to force against Hamas,[272] claiming self-defense. The next day, major hostilities ensued. The war ended with a ceasefire agreement after 51 days on August 26th.

The examination of Israel's conduct of hostilities will be focusing primarily on the targeting of civilian objects and in each event, the facts of the case will be laid out, i.e. the context of the attack, stated targets/military objective, location, timing, damage, etc. After each one, the relevant LOAC (customary and treaty-based) will be applied, with an emphasis on evaluating the event through the lens of the principles of distinction and proportionality. First, these two principles will be briefly conferred.

Distinction and Proportionality (3.0.1): In the conduct of hostilities, civilians may never be a target, lest one violates the principle of distinction. A civilian can be targeted if they are a direct participant in hostilities (DPH). The line between DPH and civilian can be thin in some instances. The MoD uses an example of a civilian working in a munitions factory.[273] That civilian is not a DPH despite contributing to the war effort. That being said, while the civilian may not be a target, the factory he/she is working in is, and the civilian's presence does not shield the objective and give it immunity.[274] Distinction is 'inherent in customary law',[275] codified in AP 1 Article 48. Distinction is so crucial to the existence and application of IHL that it is Rule 1 in the ICRC's customary IHL collection.[276] Just like with personnel, the non-personnel military objective that force is being directed at must be distinguished between military target and civilian object.[277]

The factory mentioned above, for instance, is a legitimate military target. However, if the commander, with the best intelligence and knowledge on the situation he could acquire, attacks and the factory turns out to be of a civilian nature (i.e. the intelligence was false), then he is not

[272] Barak Ravid and Gili Cohen, 'IDF to Call Up 1,500 Reservists as It Prepares for Gaza Escalation' *Haaretz* (7 July 2014) <http://www.haaretz.com/israel-news/1.603600> accessed 1 December 2016.
[273] MoD (n 108) 24.
[274] AP 1 (n 15) art 51(7).
[275] MoD (n 108) note 10.
[276] Henckaerts (n 125) rule 1.
[277] ibid rule 7-10.

in breach of this principle. Evidence of a breach must be based on the information that that commander had and whether another reasonable commander would have made the same decision. If the factory is attacked, the collateral damage incurred as a result is meant to be controlled by the principle of proportionality.

The principle of proportionality is found in customary IHL Rule 14. A disproportionate act defined and precluded by AP 1 Article 51(5)(b), as an indiscriminate 'attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.'[278] An act is also disproportionate if it does not take proper precaution, and these provisions are found in AP 1 Article 57. Customary provisions on precautions in attacks are found in customary IHL Rules 15-21 and rules on precautions against the effects of attacks are found in Rules 22-24.

When approaching the events in this chapter, the necessary precautions will be further outlined (timing, methods and means, etc) when evaluating each one to better understand whether a breach occurred. Israel has a unique number of precautionary measures at its disposal like 'roof-knocking' and calling people on the phone to warn them their home is a target.[279] Other precautions used, like the timing of an attack or the means and methods used will be discussed when evaluating each action.

The Conduct of Hostilities - Targeting UNRWA Schools (3.1): The first case examined is the attack on the Beit Hanoun Elementary Co-Educational 'A' and 'D' School, located in Beit Hanoun, which is a Palestinian city on the northeastern most corner of the Strip, where 90% of the residents are refugees. The following information was provided by the UN Board of Inquiry on Gaza (hereafter the Board of Inquiry), reported in their 'Summary by the Secretary-General of the Report of the United Nations Headquarters Board of Inquiry into Certain Incidents that Occurred in the Gaza Strip between 8 July 2014 and 26 August 2014'.

Before the attack,

[278] AP 1 (n 15) art 51(5)(b).
[279] MFA Israel, 'IDF Conduct of Operations during the 2014 Gaza Conflict' (14 June 2015) para 313 <http://mfa.gov.il/ProtectiveEdge/Documents/IDFConduct.pdf> accessed 4 December 2016.

> Portions of Belt Hanoun, including the school, fell within the so-called 'buffer zone' that was created by the IDF during Operation Protective Edge. During the Operation, the area surrounding the school was particularly dangerous and, as hostilities intensified, the entire area was exposed to fierce combat. As a result of the mass displacement of civilians and their need for shelter, UNRWA designated the school as an emergency shelter on 18 July.[280]

After July 18, the UNRWA estimated 2,000-4,000 internally displaced persons (IDPs) had sought shelter. The situation before the attack was as such: the school always had at least one guard on shift and the school was closed off at night, surrounded by a wall with access through one gate, and the IDF refused the UNRWA access to the school to deliver food and water.[281] Was there militant activity in the area? According to the IDF, yes. The Coordination and Liaison Administration (CLA) called the school a few days before the attack and told officials to evacuate the school as there was immediate rocket fire launching not just around the school, but from within the school, and the IDF wanted to strike.[282] Those being sheltered reported that they witnessed no military activity in or around the school (although launches could be heard from a distance).[283]

A day before the attack, the ICRC visited the school in an attempt to evacuate all those being sheltered but only 50 fled with them.[284] That night, gunfire hit the school and shelling occurred in the vicinity while the CLA made another call to the UNRWA urging the evacuation of the school.[285] On the morning of the attack on July 24, most IDPs, sensing the war had been winding down decided to go home and 450 folks were left.[286] The UNRWA evacuated its own people and asked the CLA to put off any attack until all IDPs had evacuated but the CLA denied

[280] Report of the Secretary General, 'Summary by the Secretary-General of the Report of the United Nations Headquarters Board of Inquiry into Certain Incidents that Occurred in the Gaza Strip between 8 July 2014 and 26 August 2014' (2015) UN Doc S/2015/286 (Board of Inquiry Report) para 26.
[281] ibid para 28.
[282] ibid para 27.
[283] ibid para 29.
[284] UNHRC 'Report of the Detailed Findings of the Independent Commission of Inquiry Established Pursuant to Human Rights Council Resolution S-21/1427' (24 June 2015) UN Doc A/HRC/29/52 (UNCIG) para 427.
[285] Board of Inquiry Report (n 280) para 29.
[286] ibid para 30.

this request and the UNRWA noted that it told the CLA that the school, whether empty or not, is a civilian object and must not be attacked.[287]

Later that morning, all IDPs decided to evacuate once two Beit Hanoun municipal officials, on request of the CLA, told residents that the school is not safe.[288] Everyone gathered in the courtyard and awaited for buses at the gate. At this point, the UNRWA was told of the IDF's plans by a field commander that the IDF 'was going to target a cluster of four other schools in Belt Hanoun, 800 meters away from the Elementary Co-educational "A" and "D" School' but that they too were sitting on a 'Hamas arsenal and that UNRWA should evacuate any people from them.'[289] Those with the knowledge most likely figured the school itself was not the target but that attacks would be extremely close by and perhaps IDF would incur into the school to remove the alleged Hamas arsenal. As the IDPs gathered in the courtyard for evacuation with the UNRWA and ICRC, the attack occurred.

> At approximately 15:00 hrs on 24 July, the school was hit by indirect artillery fire. At least two 120 MM high explosive (HE) mortar projectiles struck the school, one hitting the middle of the schoolyard and a second hitting the steps in front of the school's entrance. Between 12 and 14 residents were killed and 93 injured, some severely. No major damage was done to the school. The Board found that the incident was attributable to the IDF.[290]

The Guardian's journalists on the ground reported higher figures: 15 dead, 200 injured.[291] According to journalist Peter Beaumont, 'The Israeli military first claimed, in a text sent to journalists, that the school could have been hit by Hamas missiles that fell short,' and later on 'Lieutenant Colonel Peter Lerner [wrote in an email] "In the matter of the Beit Hanoun school, the IDF encountered heavy fire in vicinity of the school, including anti-tank missile[s]. We later

[287] Board of Inquiry Report (n 280) para 30.
[288] UNCIG (n 284) para 427.
[289] ibid para 428.
[290] Board of Inquiry Report (n 280) para 32.
[291] Raya Jalabi, Tom McCarthy and Nadja Popovich, 'Gaza Crisis: A Closer Look at Israeli Strikes on UNRWA Schools' *The Guardian* (8 August 2014) <www.unrwa.org/newsroom/features/guardian-newspaper-report-israeli-strikes-unrwa-schools> accessed 1 December 2016.

determined that an errant mortar did indeed land in the empty courtyard of the school, backing this up with video evidence.”’[292]

While there on the scene, Beaumont reported, ‘There was no visible evidence of debris from broken Palestinian rockets in the school. The injuries and the number of fatalities were consistent with a powerful explosion that sent shrapnel tearing through the air, in some cases causing traumatic amputations.’[293] Did just one ‘errant mortar’ strike the school? The Board, as stated, reported ‘at least two’ mortars, but American independent journalist Max Blumenthal when walking through the school days later found ‘a classroom pierced and scorched by an Israeli airstrike’.[294] According to the UN Commission of Inquiry on Gaza (UNCIG), ‘[A]ll witnesses interviewed by the commission said that there were at least four successive strikes.’[295]

Afterwards, according to the Board,

> The Government of Israel stated that the CLA had made extensive attempts via UNRWA and the ICRC to evacuate the school in order to minimize the risk of incidental harm to civilians as a result of the intensive fighting in the area. It also stated that the school had not been the object of the attack. It further informed the Board that, *as a result of fact-finding carried out by the IDF, there existed ‘grounds for a reasonable suspicion that the incident involved a deviation from IDF regulations’* and that the [MAG] had ordered a criminal investigation into the incident (emphasis added).[296]

The IDF, later on a blog post, stated that the reason civilians were unable to evacuate the school was because Hamas physically stopped them.[297] According to human rights groups who

[292] Jalabi (n 291).
[293] ibid.
[294] Blumenthal (n 91) 134.
[295] UNCIG (n 284) para 430.
[296] Board of Inquiry Report (n 280) para 33.
[297] UNCIG (n 284) para 430

investigated[298] and investigations of the UNCIG and UN Board of Inquiry, this is contrary to witnesses both civilian and medical/UN personnel.[299]

Let us now apply the relevant LOAC to uncover any breaches and discuss whether the attack adhered to the principles of distinction and proportionality and why.

The Application of LOAC to the Attack on Beit Hanoun Elementary (3.1.1): To approach this action, it is imperative that we apply a framework that defines the nature of the military objective the IDF sought, its lawfulness, its purpose, location, to prove whether or not the principles of distinction and proportionality were adhered to and whether a breach of IHL obligations occurred. Was it a civilian or military object that was attacked? Did the military objective change the nature of the object attacked, i.e., did the alleged presence of weapons in the school remove its immunity from attack? If not, did Israel ignore its obligation of distinction? Was the means of response (using 120mm mortars) to the Hamas fire allegedly coming from around the school and to the alleged existence of a Hamas weapons cache proportional to the definite military advantage expected? Did the IDF take the necessary humanitarian precautions prior to the attack? Would a reasonable commander, with the same intelligence and in the same context, do the same thing? The IDF stated the attack was caused by accident, 'an errant mortar'; does this matter?

The AP 1's provision on military objectives – Article 52(2)[300] - was stated in 2005 by the Eritrea-Ethiopia Claims Commission (EECC) as 'widely accepted as an expression of customary' IHL.[301] Article 57(2)(a)(i) expresses that commanders must 'do everything feasible' to make sure that the objectives struck fit the definition of military objective in Article 52(2). Does the UNRWA school qualify as a military objective? The nature of the objective is meant to be determined by 'its intrinsic nature', in other words, contains an 'inherent attribute which *eo ipso* makes an effective contribution to the military action'.[302]

---

[298] HRW, 'Israel: In-Depth Look at Gaza School Attacks' (11 September 2014) <www.hrw.org/news/2014/09/11/israel-depth-look-gaza-school-attacks> accessed 1 December 2016.
[299] UNCIG (n 284) para 429.
[300] See Section 2.6.
[301] Dinstein (n 42) 90.
[302] ibid 96.

In our case, the objective here was a school being used as an official UN emergency shelter. It is indisputably a civilian object. The IDF confirmed to the UNRWA that a strike on the school was imminent as it was 'sitting on a Hamas arsenal' and they also planned to strike four other schools 800 meters away. If such a civilian object, however, were to be used by Hamas 'in a manner making an effective contribution to military action' then it would become a military objective.[303] The presence of weapons could be construed as making an effective contribution to their war effort.

I contend that the school was a legitimate military objective and therefore an lawful target. The UNRWA found weaponry at three other UNRWA schools – not the Beit Hanoun one in question[304] -- but IDF intelligence must have confirmed that all of them had weaponry. Since there were ended up being no weapons present and since Hamas was not using the school for any purpose, let alone 'in a manner making an effective contribution' to the war effort, at any time the UNRWA was operating at the school, the IDF acted off bad information and all things considered, should not have targeted it. However, weapons are a legitimate target,[305] and the commander acted off what is presumed to be the best information available. Was there ever any doubt? AP 1 Article 52(3) states, 'In case of doubt whether an object which is normally dedicated to civilian purposes, such as…a school, is being used to make an effective contribution to military action, it shall be presumed not to do so.'[306] This would mean Israel targeted the school, thinking that without a doubt, the compound was being used as weapons storage, and thus must be considered lawful to target.

We are to presume that the IDF executed its plan with the best intelligence at its disposal, and that they believed the presence of weapons was definite and that it removed the school's immunity from attack. This does not mean, however, that the commander did everything feasible to make sure it fit the criteria of a military objective, since the intelligence turned out false. This is required under Article 52(2) of AP 1. What could the commander have done differently? There were multiple opportunities when in contact with the UNRWA to make

[303] Dinstein (n 42) 96.
[304] UNCIG (n 284) para 444.
[305] MoD (n 108) 57.
[306] AP 1 (n 15) art 52(3).

sure there was a Hamas arsenal present in the school during its many phone calls from the CLA and when the commander himself called to let the UNRWA Gaza Office know of the cluster of schools being attacked hundreds of meters away. A simple solution - if voice confirmation from a trusted neutral official would not be enough - would have been a video call.

The IDF also claimed after the attack that Hamas refused to allow people to evacuate, did the IDF then believe Hamas members were present at our outside the school's compound? This certainly would have removed all doubt and would have solidified the nature of the objective as military. Whether the IDF believed this at that time is unknown, but presents a situation where the IDF commander may not have done everything feasible to determine that that normally civilian object was now a military objective, in breach of AP 1 Article 52(2).

Dinstein states that as long as the objective in question continues to perform its normal functions, then it 'must not' be considered a military objective.[307] With no weapons or Hamas members present, the partial or complete capture, destruction, or neutralization of the school would not present the IDF with a definite military advantage, which is defined specifically as ' a concrete and perceptible military advantage', not a 'hypothetical or speculative one'.[308] The Commentary to AP 1 states, 'Those ordering or executing the attack must have sufficient information available to take this requirement [of definite military advantage] into account.' Given the lack of Hamas weapons and their members, the information held by the attack's executor could not have been sufficient. Whether intended or not, by attacking the undefended school, containing no weapons, Israel violated customary rules on the principle of distinction and the above AP 1 treaty provisions accepted as custom, including Article 59(1), which prohibits attacks 'by any means whatsoever, [on] non-defended localities'.[309]

The questions now relate to the means of response and the damage caused. The UNCIG's investigation concluded, 'Mortars are also considered as an area weapon which, if used in a built up, densely populated area, are likely to strike military objectives and civilians without distinction… Combined with the impact of the blast and fragmentation effects, this type of

[307] Dinstein (n 42) 98.
[308] MoD (n 108) 56.
[309] This language is found in Hague IV Annex (n 128) reg 25, see Dinstein (n 42) 108.

weapon may injure or kill persons several hundred meters from the object of the attack.'[310] The 120 mm mortar is a high explosive ordnance, which when used in the context of a densely populated area, may constitute an indiscriminate attack as it's a 'means of combat which cannot be directed at a specific military objective'.[311] Firing 'imprecise missiles', in this case 120mm mortars, 'against military objectives located near, or intermingled with, civilian objects' qualifies as an indiscriminate attack.[312] It may also have been contrary to AP 1's Article 57(2)(a)(ii).[313]

The presence of a large group of IDPs, reported to be 450 at the time of attack, also raises questions whether the means of response was lawful and proportionate. Given the weapon used and the large civilian presence outside of the school at the time, the IDF could not have reasonably believed that the incidental injury and loss of life would not be excessive in relation to the tangible and direct military advantage anticipated. Of course, as Dinstein reminds us, just because civilians were present does not mean that what the IDF labeled as a military objective stops being a military objective.[314] That being said, the rule does forbid attacks against 'impeccably lawful targets owing to the envisaged disproportionate injury/damage' to civilians and civilian objects.[315] Any excessive attack would be a breach of AP 1 Article 51(5)(b) but it's important to note that 'excessive' damage does not mean 'any'[316] and that the 'yardstick of proportionality' is much more difficult to ascertain than simply 'crunching numbers of causalities and destruction'.[317] Crunching the numbers would actually inform us that 3% of the civilians present lost their lives, or 0.3% of the original group of IDPs. I cannot construe this as excessive or disproportionate. The injured, though, total 44% of the IDPs present, as reported by the Guardian. This, I believe, is excessive.

Did they take proper precautionary measures, though? Israel did take serious and extensive precautions before striking, warning the UNRWA about an imminent strike days in

---

[310] UNCIG (n 284) para 410.
[311] AP 1 (n 15) art 51(4).
[312] Dinstein (n 42) 128.
[313] '(2) With respect to attacks, the following precautions shall be taken: (ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.'
[314] Dinstein (n 42) ibid 129.
[315] ibid.
[316] ibid 131.
[317] ibid 130.

advance. The ICRC also attempted its own evacuation but most IDPs ignored this. The CLA and IDF had been in frequent contact with the UNRWA and while the IDF did refuse an extension of time for a final evacuation, there were plenty of ample opportunities prior to the event, including when almost 3,800 of the original 4,200 residents of the school went home the morning of the attack. However, this does not remove Israel's responsibility to those 450 civilians.

Had the IDF extended that window of opportunity for the UNRWA (despite having given them 3-4 days), the incidental injuries and loss of life would have been substantially lower – possibly non-existent. AP 1 Article 57(2)(b) states that it is required to suspend or re-plan an attack in the event an attack 'may cause incidental loss to civilian life',[318] which given the presence of 450 civilians in a schoolyard, may have been required. If there is an option, or multiple options, which provide lower collateral damage, AP 1 Article 57(3) requires a commander to choose the option that causes the least damage.[319] While the article states this for situations where a commander is choosing between attacking multiple military objectives, it should not be restricted to such. If a single attack can cause differing amounts of damage depending on the timing, then the time that causes the least amount of collateral damage should be chosen. In fact, by attacking after civilians left the compound, the commander truly would have done everything feasible to assure that civilian object was a military object, since it would no longer be functioning as normal and all doubt on whether it is a military objective would be removed. By not doing so, several customary rules were breached.

Was the strike a mistake caused by 'an errant mortar' and thereby an accident? Are breaches absolved by accidents? Civilian death in war is expected but what IHL seeks to do is limit it as much as possible. There were a number of factors in this case which offers a perspective that the strike was a mistake. It was launched on faulty intelligence. In addition, as noted by the UNCIG, the 120mm mortar can tend to stray from its intended target, but given the human component of a mortar launcher, human error may have also played a role. Mistakes 'do

[318] AP 1 (n 15) art 57(2)(b).
[319] ibid art 57(3).

not in themselves establish liability' under the LOAC,[320] so it may be difficult to seek accountability for this event.

While the principle of distinction can be argued to have been ignored by the IDF in this event, the incidental loss of life was not disproportionate to the military advantage *anticipated.* I expect that the IDF anticipated that the destruction of the cache and the squads fighting in the vicinity would lead to a better foothold for their troops incurring into Beit Hanoun. To argue otherwise, we would have to show that the commander acted contrary to good faith and the ICTY's jurisprudence states it is necessary, in order to prove disproportionality, to show that a 'reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian causalities to result from the attack'.[321] I believe any other reasonable commander would have launched the same attack.

The Conduct of Hostilities – Targeting Commercial Skyscrapers in Gaza City (3.2): A few days prior to the attack on the UNRWA school in Beit Hanoun, on July 21, the IDF brought down a 9 story high rise tower in the center of Gaza City, known as Al-Salam Tower. This high rise contained commercial office space and apartments. The UNCIG set up by the UN Human Rights Council conducted a thorough investigation of the event.

The entire Al-Kilani and Derbass families were killed in the attack, totaling 11 (including 5 young children, all from the Al-Kilani family).[322] A relative explained to the UNCIG how both families ended up in Al-Salam Tower because the IDF dropped leaflets on their city of Beit Labiya telling them to go to the center of the Strip and since Inas Derbass's employer had an office in the tower,[323] they sought shelter on July 19th.[324]

> On 21 July, at around 8 p.m., the nine-story Al Salam tower…was bombed […] It appears that a member of the Al Quds Brigades [the military wing of Palestinian Islamic

[320] Dinstein (n 42) 136.
[321] *Prosecutor v Stanilav Galic* (Judgment) IT-98-29-T, para 58
[322] UNCIG (n 284) para 168.
[323] ibid para 169.
[324] ibid para 170.

> Jihad, or PIJ], who was on the fourth floor, was also killed. The rest of the building was empty except for the family of Abdul Karim Madder, a lawyer on the second floor, all of whom escaped before the upper floors collapsed[325] […] [T]hey were gathered for *iftar* [Ramadan dinner] when the sixth floor of the tower was struck causing the upper floors to collapse on the lower floors. One witness told the commission that he did not see the tower being hit but he heard what he thought were two missiles being fired. Another witness said he heard aircraft on the day of the attack in the area.[326]

The tower was hit by 'a JDAM equipped 500 lb bomb, likely inert, as that would ensure the collapse of the floors while minimizing collateral damage.'[327] Multiple witnesses who worked at and around the tower stated that there were no warnings given by the CLA or IDF prior to the strike and that there was no visible militant activity in the building's vicinity.[328] The MAG revealed the target was a senior commander of the PIJ and that he had been in and out of the building in the days leading up to the attack.[329]

The MAG released a statement about the strike, stating that it 'complied with the principle of proportionality, as at the time the decision was taken, it was considered that the collateral damage expected from the attack would not be excessive in relation to the military advantage anticipated from it, and this assessment was not unreasonable under the circumstances.'[330] The precautionary measures taken by the IDF 'included, inter alia, the choice of munition[s] to be used, and the method according to which the attack was carried out.'[331] Unlike the first case of the Beit Hanoun school, the MAG did not order a criminal investigation.

Let us now apply the relevant LOAC to uncover any breaches and discuss whether the attack adhered to the principles of distinction and proportionality and why.

---

[325] UNCIG (n 284) para 168.
[326] ibid para 170.
[327] ibid para 171.
[328] ibid para 172.
[329] ibid para 168, 172.
[330] ibid para 174.
[331] ibid.

The Application of LOAC to the Attack on Al-Salam Tower (3.2.1): When approaching this particular attack, I will applying a similar framework to the Beit Hanoun school case, as the object struck in this situation too was typically a civilian object - a residential/commercial building. Therefore I will define the nature of the military objective, its lawfulness, its purpose, and location to prove whether or not the principles of distinction and proportionality were adhered to and whether a breach of IHL obligations occurred. Was the Al-Salam Tower, a civilian object, the target or was the military commander of PIJ the military objective? Did Israel ignore the principle of distinction by attacking a residential/commercial building? Was the means (a JDAM equipped with a 500lb MK-82) utilized in this targeted killing proportional to the definite military advantage anticipated? Did the IDF take the necessary humanitarian precautions prior to the attack? Would a reasonable commander, with the same intelligence and in the same context, do the same thing?

As stated in the first case, Article 57(2)(a)(i) expresses that commanders must 'do everything feasible' to make sure that the objectives targeted fit the definition of military objective in Article 52(2). The military objective in this case was a battalion commander[332] for the PIJ's Al-Quds Brigade, a belligerent party to hostilities, allied with Hamas's Al-Qassam Brigades. He was inside of a civilian object, Al Salam Tower, at the time of attack. His consistent presence in the tower recorded by the IDF over several days suggests that the status of civilian object was removed. His status as military objective meant the IDF expected his death to provide a definite military advantage. Those involved directly with guiding armed forces can be lawfully targeted, 'even individually'.[333] It would appear the provisions above were adhered to.

Did the IDF 'take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects'?[334] The timing of the attack occurred in the late evening around 8pm, and the MAG claimed that based on intelligence there would be no civilians

[332] His name was Sha'aban Dachdouch, see MAG Corps Command, 'Decisions of the IDF MAG Regarding Exceptional Incidents that Allegedly Occurred During Operation "Protective Edge" - Update No 4' (11 June 2015) <www.law.idf.il/163-7353-en/Patzar.aspx> accessed 3 December 2016.
[333] Dinstein (n 42) 107.
[334] AP 1 (n 15) art 57(2)(a)(ii).

present.'[335] Since two families met their demise in the attack, we know that the intelligence was faulty. The IDF must have been aware that Ramadan fell under the month of July that year and that civilians were bound to be gathered together around those hours when their fast comes to an end. That being said, choosing that time was, I believe, the best choice. The IDF had dropped leaflets informing Gazans to move to the center of Gaza City and since a lawful target appeared in that area, they had to choose a time to strike where the least amount of civilians would be milling around outside and indeed, *iftar* would mean that civilians would be inside their homes and not walking the streets. However, regardless of the families' presence in Al-Salam, the IDF chose a means of attack that would minimize incidental loss of civilian life if they were present: precision guided munitions (PGM).

Dinstein says that if attacking a small target is planned in a densely populated area, like in our case, then 'the only *modus operandi* minimizing expected collateral damage to civilians may be the employment of PGM'. PGM are externally guided (or by sensors) and come in a range of weights, from 500lb to a ton. The smallest, the 500lb MK-82, was chosen in our case. It must be noted, though, that using a PGM is not a duty in urban settings nor is it the only option for countries rich enough to be equipped with the weapon.[336] It is, however, preferred in that a PGM has a smaller explosive charge and size than a non-PGM,[337] can be used in any weather conditions and has an 'unprecedented 95% accuracy.'[338] By using the tactical JDAM in this attack, the IDF was adhering to the principle of distinction.

Did the attack violate the principle of proportionality? The MAG stated, 'The attack complied with the principle of proportionality, as at the time the decision was taken, it was considered that the collateral damage expected from the attack would not be excessive in relation to the military advantage anticipated from it, and this assessment was not unreasonable under the circumstances.' Considering that the strategic strike which hit the 4th floor where the PIJ commander was located did not injure the Al-Kilani and Derbass families only reinforces the

[335] MAG (n 332).
[336] Dinstein (n 42) 142-143.
[337] ibid.
[338] Ryan Hansen, 'JDAM Continues to be Warfighter's Weapon of Choice' (17 March 2006) <www.af.mil/news/story.asp?storyID=123017613> accessed 3 December 2016; USAF, 'Factsheet: Joint Direct Attack Munition GBU- 31/32/38' (21 November 2007) <www.af.mil/information/factsheets/factsheet.asp?fsID=108> accessed 3 December 2016.

MAG's statement. The civilian deaths occurred since, unexpectedly, the top floors collapsed. The UNCIG cited a video showing a lawyer located just a few floors below the PIJ commander escaping down the stairwell, making it to safety before the upper floors collapsed.[339] This suggests there was a long enough duration of time between the strike and the collapse for those remaining to escape. Although the loss of life is tragic in that two complete families perished after heeding precautionary leaflets, the JDAM itself did not cause the incidental loss of life. It did however, cause enough damage on the 5th floor to cause the upper floors to fall in on themselves. Leveling the building for one small target was never the intention of the strike and any reasonable commander with the same intelligence, I believe, would have made the same decision.

Article 57(2)(c) states 'effective advance warning shall be given of any bombardment, unless circumstances do not permit this'. This provision is custom, embodied in Hague Regulation 26.[340] As the UNCIG reported, 'Three witnesses interviewed by the commission, who either work at the tower or close to it, were not aware of any warning issued before the attack.' This is certainly a breach of Israel's IHL obligations in regards to giving effective advance warning before the strike. The IDF, aside from roof-knocking,[341] also is known to call Gazans and warn them that their home is a target and that they should flee. This method of effective advance warning should have been implemented in this case, as two families who heeded a prior effective advance warning accidentally sought safety one floor above a senior combatant marked as a target and could have made it to safety in a timely manner that would not have compromised the mission. Whether circumstances prevented an effective advanced warning or not is not clear as nowhere in either the MAG investigation or UNCIG report is it mentioned. Aside from a breach of Article 57(2)(c), the action appears to have adhered to the principles of distinction and proportionality and was indeed lawful.

The Conduct of Hostilities - Indiscriminate Targeting in Rafah (3.3): On August 1st in the southernmost Gazan city of Rafah, on the border with Egypt – home to over 150,000 people, the

[339] UNCIG (n 284) para 168.
[340] Oeter (n 126) 196.
[341] MFA Israel (n 279).

events that came to be known as 'Black Friday' unfolded. The attacks came in response to the rumored kidnapping of an IDF officer, Lieutenant Hadar Goldin after a surprise Al-Qassam Brigades ambush killed two IDF officers. The Israelis said the ambush occurred after a 8:00 ceasefire went into effect and so hostilities were able to resume[342] and the US called the ambush a 'barbaric violation' of the ceasefire.[343] The Al-Qassam Brigades Twitter feed, however, boasted of the attack before the ceasefire, at 6:22.[344]

When Colonel Winter received word that Goldin was missing, he enacted the IDF General Staff Directive for Contending with Kidnapping Attempts, frequently called the Hannibal Directive, as 'Hannibal' is the code-word used to enact the directive. He made the announcement at 9:36 that morning and began mobilizing his forces towards Rafah.[345]

The Hannibal Directive was created exactly 30 years ago and is used to impede any effort to kidnap a soldier as that provides the enemy with a major bargaining chip. An example of that is the Gilad Shalit affair. His return from Gaza in 2011 (after his 2006 capture) was in exchange for over 1,000 Palestinian political prisoners. The Hannibal Directive forces all fire to be directed towards the kidnappers, even if it kills the captured person, although officially, the directive clarifies that it does not 'call for the killing of captured soldiers.'[346] The soldier in charge of finding Goldin, however, stated, 'I told [a fellow soldier] you identity [anyone] you shoot. Even if this means killing [Goldin] – this is what you do. Painful as it is, it's better this way.'[347] While Holdin was dragged away into a tunnel, he was left there to die and discovered shortly after by those ordered to locate him, yet the MAG did not state this until the following evening on August 2nd.[348] 'In a matter of hours, at least five hundred artillery shells and hundreds of missiles were dumped on [Rafah], almost entirely in civilian areas.'[349]

According to the UNCIG,

---

[342] UNCIG (n 284) para 350.
[343] Blumenthal (n 91) 97.
[344] ibid 95.
[345] UNCIG (n 284) para 357.
[346] ibid para 360.
[347] Blumenthal (n 91) 99.
[348] ibid 96.
[349] ibid 98.

> [T]he IDF fired over 1000 shells against Rafah within three hours and dropped at least 40 bombs. Tanks and bulldozers demolished dozens of homes. Inhabitants came under intense attacks in their homes and in the streets. Witnesses reported to the commission that dozens of homes were destroyed by IDF bulldozers. Ambulances and private vehicles trying to evacuate civilians from the fighting were also hit. As a result of the operation, virtually every person or building in Rafah became a potential military target. Families gave accounts of dividing their children into separate groups before fleeing their homes, in the hope that only one group might be fired on and the others would survive.[350] […] According to eyewitnesses, two missiles struck the Al Najjar hospital, which caused destruction to some of the infrastructure such as the windows, doors and the air conditioning system. Ambulances were also hit.[351]

In total, 121 died with over 80 being civilians, according to Blumenthal,[352] although the UNCIG puts the total at 100.[353] The fire was so uncoordinated and indiscriminate, even a soldier yelled into his radio, 'Stop firing like morons!' and Lieutenant Colonel (Lt Col) Eli Gino shouted, 'You're shooting like retards. You'll kill one another. Enough!'[354] After apparently taking a Gazan down, Gino ordered a soldier to 'give him another shell.'[355]

Let us now apply the relevant LOAC to uncover any breaches and discuss whether the attack adhered to the principles of distinction and proportionality and why.

The Application of LOAC to Black Friday (3.3.1): As we look to apply the relevant LOAC to the events of Black Friday in Rafah, we must first define the military objective being sought and its lawfulness. Then we must ask about the objects attacked: What was hit? Were civilian objects hit by accident or were they targeted? Was the military objective achieved? Did the military

[350] UNCIG (n 284) para 352.
[351] ibid para 355.
[352] Blumenthal (n 91) 101.
[353] UNCIG (n 284) para 356.
[354] Blumenthal (n 91) 100.
[355] UNCIG (n 284) para 357.

objective change the nature of the objects attacked, i.e., did the alleged kidnapping of an IDF soldier remove civilian immunity from all objects attacked? If not, did Israel ignore its obligation of distinction? What about the principles of proportionality and precaution? Was the means of response (800 artillery, naval, and tank shells, 250 mortars, F16 airstrikes, and Hellfire missile-equipped drone strikes) to the alleged kidnapping of Goldin proportional to the definite military advantage anticipated? Did the means of response follow the principles of distinction and discrimination? Did the IDF take the necessary humanitarian precautions prior to the attack? Would a reasonable commander, with the same intelligence and in the same context, have done the same thing? Lt Col Gino stated after the attack, 'When they kidnap a soldier, all means are kosher, even if it exacts a price',[356] is this true from an IHL standpoint? Is the Hannibal Directive lawful under IHL? If so, was it lawfully used in Rafah?

First, let's define the military objective and its lawfulness. The military objective was the group of combatants who kidnapped Lt Goldin. The definite military advantage anticipated was the prevention of the capture of Goldin, not necessarily his rescue. By enacting the Hannibal Directive, the heavy fire was meant to either frustrate and hinder the kidnapping or on the other hand, meant to neutralize the combatants and end the kidnapping attempt. 'Preventing the capture or freeing a soldier from captivity may be conceived as a concrete and direct military advantage, albeit of a limited nature, since the loss of one soldier in a large army such as the IDF does not reduce its military capability.'[357] Whether Goldin would be alive at the end was not the issue, 'painful as it is,' as stated according to an IDF officer.[358]

Is this a lawful military objective? No, I contend that it was not a lawful military objective. Combatants are a lawful target, even individually as discussed in Section 3.2.1. However, this group of combatants did have with them an *hors de combat* and therefore could not be subject to attack.[359] Given that the Hannibal Directive was 'highly likely to result in the

[356] UNCIG (n 284) para 361.
[357] ibid para 369.
[358] Blumenthal (n 91) 99.
[359] An *hors de combat* must never be targeted and this prohibition is a 'long-standing rule of customary international law', found in Hague IV Annex (n 128) reg 23 and even in earlier sources of law. Lt Goldin was an *hors de combat* under the ICRC customary IHL Rule 47(a), as he was in the hands of an adverse party.

soldier's death it further reduce[d] the concrete and direct military advantage.'[360] AP 1 Article 52(2) states that the destruction or neutralization of the military objective must provide a '*definite* military advantage (emphasis added).'[361] As stated in Section 3.1.1, this advantage cannot be speculative or hypothetical. I believe Goldin's death would have erased any definite military advantage but, as the UNCIG points out, the IDF took 'into account the strategic consideration of denying the armed groups the leverage they could obtain over Israel in negotiations for the release of the captured soldier.'[362] I support the UNCIG's statement on the IDF's stance, that it is an 'erroneous interpretation' of IHL that erodes the proportionality principle of its protective scope. The amount of leverage given to Hamas for capturing a soldier is entirely up to the Israeli government.

Thus, the military objective was not lawful for several reasons: Goldin's status as *hors de combat* when captured should have prevented any attacks from being targeted in his immediate vicinity. If we accept that the incidental loss of his life would not be disproportionate to the military advantage anticipated, it still is not lawful. Hindering his capture was for political advantage, not a concrete and definite military advantage, as his retrieval offers very little gain for such a large military and his death only prevents leverage on a political level. 'A potential political outcome is not an admissible consideration in assessing the character of the object as a military objective.'[363] Goldin's capture would change Hamas's negotiating attitude in the war and probably give them leverage for ceasefire conditions, and the IDF was hoping to prevent this when targeting Goldin's captors. "'Forcing a change in the negotiating attitudes" of the enemy cannot be deemed a proper military advantage.'[364] Finally, attacking a military objective is unlawful if it is expected to be excessive in collateral damage and as we will uncover going forward, it should have easily been expected in this case.

It should now be noted that while the Hamas combatants holding Goldin were the target, their location was unknown to the IDF. So what was hit? Vehicles both medical and civilian were struck. Since it was in relation to the Hannibal Directive, the IDF must have been targeting

[360] UNCIG (n 284) para 369.
[361] AP 1 (n 15) art 52(2).
[362] UNCIG (n 284) para 369.
[363] Dinstein (n 42) 93.
[364] ibid.

these vehicles to stop Goldin's captors from making off with him. Civilian vehicles may never be hit but as soon as they are repurposed for the war effort, they may be. However, according to investigators, '**all** vehicles appear to have been targeted, irrespective of their civilian or military use.'[365] This is a major deviation from the principle of distinction.

This is also a serious breach of other IHL obligations: it is indiscriminate as the attacks were not directed at a specific military objective - AP 1 Article 51(4)(a); it is prohibited to attack civilian and military objectives without distinction under AP 1 Articles 48 and 51(2); attacking all civilian vehicles can be construed as a direct attack on civilians and civilian objects, contrary to AP 1 Article 51(4)(a) and Article 52(1) respectively; in case of doubt, which there must have been if *all* vehicles were targeted, the object in question must remain in its civilian status, under AP 1 Article 52(3); medical personnel are provided special protection embodied in GC 1 Article 24 and attacking ambulances without actually knowing if they contained combatants is a breach AP 1 Articles 51(1)-(4)(a) and 52(2).

The attacks on both civilian and medical vehicles also breaches the provisions of Article 51(5)(a)-(b). These treaty provisions are also found in the ICRC customary IHL collection. The following rules were breached by attacking all civilian and medical vehicles: Regarding lack of distinction between military and civilian object – customary IHL Rules 1, 6, 7, 8, 9, and 10[366] were breached; Regarding the indiscriminate nature of the disproportionate strikes – customary IHL Rules 11, 12(a)-(b), 13, and 14;[367] and finally regarding the special protection afforded to medical personnel and the attacks on their ambulances – Rules 25, 28, and 29.[368]

Israel has responded to criticism regarding the above discussion on their targeting of all civilian vehicles, saying that it is impossible for them to prove, after they have struck, that the object was no longer civilian. 'In the context of wide-scale military operations, it is often extremely difficult to provide evidence demonstrating exactly why certain structures were damaged. While the IDF targets only military objectives, forensic evidence that a particular site

[365] UNCIG (n 284) para 365.
[366] Henckaerts (n 125) 241-242.
[367] ibid 242-243.
[368] ibid 244.

was used for military purposes is rarely available after an attack.'[369] This should not be considered a valid excuse. Evidence that the particular site attacked was being used militarily and was no longer civilian in nature should be absolutely confirmed upon execution of the attack. When and if there is any doubt, the LOAC requires the commander consider the object civilian and therefore, not attack.[370]

Did Israel take the proper precautions by issuing effective advanced warnings to the civilians in Rafah? Yes, according to the MAG,

> After the resumption of hostilities following a ceasefire violation by Hamas and the attempted kidnapping of an IDF officer, the IDF warned the residents of Rafah through telephone calls and text messages that 'due to the IDF's increased operational activity against militants, you are asked to remain in your homes, and not go out into the streets. Whoever leaves his home, risks injury and endangers his life.' Later that afternoon, as the intensive hostilities continued, the IDF disseminated additional telephone and text messages warning residents not to travel on the roads leading from Rafah to Khan Yunis because of concentrated IDF activity in that area.[371]

This does not mean Israel took all proper precautions in attacks. There is nothing in the investigations that suggest the IDF took ' all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects' according to AP 1 Article 57(2)(a)(ii). In fact, the means and methods used reinforce the idea that the IDF did not consider incidental loss of civilian life at all when pursuing their military objective. The means of response, I do not believe, was proportionate. The UNCIG does not believe so either, saying that the 'use of over 250 mortar shells, a statistical weapon with a wide impact area, in a densely populated area, as well as the firing of over 800 artillery and tank shells with wide area effects in a densely populated and built up area over the period of a few hours, indicate the use by the IDF

[369] MFA Israel (n 279) para 286.
[370] AP 1 (n 15) art 52(3).
[371] MFA Israel (n 279) para 295.

of methods and means of combat which in the circumstances were of a nature to strike military objectives and civilians or civilian objects without distinction.'[372] Excessive, disproportionate damage, must have been expected.

The IDF also bulldozed 'dozens' of civilian homes, for no disclosed reason in any investigation. The bulldozing of civilian homes with no justification amounts to wanton destruction, a serious treaty-based breach of IHL[373] and one that ignores the principles of distinction and discrimination. With the unbridled, unrestricted use of firepower against Rafah on August 1 coming from tanks, navy warships, drones, and personnel, and considering that Israel is known to have had UAV's above the battle the whole time,[374] there is no conceivable way the IDF could say that their strikes were proportionate nor could they say they did everything feasible to make sure civilian objects were no longer civilian in nature or to make sure their means and methods would minimize the loss of civilian life. Israel appears to have breached the customary rules regarding precautions in attack found in Rules 16 through 19.[375]

Would a reasonable commander, with the same intelligence and in the same context, have done the same thing? I do not believe so. Based on the Hannibal Directive's inherent disproportionality when utilized in heavily populated areas, any reasonable commander, especially with UAV surveillance overhead, would have known that the attack would have caused disproportionate and excessive damage in relation to the military advantage achieved and during the attack, would have known the attack *was* causing disproportionate damage. Not suspending the attack in light of such information would be in breach of IHL.[376]

An IDF officer present said that after Goldin was taken, 'all means' of capturing him 'are kosher'. Is this compatible with IHL? No, as IHL says, 'In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.'[377] And it is also 'prohibited to employ methods or means of warfare which are intended, or may be expected, to

---

[372] UNCIG (n 284) para 366.
[373] '[E]xtensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly' are serious violations of IHL, embodied in GC 1 (n 3) art 50, GC 2 Article 51, and GC 4 (n 128) art 147.
[374] UNCIG (n 284) para 373.
[375] Henckaerts (n 125) 243.
[376] AP 1 (n 15) art 57(2)(b).
[377] ibid art 35(1).

cause widespread, long-term and severe damage to the natural environment.'[378] It would seem then that all means are not kosher, even if a soldier is kidnapped.

The Hannibal Directive's employment in Rafah on August 1 led to widespread and severe damage to Rafah, from over a hundred deaths to wanton destruction of homes, vehicles, and other civilian objects all with the objective of 'prevent[ing] the country from experiencing another turmoil as it underwent in the Gilad Shalit affair.'[379] Even the US, upon hearing of the destruction in Rafah, urged Israel to hold itself to its normally high standards.[380] I do not believe Israel can assure this does not happen in the future unless it repeals the dangerous directive known as Hannibal.

Conclusion (3.5): In this chapter, I approached the conduct of hostilities in Gaza through a lens of distinction and proportionality. In the war of 2014, over 2,000 Palestinians lost their lives in a month and a half. There, as one might imagine, was no shortage for events where civilians tragically lost their lives – sometimes lawfully and other times not so much. The siege on Gaza gave us a look into a level of the conflict inherently indiscriminate and disproportionately damaging. On the second, more violent level of the conflict, I presumed the same type of non-adherence to the cardinal principles of distinction and proportionality were occuring. Three events felt to be quintessential of the war: the targeting of a UN school (7 UNRWA schools were bombed during the war, where 15% of the population was taking shelter), a residential/commercial high rise (an unprecedented amount of skyscrapers in Gaza City were toppled – most notably the Zafer 4 Tower), and the direct targeting of civilian objects (aside from Rafah, the Battles of Shujaiya and Khuza'a present similar pictures of indiscriminate attacks on civilians).

I took these three events and their respective investigations and reports and began dissecting what occurred before applying a framework that outlines requirements of the conduct of hostilities and the relevant LOAC, customary and treaty-based. There was, of course, an

[378] AP 1 (n 15) art 35(3).
[379] UNCIG (n 284) para 359.
[380] Jen Psaki, 'US State Department Press Release: UNRWA School Shelling' (3 August 2014) <www.state.gov/r/pa/prs/ps/2014/230160.htm> accessed 8 December 2016.

emphasis on the principles of distinction, discrimination, precaution, and proportionality. In each event, the question of whether breaches of LOAC or its fundamental principles occurred were answered. While two out of the three events did not contain grave breaches of IHL, one certainly suggests as much. I hope that this particular event and others like it will be more thrououghly examined, especially through the lenses of other principles of humanitarian law – namely humanity.

Now that each level of the conflict has been analyzed to a certain extent, where does this leave us? How should the information and analyses in this thesis be used? I believe that this thesis provides a foundation and basis from which we can begin to seek enforcement and accountability. Reports like this help to make sure in future conflicts, similar breaches to not reoccur – in essence, published findings and legal anlayses of conflicts are meant to prevent further suffering. They also help sway the public into seeking IHL enforcement. Enforcement and accountability will now be discussed as we move towards the Final Word.

Final Word - The Path to Accountability and Suggestions for Further Research: In 1859, Henry Dunant, the father of the ICRC, wrote, 'In an age when we hear so much of progress and civilization, is it not a matter of urgency – since unhappily we cannot always avoid wars – to press forward in a human and truly civilized spirit the attempt to prevent, or at least to alleviate, the horrors of war?'[381] As we know, IHL formed over the following years and became what it is today.

As a field of international law, IHL applies to states, the original sole subject of international law. States may be brought to the ICJ by another state, assuming both have granted jurisdictional consent, and even IOs can bring claims against states as well. However, the scope has spread to individual perpetrators – whether commanders, soldiers, or defense politicians. 'If individuals transgress the norms of IHL, then they are to be criminally liable under international law.'[382] With *ad hoc* courts like the International Criminal Tribune of the Former Yugoslavia to the Special Court for Sierra Leone, justice has been delivered for alleged IHL violations. In the

[381] Henry Dunant, *A Memory of Solferino* (ICRC 1986) 30, quoted in Ghesquiere (n 236) 445.
[382] Cedric Ryngaert, 'Repression of Violations of International Humanitarian Law' 485, in Wouters (n 50).

International Criminal Court (ICC), individuals can be prosecuted for international war crimes and crimes of aggression (amongst other serious crimes, like genocide). Things have certainly changed for the better, although at the conclusion of most conflicts, IHL violations are not brought to international courts. In fact, all 39 individuals indicted by the ICC are from Africa, leaving other conflicts outside of Africa empty of justice. How would we deliver accountability and justice for IHL crimes committed in the Hamas-Israel conflict?

To be candid, I do not believe there will be an *ad hoc* court set up to try the crimes of both Hamas and Israel in their decades-long conflict, but like many others I believe one should be formed. While Palestine is a signatory to the Rome Statute (the legal basis of the ICC) and has asked the prosecutor there to investigate crimes committed in the conflict, Israel is not a party to the court. Their staunchest ally, the US, even enacted a law authorizing the invasion of The Hague to retrieve any American being tried by an international court.[383] How would charges related to IHL be brought to the ICC against perpetrators of Israeli war crimes? There are three options.[384]

1. Palestine, a party to the court, can refer the situation to the prosecutor under Article 14 of the ICC Statute. It has actually done this already.
2. The UNSC using its UN Charter-based authority can refer the situation to the prosecutor – despite Israel not being an ICC member, under Article 13(b) of the ICC Statute.
3. The ICC can conduct its own investigation into the violations of IHL committed *propio motu* under Article 15 of the ICC Statute.

At the end of the 2014 war between Hamas and Israel, the MAG conducted its own investigations into the war itself and ordered criminal investigations into particular actions. This is demanded through GC 4 Article 146. Everyone investigated was cleared of wrongdoing. The UNCIG and Board of Inquiry provided a plethora of evidence of wrongdoing during the war, but

[383] 2 USC 107-206.
[384] Ryngaert (n 382) 498-499.

there exists no mechanism to enforce IHL. What can victims in Gaza do and what can Israel do to hold itself to the high standard that it holds so proudly?

International criminal tribunals are said to 'not only lack enforcement powers, but their prosecutorial offices also suffer from an accountability deficit' and that the ICC can only really handle 'the big fish'.[385] There is little victims in Gaza can do other than appeal to their government for assistance and to pressure them to seek accountability through the ICC, which they are, as flawed as it is. Israel can do more to hold itself to its high standards on the battlefield by allowing criminal investigations to be handled by an independent civilian panel, not the MAG.

I believe that the path to accountability most effective for ending future military engagements between Hamas and Israel leads to both a Truth and Reconciliation Commission (TRC) and an *ad hoc* court. TRCs are not appropriate for all conflicts – they only offer 'non-criminal mechanisms and solutions…[with] amnesties, immunities, political bargaining and collective oblivion.'[386] As stated, an *ad hoc* court is a long shot but what it offers is a criminal mechanism and solutions that are more readily accepted by the general public. The lack of enforcement powers is one aspect that certainly can drain the willingness to head in the direction of an *ad hoc* court.

In any event, I hope that this thesis contributes in a similar fashion to other reports on IHL breaches – by galvanizing public opinion, which has 'supported the prosecution of war crimes' and in regards to continuing conflicts like in our case, by 'enforcing behavior' in compliance with IHL and impairing the fighting morale of Israeli forces and the consent of the Israeli population.[387] The latter intent is meant to prevent situations like in Rafah where soldiers willingly executed the Hannibal Directive at the risk of friendly fire and from what I witnessed on the ground, civilian support for the war was surprisingly fervent.

For further research, I do not only recommend researching other actions in the same war covered in this thesis. The most critical door that I opened for others to explore is the application of the laws of occupation to the Hamas-Israel Conflict. I was not able to apply the LOO to the

[385] Ryngaert (n 382) 510-511.
[386] ibid 486.
[387] Rüdiger Wolfrum and Dieter Fleck, 'Enforcement of International Humanitarian Law' 698, in Fleck (n 7).

conflict as that extra layer of law's application fell outside the ambit of this thesis. There only was so much free space for legal analysis. Aside from applying the LOO to the conflict, analyses into the previous wars of 2008-2009 and 2012 are critical to understanding what has changed and evolved in terms of Israeli adherence to IHL. On the flip side of the conflict, I insist that researchers begin investigating the breaches of IHL committed by Hamas and its allies in its engagements with Israel.

Returning back to accountability and enforcement, I strongly believe that research should be directed in this corner. What I have mentioned in this brief denouement does not scratch the surface of the difficulties in seeking justice for crimes breaching the law of armed conflict. This thesis is meant to bring attention to the plight of civilians in this conflict, so perhaps a closer look at the roles of neutral organizations like the ICRC will bring more attention to the much needed protection of civilians and *hors de combat*. Even more important would be a deeper examination of the besiegement of the Strip. Since we are not witnessing any war between Hamas and Israel currently, it is recommended to focus on the siege, which is currently raging on without an end in sight. The role of ceasefire agreements, security arrangements, and zones are all fascinating legal topics related to the Hamas-Israel Conflict and are encouraged for further research.

While justice may not be served right now, there is no reason to lose hope. International Humanitarian Law is broadening its scope, growing more protective for those not involved in the conduct of hostilities and works closely with International Human Rights Law, indeed applicable in armed conflict alongside IHL.[388] The LOAC exists to alleviate the suffering of war and we should carry its banner of protection and relief until the suffering of war comes to an end.

[388] *Targeted Killings Case* (n 6) para 18.

Bibliography *Alphabetical by Name/Organization*

- al-Waheidi M and Kershner I, 'Israel Expands Palestinian Fishing Zone Off Gaza's Coast' *New York Times* (3 April 2016) <www.nytimes.com/2016/04/04/world/middleeast/israel-expands-palestinian-fishing-zone-off-gazas-coast.html> accessed 9 October 2016
- Arce D, 'Gaza Blockade Violates International Law: ICRC' *JURIST* (14 June 2010) <www.jurist.org/paperchase/2010/06/gaza-blockade-violates-international-law-icrc.php> accessed 17 October 2016
- 'List of Commercial Goods Allowed for Import into Gaza, April 2010' *BBC News* (April 2010) <www.news.bbc.co.uk/2/shared/bsp/hi/pdfs/05_05_10_gazaimports.pdf> accessed 9 October 2016
- Bell A and Shefi D, 'The Mythical Post-2005 Israeli Occupation of the Gaza Strip' [2010] 16(2) Israeli Affairs 268
- Benvenisti E, *The International Law of Occupation* (2nd edn OUP 2013)
  - — 'Occupation, Belligerent' *Max Planck Encylopedia of Public International Law* (*MPEPIL*) <http://opil.ouplaw.com.proxy.library.uu.nl/view/10.1093/law:epil/9780199231690/law-9780199231690-e359?rskey=fl0IEb&result=2&prd=EPIL> accessed 19 November 2016
- Blumenthal M, *The 51-Day War: Ruin and Resistance in Gaza* (Nation Books 2015)
- Brull M, 'Civilian Levers' (2 June 2010) <https://michaelbrull.wordpress.com/2010/06/03/civilian-levers/> accessed 20 October 2016
  - — 'Israel's World Vision Allegation, Part 2: Shin Bet And The Civilians Of Gaza' *New Matilda* (15 August 2016) <https://newmatilda.com/2016/08/15/israels-world-vision-allegation-part-2-shin-bet-and-the-civilians-of-gaza/> accessed 20 October 2016
- B'Tselem, 'Gaza Strip: The Siege on Gaza' (1 January 2011) <www.btselem.org/gaza_strip/siege> accessed 2 October 2016
  - — 'Israel Sprays Gazan Farmland Close to Border Fence, Destroying Crops and Causing Heavy Losses' (4 February 2016) <www.btselem.org/gaza_strip/20160204_crops_sprayed_with_herbicide> accessed 16 October 2016

- — ‘Restriction of Movement: Closure’ (1 January 2016) <www.btselem.org/freedom_of_movement/closure> accessed 28 September 2016
- — ‘The Scope of Israeli Control in the Gaza Strip’ (5 Jan 2014) <www.btselem.org/gaza_strip/gaza_status> accessed 19 November 2016

- Butler L, ‘Gaza at a Glance’ [2009] 38 JPS 3, 93 <http://jps.ucpress.edu/content/38/3/93.full.pdf+html> accessed 28 September 2016
- ‘UN Security Council to Send Palestinian State Bid to Admissions Committee’ *CNN* (26 September 2011) <www.edition.cnn.com/2011/09/26/world/un-palestinian-statehood/index.html> accessed 16 November 2016
- Cohen G, ‘Israel’s Military Censor Takes on Dozens of Bloggers, Facebook Pages’ *Haaretz* (4 February 2016) <www.haaretz.com/israel-news/.premium-1.701462> accessed 20 October 2016
- Crawford E and Pert A, *International Humanitarian Law* (CUP 2015)
- Delissen AJM and Tanja GD (eds), *Humanitarian Law of Armed Conflict Challenges Ahead: Essays in Honor of Frits Kalshoven* (Martinus Nijhoff Publishers 1991)
- Dinstein Y, *The Conduct of Hostilities under the Law of International Armed Conflict* (2nd edn CUP 2010)
  - — *The International Law of Belligerent Occupation* (CUP 2009)
- DoD, *Law of War Manual* (Office of the General Counsel of the DoD 2016) <http://www.defense.gov/Portals/1/Documents/DoD_Law_of_War_Manual-June_2015_Updated_May_2016.pdf> accessed 17 September 2016
- Egbert LD (ed), 'Judicial Decisions: International Military Tribunal (Nuremberg), Judgment and Sentences - October 1, 1946' [1947] 41(1) AJIL 172
- Eldar S, ‘Hamas: The First Palestinian Army’ *Al-Monitor* (23 July 2014) <www.al-monitor.com/pulse/originals/2014/07/hamas-terror-organization-recruit-army-gaza-is-idf-tunnels.html> accessed 20 October 2016
- FAO ‘Impact of Gaza Crisis’ (2 March 2009) <www.apis.ps/documents/AGR%20Sector%20Gaza%20Report_final.pdf> accessed 19 November 2016
- Fleck D, *The Handbook of International Humanitarian Law* (OUP 2008)
- Franks T, ‘Details of Gaza Blockade Revealed in Court Case’ *BBC News* (3 May 2010) <www.news.bbc.co.uk/2/hi/middle_east/8654337.stm> accessed 9 October 2016

- Gabor A, 'Hamas Truce Terms: Airport, Seaport, Entrance to Al-Aqsa' *Ma'ariv* (Hebrew) (16 July 2014) <www.nrg.co.il/online/1/ART2/597/047.html?hp=1&cat=666&loc=2> accessed 9 October 2016
- Gadzo M, 'Gaza Electricity Crisis: "People are Dying Daily"' *Al Jazeera* (7 January 2016) <www.aljazeera.com/news/2016/01/gaza-electricity-crisis-people-dying-daily-160106071146327.html> accessed 16 October 2016
- Glunts I, 'Report: Hamas Offers Israel 10 Conditions for a 10 Year Truce' *Mondoweiss* (16 July 2016) <www.mondoweiss.net/2014/07/report-israel-conditions/> accessed 9 October 2016
- Gómez FJG, 'The Law Air Warfare' [1998] 323 IRRC <www.icrc.org/eng/resources/documents/article/other/57jpcl.htm> accessed 16 October 2016
- Gross JA, 'Israel Shoots Down Hamas Drone Off the Gaza Coast' *Times of Israel* (20 September 2016) < www.timesofisrael.com/israel-shoots-down-palestinian-drone-off-the-gaza-coast/> accessed 16 October 2016
- 'UN Chief Ban Ki-Moon Calls for Israel to End "Collective Punishment" Blockade of Gaza' *Haaretz* (29 June 2016) <www.haaretz.com/middle-east-news/1.727871> accessed 17 October 2016
- Hansen R, 'JDAM Continues to be Warfighter's Weapon of Choice' (17 March 2006) <www.af.mil/news/story.asp?storyID=123017613> accessed 3 December 2016
- Hass A, 'Think of the Gaza Strip the Next Time You Drink Tap Water' *Haaretz* (22 March 2016) <www.haaretz.com/opinion/.premium-1.710413> accessed 16 October 2016
- Harel A, 'Notes From an Interrogation: How the Shin Bet Gets the Lowdown on Terror' *Haaretz* (2 September 2014) <www.haaretz.com/israel-news/.premium-1.613576> accessed 1 December 2016
    - — 'Reservists: Hamas Fights like an Army' *Haaretz* (8 November 2007) <www.haaretz.com/reservists-hamas-fights-like-an-army-1.232781> accessed 20 October 2016
- HRW, 'Israel/Egypt: Choking Gaza Harms Civilians: US, EU, Security Council Should Demand Greater Access for Food and Fuel' (18 February 2009) <www.hrw.org/news/2009/02/18/israel/egypt-choking-gaza-harms-civilians> accessed 19 November 2016

- — ‘Israel: In-Depth Look at Gaza School Attacks’ (11 September 2014) <www.hrw.org/news/2014/09/11/israel-depth-look-gaza-school-attacks> accessed 1 December 2016
- — ‘Why They Died: Civilian Casualties in Lebanon during the 2006 War’ (5 September 2007) <www.hrw.org/report/2007/09/05/why-they-died/civilian-casualties-lebanon-during-2006-war> accessed 17 November 2016

- Hyde CC, *International Law* (2nd edn Little Brown and Co 1945) vol 3
- ICRC, ‘Glossary: Starvation’ (29 May 2012) <https://casebook.icrc.org/casebook/doc/glossary/starvation-glossary.htm> accessed 19 October 2016
  - — ‘International Humanitarian Law and the Challenges of Contemporary Armed Conflicts – Report Prepared by the International Committee of the Red Cross for the 28th International Conference of the Red Cross and Red Crescent, 2-6 December 2003’ (24 January 2012) <https://casebook.icrc.org/casebook/doc/case-study/icrc-challenges-conflicts-case-study.htm> accessed 21 October 2016
  - — ‘Israel, Blockade of Gaza and the Flotilla Incident - 13-08-2015 Case Study: Discussion’ (13 August 2015) <https://casebook.icrc.org/casebook/doc/case-study/israel-blockade-of-gaza-and-the-flotilla-incident.htm> accessed 17 October 2016
  - — ‘San Remo Manual on International Law Applicable to Armed Conflicts, 12 June 1994’ <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=5B310CC97F166BE3C12563F6005E3E09> accessed 7 October 2016
- Intelligence and Terrorism Information Center at the Israel Intelligence Heritage & Commemoration Center, 'The Six Months of the Lull Arrangement' (December 2008) <www.terrorism-info.org.il/data/pdf/PDF_08_300_2.pdf> accessed 2 October 2016
- ‘PCHR-Gaza: Israeli Buffer Zone Policies Typically Enforced with Live Fire’ *International Middle East Media Center* (11 May 2015) <http://imemc.org/article/71548/> accessed 16 October 2016
- Jalabi R, McCarthy T, and Popovich N, ‘Gaza Crisis: A Closer Look at Israeli Strikes on UNRWA Schools’ *The Guardian* (8 August 2014) <www.unrwa.org/newsroom/features/guardian-newspaper-report-israeli-strikes-unrwa-schools> accessed 1 December 2016

- Keinon H, 'Netanyahu: Abbas Must Choose, Peace with Israel or Reconciliation with Hamas' *Jerusalem Post* (23 April 2014) <www.jpost.com/Diplomacy-and-Politics/Netanyahu-Abbas-must-choose-peace-with-Israel-or-reconciliation-with-Hamas-350159> accessed 2 October 2016
- Khoury J, Levinson C, and Hasson N, 'Two Palestinian Teens Killed at Nakba Day Protest in West' *Haaretz* (15 May 2014) <www.haaretz.com/israel-news/1.590861> accessed 30 November 2016
- Klabbers J, *International Law* (CUP 2013)
- Lee D (ed), *Law of Armed Conflict Deskbook* (5th edn Judge Advocate General's Legal Center and School 2015)
- MAG Corps Command, *Rules of Warfare on the Battlefield* (2nd edn IDF School of Military Law 2006)
    - — 'Decisions of the IDF MAG Regarding Exceptional Incidents that Allegedly Occurred During Operation "Protective Edge" - Update No 4' (11 June 2015) <www.law.idf.il/163-7353-en/Patzar.aspx> accessed 3 December 2016
- Masri F, 'How to Revive the Stalled Reconstruction of Gaza' *Brookings Institution* (27 April 2016) <www.brookings.edu/blog/markaz/2016/04/27/how-to-revive-the-stalled-reconstruction-of-gaza/> accessed 9 October 2016
- Meron T, 'Classification of Armed Conflict in the Former Yugoslavia: *Nicaragua's* Fallout' [1998] 92 AJIL 236
- MFA Israel, 'The Hamas Terror War Against Israel' (March 2011) <www.mfa.gov.il/mfa/foreignpolicy/terrorism/palestinian/pages/missile%20fire%20from%20gaza%20on%20israeli%20civilian%20targets%20aug%202007.aspx> accessed 28 September 2016
    - — 'IDF Conduct of Operations during the 2014 Gaza Conflict' (14 June 2015) <http://mfa.gov.il/ProtectiveEdge/Documents/IDFConduct.pdf> accessed 4 December 2016
    - — 'The Operation in Gaza: 27 December 2008 – 18 January 2009, Factual and Legal Aspects' (July 2009) <www.jewishvirtuallibrary.org/jsource/Peace/GazaOpReport0709.pdf> accessed 15 November 2016

- Ministry of Transport Administration of Shipping and Ports, 'Notice to Mariners No 1/2009 Blockade of Gaza Strip' (6 January 2009) <http://asp.mot.gov.il/en/shipping/notice2mariners/547-no12009> accessed 7 October 2016
- MoD, *The Manual of the Law of Armed Conflict* (OUP 2005)
- Murphy D, 'Israel Calls Gaza a "Enemy Entity"' *Christian Science Monitor* (19 September 2007) <www.csmonitor.com/2007/0919/p99s01-duts.html> accessed 20 October 2016
- OCHA, 'Gaza Emergency Situation Report' (4 September 2014)
    - — 'The Gaza Strip: The Humanitarian Impact of the Blockade' (July 2015) <www.ochaopt.org/documents/ocha_opt_gaza_blockade_factsheet_July_2015_english.pdf> accessed 16 October 2016
- Oppenheim L, *International Law: A Treatise – War and Neutrality* (2nd edn Longmans, Green, & Co 1912) vol 2
- Oxfam International 'Electricity Crisis Brings Dark Times for Women in Gaza' <http://oxf.am/ueb> accessed 16 October 2016
- Psaki J, 'US State Department Press Release: UNRWA School Shelling' (3 August 2014) <www.state.gov/r/pa/prs/ps/2014/230160.htm> accessed 8 December 2016
- PCHR, 'The Buffer Zone in the Gaza Strip' (1 April 2012) <http://pchrgaza.org/en/?p=5019> accessed 16 October 2016
- Poort D, 'History of Israeli Blockade on Gaza' *Al Jazeera* (2 November 2011) <www.aljazeera.com/indepth/features/2011/10/20111030172356990380.html> accessed 2 October 2016
- Ravid B and Cohen G, 'IDF to Call Up 1,500 Reservists as It Prepares for Gaza Escalation' *Haaretz* (7 July 2014) <http://www.haaretz.com/israel-news/1.603600> accessed 1 December 2016
    - — 'IDF Formulates Plan to Limit Services to Civilians in Gaza' *Haaretz* (19 September 2007) <www.haaretz.com/news/idf-formulates-plan-to-limit-services-to-civilians-in-gaza-1.229602> accessed 20 October 2016
- Rose D, 'The Gaza Bombshell' *Vanity Fair* (3 March 2008) <www.vanityfair.com/news/2008/04/gaza200804> accessed 29 September 2016
- Samson E, 'Is Gaza Occupied?: Redefining the Status of Gaza Under International Law' [2010] 25(5) Am Uni Intl Law Rev 915
- Sassòli M, Bouvier AA, and Quintin A, *How Does Law Protect in War?: Cases, Documents*

and Teaching Materials on Contemporary Practice in International Humanitarian Law (3rd edn ICRC 2011) vol 3

- Solis G, *The Law of Armed Conflict* (CUP 2010)
- 'Hamas Leader: No to Israel's Disarmament Demand' *Times of Israel* (5 September 2014) <www.timesofisrael.com/hamas-leader-no-to-israels-disarmament-demand> accessed 2 October 2016
- UNRWA, 'Restrictions on Freedom of Movement Waiting for a Miracle' (16 June 2016) <www.unrwa.org/newsroom/features/restrictions-freedom-movement-waiting-miracle> accessed 17 October 2016
- Urquhart C, 'Gaza on Brink of Implosion as Aid Cut-Off Starts to Bite' *Guardian* (16 April 2006) <www.theguardian.com/world/2006/apr/16/israel> accessed 9 October 2016
    - — 'The Call that Tells You: Run, You're About to Lose Your Home and Possessions' *The Guardian* (28 July 2006) <www.theguardian.com/world/2006/jul/28/israel> accessed 20 November 2016
- USAF, 'Factsheet: Joint Direct Attack Munition GBU- 31/32/38' (21 November 2007) <www.af.mil/information/factsheets/factsheet.asp?fsID=108> accessed 3 December 2016
- Wilmshurst E, *International Law and the Classification of Conflicts* (OUP 2012)
- Wouters J, de Man P, and Verlinden N (eds), *Armed Conflicts and the Law* (Intersentia 2016)
- 'Demolition of Gaza Homes Completed' *Ynet* (1 September 2005) <www.ynetnews.com/articles/0,7340,L-3136516,00.html> accessed 28 September 2016
    - — 'Peres: We'll End Siege if Gaza Rulers Abandon Terror, release Shalit' (2 June 2010) <www.ynetnews.com/articles/0,7340,L-3907624,00.html> accessed 2 October 2016

Appendix I: OCHA Map Relating to Movement and Access in Gaza, August 2016

'Gaza Strip Access and Movement' (16 August 2016) <www.ochaopt.org/sites/default/files/gaza_a0_2016_draft_16_08_2016_final.pdf> accessed 28 September 2016.