



1-1-2015

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Recommended Citation

Pat Andriola, *Did Israel Violate International Humanitarian Law During Operation Protective Edge?*, 30
Emory Int'l L. Rev. Recent Dev. 2001 (2015).

Available at: <https://scholarlycommons.law.emory.edu/eilr-recent-developments/20>

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DID ISRAEL VIOLATE INTERNATIONAL HUMANITARIAN LAW DURING OPERATION PROTECTIVE EDGE?

*Pat Andriola**

On July 8, 2014, the Israel Defense Forces (IDF) announced that they had launched “Operation Protective Edge,” a military intervention into the Gaza territory. The IDF stated that the goals of Protective Edge were “aimed to retrieve stability to the residents of southern Israel, eliminate Hamas’ capabilities and destroy terror infrastructure operating against the State of Israel and its civilians.”¹ Less than two months later, at least 2,131 Palestinians had been killed, 1,473 of whom were civilians and 501 children.²

This Essay seeks to make two assessments. First, it will analyze the military actions taken by Israel over the course of the summer of 2014 and determine if they comport with customary international humanitarian law. Specifically, this Essay will argue that Israel very likely violated the Principle of Distinction, Collective Punishment, and Proportionality throughout the course of the operation. The second assessment is to determine if there was any evidence to point to the existence of international law, in opposition to the Realist position that international law “does not exist.” This Essay will argue that actions taken by Israel to ostensibly notify the civilian population of Gaza of imminent attacks was direct evidence of the existence of international law. However, this Essay will also argue that Israel used these necessary requirements (e.g., the warning of civilians in the region of pending military strikes) to create the impression that it had complied with all areas of international law during the invasion.

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¹ *Operation ‘Protective Edge’ Commences as IDF Targets Terror Sites in the Gaza Strip*, ISR. DEF. FORCES (July 8, 2014), <http://www.idfblog.com/blog/2014/07/08/operation-protective-edge-commences-as-idf-targets-terror-sites-in-the-gaza-strip/>.

² U.N. OFFICE FOR THE COORDINATION OF HUMANITARIAN AFFAIRS, OCCUPIED PALESTINIAN TERRITORY: GAZA EMERGENCY SITUATION REPORT 1 (Sept. 4, 2014), http://www.ochaopt.org/documents/ocha_opt_sitrep_04_09_2014.pdf [hereinafter OCCUPIED PALESTINIAN TERRITORY REPORT SEPT. 2014].

I. THE PRINCIPLE OF DISTINCTION

A. *Legal Background*

The Principle of Distinction is a well-settled tenet of the *jus in bello* branch of customary international law: unless they are to take up arms and thus become combatants during hostilities, civilians are afforded full protection against attacks. This rule is specifically enshrined in Article 48 of Additional Protocol I to the Geneva Conventions, which states that:

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.³

The Israeli Supreme Court itself has stated that it is bound by customary international law, including Article 48.⁴ One of the key goals of international humanitarian law has been to try to shield innocents from the violent geopolitical battles that go on around them. Without it, not only could warring states fire indiscriminately without worry, taking civilians as collateral damage, but civilians could become strategic targets themselves, one of the greatest concerns of the international community. In this light, we can see why the Principle of Distinction is so important, and why the International Criminal Court (ICC), under Article 8 of the Rome Statute, declares it a war crime to “[direct] attacks against the civilian population as such or against individual civilians not taking direct part in hostilities.”⁵ Similarly, in the following subsections of Article 8, direct attacks on either “civilian objects . . . which are not military objectives” or “personnel, installations, material, units, or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations” are also deemed war crimes.⁶

³ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 48, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].

⁴ HCJ 769/02 Pub. Comm. Against Torture in Israel v. Gov’t of Israel ¶ 23 (2006) (Isr.), http://www.haguejusticeportal.net/Docs/NLP/Israel/Targetted_Killings_Supreme_Court_13-12-2006.pdf.

⁵ Rome Statute of the International Criminal Court art. 8(2)(b)(i), July 17, 1998, 37 I.L.M. 1002.

⁶ *Id.*

B. *The Civilian/Combatant Problem in Gaza*

Key definitional and conceptual issues still remain after we have recognized that civilians and combatants must be differentiated during conflict. Namely, what is a citizen and what is a combatant? Article 43(2) of Additional Protocol I defines combatants as “members of the armed forces of a party to a conflict,” excluding certain medical and religious personnel.⁷ Civilians are subsequently defined negatively, i.e., as being “not combatants.” Article 50 of the Protocol defines civilians as anyone who is not a combatant under Article 43, and similarly the International Criminal Tribunal for the Former Yugoslavia, in the *Blaškić* case of 2000, stated that civilians are “persons who are not, or no longer, members of the armed forces.”⁸

One of the main areas of disagreement between Israel and the foreign press (as well as human rights groups) was over combatant/civilian fatality statistics. On August 5, 2014, in the wake of a short-lived Egyptian-brokered ceasefire, a senior Israeli military official estimated that 900 Hamas operatives had been killed at a time when health officials were estimating over 1,800 deaths.⁹ This would place the ratio of combatants to civilians at or near 1:1. Meanwhile, the United Nations (U.N.) was saying that of the 1,843 Palestinians killed, a total of 1,354 were civilians.¹⁰ That represents about a twenty-three percent difference between the counts of the IDF and U.N.

Much of this discrepancy has to do with the way in which Operation Protective Edge was fought. Hamas, the controlling political party of the Gaza Strip, is not formally permitted to have an army, although they do have a military wing entitled The Izz ad-Din al-Qassam Brigades (al-Qassam). Because much of al-Qassam’s work is forced underground due to the continued presence of Israel in the region, trying to figure out who is and who is not is a soldier for al-Qassam is somewhat difficult. The geography and density of Gaza, combined with underground troops, also mean that civilians and combatants are constantly pushed closer to one another, especially when there is significant destruction to civilian centers.

⁷ Additional Protocol I, *supra* note 3, art. 43(2).

⁸ Prosecutor v. Tihimir Blaškić, Case No. IT-95-14-T, Judgment, ¶ 180 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000).

⁹ Adiv Sterman, *900 Operatives Killed Over Gaza Campaign, IDF Says*, TIMES ISR. (Aug. 5, 2014), <http://www.timesofisrael.com/900-operatives-killed-over-gaza-campaign-idf-says/>.

¹⁰ U.N. OFFICE FOR THE COORDINATION OF HUMANITARIAN AFFAIRS, OCCUPIED PALESTINIAN TERRITORY: GAZA EMERGENCY SITUATION REPORT 1 (Aug. 6, 2014), http://www.ochaopt.org/documents/ocha_opt_sitrep_07_08_2014.pdf.

Because Hamas has also recently taken up guerilla tactics in their battles, including the building of intricate tunnel systems that have even allowed them to enter Israel, the problem of accurate identification is compounded.¹¹ Likewise, rocket attacks, which are the primary way Hamas engages in war with Israel, are often activated with timers in various locations in order to shield operations.¹² One Western photojournalist covering Gaza in the summer of 2014 said that he “didn’t see a rocket at point of launch,” while an American reporter said that, “[y]ou couldn’t tell exactly where a rocket was being launched from.”¹³ One correspondent in the region put the civilian/combatant distinction most strikingly: “Hamas isn’t a regular army: When they leave the fighting areas, they don’t wear uniforms or carry guns.”¹⁴ These features contribute to the difficulty in effectively applying the Principle of Distinction.

C. Attacks on Non-Military Hamas Officials

Israel has also made a habit of targeting Hamas politicians and officials, who would not be considered “combatants” under customary international law (just as it would be illegal for Hamas to target the home of a member of Knesset, the Israeli parliament).¹⁵ However, an attorney at Human Rights Watch, a humanitarian advocacy group, said that, “Israel has a very liberal definition of who qualifies [as a combatant] . . . Israel’s labeling of certain individuals as ‘terrorists’ does not make them military targets as a matter of law.”¹⁶ The attorney is correct: although Israel may deem certain politicians or people providing substantive aid to Hamas to be “terrorists,” they are not “combatants” under the definition of Article 43, and thus the Principle of Distinction (as codified in Article 48) dictates that targeting them is a war crime.¹⁷

¹¹ Terrence McCoy, *How Hamas Uses Its Tunnels to Kill and Capture Israeli Soldiers*, WASH. POST (July 21, 2014), <http://www.washingtonpost.com/news/morning-mix/wp/2014/07/21/how-hamas-uses-its-tunnels-to-kill-and-capture-israeli-soldiers/>.

¹² Ahmed Hadi, *Gaza: An Exclusive Look into the Roles of al-Qassam Brigades and Islamic Jihad*, AL-AKHBAR (July 14, 2014), <http://english.al-akhbar.com/node/20730>.

¹³ Anshel Pfeffer, *Foreign Press: Hamas Didn’t Censor Us in Gaza, They Were Nowhere to be Found*, HAARETZ (Aug. 8, 2014), <http://www.haaretz.com/news/national/.premium-1.609589>.

¹⁴ *Id.*

¹⁵ *Israel Destroys 2 Gaza High-Rises in Escalation*, DENVER POST (Aug. 25, 2014), http://www.denverpost.com/nationworld/ci_26400618/gaza-israel-targets-hamas-officials-home-2-die.

¹⁶ Jodi Rudoren, *Civilian or Not? New Fight in Tallying the Dead from the Gaza Conflict*, N.Y. TIMES (Aug. 5, 2014), <http://www.nytimes.com/2014/08/06/world/middleeast/civilian-or-not-new-fight-in-tallying-the-dead-from-the-gaza-conflict.html>.

¹⁷ Additional Protocol I, *supra* note 3, art. 48.

D. Attacks on Civilian Centers

Despite the camouflage tactics of Hamas, there were clear instances in the summer of 2014 of violations of Article 8(2)(b)(ii) and (iii) of the Rome Statute: namely, the targeting of civilian centers and humanitarian operations. Israel certainly has the right to defend itself, as has been stated in a 2004 advisory opinion by the International Court of Justice.¹⁸ However, Israel must still abide by the Principle of Distinction. For example, on July 30, 2014, Israeli forces shelled the Jabalia refugee camp in Gaza, which was being run by the United Nations Relief and Works Agency (UNRWA) as a school for over 3,000 young Palestinian girls displaced by the war.¹⁹ According to an UNRWA spokesperson, the U.N. had warned Israel of the exact location and coordinates of the refugee camp *seventeen times*.²⁰ The attack, which Israel claimed was in response to mortar fire launched from the territory, resulted in at least fifteen casualties and dozens of injuries.²¹ The events received such scorn on an international basis that even the United States (U.S.), Israel's most loyal ally, released a statement condemning the attack, while Ban Ki-moon, the Secretary-General of the U.N., said that "[n]othing is more shameful than attacking sleeping children."²² Moreover, Navi Pillay, the U.N. High Commissioner for Human Rights, stated the day after the attacks that Israel had most likely committed war crimes for attacking civilian areas.²³

This violation of international law was nothing new to the humanitarians at Jabalia. In January of 2009, during another conflict between Israel and Gaza (Operation Cast Lead), Israeli tanks fired upon an UNRWA school/refugee camp in the region, killing over forty Palestinians, including children.²⁴ Israel initially claimed that "two Hamas militants . . . were in the building and firing

¹⁸ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶ 140 (July 9).

¹⁹ *Israeli Fire Kills Nineteen in Gaza UN School*, AL JAZEERA (July 31, 2014), <http://www.aljazeera.com/news/middleeast/2014/07/gaza-un-school-hit-201473041918975321.html>.

²⁰ *Id.*

²¹ *Gaza Conflict: UN Accuses Israel over Jabaliya Attack*, BBC NEWS (July 30, 2014), <http://www.bbc.com/news/world-middle-east-28558433>.

²² Barak Ravid, *UN Chief Condemns 'Shameful' Shelling of School in Gaza*, HAARETZ (July 30, 2014), <http://www.haaretz.com/1.608078>.

²³ *Israel Must be Probed for War Crimes by World Powers, UN Rights Chief Says*, JERUSALEM POST (July 31, 2014), <http://www.jpost.com/Operation-Protective-Edge/Israel-must-be-probed-for-war-crimes-by-world-powers-UN-rights-chief-says-369589>.

²⁴ *'Stray Mortar' Hit UN Gaza School*, BBC NEWS (Jan. 11, 2009), http://news.bbc.co.uk/2/hi/middle_east/7823204.stm.

rockets.”²⁵ In order to corroborate their claim, the IDF showed a video of what they alleged were gunmen shooting from the schoolyard.²⁶ However, the video was shown to be from October of 2007, making it impossible for it to be an accurate video of the incident.²⁷ Israel later admitted their claims about gunmen and the video were incorrect, and said that the attack was an accident caused by a “stray mortar.”²⁸

However, the Jabalia incident was not the first time Israel had attacked a UNRWA school/refugee camp. In fact, just six days earlier Israeli tanks shelled the “Beit Hanoun preparatory school for refugees,” killing sixteen Palestinians and wounding hundreds.²⁹ Lieutenant Colonel Peter Lerner of the IDF claimed that rockets had been fired from the region, though not from the school itself, and that Israel hit the school accidentally as the result of several rockets that had fallen short of their targets, hitting civilians instead.³⁰ Once again, U.N. Secretary-General Ban Ki-moon condemned the act.³¹

Similarly, Israel struck a school/refugee camp in Zeitoun in the beginning of August, resulting in over ten deaths (eight of which were children) and dozens of injuries, after claiming that mortars were being fired nearby by Hamas combatants.³² The U.N. claimed it had warned Israel of the location of the school thirty-three times, including as early as one hour before the attack.³³ U.N. Secretary-General Ban Ki-moon once again expressed his dismay, calling

²⁵ Jonathan Miller, *Why UN ‘Reversal’ Over Gaza School Should Be Treated With Caution*, CHANNEL 4 NEWS (Feb. 5, 2009), http://www.channel4.com/news/articles/world/middle_east/why+un+reversal+over+gaza+school+should+be+treated+with+caution/2924657.html.

²⁶ Patrick Martin, *Account of Israeli Attack Doesn’t Hold up to Scrutiny*, GLOBE & MAIL (Jan. 29, 2009, 12:00 AM), <http://www.theglobeandmail.com/news/world/account-of-israeli-attack-doesnt-hold-up-to-scrutiny/article4286191/>.

²⁷ Andrew England, *Anger as School Bomb Victims Buried*, FIN. TIMES (Jan. 7, 2009, 7:29 PM), <http://www.ft.com/intl/cms/s/0/3b805b46-dceb-11dd-a2a9-000077b07658.html>.

²⁸ *‘Stray Mortar’ Hit UN Gaza School*, *supra* note 24.

²⁹ Asmaa al-Ghoul, *Israel Shells Fall on UN School During Evacuation*, AL-MONITOR (July 25, 2014), <http://www.al-monitor.com/pulse/originals/2014/07/unrwa-refugee-schools-gaza-targeted-israel.html>.

³⁰ Ben Hubbard & Jodi Rudoren, *Blasts Kill 16 Seeking Haven at Gaza School*, N.Y. TIMES (July 24, 2014), <http://www.nytimes.com/2014/07/25/world/middleeast/despite-talk-of-a-cease-fire-no-lull-in-gaza-fighting.html>.

³¹ *‘Appalled’ By Attack on UN-Run School in Gaza, Ban Urges Halt to All Fighting*, UN NEWS CTR. (July 24, 2014), http://www.un.org/apps/news/story.asp?NewsID=48341#.VICyN1f_8w.

³² Jason Burke, *Gaza School Attack Denounced as ‘Criminal Act’ by UN Chief*, GUARDIAN (Aug. 3, 2014), <http://www.theguardian.com/world/2014/aug/03/israel-air-strike-un-school-gaza-rafah>.

³³ *Israel: In-Depth Look at Gaza School Attacks*, HUM. RTS. WATCH (Sept. 11, 2014), <http://www.hrw.org/news/2014/09/11/israel-depth-look-gaza-school-attacks>.

the attack a “moral outrage and a criminal act.”³⁴ A report from Human Rights Watch that came out in September 2014 gave an in-depth analysis of the attacks on the three schools, finding as follows:

Two of the three attacks Human Rights Watch investigated—in Beit Hanoun and Jabalya—did not appear to target a military objective or were otherwise unlawfully indiscriminate. The third attack in Rafah was unlawfully disproportionate if not otherwise indiscriminate. Unlawful attacks carried out willfully—that is, deliberately or recklessly—are war crimes.³⁵

Given the propensity for Israel to attack schools, and the lack of (and sometimes contradictory) evidence provided by the IDF that combatants were in the area, it is very possible Israel’s attacks on these three schools constitute war crimes under the Rome Statute.

However, schools and refugee camps were not the only civilian centers attacked during Operation Protective Edge. One of the most infamous attacks on a civilian object during the summer of 2014 was on a center for the handicapped and disabled, called the Mabaret Palestine Society. Two residents were killed, including a disabled thirty-nine year-old woman who, according to her family, “had been born severely disabled and unable to speak.”³⁶ The IDF claimed once again that the bombing was a mistake, and that they would investigate.³⁷ Thus far there has been no update or explanation from the IDF as to its investigation.

Similarly, on July 20, 2014, Israeli forces struck al-Aqsa hospital, located in central Gaza, resulting in the deaths of five civilians.³⁸ According to the director of the hospital, there was no reason for an attack, and in retaliation to accusations from Israeli military sources who claimed anti-tank missiles were stored near the hospital, the director said, “[t]here are no weapons in our hospital. We are ready for any inspection. Any international organization

³⁴ *Gaza Crisis: Deadly Strike 'At UN School In Rafah,'* BBC NEWS (Aug. 3, 2014), <http://www.bbc.com/news/world-middle-east-28628682#TWEET1199954>.

³⁵ *Israel: In-Depth Look at Gaza School Attacks*, *supra* note 33.

³⁶ Steven Erlanger, *As Israel Hits Mosque and Clinic, Air Campaign's Risks Come Home*, N.Y. TIMES (July 12, 2014), <http://www.nytimes.com/2014/07/13/world/middleeast/israel-gaza-strip.html>.

³⁷ Yonah Jeremy Bob, *Exclusive: IDF Source Says Investigation into Gaza Hospital Incident—Not an Attack*, JERUSALEM POST (July 21, 2014), <http://www.jpost.com/Operation-Protective-Edge/Damage-to-Gaza-hospital-was-caused-by-attack-on-nearby-rocket-launcher-363629>.

³⁸ *Deaths as Israeli Tanks Shell Gaza Hospital*, AL JAZEERA (July 21, 2014, 8:55 PM), <http://www.aljazeera.com/news/middleeast/2014/07/deaths-as-israeli-tanks-shell-gaza-hospital-201472112411171397.html>.

can come and make sure we have nothing in our hospital.”³⁹ Although Israel has claimed to have accidentally hit a number of civilian areas and objects, there were also times, such as with al-Aqsa, that they claimed civilians were being used as “human shields,” or that military operations were being hidden beneath layers of superficial civilian facades, such as mosques,⁴⁰ community centers, schools, and hospitals.⁴¹

E. Article 52(3) of Protocol I

Importantly, when pressed about the attack on al-Aqsa and other civilian centers, the spokesperson for Israeli Prime Minister Benjamin Netanyahu said, “[y]ou are allowed to hit targets where their [Hamas] war machine is using to hide rockets . . . I have no doubt Hamas uses, has used and continues to use, hospitals . . . we do not target civilians.”⁴² However, Israel is not clarifying the law when it comes to civilian centers that may be being used as military outlets, which Hamas has been guilty of as recently as July of 2014.⁴³ Article 52(3) of Protocol I clearly states:

In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, *it shall be presumed not to be so used.*⁴⁴

Therefore, it is accurate for Prime Minister Netanyahu to claim that civilian dwellings used for military purposes are generally subject to attack. However, a large hurdle has been that there is no check on Israel’s claim that Hamas is attacking from the dwellings, and unless Israel is positive (i.e., when there is no “doubt,” as Article 52(3) states),⁴⁵ the presumption should be against attacking. As was the case with al-Aqsa, unless Israel is withholding evidence from the international community, from the basis of intelligence on the ground and the director of the hospital it appears that there was certainly enough doubt

³⁹ *Id.*

⁴⁰ *Gaza Fighting Rages on as Hundreds of Israelis Flee Homes*, CBS NEWS (Aug. 25, 2014, 10:15 AM), <http://www.cbsnews.com/news/israel-targets-2-gaza-mosques-in-latest-airstrikes/>.

⁴¹ *Hamas’ Use of Human Shields is a War Crime*, ISR. DEF. FORCES (July 14, 2014), <http://www.idfblog.com/blog/2014/07/14/hamas-use-human-shields-war-crime/>.

⁴² *Deaths as Israeli Tanks Shell Gaza Hospital*, *supra* note 38.

⁴³ *UNRWA Investigating Discovery of 20 Rockets Found in Empty Gaza School*, GUARDIAN (July 17, 2014, 10:48 AM), <http://www.theguardian.com/world/2014/jul/17/unrwa-investigating-20-rockets-empty-gaza-school-palestinian>.

⁴⁴ Additional Protocol I, *supra* note 3, art. 52(3) (emphasis added).

⁴⁵ *Id.*

to trigger the presumption required in Article 52(3). In fact, when U.N. Human Rights Council inspectors attempted to enter Israel in November of 2014 in order to determine if any war crimes were committed during Protective Edge, Israel blocked them, claiming that an impartial investigation was impossible because the U.N. has an “obsessive hostility toward Israel.”⁴⁶

Israel may very well be correct: if Hamas is systematically hiding weapons, soldiers, and military apparatuses in civilian centers, not only are Israeli attacks most likely legitimate under international law, but Hamas could be guilty of war crimes themselves. However, the evidence is extremely spotty, many civilian centers of all shapes and sizes have been attacked, and hundreds of innocent civilians have been killed as a result. Israel can absolve itself of any potential wrongdoing by providing clear and convincing evidence that their attacks were not on civilian centers, but on military centers masquerading as civilian centers. So far Israel has not shown that it has met this stringent standard required by Article 52(3), and their refusal to comply with the U.N. Human Rights Commissions infers that evidence may be lacking.

II. COLLECTIVE PUNISHMENT

A. *Legal Background*

The prohibition on collective punishment, or the punishing of individuals not responsible for criminal action (but who often bear some relation to those who may be), is a “fundamental guarantee” to all global citizens under Article 4(2)(b) of the Second Additional Protocol (Protocol II) to the Geneva Conventions.⁴⁷ Moreover, Article 33 of the Fourth Geneva Convention states the following:

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. Pillage is prohibited.

⁴⁶ *Israel Blocks U.N. Human Rights Inspectors from Entering Gaza to Investigate Civilian Deaths*, COUNTER CURRENT NEWS (Nov. 13, 2014, 7:47 PM), <http://countercurrentnews.com/2014/11/israel-blocks-u-n-human-rights-inspectors-from-entering-gaza-to-investigate-civilian-deaths>.

⁴⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 4(2)(b), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

Reprisals against protected persons and their property are prohibited.⁴⁸

While collective punishment is clearly banned as a tool of war under international law, it is less clear as to whether it constitutes a “war crime.” For example, the Rome Statute makes no specific mention of collective punishment. However, there are two examples of international tribunals that, through statute, had jurisdiction over collective punishment as a war crime: The Special Court for Sierra Leone and the International Criminal Tribunal for Rwanda.⁴⁹ Still, there have been calls from the international community for the ICC to formally introduce collective punishment as a statutory war crime.⁵⁰

B. The Beginnings of Operation Protective Edge

Although Israel has claimed that routine security concerns stemming from Hamas’ rocket fire and tunnel building were the main causes of Protective Edge, there was a clear consensus from international commentary that much of the clash stemmed from the kidnapping and murder of three Israeli teenagers on June 12, 2014, a terrorist act that some members of Hamas took credit for, although others within the organization denied culpability.⁵¹ The murders shook the Israeli community, and three Jewish Israelis eventually responded with a “revenge attack,” killing and setting on fire a sixteen year-old Palestinian from East Jerusalem.⁵²

The Israeli government responded to the attacks in a much more sweeping manner: they conducted raids into the West Bank on Palestinian towns and refugee camps, arresting over 150 people without charge and killing at least five.⁵³ From June to July 2014, Israel arrested roughly 700 Palestinians, focusing on anyone even tangentially connected to members of Hamas, whom

⁴⁸ Geneva Convention (IV) Relative to the Protection of Civilian Persons in Times of War art. 33, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

⁴⁹ Shane Darcy, *Prosecuting the War Crime of Collective Punishment: Is It Time to Amend the Rome Statute?*, J. INT’L CRIM. JUST. 29, 34 (2010).

⁵⁰ *Id.*

⁵¹ Orlando Crowcroft, *Hamas Official: We Were Behind the Kidnapping of Three Israeli Teenagers*, GUARDIAN (Aug. 21, 2014), <http://www.theguardian.com/world/2014/aug/21/hamas-kidnapping-three-israeli-teenagers-saleh-al-arouri-qassam-brigades>.

⁵² Orlando Crowcroft, *Three Jewish Israelis Admit Kidnapping and Killing Palestinian Boy*, GUARDIAN (July 14, 2014), <http://www.theguardian.com/world/2014/jul/14/three-jewish-israelis-charged-kidnapping-killing-palestinian-boy>.

⁵³ *Israel: Serious Violations in West Bank Operations*, HUM. RTS. WATCH (July 3, 2014), <http://www.hrw.org/news/2014/07/03/israel-serious-violations-west-bank-operations>.

they said were responsible for the murder of the three Israeli boys.⁵⁴ According to Human Rights Watch:

[T]he scale of arbitrary arrests and detentions, unlawful use of force, property destruction including home demolitions, and raids on homes and media offices raise the collective punishment concerns. “Israel’s search for those responsible for the appalling kidnappings and killings of its citizens cannot justify unlawfully killing civilians, destroying property, and detaining hundreds of Palestinians without basic due process,” said Sarah Leah Whitson, Middle East director at Human Rights Watch. “The teens’ killers should be brought to justice but mass punishment without trial merely creates more injustice.”⁵⁵

Arresting 700 people for the deaths of three people, while also raiding and demolishing the homes of family members, is not only excessive, but a very clear case of punishing a community for the alleged crimes of a few.

For example, Israel arrested Palestinian West Bank resident Hussam Qawasmeh, accusing him of involvement with the kidnapping and murder.⁵⁶ However, rather than simply charging Hussam, Israeli officials destroyed his family’s house, leaving his wife and family homeless. As Ghada Qawasmeh, Hussam’s wife, said herself, “[t]his is collective punishment What did I or my children do?”⁵⁷ The Israeli Supreme Court heard an appeal from an Israeli rights group not to demolish the house, but ruled in favor of the military, stating that “the demolition of the houses was imperative to deter other terrorists from committing additional severe terrorist attacks.”⁵⁸

While the Supreme Court may very well be correct that home demolitions (prior to any conviction, it should be noted) do deter terrorist attacks, deterrence is not an exception to Article 4(2)(b) of Protocol II⁵⁹ or Article 33 of the Fourth Geneva Convention.⁶⁰ In fact, deterrence is a very logical reason a country may wish to use collective punishment, which is precisely why the international community has outlawed it via customary law in its aim to protect innocent civilians *hors de combat*.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Rania Zabaneh & Dalia Hatuqa, *Israeli Demolitions ‘Collective Punishment,’* AL JAZEERA (Aug. 18, 2014), <http://www.aljazeera.com/news/middleeast/2014/08/israeli-demolitions-collective-punishment-201481892047643368.html>.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Additional Protocol II, *supra* note 47.

⁶⁰ Geneva Convention IV, *supra* note 48.

C. “Mowing The Lawn”

It is much easier to argue that collective punishment is occurring in a discrete instance than over the course of many months, for example, with Ghada Qawasmeh above. But it is also very likely that Israel’s treatment of Gaza throughout the totality of Operation Protective Edge was tantamount to collective punishment. To analogize, just as Ghada was not guilty for the actions of her husband, the civilian population and their places of community gathering were not guilty for the actions of Hamas, yet in both instances they bore a large portion of the punishment.

Professor Noam Chomsky has argued that whenever Palestinians act defiantly toward Israel, usually by exerting political power, Israel responds by “mowing the lawn,” or causing large-scale destruction of civilian areas in Gaza.⁶¹ Chomsky believes that Operation Protective Edge was a response to the unity agreement formed by Hamas and Fatah (the West Bank political party) in April of 2014.⁶² Chomsky argues that Israel, unhappy that the moderate Fatah party was aligning itself with what they declared a terrorist organization, sought to exact revenge on the Palestinians by “mowing the lawn” once again, after which “the desperate population seeks to rebuild somehow from the devastation and the murders.”⁶³ Assuming Professor Chomsky is correct, this would be a clear case of collective punishment on Palestinian civilians, though it may delve too far into the realm of political theory to be considered a viable legal argument.

III. PROPORTIONALITY

A. *Legal Background*

Conducting an individual attack in a disproportionate manner is contrary to customary international humanitarian law under Article 51(5)(b) of Additional Protocol I, codified as follows:

Among others, the following types of attacks are to be considered as indiscriminate:

⁶¹ Noam Chomsky, *The Real Reason Israel “Mows the Lawn” in Gaza*, ALTERNET (Sept. 9, 2014), <http://www.alternet.org/noam-chomsky-real-reason-israel-mows-lawn-gaza?page=0%2C2>.

⁶² *Id.*

⁶³ Noam Chomsky, *Nightmare in Gaza*, TRUTHOUT (Aug. 3, 2014), <http://www.truth-out.org/opinion/item/25343-noam-chomsky-%7C-nightmare-in-gaza>.

(b) [A]n 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.⁶⁴

Similar language is also used in Article 57, which covers precautions in attack.⁶⁵ It is immediately important to note the last phrase, which conditions the damage on the “direct military advantage anticipated.” Therefore, all proportionality calculi must weigh the cost of potential civilian life and community damage against the military gain anticipated. This is clearly a subjective test, and thus it is held to a “reasonableness” standard. As Professor Laurie Blank of Emory University School of Law puts it, proportionality “[requires] extensive steps to protect civilians and reasonable judgments about the potential harm to civilians and the actions needed to minimize that harm.”⁶⁶

However, this is a clear *jus in bello* standard, in that it relates to attacks within the framework of an already existing conflict. While we may be able to conduct such an analysis for individual attacks, the vast information asymmetry between what military commanders know and what the public knows as to prospective military advantages makes it extremely difficult to decide if proportionality was violated on an individual attack level *ex post facto*. Still, proportionality is required on a *jus ad bellum* basis as well, whereby proportionality is measured as to the entire military operation, including the same “reasonableness.”⁶⁷

B. Analysis

We can now begin an analysis of whether the military objectives claimed by Israel were “reasonable” compared to the civilian life lost. As stated earlier, the IDF claimed that the central mission of Operation Protective Edge was to “retrieve stability to the residents of southern Israel, eliminate Hamas’ capabilities and destroy terror infrastructure operating against the State of Israel and its civilians.”⁶⁸ “Stability” most likely refers to the barrage of rockets that al-Qassam has sent in the direction of southern Israel over the past

⁶⁴ Additional Protocol I, *supra* note 3, art. 51(5)(b).

⁶⁵ *Id.* art. 57.

⁶⁶ Laurie R. Blank, *Asymmetries and Proportionalities*, HILL (July 29, 2014, 6:00 AM), <http://thehill.com/blogs/pundits-blog/international/213546-asymmetries-and-proportionalities>.

⁶⁷ See Raphaël Van Steenberghe, *Proportionality Under Jus Ad Bellum and Jus in Bello: Clarifying Their Relationship*, 45 ISR. L. REV. 107, 116 (2012).

⁶⁸ *Operation ‘Protective Edge’ Commences*, *supra* note 1.

few years.⁶⁹ However, according to Israel's own Ministry of Foreign Affairs, prior to Operation Protective Edge, no Israeli (either "citizen" or "combatant") had been killed from rocket fire from a mortar attack since November 21 of 2012.⁷⁰ It was only after Operation Protective Edge began, and Hamas subsequently began firing more rockets, that Israelis were killed.

However, Israel could always argue that one must look at the whole picture: rockets have been a consistent threat to Israeli peace and stability since Hamas operatives began firing them roughly ten years ago. Looking at the data, the number of total Israeli fatalities from rocket fire from 2004 (when they began) to the beginning of Operation Protective Edge was thirty-five.⁷¹ Moreover, an Israeli has not died from a rocket or mortar attack that was not in the midst of one of Israel's "operations" since 2011.⁷² Of course there are other costs to rocket attacks: civilian psychological trauma and the disruption of everyday economic and cultural life being two.⁷³ Still, according to the U.N., 1,473 Palestinian civilians died during Operation Protective Edge alone, including 501 children.⁷⁴ These numbers seem entirely disproportionate ex post facto. For example, the ratio of Palestinian children killed by Israel over the course of Protective Edge's two months to adult civilian and military Israelis killed via Hamas rocket and mortar bombings over the course of the ten years prior to Protective Edge is over 14:1. Israel could argue that it did not know what the death toll would be ex ante, but the recent history should have given them pause: 1,166 Palestinians died during the 2008-2009 Gaza War.⁷⁵

One may argue that the presence of Hamas' underground tunnels (which IDF soldiers would eventually destroy) was a more serious threat that justified the large-scale Israeli response, but there are three main problems with this line of reasoning. First, despite claims from Israel that Hamas had built these

⁶⁹ *Rocket Attacks on Israel From Gaza*, ISR. DEF. FORCES, <http://www.idfblog.com/facts-figures/rocket-attacks-toward-israel/> (last visited Oct. 9, 2015).

⁷⁰ *Victims of Palestinian Violence and Terrorism Since September 2000*, ISR. MINISTRY FOREIGN AFF., <http://www.mfa.gov.il/mfa/foreignpolicy/terrorism/palestinian/pages/victims%20of%20palestinian%20violence%20and%20terrorism%20sinc.aspx> (last visited Oct. 9, 2015).

⁷¹ Phan Nguyen, *How Many People Have Died From Gaza Rockets into Israel?*, MONDOWEISS (July 14, 2014), <http://mondoweiss.net/2014/07/rocket-deaths-israel>.

⁷² *Id.*

⁷³ William M. Welch, *Tel Aviv Flight Ban Cuts off Israelis*, USA TODAY (July 23, 2014, 8:09 AM), <http://www.usatoday.com/story/news/world/2014/07/22/ben-gurion-airport/13015887/>.

⁷⁴ OCCUPIED PALESTINIAN TERRITORY REPORT SEPT. 2014, *supra* note 2.

⁷⁵ Adam Taylor, *The Lopsided Death Tolls in Israel-Palestinian Conflicts*, WASH. POST (July 11, 2014), <http://www.washingtonpost.com/blogs/worldviews/wp/2014/07/11/the-lopsided-death-tolls-in-israel-palestinian-conflicts/>.

tunnels to kill Israeli citizens, they had never been previously successful at doing so. Second, there was an alternative option: they could attempt to seal off the tunnels on their side of the border, rather than penetrating Gaza, which was exactly what Egypt did after a Palestinian used the tunnels to kill sixteen border guardsmen in 2012.⁷⁶ Third, and possibly most problematic to the case against proportionality, is that Israel did not mention the tunnels as a military concern *until after Operation Protective Edge had already begun*. As was reported by the BBC on July 31, 2014: “Israel’s offensive, named Operation Protective Edge, began with a focus on Hamas’ rocket-launching capability. But it has since expanded to take in the threat from tunnels. After air strikes began, the Israel Defense Forces (IDF) discovered an extensive network of tunnels leading from Gaza into Israel.”⁷⁷

By July 31, 2014, over 1,400 Palestinians had been killed, roughly 1,050 of which were civilians.⁷⁸ Therefore, Israel cannot justify the military advantage gained from destroying tunnels until after 1,050 civilians had already been killed. This means that *jus ad bellum* proportionality needs to be determined primarily by reference to rocket attacks, which were the original reasons given for Protective Edge, for all civilian destruction and lives lost from July 8th to July 31st. Considering an Israeli had not been killed by a Palestinian rocket during peacetime in three years, the case for Israel’s compliance with *jus ad bellum* proportionality seems weak.

IV. THE EXISTENCE OF INTERNATIONAL LAW DURING OPERATION PROTECTIVE EDGE

A. *The Realist Position*

The Realist stance toward international law is usually framed in terms of “existence” or “belief.” While there are some benefits to these terms, the Realist position is a bit more complicated. Stephen M. Walt, a professor at the Harvard Kennedy School of Government, as well as an international relations expert and “Realist,” clarifies his school of thought:

⁷⁶ *In Wake of Sinai Attack, Egypt Moves to Seal Gaza Tunnels*, HAARETZ (Aug. 7, 2012, 7:25 PM), <http://www.haaretz.com/news/diplomacy-defense/in-wake-of-sinai-attack-egypt-moves-to-seal-gaza-tunnels-1.456654>.

⁷⁷ *Israel ‘to destroy’ Hamas Gaza Tunnels–Netanyahu*, BBC NEWS (July 31, 2014), <http://www.bbc.com/news/world-middle-east-28582853>.

⁷⁸ Ian Deitch & Ibrahim Barzak, *US, UN Announce Deal on 72-hour Gaza Cease-Fire*, AP: THE BIG STORY (Aug. 1, 2014, 12:54 AM), <http://bigstory.ap.org/article/israel-calls-another-16000-reserves>.

Of course realists “believe in” international law and institutions: they exist, and we’d have to be blind to deny that basic fact. Moreover, realists have long acknowledged that international law and international institutions can be useful tools of statecraft, which states can use to achieve their national interests. In particular, law and institutions can help states coordinate their behavior so as to reap greater gains or avoid various problems (think of the rules that regulate air traffic, some forms of pollution, or global communications), and they can also provide mechanisms to facilitate international trade and to resolve various disputes. Where realists part company with some (but not all) liberal idealists is in their emphasis on the limits of institutions: they cannot force powerful states to act against their own interests and they usually reflect the underlying balance of power in important ways.⁷⁹

With this description of Realism in mind, whereby international law and institutions “exist” but do not actually or effectively circumscribe what actions states can take, we can see whether there was evidence of international law during Operation Protective Edge, and if there was, whether it limited state action.

B. *Warning Palestinian Civilians*

The most direct evidence of international law in action during Protective Edge was Israel’s warnings to the Palestinian people of incoming attacks in compliance with customary international humanitarian law. Article 57(2)(c) of Protocol I requires that “effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.”⁸⁰ The IDF thus instituted a series of policies to warn civilian populations of upcoming attacks in their area, including phone calls and text messages, leaflet droppings, and “roof knockings,” whereby a building is hit with a “safe bomb” that does no damage but makes a loud enough sound to notify civilians that they are close to military targets or operations that will soon be attacked.⁸¹ Israel was praised for taking these steps. For example, an op-ed in *The Jerusalem Post* argued that Israel was taking “extraordinary

⁷⁹ Stephen M. Walt, *Do I Believe in International Law?*, FOREIGN POL’Y (Feb. 9, 2012), <http://foreignpolicy.com/2012/02/09/do-i-believe-in-international-law/>.

⁸⁰ Additional Protocol I, *supra* note 3, art. 57(2)(c).

⁸¹ *How is the IDF Minimizing Harm to Civilians in Gaza?*, ISR. DEF. FORCES (July 16, 2014), <http://www.idfblog.com/blog/2014/07/16/idf-done-minimize-harm-civilians-gaza/>. However, these “roof knockings” are not always benign: at least one civilian was killed from one of these “knockings” during Protective Edge. *Id.*

precautions to minimize unintended harm.”⁸² Likewise, another op-ed on Fox News written by an American-born member of Knesset stated that the precautions taken by Israel show that the “Israeli Army actually puts its own soldiers at risk to prevent civilian casualties.”⁸³

On the one hand, this is direct evidence of the existence of international law: Israel would most likely not be taking these precautions if not for the existence of Article 57(2)(c).⁸⁴ However, some have confused Israel’s required action under Protocol I with the belief that once Israel has attempted to warn Palestinian civilians of incoming attacks, they are no longer responsible for any civilian lives lost or damage done. As known from the understanding of the Principle of Distinction discussed in Part I, this is absolutely not the case. Israel is still required to limit damage done to civilians even after warning them, and they cannot attack civilian centers if any doubt exists as to whether the center is or is not being used for combatant purposes. That is why Navi Pillay wrote a letter to the Human Rights Council stating, “[e]ven if Israel has attempted to warn civilians to, for example, leave their homes or conducted an evacuation before an attack, this does not release Israel from its obligations under international humanitarian law.”⁸⁵

For example, Israel dropped leaflets in northern Gaza on July 13, 2014 warning residents there to evacuate the area.⁸⁶ Two days later, three Palestinians were killed when Israel bombed the house of Mahmoud Zahar, a Hamas political leader who was not home at the time.⁸⁷ This attack raises a number of concerns: it could be seen as a form of collective punishment if Israel knew that Zahar was hiding elsewhere (which was known by the press at

⁸² Reuven Ben-Shalom, *UNHRC is Empowering Terrorism and Degrading Human Rights*, JERUSALEM POST (July 28, 2014), <http://www.jpost.com/Opinion/Op-Ed-Contributors/UNHRC-is-empowering-terrorism-and-degrading-human-rights-369197>.

⁸³ Dov Lipman, *Israel Must Not Be Held to a Different Standard in Protecting its Citizens*, FOX NEWS (July 28, 2014), <http://www.foxnews.com/opinion/2014/07/28/israel-must-not-be-held-to-different-standard-in-protecting-its-citizens/>.

⁸⁴ Additional Protocol I, *supra* note 3, art. 51(5)(b).

⁸⁵ Navi Pillay, U.N. High Comm’r for Human Rights, Human Rights Situation in the Occupied Palestinian Territory, Including East Jerusalem, Statement at the Human Rights Council Twenty-first Special Session (July 23, 2014), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14893&LangID=E>.

⁸⁶ Michael Schwartz, Salma Abdelaziz & Josh Levs, *Israel Drops Leaflets Warning Gaza Residents to Evacuate Ahead of Strikes*, CNN (July 13, 2014), <http://www.cnn.com/2014/07/13/world/meast/mideast-tensions/>.

⁸⁷ Nidal Al-Mughrabi & Jeffrey Heller, *Israel Targets Top Hamas Leader as Cease-Fire Collapses*, REUTERS (July 15, 2014), <http://www.reuters.com/article/2014/07/15/us-palestinians-israel-idUSKBN0FI04420140715>.

the time), meaning that Israel may have just been attempting to coerce or punish Zahar by hurting his family. The attack could also fail the Principle of Distinction in two key ways: first, as was explained earlier, political leaders are not legitimate targets during wartime, even if Israel claims that they are “terrorists,” which is not an exception to the Principle of Distinction. Therefore, the targeting alone of Zahar could be considered a war crime under Article 8(2)(b)(i) of the Rome Statute. Second, this attack could violate the Principle of Distinction because it targeted a civilian object (a home) when doubt existed as to whether it was being used for military purposes.

This example shows that the Realist position was not far off in the summer of 2014 in Gaza. Although Israel abided by some areas of international law, they also used it as a public relations tool in order to not follow through on further obligations to civilians. Israel did not feel circumscribed by the rules of *jus in bello*, and in fact used their required behavior to cover up many abuses.

CONCLUSION

The damage inflicted on Gaza during the summer of 2014 was horrendous, but one may find it easier to sleep at night if the damage were simply the unfortunate byproduct of a just war. However, the attacks on schools and hospitals were potential war crimes under the Rome Statute. The Palestinians in Gaza and the West Bank were possible victims of collective punishment. The proportionality requirement did not seem to have been met, given the relatively minor threat of Israeli deaths via Hamas rocket attacks. Moreover, Israel’s most consistent upholding of international law, warnings to civilians of incoming attacks, was repeatedly conflated by the international media with giving Israel the authority to hurt civilians, a point in favor of the Realist position adopted by Stephen M. Walt. Still, there may be more clarity coming: on October 1, 2014, President Mahmud Abbas of Fatah indicated his intention “to petition the International Criminal Court over alleged Israeli war crimes.”⁸⁸ Many obstacles stand in the way of that coming to fruition, but there is some hope that the truth may someday be discovered.

⁸⁸ *Palestinians Risking US Aid over UN Bid: Abbas*, YAHOO NEWS (Oct. 1, 2014, 3:00 PM), <http://news.yahoo.com/palestinians-risking-us-aid-over-un-bid-abbas-190059291.html>.