THE APPLICATION OF IHL IN THE GOLDSTONE REPORT: A CRITICAL COMMENTARY[1]

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1. INTRODUCTION

Operation Cast Lead, the Israeli military operation in Gaza that began on 27 December 2008, demonstrated anew the challenges international humanitarian law (IHL) – otherwise known as the law of armed conflict or the law or war[3] – faces in contemporary conflict.[4]

In response to the firing of rockets at southern Israel and Hamas's use of tunnels to smuggle rockets into Gaza, the Israel Defense Forces (IDF) launched major air and ground operations against Hamas and other Palestinian armed groups in Gaza. The nature of the ensuing combat highlighted complex legal issues regarding, *inter alia*, targeting, collateral damage and the protection of civilians.

The Report of the United Nations Fact Finding Mission on the Gaza Conflict (hereinafter Goldstone Report)[5] presented an opportunity to examine critically how the law applies in complicated modern warfare and how the law might be used to solve difficult problems such conflict poses. Mandated to investigate possible vio-

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3. International humanitarian law is generally viewed as a marginally broader term than the law of armed conflict or the law of war, encompassing the law on genocide, crimes against humanity and the protection of civilians generally. Nonetheless, all three terms denote the body of law that governs the conduct of states, armed groups and individuals during armed conflict. For the purposes of this article, I will use these terms interchangeably.

4. See L.R. Blank and A.N. Guiora, 'Teaching an old dog new tricks: operationalizing the law of armed conflict in new warfare', 1 *Harvard NSJ* (2010) pp. 45-85, defining 'new warfare' as 'conflicts generally involv[ing] a state engaged in combat with non-state forces, combat characterized by fighting in highly populated areas with a blurring of the lines between military forces and civilian persons and objects'.

5. 'Human Rights in Palestine and Other Occupied Arab Territories', Report of the United Nations Fact Finding Mission on the Gaza Conflict, A/HRC/12/48, 15 September 2009 [hereinafter Goldstone Report].

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lations of IHL and human rights law during the conflict in Gaza, the Goldstone Report engages in a sweeping review of the conflict, as well as the historical underpinnings of the Israeli-Palestinian conflict, human rights in the West Bank and in Israel proper, and Israel's strategic aims. Its determinations rely primarily on factual information gathered in the course of the investigations on the ground in Gaza. Others have highlighted limitations in the fact-finding and raised questions about whether the conclusions set forth in the Goldstone Report are even-handed given the absence of information from the Israeli government, which refused to cooperate in the investigation.[6] This article will not address those questions, nor will it assess whether actual crimes were committed; that would be a task for a competent court or tribunal. Rather, I will analyze the Goldstone Report's application of the law to the conduct of both parties so as to examine whether it applies the correct legal standards and interprets them appropriately within the framework of the Gaza conflict. In particular, the article will focus on two main shortcomings in the Goldstone Report's application of IHL: areas in which the report could have benefitted from a greater sensitivity to the complexities of modern warfare, and areas in which its approach is questionable as a matter of law.

The second section offers a brief background on the conflict, the Goldstone Report itself, and the applicable law. In the third, I highlight the report's flawed examination of the challenges posed by contemporary conflicts in two fundamental areas of IHL: distinction and military objectives. Both require that military commanders and soldiers understand who is a civilian and who is a fighter or combatant, and which targets are military targets and which are civilian objects. Without a thorough and sophisticated understanding of how to make these determinations, military commanders, soldiers and policy makers will face grave difficulty in planning and carrying out military operations within the bounds of the law. The challenges presented in Operation Cast Lead are emblematic of some of the most difficult dilemmas modern warfare poses.

Section four highlights several areas in which the Goldstone Report's application of IHL is questionable, either because it uses the incorrect legal standard or because it applies the wrong law when more than one body of law applies. The report errs twice in its treatment of the principle of proportionality, first by approaching *jus in bello*[7] proportionality retrospectively rather than prospectively, and second by conflating jus *ad bellum*[8] proportionality with *jus in bello* proportionality. Additional problems arise in its analysis of the law governing precautions

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6. See e.g., N. Cumming-Bruce, 'U.N. investigator presents report on Gaza war', *New York Times*, 30 September 2009; R.O. Freedman, 'A biased war report; U.N.'s human rights council's Gaza study was destined to unfairly criticize Israel', *Christian Science Monitor*, 20 October 2009; G. Steinberg, 'Fundamentally flawed, or a step toward sanctions?', *Jerusalem Post*, 16 September 2009; R. Goot, 'A blind eye to Hamas atrocities', *The Australian*, 6 November 2009.

7. *Jus in bello* is the body of law governing the conduct of hostilities and the conduct of persons during armed conflict. See Section 4.2 *infra*.

8. *Jus ad bellum* is the law governing the resort to force. See Section 4.2 *infra*.

in attack and the treatment of prisoners of war, and its assessment of responsibility for specific crimes, including attacks on civilians, destruction of property and hostage taking.

IHL seeks to balance two key goals – military necessity and humanity. In this way, the law protects civilians from the ravages of war while still enabling effective military operations. Interpretations of the law that leave militaries with no lawful means by which to engage in necessary operations are often viewed as counter-productive and pose the risk of generating disregard for legal norms. The Goldstone Report unfortunately fails to give sufficient weight to this inherent balancing – the most basic and historic premise of humanitarian law: the 'desire to diminish the evils of war, as far as military requirements permit'.[9]

2. BACKGROUND

Countless articles and media reports have provided detailed accountings of the Israeli-Palestinian conflict, the Israeli disengagement from Gaza, Hamas's rise to power in Gaza, and the escalation of hostilities between Israel and Gaza in 2007 and 2008.[10] Therefore, only a summary of the Gaza conflict and the establishment of the United Nations fact-finding mission that culminated in the publication of the Goldstone Report is necessary to frame the subsequent discussion.

2.1 **Operation Cast Lead**

For the three years between Israel's disengagement from the Gaza Strip and the start of Operation Cast Lead, Hamas fired nearly 6000 rockets at southern Israel.[11] Israel maintained its blockade of Gaza, originally instituted in response to the 2006 capture of IDF Corporal Gilad Shalit by Palestinian armed groups in a cross-border raid. In June 2008, Israel and Hamas agreed to an Egyptian-brokered cease-fire that was intended to last for six months. Throughout the summer and the fall, the

9. Hague Convention No. IV Respecting the Laws and Customs of War on Land, 18 October 1907, preamble, Stat. 2277, T.S. 539 [hereinafter Hague IV].

10. Y. Shany, 'Faraway, so close: the legal status of Gaza after Israel's disengagement', 8 *YIHL* (2005) pp. 369-383; M. Mari, 'The Israeli disengagement from the Gaza Strip: an end of the occupation?', 8 *YIHL* (2005) pp. 356-368; N. Stephanopoulos, 'Israel's legal obligations to Gaza after the pullout', 31 *Yale JIL* (2006) pp. 524-528; M.S. Kaliser, 'Modern day exodus: international human rights law and international humanitarian law implications of Israel's withdrawal from the Gaza Strip', 17 *Indiana I & Comp. LR* (2007) pp. 187-228; G. Robinson, 'The fragmentation of Palestine', 106 *Current History* (2007) p. 421; E. Bronner, 'Hamas fires rockets into Israel', *New York Times*, 15 November 2008; J. Goldberg, 'The forgotten war: the overlooked consequences of Hamas's actions', *New Yorker*, 11 September 2006; 'Holiday marks 35th anniversary of Yom Kippur war', *US Fed. News*, 6 October 2008, (noting that 'since Israel's Gaza withdrawal, Iran-backed Hamas and other terrorist groups in Gaza have fired more than 5,800 rockets and mortars into Israel').

11. See A.N. Guiora and D. Luban, 'An exchange on law and Israel's Gaza campaign', 31 *ABA National Security Law Report* (Jan./Feb. 2009) pp. 1-16.

Israeli blockade remained in place and Hamas continued sporadic rocket fire. On 5 November 2008, Israel launched a raid on a tunnel being built near the Gaza border and Hamas retaliated with rocket fire.[12] Hostilities intensified over the next several weeks, with Hamas firing over 196 rockets and 127 mortars into Israel during that time.[13] After Hamas declared the truce over on 18 December 2008, Palestinian rocket attacks and Israeli air strikes intensified. On 27 December 2008, Israel launched Operation Cast Lead with a weeklong air attack. Ground operations began on 3 January 2009 and ended on 18 January 2009.

2.2 The Goldstone Report: genesis and mandate

The United Nations Human Rights Council established the United Nations Fact-Finding Mission on the Gaza Conflict (hereinafter the Mission) on 3 April 2009. The Mission's mandate was to 'investigate all violations of international human rights law and international humanitarian law that might have been committed at any time in the context of the military operations that were conducted in Gaza during the period from 27 December 2008 and 18 January 2009, whether before, during or after.'[14] The Mission convened in Geneva in May, July and August 2009, and conducted field visits to Gaza and Amman, Jordan during the summer of 2009. The government of Israel refused to cooperate with the investigations or allow the Mission to enter Gaza through Israel. Eventually, Egypt granted the Mission permission to enter Gaza through the Rafah crossing. In addition, the Mission held public hearings in Gaza in June 2009 and in Geneva in July 2009. On 15 September 2009, the Mission issued its final report, entitled *Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact Finding Mission on the Gaza Conflict*.

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12. 'Gaza truce broken as Israeli raid kills six Hamas gunmen', *The Guardian*, 5 November 2008.
13. Goldstone Report, paras. 257, 259.
14. At <http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/FactFindingMission.htm>. Many critics of the Goldstone Report charge that the report's official mandate only addresses alleged Israeli violations of IHL and human rights law rather than violations committed by both sides. For example, the Human Rights Council resolution calling for the establishment of the Mission states that the HRC: '*Decides* to dispatch an urgent, independent international fact-finding mission, to be appointed by the President of the Council, to investigate all violations of international human rights law and international humanitarian law by the occupying Power, Israel, against the Palestinian people throughout the Occupied Palestinian Territory, particularly in the occupied Gaza Strip, due to the current aggression, and calls upon Israel not to obstruct the process of investigation and to fully cooperate with the mission.' United Nations Human Rights Council, 'The grave violations of human rights in the occupied Palestinian territory, particularly due to the recent Israeli military attacks against the occupied Gaza Strip', UN Doc. A/HRC/S-9/L.1, para. 14 (9th special sess.), 9 and 12 January 2009. After raising concerns about the wording of the mandate, Judge Richard Goldstone received verbal confirmation of a revised mandate to address violations by Hamas and other Palestinian armed groups as well. See H. Rettig Gur, 'Goldstone to "Post": Mandate of my Gaza probe has changed. There's no reason for Israel not to cooperate. Israel disagrees: There's been no formal change. The goal is not to find truth but to attack us', *Jerusalem Post*, 17 July 2009. This article will not address the nature of the mandate but will focus entirely on the misapplication of IHL in the report.

In its conclusions and recommendations, the Goldstone Report found numerous violations of IHL and human rights law by Israel and Hamas and other Palestinian armed groups. The report also analyzed and criticized Israel's overall objectives and strategy, Israel's blockade of the Gaza Strip, and the treatment of Palestinians in the West Bank, among other issues. Finally, the report analyzed the Israeli mechanisms for holding alleged perpetrators of IHL violations accountable and offered numerous critiques of the military investigation and justice systems. In the same vein, the report addressed the obligation of Hamas to hold perpetrators accountable and found no existing suitable mechanisms for accountability in the Gaza Strip.

The report issues a number of recommendations, focusing on accountability for IHL violations, reparations, violations of human rights law, the blockade, the use of weapons and military procedures, and the protection of human rights organizations.[15] In particular, the report recommends that the United Nations Security Council refer the situation in Gaza to the prosecutor of the International Criminal Court (ICC) pursuant to Article 13(b) of the Rome Statute of the International Criminal Court (hereinafter Rome Statute) if, after six months, no 'good faith investigations that are independent and in conformity with international standards' are underway.[16] It also recommends that other States Parties to the 1949 Geneva Conventions use universal jurisdiction, where available, to begin criminal investigations of grave breaches in their national courts.[17] Finally, the report issued numerous recommendations to Israel and to Palestinian authorities and armed groups regarding adherence to IHL and human rights law, the release of Corporal Shalit, and the review of rules of engagement and other instructions to military and security forces, as well as several other related matters.[18]

The Mission's work and the report itself demonstrate many of the challenges fact-finding missions face. In particular, while alleged violations of 'Geneva law' – the branch of IHL focused on protection of civilians – are perhaps more easily identifiable, much of the Mission's work involved alleged violations of 'Hague law' – the branch of IHL focused on the conduct of hostilities. Many of the issues raised here highlight the significantly more complex nature of fact-finding in the area of Hague law. Beyond the recommendations and the fact-finding, however, the Goldstone Report offers a window into the implementation of IHL during complex asymmetrical warfare.[19] For this reason, a careful analysis of how the report applies IHL to situations, incidents and persons during the conflict is critical.

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15. Goldstone Report, para. 1764.
16. Ibid., para. 1766.
17. Ibid., para. 1772.
18. Ibid., paras. 1769-1771.
19. Asymmetrical warfare is generally used to describe 'a situation where an adversary can take advantage of its strengths or an opponent's weaknesses'. R.W. Barnett, *Asymmetrical warfare: today's challenge to U.S. military power* (Washington, Brassey's 2003) p. 15. In 'the modern context, asymmetrical warfare emphasizes what are popularly perceived as unconventional or non-traditional methodologies'. C.J. Dunlap, Jr., 'A virtuous warrior in a savage world', 8 *USAFA JLS* (1997) pp. 71 at 72.

2.3 **Applicable law**

The Goldstone Report briefly assesses the law applicable to the conflict in Gaza. Israel is a party to the four Geneva Conventions of 1949[20] but is not a party to the 1977 Additional Protocols.[21] The report, referencing the Israeli Supreme Court's determination that the conflict with Hamas and other Palestinian armed groups is an international armed conflict[22] , identifies the applicable law as the Geneva Conventions (particularly Geneva Convention IV), the Hague Convention IV of 1907 and its accompanying Regulations ('Hague Convention'), and the provisions of Additional Protocol I that form part of customary law.[23] Additional Protocol I did not apply to the conflict as conventional law because neither Israel nor Hamas is a party, but many of its provisions are customary law that was binding in the conflict.[24] The Goldstone Report also recognizes that these same principles bind Hamas and other Palestinian armed groups.[25] Finally, the report references the Rome Statute and the definitions of crimes therein and recommends that the alleged viola-

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20. Israel ratified the Geneva Conventions on 6 July 1951. The four Geneva Conventions are: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 6 *UST* 3114, 75 *UNTS* 31 [hereinafter GC I or First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 6 *UST* 3217, 75 *UNTS* 85 [hereinafter GC II or Second Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, 6 *UST* 3316, 75 *UNTS* 135 [hereinafter GC III or Third Geneva Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 6 *UST* 3516, 75 *UNTS* 287 [hereinafter GC IV or Fourth Geneva Convention].

21. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 *UNTS* 3 [hereinafter AP I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 *UNTS* 609 [hereinafter AP II].

22. Goldstone Report, para. 282, citing to *Public Committee Against Torture* v. *Government of Israel*, HCJ 769/02 (11 December 2006).

23. Goldstone Report, paras. 271, 272, 285. The Israeli report on the Gaza operation takes a similar approach; see 'The operation in Gaza, 27 December 2008-18 January 2009: factual and legal aspects' (July 2009), para. 30 (Israel 'applies to its military operations in Gaza the rules of armed conflict governing both international and non-international armed conflicts'); para. 31 ('In particular, Israel's High Court of Justice has confirmed that in the ongoing armed conflict with Palestinian terrorist organisations, including Hamas, Israel must adhere to the rules and principles in (a) the Fourth Geneva Convention, (b) the Regulations annexed to the Fourth Hague Convention (which reflect customary international law), and (c) the customary international law principles reflected in *certain* provisions of Additional Protocol I to the Geneva Conventions on 1949. Israel is not a Party to the Additional Protocol I, but accepts that some of its provisions accurately reflect customary international law.') [footnotes omitted].

24. Goldstone Report, para. 282, see also n. 26 *infra*.

25. Goldstone Report, para. 304 ('As the Special Court for Sierra Leone held, "it is well settled that *all* parties to an armed conflict, whether States or non-State actors, are bound by international humanitarian law, even though only States may become parties to international treaties".'), citing *Prosecutor* v. *Sam Hinga Norman*, case No. SCSL-2004-14-AR72(E), Decision on preliminary motion based on lack of jurisdiction (child recruitment) (31 May 2004), para. 22.

tions potentially be submitted to the ICC for prosecution. Any questions regarding the nature of the conflict – whether it is international or non-international – are, while both debatable and relevant, beyond the scope of this article. Similarly, although the applicability of the Rome Statute to Hamas and other Palestinian armed groups is highly disputed and uncertain, such questions are also beyond the scope of this article. Therefore, this article will employ the framework set forth above regarding the applicable law and will use the elements of crimes in the Rome Statute as a guide, without any suggestion that the conflict is indeed an international armed conflict or that Hamas is subject to the Rome Statute. Finally, I note that the primary provisions of Additional Protocol I relied on in this article and in the corresponding sections of the Goldstone Report all form part of customary international law.[26]

3. DISTINCTION AND MILITARY OBJECTIVES: APPLYING THE LAW OF ARMED CONFLICT AMID THE COMPLEXITIES OF NEW WARFARE

One of the most fundamental issues during conflict is identifying who or what can be targeted.[27] Traditionally, one could distinguish between soldiers – who wore uniforms – and civilians – who typically did not venture near the battlefield – in most circumstances. Similarly, identifying military and civilian objects was usually feasible. Contemporary conflicts introduce a whole set of new challenges in this area, however, and Operation Cast Lead was no exception. Fighters dressed in civilian clothing and fighting from civilian areas introduce massive uncertainties that dramatically complicate the implementation of IHL.

This article does not suggest that militaries fighting against insurgents or other non-state entities (whether called terrorists, guerrillas, rebels, etc.) should be granted greater leeway in carrying out their obligations under IHL. One principal tenet of IHL is that parties' obligations are constant, regardless of the conduct, status or obligations of the other side. Thus, the mere fact that Hamas and other Palestinian militants did not distinguish themselves from the civilian population did not absolve Israel of its obligation to distinguish between legitimate targets and innocent civilians.

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26. AP I, Arts. 37(1), 48, 51, 52(2), 57, and 58 all form part of customary international law. See J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, 3 Vols. (Cambridge, CUP 2005) Rules 1, 2, 7, 8, 10-15, 17-24, 65; C. Greenwood, 'The customary law status of the 1977 Protocols', in *Essays on War in International Law* (London, Cameron May 2006); M.N. Schmitt, 'Human shields in international humanitarian law', 47 *Columbia JTL* (2009) pp. 292 at 308; Y. Dinstein, *The Conduct of Hostilities in International Armed Conflict*, (Cambridge, CUP 2004) p. 83, T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (New York, Oxford University Press 1989) pp. 64-65.

27. See Blank and Guiora, *supra* n. 4, for an in-depth discussion of how to identify and classify legitimate targets effectively for commanders and troops on the ground.

3.1 The principle of distinction in contemporary conflicts

The principle of distinction, one of the 'cardinal principles of IHL',[28] requires that any party to a conflict distinguish between those who are fighting and those who are not and direct attacks solely at the former.[29] Similarly, parties must distinguish between civilian objects and military objects and target only the latter. Article 48 of Additional Protocol I sets forth the basic rule:

> '[i]n 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.'[30]

Distinction lies at the core of IHL's seminal goal of protecting innocent civilians and persons who are *hors de combat*. The obligation to distinguish forms part of the customary international law of both international and non-international armed conflicts, as the International Criminal Tribunal for the former Yugoslavia (ICTY) held in the *Tadić* case.[31] As a result, all parties to any conflict are obligated to distinguish between combatants, or fighters, and civilians, and concomitantly, to

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28. Legality of the Threat and Use of Nuclear Weapons in Armed Conflict, Advisory Opinion, 8 July 1996, 1996 *ICJ Rep.*, para. 78 (Dissenting Opinion of Judge Higgins, dissenting on unrelated grounds) (declaring that distinction and the prohibition on unnecessary suffering are the two cardinal principles of IHL) [hereinafter Nuclear Weapons].

29. Distinction was first set forth in Article 22 of the Lieber Code: 'Nevertheless, as civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit.' Francis Lieber, War Department, Instructions for the Government of Armies of the United States in the Field Art. 22 (1863), at <http://www.icrc.org/ihl.nsf/FULL/110?OpenDocument> [hereinafter Lieber Code]. A few short years later, the international community reinforced the rule in the St. Petersburg Declaration, which stated that 'the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy.' Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, preamble, 29 November (11 December), 1868, reprinted in 1 *AJIL* Supp. 95; see also Henkaerts and Doswald-Beck, *supra* n. 26, Rule 1.

30. AP I, Art. 48, 8 June 1977, 1125 *UNTS* 3 [hereinafter AP I]. Article 48 is considered customary international law. See Henkaerts and Doswald-Beck, *supra* n. 26, Rule 1.

31. *Prosecutor* v. *Dusko Tadić*, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, para. 110, 127, citing UN General Assembly Resolution 2675: 'Bearing in mind the need for measures to ensure the better protection of human rights in armed conflicts of all types, [… the General Assembly] Affirms the following basic principles for the protection of civilian populations in armed conflicts, without prejudice to their future elaboration within the framework of progressive development of the international law of armed conflict: … 2. in the conduct of military operations during armed conflicts, a distinction must be made at all times between persons actively taking part in the hostilities and civilian populations.' See also Nuclear Weapons, *supra* n. 28, para. 79 (distinction is one of the 'intransgressible principles of international customary law'); Henkaerts and Doswald-Beck, *supra* n. 26, Rule 1; *Abella* v. *Argentina* (La Tablada), Inter-American Commission on Human Rights, Report No. 55/97, Argentina, Doc. 38, 1997, para. 178.

distinguish themselves from civilians and their own military objects from civilian objects.

The purpose of distinction – to protect civilians – is emphasized in Article 51 of Additional Protocol I, which states that '[t]he civilian population as such, as well as individual civilians, shall not be the object of attack'.[32] Article 51 continues, stating:

> '[i]ndiscriminate attacks are prohibited. Indiscriminate attacks are: (a) those which are not directed at a specific military objective; (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.'[33]

Furthermore, Article 85 of Protocol I declares that nearly all violations of distinction constitute grave breaches of the Protocol, including:

> 'a) making the civilian population or individual civilians the object of attack;?(b) launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a)(iii); … (d) making non-defended localities and demilitarized zones the object of attack;?[and] (e) making a person the object of attack in the knowledge that he is hors de combat …'[34]

The Rome Statute similarly criminalizes attacks on civilians and indiscriminate attacks.[35]

New warfare poses particular challenges for distinction precisely because of the lack of boundaries between conflict areas and civilian areas, and thus between those actively participating in hostilities and those who are not. Moreover, modern warfare is increasingly characterized by asymmetry in the military capabilities of the parties. As such asymmetry grows, the 'disadvantaged party has an incentive to blur the distinction between its forces and the civilian population in the hope that this will deter the other side from attack'.[36] For example, during Operation Iraqi Freedom, Iraqi insurgents commonly wore civilian clothing when approaching

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32. AP I, Art. 51(2).
33. AP I, Art. 51(4).
34. AP I, Art. 85.
35. See Rome Statute of the International Criminal Court, Arts. 8(2)(b)(i), 8(2)(b)(ii), 8(2)(b)(iv), 8(2)(b)(v), 8(2)(b)(vi), 8(2)(e)(i), 8(2)(e)(ii), 8(2)(e)(iv), U.N. Doc A/CONF.183/9 (July 17, 1998), at <http://untreaty.un.org/cod/icc/statute/ romefra.htm> [hereinafter Rome Statute].
36. M.N. Schmitt, 'The impact of high tech and low tech warfare on distinction', Harvard Program on Humanitarian Policy and Conflict Research, International Humanitarian Law Research Initiative Briefing Paper (November 2003) p. 7, reprinted in R. Arnold and P.-A. Hildbrand, eds., *International Humanitarian Law and the 21st Century's Conflicts: Changes and Challenges* (Lausanne, Editions Interuniversitaires Suisses 2005).

American and British forces in order to get closer without seeming to present a threat.[37] Similarly, the Taliban in Afghanistan regularly 'use a tactic of engaging coalition forces from positions that expose Afghan civilians to danger'.[38] Perhaps most nefariously, insurgent groups that employ suicide bombing as a tactic have now turned to the use of women and children, for they have proven more likely to evade measures designed to identify suicide bombers.[39]

In any assessment of compliance with international humanitarian law, it is essential to understand the context in which it is applied, beyond the natural inclination to focus on the innocent civilian casualties and the civilian infrastructure that endures significant damage in the course of conflict that knows no differentiation between the traditional battlefield and populated urban areas. Of course, context does not excuse overt violations of the law nor does it alter the fundamental legal framework at issue. However, the circumstances to which the law is applied may well determine the nature of compliance. In no area of international humanitarian law is this more true than that of distinction. As will become apparent, both Hamas tactics and the urban environment in which most of the relevant military operations occurred dramatically influenced the application of the principle of distinction during Operation Cast Lead.

3.2 Identifying military objectives

Beyond the obligation to differentiate between innocent civilians and persons who are fighting (and therefore can be targeted), the principle of distinction requires comparable determinations regarding the targeting of objects. The obligation to target only military objectives is one means of implementing the age-old principle that the means and methods of warfare are not unlimited.[40] Operation Cast Lead,

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37. Ibid. Similarly, Afghan militants often pose as women to escape from fire fights unseen. See 'Official: Afghan militants fled dressed as women', [6 July 2009] at <http://www.cnn.com/2009/WORLD/asiapcf/07/06/afghanistan.marine.stahttp://www.cnn.com/2009/WORLD/asiapcf/07/06/afghanistan.marine.standoff/index.html>.

38. J. Garamone, 'Directive re-emphasizes protecting Afghan civilians', *American Forces Press Service*, [6 July 2009] at <www.defenselink.mil>.

39. See e.g., 'Pakistan: Taliban buying children for suicide attacks', [7 July 2009] at <http://edition.cnn.com/2009/WORLD/asiapcf/07/07/pakistan.child.bombers/index.html> (explaining that 'young suicide bombers may be able to reach targets unnoticed'.); C. Clifford, 'The battle for suicide bombers', children.foreignpolicyblogs.com/category/suicide-bombers/; 'Child bombers-in-training arrested in Iraq', [21 April 2009] at <www.UPI.com>; D. Abrams, 'Turning a blind eye to child suicide bombers', [26 March 2004],at <www.msnbc.msn.com/id/4601244>.

40. The modern version of this principle appears in AP I, Art. 35; earlier formulations appear in the writings of Vitoria, Grotius and Vattel, as well as in early codifications of the laws of war. See Franciscus de Vitoria, *De Indis Et De Ivre Belli Reflectiones*, J. Pawley Bate, transl. (New York, Oceana Publications 1964) (1557); 3 Hugo Grotius, *The Law of War and Peace*, F.W. Kelsey, transl. (New York, Oceana Publications 1964) (1646); Emmerich de Vattel, *The Law of Nations or the Principles of Natural Law*, C.G. Fenwick, trans. (Washington, Carnegie Institute of Washington 1916) (1785); Lieber Code, Art. 16, St. Petersburg Declaration, *supra* n. 29; Laws of War on Land (1880 Oxford Manual) Art. 4, at the ICRC Treaty Database, <www.icrc.org/ihl>.

even more than other asymmetrical conflicts, demonstrated the complexities of determining when buildings and other objects constitute military objectives. According to many reports, Palestinian militants hid or stored rockets, missiles and other munitions in mosques, hospitals, schools and other civilian buildings.[41] In any conflict, such conduct makes targeting decisions extraordinarily difficult given the obligations to minimize civilian casualties and operate within the framework of proportionality; in Gaza, the most densely populated piece of land on earth,[42] the demands and dangers increase exponentially.

The very nature of Hamas and the political situation in Gaza make the question of how to identify military objectives a challenging one. As the IDF report on Operation Cast Lead explains,

> '[w]hile Hamas operates ministries and is in charge of a variety of administrative and traditionally governmental functions in the Gaza Strip, it still remains a terrorist organisation. Many of the ostensibly civilian elements of its regime are in reality active components of its terrorist and military efforts. Indeed, Hamas does not separate its civilian and military activities in the manner in which a legitimate government might. Instead, Hamas uses apparatuses under its control, including quasi-governmental institutions, to promote its terrorist activity.'[43]

Unlike previous counterterrorism operations against Hamas leaders and others involved in terrorist attacks against Israel,[44] Operation Cast Lead was essentially a war.[45] Israel therefore analysed and designated military targets within that framework, targeting Hamas ministries and other objects that appeared civilian in character. Criticisms of this approach have abounded; this article will not address them, except to recognize that the Israeli approach broadens the concept of military objective in potentially problematic ways. Rather, the analysis that follows examines the narrower issue of how the Goldstone Report applies IHL to the targeting of buildings in Gaza.

Article 52 of Additional Protocol I defines military objectives as:

> '… those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neu-

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41. A.H. Cordesman, Center for Strategic & International Studies, *The 'Gaza War': A Strategic Analysis* (2009) p. 24 (describing how Hamas used a mosque to store Grad missiles and Qassam rockets), <http://www.csis.org/media/csis/pubs/090202_gaza_war.pdf>; J. Fleishman, 'Charges fly in battle over what happened in Gaza', *Los Angeles Times*, 23 January 2009, p. A1 (detailing how Hamas used a bunker beneath a hospital as a headquarters).

42. BBC News, Key Maps, at <http://news.bbc.co.uk/2/shared/spl/hi/middle_east/03/v3_israel_palestinians/maps/html/population_settlements.stm>.

43. 'The operation in Gaza: factual and legal aspects' (July 2009) para. 235.

44. See *Public Committee Against Torture*, *supra* n. 22.

45. See Guiora and Luban, *supra* n. 11 (suggesting that while Israel did not declare war in the traditional sense under international law – since neither Hamas nor Gaza is a state – it did declare war on an organization, leading to an operation fundamentally different from previous operational counterterrorism).

> tralization, in the circumstances ruling at the time, offers a definite military advantage.'[46]

This definition sets forth nature, location and use or purpose as the primary criteria. Nature refers to 'all objects directly used by the armed forces: weapons, equipment, transports, fortifications, depots, buildings occupied by armed forces, staff headquarters, communications centres etc'.[47] Location is an important factor because certain objects, such as bridges, make a direct contribution to military action regardless of whether they have a military function. Finally, use and purpose refer respectively to an object's present or intended function. The Commentary to the Additional Protocols (the 'Commentary') explains that many civilian objects are or become useful to the armed forces. 'Thus, for example, a school or a hotel is a civilian object, but if … used to accommodate troops or headquarters staff, [it will] become [a] military objective[].'[48] Nonetheless, the Protocol emphasizes that all doubts as to the civilian or military nature of an object should be resolved in favour of civilian status.

Two key questions of targeting in Operation Cast Lead stand out: classification and targeting of Hamas ministry buildings and Israeli attacks on hospitals and mosques. In both situations, the nature of Hamas as a terrorist organization governing a non-state entity and engaging in terrorism and insurgent warfare makes the application of IHL extremely complex.

3.2.1 *Classification of government buildings*

The IDF targeted a broad swath of government buildings and civilian political infrastructure in Gaza, including civilian ministries, the al-Saraya prison and the Palestinian Legislative Council building. On first glance, these buildings are not self-evident military targets like barracks, tanks or munitions factories, but could be legitimate targets if they meet the definition set forth in Article 52(2). The Goldstone Report rejects the argument that these targets could be military objectives by finding that they are not 'war ministries', do not have a dual civilian-military use and did not make an effective contribution to military action.[49] It does so, however, with little, if any, analysis of the actual use of those buildings at the time of the conflict, simply stating that there is 'no indication' or 'an absence of evidence' of any military use.[50] In contrast, the Israeli position that all Hamas buildings were part of the terror infrastructure and therefore legitimate targets is a clear broaden-

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46. AP I, Art. 52(2).
47. Y. Sandoz, C. Swinarki and B. Zimmerman, eds., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August1949* (Geneva, ICRC, Dordrecht, Nijhoff 1987) para. 2020 (hereinafter Protocol Commentary).
48. Ibid., para. 2022.
49. Goldstone Report, paras. 385-387.
50. Ibid., paras. 386-387.

ing of the category of military objectives and legitimate targets. Although the report's concern about the risks of this approach is valid, its response is overly narrow.

For example, the report states that the only ministries on the two lists of military objectives commonly used – one by the International Committee of the Red Cross (ICRC) and one by Major General A.P.V. Rogers – are 'war ministries'.[51] In the case of Hamas, which has no 'war ministry' but rather multiple armed entities engaged in operations against Israel, this distinction is too elementary. The Interior Ministry, for example, oversees 'Hamas-controlled government forces in Gaza'.[52] According to Article 52(2) and the ICRC's list of military objectives, it meets the standard of a military objective because it makes an effective contribution to military action and its neutralization or destruction would offer a direct military advantage for Israel by eliminating or curtailing the ability of those forces to engage in combat. Moreover, the ICRC list specifically mentions 'other organs for the direction and administration of military objectives' as legitimate military objectives.[53] Given the nature of Hamas's infrastructure, a number of its buildings qualify.[54] The Goldstone Report's analysis inadequately assesses the significance of this infrastructure during the Gaza conflict in evaluating whether the targets were military objectives.

Based on this cursory appraisal, the report then asserts that attacks on the buildings were deliberate attacks against civilian objects. IHL uses a reasonableness standard based on the circumstances at the time to assess targeting determinations. In *Prosecutor* v. *Galić*, the ICTY stated that a civilian object 'shall not be attacked when it is not reasonable to believe, in the circumstances of the person contemplating the attack, including the information available to the latter, that the object is being used to make an effective contribution to military action'.[55] The status of a building thus cannot be determined solely from hindsight or in the absence of relevant intelligence information about the actual, rather than perceived, use of the building. Instead, as with proportionality determinations, discussed *infra*, assessments of the military or civilian nature of a target must be based on the information reasonably available to the commander or military planner at the time of the attack. For example, during Operation Iraqi Freedom, the U.S. attacked, among other buildings, the Baath Party Headquarters, which appears, at first blush, to be a civilian object. Yet Iraqi forces were firing at the US troops from within and near the build-

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51. Ibid., para. 385, citing to Office of the Prosecutor, International Criminal Tribunal for the former Yugoslavia, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (13 June 2000) para. 49, reprinted in (2000) 39 *ILM* 1257 [hereinafter NATO Bombing Report].

52. Nidal al-Mughrabi, 'Israel flattens Hamas ministry in Gaza Strip', *Reuters*, 18 January 2008.

53. NATO Bombing Report, *supra* n. 51, para. 39.

54. M. Levitt, *Hamas: Politics, Charity, & Terrorism in the Service of Jihad* (New Haven, Yale Univ. Press 2006).

55. *Prosecutor* v. *Stanislav Galić*, case No. IT-98-29-T, Judgment, § 51 (5 December 2003).

ing, and a weapons cache was subsequently found inside the facility.[56] As this example illustrates, those examining whether there has been a deliberate attack on civilians or civilian objects must:

> 'reconstruct the assessment carried out by the military regarding the military necessity of destroying the target. This requires knowledge of the tactical and strategic goals of the belligerents at that time as the determination of what is militarily necessary may be relative to the goals of the warring party concerned – which may change during the conflict …'[57]

The failure to address intent and military use of civilian objects in the Goldstone Report – indeed to even raise serious questions regarding the possible military use of certain buildings – risks undoing the balance IHL draws between military necessity and humanitarian concerns in the classification of military objectives.

In addition, as discussed in greater detail below, both the ICTY and the Rome Statute require a *mens rea* of wilfulness or intentionality to satisfy the elements of deliberate attack[58] – yet the Goldstone Report's analysis of military objectives appears to disregard this requirement. The report seems to assume that Israel had concluded that all Hamas buildings were by nature military. However, even assuming, solely for the sake of analysis, that such a conclusion was incorrect, the approach would not evidence a violation of the prohibition on directly attacking civilian objects unless it was also, in the attendant circumstances, unreasonable. If the IDF reasonably believed, based on the information it had at the time, that individual buildings in question met the definition of military objective, then the intent element of the crime of deliberate attacks on civilian objects would not have been met. With no information from the IDF about how they reached their determinations and on what evidence they based their classifications, the report pays insufficient regard to the issue of intent.

3.2.2 *Attacks on protected objects*

The second shortcoming in the Goldstone Report regarding targeting in the context of military objectives involves its analysis of Israeli attacks on hospitals and mosques.

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56. M.N. Schmitt, 'Conduct of hostilities during Operation Iraqi Freedom: an international humanitarian law assessment', 6 *YIHL* (2003) pp. 73-110, citing US CENTCOM News Release No. 03-03-105, 'U.S. Marines destroy Ba'ath Party Headquarters', 31 March 2003.

57. C. Wuerzner, 'Mission impossible? Bringing charges for the crime of attacking civilians or civilian objects before international criminal tribunals', 90 *IRRC* (December 2008) pp. 907 at 917.

58. *Prosecutor* v. *Tihomir Blaškić*, case No. IT-95-14-A, Appeals Judgment, 29 July 2004, para. 180; K. Dormann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (Cambridge, CUP 2005) p. 152 ('the civilian character of the object must or should have been known to the perpetrator and, similar to the *mens rea* of the crime of attacking civilians, the attack must have been willfully directed at civilian objects'.). See also *Prosecutor* v. *Dario Kordić and Mario Čerkez*, case No. IT-95-14/2-A, Judgement, para. 53 (17 December 2004).

Numerous allegations arose of Hamas using hospitals, schools, mosques, residential houses and other civilian objects for the storage of weapons, firing of rockets and other military purposes.[59] Conflicts in Afghanistan, Iraq and Lebanon, among others, also involved similar use of protected objects by insurgents and other fighters.[60] Normally protected under international law, these buildings lose their immunity from attack if used for military purposes. For example, Article 18 of the Fourth Geneva Convention sets forth the obligation to refrain from attacking – and to protect – civilian hospitals.[61] Article 19 then states that 'the protection to which civilian hospitals are entitled shall not cease unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy'.[62] Launching rockets from or storing munitions in a hospital clearly qualify. Similarly, Hague Convention IV recognizes limits on the protection of cultural and religious buildings:

> '[i]n sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.'[63]

During Operation Iraqi Freedom, human rights organizations condemned the Iraqi practice of using hospitals and mosques for military uses. Emphasizing that such use was illegal under IHL, Human Rights Watch's report *Off Target* explains that the 'protection ceases [when] medical establishments are used to commit "acts harmful to the enemy". By using hospitals as military headquarters, Iraqi forces

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59. See Cordesman, *supra* n. 41, pp. 43-47, 49, 51-52, 54-55 (describing how Hamas uses mosques, houses and cemeteries for military operations and to store weapons).

60. See D. Filkins, 'The conflict in Iraq: with the eight Marines; in taking Falluja mosque, victory by the inch', *New York Times*, 10 November 2004]; C. Gall, 'Americans face rising threat from Taliban', *Int'l. Herald Tribune*, 15 July 2008; J. Rabkin, 'The fantasy world of international law: the criticism of Israel has been disproportionate', *Weekly Standard*, 21 August 2006; Department of Defense Final Report to Congress, Conduct of the Persian Gulf War (1992), at <http://www.nduedu/library/epubs/cpgw.pdf> [hereinafter Gulf War Final Report]; Letter Dated 5 March 1991 From the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, S/22341, 8 March 1991, p. 3 (explaining that the Iraqis 'moved significant amounts of military weapons and equipment into civilian areas with the deliberate purpose of using innocent civilians and their homes as shields against attacks on legitimate military targets'; and 'Iraqi fighter and bomber aircraft were dispersed into villages near military airfields where they were parked between civilian houses and even placed immediately adjacent to important archaeological sites and historic treasures').

61. GC IV, Art. 18 ('Civilian hospitals organized to give care to the wounded and sick, the infirm and maternity cases, may in no circumstances be the object of attack but shall at all times be respected and protected by the Parties to the conflict.').

62. Ibid., Art. 19. See also Protocol Commentary, para. 1948 ('purely civilian objects may in combat conditions become military objectives'.).

63. Hague IV, Art. 30. See also *Prosecutor* v. *Pavle Strugar*, case No. IT-01-42-T, Judgment, 31 January 2005, para. 310 (stating that 'the protection accorded to cultural property is lost where such property is used for military purposes').

turned them into military objectives.'[64] The military manuals of many countries provide further explanation as well. 'For example, if enemy soldiers use a school building as shelter from attack by direct fire, then they are clearly gaining a military advantage from the school. This means the school becomes a military objective and can be attacked.'[65]

In assessing the Israeli shelling of the UNRWA school, the Goldstone Report does consider that Palestinian armed groups were firing at Israeli forces from near the school in determining whether the school, or at least the area near the school, was a legitimate target. In other cases, however, the Goldstone Report fails to mention that use of otherwise civilian objects for military purposes causes such objects to lose their immunity from attack. For example, the only comments the report makes about the use of mosques to store weapons or as a location from which to launch attacks refer to the obligation of Palestinian armed groups to refrain from conducting attacks from civilian buildings. It further states that 'it could not exclude that Palestinian armed groups engaged in combat activities in the vicinity of' hospitals and other protected sites', nor could it exclude that they may have used 'mosques for military purposes or to shield military activities'.[66] Given that it claims a lack of the necessary information, it may well be understandable that the report did not reach definitive conclusions regarding violations of those obligations. However, the failure to state the law regarding the loss of protected status for civilian objects precisely when it is relevant is a regrettable oversight. The report thus presents an incomplete assessment of the zone of combat and the full panoply of relevant legal obligations.

3.3 **Perfidy**

One additional issue that arises frequently in contemporary conflicts – but is noticeably absent in the Goldstone Report – is perfidy. Given the nature of Hamas's tactics and the combat involved in Operation Cast Lead, this omission is unfortunate.

The traditional definition of perfidy is '[t]o kill or wound treacherously individuals belonging to the hostile nation or army',[67] as set forth in Article 23(b) of

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64. Human Rights Watch, *Off Target: The conduct of the war and civilian casualties in Iraq* (2003), p. 73, at <www.hrw.org/reports/2003/usa1203>.

65. Australia, *Defence Force Manual*, (1994) § 530, cited in Henkaerts and Doswald-Beck, *supra* n. 26, at p. 236. See also Canada LOAC Manual, p. 4-5, § 37, cited in ibid., at p. 237 ('where a civilian object is used for military purposes, it loses its protection as a civilian object and may become a legitimate target'.); Netherlands, *Military Manual* (1993), p. V-3, ibid., at p. 238 (civilian buildings can become military objectives if, for example, they house combatants or are used as commando posts); United States, Air Force Pamphlet (1976), § 5-3(b)(2) ('the inherent nature of the object is not controlling since even a traditionally civilian object, such as a civilian house, can be a military objective when it is occupied and used by military forces during an armed engagement'.).

66. Goldstone Report, para. 495.

67. Hague IV, Art. 23(b). The prohibition on killing treacherously goes back to the Lieber Code, which states that military necessity 'admits of deception, but disclaims acts of perfidy'. Lieber Code, Art. 16.

the 1907 Hague Convention. Suicide bombers disguising themselves as civilians to gain closer access to military checkpoints or other locations are a prime example of killing 'treacherously'. Article 37(1) of Additional Protocol I offers a more comprehensive formulation, forbidding killing, capturing or injuring the enemy 'by resort to perfidy'.[68] Examples of perfidy in Article 37(1) include feigning truce or surrender, feigning civilian status, or feigning protected status by using emblems of the United Nations or neutral states.[69] In particular, the Protocol states that '[a]cts inviting the confidence of an adversary to lead him to believe that he is entitled to, or *is obliged to accord*, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy'[70] [emphasis added]. As the Commentary explains, '[t]he central element of the definition of perfidy is the deliberate claim to legal protection for hostile purposes. The enemy attacks under cover of the protection accorded by humanitarian law … '[71] Unquestionably, the prohibition against perfidy, based on notions of honour, forms part of customary international law.[72]

Thus, when fighters intentionally disguise themselves as civilians in order to lead soldiers on the opposing side to believe they need not take defensive action to guard against attack, they commit perfidy. The indirect consequence of such actions is that civilians are placed at greater risk, since soldiers previously attacked by fighters disguised as civilians may be more likely to view those who appear to be civilians as dangerous and respond accordingly.

During Operation Cast Lead, Palestinian armed groups generally operated in civilian clothes and from civilian areas, enabling them to take advantage of the protections IHL affords civilians. Not once in discussing the activities of these armed groups, however, does the Goldstone Report mention the word perfidy.[73] What the report does do is indicate that Palestinian armed groups fired rockets and mortars from urban areas and cites a January 2009 interview with three Palestinian militants in which they stated that 'rockets and mortars were launched in close proximity to homes and alleyways "in the hope that nearby civilians would deter Israel from responding"'.[74] Similarly, the report recognizes that members of Pales-

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68. AP I, Art. 37(1).
69. Ibid., Art. 37(1)(a)-(d).
70. Ibid.
71. Protocol Commentary, para. 1500, further explaining that the 'definition is based on three elements: inviting the confidence of an adversary, the intent to betray that confidence (subjective element) and to betray it on a specific point, the existence of the protection afforded by international law applicable in armed conflict (objective element)'.
72. Dinstein, *supra* n. 26, p. 199, M.N. Schmitt, 'Asymmetrical warfare and international humanitarian law', 62 *Air Force LR* (2008) pp. 1 at 22-23, citing to NWP 1-14M, para. 12.7; US Army Judge Advocate General's School, Law of War Handbook 192 (2005); and L. Doswald-Beck, ed., *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (Cambridge, CUP 1995), Rule 111. See also, Henkaerts and Doswald-Beck, eds., *supra* n. 26, Rule 65.
73. The word 'perfidy' appears three times in the Goldstone Report, all in para. 1102, addressing the alleged practice of Israeli troops urging militants to exit a building because the ICRC was present.
74. Goldstone Report, paras. 450-451.

tinian armed groups did not wear uniforms. Instead, after the start of military operations, 'members of al-Qassam Brigades abandoned military dress and patrolled streets "in civilian clothes".'[75] These acts appear to constitute human shielding, itself a violation of IHL,[76] and addressed briefly in Section 4.3 *infra*. The Goldstone Report analyzes these actions and accompanying behaviours solely in that context.

What the report fails to mention, however, is that the Palestinian militants were not just shielding the mortars from attack, but were attacking – firing mortars and rockets – while in civilian dress and while feigning civilian status, the fundamental element of perfidy.[77] A reading of Article 37(1) demonstrates that, if accounts of militants wearing civilian dress in order to launch attacks while benefitting from the protection of apparent civilian status are credible, the militants involved would likely be guilty of perfidy. 'A combatant who takes part in an attack, or in a military operation preparatory to an attack, can use camouflage and make himself virtually invisible against a natural or man-made background, but he may not feign civilian status and hide amongst a crowd.'[78] Although wearing civilian clothes while firing mortars and rockets is not in and of itself a violation of IHL, doing so in order to deceive the opposing party as to one's status would be perfidy.

Given the nature of the combat during Operation Cast Lead, it is certainly conceivable that Hamas and other Palestinian militants wore civilian clothes for the purpose of deceiving the IDF as to their status and with the aim of conducting attacks. The Goldstone Report unfortunately does not include any factual information regarding a possible intent to deceive through the use of civilian clothes. The failure to examine this question and to address the apparent practice of militants attacking while disguised as civilians is regrettable because it suggests that the Mission did not adequately explore what appears to have been the use of perfidious – and therefore unlawful – tactics.

4. ERRORS AND MISSTEPS IN APPLYING THE LAW

Beyond any doubt, the human toll among Palestinians and Israelis from the conflict in Gaza was high and the damage to infrastructure, housing and civilian life

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75. Ibid., para. 478.

76. AP I, Art. 51(7) ('The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.')

77. See e.g., 'Legal Aspects of Suicide Attacks in Iraq' in *Monitoring International Humanitarian Law in Iraq*, International Humanitarian Law Research Initiative, at <http://www.ihlresearch.org/iraq/pdfs/briefing3446.pdf> ('However, the fact that the attackers in recent suicide operations have posed as civilians and therefore concealed their combatant status constitutes an act of perfidy prohibited under IHL.').

78. Protocol Commentary, *supra* n. 47, para. 1507.

widespread. Although one of IHL's fundamental goals is the protection of civilians and civilian objects, it also recognizes and accounts for civilian deaths and injuries. The mere fact of harm to civilians does not mean that an attacker has violated the law. However, the Goldstone Report seems to adopt a framework in which civilian deaths and the destruction of civilian property necessarily connote violations of the law.

4.1 Proportionality in the conduct of hostilities

The principle of proportionality requires that parties refrain from attacks in which the expected civilian casualties will be excessive in relation to the anticipated military advantage gained. This principle balances military necessity and humanity and is based on the confluence of two key ideas. First, the means and methods of attacking the enemy are not unlimited. Rather, the only legitimate object of war is to weaken the military forces of the enemy. Second, the legal proscription on targeting civilians does not extend to a complete prohibition on all civilian deaths. The law has always tolerated 'the incidence of some civilian casualties … as a consequence of military action',[79] although 'even a legitimate target may not be attacked if the collateral civilian casualties would be disproportionate to the specific military gain from the attack'.[80] That is, the law requires that military commanders and decision makers assess the advantage to be gained from an attack and assess it in light of the likely civilian casualties.

This principle stems from St. Thomas Aquinas' 'doctrine of double effect', which explains that it is morally permissible to perform an act having both a good effect and an evil effect, as long as the intended good effect outweighs the evil effect, which is simply foreseen rather than intended.[81] In essence, 'double effect is a way of reconciling the absolute prohibition against attacking non-combatants with the legitimate conduct of military activity'.[82] Even before codification in the various Hague and Geneva Conventions, and the modern formulation of proportionality in Additional Protocol I, the laws of war incorporated these notions.[83]

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79. J. Gardham, 'Necessity and proportionality in *jus ad bellum* and *jus in bello*', in L. Boisson de Chazournes and P. Sands, eds., *International Law, The International Court of Justice and Nuclear Weapons* (Cambridge, CUP 1999) pp. 283-284.

80. Nuclear Weapons, *supra* n. 28, p. 936 (Dissenting Opinion of Judge Higgins).

81. *Summa Theologica* (II-II, Qu. 64, Art.7)

82. M. Bagaric and J. Morss, 'In search of coherent jurisprudence for international criminal law: correlating universal human responsibilities with universal human rights', 29 *Suffolk Transnational Law Review* (2006) pp. 157 at 174-175.

83. For example, the Lieber Code includes the following concepts: '[m]ilitary necessity … consists in the necessity of those measures which are indispensable for securing the ends of the war'; '[m]ilitary necessity admits of all direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of the war'; and 'the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit'. Lieber Code, Arts. 14, 15, 22. Although the Lieber Code does not include a specific statement of the principle of proportionality, we can see the early underpinnings of it in these three statements.

Additional Protocol I contains three separate statements of the principle of proportionality. The first appears in Article 51, which sets forth the basic parameters of the obligation to protect civilians and the civilian population, and prohibits any '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'.[84] This language demonstrates that Additional Protocol I contemplates incidental civilian casualties, and appears again in Articles 57(2)(a)(iii)[85] and 57(2)(b),[86] which refer specifically to precautions in attack.

The Rome Statute also incorporates the principle of proportionality in criminalizing war crimes. Article 8(2)(b)(iv) forbids:

> '[i]ntentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.'[87]

Both formulations emphasize that proportionality is not a mathematical concept, but rather a guideline to help ensure that military commanders weigh the consequences of a particular attack and refrain from launching attacks that will cause excessive civilian deaths. The principle of proportionality is well-accepted as an element of customary international law applicable in all armed conflicts.[88]

The Goldstone Report relies on the statement of proportionality in Additional Protocol I and acknowledges that 'not all deaths constitute violations of international humanitarian law'.[89] However, it then qualifies that statement by explaining that 'under certain strict conditions, actions resulting in the loss of civilian life may

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84. AP I Art. 51(5)(b).

85. AP I, Art. 57(2)(a)(iii) ('With respect to attacks, the following precautions shall be taken: (a) those who plan or decide upon an attack shall: … (iii) refrain from deciding to launch any 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.').

86. AP I, Art. 57(2)(b) ('[A]n attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack 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.').

87. Rome Statute, Art. 8(2)(b)(iv).

88. Nuclear Weapons, *supra* n. 28, para. 587; Henkaerts and Doswald-Beck, *supra* n. 26, Rule 14; M.N. Schmitt, 'Fault lines in the law of attack', in S. Breau and A. Jachec-Neale, eds., *Testing the Boundaries of International Humanitarian Law* (London, British Institute of International and Comparative Law 2006) pp. 277 at 292; Y. Dinstein, 'The laws of air, missile and nuclear warfare', 27 *Israel YB HR* (1997) pp. 1 at 7, citing C. Greenwood, 'Customary international law and the first Geneva Protocol of 1977 in the Gulf conflict', in P. Rowe, ed., *The Gulf War 1990-91 in International and English Law* (London, Sweet & Maxwell 1993) pp. 63 at 77.

89. Goldstone Report, para. 1683.

not be unlawful'.[90] This formulation is significantly narrower than the standard in Additional Protocol I. The report also misconstrues the appropriate test, substituting a criterion of 'acceptable loss of civilian life'[91] for the actual test of 'excessiveness' in Additional Protocol I and the Rome Statute. The law does not require commanders to determine some measure of 'acceptable' civilian casualties, but rather demands only that they refrain from any attack that they expect would cause excessive civilian casualties relative to the military gain. In contrast, the Goldstone Report arguably starts from the erroneous premise that the very existence of civilian deaths creates prima facie evidence of a disproportionate attack and therefore a presumption of an IHL violation.[92] Precisely because this presumption does not exist in IHL, '[n]o tribunal to date has ever explicitly determined in a well articulated manner that disproportionate damage was caused when assessing an incident in which the disproportionate impact of the attack was not blatant or conspicuous'.[93]

When weighed against common interpretations of proportionality in international and domestic jurisprudence and state practice and given the absence of any further interpretation, the report's approach is unduly restrictive. As the ICTY stated, an attacking party should be guided by the 'basic obligation to spare civilians and civilian objects as much as possible'[94] when considering whether to launch an attack, understanding that civilian deaths are inevitable and unavoidable in conflict. In fact,

> '[w]ithin both the Just War Tradition and the law of war, it has always been permissible to attack combatants even though some noncombatants may be injured or killed; so long as injury to noncombatants is ancillary (indirect and unintentional) to the attack of an otherwise lawful target, the principle of noncombatant immunity is met.'[95]

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90. Ibid.

91. Ibid., para. 701.

92. Schmitt, *supra* n. 56; Schmitt, *supra* n. 88, p. 293. See also J. Holland, 'Military objective and collateral damage: their relationship and dynamics', 7 *YIHL* (2004) pp. 35 at 47 ('Clearly, one cannot always attribute every civilian death after an attack to the attacker … One cannot assess incidental civilian losses for which the attacker is responsible by simply conducting a body count. Such an oversimplification is as superficial assessing the quality of a hospital by only counting the bodies in its morgue.'); W.J. Fenrick, 'The prosecution of unlawful attack cases before the ICTY', 7 *YIHL* (2004) pp. 153 at 175 ('The actual results of the attack may assist in inferring the intent of the attacker as he or she launched the attack but what counts is what was in the mind of the decision maker when the attack was launched.').

93. Fenrick, *supra* n. 92, at p. 177. See also A.P.V. Rogers, *Law on the Battlefield* (Manchester, Manchester University Press 1996) p. 67 ('any tribunal dealing with the matter would have to look at the situation as the soldier making the decision saw it before assessing his guilt.'); A.P.V. Rogers, 'Conduct of combat and risks run by the civilian population', *Military Law and Law of War Review* (1982) p. 311.

94. Galić, *supra* n. 55, para. 58.

95. W. Hays Parks, 'Air war and the law of war', 32 *Air Force LR* (1990) pp. 1 at 4.

Numerous military manuals confirm this interpretation of IHL and the principle of proportionality.[96]

Thus, '[a]lthough the legal process requires a line to be drawn in order to provide clarity for those required to make [these] difficult decisions, there must remain a broad scope for the interpretation of significantly different concepts'.[97] In contrast, the Goldstone Report's approach to proportionality draws a line too far to one side, undoing the delicate balance IHL strikes between military necessity and protection of civilians.

4.1.1 *Applying proportionality in practice: military advantage*

Applying proportionality requires that we compare two dissimilar factors: civilian harm and military advantage. Although it may seem straightforward to declare that militaries should never attack when the loss of innocent life will outweigh any military benefit from the attack, in practice the application of the principle is rarely clear-cut. As one commentator glibly explained, military commanders are not issued a 'proportionometer' to help them make such calculations.[98] Comparing the destruction of a munitions factory – or, in Gaza, a storage facility for rockets – to the number of civilian deaths or serious injuries is difficult, perhaps impossible.

No less, although the common terminology of proportionality is one of 'balance' or 'weighing', the actual test requires that we examine 'excessiveness', as stressed in Additional Protocol I. Therefore, we cannot use that 'proportionometer' to determine precisely when one additional civilian death will 'tip the scale' and make an otherwise lawful attack disproportionate. The Rome Statute's use of the term '*clearly* excessive' emphasizes again that proportionality is not a question of numbers or math. Instead, 'focusing on excessiveness avoids the legal fiction that collateral damage, incidental injury, and military advantage can be precisely measured'.[99]

Rather than proceeding blindly with the assumption that numbers of civilian deaths and quantifications of damage to civilian objects or infrastructure are the dominant factor, therefore, it is important to understand the concept of military advantage. Both Article 51(5)(b) of Additional Protocol I and Article 8(2)(b)(iv) of

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96. Australia *Defence Force Manual* (1994), § 535, cited in Henkaerts and Doswald-Beck, *supra* n. 26, p. 299 ('collateral damage may be the result of military attacks. This fact is recognized by [the law of armed conflict] and, accordingly, it is not unlawful to cause such injury and damage'.); US Naval Handbook, § 8.1.2.1 ('it is not unlawful to cause incidental injury to civilians or collateral damage to civilian objects, during an attack upon a legitimate military objective'.); Canada, *LOAC Manual*, pp. 4-2 and 4-3, §§ 17 and 18, cited in Henkaerts and Doswald-Beck, *supra* n. 26 at 300 ('the fact that an attack on a legitimate target may cause civilian casualties or damage to civilian objects does not necessarily make the attack unlawful under the [law of armed conflict]'.).

97. K.W. Watkin, 'Assessing proportionality: moral complexity and legal rules', 7 *YIHL* (2004) pp. 3 at 50.

98. See Holland, *supra* n. 92, p. 48.

99. Schmitt, *supra* n. 88, p. 293.

the Rome Statute speak of a 'concrete and direct' military advantage. The Commentary states that the phrase 'concrete and direct' was intended to show that 'advantages which are hardly perceptible and those which would only appear in the long term should be disregarded'.[100] Although this explanation reinforces the need for a strong connection between the military operation at issue and its advantage or goals, state practice also demonstrates that 'concrete and direct' must not be interpreted too narrowly. Thus, in ratifying Additional Protocol I in 1998, the United Kingdom stated that the 'military advantage anticipated from an attack is intended to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack'.[101] The Canadian Manual on the Law of Armed Conflict offers a similar explanation of military advantage and, like numerous others, emphasizes that 'military advantage may include a variety of considerations including the security of the attacking forces'.[102]

Although the Goldstone Report refers to military advantage often in applying the proportionality test to various incidents during the conflict in Gaza, it offers neither a useful examination of the nature of military advantage nor a discussion of the considerations involved in assessing whether a military advantage is 'concrete and direct'. The report's brief attempt at explicating military advantage references the analysis in the *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia* (hereinafter NATO bombing report), but does not set forth any standard by which the Mission would then assess military advantage. The report first poses the questions from the NATO bombing report, now recognized as constituting factors relevant in a proportionality analysis:

> '(a) What are the relative values to be assigned to the military advantage gained and the injury to non-combatants and or the damage to civilian objects?
> (b) What do you include or exclude in totaling your sums?

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100. Protocol Commentary, para. 1980.

101. United Kingdom, Statement Made on Ratification of Additional Protocol I (28 January 1998) reprinted in A. Roberts and R. Guelff, eds., *Documents on the Laws of War*, 3rd edn. (Oxford, OUP 2000) p. 511. Numerous other states expressed the same interpretation, including Belgium, Canada, the Federal Republic of Germany, the Netherlands, Italy, Spain and the United States. See H.S. Levie, *Protection of War Victims: Protocol I to the 1949 Geneva Convention* (Dobbs Ferry NY, Oceana 1980). See also M. Bothe et al., *New Rules for Victims of Armed Conflicts* (The Hague, Martinus Nijhoff 1982) p. 311 ('It would obviously be impossible to apply this balancing requirement to each individual act of violence which takes place during the course of a battle.').

102. Canada, *LOAC Manual*, p. 4-3, §§ 20 and 21, cited in Henkaerts and Doswald-Beck, *supra* n. 26, p. 328 (stating that 'the military advantage at the time of the attack is that advantage anticipated from the military campaign or operation of which the attack is part, considered as a whole, and not only from isolated or particular parts of that campaign or operation. A concrete and direct military advantage exists if the commander has an honest and reasonable expectation that the attack will make a relevant contribution to the success of the overall operation.'). States also viewing the security of the attacking forces as a proper consideration in assessing military advantage also include the United States and Australia, for example. See Henkaerts and Doswald-Beck, *supra* n. 26, p. 329.

(c) What is the standard of measurement in time or space? and
(d) To what extent is a military commander obligated to expose his own forces to danger in order to limit civilian casualties or damage to civilian objects?'[103]

After acknowledging that 'these views are helpful to inform the present discussion',[104] the Goldstone Report offers but one hint at its restrictive understanding of military advantage. It appears in the analysis of Israeli shelling of al-Fakhura Street in response to mortars fired by Hamas operatives somewhere near a UNRWA elementary school.[105] To determine whether the attack constituted an indiscriminate attack within the meaning of Article 51 of Additional Protocol I, the report examines 'the issue of proportionality in relation to the military advantage to be gained'.[106] It states that '[t]he military advantage to be gained was to stop the alleged firing of mortars that posed a risk to the lives of Israeli armed forces'.[107] Stopping mortar fire endangering one's own troops offers a clear military advantage. After all, no military force can engage in any military operations if the law does not permit it to take defensive action.

The report fails to consider, however, that stopping the firing of mortars offers additional military advantages, such as the pursuit of the overall objective of eliminating the ability of Hamas and other Palestinian armed groups to launch attacks on civilians in Israel. Indeed, 'the term "military advantage", should be interpreted in this context – as an advantage that will help a commander reach the goal of submission of the enemy at the earliest possible moment with the least possible expenditure of men and resources'.[108] Israel sought to end rocket attacks on Israel both by destroying weapons caches, smuggling tunnels, and other attack infrastructure and by eliminating the ability of Hamas to carry out such attacks. Stopping the firing of mortars near the school would thus be part of the overall strategic goal of ending the attacks, a clear military advantage. In this particular case, the military advantage of simply stopping the mortar attacks to protect Israeli forces is sufficiently concrete and direct to satisfy the standard. But the broader military advantages are equally concrete and direct, and therefore also valid. The Goldstone Report's restrictive interpretation of military advantage here suggests that its analysis will be excessively narrow in other circumstances.

The approach to military advantage suffers from a more serious shortcoming. The simple fact that stopping the mortar attacks constituted a military advantage

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103. NATO Bombing Report, *supra* n. 51, para. 49.
104. Goldstone Report, para. 694.
105. Goldstone Report, Section X, explaining that it was likely, but unconfirmed, from the information gathered that Hamas launched a mortar attack from somewhere in the vicinity of the elementary school, and that Israel responded with shelling that landed on busy al-Fakhura Street, killing at least 24 people and injuring as many as 40.
106. Ibid., para. 691.
107. Ibid., para. 694(a).
108. N. Neuman, 'Applying the rule of proportionality: force protection and cumulative assessment in international law and morality', 7 *YIHL* (2004) pp. 79 at 91.

should have been sufficient for the Mission to then consider whether any expected civilian losses from the attack were excessive. However, the Mission instead stated that 'the calculation of the military advantage has to be assessed bearing in mind the chances of success in killing the targets as against the risk of firing into a street full of civilians …'[109] The proportionality analysis considers anticipated military advantage (stopping the mortar attacks) on one side and expected civilian losses on the other side. Once military advantage is identified and determined to be appropriately concrete and direct within the ordinary meaning of the law, one then considers whether the military commander expected the attack to cause excessive civilian losses relative to that military advantage. Although it may simply be imprecise writing, the Goldstone Report appears to conflate these separate considerations into the determination of military advantage by requiring that military advantage include both the chances of success and the risk of hitting civilians. Nowhere in the Additional Protocol or in the Commentary does the law suggest that military advantage includes an assessment of the risk to civilians. Doing so would simply turn the identification of military advantage into the proportionality analysis itself, thereby undoing the careful balance that the principle of proportionality seeks between military necessity – the need to pursue effective military action – and considerations of humanity – the overarching obligation to take 'constant care … to spare the civilian population, civilians and civilian objects'.[110]

4.1.2 *Proportionality: a prospective approach*

Understanding the correct perspective is critical to analyzing proportionality in any given situation. The very language of Additional Protocol I, referring to 'anticipated' military advantage and 'expected' civilian casualties, demonstrates that proportionality cannot be viewed in hindsight. Rather, we must approach the balance between military advantage and civilian casualties on the basis of the information available and the circumstances at the time of the military operation in question. 'Such decisions cannot be judged on the basis of information which has subsequently come to light.'[111] Combat, even a minor fire fight, involves confusion and uncertainty – the 'fog of war'. Viewing proportionality in hindsight ignores these considerations. A retrospective approach also falls prey to the challenge of comparing the impact of civilian deaths to military advantage gained or lost. The former are dramatic and emotional and 'lend themselves to powerful pictures and strong reactions'.[112] Military advantage, in contrast, is abstract, has little or no emotional impact and is difficult to convey in pictures. It will often prove difficult to fairly assess whether collateral damage is excessive in practice because the military advantage from an attack may not be immediately apparent to an observer. The

109. Goldstone Report, para. 694(b).

110. AP I, Art. 57(1).

111. Canada, Reservations and Statements of Understanding made upon Ratification of Additional Protocol I, 20 November 1990, § 7, cited in Henkaerts and Doswald-Beck, *supra* n. 26, p. 332.

112. Holland, *supra* n. 92, p. 47.

retrospective approach can therefore lead to departures from the accepted application of the principle of proportionality.

For this reason, numerous countries issued statements upon ratifying Additional Protocol I to emphasize that 'the only information on which [proportionality determinations] can possibly be taken is such relevant information as is then available and that it has been feasible from him to obtain for that purpose'.[113] Military manuals provide the same guidance to commanders regarding how to assess the lawfulness of a potential attack, recognizing that:

> '[i]t will not always be easy for a commander to evaluate [whether an attack will be disproportionate] with precision. On the one hand, he must take into account the elements *which are available to him*, related to the military necessity necessary to justify an attack, and on the other hand, he must take into account the elements *which are available to him*, related to the possible loss of human life and damage to civilian objects.'[114]

In addition, these decisions must also take into account 'the urgent and difficult circumstances under which such decisions must usually be made'[115] – the fog of war.

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113. Belgium, Interpretative declarations made upon ratification of Additional Protocol I, 20 May 1986, § 3, cited in, Henkaerts and Doswald-Beck, *supra* n. 26, p. 332. For additional statements, see ibid., pp. 332-333, citing to: Algeria, Interpretative declarations made upon accession to Additional Protocol I, 16 August 1989, § 2 ('To judge any decision, the circumstances, the means and the information available at the time the decision was made are determinant factors and elements in assessing the nature of the said decision'.); Austria, Reservations made upon ratification of Additional Protocol I, 13 August 1982, § 1 (Article 57(2) of Additional Protocol I 'will be applied on the understanding that, with respect to any decision taken by a military commander, the information actually available at the time of the decision is determinative'.); Egypt, Declaration upon ratification of Additional Protocol I, 9 October 1992 ('Military commanders planning or executing attacks make their decisions on the basis of their assessment of all kinds of information available to them at the time of the military operations.'); Ireland, Declarations and reservations made upon ratification of AP I, 19 May 1999, § 9 ('military commanders and others responsible for planning, deciding upon, or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is reasonably available to them at the relevant time'.); Germany, Declarations made upon ratification of Additional Protocol I, 14 February 1991, § 4 ('the decision taken by the person responsible has to be judged on the basis of all information available to him at the relevant time, and not on the basis of hindsight'.); Italy, Declarations made upon ratification of AP I, 27 February 1986, § 5; Netherlands, Declarations made upon ratification of AP I, 26 June 1987, § 6; New Zealand, Declarations made upon ratification of AP I, 8 February 1988, §2; Spain, Interpretative declarations made upon ratification of AP I, 21 April 1989, §5 ('the decision made by military commanders, or others with the legal capacity to plan or execute attacks which may have repercussions on civilians or civilian objects or similar objects, shall not necessarily be based on anything more than the relevant information available at the relevant time and which it has been possible to obtain to that effect'.).

114. Belgium, *Law of War Manual* (1983), p. 29, cited in Henkaerts and Doswald-Beck, *supra* n. 26, p. 334. See also UK Ministry of Defence Manual of the Law of Armed Conflict (2004) 2.4.2 ('the responsibility of the officer … would be assessed in light of the facts as he believed them to be, on the information reasonably available to him from all sources'.).

115. Canada, LOAC Manual (1999), pp. 4-2, 4-3. See e.g., The Canadian Law of Armed Conflict at the Operational and Tactical Level, § 5, § 27 (1992), at <http://www.cfd-cdf.forces.gc.ca/websites/

This prospective analysis depends, at its heart, on what is commonly referred to as 'the reasonable commander'. With its analogy in domestic criminal law's notion of the 'reasonable person', the reasonable commander is 'the reasonable man in the law of war … and is based upon the experience of military men in dealing with basic military problems'.[116] Merely adding up the resulting civilian casualties and injuries and assessing the actual value gained from a military operation may be the simpler approach, because 'the results of an attack are often tangible and measurable, whereas expectations are not'.[117] However, it does not do justice to the complexities inherent in combat; instead, the proportionality of any attack must be viewed from the perspective of the military commander on the ground, taking into account the information he or she had at the time. As Clausewitz wrote, '[t]he great uncertainty of all data in war is a peculiar difficulty, because all action must, to a certain extent, be planned in a mere twilight, which in addition not infrequently – like the effect of a fog or moonshine – gives to things exaggerated dimensions and unnatural appearance'.[118] Furthermore, as the Committee investigating the NATO bombing of Yugoslavia concluded:

> '[i]t is unlikely that a human rights lawyer and an experienced combat commander would assign the same relative values to military advantage and to injury to noncombatants', nor would 'military commanders with different doctrinal backgrounds and differing degrees of combat experience or national military histories … always agree in close cases.'[119]

Although few international tribunals and domestic courts have tackled questions of proportionality in depth, those that have done so have hewed carefully to the reasonable commander approach. In *Prosecutor v. Galić*, for example, the ICTY declared that:

> '[i]n determining whether an attack was proportionate it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpe-

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Resources/dgfda/Pubs/CF%20Joint%20Doctrine%20Publications/CF%20Joint%20Doctrine%20-%20B-GJ-005-104%20FP-021%20-%20LOAC%20-%20EN%20(13%20Aug%2001).pdf> (explaining that 'consideration must be paid to the honest judgement of responsible commanders, based on the information reasonably available to them at the relevant time, taking fully into account the urgent and difficult circumstances under which such judgements are usually made' and emphasizing that any analysis of the proportionality test must be based on 'what a reasonable person would do' in the circumstances).

116. W.V. O'Brien, 'The conduct of just and limited war', in J.E. White, ed., *Contemporary Moral Problems: War, Terrorism, and Torture* (Belmont CA, Wadsworth 2009) pp. 21 at 28.

117. Schmitt, *supra* n. 88, p. 294.

118. C. von Clauswitz, *On War*, M. Howard and P. Paret, transl. (Princeton, Princeton University Press 1976) Book 2, Chapter 2, para. 24.

119. NATO Bombing Report, *supra* n. 51, para. 50. See also W.J. Fenrick, 'Justice in cataclysm criminal trials in the wake of mass violence: attacking the enemy civilian as a punishable offense', 7 *Duke JCIL* (1997) pp. 539 at 546.

> trator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack.'[120]

This approach dates back to the post-World War II trials, when the Nuremberg Tribunal acquitted General Lothar Rendulic of the crime of wanton destruction of property. Notwithstanding the extraordinary destruction Norway suffered at General Rendulic's hands as he embarked on his 'scorched-earth' retreat in the face of the approaching Russian army, the tribunal found that his actions were not criminal because they were based on his judgement in the circumstances. In a clear statement of the nature of the proportionality analysis, the tribunal stated:

> '[w]e are not called upon to determine whether urgent military necessity for the devastation and destruction in the province of Finmark actually existed. We are concerned with the question whether the defendant at the time of its occurrence acted within the limits of honest judgment on the basis of the conditions prevailing at the time. The course of a military operation by the enemy is loaded with uncertainties, such as the numerical strength of the enemy, the quality of his equipment, his fighting spirit, the efficiency and daring of his commanders, and the uncertainty of his intentions … It is our considered opinion that the conditions, as they appeared to the defendant at the time were sufficient upon which he could honestly conclude that urgent military necessity warranted the decision made. This being true, the defendant may have erred in the exercise of his judgment but he was guilty of no criminal act.'[121]

The NATO bombing report also took a prospective approach to proportionality determinations, examining each incident under consideration by looking at the facts at the time of the attack rather than the facts that were known at the time of the investigation.[122]

Domestic courts have adopted the same approach. In October 2009, the Spanish National Court confirmed its order dismissing a complaint against two US servicemen for the death of José Couso, a Spanish journalist killed in the crossfire during a fire fight in Iraq in 2003. The US soldiers fired on the Palestine Hotel, where many journalists resided while on assignment, believing that there was a sniper on the roof shooting at them. Finding that it could not determine whether the sniper actually existed, the Spanish court held that in the absence of any evidence that the soldiers acted unreasonably, and given the tensions and confusion inherent in a hostile environment, it could not hold them criminally accountable for Couso's death.[123] Similarly, in reviewing the actions of the IDF, the Israeli Supreme Court

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120. *Galić*, *supra* n. 55, at § 58.

121. XI Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, 1230, 1296-7 (1950) (hereinafter Hostage Judgment).

122. NATO Bombing Report, *supra* n. 51, paras. 63-70, 86-89.

123. Seccion 3a de la Sala de lo Penal de la Audiencia Nacional, 23 October 2009; Victoria Burnett, 'Spain: court drops charges on GIs in killing', *New York Times*, 15 July 2009, p. A9; '3 US soldiers cleared in slaying', *Los Angeles Times*, 15 July 2009, p. A20.

has repeatedly stated that its role is to ensure that a military commander's decision falls within the 'zone of reasonableness'.[124]

The bombing of the Al Firdus Bunker during the 1991 Gulf War offers a useful example of how the evaluation of proportionality works, both at the time of the attack and at the time of the post-hoc consideration. Coalition forces identified the bunker as an Iraqi command shelter and therefore a legitimate military objective. Camouflaged and surrounded by barbed wire, the bunker was guarded by armed sentries. In the early morning of 13 February 1991, Coalition forces bombed the bunker, unknowingly killing hundreds of Iraqi civilians who were using the bunker as a night-time shelter. An evaluation of the attack demonstrated that US military planners and decision-makers had no knowledge that civilians were using the bunker as a shelter and therefore, 'no reasonable commander could have foreseen the disproportionate civilian casualties that occurred'.[125] Rather than the actual number of civilian casualties, investigators focused on the *expected* loss of civilian life, the appropriate legal test, and concluded that 'in the absence of any knowledge of the civilian use of the bunker, the military commander did not violate the rule of proportionality'.[126]

The fact-finding mission in Gaza gathered significant amounts of factual information on the ground – after the fact. The lack of Israeli cooperation admittedly made the Mission's task significantly more difficult, because investigations of potential IHL violations require 'some knowledge of the intelligence available to the attacker and the operational circumstances in which the attack took place as seen by the attacker', which can be 'very difficult without the cooperation of the attacker'.[127] Such difficulties, however, are not cause for disregarding the fundamental premise that proportionality is based on the notion of the reasonable

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124. HCJ 7015/02 *Ajuri* v. *IDF Commander*, at 375. See also HCJ 1005/89 *Aga* v. *Commander of the IDF Forces in the Gaza Strip Area*, at 539.

125. C.B. Puckett, 'In this era of "smart weapons", is a state under an international legal obligation to use precision-guided technology in armed conflict?', 18 *Emory ILR* (2004) pp. 645, 670-671, citing to Int'l and Operational Law Dep't, The Judge Advocate General's School, US Army, Operational Law Cases and Materials 9-8 (45th Graduate Course 1996). See also T.L.H. McCormack and P.B. Mtharu, 'Cluster munitions, proportionality and the foreseeability of civilian damage', in O. Engdahl and P. Wrange, eds., *Law at War: The Law as it Was and the Law as it Should Be* (Leiden, Nijhoff 2008) p. 197 ('US authorities determined that there had been no violation of international humanitarian law because the information available at the time had allowed the military commander to make a reasonable assessment that the target was a legitimate military objective and that the expected loss of civilian life and/or damage to civilian property was not disproportionate to the expected military advantage.').

126. McCormack and Mtharu, *supra* n. 125, p. 197. Indeed, had Coalition planners known of the presence of civilians in the bunker, they likely would not have launched the attack; see T. Keaney, 'Collateral Damage in the Gulf War: Experience and Lessons', at <http://www.hks.harvard.edu/cchrp/Use%20of%20Force/June%202002/Keaney_Final.pdf>.

127. Report of an Expert Meeting Which Assessed Procedural Criticisms Made of the UN Fact-Finding Mission on the Gaza Conflict (The Goldstone Report), Chatham House (November 2009) p. 6.

commander making a good faith, honest and competent decision.[128] After all, as the ICTY explained in *Galić*, neither the *actual* damage caused nor the *actual* military advantage gained is dispositive; the key lies in the terms 'expected' and 'anticipated'.[129]

Notwithstanding the report's insistence that it 'is not attempting to second-guess with hindsight the decisions of commanders',[130] it repeatedly finds that particular Israeli attacks were disproportionate[131] on the basis of 'the information before it'.[132] Such conclusions seem to shift the burden to an attacker, such that attackers must now adduce evidence that their attacks were in compliance with the law. It is unclear whether the Mission would have reached the same conclusions if it had access to the information available to the commanders on the ground. That said, the lack of such information cannot justify drawing legal conclusions in its absence.

The report's analysis of the Israeli attacks on the Palestinian police stations in the opening hours of the conflict illustrates both the challenges of a proportionality analysis and the way in which the report misconstrues proportionality. In analyzing the attacks on the police stations, which indeed raise complex questions, the report explains that the presence of members of Palestinian armed groups among the policemen at the time of the attacks could have made them lawful.[133] Indeed, Israel specifically stated that it viewed the policemen as combatants because of their involvement with Hamas, the Executive Force and other Palestinian armed groups.[134] In response, the report accepts that 'there may be individual members of the Gaza police that were at the same time members of al-Qassam Brigades or other Palestinian armed groups and thus combatants'.[135] However, it then concludes that 'the deliberate killing of 99 members of the police' constituted an attack that:

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128. Dinstein, *supra* n. 88, p. 8, Protocol Commentary, *supra* n. 47, para. 1978; Middle East Watch, *Needless Deaths in the Gulf War: Civilian Casualties During the Campaign and Violations of the Laws of War* (1991).

129. *Galić*, *supra* n. 55, fn. 109. *See also* Lieutenant Colonel E.T. Jensen, 'Targeting of Persons and Property', in G.S. Corn, *The War on Terror and the Laws of War: A Military Perspective* (New York, Oxford Univ. Press 2009) p. 60 ('The commander is not required to be able to predict the future. Nor is he required to search out every possible misapplication of force that could occur from his targeting strategy, only those that may be expected. The standard is the reasonableness of the commander's decision, and the reasonableness of the commander's decision is determined in light of the anticipated results, not the actual results.').

130. Goldstone Report, para. 588.

131. See e.g., Goldstone Report, paras. 584-593, 701,

132. Ibid., paras. 624, 625, 809, 836.

133. Goldstone Report, para. 433. The question of which policemen were combatants is, of course, one of distinction and reinforces the grave challenges modern conflicts pose as we try to sort out who is a combatant – or fighter – and who is a civilian.

134. Goldstone Report, para. 406; 'The operation in Gaza', paras. 238-248.

135. Goldstone Report, para. 434.

> 'failed to strike an acceptable balance between the direct military advantage anticipated (i.e., the killing of those policemen who may have been members of Palestinian armed groups) and the loss of civilian life (i.e. the other policemen killed and members of the public who would inevitably have been present or in the vicinity).'[136]

The flaw in this analysis is that the report fails to address the issue of the number of civilian casualties the Israeli commanders and decision makers expected – either among the policemen or in the broader civilian population. In other words, the report reaches a legal conclusion that the attack was disproportionate without evidence of the key component of the proportionality equation. Furthermore, from the Israeli perspective, the anticipated military advantage of eliminating a significant number of combatants (based on the information available to them at the time) would be considerable. By focusing its analysis on the simple number of policemen killed without taking full cognizance of the anticipated military advantage, the number of policemen qualified as combatants, or the expected civilian casualties, the Goldstone Report once again deviates from accepted understandings of the principle of proportionality.

4.2 Two proportionalities: jus in bello and jus ad bellum

A common source of confusion – and one present in the Goldstone Report – derives from the use of the term proportionality in the law governing the resort to force. International law applicable to armed conflict includes two main bodies of law: *jus in bello* and *jus ad bellum*. *Jus in bello* is the law governing the conduct of hostilities and the protection of persons in times of conflict and is synonymous with IHL or the law of armed conflict. *Jus ad bellum* is the law governing the resort to force; that is, when a state may use force within the constraints of the United Nations Charter framework and traditional legal principles.[137] Modern *jus ad bellum* has its origins in the 1919 Covenant of the League of Nations, the 1928 Kellogg-Briand Pact and the United Nations Charter.[138]

Proportionality plays an important role in both legal regimes. As discussed in the previous section, the principle of proportionality in *jus in bello* balances military necessity and humanity by prohibiting attacks in which the expected civilian casualties would be excessive in relation to the anticipated military advantage gained. In *jus ad bellum*, proportionality limits the power to use force in response to an armed attack, assessing whether a state's military operation exceeded what was necessary to defend the state. Unlike *jus in bello* proportionality, *jus ad bellum* proportionality is unconcerned with the extent of civilian casualties. The two forms

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136. Ibid., para. 435.

137. The United Nations Charter prohibits the use of force, Art. 2(4), with two exceptions: the right to self-defence, Art. 51, and the multilateral use of force authorized by the Security Council under Art. 43.

138. M. Shaw, *International Law*, 4th edn. (Cambridge, CUP 1997) pp. 807-808.

of proportionality are therefore separate and distinct, and serve different purposes in international law. The Goldstone Report conflates the two and weaves them together, allowing one to inappropriately impact its conclusions regarding the other. This section will first detail international law's continued separation between *jus in bello* and *jus ad bellum*. It will then explain the concept of *jus ad bellum* proportionality and how it differs from *jus in bello* proportionality before analyzing how the Goldstone Report confuses the two.

4.2.1 *The importance of distinguishing jus in bello from jus ad bellum*

International law has long recognized a firm distinction between *jus in bello* and *jus ad bellum*. The modern incarnation of this distinction appears in common Article 2 to the Geneva Conventions and in the preamble to Additional Protocol I, which reaffirms that the 'provisions of the Geneva Conventions [and] this Protocol must be fully applied in all circumstances … without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict'.[139]

Dating back several centuries, the distinction appears in the writings of Hugo Grotius, Francisco de Vitoria and Emmerick de Vattel. All three emphasized that certain restraints in war must apply equally to all combatants, that 'whatever is permitted to the one in virtue of the state of war, is also permitted to the other'.[140] With the rise of the nation-state in the eighteenth and nineteenth centuries, the cause of war diminished in importance, with war characterized as a neutral situation. 'This view of violence as a process to be regulated in and of itself is what set the stage for the development of the modern laws of war, by severing their "historical dependence on the *jus ad bellum*".'[141] As Meron writes, '[i]n contrast to medieval law, most modern rules of warfare (e.g., on requisitioning property and the treatment of prisoners of war and civilians, that is *jus in bello*) apply equally to a state fighting a war of aggression and to one involved in lawful self-defence'.[142]

IHL's effectiveness depends in many ways on the separation of *jus in bello* and *jus ad bellum*. If the cause at arms influenced a state's obligation to abide by the laws regulating the means and methods of warfare and requiring protection of ci-

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139. AP I, preamble. Common Article 2 to the Geneva Conventions states that the conventions apply in 'all cases of war.' Similarly, in a 1963 resolution, the Institut de Droit International declared that the rules restraining conduct in war must be equally applied to all belligerents. *Institut de Droit International*, Resolution, 'Equality of Application of the Rules of the Law of War to Parties to an Armed Conflict', 50 (II) *AIDI* 376 (Bruxelles, 1963).

140. E. de Vattel, *Le droit des gens* (posthumous edition, 1773 [1758]), cited in Roberts, *supra* n. 101, p. 938. See also 3 Hugo Grotius, *The Rights of War and Peace*, Richard Tuck, ed., (Indianapolis IN, Liberty Fund 2005) pp. 1420-1421.

141. J. Moussa, 'Can *jus ad bellum* override *jus in bello*? Reaffirming the separation of the two bodies of law', 90 *IRRC* (December 2008) pp. 963 at 966, citing J. Gardam, 'Proportionality and force in international law', 87 *AJIL* (1993) pp. 391 at 396.

142. T. Meron, 'Shakespeare's Henry the Fifth and the law of war', 86 *AJIL* (1992) pp. 1 at 12.

vilians and persons *hors de combat*, states would justify all departures from *jus in bello* with reference to the purported justness of their cause. The result: an invitation to unrestricted warfare. International law instead applies both *jus ad bellum* and *jus in bello* to all situations of armed conflict. *Jus ad bellum* governs the resort to force and examines the necessity and proportionality of the force used in response to an 'armed attack' as that term is understood in the customary law of self-defence and Article 51 of the United Nations Charter. *Jus in bello* applies to the conduct of hostilities and the protection of persons. Violation of the former constitutes the crime of aggression; a violation of the latter, depending on the seriousness of the violation, is a war crime.

International jurisprudence consistently reinforces this separation. Most recently, the Appeals Chamber of the Special Court for Sierra Leone held that the separation between *jus in bello* and *jus ad bellum* is fundamental to the implementation of humanitarian law. In *Prosecutor* v. *Fofana and Kondewa*, the Trial Chamber convicted two leaders of the Civil Defence Forces, a militia fighting to restore the legitimate government, of mutilation, amputation, hacking civilians to death and other brutal crimes.[143] At sentencing, the Trial Chamber reduced their sentences on the grounds that, although they committed grievous atrocities, they fought for 'a cause that is palpably just and defendable'.[144] In essence, the Trial Chamber conflated *jus in bello* and *jus ad bellum*, explicitly accepting that those who fight in a just war bear lesser obligations under the law of armed conflict. On appeal, the Appeals Chamber rejected this approach, finding that it violated the 'basic distinction and historical separation between *jus ad bellum* and *jus in bello*, … a bedrock principle' of IHL.[145] In particular, the court emphasized that '[a]llowing mitigation for a convicted person's political motives, even where they are considered … meritorious … provides implicit legitimacy to conduct that unequivocally violates the law – the precise conduct this Special Court was established to punish'.[146]

The ICTY has placed equal weight on the distinction between the two bodies of law, lamenting that '[t]he unfortunate legacy of wars shows that until today many perpetrators believe that violations of binding international norms can be lawfully committed, because they are fighting for a "just cause"'.[147] In response, the Tribunal declared emphatically that '[t]hose people have to understand that international law is applicable to everybody, in particular during times of war'.[148] Similarly, the committee investigating the NATO bombing in Yugoslavia rejected attempts to

143. *Prosecutor* v. *Fofana & Kondewa*, case No. SCSL-04-14-T, Sentencing Judgement (9 October 2007), § 46.

144. Ibid., §§ 86-88.

145. *Prosecutor* v. *Fofana & Kondewa*, case No. SCSL-04-14-A, Judgement, §§ 529-30 (28 May 2008).

146. Ibid., § 534.

147. *Kordić and Čerkez*, *supra* n. 58, para. 1082.

148. Ibid. See also *Abella* v. *Argentina*, *supra* n. 29, paras. 173-174 ('application of the law is not conditioned by the causes of the conflict'.).

argue that because NATO did not act in self-defence or under Security Council authority, all actions taken during the bombing campaign were illegal. After examining past precedent, the committee concluded that its task was to 'deliberately refrain[] from assessing *jus ad bellum* issues … and focus exclusively on whether or not individuals have committed serious violations of international humanitarian law as assessed within the confines of the *jus in bello*'.[149]

The trials of Nazi leaders in the aftermath of World War II offered a prime opportunity to address the relationship between *jus in bello* and *jus ad bellum*. Although the Nuremberg Tribunal convicted several Nazi leaders for the crime of waging aggressive war, the Tribunal was careful to separate crimes under *jus ad bellum* from crimes under *jus in bello*. In doing so, it refused to accept the Prosecution's argument that Germany, as the aggressor, was not entitled to invoke rights and protections under IHL.[150] For example, in the *Justice Trial*, the Tribunal declared:

> '[i]f we should adopt the view that by reason of the fact that the war was a criminal war of aggression every act which would have been legal in a defensive war was illegal in this one, we would be forced to the conclusion that every soldier who marched under orders into occupied territory or who fought in the homeland was a criminal and a murderer.'[151]

In the *Hostages Trial*, German leaders faced prosecution for crimes committed during the occupation of and campaigns in Greece and Yugoslavia. Rejecting the argument that the illegal use of force prevented Germany from invoking the law of belligerent occupation, the Tribunal emphasized that 'whatever may be the cause of a war that has broken out, and whether or not the cause be a so-called just cause, the same rules of international law are valid as to what must not be done, may be done, and must be done by the belligerents themselves in making war against each other'.[152]

4.2.2 *Proportionalities conflated: undermining IHL's protections*

Notwithstanding international law's firm prescription against combining *jus in bello* and *jus ad bellum*, the Goldstone Report does just that. Specifically, it confuses *jus in bello* proportionality with the *jus ad bellum* requirement of a proportionate response. Most past attempts to conflate the two bodies of law involved imposing *jus ad bellum* on the *jus in bello* in one of two ways: 1) arguing that an unjust war, or

149. NATO Bombing Report, *supra* n. 51, para. 34.

150. Moussa, *supra* n. 141, p. 985.

151. *USA* v. *Alsotter et al.*, Law Reports of Trials of War Criminals, Vol. VI, United Nations War Crimes Commission, London, 1947-9, p. 52.

152. *USA* v. *William List et al.*, (case No. 7), Trials of War Criminals before the Nuremberg Military Tribunals, Vol. XI, 1950, pp. 1247-1248, citing Oppenheim's *International Law*, II Lauterpacht, p. 174.

war of aggression, makes all acts illegal; or 2) arguing that a just war excuses acts that would otherwise be violations of IHL. The Goldstone Report takes a different, but equally troubling tack. The report uses conclusions about attacks purportedly violating the *jus in bello* principle of proportionality to conclude that Israel's overall use of force was a disproportionate response under *jus ad bellum*.[153]

Under *jus ad bellum*, a state can use force in self-defence in response to an armed attack as long as the force used is necessary and proportionate to the goal of repelling the attack or ending the grievance.[154] Thus, the law focuses on whether the defensive act is appropriate in relation to the ends sought. The requirement of proportionality in *jus ad bellum* measures the extent of the use of force against the overall military goals, such as fending off an attack or subordinating the enemy. To this end, 'acts done in self-defense must not exceed in manner or aim the necessity provoking them'.[155] The classic formulation of the parameters of self-defence stems from the Caroline Incident. British troops crossed the Niagara River to the American side and attacked the steamer *Caroline*, which had been running arms and materiel to insurgents on the Canadian side. The British justified the attack, which killed one American and set fire to the *Caroline*, on the grounds that their troops had acted in self-defence. In a letter to his British counterpart, Lord Ashburton, US Secretary of State Daniel Webster declared that the use of force in self-defence should be limited to 'cases in which the necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation'.[156] Furthermore, the force used must not be 'unreasonable or excessive; since the act, justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it'.[157] Over the past sixty years, the International Court of Justice has embraced this same formulation.[158]

Israel responded in self-defence to an eight-year campaign of rocket attacks from Gaza that terrorized the civilian population of southern Israel. As the Goldstone Report documents, between April 2001 and December 2008, Palestinian armed groups launched more than 8000 rockets and mortars into southern Israel from Gaza, including over 500 in November and December 2008.[159] Operation Cast

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153. Goldstone Report, paras. 1023, 1683, 1690.

154. Nuclear Weapons, *supra* n. 28, para. 41; *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*), Merits, *ICJ Rep*. 1986; Arbitral Award of 19 December 2005, 'Ethiopia v. Eritrea, jus ad bellum, Ethiopia's claim 1-8', at <www.pca-cpa.org>.

155. O. Schachter, 'In defense of international rules on the use of force', 53 *Univ. Chicago LR* (1986) pp. 113 at 132.

156. Letter from Daniel Webster, US Secretary of State, to Lord Ashburton, Special British Minister (6 August 1842) reprinted in 2 J. Moore, Digest of Int'l Law § 217 at 409 (1906).

157. Ibid.

158. See e.g., *Nicaragua* v. *U.S.*, *supra* n. 154; *Oil Platforms* (*Iran* v. *U.S.*), 2003 ICJ 161 (6 November); *Armed Activities on the Territory of the Congo* (*Dem. Rep. Congo* v. *Uganda*), 2005 ICJ 116 (19 December).

159. Goldstone Report, para. 1630, citing statistics from Report of the Intelligence and Terrorism Information Center at the Israel Intelligence Heritage & Commemoration Center (IICC), 'Summary of

Lead's primary purpose was to destroy the rocket launchers and the tunnels used to smuggle the rockets and launchers into Gaza from Egypt. *Jus ad bellum* provides the appropriate framework for analyzing the lawfulness of Israel's response, based on the requirements of necessity and proportionality. Whether Israel's use of force met those requirements may be debatable, but the Goldstone Report departs from the accepted *jus ad bellum* proportionality analysis.

Instead of examining the scale and nature of the Israeli military response in relation to that which would be reasonably necessary to defend itself against the rocket attacks, the report focuses on the civilian casualties as the benchmark, even though civilian casualties play no role in *jus ad bellum* proportionality determinations. After concluding – using an unduly narrow standard and a retrospective approach, as explained above – that many of Israel's attacks on particular targets violated the *jus in bello* principle of proportionality, the Goldstone Report uses this assessment to reach conclusions regarding the lawfulness of Israel's overall response under *jus ad bellum*. In particular, the report concludes that Operation Cast Lead therefore was 'a deliberately disproportionate attack designed to punish, humiliate and terrorize a civilian population, radically diminish its local economic capacity both to work and to provide for itself, and to force upon it an ever increasing sense of dependency and vulnerability'.[160] This sweeping conclusion, based on only several incidents in which the Goldstone Report found civilian casualties excessive in relation to the military advantage gained, harkens back to the arguments made – and rejected soundly – at Nuremberg about the criminality of specific German acts based on the German war of aggression. Although, as explained above, past conflations have generally involved using *jus ad bellum* violations to excuse *jus in bello* violations, the report's use of purported *jus in bello* violations to find an overall *jus ad bellum* violation is equally problematic.

Past precedent and the work of numerous scholars condemn this approach. Indeed, 'a finding that an attack or series of attacks did not meet the proportionality test under *jus in bello* should have no bearing on whether the conflict is a legitimate exercise of self-defence'.[161] An attack that fails to meet the standard set forth in Articles 51 and 57 of Additional Protocol I – that is, one where the expected civilian casualties are excessive in relation to the anticipated military advantage gained – can be committed within the context of a lawful resort to force under *jus ad bellum*. Just the same, the military forces of an aggressor state may well comport themselves entirely in accordance with their obligations under humanitarian law, the *jus in bello*. Distinguishing between victim and aggressor or between just and unjust causes in applying the law of armed conflict will '[lead] to a complete disintegration of the *jus in bello*',[162] regardless of whether one uses *jus ad bellum*

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rocket fire and mortar shelling in 2008', at <http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/pdf/ipc_e007.pdf>; Goldstone Report, para. 1634.

160. Goldstone Report, para. 1690.

161. Moussa, *supra* n. 141, p. 977.

162. Y. Dinstein, *War Aggression and Self-Defense* (Cambridge, CUP 2005) p. 156.

to justify or condemn *jus in bello* actions or the reverse. By conflating and confusing *jus in bello* proportionality with *jus ad bellum* proportionality, the Goldstone Report opens the door for future victims to indict their aggressors solely on the basis of *jus ad bellum* violations, for those assured of their 'just cause' to excuse unlawful behaviour as justified, and for parties to claim that *jus in bello* violations render unlawful an otherwise legitimate operation in self-defence.

4.3 Precautions and measures to protect civilians

In pursuit of the goal of protecting civilians and those *hors de combat* from unnecessary suffering in war, IHL imposes obligations to take 'constant care'[163] during military operations to protect the civilian population. Thus, in addition to the rules governing legitimate targets of attack and methods of warfare, the law mandates that parties take certain precautionary measures to protect civilians.

The Goldstone Report addresses precautions taken by both Israel and Palestinian armed groups, with a significantly greater factual and legal emphasis on the former. In so doing, the Mission interprets the law in ways that pose grave consequences for future conflicts. First, the report applies an unduly strict standard for the obligation to issue advance warning of attacks. Second, the report's minimalist standards for the obligations of defending parties to offer protections for their own civilians would, if followed, leave civilian populations even more vulnerable to the dangers of modern warfare.

4.3.1 *Precautions in attack: effective advance warning*

Article 57 of Additional Protocol I sets forth precautions that attacking parties must take. First, parties must refrain from launching attacks that violate the principle of proportionality, as detailed above. Parties also must do everything feasible to ensure that targets are military objectives and must choose the means and methods of attack with the aim of minimizing incidental civilian losses and damage. When choosing between two possible attacks offering similar military advantage, parties must choose the objective that offers the least likely harm to civilians and civilian objects. Finally, Article 57(2)(c) mandates that 'effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit'.[164] With particular relevance to the conflict in Gaza, the Commentary emphasizes that these precautions 'will be of greatest importance in urban areas because such areas are most densely populated'.[165]

Precautions are, understandably, a critical component of the law's efforts to protect civilians. For this reason, even if a target is legitimate under the laws of

163. AP I, Art. 57(1).
164. AP I, Art. 57(2)(c).
165. Protocol Commentary, para. 2190.

war, failure to take precautions can make an attack on that target unlawful.[166] By the same token, this obligation by no means requires defined protections for civilians, because the very nature of combat precludes such an absolute measure of certainty.[167]

Recent international jurisprudence emphasizes that the obligation extends to those precautions that are feasible in the circumstances, given the information available to the commanders and military planners. Among other incidents during the 1999 NATO bombing campaign in Yugoslavia, the committee investigating the bombing examined NATO's attack on Korisa, a village near Pristina. 87 civilians, mostly refugees, died when NATO attacked a Serbian military camp and command post near the village. NATO asserted that it bombed a legitimate military target – the command post – and that it did not observe any civilians in the area immediately before the attack.[168] The committee examined the pilot's efforts to identify the target and the surrounding area, including the identified military characteristics of the vehicles and buildings. Accepting NATO's position that 'all practicable precautions were taken' and recognizing that the pilot and air controllers took appropriate steps to identify the target, the committee determined that no violation of the law occurred.[169] The Ethiopia-Eritrea Claims Commission took a similar approach, finding that, '[b]y "feasible", Article 57 means those measures that are practicable or practically possible, taking into account all circumstances ruling at the time.'[170]

The obligation to warn civilians of impending attacks appears in the law of war dating back to the Lieber Code, which required military commanders to inform the enemy 'of their intention to bombard a place, so that non-combatants, and especially the women and children, may be removed before the bombardment commences'.[171] The main purpose of warnings is to give civilians an opportunity to

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166. See e.g., *Isayeva* v. *Russia*, 41 ECtHR 847 (2005), in which the European Court of Human Rights held that a Russian aerial assault on the village of Katyr-Yurt violated the right to life in Article 2 of the European Convention on Human Rights because the military continued its aerial bombardment of the village and its outskirts even as the civilians tried to leave via a safe passage corridor. The Court found no evidence that, although the attack may have been against a legitimate target – insurgents entrenched in the village – 'it was planned and executed with the requisite care for the lives of the civilian population'. Ibid., para. 200. Although the ECHR applied the human rights framework and analysis of Article 2(2) of the European Convention rather than Article 57 of Additional Protocol I, the court's analysis is comparable and offers useful information for understanding when the failure to take precautions will make an attack unlawful.

167. Dinstein, *supra* n. 26, p. 126 ('[p]alpably, no absolute certainty can be guaranteed in the process of ascertaining the military character of an objective selected for attack, but there is an obligation of due diligence and acting in good faith'.).

168. NATO Bombing Report, *supra* n. 51, para. 88.

169. Ibid., para. 89. At a press conference after the attack, a NATO General explained that the command post 'was a military target which had been used since the beginning of [the] conflict over there and we have all sources used (sic) to identify this target in order to make sure that this target was still a valid target when it was attacked', Ibid., para. 88.

170. Arbitral Award of 19 December 2005, 'Ethiopia v. Eritrea, Western and Eastern Fronts, Ethiopia's claims 1 & 3', para. 33, at <www.pca-cpa.org>.

171. Lieber Code, Art. 19. See also J.-F. Quéguiner, 'Precautions under the law governing the conduct of hostilities', 88 *IRRC* (December 2006) pp. 793 at 806 fn. 42, describing the content of this

leave and find a place of greater safety. Article 26 of the Regulations annexed to the 1907 Hague Convention is the most oft-cited statement of the obligation to warn: '[t]he officer in command of an attacking force must, before commencing a bombardment, except in cases of assault, do all in his power to warn the authorities'.[172] Like Article 57(2)(c) of Additional Protocol I, this requirement provides a practical limitation taking into account the circumstances and the feasibility of issuing such a warning. In essence, the obligation to warn is not absolute and can be avoided if issuing a warning would seriously compromise the chances of success, such as in the case of a surprise attack.

IHL contains no further guidance to help understand what actions make a warning 'effective', but state practice supports the Commentary's view that '[w]arnings may also have a general character'.[173] Examples in the Commentary include giving notice by radio of attacks on certain types of facilities or providing a list of objectives to be attacked. In the 1991 Gulf War, for example, the United States military dropped leaflets to warn before attacks in Basra, Faw, Zubair, Tannuwa and Abdul Khasib, among other cities.[174] Responding to ICRC queries, the United States wrote: 'a warning need not be specific; it may be a blanket warning, delivered by leaflets and/or radio, advising the civilian population of an enemy nation to avoid remaining in proximity to military objectives'.[175] In a more controversial situation, the committee investigating the NATO bombing in Yugoslavia examined the warnings NATO issued before bombing the radio and television stations in Belgrade. Amid uncertainties about the actual nature and content of NATO's warnings, the committee raised doubts about their effectiveness, but did not conclude that NATO had violated the obligation to warn.[176]

The Goldstone Report sets forth several criteria in determining whether a warning is effective:

> 'it must reach those who are likely to be in danger from the planned attack, it must give them sufficient time to react to the warning, it must clearly explain what they

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warning in successive law of war instruments, including the Brussels Declaration (Art. 16), the Oxford Manual (Art. 33) and the Regulations annexed to the 1899 Hague Convention II (Art. 26).

172. Hague IV, Art. 26.

173. Protocol Commentary, para. 2225. The Commentary gives examples from WWII of warnings by radio, by pamphlets and by flying low over the objectives to give civilians time to leave. Ibid., para. 2224.

174. C.B. Shotwell, 'Economy and humanity in the use of force: a look at the aerial rules of engagement in the 1991 Gulf War', 4 *USAFA JLS* (1993) pp. 15 at 36. Similarly, Israel has used leaflets, telephone calls and radio broadcasts in the past. Parks, *supra* n. 95; E. Gross, 'Use of civilians as human shields: what legal and moral restrictions pertain to a war waged by a democratic state against terrorism?', 16 *Emory ILR* (2002) pp. 445 at 497; S. Goldberg, 'Israel launches rocket attacks after frantic mob murders soldiers', *The Guardian*, 13 October 2000.

175. United States, Message from the Department of the Army to the legal advisor of the US Army Forces deployed in the Gulf, 11 January 1991, § 8(I).

176. NATO Bombing Report, *supra* n. 51, para. 77. Some reports said that NATO did not give a warning so as to protect its pilots; others said that foreign media representatives apparently were warned of the attack.

> should do to avoid harm and it must be a credible warning. The warning also has to be clear so that the civilians are not in doubt that it is indeed addressed to them. As far as possible, warnings should state the location to be affected and where the civilians should seek safety. A credible warning means that civilians should be in no doubt that it is intended to be acted upon …'[177]

Although these criteria seem reasonable, in actually applying them, the report diverges from the general understanding of and state practice regarding warnings in three primary ways. First, the report seems to set an unduly high standard for measuring the 'effectiveness' of warnings. According to the Israeli government, and as stated in the report, Israel's warnings consisted of: 165,000 telephone calls, 300,000 warning notes on 28 December 2008 alone, 2,500,000 leaflets overall, radio broadcasts and roof-knocking.[178] After detailing the content of the leaflet and radio broadcast warnings, the Mission concludes that the warnings were not sufficient because Israel had the capability to issue more effective warnings, civilians in Gaza were uncertain about whether and where to go for safety, and some places of shelter were struck after the warnings were issued. As a simple factual matter, these conclusions suggest that warnings far exceeding those given in any other conflict are insufficient, a claim that seems unreasonable on its face.

In addition, while Israel certainly has capabilities far superior to those of Hamas and other Palestinian armed groups, IHL applies equally to belligerents regardless of capability.[179] By qualifying Israel's obligations based on its capabilities, the Goldstone Report exacerbates the already-present tendency towards 'a capabilities-based IHL regime'.[180] In fact, IHL is not about a fair fight. The wording of Article 57(2)(c) speaks to feasibility, not capability, and does not require the attacking party to exhaust all possible means to warn. By the Goldstone Report's standards – which do not reflect existing law – states simply will not issue warnings because no warnings will meet these standards and still enable effective military operations.

Second, the Goldstone Report takes a retrospective look at warnings. Nothing in Article 57(2)(c) of Additional Protocol I or Article 26 of the Hague Convention suggests that the effectiveness of warnings should be judged on the basis of whether civilians actually heeded the warnings or found safety. Rather, the very language of both provisions, speaking of attacks that 'may affect'[181] the civilian population,

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177. Goldstone Report, para. 528.

178. Ibid., paras. 498-489. Roof-knocking is a new technology the Israelis developed in which they fire light explosives at rooftops to warn the residents inside of an impending attack. The explosives merely make a noise and do not explode.

179. M.N. Schmitt, 'Asymmetrical Warfare and International Humanitarian Law', in W. Heintschel von Heinegg and V. Epping, eds., *International Humanitarian Law Facing New Challenges*, Symposium in Honour of Knut Ipsen (Berlin, Springer 2007) pp. 11 at 36.

180. Ibid., (recognizing the danger that the 'more a military is capable of conducting "clean" warfare, the greater its legal obligations, and the more critical the international community will be of any instance of collateral damage and incidental injury (even when unavoidable)'.).

181. AP I, Art. 57(2)(c).

accounting for 'circumstances' or events within the commander's 'power',[182] leads to the conclusion that the law focuses on the content and nature of the warnings at the time and whether they were reasonable and effective under the circumstances. But the Goldstone Report judges the warnings by looking at whether civilians followed them, which, while a fair consideration, is not dispositive and introduces a host of additional factors not contemplated by the conventional law. Indeed, the law contains no requirement that the civilian population be able to act on the warnings in order to find them effective. Had alternative warning options been available that could have enabled the civilian population to act on them, it might fairly have been concluded that the Israeli warnings were ineffective. No such argument exists here. Instead, the legally correct approach is to examine whether the warnings generally informed civilians that they were at risk and should seek shelter. In other words, the legal issue is whether they were effective in transmitting a warning, not whether the civilians actually heeded them. The sheer numbers involved – 165,000 phone calls and 2.5 million leaflets – seem to suggest an affirmative answer.

Finally, the Goldstone Report injects the proportionality analysis into the determination of whether warnings are effective, a factor not present in the Additional Protocol or the Hague Convention. The report questions whether 'the injury or damage done to civilians or civilian objects by not giving a warning is excessive in relation to the advantage to be gained by the element of surprise for the particular operation'.[183] And yet IHL does not link the effectiveness of a warning to the principle of proportionality; it simply requires a warning 'unless circumstances do not permit'. In light of the report's retrospective approach to proportionality, this linkage is doubly problematic.

4.3.2 *Defender's obligation to take precautions*

Recognizing that the party in control of the territory where the conflict is taking place is often best situated to protect civilians from the unfortunate consequences of war, Additional Protocol I places obligations on the defending party as well. Article 58, entitled 'Precautions against the effects of attacks', requires that parties shall, to the extent feasible,

> 'endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives;?(b) avoid locating military objectives within or near densely populated areas;?[and] (c) take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.'[184]

Although Additional Protocol I emphasizes the attacking party's affirmative obligation to take precautions in planning and launching attacks, this obligation in no

182. Hague IV, Art. 26(b).
183. Goldstone Report, para. 527.
184. AP I, Art. 58.

way diminishes the defending party's obligations.[185] As the Commentary explains, '[b]elligerents may expect their adversaries to conduct themselves [lawfully] and to respect the civilian population, but they themselves must also cooperate by taking all possible precautions for the benefit of their own population as is in any case in their own interest'.[186]

Indeed, the Goldstone Report specifically 'emphasize[s] that the launching of attacks from or in the vicinity of civilian buildings and protected areas are serious violations of the obligation on the armed groups to take constant care to protect civilians from the inherent dangers created by military operations'.[187] This statement recognizes what seems apparent from the wording of Article 57(1) of Additional Protocol I – and is critically important in a conflict like that in Gaza – that the obligation to take 'constant care' applies to the entirety of the civilian populations affected by the conflict and is not limited only to the civilian population of the attacked party. Parties have an obligation to protect their own civilians from the consequences of their own offensive actions as well as those of the enemy.

In practice, however, the report gives the defending party's obligations short shrift. Similar focus on the attacking party's obligations in recent years has led some to argue that the recent shift in emphasis overall from defender to attacker creates perverse incentives for the defender to use the civilian population as a shield. They further insist that 'the international community must re-direct its attention and disapproval to those who intentionally place non-combatants in danger to achieve military and political objectives; if it fails to do so, it serves as an 'enabler' for those who deliberately place civilians at risk'.[188] The Goldstone Report's approach does indeed pose this risk.

Paragraph (b) of Article 58 – regarding precautions against locating military objectives in densely populated areas – is particularly relevant to the conflict in Gaza. Curiously, the Goldstone Report fails to mention Article 58 at all. Rather, the report limits its legal analysis of precautions by Palestinian armed groups to the prohibition against using human shields set forth in Article 28 of the Fourth Geneva Convention and in Article 51(7) of Additional Protocol I.[189] Much has been writ-

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185. Although the obligation to take 'constant care' appears in Article 57, which addresses the attacking party, the Commentary suggests that both parties have such an obligation: 'The term "military operations" should be understood to mean any movement, manoeuvres, and other activities whatsoever carried out by the armed forces with a view to combat.' Protocol Commentary, para. 2191.

186. Protocol Commentary, para. 2240.

187. Goldstone Report, para. 495.

188. R.D. Rosen, 'Targeting enemy forces in the war on terror: preserving civilian immunity', 42 *Vanderbilt JTL* (2009) pp. 683 at 691-692.

189. Article 28 of the Fourth Geneva Convention states: 'The presence of a protected person may not be used to render certain points or areas immune from military operations.' Article 51(7) of Additional Protocol I states: 'The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.'

ten on human shields elsewhere; rather than reprise the debate over human shields, this section will focus on the Goldstone Report's improper application of the law relevant to the placing of military objectives in civilian areas.

The Goldstone Report's approach raises two significant legal problems: first, the obvious failure to address the location of military objectives in densely populated areas; and second, the transmutation of the intent element of Article 51(7) to potential violations of Article 58(b). The report concludes that 'there are indications that Palestinian armed groups launched rockets from urban areas'.[190] It neglects to recognize, however, that in this particular conflict, the rocket launchers themselves were military objectives for Israel – one of the main goals of Operation Cast Lead was to eliminate the ability of Palestinian armed groups to fire rockets at civilian areas in southern Israel. Therefore, when Palestinian armed groups launched rockets from civilian areas in Gaza, they were locating military objectives in densely populated areas, in violation of Article 58(b) of Additional Protocol I.[191] Failure to address this point is a serious shortcoming that could evince a failure to recognize fully the obligations of the defending party, especially in the complicated scenarios of contemporary conflicts. Just as the densely populated nature of Gaza does not relieve Israel of its obligations to distinguish between civilian and military objectives and take precautions, so it correspondingly does not relieve Palestinian armed groups of their obligations under Article 58. For civilians caught in the zone of combat and for military planners and commanders making targeting determinations, the continued force of this obligation is critical.

As a result of this failure to address Article 58, the Goldstone Report analyzes precautions taken, or not taken, by Hamas and other Palestinian armed groups solely within the framework of the prohibition on shielding. The language of the provisions on shielding does suggest that a measure of intent is required – civilians 'shall not be used to render certain points or areas immune from military operations', and parties shall not direct the movement of civilians 'in order to attempt to shield military objectives'.[192] That intent, however, is only necessary for the purpose of 'finding that a party is using the civilian population living in the area of the fighting as a human shield',[193] *not* for the purpose of finding a violation of Article 58(b)'s prescription against locating military objectives in densely populated areas. By applying the incorrect standard and requiring intent where IHL requires none, the Goldstone Report identifies no violation of Article 58; rather, it merely

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190. Goldstone Report, para. 450.

191. In addition, 'the law of armed conflict requires that the defence should be conducted from the position which would cause the least danger to civilians and civilian objects'. Australia *Defence Force Manual*, § 553, cited in Henkaerts and Doswald-Beck, *supra* n. 26, p. 430. One could also argue that such attacks violated Article 57(2)(a)(ii) as well, which obligates parties to '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'.

192. AP I, Art. 51(7).

193. Goldstone Report, para. 491.

states that it could not 'obtain any direct evidence that [rockets were launched from urban areas] with the specific intent of shielding the rocket launchers from counterstrokes by the Israeli armed forces'.[194] Aside from the fact that it is hard to envision what purpose Hamas could have had other than shielding the rocket launchers from attack, the report's analysis encourages those who wish to take advantage of the civilian population's presence. Article 58's clear prohibition on locating military objectives in densely populated areas, regardless of intent, offers much greater protection for civilians than does the Goldstone Report's approach.

4.4 **Attacks on civilians and civilian property**

Unlawful attacks on civilians include both deliberate and indiscriminate attacks. This section will focus on two specific issues regarding attacks on civilians: the requisite intent for a finding of deliberate attacks and the relationship between human rights law and IHL in analyzing responsibility for attacks on civilians.

4.4.1 *Mens rea for the crime of deliberate attacks*

The Rome Statute criminalizes two types of deliberate attacks: intentional attacks directed against civilians and attacks made in the knowledge that civilian casualties would be clearly excessive in relation to the military advantage gained, that is, attacks that violate the principle of proportionality.[195] The ICTY has also prosecuted both types of attacks committed in the course of the war in the former Yugoslavia.[196] The crime of unlawful attacks on the basis of a violation of the principle of proportionality involves the *actus reus* of causing disproportionate civilian deaths or civilian property damage and the *mens rea* of knowledge or intent.[197] The discussion of proportionality in section 4.1 above highlights the shortcomings in the Goldstone Report's approach to finding disproportionate attacks and therefore *actus reus* will not be addressed here. On the issue of intent,

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194. Ibid., para. 480.

195. Rome Statute, Art. 8, defining war crimes as: '(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities; … (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated; …'.

196. See *Prosecutor* v. *Tihomir Blaškić*, case No. IT-95-14-T, Judgment, 3 March 2000 and *Blaškić*, *supra* n. 58; *Kordić*, *supra* n. 58; *Strugar*, *supra* n. 63; *Galić*, *supra* n. 55.

197. United Nations Preparatory Commission for the International Criminal Court, Report of the Preparatory Commission for the International Criminal Court, Addendum, Part II, Finalized Draft Text of the Elements of Crimes Art. 8(2)(b)(iv) War Crime of Excessive Incidental Death, Injury, or Damage (2 November 2000) (hereinafter Elements of Crimes).

both the ICTY and the ICC recognize the importance of *mens rea* because, as the Prosecutor of the ICC explained,

> 'under international humanitarian law and the Rome Statute, the death of civilians during an armed conflict, no matter how grave and regrettable, does not in itself constitute a war crime. International humanitarian law and the Rome Statute permit belligerents to carry out proportionate attacks against military objectives, even when it is known that some civilian deaths and injuries will occur.'[198]

The Goldstone Report's primary conclusion is that the Israeli armed forces committed deliberate attacks against civilians and the civilian population in Gaza because it could not ascertain 'any grounds which could have reasonably induced [them] to assume that the civilians attacked were in fact taking a direct part in the hostilities and had thus lost their immunity against direct attacks'.[199] As in the proportionality analysis above, however, the report makes this conclusion without any information from the Israeli commanders launching the attacks and – as a result – on the basis of retrospective information, rather than that available at the time of the attack. Both features of the analysis lead to an unnecessary broadening of the *mens rea* for the crime of unlawful attack – indeed, to an effective elimination of the *mens rea* element.

On first glance, the Goldstone Report's formulation appears similar to that used by the ICTY in *Prosecutor* v. *Galić*, where the tribunal held that:

> 'the Prosecution must show that the perpetrator was aware or should have been aware of the civilian status of the persons attacked. In case of doubt as to the status of a person … the Prosecution must show that in the given circumstances a reasonable person could not have believed that the individual he or she attacked was a combatant.'[200]

However, the report ignores the need to understand what the commander knew at the time of the attack. First, Article 85 of Additional Protocol I states that excessive civilian losses are a grave breach only if the attack leading to such losses is committed wilfully and in the knowledge that it will cause excessive loss.[201] The draft-

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198. International Criminal Court, *Organs of the Court*, 'Letter to Senders regarding Iraq', 9 February 2006 at <http://www.icc-cpi.int/library/organs/otp/OTP_letter_to_senders_re_iraq_9_February_2006.pdf>. See also R.J. Galvin, 'The ICC Prosecutor, collateral damage, and NGOs: evaluating the risk of politicized prosecution', *Univ. Miami I & Comp. LR* (Fall 2005) p. 58-59 (reiterating that the fact that civilian deaths occurred does not unequivocally lead to an assumption that war crimes took place); NATO Bombing Report, *supra* n. 51, para. 62 ('Collateral casualties to civilians and collateral damage to civilian objects can occur for a variety of reasons.').

199. Goldstone Report, para. 809. This statement references the loss of immunity from attack for civilians who are directly participating in hostilities. AP I, Art. 51(3).

200. *Galić*, *supra* n. 55, para. 55. The Tribunal also held, para. 50, that 'a person shall not be made the object of attack when it is not reasonable to believe, in the circumstances of the person contemplating the attack, including the information available to the latter, that the potential target is a combatant.'

201. AP I, Art. 85(3)(b). The Commentary to Additional Protocol I is clear that, by adding 'the words "in the knowledge" to the common constitutive elements set out in the opening sentence[, it is

ers of the Rome Statute and the Elements of Crimes similarly reinforced the importance of the knowledge element, explaining that one element of the crime of excessive incidental death is that the 'perpetrator *knew* that the attack would cause'[202] clearly excessive collateral damage. Similarly, in *Prosecutor* v. *Galić*, the ICTY held that 'to establish the *mens rea* of a disproportionate attack, the Prosecution must prove … that the attack was launched willfully and in knowledge of circumstances giving rise to the expectation of excessive civilian casualties'.[203]

The Goldstone Report's standard is a lower requirement of acting on grounds that 'reasonably induced them to assume' the persons killed were legitimate targets, which does not appear to be drawn from any international criminal jurisprudence. More importantly, it enables a determination of criminality without any grasp of what the alleged perpetrator knew or intended at the time of the attack. Since the time of the Nuremberg Tribunals, the law has required that 'an individual should not be charged or convicted on the basis of hindsight but on the basis of information available to him or information he recklessly failed to obtain at the time in question'.[204]

The Mission had no access to information from the Israeli armed forces about what particular commanders or soldiers knew at the time of the attacks in question – perhaps understandably because of the Israeli decision not to cooperate. Testimony from witnesses and analysis by experts after the fact are a useful source of information for any investigation, but cannot provide the whole picture.[205] The military has information regarding the nature of the threat anticipated, the intelligence information available to the commanders and soldiers at the time of the attack, previous operations that directly influenced decision-making in the particular incident in question, and other data relevant to analyzing what the commander knew at the time of the alleged unlawful attack. The report fails to recognize that lack of such information limits its ability to make determinations about violations of the law. Accountability for violations of IHL is critically important, but justifies neither a relaxed standard of analysis nor elimination of the element of *mens rea*.

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therefore] only a grave breach if the person committing the act knew with certainty that the described results would ensue, and this would not cover recklessness'. Protocol Commentary, para. 3479. Similarly, the Commentary to Article 51 of Additional Protocol I emphasizes that 'in relation to criminal law the Protocol requires intent and, moreover, with regard to indiscriminate attacks, the element of prior knowledge of the predictable result.' Protocol Commentary, para. 1934.

202. Elements of Crimes, *supra* n. 197, Finalized Draft Text of the Elements of Crimes Art. 8(2)(b)(iv) War Crime of Excessive Incidental Death, Injury, or Damage (2 November 2000).

203. *Galić*, *supra* n. 55, para. 59.

204. *USA* v. *Wilhelm List and Others*, The Hostages Trial: Trial of Wilhelm List and Others (case No. 47), 8 Law Reports of Trials of War Criminals, 34, 57 (UN War Crimes Comm. 1948), para. 69 (hereinafter *Hostages Trial*).

205. See Wuerzner, *supra* n. 57, p. 923 ('With respect to the mental element of the crime, this overview should include knowledge of the information available to the military at the time of the attack and at the time of the decision-making process. The Prosecutor must rely not only on military and weapons experts, but also on witnesses who have survived the attack and, *most importantly*, on the armed forces themselves.' [emphasis added]).

4.4.2 *Mens rea for the crime of wanton destruction of property*

Huge swaths of Gaza still lie in ruins. The Goldstone Report raises important questions about just how much property destruction was lawful. Fact-finding missions can indeed play a critical role in reinforcing protections for civilians and civilian property by highlighting the extent of destruction resulting from military operations, whether lawful or unlawful. Nonetheless, the Goldstone Report's analysis of the destruction in Gaza is – like many other areas of the report – regrettably simplistic and imprecise.

The central element of the crime of wanton destruction is the absence of military necessity justifying the measure of destruction.[206] In this context, we assess military necessity using the definition of military objective in Article 52(2) of Additional Protocol I: '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'.[207] To do so, as the ICTY explained in the *Strugar* case, 'each case must be determined on its facts'.[208] The Mission, however, did not incorporate analysis of the relevant facts or information available at the time of the attacks in question into its analysis of their military necessity or military advantage.[209] In the absence of sufficient evidence to determine whether particular targets were military objectives – and therefore to consider the military necessity of attacking those targets – the Goldstone Report lacked the information necessary to conclude that the destruction was wanton.

In addition, the report again applies a *mens rea* standard not ordinarily accepted in IHL. As in the case of attacks on civilians, the report's analysis of property destruction relies on testimony of witnesses and includes little, if any, assessment of the information available to the Israeli forces at the time of the attacks. In contrast, the ICTY has consistently held that 'military advantage must be assessed from the perspective of the commander'[210] and that knowledge or intent is required to reach a finding of wanton destruction not justified by military necessity.[211]

The Nuremberg Tribunal demonstrated that courts will afford commanders a wide degree of discretion when assessing the *mens rea* of the crime of wanton destruction. As described earlier, General Rendulic was indicted in the *Hostages*

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206. *Kordić and Čerkez*, *supra* n. 58, para. 346.
207. AP I, Art. 52(2).
208. *Strugar*, *supra* n. 63, para. 295.
209. Goldstone Report, paras. 926-928, 955-956.
210. *Galić*, *supra* n. 55, paras. 50-51.
211. *Strugar*, *supra* n. 63, para. 296; *Kordić and Čerkez*, *supra* n. 58, para. 346 (holding that the crime of wanton destruction requires that '(i) the destruction of property occurs on a large scale; (ii) the destruction is not justified by military necessity; and (iii) the perpetrator acted with the intent to destroy the property in question or in reckless disregard of the likelihood of its destruction'.).

Trial for the scorched earth policy he carried out in Norway during his retreat in the face of the Soviet invasion. Accepting his plea of military necessity – that he believed the scorched earth policy was necessary to slow the Soviet advance – the court found that 'the conditions, as they appeared to the defendant at the time were sufficient upon which he could honestly conclude that urgent military necessity warranted the decision he made'.[212] Similarly, in the *High Command* case, the Tribunal emphasized that military necessity requires difficult factual determinations and recognized that in many combat situations, 'a commander must necessarily make quick decisions to meet the particular situation of his command. A great deal of latitude must be accorded to him under such circumstances'.[213] Whether the Israeli commanders made reasonable decisions in targeting residential property, flour mills and other contested targets during the conflict remains unclear. In fact, the most recent Israeli investigation into the attacks on the flour mill concluded that 'photographic proof [demonstrates] that the mill was accidentally hit by artillery in the course of a firefight with Hamas militiamen',[214] a claim subsequently contested,[215] thereby illustrating the uncertainty surrounding the actual events. Unfortunately, the Goldstone Report disregards *mens rea* and assesses the targeting decisions without regard to the information available to the commanders at the time or to the attendant circumstances.

4.4.3 *IHL or international human rights: where do we draw the line?*

On several occasions, the Goldstone Report applies human rights law concurrently with IHL, stating that Israel is in violation of Article 6 of the International Covenant on Civil and Political Rights (ICCPR) in addition to particular provisions of Additional Protocol I. This juxtaposition of the two bodies of law raises important questions about how they interrelate during armed conflict.

Article 6 of the ICCPR prohibits the arbitrary deprivation of the right to life.[216] The Goldstone Report therefore concludes that in most of the cases in which Israeli attacks killed civilians, Israel also violated Article 6 of the ICCPR. These conclusions raise two separate issues: the application of the ICCPR to Israeli military operations outside Israeli territory, and the interplay between international human rights law and IHL during the conduct of hostilities. The former involves

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212. *Hostages Trial*, *supra* n. 204, p. 1297.

213. *USA* v. *Wilhelm von Leeb et al*., Trials of War Criminals before the Nuernberg Military Tribunals, Vol. XI, p. 541.

214. E. Bronner, 'Israel Poised to Challenge a U.N. Report on Gaza', *New York Times*, 23 January 2010, p. A6.

215. R. McCarthy, 'UN find challenges Israeli version of attack on civilian building in Gaza war', *The Guardian*, 1 February 2010.

216. International Covenant on Civil and Political Rights, GA Res. 2200A (XXI), UN Doc. A/6316 (16 December 1966) (hereinafter ICCPR), Art. 6 ('Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.').

the extraterritorial application of the ICCPR,[217] a topic beyond the scope of this article. Therefore, this section will focus on the latter.

Although human rights law applies in times of war as well as in times of peace, IHL, as *lex specialis*, is the dominant legal framework in armed conflict. The ICJ has reaffirmed the primary role for IHL on more than one occasion, expressly stating that:

> '[t]he test of what is an arbitrary deprivation of life ... falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict, which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.'[218]

The Court recognizes that IHL does not categorically forbid all killing in armed conflict and that the taking of life in armed conflict can only be an arbitrary deprivation of life if it violates IHL. The *travaux preparatoires* of the ICCPR confirm this interpretation, suggesting 'that this was the meaning which the term "arbitrary" was intended to bear, since killing in the course of a "lawful act of war" was given as an example of a taking of life which would not be arbitrary'.[219] Regional courts have adopted the same approach.[220] In addition, the Human Rights Com-

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217. *Banković & Others* v. *Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey and the United Kingdom,* ECt. HR, App. No. 52207/99 (holding that extraterritorial acts by NATO forces were not within the jurisdiction of member states for the purposes of Art. 1 of the ECHR); see also *Al Skeini and Others* v. *Secretary of State for Defence* [2004] EWHC 2911, paras. 263, 265 (holding that the House of Lords did not have 'broad, world-wide extraterritorial personal jurisdiction' over the action on behalf of Iraqis killed by British forces in shooting incidents in Basra); cf. *Issa* v. *Turkey*, App. No. 31821/96, para. 71 (2004) (finding a broad jurisdictional exception to avoid allowing a state to perpetrate violations on the territory of another state that it could not perpetrate on their own territory); *Cyprus* v. *Turkey*, 2001-IV ECt.HR 1 (Grand Chamber) (a state's responsibility may be engaged when it exercises effective control outside its jurisdiction as a consequence of lawful or unlawful military action); *Lopez Burgos* v. *Uruguay*, Communication [Comm.] No. 52/1979, UN Doc. CCPR/C/13/D/52/1979 (1981) ('never was it envisaged … to grant States parties unfettered discretionary power to carry out willful and deliberate attacks against the freedom and personal integrity of their citizens living abroad'.); see also M.J. Dennis, 'ICJ Advisory opinion on construction of a wall in the occupied Palestinian territory: application of human rights treaties extraterritorially in times of armed conflict and military occupation', 99 *AJIL* (2005) pp. 119, at 126.

218. Nuclear Weapons, *supra* n. 28, para. 25. See also Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion (ICJ 9 July 2004), 43 *ILM* 1009 (2004)

219. C. Greenwood, '*Jus ad bellum* and *jus in bello* in the *Nuclear Weapons* Advisory Opinion', in Boisson de Chazournes et al., *supra* n. 79, pp. 247 at 253.

220. See *Cyprus* v. *Turkey*, Apps. Nos. 6780/74, 6950/75, 4 *EHRR* 482 (1982) (finding that the Third Geneva Convention takes precedence over the ECHR with regard to treatment of prisoners of war); Inter-American Court of Human Rights, Decision on Request for Precautionary Measures (Detainees at Guantanamo Bay, Cuba) (12 March 2002) 41 *ILM* 532, 533 (2002) (finding that IHL is *lex specialis* with regard to the American Declaration on Human Rights).

mittee stated that 'in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights'.[221] To reach an alternative conclusion arguably suggests that Article 6 outlaws all killing in armed conflict and therefore all military action.

Similarly, although human rights law plays an important role in times of armed conflict, the practical ramifications of applying a human rights framework to individual attacks in hostilities are challenging. As a former Canadian Judge Advocate General explains:

> 'due to its extensive procedural, time and resources requirements, [the human rights framework] lends itself more readily to the assessment of isolated acts of violence rather than the traditional scope of hostilities in either internal or international armed conflict. The danger lies in suggesting that such an accountability process has to be put in place for each attack during which an uninvolved civilian is killed, when there are potentially hundreds of such attacks in the course of a major conflict.'[222]

The concomitant obligations of this 'law-enforcement' approach would overwhelm the system and result, perhaps, in diminished protection for civilians and other protected persons in the zone of combat. Any human rights analysis of hostilities and attacks on civilians must therefore account for the 'shoot to kill' paradigm of IHL within the parameters of lawful killing during armed conflict.

In most of the incidents for which the Goldstone Report finds Israel in violation of Article 6 of the ICCPR, it has also found a violation of IHL. If the IHL analysis in those situations was correct, then one might equally find an arbitrary killing under Article 6 of the ICCPR. This article has already addressed the misapplication of IHL to proportionality calculations and to incidents purportedly involving intentional attacks against civilians and will therefore not consider whether it is appropriate for the Goldstone Report to find violations of Article 6 of the ICCPR in such cases.

However, in one particular incident, the attack on the al-Daya family house, the report's finding of an Article 6 violation constitutes a 'second bite at the apple'. In that incident, the IDF destroyed the al-Daya house in an operation against a neighbouring house used to store weapons. The report questions the Israeli explanation, but after analyzing the facts available to it, concludes that '[i]n the absence of information necessary to determine the precise circumstances of the incident, the Mission can make no findings on possible violations of international humanitarian law or international criminal law'.[223] And yet, the report then finds that Israel is liable for a violation of Article 6 of the ICCPR because, even though it did not plan to strike the al-Daya house, it did plan to fire the projectile. Finding that

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221. Human Rights Commission, General Comment No. 31, UN Doc. CCPR/C/21/Rev.l/Add.l3, para. 11 (2004).

222. Watkin, *supra* n. 97, p. 40.

223. Goldstone Report, para. 858.

'the consequences may have been unintended [but] the act was deliberate',[224] the report states that the civilian deaths were arbitrary killings. This conclusion flies in the face of international jurisprudence and state practice recognizing that an arbitrary killing can only be one that violates IHL. In this case, the Goldstone Report itself acknowledges that the attack did not violate IHL. In its search for an alternative basis for liability in human rights law, the report ignores both the *lex specialis* of IHL and IHL's basic understanding that not all taking of life in armed conflict is arbitrary.

Beyond the legal error there lies a broader danger. As discussed above, IHL is premised on a delicate balance between minimizing suffering in war and enabling effective military operations. The notion that an attack lawful under IHL can nevertheless violate human rights law undermines that delicate balance.

4.5 Treatment of prisoners of war and hostage taking

Since 2006, Palestinian armed groups have held Israeli Corporal Gilad Shalit captive in Gaza. The Goldstone Report declares that 'Gilad Shalit meets the requirements for prisoner-of-war status under the Third Geneva Convention'.[225] The report then briefly enumerates the basic protections to which Shalit is entitled as a prisoner of war: humane treatment, external communication, visits from the ICRC, and the provision of information about his condition to his family. By all accounts, Hamas and other Palestinian groups have routinely failed to meet these standards.[226]

The Third Geneva Convention governs the treatment of prisoners of war during international armed conflict, which is how both the Goldstone Report and the Israeli Supreme Court characterize the conflict, as noted in Section 2.3 *infra*. In particular, prisoners of war are entitled to humane treatment, medical treatment, and to be 'quartered under conditions as favourable as those for the forces of the Detaining Power who are billeted in the same area'.[227] Furthermore, Article 23 of the Third Geneva Convention forbids detaining prisoners of war where they 'may be exposed to the fire of the combat zone'.[228] Finally, and with particular relevance to the situation of Corporal Shalit, who has not been allowed any contact with his family or the ICRC, Section V of the Third Geneva Convention sets forth the detaining power's obligations regarding contact between prisoners of war and 'the exterior':

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224. Ibid., para. 861. On its face, the statement is absurd and would mean that anytime a combatant intentionally fired a weapon and unintentionally killed a civilian, he would be liable for an arbitrary killing under ICCPR Art. 6.

225. Goldstone Report para. 1337.

226. At <http://www.icrc.org/Web/eng/siteeng0.nsf/html/israel-interview-111208 (explaining that Hamas has refused ICRC requests to visit Shalit and has refused to forward letters and other communications to him).

227. GC III, Art. 25.

228. GC III, Art. 23.

> 'Art. 70. Immediately upon capture, or not more than one week after arrival at a camp, … every prisoner of war shall be enabled to write direct to his family, on the one hand, and to the Central Prisoners of War Agency provided for in Article 123, on the other hand, a card … informing his relatives of his capture, address and state of health. …
> Art. 71. Prisoners of war shall be allowed to send and receive letters and cards. … Such letters and cards must be conveyed by the most rapid method at the disposal of the Detaining Power; they may not be delayed or retained for disciplinary reasons.'[229]

Humane treatment of prisoners of war is also required by customary international law. The Eritrea-Ethiopia Claims Commission analyzed the customary law obligations of parties regarding treatment of prisoners of war because for much of the Eritrea-Ethiopia conflict, Eritrea was not a party to the Geneva Conventions.[230] The Commission held that, under customary international law, 'the requirement of treatment of POWs as human beings is the bedrock upon which all other obligations of the Detaining Power rest'.[231] More specifically, the Commission clearly stated that the obligation to grant the ICRC access to prisoners of war is an obligation under customary international law, and that 'Eritrea violated customary international law … by refusing to permit the ICRC to send its delegates to visit all places where Ethiopian POWs were detained, to register those POWs, to interview them without witnesses, and to provide them with the customary relief and services'.[232]

Although the Goldstone Report states that Shalit is a prisoner of war according to the Third Geneva Convention, it does not make any findings or reach any conclusions about violations of the standards therein or of customary law. As international tribunals have repeatedly held, non-state parties, like Hamas, are bound by IHL, even though they are not parties to international treaties.[233] The ICRC has specifically emphasized this obligation with regard to the taking of prisoners, stating that '[t]here is an obligation for both State and non-State actors of conflicts to comply with the rules of international humanitarian law. One of these rules provides that all persons deprived of their liberty must be allowed to correspond with their families'.[234] The conditions of Corporal Shalit's captivity clearly violate these prescriptions.

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229. GC III, Arts. 70-71.

230. Eritrea ratified the four Geneva Conventions on 14 August 2000. See at <http://www.icrc.org/IHL.NSF/WebSign?ReadForm&id=375&ps=P>.

231. Arbitral Award of 1 July 2003, 'Ethiopia v. Eritrea, Prisoners of War, Eritrea's claim 17', para. 55, at <www.pca-cpa.org>; see also paras. 29, 57; Arbitral Award of 1 July 2003, 'Ethiopia v. Eritrea, Prisoners of War, Ethiopia's claim 4', para. 53, at <www.pca-cpa.org>.

232. Ibid., para. 62.

233. See e.g., *Prosecutor* v. *Sam Hinga Norman*, *supra* n. 25, at § 22.

234. Interview, 'ICRC President: access to captured Israeli soldiers remains a priority', 8 June 2007, at <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/israel-interview-070607>. See also Interview, 'ICRC continues efforts to gain access to captured Israeli soldiers', 30 May 2008, at <https://www.icrc.org/web/eng/siteeng0.nsf/htmlall/israel-interview-300508>, ('Both States and armed groups are bound by these essential rules.').

Given that Hamas and other Palestinian armed groups holding Shalit have repeatedly violated their obligations under the Third Convention and customary international law with regard to his capture, treatment, and visits from the ICRC, the Mission's failure to comment on their obligations and violations is a glaring omission. A second omission is still more troubling. The circumstances of Shalit's detention demonstrate that his captors have in fact made him a hostage, conduct that violates IHL and would constitute a war crime under the Rome Statute. As the ICRC explains, hostage-taking occurs when '[a] person has been captured and detained illegally [and a] third party is being pressured, explicitly or implicitly, to do or refrain from doing something as a condition for releasing the hostage or for not taking his life or otherwise harming him physically'.[235]

IHL prohibits hostage taking in all situations, as manifested in multiple IHL treaty provisions. In some circumstances, these treaties define hostage-taking as a grave breach. Common Article 3 to the four Geneva Conventions, Article 34 of the Fourth Geneva Convention and Article 75(2)(c) of Additional Protocol I, all of which apply to or evince customary norms applicable to the conflict in Gaza, all forbid taking of hostages. Although some iterations of the crime of hostage-taking specifically refer to civilians, such as Article 2(h) of the Statute of the ICTY, and civilians are traditionally the most common victims of hostage-taking in wartime, the law is quite clear that '[n]o hostages can be taken, whether civilians, combatants (*especially, prisoners of war*), or even neutrals'[236] [emphasis added]. In particular, common Article 3 specifically mentions 'members of armed forces … placed "hors de combat" by … detention' as persons protected from hostage taking and applies in both international and non-international armed conflicts.[237] Similarly, the Rome Statute makes hostage-taking a war crime in all circumstances in both international and internal armed conflict.[238]

In a recent decision in the *Karadžić* case, the ICTY confirmed that the crime of hostage taking is not limited to the holding of civilians as hostages. The Tribunal held that 'the minimum protections outlined in common Article 3, which include the prohibition of hostage-taking, also apply to persons who are *hors de combat* by

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235. 'ICRC position on hostage-taking', in 846 *IRRC* (2002) p. 467, at <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/5C6CLN>. See also Elements of Crimes, *supra* n. 197, p. 18; Dormann, *supra* n. 58, pp. 124-127. The elements of the crime of hostage taking draw heavily from the International Convention Against the Taking of Hostages (1979), 1316 *UNTS* 205 (1983); see *Prosecutor* v. *Sesay, Kallon and Gbao* (*RUF* case), SCSL-04-15-A, Appeals Judgement, para. 579, 26 October 2009.

236. Dinstein, *supra* n. 26, p. 227. See also M.N. Schmitt, 'Humanitarian law and direct participation in hostilities by private contractors or civilian employees', 5 *Chicago JIL* (2005) pp. 511 at 540.

237. *Prosecutor* v. *Radovan Karadžić*, Decision on Appeal of Trial Chamber's Decision on Preliminary Motion to Dismiss Count 11 of the Indictment, IT-95-5/18-AR72.5, para. 25, 9 July 2009; *Tadić*, *supra* n. 31, para. 102, *Nicaragua* v. *US*, *supra* n. 154, para. 219; *Prosecutor* v. *Mrkšić, Radić and Šljivančanin*, case No. IT-95-13/1-A, Judgment, para. 70 (5 May 2009); *Prosecutor* v. *Dragoljub Kunarac et. al*, case No. IT-96-23 and IT-96-23/1-A, Judgment, para. 68 (12 June 2002); *Prosecutor* v. *Zegnil Delalić et Al.*, (*Čelebići* case), case No. IT-96-21-A, paras. 143, 147, 150 (20 February 2001).

238. Rome Statute, Arts. 8(2)(a)(viii) and 8(2)(c)(iii).

virtue of detention'.[239] More specifically, in relation to the Mission's failure to address Corporal Shalit's captivity, the Appeals Chamber held that the prohibition on hostage-taking is integral to the Third Geneva Convention, stating that 'the protection of POWs is covered by an extensive net of provisions within the Third Geneva Convention which, read together, lead to the conclusion that any conduct of hostage-taking involving POWs could not but be in violation of the Third Geneva Convention'.[240]

Corporal Shalit has obviously been rendered *hors de combat* by detention. Because his continued detention is motivated not by a purpose of preventing his return to hostilities, but instead as a tool to leverage the policies of his government, he fits the definition of a hostage. By acknowledging that even POWs can be made hostages, the *Karadžić* decision confirmed that detention for the purpose of preventing a return to hostilities is the underlying purpose of the Third Geneva Convention prisoner of war regime, a purpose derived from earlier conventional law and customary law. 'The object of capture is to prevent the captured individual from serving the enemy. He is disarmed and from then on he must be removed as completely as practicable from the front, treated humanely and in time exchanged, repatriated or otherwise released'.[241] In particular, 'captivity in war is "neither revenge, nor punishment, but solely protective custody"'.[242] Moreover, the Third Geneva Convention specifically prohibits reprisals against POWs[243] – and using POWs to gain leverage in negotiations rather than holding them in preventive custody fits within the spirit of that provision. Hamas has stated that Corporal Shalit's release depends on a number of conditions, including the end of the Israeli blockade of Gaza, an end to the Israeli policy of targeted killings and the release of prisoners in Israeli jails.[244] As the ICTY Appeals Chamber recently stated regarding the crime of hostage-taking:

> '[t]he lawfulness of detention does not depend on the circumstances in which any individual comes into the hands of the enemy but rather depends upon the whole circumstances relating to the manner in which, and reasons why, they are held. Thus, the unlawfulness of detention relates to the idea that civilians or those taking no active

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239. *Prosecutor* v. *Radovan Karadžić*, Decision on Six Preliminary Motions Challenging Jurisdiction, IT-95-5/18-PT, para. 60, 28 April 2009. See also *Blaškić*, *supra* n. 58, para. 708 (entering convictions for hostage-taking when even though 'not all were necessarily civilians, all were persons placed hors de combat'.); *Kordić and Čerkez*, *supra* n. 58, para. 319.

240. *Prosecutor* v. *Radovan Karadžić*, Decision on Appeal of Trial Chamber's Decision on Preliminary Motion to Dismiss Count 11 of the Indictment, IT-95-5/18-AR72.5, para. 21, 9 July 2009.

241. In re Territo, 156 F.2d 142, 145 (9th Cir. 1946).

242. Y. Naqvi, 'Doubtful prisoner-of-war status, 84 *IRRC* (2002) pp. 571 at 572 (quoting Nuremberg Military Tribunal, Judgment and Sentences, 1October 1946, reprinted in 41 *AJIL* (1947) pp. 172, 229)

243. GC III, Art. 13.

244. 'Palestinians could hand over Israeli soldier to Egypt or France', *BBC Monitoring Middle East*, 4 July 2006.

> part in hostilities are taken or held hostage not to ensure their safety or to protect them, but rather to gain an advantage or obtain a confession.'[245]

Since Hamas's reason for continued detention is inconsistent with conventional and customary law, Corporal Shalit is being detained unlawfully, a fact that the Goldstone Report fails to consider or condemn.

5. CONCLUSION

By all accounts, over a thousand Palestinians died during Operation Cast Lead. Property damage and destruction left most of Gaza in ruins. Although undeniably tragic, these facts do not alone evidence violations of IHL by Israel. By the same token, the much smaller number of Israeli civilian deaths and lesser extent of property damage in southern Israel do not absolve Hamas of responsibility for violating IHL by firing rockets intentionally and indiscriminately into civilian areas.

IHL maintains a delicate balance between two goals: effective lawful military operations and minimizing suffering during conflict. To do so, the law must be agile enough to accommodate new challenges. Even when the complexities of asymmetrical warfare, counterinsurgency and other complicated contemporary conflicts make implementation of IHL difficult, core principles such as distinction, proportionality, military necessity and humanity must nevertheless bound military action and guide our analysis of such action. The challenges Israeli forces faced in the densely populated Gaza Strip, where militants fought in civilian clothing, stored rockets in mosques and fired rockets from the shadow of schools, do not diminish IHL's core obligations. Nor do these key principles change merely because Hamas, a non-state entity armed solely with missiles and rockets, faces Israel, which has one of the most technologically advanced militaries in the world. Doing so would fundamentally disrupt IHL's delicate balance.

Yet the Goldstone Report appears to do just that by devoting little attention to Hamas's violations of the IHL principle of distinction, such as the intentional failure of its forces to distinguish themselves from the civilian population and its use of civilian areas as a shield against Israeli operations. Such an approach risks fundamentally changing the calculus of combat because it drastically reduces the ability of militaries to conduct effective operations while still maximizing protection of the civilian population.

Beyond distinction, the Goldstone Report turns proportionality on its head, using a retrospective analysis to judge a commander's actions during combat. Relying substantively on information gathered after the fact, it discounts or simply fails to incorporate contemporaneous Israeli intentions or actions and the surrounding

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245. *Prosecutor* v. *Radovan Karadžić*, Decision on Appeal of Trial Chamber's Decision on Preliminary Motion to Dismiss Count 11 of the Indictment, IT-95-5/18-AR72.5, para. 65, 9 July 2009.

circumstances. The Goldstone Report instead measures proportionality by a 'mathematical formula' in which the number of casualties directly correlates to a finding that crimes were committed. If the law functioned in this manner, no military could ever engage in any operations. In a separate misapplication of proportionality, the report conflates *jus in bello* proportionality and *jus ad bellum* proportionality. By doing so, it uses the incorrect assessment that particular Israeli attacks violated *jus in bello* proportionality to unfairly package Operation Cast Lead as disproportionate overall.

Apart from this fundamental misinterpretation of the key principles of distinction and proportionality, the Goldstone Report drastically alters the nature of certain crimes under IHL by all but eliminating the *mens rea* requirement for attacks on civilians and destruction of property. Absent the mental element of intent, the mere fact of civilian deaths or property destroyed becomes the sole determining factor in finding violations of the law. Curiously, the report introduces an intent element not normally present in IHL when analyzing whether Hamas and other Palestinian armed groups took sufficient precautions to locate military objectives away from the civilian population.

The misapplication of IHL in the Goldstone Report has great significance. Perhaps the Mission sought greater protection for civilians by introducing new interpretations of IHL. In reality, the Goldstone Report will have the opposite effect. The report will embolden insurgent and terrorists who will now see the benefit of, and lack of accountability for, intermingling with the civilian population and endangering civilians with every launch of a rocket and every missile stored under a hospital. Moreover, militaries may conclude that even operations conducted lawfully under existing IHL cannot meet the (flawed) standards propounded in the Goldstone Report. As a result, some may choose to simply disregard the law; others may refrain from mounting effective operations out of fear that they will be condemned as acting unlawfully. Both choices place civilians at grave risk of injury and death … and undermine the very purpose of IHL.