



Institute for International
Law and Justice

IILJ International Legal Theory Colloquium Spring 2011
Convened by Professor Joseph Weiler

Wednesdays 2pm-3:50pm on dates shown

NYU Law School
Vanderbilt Hall 208, 40 Washington Square South
(unless otherwise noted)

SCHEDULE OF SESSIONS:

- February 9** Yitzhak Benbaji, *Bar-Ilan University*
“The Moral Power of Soldiers to Undertake the Duty of Obedience”
- February 16** Michael Walzer, *Institute for Advanced Study in Princeton / Tikvah and Straus Fellow at NYU School of Law*
“Can the Good Guys Win”
- February 23** No Colloquium
- March 2** Doreen Lustig, *NYU School of Law*
“Doing Business, Fighting a War: Non-State Actors and the Non State: the Industrialist Cases at Nuremberg”
- March 9** Gabriella Blum, *Harvard Law School / Tikvah Fellow at NYU School of Law*
“States’ Crime and Punishment”
- March 16** No Colloquium – SPRING BREAK
- March 23** Matthew C. Waxman, *Columbia Law School*
“Regulating Resort to Force: Form and Substance of the UN Charter Regime”
- March 30** Paul Kahn, *Yale Law School*
“Imagining Warfare, or I know It When I See It”
- April 6** David Kretzmer, *Hebrew University of Jerusalem and Academic Center of Law and Business, Ramat Gan*
“The Inherent Right to Self-Defense and Proportionality in Ius ad Bellum”
- April 13** Andreas Zimmermann, *University of Potsdam*, and Philip Alston, *NYU School of Law*
“Abiding by and enforcing international humanitarian law in asymmetric warfare: the case of ‘Operation Cast Lead’”
- April 20** No Colloquium
- April 27** J.H.H. Weiler, *NYU School of Law*
“Not So Quiet on the Western Front: Reflections on the Bellicose Debate Concerning the Distinction between Ius ad Bellum and Ius in Bello”

DRAFT –NOT FOR QUOTATION

Prof. Dr. Andreas Zimmermann, LL.M. (Harvard)

Abiding by and enforcing international humanitarian law in asymmetric warfare: the case of ‘Operation Cast Lead’

I. Introduction

Asymmetric military conflicts raise a wide set of dilemmata for States confronting non-State armed groups. The armed conflict that took place between the Israeli army and armed Palestinian groups in the Gaza strip between 27 December 2008 and 18 January 2009 constitutes one of the most recent and most dramatic examples of such asymmetric conflicts.

It is against this background that the paper will deal with some of the most serious allegations of Israel having violated applicable rules of *jus in bello*, *i.e.* international humanitarian law, particularly those contained in the 2009 ‘Report of the United Nations Fact Finding Mission on the Gaza Conflict’ (‘Goldstone Report’)¹. In doing so the paper will focus on

- the legal status of Gaza as such and that of the parties to the conflict and ensuing legal consequences;

- the legal character of the conflict,

- possible violations by Israel of the laws of war related to the means and methods of warfare;

and, finally,

- the question how to eventually implement and enforce prohibitions arising under international humanitarian law in asymmetric warfare, as exemplified by the Gaza war.

¹ UN Doc. A/HRC/12/48 (hereinafter referred to as “Goldstone report”); but *cf.* also most recently R. Goldstone, Reconsidering the Goldstone report on Israel and war crimes, Washington Post, April 1, 2011, available at: http://www.washingtonpost.com/opinions/reconsidering-the-goldstone-report-on-israel-and-war-crimes/2011/04/01/AFg111JC_story.html, where the chairman of the ‘Goldstone Commission’ himself takes a much more cautious position as to such allegations.

For a particularly critical view of the Goldstone report *cf.* N. Rostow, The Human Rights Council (Goldstone) Report and international law, *Isr. Yearb. Hum. Rights* 2010, p. 275 *et seq.*; *cf.* also a 2009 resolution adopted by the United States House of Representatives, 111th CONGRESS, 1st Session, H. RES. 867, calling on the US administration to oppose any endorsement or further consideration of the Goldstone report; but *cf.* also the response of Richard Goldstone thereto, as well as the rejoinder by a member of the US House of Representatives, *Howard Berman*, who was one of the co-sponsors of the aforementioned resolution, both available at: <http://washingtonindependent.com/66189/bermans-response-to-goldstone-on-house-gaza-war-crimes-resolution#>.

Accordingly, the paper does not deal at all with issues of *jus ad bellum*, and, in particular, it does not deal with the legality of acts of self defence against armed acts emanating from *non-State* actors such as Hamas².

Moreover, I will not address as to whether at all, and if so to what extent and under what circumstances, human rights arising under either customary international law or human rights treaties, governed the behaviour of the parties during the armed conflict, be it due to the extraterritorial character of the acts of the Israeli armed forces, be it due to the non-State character of the Palestinian actors, or be it finally due to the *lex specialis* character of applicable norms of international humanitarian law.

I will neither deal with the issue of the mandate of the fact-finding commission which was originally limited to cover alleged violations of international law by the Israeli side only³, and which was only later extended by virtue of an informal agreement reached between the head of the mission, Richard Goldstone, and the then President of the Human Rights Council so as to cover “*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

² Cf. specifically with regard to Gaza A. Bell, International Law and Gaza: The Assault on Israel's Right to Self-Defense, <http://www.jcpa.org/JCPA/Templates/ShowPage.asp?DBID=1&LNGID=1&TMID=111&FID=378&PID=0&IID=2021>; I. Rosenzweig/Y. Shany, Armed Conflict in Gaza – The General *jus ad bellum* Framework, http://www.idi.org.il/sites/english/ResearchAndPrograms/NationalSecurityandDemocracy/Terrorism_and_Democracy/Newsletters/Pages/2nd%20newsletter/1/Armed_Conflict_in_Gaza.aspx; Van der Vyver/D. Johan, Legal ramifications of the war in Gaza, Florida J. Int. Law, 2009, p. 403 *et seq.* Cf. also generally C. Tams, The use of force against terrorists, EJIL 2009, p. 359 *et seq.*; Y. Dinstein, War, Aggression and Self-Defence (4th ed., 2005), p. 244 *et seq.*

As to the conflict between Israel and Hezbollah cf. T. Ruys, Crossing the Thin Blue Line: An Inquiry into Israel's Recourse to Self-Defense against Hezbollah, Stanford J. Int. L. 2007, p. 265 *et seq.* (274), as well as A. Zimmermann, The Second Lebanon War: *Jus ad bellum*, *jus in bello* and the Issue of Proportionality”, Max-Planck-Yearbook of United Nations Law 2007, p. 99 *et seq.*

³ On 12 January 2009, the United Nations Human Rights Council (UNHRC) adopted Resolution S-9/1, deciding in para. 14 *inter alia*:

“(…) 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 (…)”

before, during or after”⁴, nor will I address the issue of the alleged bias of one of the members of the fact-finding commission, Professor *Christine Chinkin*, who, while the conflict was ongoing, had signed a public letter referring to violations of international law by the parties to the conflict⁵.

Before doing so, it has to be noted, however, that many factual questions concerning the Gaza war continue to remain open⁶, and will most probably do so for a significant period of time, if not forever, as was most recently confirmed by *Richard Goldstone* himself⁷. This is the case regardless how one judges the efforts of the Goldstone commission and the cooperation, or lack thereof, with the commission by the parties to the conflict. It follows therefrom that any evaluation of legal issues arising under applicable norms of international humanitarian law is also significantly hampered. This is particularly true, *inter alia*, with regard to the status of certain individuals, as well as with regard to attacks on both, civilian objects which might have been

⁴ Goldstone report, *supra* note 1, para. 1. It seems that, originally, former United Nations High Commissioner for Human Rights *Mary Robinson* had been asked to head the mission which she refused.

⁵ *Inter alia*, the letter stated that:

„As things stand, its invasion and bombardment of Gaza amounts to collective punishment of Gaza’s 1.5m inhabitants contrary to international humanitarian and human rights law. In addition, the blockade of humanitarian relief, the destruction of civilian infrastructure, and preventing access to basic necessities such as food and fuel, are *prima facie* war crimes.”

Cf. ‘Israel’s bombardment of Gaza is not self-defence – it’s a war crime’, Sunday Times January 11, 2009, available at: <http://www.timesonline.co.uk/tol/comment/letters/article5488380.ece>

⁶ As to the limits of fact-finding missions mandated by the Human Rights Council *cf.* C. Chinkin, U.N. Human Rights Council fact-finding missions: lessons from Gaza in: M. H. Arsanjani *et al.* (eds), *Looking to the future - essays on international law in honor of Michael W. Reisman* (2011), p. 475 *et seq.*; the article does not deal, however, with the mission which forms the subject-matter of this article.

Cf. also specifically as to an alleged evidentiary bias of the Goldstone Commission and the ensuing report A. Dershowitz, *The Case against the Goldstone Report: a Study in Evidentiary Bias*, available at: <http://www.alandershowitz.com/goldstone.pdf>.

⁷ R. Goldstone, *Reconsidering the Goldstone Report on Israel and war crimes*, Washington Post, April 1, 2011, available at: http://www.washingtonpost.com/opinions/reconsidering-the-goldstone-report-on-israel-and-war-crimes/2011/04/01/AFg11JC_story.html, stating *inter alia*:

„We know a lot more today about what happened in the Gaza war of 2008-09 than we did when I chaired the fact-finding mission appointed by the UN Human Rights Council (...)“

misused for military purposes, and on military objects within, or in the vicinity of, civilian settlements, as well as finally to alleged, but denied, instances of using civilians as human shields.

The following considerations will thus almost exclusively, and indeed necessarily, given my lack of access to facts, focus on the rules of international humanitarian law that were applicable during the conflict, and how they had to be applied on the ground.

II. Legal character of the conflict

A first fundamental issue relates to the legal character of the armed conflict, *i.e.* whether it was a conflict of an international or non-international character⁸. That question in turn relates back to the status of Gaza during the period of the conflict, *i.e.* whether it then was (and possibly continues to be) occupied territory, Israel accordingly being the occupying power, or whether, instead, the unilateral withdrawal of Israeli forces in 2006 had also led to a change in the legal status of Gaza and hence (possibly) in the character of the armed conflict that took place in December 2008/ January 2009.

1. Gaza: occupied territory?

The question whether, during the relevant time, Gaza had remained occupied territory, the Israeli withdrawal notwithstanding⁹, is - at the very least - relevant to the extent that it is only under this hypothesis that Israel could have violated certain provisions of the IVth Geneva Convention such as, for example, Art. 53 Geneva IV relating to the protection of private property, or Art. 59 Geneva IV as to the granting of permissions for relief agencies to provide relief supplies.

In order to address this question, it should first be noted that it is, as of today, largely unquestioned that Geneva IV applies to various forms of occupied territory, even if – like in the case of Gaza – the territory in question does not form part of the territory of another High Contracting Party¹⁰. Not the least, this position has unequivocally been confirmed, *inter alia*, by

⁸ As to this issue *cf.* K. Mastorodimos, The character of the conflict in Gaza - another argument towards abolishing the distinction between international and non-international armed conflicts, *Int. Community L. Rev.* 2010, p. 437 *et seq.*

⁹ *Cf. inter alia* S. Darcy/J. Reynolds, An enduring occupation - the status of the Gaza Strip from the perspective of international humanitarian law, *J. Conflict & Security L.* 2010, p. 211 *et seq.*; E. Samson, Is Gaza occupied? Redefining the status of Gaza under international law, *Am. Univ. Int. L. Rev.* 2010, p. 915 *et seq.*

¹⁰ Y. Dinstein, The International Law of Belligerent Occupation (2009), p. 20 (“Israel first country to call upon by the IC to implement the provisions of Geneva IV in respect of occupied territories”); B. Rubin, Disengagement from the Gaza Strip and post-occupation duties, *Israel L. Rev.* 2009, p. 528 *et seq.*; Y. Shany, Forty years after 1967 – reappraising the role and limits of the legal discourse on occupation in the Israeli-Palestinian context, *Israel L. Rev.* 2008, p. 6 *et seq.*

the International Court of Justice in its 2004 Wall advisory opinion¹¹ after a careful analysis of the wording and structure of Art. 2 of Geneva IV, its drafting history, subsequent State practice, as well as by the ICRC¹², and, notably, the Israeli Supreme Court¹³.

Yet, Art. 2 Geneva IV itself does not contain a legal definition as to what is understood as constituting ‘occupied territory’. Art. 42 of the Hague Regulations on the Laws and Customs of War at Land, the content of which is generally considered to constitute customary international law¹⁴ (even if the applicability of Geneva IV does not necessarily, in all of its aspects, depend on such situation of occupation under general international law), in turn, however provides that territory is considered occupied whenever “it is actually placed under the authority of the hostile army”, *i.e.* where “such authority has been established and *can be exercised*”¹⁵. In light of the official heading of Section III of the Hague Regulations, of which Art. 42 Hague Regulations forms part, which refers to “military authority over the territory of the hostile State”, one has to, therefore, determine whether there is military control over the territory in question.

This notion of ‘military control’ is, however, generally understood, given the very wording of Art. 42 Hague Regulations (‘can be exercised’), to also include situations where there is only the potential to exercise such authority¹⁶. This was already confirmed in 1949 by a US Military Tribunal, when it found that Germany had been the occupying power of both, Greece and Yugoslavia, even if parts of these territories had then been subject to the control by partisan forces since, as the Tribunal then put it, “the Germans could at any time they desired assume physical control of any part of the country.”¹⁷

Most notably, it was the Israel Supreme Court itself that found with regard to the situation in Southern Lebanon in the early 1980es, that ‘the mere military control of [an] area’

¹¹ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Rep. 2004, p. 172 *et seq.*, paras 89 – 96.

¹² *Ibid.*, para. 97 *et seq.*, quoting the Supreme Court of Israel in a judgment dated 30 May 2004. (Beit Sourik Village Council *v.* The Government of Israel, HCJ 2056/04)

¹³ *Ibid.*

¹⁴ *Cf. e.g.* ICTY Judgment Trial Chamber, 31 March 2003, - Prosecutor *v.* Nikolic - , Case no. IT-98-34-T, para. 215.; Y. Shany, Faraway, So Close: The Legal Status of Gaza After Israel’s Disengagement, Yb. Int. Hum L. 2005, p. 369 *et seq.* (374).

¹⁵ Emphasis added.

¹⁶ A. Roberts, Termination of military occupation, Max Planck Encyclopedia of Public International Law (2009), para. 3.

¹⁷ US *v.* List, VIII Law Reports of Trials of Major War Criminals (1949), p. 39 *et seq.* (55 - 56); *cf.* also Shany, *supra note* 10, p. 374.

leads to the area being occupied, even if the occupying power has decided to leave large parts of the administrative powers to the former local government¹⁸.

In the *Congo v. Uganda* case, the ICJ found that, in order to decide the question whether a State ought to be considered an occupying power, it is decisive as to whether “there is sufficient evidence to demonstrate that the said authority was in fact established and exercised by the intervening State in the areas in question”¹⁹. It is true that the ICJ in *Congo/Uganda* limited its finding of Ugandan occupation to the Ituri province²⁰, but that might be explained by the simple fact that, given the sheer size of the DRC combined with the limited number of Ugandan forces involved in the conflict, Uganda would have never been able to extend its control beyond the boundaries of Ituri anyhow²¹.

As to the case of Gaza, it should be noted that, at least at the time of the unfolding conflict, Israel was almost completely controlling the entry and exit of both, persons and goods (including foodstuff) to and from Gaza. Besides, it also controlled the territorial sea adjacent to Gaza and its airspace. Israel was also, *inter alia*, having control of the population registry of the population living in the area²².

Moreover, the Gaza area was occupied jointly with other parts of Palestine, *i.e.* the West Bank and during the very same military conflict. Additionally, both, Gaza and the West Bank, are considered to form one single geo-political unit²³. Accordingly, given that Israel continues to exercise full-fledged control over at least certain parts of the West Bank and Eastern Jerusalem, the unilateral withdrawal from Gaza did only amount to a limited retreat from parts of the overall occupied Palestinian territories, but did not, nor could it, terminate the occupation regime as such. Finally, under the Oslo Accords, Israel has retained overall responsibility as to public security even in those areas of the Palestinian territories that are currently subject to Palestinian rule²⁴.

Taken these factors together, it thus seems safe to assume that, during the relevant period, Israel continued to be the *de jure* occupying power as to Gaza the 2006 Israeli unilateral

¹⁸ *Tsemel v. Minister of Defence*, HCJ 102/82, 7(3), PD 365, p. 373 – 374; translation to be found in Shany, *supra* note 10, p. 376.

¹⁹ *Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda)*, I.C.J. Rep. 2005, para. 173.

²⁰ *Ibid.*, para. 177.

²¹ It is thus not convincing to rely on the *Congo/Uganda* judgement as an indication that a *de facto* presence and control of all parts of the territory in question are necessary in order to establish an occupation regime; but *cf.* Shany, *supra* note 10, p. 378 for such a proposition.

²² *Cf.* Goldstone report, *supra* note 1, para. 187.

²³ *Cf.* Declaration of Principles on Interim Self-Government (Israel/PLO) of 12 September 1993, as well as Art. XI Interim Agreement on the West Bank and Gaza Strip (Israel/PLO), ILM 1997, p. 551, and Israeli Supreme Court, *Ajuri v. IDF West Bank Military Commander*, HCJ 7015/02, 56(6) PD 352.

²⁴ Art. X para. 4 Interim Agreement, *supra* note 23.

disengagement notwithstanding, despite the fact that it was no longer, and could no longer, fulfil some of the obligations of an occupying power²⁵.

Yet, even assuming that Gaza continued to be occupied territory by the time Operation ‘Cast Lead’ took place, it still remains questionable whether all rules applicable in international armed conflicts automatically applied to the 2008/ 2009 conduct of hostilities between Hamas militants on the one hand and Israeli armed forces on the other, or only the rules contained in Geneva IV.

As a matter of fact, it is less than clear whether all forms of armed conflicts taking place in occupied territory, in particular when they do not involve regular armed forces of the occupied State or entity, but instead informal militias and insurgents, are necessarily governed by the rules of international humanitarian applicable in international armed conflicts

2. Operation ‘Cast Lead’: international armed conflict?

The Israeli Supreme Court considered already in its Targeted Killings case²⁶ that *any* armed conflict which takes place between an occupying power and rebel or insurgent groups in territory that is placed under occupation *ipso facto* amounts to an international armed conflict²⁷ triggering, as a matter of principle, the whole set of rules applicable in such types of conflicts.

Prima facie, this would mean, however, that not only the rules on means and methods of warfare (which in any case are, as of today, by and large identical in both types of armed conflict by virtue of customary law²⁸), but also rules on combatant status (provided non-State insurgents in such territories were to fulfil the conditions laid down in Art. 4 Geneva III), as well as those related to protected persons, such as prisoners of war, would apply in such conflicts.

Indeed, this seems to be, at least implicitly, the approach of the Goldstone commission, when it stated that Israeli soldiers captured by Hamas forces enjoy prisoner of war status under Geneva III²⁹. However, prisoner of war status does not only imply a right of the individual to be treated accordingly. Rather, Art. 21 Geneva III also, *inter alia*, provides for a *right* of the parties to the conflict to subject such persons to internment.

Moreover, if one were to qualify any type of armed conflict in situations of occupation to be international in character, one would have to also recognize the right of insurgents and similar

²⁵ Israel’s status as an occupying power might change however *inter alia* depending on the question whether Palestinians might leave respectively enter the Gaza strip via the Rafah crossing subject only to usual identity controls.

²⁶ Israeli Supreme Court, Judgment of December 11 2005, HCJ 769/02, The Public Committee against Torture in Israel *et al.* v. The Government of Israel *et al.*

²⁷ Israeli Supreme Court, *supra* note 23, paras. 18 and 21 quoting A. Cassese, International Law (2nd ed. 2005), p. 420.

²⁸ Cf. J.-M. Henckaerts/L. Doswald-Beck, Customary International Humanitarian Law, Volume I: Rules (2005) (hereinafter referred to as ICRC Customary Law Study), especially Rules 1 – 24 and 46 - 86.

²⁹ Goldstone report, *supra* note 1, para. 77.

militias, provided they have a distinctive sign, carry their arms openly (at least within the meaning of Art. 44, para. 3 Additional Protocol I, provided one considers Art. 44, para. 3 Additional Protocol I to constitute, as of today, customary international law), and abide by international humanitarian law, to be recognized as combatants. As a matter of fact, the Goldstone report seems to accept this very possibility when finding that members of the Gaza police forces would have acquired combatant status (*sic!*) in case they had either individually, or collectively, been incorporated into the so-called ‘armed forces’ of Hamas³⁰.

In order to decide, however, whether the mere fact of belligerent occupation triggers the applicability of the whole set of rules of international humanitarian law applicable in international armed conflicts even *vis-à-vis* groups that do not belong to the armed forces of the occupied State respectively to the entity representing the people in question, one has to consider that Geneva IV was originally meant to cover occupation of foreign territory subsequent to an inter-State conflict, even more so since the drafters had the occupations by Germany and Japan during World War II as paradigmatic examples in their minds.

In contrast thereto, one wonders why a conflict between a State and a non-State group on territory not belonging to the former State, or why armed confrontations between occupying forces and armed insurgents not belonging to the hostile army, such as, for example in the case of Iraq after the officially declared end of hostilities, should automatically qualify as international armed conflicts³¹.

Indeed, as the current conflict in Afghanistan confirms³², there are forms of armed conflicts involving non-State fighters which, despite possessing an international element by involving third States as parties to the conflict, and, moreover, by taking place on foreign soil, are nevertheless still generally accepted to constitute *non-international* armed conflicts.³³

Finally, Art. 1, para. 4 Additional Protocol I, to which Israeli is however not even a party³⁴, confirms that only certain types of armed conflicts taking place in a situation of

³⁰ Goldstone report, *supra note 1*, para. 429.

³¹ *Cf.* generally as to this issue K. Mastorodimos, ‘The character of the conflict in Gaza - another argument towards abolishing the distinction between international and non-international armed conflicts’, *Int. Community L. Rev* 2010, p. 437 *et seq.*

³² *Cf.* generally M. N. Schmitt (ed.), *The War in Afghanistan: A Legal Analysis* (2009)

³³ *Cf.* only R. Geiß/ M. Siegrist, ‘Armed Conflict in Afghanistan (2001-2011): Has it affected international humanitarian law?’, *Int. Rev. Red Cross* 2011, (forthcoming, manuscript on file with author). But *cf.* also for the opinion that the nature of the conflict between the ISAF contributing States and the Taliban has not changed, *i.e.* that the conflict remains an international armed conflict, Y. Dinstein, ‘Terrorism and Afghanistan’, in Schmitt, *ibid.*, p. 51-53.

³⁴ Israel could even argue to qualify as a persistent objector with regard to Art. 1 para. 4 Additional Protocol I; *cf.* as to this question A. Zimmermann, ‘Responsibility for Violations of International Humanitarian Law’, *International Criminal Law and Human Rights Law - Synergy and Conflict?*, in: V. Epping/ W. Heintschel v. Heinegg (eds.)

occupation might amount to international armed conflicts as such. Said provision, by using the notion of alien occupation, also covers cases of occupation of a territory which has not yet been fully formed as a State³⁵. Yet, even under Art. 1, para. 4 Additional Protocol I, armed conflicts taking place in such occupied territories only qualify as international armed conflict provided further criteria are met. In particular, it is required, in order to internationalize the conflict in question, that the non-State group involved in the conflict, as confirmed by Art. 96, para. 3 Additional Protocol I, represents a people exercising its right of self-determination and thus, requiring that this non-State party to the conflict constitutes more than a mere group *de facto* exercising control over a certain part of the occupied territory.

However, as far as Palestine is concerned, while the international community, as well as the International Court of Justice³⁶, has, and for good reason, recognized the right of the Palestinian people to exercise its right of self-determination, it has, by the same token, always recognized the PLO and the Palestinian Authority, and them alone, but not the *de facto* authorities in Gaza or Hamas, as representing the Palestinian people.

Accordingly, even under Additional Protocol I, the armed conflict between Israeli armed forces and Hamas-affiliated armed groups should not be considered an international one. *A fortiori*, Israel not being a party to Additional Protocol I, and eventually even being a persistent objector to at least some of its contents, the conflict taking place in 2008/2009 between Israel on the one hand and Hamas on the other was not automatically internationalized by the mere fact that Gaza continued to be occupied territory by the time the armed confrontation between Israeli armed forces and armed groups affiliated with Hamas broke out.

Accordingly, the question as to whether the conduct of hostilities during the Gaza war was governed by the rules of international humanitarian law applicable in international armed conflict is not predetermined by the question as to whether Gaza was or was not, at the relevant time occupied territory.

Instead, recent State practice, at least in its majority, continues to qualify armed conflicts with non-State groups as being non-international in character, even when they possess a transboundary or international element³⁷. As a matter of fact, Art. 1, para.4 Additional Protocol I,

International Humanitarian Law - Facing New Challenges 2006, p. 203 *et seq.* (218 *et seq.*); *cf.* generally as to the concept of persistent objectors T. L. Stein, The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law, Harv. Int. L. J. 1985, p. 457 *et seq.*

³⁵ Y. Sandoz, C. Swinarski, B. Zimmermann (eds.), ICRC Commentary on the Additional Protocols (1987), para. 112.

³⁶ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Rep. 2004, p. 171 *et seq.*, paras. 88 – 115.

³⁷ US Supreme Court, Hamdan v Rumsfeld, Secretary of Defense *et al.*, Judgment of 29 June 2006 (2006) 548 US 67. *Cf.* also C. Kress, Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts; J. Conflict & Security L. 2010, p. 245 *et seq.* *Cf.* also R. Schöndorf, Extra-State Armed Conflicts: Is There a Need for a New Legal Regime?, New York UJ Intl L Politics 2004, p. 26; M. Sassòli, Transnational Armed Groups

as of today ratified by 170 States, confirms that States were only willing to accept the ‘internationalization’ of armed conflicts involving non-State groups in very limited circumstances, namely in particular where the non-State party is representing a people exercising its right of self-determination.

III. Relevant rules of international humanitarian law

Regardless of whether ‘Operation Cast Lead’ amounted to an international armed conflict or not, it has to be noted that, as of today, almost all rules of international humanitarian law, at least those governing the means and methods of warfare in both types of conflict, are identical, certain rare exceptions notwithstanding.

In particular, this is true for the distinction between civilians not taking part in hostilities on the one hand, and those actively involved in the fighting on the other (be they enemy combatants, civilians taking direct part in hostilities, or even persons considered so-called ‘unlawful combatants’)³⁸. A similar requirement of distinction applies *mutatis mutandis* to military objects *versus* civilian ones in both types of conflict³⁹. Apart, certain civilian objects such as hospitals⁴⁰, places of worship⁴¹ or United Nations installations⁴² enjoy special protection which they might only forfeit under specific circumstances.

More specifically with regard to individuals actively participating in hostilities, it is beyond doubt that, on the one hand, within the framework of international armed conflicts, enemy combatants constitute legitimate military targets unless they are placed *hors de combat*⁴³. Where,

and International Humanitarian Law, Harvard University Program on Humanitarian Policy and Conflict Research Occasional Papers Series, number 6, available at: [http://www.reliefweb.int/rw/lib.nsf/db900sid/EVOD-6WQFE2/\\$file/OccasionalPaper6.pdf?openelement](http://www.reliefweb.int/rw/lib.nsf/db900sid/EVOD-6WQFE2/$file/OccasionalPaper6.pdf?openelement).

³⁸ ICRC Customary Law Study, *supra* note 24, Rule 1. In its advisory opinion on the legality of nuclear weapons the International Court of Justice stated that the principle of distinction constitutes one of the “cardinal principles of international humanitarian law”; ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Rep. p. 226 *et seq.*, para. 78. *Cf.* also K. Dörmann, The legal situation of unlawful/unprivileged combatants, Int. Rev. Red Cross 2003, p. 45 *et seq.*, available at: http://www.icrc.org/eng/assets/files/other/irrc_849_dorman.pdf.

³⁹ ICRC Customary Law Study, *supra* note 24, Rule 7.

⁴⁰ ICRC Customary Law Study, *supra* note 24, Rule 30; *cf.* also J. Kleffner in: D. Fleck (ed.), The Handbook of International Humanitarian Law (2nd ed., 2008), p. 353 *et seq.*

⁴¹ *Ibid.*, Rules 38-42. *Cf.* also R. O’Keefe, The protection of cultural property in armed conflict (2006), *passim*.

⁴² *Cf.* Art. 8 para. 2 (b) (iii) and para. 2 (e) (iii) ICC-Statute. *cf.* M. Cottier, in: O. Triffterer (ed.), Commentary on the Rome Statute of the International Criminal Court, p. 330 *et seq.* *cf.* also UN Convention on the Safety of United Nations and Associated Personnel; Annex to U.N. Doc A/RES/49/59 (1994) (not yet in force).

⁴³ *Cf.* ICRC Customary Law Study, *supra* note 24, Rule 47. *Cf.* also Y. Dinstein, The conduct of hostilities under the law of international armed conflict, 2nd ed., p. 92; S. Oeter, in: D. Fleck (ed.), The Handbook of International Humanitarian Law, pp. 34, 178.

however, as was the case in the Gaza conflict, persons do not possess combatant status, either due to the non-international character nature of the conflict, or because they did not fulfil the criteria laid down in Art. 4 Geneva III/ Art. 44, para. 3 Additional Protocol I⁴⁴, they are to be considered civilians, unless they form part of the ‘armed forces’ of the insurgents. Even civilians could nevertheless be the subject to legitimate attack when taking direct part in hostilities⁴⁵.

There is also general agreement that, whatever the nature of the armed conflict, even attacks on legitimate military targets, which are to be expected to cause excessive collateral civilian damage, are prohibited⁴⁶.

Moreover, there is a general prohibition to use either civilians or other protected persons as human shields⁴⁷, so as to render certain points, areas or one’s own military forces immune from military operations⁴⁸.

Finally, certain weapons are prohibited, the use of which might, especially in urban warfare, be indiscriminatory in nature, or might raise serious problems⁴⁹

Having thus outlined the main rules of international humanitarian law generally accepted to apply to the conflict⁵⁰, their application, and alleged violations during ‘Operation Cast Lead’ will now be analyzed.

⁴⁴ Cf. J. C. Yoo/ C. Ho, The Status of Terrorists, VJIL 2003/2004, p. 207 *et seq.* (226-227); G. B. Roberts, The New Rules for Waging War: the Case against Ratification of AP I, VJIL 1985/86, p. 109 *et seq.* (129); A.D. Sofaer, The Rationale for the United States Decision, AJIL 1988, p. 784 *et seq.* (786). Generally cf. Y. Dinstein, *ibid.*, p. 53 - 54.

⁴⁵ As to attempts to qualify non-combatant civilians (illegally) taking part in hostilities as so-called ‘illegal combatants’ cf. Y. Dinstein, *ibid.*, p. 33 *et seq.*

⁴⁶ H. Parks, Air War and the Law of War, Air Force Law Review 1990, p. 135 *et seq.*; cf. also I. Henderson, The contemporary law of targeting: Military objectives, proportionality and precautions in attack under Additional Protocol I, p. 221. W. Fenrick, The Rule of Proportionality and Protocol I in Conventional Warfare, p. 95; M. N. Schmitt, The Principle of Discrimination in 21st Century Warfare Yale Human Rights and Development Law Journal 1999, p. 143 *et seq.*

⁴⁷ Cf. S. Oeter, in D. Fleck (ed.), The Handbook on International Humanitarian Law (2008), p. 193 *et seq.*; E. Gross, Use of civilians as human shields, Emory International Law Review 2002, p. 445 *et seq.*

⁴⁸ Cf. Art. 8 para. 2 (b) (xxiii) ICC-Statute.

⁴⁹ W. H. Boothby, Weapons and the Law of Armed Conflict (2009), p. 62. cf. also H. Meyrowitz, The principle of superfluous injury or unnecessary suffering from the Declaration of St. Petersburg of 1868 to Additional Protocol I of 1977, Int.Rev. Red Cross 1994, p. 98 *et seq.* (109 *et seq.*); H. Blix, Means and Methods of Combat, International Dimensions of Humanitarian Law (1997), p. 135 *et seq.* (138).

⁵⁰ With regard to further rules concerning the conduct of hostilities such as the prohibition to deny quarter, the prohibition to use starvation as a method of warfare or the principle of precautions in attack, including the obligation to give effective advance warning, provided circumstances so permit, cf. S. Oeter, in: D. Fleck (ed.) The Handbook on International Humanitarian Law (2008), p. 126-137. .

IV. Alleged attacks on civilian objects

The prohibition to attack civilian objects raises two different issues, namely for one deliberate Israeli attacks on Hamas governmental facilities, and, on the other hand, attacks against civilian installations (recognized as such) allegedly used for military purposes.

1. Attacks against government buildings: the notion of military objectives

In its report on factual and legal aspects of Operation ‘Cast Lead’ Israel claimed that “[m]any of the ostensibly civilian elements of [the Hamas] regime are in reality active components of its terrorist and military efforts” and that “Hamas does not separate its civilian and military activities in the manner in which a legitimate government might”, but rather “uses apparatuses under its control, including quasi-governmental institutions, to promote its terrorist activity.” This raises the question as to whether installations, such as the Palestinian Legislative Council Building or Hamas ‘ministries’, could be considered legitimate military targets.

A generally accepted⁵¹ definition of what constitutes a military objective is to be found in Art. 52, para. 2 of the First Additional Protocol. Under said provision, in order to qualify as a military target, it is decisive whether these are objects

“which by their nature, location, purpose, or use make an effective contribution to military actions and whose total or partial destruction, capture, or neutralization, in the circumstances ruling at time, offers a definite military advantage.”

Moreover, the qualification of a specific object as a military or non-military depends on the specific circumstances prevailing at the time of the attack, as confirmed by the phrase “in the circumstances ruling at time” contained in Art. 52, para. 2 Additional Protocol I, which limitation, as the rule reflected in Art. 52, para. 2 also applies in non-international armed conflicts by virtue of customary international law⁵².

Thus, in order for a Hamas ‘ministry’ or the Gaza Legislative Council building to qualify as a military objective, one would have to reach the conclusion that it was connected with the Hamas’ military efforts within the meaning of the two-pronged test provided for in Art. 52, para. 2 Additional Protocol I and its customary law equivalent. That would be the case - apart from scenarios where enemy fighters or weapons were present within these compounds - provided military planning took place therein, or if part of the Hamas operational command and control facilities were located within such facilities.

⁵¹ For a general overview as to the notion of ‘military target’ cf. A.P.V. Rogers, “What is a legitimate military target?”, in: R. Burchill *et al.* (eds.), *International Conflict and Security Law* 2005, p. 160 *et seq.* cf. also I. Henderson, *supra* note 46.

⁵² ICRC Customary Law Study, *supra* note 28, Rule 8. Cf. also the commentary to the recently adopted HPCR Manual on International Law Applicable to Air and Missile Warfare, 15 May 2009, p. 88, available at: <http://www.ihlresearch.org/amw/manual/>.

In contrast, the mere fact that they were part of the Hamas propaganda machinery⁵³ or part of its political apparatus, not connected to military planning, nor forming part of its control and command installations, did not turn them into legitimate military targets, as such use did then not make an effective contribution to military actions, and neutralizing them did accordingly not constitute a military advantage either.

It were otherwise if specific governmental installations had been connected to the Hamas military operations efforts, or, as Israel has put it⁵⁴, constituted “active components of military efforts”, which claim, however, Israel has not laid out in detail in its own submissions.

2. Other civilian installations used for military purposes

It is generally accepted that, whenever a civilian object is being used for military purposes, such as for example for the storage of weapons or as a military planning site, as Israel claims has been frequently the case as far as Gaza is concerned⁵⁵, it loses its civilian status *when and for such time* such misuse is actually taking place⁵⁶ and may then be subject of attack⁵⁷.

It should be noted, however, that such loss of civilian status is only a temporary one, *i.e.* an otherwise civilian building does not *permanently* lose its civilian status once used *e.g.* as a rocket launch site⁵⁸. Accordingly, in order to find a violation of international humanitarian law in case of Israeli attacks on alleged civilian objects during Operation ‘Cast Lead’, one would have to clarify as to whether the object in question had indeed previously been used for military purposes, and whether such military use might have already been terminated well before the attack took place.

⁵³ Cf. the Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia para. 47, available at: <http://www.un.org/icty/pressreal/nato061300.htm>. The report stated:

“Whether the media constitutes a legitimate target group is a debatable issue. If the media is used to incite crimes, as in Rwanda, then it is a legitimate target. If it is merely disseminating propaganda to generate support for the war effort, it is not a legitimate target.”

⁵⁴ “The operation in Gaza: Factual and legal aspects”, July 2009, published on the website of the Israeli Ministry of Foreign Affairs, available at: http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Terrorism+and+Islamic+Fundamentalism-/Operation_in_Gaza-Factual_and_Legal_Aspects .htm, para. 235 [hereinafter referred to as “The operation in Gaza”].

⁵⁵ *Ibid.*, paras. 233 - 235.

⁵⁶ ICRC Customary Law Study, *supra* note 28, Rule 6.

⁵⁷ *Ibid.* Cf. also Article 8, para. 2 lit. (b) (ii), as well as Article 8, para. 2, lit. (b) (ix) and lit. (e) (iv) ICC-Statute concerning specifically attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected.

⁵⁸ I. Henderson, *supra* note 46, p. 76 *et seq.*

On the other hand, one has to acknowledge that Art. 52, para. 2 Additional Protocol I not only refers to the use, but also to the ‘purpose’ of such an object. It thereby hints at the possibility of a civilian object losing its protected status once it is being turned into an object to be used for military goals⁵⁹. Yet, not every single, one-time military usage of a civilian object turns it into a military object by virtue of the ‘purpose’-clause, since otherwise the limiting effect of the “in the circumstances ruling at time” clause would in turn become obsolete. Accordingly, the best way to reconcile the various parts of Art. 52, para. 2 is to require that there must be indications for an intention of the enemy to use a civilian object for military purposes *ad futurum* on a continuous basis in order for it not to regain its civilian status once the actual military use has come to an end.

In that regard, it is also relevant to note that not even the customary law study of the ICRC, which some States have furthermore argued is too liberal in determining the existence of rules of customary law⁶⁰, claims that the presumption of civilian status contained in Article 52, para. 3 Additional Protocol I, does form part of customary law, as applicable in international armed conflict, and thus even less so in non-international armed conflicts⁶¹.

On the whole, the problems of finding a violation of the prohibition of attacks against civilian objects, once again, highlights the extreme relevance of a proper fact finding, which, however, given the prevailing circumstances in armed conflict generally, and the Gaza conflict in particular, is very complex, if not impossible.⁶²

V. Attacks on persons affiliated with Hamas

1. General considerations

The requirement to distinguish between civilians on the one hand (who may not, as a matter of principle, be attacked), and members of the armed forces underlies the whole fabric of international humanitarian law⁶³. Both, in international as well as in non-international armed

⁵⁹ *Cf.* ICRC Commentary on the Additional Protocols, *supra* note 35, para. 2022, which notes that the criterion of ‘purpose’ is concerned with the intended future use of an object while that of ‘use’ is concerned with its present function. Most civilian objects can become useful objects to the armed forces. Thus, for example, a school or a hotel is a civilian object, but if they are used to accommodate troops or headquarters staff, they become military objectives. *Cf.* also R. Geiß, *The Conduct of Hostilities in Asymmetric Conflicts – Reciprocity, Distinction, Proportionality, Precautions*, *Humanitäres Völkerrecht* 2010, p. 122 *et seq.*

⁶⁰ *Cf.* only J. B. Bellinger III/ W. J. Haynes II, *A US government response to the International Committee of the Red Cross Study Customary International Humanitarian Law*, *Int. Rev. Red Cross* 2007, p. 443 *et seq.*, available at: http://www.icrc.org/eng/assets/files/other/irrc_866_bellinger.pdf.

⁶¹ ICRC Customary Law Study, *supra* note 28, p. 35 *et seq.*

⁶² *Cf.* only D. Akande, *Clearing the fog of war - the ICRC’s interpretive guidance on direct participation in hostilities*, *ICLQ* 2010, p. 180 *et seq.*

⁶³ ICJ, *Nuclear Weapons advisory opinion*, *supra* note 38, para. 179.

conflicts, civilians are negatively defined as being those persons that do not belong to the armed forces of a party to the conflict⁶⁴.

While international humanitarian law contains an express definition of who are the members of the armed forces as far as international armed conflicts are concerned, *i.e.* all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates⁶⁵, there does not exist a generally accepted parallel definition as far as non-international armed conflicts are concerned.

Notwithstanding, both common Art. 3 Geneva I – IV, by referring to the armed forces of *both* sides of a non-international armed conflict (thus including the non-State side), as well as Additional Protocol II, by referring to ‘other organized armed groups’, presuppose that individuals can be ‘incorporated’ into non-State armed groups in that they are supposed to fulfill, as the ICRC has rightly put it in its work on direct participation in hostilities⁶⁶, a continuous combat function equivalent to that of soldiers, by which fact alone they then become legitimate targets of attacks simply by belonging to the armed group, even if they do not, at the time of the attack, directly participate in hostilities⁶⁷.

⁶⁴ K. Dörmann, *supra* note 38, p. 45 - 74; but *cf.* also

⁶⁵ ICRC Customary Law Study, *supra* note 28, Rule 3 and commentary at p. 12.

⁶⁶ The ICRC’s Interpretive Guidance on the notion of direct participation in hostilities under international humanitarian law (2009), p. 33[hereinafter ICRC Interpretive Guidance].

For a critical discussion of the ICRC’s Interpretive Guidance *cf.* K. Watkin, Opportunity Lost: Organized Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guidance, N. Y. Univ. J. Int. L. & Pol. 2010, p. 641 *et seq.*; M. N. Schmitt, Deconstructing Direct Participation in Hostilities: The Constitutive Elements, *ibid.*, p. 697 *et seq.*; B. Boothby, “And for Such Time As”: The Time Dimension to Direct Participation in Hostilities, *ibid.*, p. 741 *et seq.*; W. H. Parks, Part IX of the ICRC “Direct Participation in Hostilities Study”: No Mandate, No Expertise, And Legally Incorrect, *ibid.*, p. 769 *et seq.*; but *cf.* also N. Melzer, Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities, *ibid.*, p. 831 *et seq.*

⁶⁷ ICRC Interpretive Guidance, *ibid.*, Recommendation II and p. 23. Recommendation II entitled “The concept of civilian in non-international armed conflict” provides:

“For the purposes of the principle of distinction in non-international armed conflict, all persons who are not members of State armed forces or organized armed groups of a party to the conflict are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. In non-international armed conflict, organized armed groups constitute the armed forces of a non-State party to the conflict and consist only of individuals whose continuous function it is to take a direct part in hostilities (continuous combat function)”.

It is noteworthy, however, that, similar to States, also insurgent, secessionist or similar movements – and thus also Hamas – comprise, at least in most cases⁶⁸, not only military formations, but also political segments, parts or wings, the members of which, while politically supporting their respective ‘armed forces’, are neither necessarily trained for military operations, nor involved in such military operations. Conceptually, one has to therefore distinguish between the non-State party to the conflict on the one hand generally, and its ‘armed forces’ on the other. As a consequence, individuals who do not assume a continuous combat function within the organized armed group as such (including the respective military leadership) are therefore qualifying as civilians. Accordingly, they may only be subject to attack provided they directly participate in hostilities, even if they belong to the overall political structure of the non-State party to the conflict⁶⁹.

It has to be noted, however, that the inclusion into the armed forces of a non-State party to a conflict (unlike in the case of a State) does not require any formal act of recruitment or incorporation, nor do members of such organized armed groups regularly wear uniforms or other fixed distinctive emblems or signs, which, admittedly⁷⁰, makes it extremely difficult to make a well-informed decision as to who belongs to such organized armed groups⁷¹.

2. Gaza police: part of Hamas’ ‘organized armed group’?

Applying these principles specifically to the Gaza conflict and the attacks on members of the Gaza police force, it seems to be misleading to apply, either *mutatis mutandis* or directly, as the Goldstone report does⁷², the mere formal incorporation test provided for in Art. 43 Additional Protocol I⁷³ to the case at hand since this does not correspond to the realities on the ground.

Rather, one would have to determine whether at all, and if so to what extent, the Gaza police force as such, or larger numbers of its members, were *de facto* linked to the Hamas military wing or other armed groups by assuming a continuous combat function. The Goldstone report is

⁶⁸ C. Schaller, Humanitäres Völkerrecht und nicht-staatliche Gewaltakteure, available at: <http://www.swp-berlin.org/de/produkte/swp-studien-de/swp-studien-detail/article/humanitaeres-voelkerrecht-und-nichtstaatliche-gewaltakteure.html>. Cf. also U. Schneekener, Fragile Statehood, Armed Non-State Actors and Security Governance, in: A. Bryden/M. Caparini (eds.), Private Actors and Security Governance (2006), p. 23 *et seq.*

⁶⁹ But cf. K. Watkin, *supra* note 67, p. 641 *et seq.*, who favours a much broader approach on who might be legitimately targeted as far as persons belonging to the non-State side of an armed conflict are concerned.

⁷⁰ ICRC Interpretive Guidance, *supra* note 67, p. 33.

⁷¹ This is admitted by the ICRC in the Interpretive Guidance, *ibid.*, p. 33.

⁷² Goldstone report, *supra* note 1, paras. 34, 214.

⁷³ As example of a formal incorporation of police forces into national armed forces was the (former) German Federal Border Guard (Bundesgrenzschutz, now Bundespolizei/ Federal Police) which until 1994 did *ipso facto* acquire combatant status once hostilities had started, cf. Sect. 64 Bundesgrenzschutzgesetz as it stood until 1994, Bundesgesetzblatt 1974 I, p. 1834 *et seq.*

thus correct to the extent that it states that the mere membership in Hamas (unlike *e.g.* membership in its Al-Qassam-Brigade or other organized armed fractions of Hamas or related armed groups) did not automatically turn members of the Gaza police forces *per se* into members of the ‘organized armed forces’ of the enemy, and thus did not terminate their civilian status neither.

On the other hand, provided allegations made by Israel were true, that the Gaza police forces generally, and not only single policemen in their individual capacity, would have been incorporated into the Al-Qassam Brigades in the event of Israeli military operations taking place against Gaza⁷⁴, the Gaza police force and its members *in toto* would have then constituted a legitimate military target. If this was not the case, however, they were not legitimate targets as such unless they were directly participating in hostilities, an issue that will now be addressed.

3. Civilians taking a direct part in hostilities

In the context of the Gaza conflict, and indeed in all forms of asymmetric warfare, one of the most complex issues related to such types of conflicts consists in determining under what circumstances a civilian is to be considered to directly participate in hostilities (thereby making him or her a legitimate military target). Besides, it is also crucial to determine whether such a civilian, once having directly participated in hostilities, loses his or her civilian status for good, or whether instead, he or she does so only for the time such direct participation is actually taking place⁷⁵ - issues that have also already previously and extensively been discussed here at New York University⁷⁶.

Yet, the Goldstone report devotes surprisingly little space to the discussion as to whether individuals, not incorporated into non-State armed groups, continue to be legitimate targets of attacks once they have taken a direct part in hostilities. Rather, after having determined that the members of the local police force had not been, as such, incorporated into the ‘organized armed forces’ of Hamas⁷⁷, the report simply states that they could not be considered as civilians taking direct part in hostilities since they were, at the time of the attack, “engaged in civilian tasks inside civilian police facilities”⁷⁸.

The report thus seems to take it for granted that civilians, provided they take a direct part in hostilities, are only *temporarily* losing their protection under international humanitarian law while doing so, thereby claiming that the relevant qualifying part of Art. 51, para. 3 Additional

⁷⁴ The operation in Gaza, *supra* note 55, para. 243.

⁷⁵ *Cf.* as to this issue on the one hand The ICRC’s Interpretive Guidance, *supra* note 67, p. 70 *et seq.* and, on the other, B. Boothby, *supra* note 67, pp. 741-769.

⁷⁶ For a detailed critique of various aspects of the ICRC ‘Interpretive Guidance’ *cf.* K. Watkin, M. N. Schmitt, W. Boothby and W. H. Parks, *supra* note 67.

⁷⁷ As to this issue *cf.* above p. 8 *et seq.*

⁷⁸ Goldstone report, *supra* note 1, para. 435.

Protocol I reflects, at least as of today and with regard to international armed conflicts, a norm of customary international law.

In contrast thereto, some academic commentators continue to however deny the customary law status of the ‘and for such time’-clause *in toto*⁷⁹. Yet, the Israeli government, contrary to its own pleadings before the Israeli Supreme Court in the Targeted Killings case, seems to at least *no longer* share this position⁸⁰. Rather, with regard to the conduct of hostilities during Operation ‘Cast Lead’, Israel argued along the lines of the judgment of the Israeli Supreme Court in the Targeted Killings case⁸¹. In said case, the Court, as is well-known, after having determined that *all* parts of Article 51, para. 3 Additional Protocol I (including the ‘for such time’-clause) constituted an expression of customary international law (at least as far as international armed conflicts are concerned), adopted a relatively broad concept of what constitutes direct participation in hostilities.

The Court claimed that not only persons performing the function of a ‘combatant’, such as persons operating weapons, or civilians bearing arms (openly or concealed) on their way to hostilities or on his or her return from the battlefield⁸² are directly participating in hostilities, but also persons collecting intelligence, transporting combatant enemies to or from places where hostilities are taking place, and finally also persons supervising military operations, or providing services to members of the organized armed forces⁸³.

⁷⁹ Cf. Y. Dinstein, The ICRC customary international humanitarian law study, *Isr. Yb. Hum. Rights* 2006, p. 11.

⁸⁰ But cf. the argument by the representatives of the State of Israel in the Targeted Killings case before the Israeli Supreme court, where the Israeli government in 2004 had still argued that

“[r]egarding the period of time during which such harm [against civilians who have directly participated in hostilities] is permitted, there is no restriction (...)”

and where therefore

“according to the position of the State [of Israel], the non-customary part of article 51 para. 3 of the First Protocol is the part which determines that civilians do not enjoy protection from attack “*for such time*” as they are taking a direct part in hostilities”;

supra note 26, para. 30.

⁸¹ The operation in Gaza, *supra* note 55, para. 98.

⁸² Cf. Article 43 of Additional Protocol I.

⁸³ The operation in Gaza, *supra* note 55, para. 98. Cf. also Israeli Supreme Court, *supra* note 22, paras. 35-36.

In contrast thereto, the Court considered that individuals providing general strategic analysis, granting general logistical support or distributing propaganda for the insurgents do *not* qualify as persons directly participating in hostilities⁸⁴.

Applying this standard, as developed by the Israeli Supreme Court, to the case at hand, it is questionable whether members of the police force (assuming they had not been incorporated into Hamas armed forces or were to be so incorporated with the start of hostilities) could be considered to have directly participated in the hostilities given that the attack on the police headquarters and five police stations had taken place in the very first minutes of the aerial bombardments, *i.e.* even before there was any possibility for the members of the police to actually get involved in fighting or undertaking any of the combat-related activities considered by the Israeli Supreme Court to constitute direct participation in hostilities⁸⁵.

VI. Collateral damage

It is especially in urban warfare taking place in densely populated areas that the prohibition to cause excessive damage to civilians and civilian objects is, on the one hand, of particular relevance, but on the other hand, also the most difficult to abide by.

1. Customary law prohibition to cause excessive civilian damage⁸⁶

The principle of proportionality, as a limit for military attacks, is enshrined, in particular, in Art. 51, para. 5 of Additional Protocol I according to which any attack is prohibited “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”.

While it is true that Israel itself is not a contracting party to the First Additional Protocol, and therefore not bound by Art 51, para. 5 of the protocol as a matter of treaty law, it has to be noted that this rejection of the protocol is not due to the principle contained in Art. 51, para. 5 of the Protocol⁸⁷. The general nature and applicability of the principle of proportionality in every kind of armed conflict, be they of an international or a non-international armed conflict, has also been confirmed by the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia⁸⁸, as well as by relevant State practice⁸⁹, which let the International Committee of the

⁸⁴ Israeli Supreme Court, *supra* note 25, para. 35.

⁸⁵ Evidently, at later stages of the conflict such a line of reasoning could no longer be applied.

⁸⁶ *Cf.* also L. Vierucci, Sul principio di proporzionalità a Gaza, ovvero quando il fine non giustifica i mezzi, *Diritti umani e diritto internazionale* 2009, p. 319 *et seq.*

⁸⁷ As to the reasons why Israel is not becoming a contracting party of the First Additional Protocol *cf.* p. 24 *et seq.*

⁸⁸ International Criminal Tribunal for the Former Yugoslavia, IT-95-16-T, Judgment of 14 January 2000, Prosecutor *v.* Zoran Kupreskic *et al.*, paras. 521 *et seq.*

Red Cross in its customary law study to the conclusion that the principle of proportionality indeed equally applies to both, international and non-international armed conflicts⁹⁰.

It is true that, as far as the Rome Statute of the International Criminal Court is concerned, the crime of causing excessive collateral damage only applies in international armed conflicts⁹¹. Yet, the Rome Statute is, at least in that regard, not fully in line with modern customary international law⁹². Moreover said norm, as contained in the Rome Statute, solely covers the issue of individual criminal responsibility for the causation of excessive damage to civilians or civilian objects⁹³. This, therefore, does not preclude that a more far-reaching prohibition does indeed exist under customary international law for purposes of State responsibility⁹⁴. Accordingly, regardless of how one qualifies the Gaza war, as being international or non-international in

⁸⁹ For a survey of relevant State practice in that regard *cf.* ICRC Customary Law Study, *supra* note 24, p. 47; J. Gardam, *cf. supra* note 4, p. 110 *et seq.*

⁹⁰ ICRC Customary Law Study, *supra* note 28, Rule 14; D. Casey, Breaking the Chain of Violence in Israel and Palestine: Suicide Bombings and Targeted Killings Under International Humanitarian Law, *Syracuse J. Int. L.* 2005, p. 311 *et seq.* (319). *Cf.* also as to the position of the Israeli Supreme Court, *supra* note 25, para. 43, where the Court affirmatively referred to Art. 51 of the First Additional Protocol, as being declaratory of customary international law.

⁹¹ *Cf.* on the one hand Art. 8 para. 2 lit. (b) (iv) ICC-Statute, and the lack of any parallel provision in Art. 8, para. 2, lit. (e) ICC-Statute on the other; for the underlying reasons of this unfortunate *lacuna cf.* A. Zimmermann, Preliminary Remarks on para. 2 (c) - (f) and para. 3: War crimes committed in an armed conflict not of an international character, in: O. Triffterer (ed.), *supra* note 42, p. 263 *et seq.*

⁹² C. Kress, War crimes committed in non-international armed conflict and the emerging system of international criminal justice, *IYHR* 2000, p. 134.

⁹³ Art. 25 para. 4 ICC-Statute. As to the interrelationship between the Rome Statute and general international law, as well as international humanitarian law *cf.* A. Pellet, Applicable Law, in: A. Casesse *et al.* (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, vol. II (2002), p. 1082 - 1084.

⁹⁴⁹⁴ For a similar proposition distinguishing attribution for purposes of State responsibility from involvement of a third State in a military conflict in order to internationalize the conflict *cf.* the judgment of the ICJ in the Bosnian Genocide case, where the Court stated:

“It should first be observed that logic does not require the same test to be adopted in resolving the two issues, which are very different in nature: the degree and nature of a State’s involvement in an armed conflict on another State’s territory which is required for the conflict to be characterized as international, can very well, and without logical inconsistency, differ from the degree and nature of involvement required to give rise to that State’s responsibility for a specific act committed in the course of the conflict.”

ICJ, Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), judgement of 26 February 2007, p. 144, para 405.

character, the prohibition of causing excessive collateral damage did apply, a fact acknowledged by Israel itself⁹⁵.

2. Operation ‘Cast Lead’ and possible violations of the principle of proportionality

The Goldstone report has alleged several violations of the prohibitions to cause excessive collateral damage to have taken place, one now being considered in more detail by way of example, namely the Israeli shelling in al-Fakhura Street close to a UNRWA school then used as a shelter, in regard of which the report reaches the conclusion that Israel had, *inter alia*, caused excessive collateral damage⁹⁶.

In that regard one wonders first whether it is indeed correct to state that, as the report claims, the ‘military advantage to be gained was to stop the alleged firing of mortars’⁹⁷ only. Rather, the neutralisation of enemy fighters, the number of which is however disputed between the parties, is also a relevant military advantage to be taken into account.

Moreover, one also wonders why it is considered pertinent to state that the Israel military action was taken “very near a shelter with 1,368 civilians”, if nobody within the UNRWA compound was wounded or killed. Besides, and as to the, both legally and morally, most difficult question as to whether the killing of 35 innocent civilians, when compared with the neutralization of at least five enemy fighters, amounts to excessive collateral damage, one has to take into account the fact that the Israeli forces, when reaching the decision to launch the attack had themselves been under attack and that they might not have had sufficient information to anticipate such a degree of collateral damage so as to oblige them not to launch the attack, even if one were to consider such damage to be excessive in nature⁹⁸.

Finally, and with regard to the related obligation to take any feasible precautions in the choice of means and methods of attack with a view to minimize, as much as possible, collateral damage, it seems to be far-reaching to at least imply that Israel ought to have used weapon systems such as helicopters or fighter jets other than the actual used mortar systems⁹⁹ since no

⁹⁵ The operation in Gaza, *supra* note 55, para. 120 *et seq.* Cf. also the fact that the official manual on the laws of war of the Israeli Defence Forces provides that the commander shall not go ahead with an attack, if it is to be anticipated that the damage to the civilian population would be excessive as compared to the anticipated military advantage, ICRC Customary Law Study, *cf.* note 28, p. 302.

⁹⁶ Goldstone Report, *supra* note 1, para. 694 *et seq.*

⁹⁷ *Ibid.*

⁹⁸ It has to be noted, however, that future eventual risks emanating from a combatant enemy (such as the risk that he or she will eventually kill or neutralize a large number of members of one’s own troops) cannot be taken into account when considering the proportionality of an attack against such enemy, given that only concrete (and not mere hypothetical) military advantages are to be taken into account when determining the proportionality of an attack.

⁹⁹ Goldstone report, *supra* note 1, para. 696.

information is provided in the report as to whether such alternatives were available, and what the impact on civilians of such alternative weapons would have been.

VII. Alleged uses of human shields by Israel

One of the most serious violations of international humanitarian law Israel¹⁰⁰ has allegedly committed relates to the use of human shields¹⁰¹. Yet, while the facts are again highly disputed, it must be noted that Israel claims that no incidences of using civilians as human shields have taken place¹⁰².

On the other hand, and as far as applicable rules of international humanitarian law are concerned, it must be noted that Art. 28 Geneva IV unequivocally provides that the “presence of a protected person may not be used to render certain points or areas immune from military operations”¹⁰³ which includes the usage of civilians to protect members of one’s own military against attack¹⁰⁴. In a 2005 case, the Israeli Supreme Court has confirmed this, when considering the practice of the Israeli Armed Forces of so-called ‘early warnings’ involving the use of Palestinians *volunteering* to request persons searched for to surrender to Israeli forces. In particular, the Israeli government had confirmed during these proceedings that it considers it to be strictly

¹⁰⁰ With regard to human shields, a controversy has arisen as to the question whether, and if so under which circumstances, a person who acts as a human shield may lose his or her protection from direct attack, in other words under which circumstances the practice of shielding a military objective would amount to a direct participation in hostilities. *De facto*, however, a distinction on the basis of whether a person acts freely when shielding a given military objective, or whether the person has been coerced to do so, can hardly ever be made *bona fide* under battlefield conditions. The ICRC therefore suggests to distinguish whether a human shield amounts to a physical obstacle, for example in the context of ground operations where a person shielding a given objective may physically hamper military operations, or whether instead a human shield only amounts to a legal obstacle, for example in the context of aerial operations where the presence of human shields does not physically impede the bombardment of a military object. In the latter case the ICRC suggests that the activity of shielding would not amount to a direct participation in hostilities, given that the relevant threshold of harm is not reached. *cf.* ICRC Interpretive Guidance, *supra* note 67, p. 56 *et seq.*

¹⁰¹ Goldstone report, *supra* note 1, para. 55.

¹⁰² *Cf.* Goldstone report, *supra* note 1, para. 1085; but *cf.* also the fact that in the meantime several investigations had been started by the Israeli military justice system, Report of the Committee of independent experts in international humanitarian and human rights law established pursuant to Council resolution 13/9, A/HRC/16/24, 18 March 2011, paras. 30-32; in one case two Israeli soldiers who had forced a boy to search bags suspected of being boby trapped were demoted and received sentences of three months each, *ibid.*, para. 30.

¹⁰³ Pictet correctly noted that the use of people as a “human shield” is a “cruel and barbaric” act; *cf.* J. Pictet *Commentary IV Geneva Convention* (1958) 208; *cf.* also the ICRC Customary Law Study, *supra* note 28, Rule 97.

¹⁰⁴ Pictet, *ibid.*

forbidden to use locals as live shields against attacks¹⁰⁵, to use them as hostages, or, finally, make them locate explosives, gather intelligence or have them march ahead of Israeli forces¹⁰⁶. Indeed, the Israeli Supreme Court had even considered, and rightly so, the use of volunteers in order to inform individuals present at a given location about a request to surrender, to be illegal under international humanitarian law¹⁰⁷.

VIII. Use of certain weapons: the case of white phosphorous

Finally, the Goldstone report raises concerns about the use of three types of weapons, namely white phosphorous¹⁰⁸, so-called flechettes¹⁰⁹ and finally so-called DIME (Dense inert metal explosive] ammunition¹¹⁰, the first type of which will now be considered.

With regard to the use of white phosphorous, one has to first note that, as Israel has rightly noted¹¹¹, there does not exist a general ban on incendiary weapons generally, or white phosphorous specifically. Even Protocol III to the United Nations Conventional Weapons Convention (“CCW”) on Prohibitions or Restrictions on the Use of Incendiary Weapons (‘Incendiary Weapons Protocol’) of which, in any case, Israel is not a party, and which, besides, by virtue of Art. 1 CCW only applies in international armed conflicts, does not contain such a general prohibition. Moreover, one has to distinguish between exploding munition containing white phosphorous on the one hand, and projectiles used to develop smoke for camouflage purposes on the other, since even under the Incendiary Weapons Protocol, the latter type of weapons is not considered incendiary weapons¹¹².

It is particular the latter usage that Israel employed during the conflict causing incidental harm to civilians¹¹³. This raises the question whether such practice is subject to the generally accepted obligation not to cause excessive collateral damage, nor to use weapons which are

¹⁰⁵ Quoted in Goldstone report, *supra* note 1, para. 1095.

¹⁰⁶ *Ibid. cf.* Article 51 para. 7 of Additional Protocol I. *Cf.* also Israeli Supreme Court, *supra* note 22, paras. 21 and 22. HCJ 3799/02 1. Adalah – The Legal Center for Arab Minority Rights in Israel 2. The Association for Civil Rights in Israel 3. Kanon – The Palestinian Organization for the Protection of Human and Environmental Rights 4. Physicians for Human Rights 5. B'tselem – The Israeli Information Center for Human Rights in the Occupied Territories 6. The Public Committee Against Torture in Israel 7. Center for the Defense of the Individual *v.* 1. GOC Central Command, IDF 2. Chief of the General Staff, IDF 3. The Minister of Defense 4. The Prime Minister of Israel The Supreme Court Sitting as the High Court of Justice [June 23, 2005].

¹⁰⁷ Israeli Supreme Court, *supra* note 23, para. 25.

¹⁰⁸ Goldstone report, *supra* note 1, para. 887-901.

¹⁰⁹ *Ibid.*, para. 902-905.

¹¹⁰ *Ibid.*, para. 906-908.

¹¹¹ The operation in Gaza, *supra* note 55, para. 407.

¹¹² Art. 1 para.1 lit. (b) (i) Incendiary Weapons Protocol.

¹¹³ Goldstone report, *supra* note 1, paras. 883 – 895.

indiscriminate¹¹⁴. Israel claims that, given that in such circumstances it did not use white phosphorous for targeting purposes, it cannot be classified as an indiscriminate weapon since otherwise “any smoke-screening means would be prohibited” which, in its view, would stand in sharp contrast to established State practice¹¹⁵.

Without explicitly saying so, Israel thereby puts forward the argument that under Additional Protocol I (and a parallel norm of customary law applicable in both, international and non-international armed conflicts) only indiscriminate *attacks*, *i.e.* “means of violence against the adversary” are prohibited, while white phosphorous, when used for smoke screens, is not directed against enemy forces but instead used for protective purposes only¹¹⁶. It has to be noted, however, that such argument disregards the very object and purpose of the relevant norms, *i.e.* disregards that Art. 48 et seq. aim at the protection of the civilian population, which object would be undermined by a narrow, pure wording-based interpretation. Besides, Art. 49, para. 2 Additional Protocol I confirms that Arts. 48 et seq. were meant to have a broad scope of application. Finally, even the wording of Art. 49, para. 1 confirms that the use of weapons in order to protect one’s own troops, such as their camouflage, is subject to the limits of *inter alia* Arts. 51 et seq. Additional Protocol I, since the term ‘adversary’, as used in Art. 49 para. 1, includes civilians belonging to the adverse party. Accordingly, acts of violence inflicting damage on such civilians, even when not targeting combatant enemies, do amount to an ‘attack’.

It follows that, in order to evaluate the legality of the use of white phosphorous during the Gaza war, one would have to carefully evaluate the collateral damage to civilians caused by such use, which question, however, is once again mainly a factual one. In any case, and regardless of how one perceives the legal regime governing the use of white phosphorous, one wonders whether it was appropriate, and indeed within the mandate of the Goldstone commission, to take a position as to a possible ban *de lege ferenda* of the use of this kind of weapon in urban warfare¹¹⁷.

VIII. Enforcing international humanitarian law

1. Invoking the (possible) State responsibility of Israel

Traditionally, violations of international law including, obviously, violations of international humanitarian law, are remedied by invoking applicable norms of State responsibility. In the case at hand, one has to therefore consider who may invoke the responsibility of Israel, assuming that violations of international humanitarian law, attributable to Israel, have indeed occurred given

¹¹⁴ ICRC Customary Law Study, *supra* note 28, Rule 71.

¹¹⁵ The operation in Gaza, *supra* note 55, para. 416.

¹¹⁶ *Ibid.*, para.406 *et seq.*

¹¹⁷ But *cf.* for such a proposition Goldstone report, *supra* note 1, para. 897, as well as the most recent recommendation by the Human Rights Council that the General Assembly considers launching “an urgent discussion on the legality of the use of certain munitions (...) as recommended by the United Nations Fact-Finding Mission on the Gaza Conflict”, Un Doc. A/HRC/16/L. 31, para. 9.

that, due to the asymmetric character of the conflict, there is no injured State which might invoke such responsibility.

a) ‘Palestine’ as injured entity

It has to be noted at the outset that not only States, but also other non-State subjects of international law may invoke the responsibility of a State, a principle acknowledged already by the International Court of Justice in its advisory opinion on Reparation for Injuries Suffered in the Service of the United Nations¹¹⁸, and extended to all international organizations in the ILC’s draft articles on the responsibility of international organizations¹¹⁹, but also applying to other subjects of international law such as Palestine respectively the PLO at least *vis-à-vis* those States (including Israel) that have recognized it¹²⁰.

It should be also noted, however, that Hamas respectively the so-called ‘*de facto* authorities in Gaza’ have not yet been able to gain any form of status under international law¹²¹. Rather, Gaza continues to form part of the territory of ‘Palestine’, said entity and its population (whatever its exact scope territory- and population-wise might be) being represented internationally by the PLO respectively the Palestinian Authority.

The criteria for defining when an entity such as ‘Palestine’ is injured by an internationally wrongful act of a State do not appear to depend on the nature of that entity¹²². Hence, Palestine could invoke the responsibility of Israel provided the obligations that were breached (to the extent there were such breaches) were owed to Palestine. Given the fact that the alleged violations occurred on territory forming part of ‘Palestine’ (its continued lack of statehood notwithstanding), and that the alleged victims belong to the people which is generally acknowledged to be represented by the PLO, there seems to be no doubt that ‘Palestine’ may invoke the responsibility of Israel in that regard even if, to state the obvious, it may lack, legally or otherwise, the means to enforce a possible State responsibility of Israel.

¹¹⁸ I.C.J. Reports 1949, p. 174 at pp. 184-185.

¹¹⁹ Cf. G. Gaja, Sixth report on the responsibility of international organizations, A/CN.4/597 (60th session, 2008), para. 8.

¹²⁰ Such recognition is contained in a letter dated September 9, 1993 from Yitzhak Rabin, then Prime Minister of Israel, to Yasser Arafat, then chairman of the PLO stating, *inter alia*, that the Government of Israel has decided to recognize the PLO as the representative of the Palestinian people”

¹²¹ Cf. only Y. Ronen, ICC jurisdiction over acts committed in the Gaza strip: Art. 12 para. 3 of the ICC Statute and Non-State Entities, Journal of International Criminal Justice, Vol. 7, No. 1, 2010, pp. 3-27.

¹²² Cf. *mutatis mutandis* Gaja, *supra* note 120, para. 9.

b) Invocation of Israel’s State responsibility by third parties

According to the holding of the International Court of Justice in its advisory opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory¹²³, “a great many rules of humanitarian law applicable in armed conflict are (...) fundamental to the respect of the human person and elementary considerations of humanity' (...)” and for this reason incorporate obligations possessing an *erga omnes* character¹²⁴. Given the overall structure of the Geneva Conventions and the system of grave breaches protecting, in particular, the rights of protected persons, it seems to be safe to assume that the grave breaches provisions and analogous prohibitions applicable in non-international armed conflicts belong to this category and are thus to be considered to reflect obligations *erga omnes*. It follows that even third States may invoke the responsibility of Israel for such violations of international humanitarian law during Operation ‘Cast Lead’, provided they did take place.

On the other hand, and as confirmed by the International Court of Justice in its Wall opinion, common Article 1 of the four Geneva Conventions obliges all State parties, including third States, not parties to the conflict, to ensure that the requirements of the instruments in question are complied with. Yet, given the treaty-specific nature of common Art. 1 Geneva I - IV, possible violations of customary law do not give rise to such obligation. Accordingly, given the non-international character of the conflict¹²⁵, only violations of common Art. 3 could be invoked by third parties.

2. Private claims

Apart from inter-State or quasi (Palestinian-Israeli) inter-State claims one might also wonder whether private individuals, claiming to be victims of violations of international humanitarian law, may claim compensation.

Even leaving aside questions of State immunity¹²⁶, it seems to be safe, given abundant State practice to assume that, still as of today, victims of violations of international humanitarian law do not have an individual right arising under international law to claim compensation *vis-à-vis* the State allegedly having violated international humanitarian law¹²⁷. Even the Advisory Opinion

¹²³ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Rep. 2004, p. xxx et seq.

¹²⁴ *supra* note 11, *Ibid.*, para. 157.

¹²⁵ *Cf. supra.*

¹²⁶ As to the current case before the International Court of Justice brought by Germany against Italy *cf.* only Application instituting proceedings filed in the Registry of the Court on 23 December 2008, Jurisdictional Immunities of the State (Germany *v.* Italy), available at: <http://www.icj-cij.org/docket/files/143/14923.pdf>.

¹²⁷ For a detailed analysis *cf.* the brief submitted by the German government to the German Constitutional Court in the *varvarin* case concerning the 1999 NATO Kosovo campaign, A. Zimmermann, Verfassungsbeschwerdeverfahren- 2 BvR 2660/06 und 2 BvR 487/07- Stellungnahme der Bundesregierung, available

of the International Court of Justice in the Wall case does not necessarily lead to this conclusion, even if the relevant passage is not free from ambiguities¹²⁸.

More specifically with regard to Israel, Israeli law explicitly provides that “[t]he State [of Israel] is not civilly liable for an act done *in the course of a war operation* of the Israel Defense Forces¹²⁹”, while the Israeli Supreme Court has confirmed that “the ordinary law of torts was not designed to contend with tortious acts that are caused during the combatant activities of the security forces outside Israel in an armed conflict” since moreover the “ordinary law of torts is not suited to addressing liability for tortious acts in the course of combat¹³⁰”.

Given this situation, it is surprising that the committee of independent experts set up by the Human Rights Council to monitor and assess domestic proceedings by both, the Israeli and the Palestinian side subsequent to the Goldstone report¹³¹ (“Tomuschat Committee”)¹³², seems to have taken the – at least implied – position, albeit only *en passant* and by way of an *obiter dictum*, that such a remedy does indeed exist when complaining that Israel had not processed civil claims in an effective and transparent way¹³³, which, however, is only relevant, provided the underlying individual right to receive compensation is indeed provided for in international law.

Admitting individual claims for compensation would also lead to yet another asymmetry in armed conflicts involving non-State actors as one of the parties to the conflict: victims of violations of international humanitarian law *committed by a State* would not only have a forum to bring a claim, but could also rely on the fact that a State is responsible for any act of its organs

at : http://www.nato-tribunal.de/varvarin/Stellungnahme_d_Bundesregierung_nebst_Anlagen.pdf, *passim*, in particular p. 34 *et seq.*

¹²⁸ *Supra* note 11, para. 153.

¹²⁹ Civil Wrongs (Liability of State) Law 5712-1952.

¹³⁰ *Adalah et al. v. Minister of Defense/ State of Israel et al.* (HCJ 8276/05; HCJ 8338/05 und HCJ 11426/05); Israel Law Reports [2006] (2) IsrL Rev p. 352 *et seq.* (380 (para. 33) and 381 (para. 35); also available at http://elyon1.court.gov.il/files_eng/05/760/082/a13/05082760.a13.pdf.

¹³¹ In Resolution A/HRC/RES/13/9 of 14 April 2010 the Human Rights Council decided:

“[...], in the context of the follow-up to the report of the Independent International Fact-Finding Mission, to establish a committee of independent experts in international humanitarian and human rights laws to monitor and assess any domestic, legal or other proceedings undertaken by both the Government of Israel and the Palestinian side, in the light of General Assembly resolution 64/254, including the independence, effectiveness, genuineness of these investigations and their conformity with international standards”

ibid., para. 9. The Committee, which was chaired by *Christian Tomuschat*, is colloquially referred to as the “Tomuschat Committee” or the “Goldstone Follow-up Committee”.

¹³² On its work *cf.* C. Tomuschat, Ein ‘Follow-up’ zum Goldstone-Bericht, Vereinte Nationen 2010, p. 249 *et seq.*

¹³³ *Ibid.*, para. 58.

which are *ipso facto* attributable to said State. Victims of violations of international humanitarian law committed by non-State groups in turn would not only lack a forum where they could bring their case, but would also be in a significantly more difficult position to prove the attributability of any such violations.

3. Investigations by the International Criminal Court

Yet another possibility to enforce international humanitarian law lies in criminal prosecutions of alleged war crimes¹³⁴, if there were such, to be eventually undertaken by the International Criminal Court. Given the fact that Israel is not a contracting party of the Rome Statute¹³⁵ and since it is, to say the least, unlikely that the Security Council will ever refer the situation to the International Criminal Court¹³⁶, not the least given the position of the United States on the matter¹³⁷, the only possible avenue is to consider the referral made by ‘Palestine’ in January 2009 (*vis-à-vis*) under Art. 12, para. 3 of the Rome Statute to be an effective one¹³⁸.

¹³⁴ Cf. generally E. Lambert, *Droit international pénal: le rapport Goldstone sur les crimes commis à Gaza et ses suites*, *Rev. Sc. Criminelles* 2010, p 263 *et seq.*

¹³⁵ Israel had signed the Rome Statute on December 31, 2000, but, following the example of the United States (for further details on the US position *vis-à-vis* the ICC cf. A. Zimmermann/ H. Scheel, *USA und Internationaler Strafgerichtshof: Konfrontation statt friedlicher Koexistenz?*, *Vereinte Nationen* 2002, p. 137 *et seq.*) later informed the depositary of its intention not to become a party, thereby excluding the effect of Art. 18, lit. a) Vienna Convention on the Law of Treaties.

¹³⁶ But cf. for such proposition Goldstone report, *supra* note 1, para. 1766, as well as the recent resolution by the Human Rights Council of 25 March 2011, A/HRC/16/L.31, para. 10:

“(…) urges the [General] Assembly to submit that report to the Security Council for its consideration and appropriate action, including consideration of referral of the situation in the Occupied Palestinian Territory to the prosecutor of the International Criminal Court, pursuant to article 13 (b) of the Rome Statute;”

Cf. generally on the problems involved in Security Council referrals under Art.13 lit. b) of the Rome Statute A. Zimmermann, *Two steps forward, one step backwards? - Security Resolution 1593 (2005) and the Council’s Power to Refer Situations to the International Criminal Court*, in: P.-M. Dupuy *et al.* (eds.), *Festschrift für Christian Tomuschat*, (2006), p. 681 *et seq.*

¹³⁷ Cf. US Statement: Report of the United Nations Fact-Finding Mission on the Gaza Conflict resolution, Human Rights Council 16th Session, Geneva, March 25, 2011, stating that

“(…) [w]ith respect to the present resolution, we object, in particular, to the following elements: (...) the resolution’s recommendation for the UN General Assembly to suggest to the UN Security Council that it consider referring the situation to the ICC Prosecutor. Further UN consideration of this matter is not productive.”,

While a full discussion of the question would be beyond the scope of this paper, it should be noted that Art. 12, para. 3 Rome Statute was meant to serve as an *aliud* for a full-fledged ratification of the Rome Statute by a State. This is confirmed by the very wording of the provision which refers to “a State *which is not a Party to this Statute*”¹³⁹, *i.e.* implies that the entity concerned could (if it wanted) become a contracting party, which possibility in turn again only exists for States, but not non-State entities. It follows that a functional approach to the question of statehood when it comes to Art.12, para.3 Rome Statute including ‘quasi-State entities’ exercising a limited degree of territorial and personal jurisdiction only, as contemplated by some authors¹⁴⁰, was not meant to be covered by Art. 12, para. 3 Rome Statute. Accordingly, only States *stricto sensu* may submit declarations under Art.12, para.3. Yet, at least at the current juncture, Palestine does not itself consider to constitute a State¹⁴¹

Finally, it must also be noted that during the Kampala review conference, which took place *after* the Palestinian declaration under Art. 12, para. 3 had been lodged, ‘Palestine’ did *not* participate as an observer *State* under Rule 71 of the Rules of Procedure of the Conference, but rather as a mere observer under Rule 69 of its Rules of Procedure, which has to be taken as evidence of agreed subsequent State practice within the meaning of Art. 31, para. 3 Vienna Convention on the Law of Treaties as to the status of Palestine with regard to the Rome Statute.

IX. Conclusion

Asymmetric warfare, in particular when taking place in densely populated urban areas, poses significant challenges for armed forces aiming at upholding applicable rules of international humanitarian law. This is particularly true where, like in the case at hand, the non-State armed group is trying to take advantage of international humanitarian law so as to protect its own fighters from attack by placing them in civilian locations or protected sites, dressing in civilian clothes or making improper use of the emblems of the Geneva Conventions. Paraphrasing the

available at <http://geneva.usmission.gov/2011/03/25/gaza-conflict-resolution/>

¹³⁸ For the text of the declaration *cf.* <http://www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279777/20090122PalestinianDeclaration2.pdf>.

As to its possible legal effects, if ever, *cf.* on the one hand Y. Ronen, ICC Jurisdiction over Acts Committed in the Gaza Strip - Article 12 para. 3 of the ICC Statute and Non-State Entities, *J. Int. Crim. Justice* 2010, p. 3 *et seq.*, and, on the other, A. Pellet, The Palestinian Declaration and the Jurisdiction of the International Criminal Court, *Journal Int. Crim. Justice* 2010, p. 981 *et seq.*

¹³⁹ Emphasis added.

¹⁴⁰ Pellet, *supra* note 139, *passim*.

¹⁴¹ *Cf.* A. Pellet, Le droit international à l'aube du XXIème siècle (La Société Internationale contemporaine – permanence et tendances nouvelles), in *Cours Euro-méditerranéens Bancaja de Droit International*, vol I (1997), 1998, p. 1 *et seq.* (51-52).

Israeli Supreme Court one might say that, although a State abiding by international humanitarian law must often fight with one hand tied behind its back, preserving international humanitarian law and recognizing the obligation to protect civilians must constitute an important component in its understanding of military security¹⁴².

Finally, while this paper has, given the background and main focus of the Goldstone report, focused on alleged violations of international humanitarian law by the *State* involved in the conflict, *i.e.* Israel, it is a truism that international humanitarian law applies no less to non-State actors such as Hamas. Indeed, ensuring that such non-State actors respect these principles constitutes probably a by far more demanding challenge given the extent of violations of international humanitarian law committed by this and other non-State actors.

¹⁴² *Cf. mutatis mutandis* Israeli Supreme Court H.C. 5100/94, 4054/95, 6536/95, 5188/96, 7563/97, 7628/97 and 1043/99, Public Committee Against Torture in Israel *et al. v. The State of Israel et al.*, para. 39.