

The Principle of Proportionality under International Humanitarian Law and Operation Cast

Lead

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Introduction

International law straddles an ever-changing world of theory and practice, and it always has. It has before it the heady task of remaining relevant in the face of both widespread compliance and widespread violation, and in doing so, it must adapt to present predicaments while retaining an integrity that can command compliance. It is one of international law's great paradoxes, furthermore, that even as it insists that it is "above" politics, it is quintessentially "of" politics. It is, after all, the by-product of the complex machinations of states and other actors jockeying for advantage in a crowded landscape of disparate interests and limited resources.

International humanitarian law, a set of rules and standards that seeks to legally determine who "matters" and who "does not," and how, in situations of armed conflict, necessarily operates within this reality. As President of the Supreme Court of Israel Aharon Barak put it in the 2002 *Ajuri v. IDF Commander* case, "[e]ven when the cannons speak and the Muses are silent, law exists and operates, determining what is permitted and what forbidden, what is lawful and what unlawful."¹ The law in this context fundamentally roots itself in a commitment to distinction, and from this principle springs the balance of international humanitarian law, including the principle of proportionality. Indeed, without this commitment to distinguish, according to the *Commentaries* to the 1977 Additional Protocol I to the 1949 Geneva Conventions (AP I), international humanitarian law would collapse, so crucial is this "foundation on which the codification of the laws and customs of war rests."²

This chapter critically examines the principle of proportionality under international humanitarian law and contextualizes its vulnerabilities by looking at Israel's actions during Operation Cast Lead in the Gaza Strip between December 27, 2008, and January 18, 2009. It begins by providing a black letter law overview of the principle. Although widely accepted, the proportionality principle suffers from significant shortcomings that impact its usefulness as a predictable tool for distinguishing between the lawful and the unlawful, particularly in the context of asymmetrical warfare.³ These shortcomings exist at both a theoretical level, in the abstract, and at a practical level. To focus these discussions, the second half of this chapter looks at the largely negative international reaction to Israel's actions during Operation Cast Lead. This reaction, which was, and has been, typically couched with a feigned certainty that belies and leaves unanswered the theoretical shortcomings of the principle of proportionality, suggests that, more often than not, proportionality acts as the ultimate exemplar of law used instrumentally, as a tool to further a particular politics and paradigm of power.

The Principle of Proportionality under International Humanitarian Law

As alluded to above and as the International Court of Justice (ICJ) stated in the 1996 *Legality of the Threat or Use of Nuclear Weapons (Nuclear Weapons)* case, the principle of distinction acts as one of international humanitarian law's "cardinal principles."⁴ Indeed, it is a "first principle." Article 48 of AP I, which Dinstein describes as embodying the "kernel of LOIAC [i.e., law of international armed conflict] as it currently stands,"⁵ gives the clearest statement of this principle. Calculated to "ensure respect for and protection of the civilian population and civilian objects," it juxtaposes the "civilian population" with "combatants" and "civilian objects" with "military objectives" and only permits of operations directed against military objectives.⁶ Operations that are directed against anything other than military

objectives, which is to say, operations that are directed against civilian objects, will, by definition, violate the principle of distinction.⁷

Assuming that a party to a conflict has complied with the principle of distinction, it will also need to satisfy the related yet distinct principle of proportionality. In AP I, this latter principle appears in articles 51(5)(b), 57(2)(a)(iii), and 57(2)(b). The first of these articles frames proportionality within the context of discrimination, or the prohibition of indiscriminate attacks, while the latter two articles operate within the context of precautionary measures that must be taken to ensure compliance with international humanitarian law. These two sets of understandings of proportionality, although not substantially different as a matter of law, are best considered separately.⁸

As just stated, article 51(5)(b) couches the principle of proportionality within the context of indiscriminate attacks and the prohibition of them. Specifically, it gives as an example of an indiscriminate attack one 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.” Attacks that fall foul of this provision will be both disproportionate and a type of indiscriminate attack.

The two provisions of AP I that require a proportionality assessment but that do so within the context of precautionary measures are articles 57(2)(a)(iii) and 57(2)(b). The balancing language in these two articles exactly replicates the language in article 51(5)(b), an attack which may be “expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.” The implications here are unsurprising: planners and decision makers cannot authorize the launching of disproportionate attacks⁹ and must cancel or suspend attacks if their disproportionate nature

“becomes apparent.”¹⁰ Put differently, article 57(2)(a)(iii) upholds the principle of proportionality at the authorization stage while article 57(2)(b) acts at the stage during which an attack that was determined to have been proportionate but that is later determined to be disproportionate has already been authorized or may be underway. Clearly, these precautionary measures are meant to lessen the likelihood of indiscriminate and other types of unlawful attacks.

By definition, of course, AP I only creates legally-binding rights and obligations for states that are parties to it,¹¹ and the fact that it does not apply to non-states parties implies the non-applicability of all of its provisions as such, including those that specifically prohibit disproportionate attacks, namely articles 51(5)(b), 57(2)(a)(iii), and 57(2)(b). This means that parties to an armed conflict that are not also parties to AP I will, as a matter of international treaty law, be completely free to disregard all of its provisions as such, for the simple reason that they have not consented to be bound by them. Such states will, however, remain bound by those principles of international humanitarian law that exist under customary international law in addition to and alongside, in parallel to, AP I.¹²

To what extent, then, does the principle of proportionality also exist under customary international humanitarian law? As the ICJ put it in the *Nuclear Weapons* case, international humanitarian law’s “fundamental rules. . . constitute intransgressible principles of international customary law,”¹³ and according to the International Committee of the Red Cross’ (ICRC) *Customary International Humanitarian Law (CIHL)*, much, if not all, of what AP I understands by proportionality is also binding as a matter of customary international law, as regards both the prohibition of indiscriminate attacks and within the context of precautionary measures. Specifically, *CIHL* exactly replicates article 51(5)(b)’s proportionality language and holds that this obligation reflects customary international law in both international and non-international armed conflicts.¹⁴ Rules 18 and 19 of *CIHL*,

furthermore, effectively recognize as being binding as a matter of customary international law in both international and non-international armed conflicts articles 57(2)(a)(iii) and 57(2)(b) of AP I.¹⁵

The Problem with Proportionality: Theory and Practice, with Specific Reference to Operation Cast Lead

The principle of proportionality is firmly-entrenched in international humanitarian law discourse, and it applies in both international and non-international armed conflicts and does so as a matter of both international treaty law and customary international law. The language of the proportionality balancing test, furthermore, is consistent as regards both the prohibition of indiscriminate attacks and within the context of precautionary measures: the attacks at issue are those 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.”

Although simply stated, however, the proportionality balancing test suffers from a number of significant shortcomings, and these must be addressed and admitted, frankly and honestly. The following sections explore some of these problems as a matter of both theory and practice, with an examination of Operation Cast Lead to contextualize the latter.

Theory

Clearly, the language of the proportionality balancing test involves trade-offs. It requires the identification of expectation and balancing based on a vague notion of what can be considered “excessive,” with considerations of the civilian and a forward-looking anticipation of “concrete and direct military advantage” on opposite sides of the scale. Given the death and destruction that are inherent in armed conflict, one might think, or perhaps even hope, that these trade-offs would be taken seriously by all those concerned and that this

would engender a certain hesitancy to “pull the trigger.” At the same time, however, it should also be acknowledged that war is meant to be fought, and to be fought effectively. As United States General George S. Patton bluntly put it in 1944, “[w]ar is a bloody, killing business. You’ve got to spill their blood, or they will spill yours.”¹⁶

Bearing such tensions in mind, to what extent can it be said that the language of the proportionality balancing test as such provides a tangible clarity to the proportionality principle? Put differently, to what extent does it actually assist in being able to interpret the principle, to apply it, and to do so in a predictable way, as a matter of law? It is helpful to begin this inquiry by looking at the *Commentaries* to AP I.

Section I of part IV of AP I, which contains both articles 51 and 57, deals with the general protection of civilians from the effects of hostilities and provides a general picture. According to its *Commentary*, the adopted text is “not always as clear as one might have wished, but [according to it,] it seemed necessary to leave some margin of appreciation to those who will have to apply the rules.”¹⁷ The *Commentary* continues by stating that the effectiveness of the protection provisions depends upon the desire of the parties to the conflict to act humanely and in good faith.¹⁸ Of course, this latter variable, good faith, adds very little to the discussion since the 1969 Vienna Convention on the Law of Treaties already requires states parties to perform their treaty obligations in good faith¹⁹ and to interpret treaties “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”²⁰

The *Commentaries* to the articles in AP I that specifically contain the proportionality balancing test, namely articles 51(5)(b), 57(2)(a)(iii), and 57(2)(b), add to this unsettling sense of ambiguity. Article 51’s *Commentary*, for example, notes that its paragraph five had been criticized for its “imprecise wording and terminology”²¹ and, while recognizing an at least partial justification for these concerns, again stresses the importance of good faith and a

“desire to conform with the general principle of respect for the civilian population.”²² Article 57’s *Commentary*, unsurprisingly, echoes these concerns. Acknowledging that the terms of article 57 are “relatively imprecise and are open to a fairly broad margin of judgment,”²³ it puts great trust in both good faith and common sense as interpretative tools, although it fails to define the substance of either of these concepts as a matter of law.²⁴

The academic literature is largely in agreement with this acknowledgment of the question-begging nature of the proportionality balancing test under international humanitarian law. Schmitt, for example, states about the principle of proportionality that “there is no question that [it]. . .is among the most difficult of LOIAC norms to apply.”²⁵ Rogers, noting that proportionality is “more easily stated than applied in practice,”²⁶ stresses that greater care to minimize potential risks to civilians may actually expose attacking forces to increased risks of harm.²⁷ How is balancing to be done in this context, and to be done within the law, predictably? Does the proportionality balancing test lead to singular, incontrovertible conclusions as a matter of law? Should it? Or, rather, to quote Sloane, is the “problem. . .not that international law provides the wrong answers. . .; it is that often it provides *no* answer or only a very abstract one[?]”²⁸

Consider one side of the scale in the proportionality balancing test, the concept of the “concrete and direct military advantage anticipated.” How does international law as such, if it can, distinguish between the concrete and direct natures of anticipated military advantages? Does “concrete” mean definite? Tangible? Reasonably definite? Reasonably tangible? Should “direct” be understood in contradistinction to indirect? Whose direct? Whose indirect? Is the fact that the *Commentary* to article 57 concludes that the phrase “concrete and direct” was “intended to show that the advantage concerned should be substantial and relatively close, and that advantages which are hardly perceptible and those which would only appear in the long term should be disregarded”²⁹ a source of comfort, or is it redundant? What about the

concept of anticipation? Does it leave the law hopelessly mired in the “sphere of expectation rather than arithmetic[.]. . .never. . .a job for one’s pocket calculator[?]”³⁰ And as to “military advantage anticipated,” is this to be broadly interpreted, as the Eritrea-Ethiopia Claims Commission did in a 2005 partial award³¹ and as seems to be indicated by the analogous international criminal law provision in the 1998 Rome Statute of the International Criminal Court (ICC)?³² Other questions, of course, could also be asked, but like these, they do not admit of easy answers.³³

The *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (Final Report)*, which was released in 2000, attempted to provide some general parameters to these and other questions related to the proportionality balancing test.³⁴ It did this by collapsing the heavy burden of decision making on the shoulders of the “reasonable military commander.”³⁵ At the same time, however, it acknowledged that the decision maker’s values, background, education, and combat experience will likely influence what can conceivably be considered excessive, or less than, or perhaps even just not quite, excessive.³⁶ As Dinstein notes, particular facts and circumstances will also play an important role in these determinations.³⁷

It is precisely the absence of what Schmitt calls a “common currency of evaluation”³⁸ that makes the task of the “reasonable military commander” so difficult, and so legally inconclusive. As Kalshoven suggests, what is at issue is an “agonizing dilemma in which the law cannot provide a clear-cut answer.”³⁹ A committed pacifist and an “ends justifies the means” militarist may both argue their cases using the language of the proportionality balancing test, referring to good faith and other interpretative tools in so doing, but it is scarcely believable that they will reach the same legal conclusions. To contend otherwise is to wish for an objectivity, certainty, and integrity in the law related to proportionality that simply does not exist.⁴⁰

Practice: Operation Cast Lead

If the language of the proportionality balancing test as such, assisted by whatever interpretative tools one might wish to bring to bear on the matter, such as a sense of humanity, good faith, common sense, or a combination of these interpretative tools or perhaps even others, does not, and cannot, of itself bring a tangible clarity to the proportionality principle as a matter of law, then perhaps an examination that shifts the discussion from theory to practice will be more satisfying. Perhaps the lawyerly tendency to analyze to excess, to argue for argument's sake, problematizes proportionality in theory but does not hold up in practice, where there might actually exist a common understanding of the principle. A look at the largely negative international reaction to Israel's actions in Gaza during Operation Cast Lead, however, suggests that the proportionality principle's theoretical shortcomings are only exacerbated in practice.

This section exposes some of these practical shortcomings by separately looking at how different actors, both state and non-state, have grappled with the substance of proportionality in the context of Operation Cast Lead and, just as importantly, at the process through which these discussions have taken place. As regards the latter, particular attention is given to the United Nations Fact-Finding Mission on the Gaza Conflict (Fact-Finding Mission).

The Substance of Proportionality

Israel launched Operation Cast Lead in a particular context. That context involved *hudnas*, or ceasefires, with Hamas that had given the group tactical advantages when it had been militarily weak and opportunities to regroup, opportunities that had effectively allowed it to fight, and to fight more effectively, another day.⁴¹ The years immediately prior to Operation Cast Lead, of course, had seen Israel's disengagement from Gaza, the election of

Hamas and the routing of Fatah in Gaza, an increasingly bellicose and apocalyptic posture by Iran, with its support for Hamas ever-present and central, and thousands of rockets being launched into southern Israel from Gaza.⁴² These years had also seen international pressure of a diplomatic nature, an Israeli blockade of Gaza, and indirect negotiations.⁴³ The *génocidaires* of Hamas, however, buttressed by their constitutional and religious commitments to “kill the Jews,”⁴⁴ had strengthened their position, and Israel responded with Operation Cast Lead. As Israeli President Shimon Peres put it at the beginning of Operation Cast Lead, “we cannot permit that Gaza will become a permanent base of threatening and even killing children and innocent people in Israel for God knows why.”⁴⁵

Given that the proportionality principle has become what Walzer refers to as the “favorite critical term in current discussions of the morality of war,”⁴⁶ it is unsurprising that the international reaction to Operation Cast Lead seized upon this legal term of art and its close kin, the “excessive,” in condemning Israel. International organizations figured prominently in this regard. United Nations Secretary General Ban Ki-Moon, for example, who had been “saddened. . . profoundly,”⁴⁷ condemned the “excessive use of force by Israel.”⁴⁸ For President of the United Nations General Assembly Miguel d’Escoto Brockmann, Operation Cast Lead was “wanton aggression [and]. . . [a d]isproportionate military response.”⁴⁹ Asma Jahangir, chairperson of the coordinating body for independent United Nations human rights experts, criticized Israel in the following terms: “[t]he use of disproportionate force by Israel and the lack of regard for the life of civilians on both sides cannot be justified by the actions of the other party. They constitute clear violations of international human rights and international humanitarian law.”⁵⁰ United Nations Special Rapporteur on the Situation of Human Rights in Palestinian Territories Occupied Since 1967 Richard Falk issued a statement on the first day of the operations, December 27, 2008, condemning Israel’s “[d]isproportionate military response.”⁵¹ Similar criticisms came from

the Presidency of the Council of the European Union⁵² and many states.⁵³ The League of Arab States-commissioned *Report of the Independent Fact-Finding Committee on Gaza: No Safe Place (No Safe Place)*, released in April 2009, concluded that there was “no evidence that any military advantage was served by the killing and wounding of civilians or the destruction of property”⁵⁴ and that “buildings were destroyed not for any military advantage or for reasons of military necessity but in order to punish the people of Gaza for tolerating a Hamas regime.”⁵⁵

Across the globe, demonstrations by members of civil society, “in defense of peace,” also criticized Operation Cast Lead. Admittedly, some of these protests devolved into blatant expressions of anti-Semitism,⁵⁶ expressions that only seemed to confirm Israeli Prime Minister Ariel Sharon’s concerns, voiced before the Knesset in January 2005, that “[t]his phenomenon of Jews defending themselves and fighting back is anathema to the new anti-Semites.”⁵⁷ Words such as “proportionality” and “excessive” were frequently bandied about as emotional crutches, and one did not get the sense that the legal nature of these terms was either known or appreciated.⁵⁸ The title of an opinion piece published on January 11, 2009, in London’s *Sunday Times* by over two dozen prominent, mostly United Kingdom-based international lawyers typified the mood: “Israel’s Bombardment of Gaza is Not Self-Defence—It’s a War Crime” (“Israel’s Bombardment”).⁵⁹

In their seeming adjudications of the law *proprio motu*, however, it is unclear exactly how these international organizations, states, and members of civil society arrived at their apparently so conclusive judgments that Israel’s actions during Operation Cast Lead had so obviously violated the substance of proportionality as such. Even when they seemed cognizant of the fact that the legal balancing test for proportionality applies in both international and non-international armed conflicts and that it does so as a matter of both international treaty law and customary international law, these actors hardly hesitated to

conclude that the attacks at issue were disproportionate rather than, for example, less than, or perhaps even just not quite, disproportionate. In other words, there was little qualification, and more than a hint of what Kennedy calls “self-confident outrage.”⁶⁰ Where had proportionality’s inherent flexibility and ambiguity gone? Had they been concealed for the sake of more convincing and powerful argument, for the sake of “the cause”?

A cynical, though perhaps not inaccurate, explanation might be that “disproportionate attacks” are simply those that emanate from parties to conflicts that particular “namers” and “shamers” do not want to “win,” regardless of the largely indeterminate and complex balancing between civilian and military considerations that the proportionality principle formally requires as a matter of law.⁶¹ As Walzer notes, Operation Cast Lead “was called ‘disproportionate’ on day one, before anyone knew very much about how many people had been killed or who they were.”⁶²

While the use of legal language for political purposes cannot, and should not, be discounted and undoubtedly explains some of the largely negative international reaction to Operation Cast Lead, as does the fact that it was a Jewish state, indeed, *the* Jewish state, that was in the dock in the court of world public opinion, another explanation seems to be a fundamental misunderstanding of the substance of the proportionality principle itself, the idea that it somehow prohibits “extensive” collateral damage as a matter of law.⁶³ In fact, many of the criticisms of Operation Cast Lead that based themselves in (dis)proportionality expressly made their claims in ways that seemed to have assimilated, in error, “excessive” with “extensive.”⁶⁴

To give a few examples, consider that Chairperson Jahangir “call[ed] on all parties to immediately cease all actions that result in civilian casualties, or put them at great risk.”⁶⁵ Special Rapporteur Falk lamented “extensive” civilian casualties and “extensive” damage to both public and private property in Gaza.⁶⁶ In its discussion of indiscriminate and

disproportionate attacks in the context of war crimes, *No Safe Place* decried, and thus presumably sought to make of legal relevance, “massive destruction” that had taken place to Gazan hospitals, mosques, private homes, schools, government buildings, businesses and factories, United Nations facilities, and farmland.⁶⁷ These discussions seem to imply that international humanitarian law gives dispositive weight to “extensive” damage, particularly to civilian objects and to civilians themselves but perhaps not even exclusively to them, in assessments of proportionality.

The legal test for (dis)proportionate attacks, however, focuses *only on* those attacks 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.” What may be “excessive” need not be, though it may be, “extensive,” and what may be “extensive” may be, though it need not be, “excessive.” In fact, to suggest that proportionate attacks must necessarily avoid extensive damage *in addition to* the already-existing positive law obligation to avoid excessive damage risks effectively subjecting parties to an armed conflict to tying not one but both of their hands behind their backs.⁶⁸ Indeed, as Chief Prosecutor of the ICC Luis Moreno-Ocampo put it in his February 9, 2006, response to communications that he had received concerning Iraq, “[u]nder international humanitarian law and the Rome Statute, the death of civilians during an armed conflict, no matter how grave and regrettable, does not in itself constitute a war crime.”⁶⁹

Indeed, international humanitarian law in general and the principle of proportionality in particular are the great facilitators of death and destruction in armed conflict, “extensive” or otherwise. Put differently, as long as the casualties at issue can “fit” and be “argued within” the formal constraints of law, there will be no violation of law. What is at issue is a discourse of blood sacrifice, since “the rule opens latitude for non-excessive civilian

casualties and merely prohibits attacks that are likely to exceed its imagined limit. This latitude is where sacrifice occurs—beyond this, it is murder.”⁷⁰ As Kennedy notes, “[l]aw enable[s], frames, channels and legitimates the practice of war,”⁷¹ and there is no need to pretend otherwise.

If the largely negative international reaction to Operation Cast Lead generally failed to rigorously parse and apply to the facts identified expectation and a balancing based on a vague notion of what can be considered “excessive,” with considerations of the civilian and a forward-looking anticipation of “concrete and direct military advantage” on opposite sides of the scale, and confused “excessive” with “extensive,” it also reflected a fundamental confusion as to the actual extent of the collateral damage in Gaza.

Consider the following accounts, arranged chronologically, of collateral damage during the December 27, 2008-January 18, 2009, conflict:

January 3, 2009 In the preamble to its Final Communique on the Ongoing Israeli Assault on Gaza, the Expanded Extraordinary Meeting of the Executive Committee at the Level of Foreign Ministers of the Organization of the Islamic Conference stated that Operation Cast Lead had “claimed hundreds of civilian victims, including children, women and the elderly.”⁷² Paragraph one of the same Communique nuanced this damage upwards.⁷³

January 8, 2009 In a statement in the United Nations Security Council immediately after adoption of Security Council Resolution 1860,⁷⁴ Palestinian National Authority Minister for Foreign Affairs Riyad al-Malki asserted that “more than 760 Palestinian martyrs have fallen, 40 per cent of them women and children. More than 3,000 persons have been wounded, and vast damage has been done to the basic infrastructure in the district, including United Nations installations. . .the brutal Israeli war machine has destroyed Gaza.”⁷⁵

January 11, 2009 “Israel’s Bombardment” identified the “killing of almost 800 Palestinians, mostly civilians, and more than 3,000 injuries, accompanied by the destruction of schools, mosques, houses, UN compounds and government buildings.”⁷⁶

February 11, 2009 In his Report to the United Nations Human Rights Council, Special Rapporteur Falk concluded as follows: as regards deaths, “[a] total of 1,434 Palestinians were killed, of whom 235 were combatants. Some 960 civilians reportedly lost their lives, including 288 children and 121 women; 239 police officers were also killed, 235 in air strikes carried out on the first day”⁷⁷; as regards injuries, “[a] total of 5,303 Palestinians were injured,

including 1,606 children and 828 women (namely, 1 in every 225 Gazans was killed or injured, not counting mental injury, which must be assumed to be extensive)”⁷⁸; and figures were also cited as regards the number of damaged homes and internally displaced persons.⁷⁹

February 15, 2009 According to an article published in the *Jerusalem Post*, the preliminary findings of a study by the Israel Defense Force (IDF)’s Gaza Coordination and Liaison Administration (CLA) concluded that there were 1,338 Palestinian fatalities during Operation Cast Lead, and of the over 1,200 of these whose identities had been positively identified, 880 had been classified as either combatants or non-combatants.⁸⁰ Of these 880 Palestinian fatalities, furthermore, there were approximately two combatants killed for every non-combatant killed, “the reverse of the impression created by Palestinian officials during the conflict, and a world away from the Hamas claim that just 48 of its fighters were killed.”⁸¹

March 26, 2009 Citing Israel Defense Intelligence’s Research Department, the IDF stated that 709 of the 1166 Palestinians killed during Operation Cast Lead were terrorist operatives; 49 of the 295 uninvolved Palestinians killed were women, and 89 of these uninvolved Palestinians were children under 16 years of age; and the organizational affiliation, if any, of 162 Palestinian men killed during the conflict remained unclear, at least as of then.⁸²

April 2009 *No Safe Place* cited disparate figures, from a variety of sources, as to the precise number of Israeli and Palestinian casualties, both military and civilian.⁸³

April 2009 The International Institute for Counter-Terrorism at the Interdisciplinary Center Herzliya, Israel, issued a series of reports on casualties in Gaza during Operation Cast Lead.⁸⁴ These methodically combed through various Palestinian websites and cross-referenced casualties with organizational affiliations. Through a statistical analysis, it was concluded that “at least 63% to 75% of the Palestinians killed in Operation Cast Lead appear to have been specifically targeted, combat-aged males.”⁸⁵

July 2, 2009 According to Amnesty International’s *Israel/Gaza: Operation “Cast Lead”: 22 Days of Death and Destruction*, by the end of Operation Cast Lead, “some 1,400 Palestinians had been killed, including some 300 children and hundreds of other unarmed civilians, and large areas of Gaza had been razed to the ground, leaving many thousands homeless and the already dire economy in ruins.”⁸⁶

September 25, 2009 Like *No Safe Place*, the *Report of the United Nations Fact-Finding Mission on the Gaza Conflict (Gaza Report)* arrived at but a “ballpark figure,” between 1,166 and 1,444 Gazan fatalities.⁸⁷

The disparate nature of these figures reminds one of a point that United Nations Secretary General Kofi Annan made about the ratio of civilian to combatant casualties in

armed conflict situations in his March 2001 *Report to the Security Council on the Protection of Civilians in Armed Conflict*: “the truth is that no one really knows. . . The victims of today’s atrocious conflicts are not merely anonymous, but literally countless.”⁸⁸

How is international law to respond in this uncertain environment? Indeed, how should it? Given the “fog of war” and the fact that accusations have been made against Israel for its actions during Operation Cast Lead that were later proven to be false, the most famous of these being that the IDF had attacked a United Nations Relief and Works Agency for Palestine Refugees in the Near East school in the Jabaliya refugee camp in Gaza,⁸⁹ prudence might suggest taking all of these figures with a “grain of salt.” This is particularly the case given what Dershowitz calls the “‘continuum of civilianity,’” the fact that “‘civilianity’ is often a matter of degree, rather than a bright line.”⁹⁰

These disparate figures also reveal two of the great complexities of asymmetrical warfare in general, namely distinguishing between civilians and combatants and applying the proportionality balancing test alongside this and in “real time,” complexities to which many of the contributors to this volume allude. Put bluntly, Hamas has used civilians to their military advantage as human shields, launched attacks from urban centers, and stored weapons in mosques and in buildings with civilian living quarters.⁹¹ During Operation Cast Lead, the urban spaces of Gaza became its fighting spaces, with the attendant intermingling of civilians and combatants in close quarters.⁹² Civilian residences were taken over and used by Palestinian forces for tactical military advantage, for attacking the IDF and as weapons depots,⁹³ and mosques were used for military purposes that included the storage of Kalashnikov assault rifles, improvised explosive devices, Qassam rockets, an anti-aircraft gun, and ammunition.⁹⁴ Even a zoo in Gaza was found to have been used during Operation Cast Lead to store a rocket propelled grenade and light arms.⁹⁵ It is this strategy that Dershowitz has called “[t]he Hamas ‘dead baby’ strategy—to cause as many civilian

casualties as possible by firing its deadly rockets from schools and densely populated areas.”⁹⁶

Clarity in this environment, if there is to be found any, surely cannot be located in the legal language of the proportionality balancing test as such. Rather, essentially unconstrained by the language of law, what is at issue here is an inherently moral calculus, with different actors interacting with and understanding the various variables differently, the “question of whether or not the positive consequences of actions on one front morally justify the negative consequences on another.”⁹⁷ The *Final Report* seemed content to collapse this heavy burden on the shoulders of the “reasonable military commander,” but does the “reasonable military commander” also have a “reasonable morality,” and if so, what is it?

Processing Proportionality

In a recent article dealing with the proportionality of countermeasures under international law, Franck makes the point that a vaguely-phrased principle such as proportionality has “created a large space for third-party decision making and has become a staple in second-opinion discourse, whether in judicial or quasi-judicial proceedings, or in the forums of politics and public opinion.”⁹⁸ He goes on to argue that the ability of these discussions to actually affect the actions or omissions of relevant actors will partly depend upon the credibility of the process through which these discussions take place.⁹⁹ Related to this is the oft-cited legal maxim that “justice must not only be done but must also be seen to be done.”

Unfortunately, the probably most high-profile international investigation of Operation Cast Lead from the standpoint of international humanitarian law, the Fact-Finding Mission, suffered from a number of significant “process” flaws, and these flaws seriously cut against its credibility. Established by United Nations Human Rights Council Resolution S-9/1 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,”¹⁰⁰ the Fact-Finding Mission’s underlying terms of reference had clearly already presumed that Israel had violated its international legal obligations during Operation Cast Lead.¹⁰¹ This leads one to wonder exactly what “facts” Resolution S-9/1 had been tasking the Fact-Finding Mission with “finding,” since any process that can even pretend to credibility surely requires ascertaining facts *before* reaching conclusions of law. When and through the agency of who or what, furthermore, had Israel’s “alleged violations” of international law morphed into categorical “violations,” as Resolution S-9/1 states? And what of the fact that Resolution S-11/1, which the Human Rights Council adopted in late-May 2009 in response to the major Sri Lankan offensive against the Tamil Tigers at the time, neither established a fact-finding mission nor inquired into possible illegalities associated with Sri Lanka’s counterterrorism operations, all of this despite serious concerns from human rights observers?¹⁰²

It is true that there were some attempts to “massage away” Resolution S-9/1’s unfortunate underlying terms of reference. Human Rights Council President Ambassador Martin Ihoeghian Uhomobhi of Nigeria, for example, who was tasked with appointing the members of the Fact-Finding Mission, stated on April 3, 2009, that he had understood as the Fact-Finding Mission’s mandate the independent and impartial assessment of “human rights and humanitarian law violations committed in the context of the conflict which took place between 27 December 2008 and 18 January 2009 and. . . [the provision of] much needed clarity about the legality of the thousands of deaths and injuries and the widespread destruction that occurred.”¹⁰³ This understanding would seem to have permitted the investigation of possible international law violations “which took place” by Palestinian

factions, though, like Resolution S-9/1, it also couched the Fact-Finding Mission's mandate in terms of "violations" rather than "alleged violations." Ambassador Uhomoibhi's statement of June 15 reflected a different assertion, a mandate understood as an investigation of "international human rights and humanitarian law violations that *may have been* committed between 27 December 2008 and 18 January 2009 in relation to the conflict in the Gaza Strip."¹⁰⁴

Contradicting both Ambassador Uhomoibhi's confused signals and Resolution S-9/1 as to the actions of which parties to the conflict in Gaza could be investigated and whether these were to be understood as *prima facie* "violations" or simply "alleged violations," the head of the Fact-Finding Mission, South African Justice Richard Goldstone, stated on April 3 that the Fact-Finding Mission's mandate was the investigation of "substantial allegations of war crimes and serious violations of international human rights law having been committed before, during and after the military operations in Gaza between 27 December 2008 and 18 January 2009."¹⁰⁵ Adding further confusion, an official United Nations press release from May 8 completely contradicted Resolution S-9/1, stating that the Fact-Finding Mission's terms of reference were the investigation of "all violations of international human rights law and international humanitarian law that might have been committed at any time in the context of the military operations that were conducted in Gaza during the period from 27 December 2008 and 18 January 2009, whether before, during or after."¹⁰⁶ Clearly, these attempts to "massage away" Resolution S-9/1's unfortunate underlying terms of reference were inconsistent and convoluted, as well as perhaps also *ultra vires*.¹⁰⁷ In any event, they ultimately ended up being beside the point, since the Human Rights Council Resolution that endorsed the *Gaza Report*, Resolution S-12/1, expressly "*recall[ed]*" Resolution S-9/1.¹⁰⁸

The 2009 *Guidelines on International Human Rights Fact-Finding Visits and Reports (The Lund-London Guidelines) (Guidelines)*¹⁰⁹ provide a useful rubric for approaching some

of these questions of “process” integrity as regards the Fact-Finding Mission. While they would counsel against underlying terms of reference such as those contained in Resolution S-9/1 since they “reflect. . .predetermined conclusions about the situation under investigation,”¹¹⁰ the *Guidelines* are also useful in evaluating the question of potential bias and particularly focus on this issue. For example, they state that “[t]he mission’s delegation must comprise individuals who are and are seen to be unbiased.”¹¹¹ The members of fact-finding missions, furthermore, must be aware that “they must, at all times, act in an independent, unbiased, objective, lawful and ethical manner”¹¹² and “understand the need to be unbiased and not pre-judge any issues during the mission.”¹¹³ Of course, the question of potential bias is crucial to the credibility of fact-finding missions or, for that matter, any attempted *ad hoc* adjudication of law. The words of ICJ Judge Manfred H. Lachs in his separate opinion in the 1986 *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* are particularly worth bearing in mind in this context: “[a] judge—as needs no emphasis—is bound to be impartial, objective, detached, disinterested and unbiased.”¹¹⁴

If the terms of reference of Resolution S-9/1 reflected unfortunate “predetermined conclusions,” a perception that the members of the Fact-Finding Mission were at least potentially biased was even more regrettable, and problematic, from a credibility standpoint. Reasonable cases can be made that each of the delegates, Goldstone, Irish Colonel Desmond Travers, Professor of International Law at the London School of Economics and Political Science Christine Chinkin, and Pakistani Supreme Court Advocate Hina Jilani, could not reasonably have been or been seen to be unbiased.

Consider that Justice Goldstone had in the past sat on the Board of Directors of Human Rights Watch, a human rights non-governmental organization that has itself “thrown its hat in the ring” on Operation Cast Lead.¹¹⁵ Goldstone had also, along with Colonel

Travers, Jilani, and others, signed a letter, “Find the Truth About the Gaza War,” in which they had advocated for an “international investigation of gross violations of the laws of war, committed by all parties to the Gaza conflict.”¹¹⁶ Chinkin, as a signatory to “Israel’s Bombardment,” had effectively argued and legally concluded, as early as January 11, 2009, that Operation Cast Lead had violated the law related to the use of force and that Israel had committed an act of aggression in Gaza.¹¹⁷ The full title of that opinion piece, to repeat it again, is revealing: “Israel’s Bombardment of Gaza is Not Self-Defence—It’s a War Crime.” Admittedly, some of these cases are stronger than others, but taken together, they are very troubling indeed.¹¹⁸

Given these and other serious “process” flaws associated with the Fact-Finding Mission, it is difficult to lend much credibility to the *Gaza Report*. While a critical evaluation of its substance lies outside the scope of this chapter, suffice it to say that its hostile conclusions as regards Israel were as wholly to be expected as its findings that Israel had violated the principle of proportionality under international humanitarian law were unsurprising.¹¹⁹ The *Gaza Report* was rocket fuel for the Hamas propaganda machine.¹²⁰ As with the ICJ’s failure to recuse Judge Nabil Elaraby from participating in the 2004 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* case despite an evident bias against Israel,¹²¹ however, double standards and *a priori* condemnations of Israel are hardly new.

Conclusion

Asymmetrical warfare poses perhaps the greatest challenge to international humanitarian law since the establishment of the United Nations at the end of the Second World War and the adoption of the Geneva Conventions in 1949. Partly in response to this, new rules and standards have proliferated in recent years, but these developments should not

lead one to conclude that adjudications of law in this area are necessarily more predictable, much less that they are less fraught with political bias or problems in applying abstract legal theories to particular facts and circumstances. To use Schmitt's phrase, the "fault lines" are vast and varied.¹²²

The case of Operation Cast Lead reveals these very real and complex problems in the context of a specific asymmetrical conflict. Unsurprisingly, given what British Colonel Richard Kemp refers to as the "automatic, pavlovian presumption by many in the international media, and international human rights groups, that the IDF are in the wrong, that they are abusing human rights,"¹²³ the international reaction to Operation Cast Lead was largely negative. But it is easier to criticize, to simply "speak truth to power," than it is to suggest what one would have done differently.

Those who would seek to legally condemn the IDF for particular attacks that it undertook during Operation Cast Lead should perhaps be asked the following before casting stones: how would a "reasonable military commander" have acted "more proportionately" during Operation Cast Lead, in a way that would not have been excessive and that would have been both available and effective on the battlefield?¹²⁴

¹ *Ajuri v. IDF Commander*, HCJ 7015/02, para. 41 (2002) (citations omitted).

² Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, Commentary, Part IV: Civilian Population, Section I: General Protection Against Effects of Hostilities, Chapter I: Basic Rule and Field of Application, art. 48: Basic Rule, para. 1863, <http://www.icrc.org/ihl.nsf/WebPrint/470-750061-COM?OpenDocument>.

³ On asymmetrical warfare, see Toni Pfanner, “Asymmetrical Warfare from the Perspective of Humanitarian Law and Humanitarian Action,” *International Review of the Red Cross* 87(857): 149-74 (2005).

⁴ *Legality of the Threat or Use of Nuclear Weapons*, ICJ, para. 78 (1996). See Vincent Chetail, “The Contribution of the International Court of Justice to International Humanitarian Law,” *International Review of the Red Cross* 85(850): 252-56 (2003).

⁵ Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* (Cambridge: Cambridge University Press, 2007), 115.

⁶ Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 48. On distinction in the 1977 Additional Protocol II to the 1949 Geneva Conventions, see Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, art. 13. According to the ICRC’s *Customary International Humanitarian Law*, the principle of distinction reflects customary international law in both international and non-international armed conflicts. See International Committee of the Red Cross, *Customary International Humanitarian Law: Volume I: Rules*, ed. Jean-Marie Henckaerts and Louise Doswald-Beck (Cambridge: Cambridge University Press, 2009), 3-8.

⁷ “In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.” AP I, art. 52(2). AP I defines civilian objects in contradistinction to military objectives. See AP I, art. 52(1).

⁸ On the principle of proportionality under international humanitarian law, see Timothy L. H. McCormack and Paramdeep B. Mtharu, “Cluster Munitions, Proportionality and the Foreseeability of Civilian Damage,” in *Law at War--The Law as It Was and the Law as it Should Be: Liber Amicorum Ove Bring*, ed. Ola Engdahl and Pål Wrangé (Leiden: Martinus Nijhoff Publishers, 2008), 195-97; Thomas M. Franck, “On Proportionality of Countermeasures in International Law,” *American Journal*

of *International Law* 102(4): 723-34 (2008); Michael N. Schmitt, "Fault Lines in the Law of Attack," in *Testing the Boundaries of International Humanitarian Law*, ed. Susan C. Breau and Agnieszka Jachec-Neale (London: British Institute of International and Comparative Law, 2006), 292-306; Yoram Dinstein, "Collateral Damage and the Principle of Proportionality," in *New Wars, New Laws?: Applying the Laws of War in 21st Century Conflicts*, ed. David Wippman and Matthew Evangelista (Ardsey: Transnational Publishers, 2005), 211-24; W. J. Fenrick, "Targeting and Proportionality During the NATO Bombing Campaign Against Yugoslavia," *European Journal of International Law* 12(3): 498-502 (2001); Frits Kalshoven, "Implementing Limitations on the Use of Force: The Doctrine of Proportionality and Necessity," *American Society of International Law Proceedings* 86 (1992): 40-45. See also *The United States Army/Marine Corps Counterinsurgency Field Manual* (2007), 247-49 (discussing the principles of distinction and proportionality in the context of counterinsurgency).

⁹ See AP I, art. 57(2)(a)(iii).

¹⁰ AP I, art. 57(2)(b).

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¹¹ See Vienna Convention on the Law of Treaties, May 23, 1969. On unilateral declarations by national liberation movements within the context of AP I, see AP I, art. 96(3). See also Pfanner, "Asymmetrical Warfare," 160.

¹² They will also remain bound, of course, by those principles of international humanitarian law that may amount to *jus cogens*. On *jus cogens* and international law, see Robert P. Barnidge, Jr., "Questioning the Legitimacy of *Jus Cogens* in the Global Legal Order," *Israel Yearbook on Human Rights* 38 (2008): 199-225.

¹³ *Nuclear Weapons*, para. 79.

¹⁴ See ICRC, *Customary International Humanitarian Law*, 46-50.

¹⁵ See ICRC, *Customary International Humanitarian Law*, 58-62.

¹⁶ "Patton's Speech to the Third Army: 'Americans Play to Win All of the Time,'" June 5, 1944, <http://www.nationalreview.com/weekend/history/history-pattonprint111001.html>.

¹⁷ Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, Commentary, Part IV: Civilian Population, Section I: General Protection Against Effects of Hostilities, para. 1835, <http://www.icrc.org/ihl.nsf/WebPrint/470-750059-COM?OpenDocument>.

¹⁸ Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, Commentary, Part IV: Civilian Population, Section I: General Protection Against Effects of Hostilities, para. 1835, <http://www.icrc.org/ihl.nsf/WebPrint/470-750059-COM?OpenDocument>.

¹⁹ See Vienna Convention on the Law of Treaties, May 23, 1969, art. 26.

²⁰ Vienna Convention on the Law of Treaties, May 23, 1969, art. 31(1).

²¹ Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, Commentary, Part IV: Civilian Population, Section I: General Protection Against Effects of Hostilities, Chapter II: Civilians and Civilian Population, art. 51, para. 1977, <http://www.icrc.org/ihl.nsf/WebPrint/470-750065-COM?OpenDocument>.

²² Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, Commentary, Part IV: Civilian Population, Section I: General Protection Against Effects of Hostilities, Chapter II: Civilians and Civilian Population, art. 51, para. 1977, <http://www.icrc.org/ihl.nsf/WebPrint/470-750065-COM?OpenDocument>, para. 1978.

²³ Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, Commentary, Part IV: Civilian Population, Section I: General Protection Against Effects of Hostilities, Chapter IV: Precautionary Measures, art. 57, para. 2187, <http://www.icrc.org/ihl.nsf/WebPrint/470-750073-COM?OpenDocument>.

²⁴ Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, Commentary, Part IV: Civilian

Population, Section I: General Protection Against Effects of Hostilities, Chapter II: Civilians and Civilian Population, art. 51, para. 1977, <http://www.icrc.org/ihl.nsf/WebPrint/470-750065-COM?OpenDocument>, para. 2208. See also Dinstein, *Conduct of Hostilities*, 122; Kalshoven, “Limitations,” 44.

²⁵ Schmitt, “Fault Lines,” 293.

²⁶ A. P. V. Rogers, “Zero-Casualty Warfare,” *International Review of the Red Cross* 82(837): 177 (2000).

²⁷ A. P. V. Rogers, “Zero-Casualty Warfare,” *International Review of the Red Cross* 82(837): 177 (2000).

²⁸ Robert D. Sloane, “The Cost of Conflation: Preserving the Dualism of *Jus ad Bellum* and *Jus in Bello* in the Contemporary Law of War,” *Yale Journal of International Law* 34(1): 111 (2009). See Gregor Noll, “Sacrificial Violence and Targeting in International Humanitarian Law,” in *Law at War--The Law as It Was and the Law as it Should Be: Liber Amicorum Ove Bring*, ed. Ola Engdahl and Pål Wrangé (Leiden: Martinus Nijhoff Publishers, 2008), 212 (discussing “interpretive openness” in the context of international humanitarian law).

²⁹ ICRC, Commentary, art. 57, para. 2209.

³⁰ Kalshoven, “Limitations,” 44.

³¹ See Eritrea-Ethiopia Claims Commission, *Western Front, Aerial Bombardment and Related Claims, Eritrea’s Claims 1, 3, 5, 9-13, 14, 21, 25, and 26* (2005), 135 *International Law Reports* (2009), 608-09.

³² See Rome Statute of the International Criminal Court, July 17, 1998, art. 8(2)(b)(iv). On this analogous provision, see William A. Schabas, *An Introduction to the International Criminal Court*, 3rd ed. (Cambridge: Cambridge University Press, 2008), 125; Dinstein, *Conduct of Hostilities*, 123. According to Schmitt, the language in the Rome Statue implies the need for both contextual analysis and clarity. See Michael N. Schmitt, “Precision Attack and International Humanitarian Law,” *International Review of the Red Cross* 87(859): 456, n. 41 (2005).

³³ See *Western Front*, 601-02; Schmitt, "Precision Attack," 457; Fenrick, "Targeting and Proportionality," 499; *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia* (2000), para. 49; Rogers, "Zero-Casualty Warfare," 176.

³⁴ See *Final Report*, paras. 48-52. On the *Final Report*, see Michael Bothe, "The Protection of the Civilian Population and NATO Bombing on Yugoslavia: Comments on a Report to the Prosecutor of the ICTY," *European Journal of International Law* 12(3): 531-35 (2001). See also Franck, "Proportionality of Countermeasures," 735-36.

³⁵ *Final Report*, para. 50. For some criticism of the *Final Report's* concept of the "reasonable military commander," see Bothe, "Comments," 535.

³⁶ See *Final Report*, para. 50. See also Fenrick, "Targeting and Proportionality," 499. Franck identifies the "problem of defining the applicable situational perspective from which to render a reasoned second opinion." Franck, "Proportionality of Countermeasures," 731.

³⁷ See Dinstein, *Conduct of Hostilities*, 121. Copyright © 2010 Columbia University Press

³⁸ Schmitt, "Fault Lines," 293.

³⁹ Kalshoven, "Limitations," 44.

⁴⁰ Fenrick makes a similar point. See Fenrick, "Targeting and Proportionality," 499.

⁴¹ On *hudnas* and Hamas, see Ely Karmon, "Hudna Is No Solution," *Haaretz*, January 2, 2008.

⁴² For some background on this, see Jonathan Schanzer, *Hamas v. Fatah: The Struggle for Palestine* (New York: Palgrave Macmillan, 2008).

⁴³ See Asa Kasher, "Operation Cast Lead and the Ethics of Just War," *Azure*, 37 (2009), <http://ww.azure.org.il/include/print.php?id=502>. See also Israel Ministry of Foreign Affairs, *The Operation in Gaza: 27 December 2008-18 January 2009: Factual and Legal Aspects* (2009), 14-26, <http://www.mfa.gov.il/NR/rdonlyres/E89E699D-A435-491B-B2D0-017675DAFEF7/0/GazaOperation.pdf>.

⁴⁴ See The Covenant of the Islamic Resistance Movement (1988), art. 7, http://avalon.law.yale.edu/20th_century/hamas.asp (stating that “The Prophet, Allah bless him and grant him salvation, has said: ‘The Day of Judgement will not come about until Moslems fight the Jews (killing the Jews), when the Jew will hide behind stones and trees. The stones and trees will say O Moslems, O Abdulla, there is a Jew behind me, come and kill him. Only the Gharkad tree, (evidently a certain kind of tree) would not do that because it is one of the trees of the Jews.’ (related by al-Bukhari and Moslem).”). See also “On Hamas TV Friday Sermon: Calls to Annihilate the Jews, Who Are Compared to Dogs,” *Middle East Media Research Institute*, April 3, 2009, http://www.memritv.org/clip_transcript/en/2080.htm.

⁴⁵ Israel Ministry of Foreign Affairs, “Statement by President Shimon Peres on IDF Operation in Gaza,” December 28, 2008, http://www.mfa.gov.il/MFA/Government/Speeches+by+Israeli+leaders/2008/Statement+by+President_Peris_IDF_operation_Gaza_28-Dec-2008.htm.

⁴⁶ Michael Walzer, “The Gaza War and Proportionality,” *Dissent*, January 8, 2009, <http://www.dissentmagazine.org/online.php?id=191>.

⁴⁷ “Secretary-General’s Statement on Continued Escalation in and Around Gaza,” New York, December 29, 2008, <http://www.un.org/apps/sg/sgstats.asp?nid=3637>.

⁴⁸ “Statement to the Security Council on the Situation in the Middle East,” New York, December 31, 2008, <http://www.un.org/apps/sg/sgstats.asp?nid=3641>.

⁴⁹ Miguel d’Escoto Brockmann, President of the 63rd Session, United Nations General Assembly, “On Gaza Airstrikes,” New York, December 27, 2008, <http://www.un.org/ga/president/63/statements/ongaza271208.shtml> (bold omitted).

⁵⁰ “UN Human Rights Experts Call for Immediate Protection of Civilians in Middle East Crisis,” January 2, 2009, <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/0F804144148C59CCC12575320055A1D0?open=document>.

⁵¹ “Statement by Prof. Richard Falk, United Nations Special Rapporteur for Human Rights in the Occupied Territories,” December 27, 2008, <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/F1EC67EF7A498A30C125752D005D17F7?opendocument> (bold omitted).

⁵² See “Declaration by the Presidency of the Council of the European Union on the Violence in Gaza,” December 27, 2008, http://www.ue2008.fr/PFUE/lang/en/accueil/PFUE-12_2008/PFUE-27.12.2008/PESC_Gaza_27_decembre_2008.html.

⁵³ See Anti-Defamation League, “World Leaders React to Israel’s Operation in Gaza: Condemnations and Criticism,” December 31, 2008, http://www.adl.org/main_International_Affairs/World_Reactions_Israel_Gaza.htm?Multi_page_sections=sHeading_4.

⁵⁴ *Report of the Independent Fact-Finding Committee on Gaza: No Safe Place*, presented to the League of Arab States (2009), 3, <http://www.pchrgaza.org/files/Press/English/2008/Report%20full.pdf>.

⁵⁵ *Report of the Independent Fact-Finding Committee on Gaza: No Safe Place*, presented to the League of Arab States (2009), 3, <http://www.pchrgaza.org/files/PressR/English/2008/Report%20full.pdf>, 125. For the Organization of the Islamic Conference’s response, see Organization of the Islamic Conference, General Secretariat, Jeddah, [Final Communiqué of the Expanded Extraordinary Meeting of the Executive Committee at the Level of Foreign Ministers on the Ongoing Israeli Assault on Gaza](#), OIC/PAL-02/EXE.COM/2009/FC, January 3, 2009, <http://www.oic-oci.org/english/conf/exec/FC-exec-fm-Gaza-En.pdf>.

⁵⁶ See Joseph Abrams, “Protester Calls for Jews to ‘Go Back to the Oven’ at Anti-Israel Demonstration,” *Fox News*, January 8, 2009, http://www.foxnews.com/printer_friendly_story/0,3566,477450,00.html; Soeren Kern, “Anti-Semitism Sweeps Europe in Wake of Gaza Operation,” *Strategic Studies Group*, January 20, 2009, <http://www.eng.gees.org/imprimir.php?id=381>.

⁵⁷ Israel Ministry of Foreign Affairs, “PM Sharon’s Speech at Special Knesset Session Marking the Struggle Against Anti-Semitism,” January 26, 2005, <http://www.mfa.gov.il/MFA/Government/Speeches+by+Israeli+leaders/2005/PM+Sharon+Knesset+Speech+Against+Anti-Semitism+26-Jan-2005.htm?DisplayMode=print> (continuing by stating that “[l]egitimate steps of self-defense which Israel takes in its war against Palestinian terrorist[s]—actions which any sovereign state is obligated to undertake to ensure the security of its citizens—are presented by those who hate Israel as aggressive, ‘Nazi-like’ steps.”).

⁵⁸ See Walzer, “Gaza War and Proportionality.” Dinstein notes more generally in the context of international humanitarian law that “[l]egal themes like proportionality, indiscriminate warfare or the prohibition of mass destruction weapons (to cite just a few prime examples) are bruited about—not necessarily in legal terminology—by statesmen, journalists and lay persons around the globe.” Dinstein, *Conduct of Hostilities*, 1.

⁵⁹ “Israel’s Bombardment of Gaza is Not Self-Defence—It’s a War Crime,” *Sunday Times*, January 11, 2009.

⁶⁰ David Kennedy, “Dinner Remarks,” The New International Law Conference, Oslo, March 2007, <http://www.law.harvard.edu/faculty/dkennedy/speeches/OsloDinnerRemarks.htm>.

⁶¹ See Walzer, “Gaza War and Proportionality.”

⁶² Walzer, “Gaza War and Proportionality.” See Kasher, “Operation Cast Lead and the Ethics of Just War.” On the “exploitation of international legal rhetoric. . . [as] a major weapon in the political war to delegitimize [sic] Israeli anti-terror operations,” see “The NGO Front in the Gaza War: Exploitation of International Law,” *NGO Monitor*, January 21, 2009, <http://www.ngo-monitor.org/article.php?operation=print&id=2251>.

⁶³ On this fundamental misunderstanding, see Dinstein, *Conduct of Hostilities*, 120-21; Schmitt, “Fault Lines,” 294; Schmitt, “Precision Attack,” 457.

⁶⁴ Interestingly, the *Commentaries* to articles 51 and 57 of AP I also make this error of assimilation. See ICRC, Commentary, art. 51, para. 1980; ICRC, Commentary, art. 57, para. 2218. On this, see Noll, “Sacrificial Violence,” 213-14.

⁶⁵ “UN Human Rights Experts.”

⁶⁶ See *Human Rights Situation in Palestine and Other Occupied Arab Territories, Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967*, Richard Falk, A/HRC/10/20 (2009), 6-7.

⁶⁷ See *No Safe Place*, 115-16. See also Maha Akeel, “The War on Gaza: OIC Foreign Ministers Condemn Israel’s Aggression; Call for International Intervention,” *OIC Journal*, 9 (October-December 2008): 10, <http://www.oic-oci.org/data/journals/issue9/9%20English.pdf> (stating that “[t]he bombing campaign wrought extensive damage to public infrastructure and hundreds of civilian homes and businesses.”).

⁶⁸ This is a play of words, of course, off Justice Barak’s contention that “[a] democracy must sometimes fight with one hand tied behind its back. Even so, a democracy has the upper hand.” *Public Committee Against Torture v. Israel*, HCJ 5100/94, para. 39 (1999).

⁶⁹ ICC, Office of the Prosecutor Response to Communications Received Concerning Iraq, February 9, 2006, 5, http://www.icc-cpi.int/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDEBEF7/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf.

⁷⁰ Noll, “Sacrificial Violence,” 213.

⁷¹ Kennedy, “Dinner Remarks.” See Thomas W. Smith, “The New Law of War: Legitimizing Hi-Tech and Infrastructural Violence,” *International Studies Quarterly* 46(3): 355-74 (2002); Roger Normand and Chris af Jochnick, “The Legitimation of Violence: A Critical Analysis of the Gulf War,” *Harvard International Law Journal* 35(2): 387-416 (1994).

⁷² Organization of the Islamic Conference, Final Communique, pmb1.

⁷³ Organization of the Islamic Conference, Final Communique, para. 1 (stating that Operation Cast Lead had “claimed the lives of hundreds of civilians, injured thousands, and caused colossal destruction of homes, civilian facilities, infrastructure and places of worship.”).

⁷⁴ UN Security Council Resolution 1860, S/RES/1860 (2009).

⁷⁵ UN Security Council, S/PV.6063 (2009), 10.

⁷⁶ “Israel’s Bombardment.”

⁷⁷ *Report of the Special Rapporteur*, 6-7.

⁷⁸ *Report of the Special Rapporteur*, 7.

⁷⁹ *Report of the Special Rapporteur*, 7.

⁸⁰ See David Horovitz, "Analysis: Counted Out: Belatedly, the IDF Enters the Life-And-Death Numbers Game," *Jerusalem Post*, February 15, 2009.

⁸¹ David Horovitz, "Analysis: Counted Out: Belatedly, the IDF Enters the Life-And-Death Numbers Game," *Jerusalem Post*, February 15, 2009. A January 14, 2009, *Jerusalem Post* article had cited an earlier CLA contention that no more than one-quarter of the Palestinian fatalities in Gaza had been civilians. See Yaakov Katz, "IDF: Civilian Deaths Less Than 25% of Total," *Jerusalem Post*, January 14, 2009.

⁸² See IDF Spokesperson, "Majority of Palestinians Killed in Operation Cast Lead: Terror Operatives," Israel Defense Forces, March 26, 2009,

<http://dover.idf.il/IDF/English/News/today/09/03/2602.htm?print=true>. See also Intelligence and

Terrorism Information Center at the Israel Intelligence Heritage & Commemoration Center,

Examination of the Number of Palestinians Killed During Operation Cast Lead Indicates That Most

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Against the IDF. Hamas Has Adopted A Policy of Concealing Its Casualties and Attempts to Include

Them in the Overall Number of Civilians Killed, April 7, 2009, [http://www.terrorism-](http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/pdf/ipc_e021.pdf)

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⁸³ See *No Safe Place*, 29-32.

⁸⁴ See Interdisciplinary Center Herzliya, Tal Pavel, *Hamas Casualties in "Operation Cast Lead"--Final Findings and Conclusions*, April 2009,

http://www.ict.org.il/Portals/0/Articles/ICT_Hamas_Casualties_Final_Report.pdf; Interdisciplinary

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⁹⁸ Franck, "Proportionality of Countermeasures," 764.

⁹⁹ See Franck, "Proportionality of Countermeasures," 716-17.

¹⁰⁰ UN Human Rights Council Resolution S-9/1, A/HRC/S-9/L.1 (2009), para. 14.

¹⁰¹ See UN Human Rights Council Resolution S-9/1, A/HRC/S-9/L.1 (2009), pmbl., para. 1, para. 14.

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¹⁰³ "Richard J. Goldstone Appointed to Lead Human Rights Council Fact-Finding Mission on Gaza Conflict," UN Press Release, April 3, 2009, <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/2796E2CA43CA4D94C125758D002F8D25?opendocument>.

¹⁰⁴ UN Fact Finding Mission on the Gaza Conflict, "Statement By HRC President—Update on Gaza Fact Finding Mission—15 June 09" (emphasis added).

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¹⁰⁷ On this point, see the terse exchanges between the Fact-Finding Mission and Israel at *Fact-Finding Mission*, ann. II, 434-50 (Correspondence between the United Nations Fact-Finding Mission on the Gaza Conflict and the Government of Israel Regarding Access and Cooperation). See also Irwin Cotler, “The Goldstone Mission—Tainted to the Core (Part I),” *Jerusalem Post*, August 16, 2009; Irwin Cotler, “The Goldstone Mission—Tainted to the Core (Part II),” *Jerusalem Post*, August 18, 2009.

¹⁰⁸ UN Human Rights Council Resolution S-12/1, A/HRC/RES/S-12/1, B, pmbl. (2009) (“*Recalling* its resolution S-9/1 of 12 January 2009, in which the Council decided to dispatch an urgent, independent international fact-finding mission, and its call upon the occupying Power, Israel, not to obstruct the process of investigation and to fully cooperate with the mission. . .”).

¹⁰⁹ *Guidelines on International Human Rights Fact-Finding Visits and Reports (The Lund-London Guidelines)* (2009), www.ibanet.org/Document/Default.aspx?DocumentUid=D7BFB4EA-8EB6-474F-B221-62F9A5E302AE, pmbl. The *Guidelines* are geared toward the work of non-governmental organizations but “can provide direction to all those engaged in this exercise with a view to improving accuracy, objectivity, transparency and credibility in human rights fact finding.”

¹¹⁰ *Guidelines on International Human Rights Fact-Finding Visits and Reports (The Lund-London Guidelines)* (2009), para. 5.

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¹¹⁴ *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, ICJ, 158 (1986) (separate opinion of Judge Lachs). See *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others*, House of Lords, 1 AC 132-33 (2000).

¹¹⁵ See “The NGO Front in the Gaza War: Human Rights Watch,” *NGO Monitor*, January 11, 2009, <http://www.ngo-monitor.org/article.php?operation=print&id=2224>. See also Robert L. Bernstein, “Rights Watchdog, Lost in the Mideast,” *New York Times*, October 20, 2009; Noah Pollak, “Double Standards and Human Rights Watch,” *Wall Street Journal*, July 31, 2009; “Examining Human Rights Watch in 2008: Double Standards and Post-Colonial Ideology,” *NGO Monitor*, January 13, 2009, <http://www.ngo-monitor.org/article.php?operation=print&id=2225>.

¹¹⁶ “Gaza: World’s Leading Investigators Call for War Crimes Inquiry,” March 16, 2009, http://www.amnesty.org.uk/news_details_p.asp?NewsID=18109. On Goldstone, see Haviv Rettig Gur, “Analysis: The Problem With Goldstone,” *Jerusalem Post*, July 6, 2009; Anne Herzberg, “NGOs Dominate Gaza Fact-Finding Commissions: Their Claims Should Be Treated With the Same Scrutiny They Demand of Israel,” *Jerusalem Post*, June 9, 2009.

¹¹⁷ See “Israel’s Bombardment.” “Israel’s Bombardment” also contended that “[t]he killing of almost 800 Palestinians, mostly civilians, and more than 3,000 injuries, accompanied by the destruction of schools, mosques, houses, UN compounds and government buildings, which Israel has a responsibility to protect under the Fourth Geneva Convention, is not commensurate to the deaths caused by Hamas rocket fire.” See Jonny Paul, “NGO: Academic Should Quit Cast Lead Inquiry,” *Jerusalem Post*, August 23, 2009; Ben Hubbard, “Goldstone: Gaza War Crimes Probe Unlikely to Lead to Prosecutions,” *Jerusalem Post*, June 10, 2009.

¹¹⁸ See Cotler, “Tainted to the Core (Part I)””; Cotler, “Tainted to the Core (Part II).”

¹¹⁹ See, for example, *Fact-Finding Mission*, 17-18; Cotler, “Tainted to the Core (Part I)””; Cotler, “Tainted to the Core (Part II),” 149; 414. According to the *Gaza Report*, Operation Cast Lead was a “deliberately disproportionate attack designed to punish, humiliate and terrorize a civilian population, radically diminish its local economic capacity both to work and to provide for itself, and to force upon it an ever increasing sense of dependency and vulnerability,” 408 (bold omitted).

¹²⁰ See The Palestinian Information Center, “Haneyya: UN Report Clearly Condemned Israel for Its War Crimes in Gaza,” September 17, 2009, <http://www.palestine-info.co.uk/En/default.aspx?xyz=U6Qq7k%2bcOd87MDI46m9rUxJEpMO%2bi1s7qiZoHW7QQKojZ>

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¹²¹ See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Order of January 30, 2004, Composition of the Court, ICJ (2004). See also dissenting opinion of Judge Buergenthal.

¹²² See Schmitt, "Fault Lines," 277-307.

¹²³ Kemp, "International Law and Military Operations." According to Colonel Kemp, "[b]y taking these [precautionary] actions and many other significant measures during Operation Cast Lead[,] the IDF did more to safeguard the rights of civilians in a combat zone than any other Army in the history of warfare." On the significant steps that Israel has taken to investigate and prosecute alleged violations of international humanitarian law by individual members of the IDF during Operation Cast Lead, see State of Israel, *Gaza Operation Investigations: An Update* (2010), [http://www.mfa.gov.il/NR/rdonlyres/8E841A98-1755-413D-A1D2-](http://www.mfa.gov.il/NR/rdonlyres/8E841A98-1755-413D-A1D2-8B30F64022BE/0/GazaOperationInvestigationsAnUpdate.pdf)

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