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مركز المعلومات الإسرائيلي لحقوق الإنسان في الأراضي المحتلة-بتسيلم

B'Tselem – The Israeli Information Center for Human Rights in the Occupied Territories

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## **GUIDELINES FOR ISRAEL'S INVESTIGATION INTO OPERATION CAST LEAD: 27 DECEMBER 2008 – 18 JANUARY 2009**

On the morning of 27 December 2008, Israel's air force bombed dozens of targets in the Gaza Strip. Dozens of Palestinians were killed within the first five minutes, and hundreds more wounded. In following days, the military continued the aerial bombing and artillery shelling of buildings and sites. On 4 January 2009, ground forces entered the Gaza Strip, taking control of parts of it. On 18 January, Israel declared a unilateral cease-fire, and the next day, Hamas did the same.

The full magnitude of the injury to the civilian population and the scope of damage caused during the course of the operation are only now coming to light, after the military has left Gaza. In the three weeks of the operation, over 1,300 Palestinians were killed and over 5,320 were wounded, some 350 of them seriously. According to initial estimates, based on satellite photographs, at minimum 1,200 buildings and over 80 hothouses were destroyed during the operation.<sup>1</sup> Tens of thousands of persons were left homeless.

During the operation, Palestinians fired rockets and mortar shells at Israel with the declared intention of hitting civilians. Three Israelis civilians and a soldier were killed and more than 84 people were injured, four of them seriously from these attacks. In addition, 9 soldiers were killed in combat within the Gaza Strip (four by IDF fire) and 113 were wounded, of them one critically and 20 moderately or seriously.

As an Israeli organization, B'Tselem focuses on the acts of Israel and its human rights responsibilities; accordingly, this document does not address the conduct of the Palestinian side in the fighting. However, B'Tselem states at the outset that Hamas

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<sup>1</sup> According to data given to B'Tselem by the UN Institute for Training and Research on 4 February 2009.

committed grave breaches of international humanitarian law. Directing rockets at a civilian population, shooting at soldiers from inside civilian neighborhoods, while endangering the lives of the residents, storing weapons in civilian structures, and execution of Palestinians suspected of collaborating with Israel are all absolutely forbidden. Israeli officials also contend that Hamas fighters forced civilians to serve as human shields, that they used ambulances to move from one hiding place to another, and that they hid inside hospitals. These acts are also forbidden, and if they were indeed committed, their perpetrators are responsible for grave breaches of international humanitarian law.

International humanitarian law is not based on reciprocity, and obligation to comply with it does not depend on the other side's compliance.<sup>2</sup> Thus, the fact that Hamas breached international humanitarian law does not grant Israel the right to breach it, even if the violations by Hamas make compliance more difficult. Indeed, both during and after the operation, Israeli officials – military and other – contended that all their actions were carried out in accordance with international humanitarian law and were approved by military legal advisors and by the Attorney General.

The objective of this document is to lay out the principal questions that arise regarding the military's conduct during "Operation Cast Lead", and to outline the primary directions that Israel must investigate regarding its conduct. B'Tselem continues to research specific events that took place during the operation and will publish its findings when this research is completed.

## **Firing at civilians**

According to the Palestinian human rights organization al-Mezan, 1,342 Palestinians were killed in the course of the operation in the Gaza Strip, some by aerial bombardment, some by artillery shelling, some by tank fire, and some by soldiers' gunfire. 907 of these (some two-thirds of the Palestinian fatalities) were killed after ground forces entered the

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<sup>2</sup> Article 51(8) of the First Additional Protocol to the Geneva Conventions, of 1977.

Gaza Strip on 4 January 2009. Thousands of people were injured, some 350 of them seriously.

The high number of casualties in such a short time and the circumstances of the fighting in Gaza make it difficult to authoritatively determine how many of the casualties were involved in the hostilities, and how many were not. However, 315 of those killed were minors (under age 18), including 235 were under age 16. 115 of those killed were women and at least 83 were men over age 50. These figures give a minimum indication of the scale of the civilian casualties. In addition, B'Tselem has documented many individual incidents where young men were killed who were also not involved in the hostilities.

International humanitarian law has established principles that are intended to protect civilians and reduce, as much as possible, harm to them during hostilities. For example, military forces are required to distinguish between combatants and civilians, and attacks aimed at civilians are absolutely prohibited. It is permissible to direct attacks only against persons directly taking part in the hostilities or at military objects, which 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 existing at the time, offers a definite military advantage."<sup>3</sup> Even when an attack is aimed at an object that meets all these requirements, it is obligatory to take certain precautionary means to ensure that the harm to civilians is as minimal as possible. Therefore, it is obligatory to choose means of attack that will minimize injury to civilians and to avoid attacks that may be expected to cause excessive damage to civilians in relation to the concrete and direct military advantage anticipated.<sup>4</sup>

It is undisputed that application of these principles in the Gaza Strip is complex, given that Gaza is one of the most densely populated areas on earth, and any error could be fatal. In addition, it appears that Hamas members systematically breached these principles. Indeed, it is not exact science and commanders in the field must make rapid decisions while often lacking full knowledge of the facts. However, Israel is still required

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<sup>3</sup> Ibid., article 52(2).

<sup>4</sup> Ibid., article 57.

to act according to the principles of international humanitarian law, and to take into account the presence of civilians both near and within areas that the military attacks.

Examination of the Israeli military's conduct during the operation raises several concerns regarding the extent to which Israel complied with its obligations under international humanitarian law:

### ***A. The principle of distinction***

Most of the buildings Israel targeted in the Gaza Strip usually served civilian purposes, such as offices, mosques, and private houses. In statements released during the operation, the IDF Spokesperson claimed regarding most of these buildings that they had been attacked because Hamas was using them to store weapons, manufacture weapons, or plan attacks on Israeli soldiers or civilians. The military provided only minimal evidence to support these claims, and B'Tselem is unable to examine their accuracy. However, at least in one instance, B'Tselem found that such information was erroneous. The IDF Spokesperson's Office posted a video on its website which it claimed showed Palestinians loading Grad missiles onto a truck. At the end of the video, a missile is fired at the truck by a helicopter, killing eight Palestinians. B'Tselem's investigation revealed that the Palestinians seen in the video were loading oxygen canisters and other equipment they had taken from a metal workshop that had been bombed, their aim being to prevent the canisters and equipment from being looted.<sup>5</sup>

When civilian objects are used for military purposes, they lose the protection afforded them by law. However, the burden of proof falls on Israel to show that Hamas was using a civilian object for military purposes. If any doubt remains as to the character of an object, it must be presumed that the object is not a legitimate target and is being used for civilian purposes alone.<sup>6</sup> So long as there had been no independent inquiry, only limited credence can be given to Israeli claims that Palestinians made prohibited use of these objects turning them into legitimate targets.

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<sup>5</sup> See B'Tselem's press release of 31 December 2008.

<sup>6</sup> Article 52(3) of the First Additional Protocol to the Geneva Conventions, of 1977.

During the operation, the military used imprecise weapons, whose range of error and destructive capability were significant. For example, the military made extensive use of artillery fire before ground forces entered the Gaza Strip, with soldiers firing hundreds of shells over the course of a few hours. According to reports, this shelling was aimed primarily at open areas that were thought to be used for launching missiles at Israel in Beit Hanun, Jabalya, and Khan Yunis.<sup>7</sup> The military continued to use artillery fire also after soldiers had entered the Gaza Strip, before occupying new territory.

The standard deviation of artillery fire is dozens of meters and the range at which persons can be expected to be killed or wounded by it also reaches dozens of meters, depending on field conditions. Taking this and the densely populated area into account, use of artillery fire significantly increases the chance of civilian casualties. Indeed, civilians in the Gaza Strip have been killed by artillery fire in the past, and in November 2006, the military ceased using artillery fire, partly for this reason.<sup>8</sup>

The army also used mortar shells during the operation. Lt. Col. Shuki Ribek, commander of Battalion 51, said, “I don’t recall when we ever fired mortar shells in Gaza before.”<sup>9</sup> The reason is, primarily, that mortar fire is even less accurate than artillery fire. On 6 January 2009, the army fired a mortar shell in the Jabalya refugee camp, near UNRWA’s Fakhura school, which sheltered civilians who had fled from their homes following the aerial bombing. Over 40 civilians were killed by these mortars, including ten members of a single family who were in their yard. A few days afterwards, *Ha’aretz* reported that, according to the military’s initial inquiry, soldiers had identified rocket fire from a

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<sup>7</sup> See Ron Ben Ishai and Hanan Greenberg, “Military Opens Artillery Fire: Hundreds of Shells Fired,” *Ynet*, 3 January 2009; Yoav Stern, Avi Issascharov, Amos Harel, and Barak Ravid, “30 Soldiers Wounded, 2 Seriously; 30 Palestinians Killed,” *Ha’aretz*, 4 January 2009.

<sup>8</sup> See HCJ 3261/06, *Physicians for Human Rights et al. v. Minister of Defense et al.*, Supplemental Response on Behalf of Respondents, 2 July 2007. See, also, Amos Harel, “Peretz Determined: Artillery Fire into the Gaza Strip – only with Approval of OC Southern Command and his Superiors,” *Ha’aretz*, 9 November 2006.

<sup>9</sup> Amos Harel and Avi Issacharov, “We Came, We Bombed, We Deterred – Now, Out,” *Ha’aretz*, 15 January 2009.

building next to the school. They fired mortar shells “at the source of the fire.” The standard deviation of these shells is a few dozen meters, and in retrospect, military officers admitted to the journalist that “it was a wrong choice of means of response” and that the army should have used a precise weapon.<sup>10</sup>

B'Tselem cannot determine how many civilians were killed throughout the operation as a result of artillery fire or mortar shells. However, since these weapons are imprecise, they cannot be aimed exclusively at locations from which Palestinians were shooting. Given the population density in Gaza, and the fact that Palestinian fighters were near civilians, the risk of harm to civilians from these weapons was particularly high.

In addition, during the operation, the military used White Phosphorus, which causes severe burns and sets fires to buildings and fields. Officials did not explain why the military had chosen to use this weapon, and at first, even denied that such shells had been fired. Later, officials in the defense establishment admitted that this weapon had been used during the operation, and announced that the military would make an inquiry into the matter.<sup>11</sup> International humanitarian law does not prohibit the use of this weapon as such, but does restrict it to use against military objects, and even then, not from the air. When the military target is located inside a residential area, use of this weapon is absolutely prohibited.<sup>12</sup>

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<sup>10</sup> Amos Harel, “Admission in the IDF: We Erred in Choosing the Means of Response to the Terrorist Gunfire,” *Ha’aretz*, 11 January 2009.

<sup>11</sup> Amir Buhbut, “Admission in the Defense Establishment: IDF Fired Phosphorous Shells in Gaza,” *NRG*, 19 January 2009; Amos Harel, “IDF Investigates Why Reserve Force Fired 20 Phosphorous Shells at Residential Area in the Strip,” *Ha’aretz*, 21 January 2009.

<sup>12</sup> The Third Protocol to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, which relates to incendiary weapons. Israel has not signed the Protocol, but the rule it states is based on two customary principles of international law, which are binding on Israel: the principle of distinctions and the principle that prohibits causing unnecessary suffering.

## ***B. The principle of proportionality***

During and after the operation, there were numerous reports in the media regarding the massive force used by the military. For example, Alex Fishman wrote as follows in *Yediot Aharonot*:

In the last operation, the intensity of the fire was unprecedented in IDF warfare inside an urban area... In Operation Cast Lead, not one house along the Philadelphi Corridor was left intact. Division commanders were allowed to strike any house suspected of being booby-trapped. When they stormed Beit Lahiya, every second house, on average, was shelled... Ashkenazi gave orders in advance to use 'extensive fire': massive use of fire.<sup>13</sup>

Massive use of force does not necessarily indicate breach of the principle of proportionality, certainly when Hamas fighters are operating in a civilian area, booby-trapping houses, and hiding weapons in houses of civilians. However, the high number of people killed and injured during the operation, and particularly given that there were cases in which many civilians were killed in a single attack, necessitates an inquiry as to whether the military respected the principle of proportionality. For example, on 1 January 2009, the air force bombed the house of Nizar Rayyan, a senior Hamas official, contending that "the house served as a large munitions warehouse and as a war room. Under the house was an escape tunnel for terrorist members of Hamas' military wing."<sup>14</sup> The media reported claims that the family had been given prior warning of the intention to bomb the house, but they had refused to leave or had left the house and returned before the attack. The bombing killed Rayyan, his four wives, and their eleven children, most of them ranging in age from one to twelve. Similarly, on 6 January 2009, the military bombed the home of the a-Daiyah family, in Gaza City. The four-floor house had more than 30 people inside. 21 were killed in the bombing, 12 of them children under the age of 10.

B'Tselem is unable to examine whether Israel breached the principle of proportionality in these cases, in that the determination depends on the information that the military had at

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<sup>13</sup> Alex Fishman, "Winograd, You're Released," Weekend Supplement, *Yediot Aharonot*, 23 January 2009.

<sup>14</sup> Announcement of the IDF Spokesperson, 1 January 2009.

the time of the bombing, which has not been revealed. However, in these and many other cases, civilian casualties were very high and appear at face value to be excessive. Israel cannot make do with placing the responsibility with Hamas, but must prove that the anticipated injury to civilians as a result of carrying out the attack at that time was not excessive in relation to the military advantage anticipated from the attack.

### ***C. Direct fire at civilians***

During the operation, B'Tselem received particularly grave reports of soldiers intentionally aiming gunfire directly at civilians who were not involved in the hostilities and who did not endanger the soldiers' lives in any way. For example, B'Tselem was told of persons who wanted to leave their houses to reach a safer location, but soldiers fired at them. In some of the cases, they fired even though the civilians were waving white cloth to make it clear that they were not armed and did not intend to endanger the soldiers. B'Tselem also received testimonies regarding people shot by soldiers while trying to evacuate people who had been wounded near their houses.

Reports of such severe incidents, which constitute especially grave criminal offenses, must be thoroughly investigated. The inquiry must examine, among other things, whether the soldiers were given orders that permitted them to shoot under such circumstances, or whether they were breaching military orders.

### **Lack of protection of civilians**

One distinctive characteristic of Operation Cast Lead was the fact that civilians had nowhere to flee to escape the danger. Unlike other places in the world, in which long lines of refugees are seen carrying their few remaining possessions, Gaza civilians remained trapped within a small area, since Israel left the crossings out of the Gaza Strip closed and Egypt refused to open the Rafah Crossing.

Israel was well aware of this situation and was obliged to take precautions to reduce harm to civilians. The military claims that it fulfilled this obligation by dropping flyers from the air or by placing phone calls to notify civilians in advance of the intention to bomb the area where they were located.

International humanitarian law indeed requires that prior warning be given in order to prevent, to the extent possible, harm to civilians.<sup>15</sup> However, the warnings that the military gave does not constitute fulfillment of Israel's obligation, since their effectiveness is unclear, given the fact that the crossings out of the Gaza Strip remained closed and civilians did not always have a place to which they could flee. Moreover, giving prior warning to civilians does not render an area "sterile" and a legitimate military target that can be bombed without taking into account whether civilians indeed heeded the warning and evacuated the area. In cases in which the military knew, or should have known that civilians remained in a given area, it was obliged to take this fact into account when carrying out any attack.

Despite the warnings, some residents chose to stay in their homes. As there are no reinforced rooms or bomb shelters in the Gaza Strip, even when people did leave their homes, they remained defenseless. In addition, the conditions in those places where people sought shelter were poor. Towards the end of the operation, UN OCHA reported that more than 50,000 people had fled to shelters established by UNRWA.<sup>16</sup> As UNRWA was not equipped to deal with such a large number of refugees, the shelters severely lacked basic goods and services including food, water, mattresses and blankets.

In some cases, the military also struck places to which people had fled. According to reports given to B'Tselem, on 4 January 2009, the military fired at the Asmaa primary school in the Shati refugee camp, in which some 450 persons had sought shelter. Three were killed. On 15 January 2009, the military struck UNRWA warehouses, in which over 700 persons had found shelter. Three were injured. Two days later, on 17 January 2009, the military fired at another UNRWA facility. Two children, aged five and seven, were killed.

Not only is there concern that the military refrained from taking the necessary precautions to protect the civilian population, but in certain cases, it seems that the

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<sup>15</sup> Article 57(2)(c) of the First Additional Protocol to the Geneva Conventions, of 1977.

<sup>16</sup> United Nations Office for the Coordination of Humanitarian Affairs (OCHA), "Field up-date on Gaza from the Humanitarian Coordinator, 17-18 January".

military itself endangered civilian lives. According to testimonies given to B'Tselem, the military used Palestinians as human shields during the operation. People told B'Tselem that soldiers ordered them to enter buildings to ensure that they were not booby-trapped or to bring people outside, to remove suspicious objects from roads, and to stand before soldiers in order to prevent Palestinians from shooting at them.

Use of civilians as human shields is absolutely prohibited both under international humanitarian law and under Israeli military orders. Throughout the second intifada, and particularly during Operation Defensive Shield in April 2002, the Israeli military made extensive use of Palestinians in this way. In October 2005, following a petition filed by seven Israeli human rights organizations, the Israeli Supreme Court ruled that any form of use of civilians as human shields is absolutely forbidden.<sup>17</sup> Accordingly, military orders were changed and the use of human shields dropped significantly.

## **Targeting symbols of government**

During the operation, the Israeli military bombed clearly civilian objects, among them the Police building, the Legislative Council, and government ministries, including the ministries of justice, finance, foreign affairs, labor, and construction and housing.

On the first day of the operation, 27 December 2008, the air force bombed the central Police headquarters in the Gaza Strip, killing 42 cadets standing in their morning formation. One of the cadet trainers told B'Tselem that during the course, cadets study first-aid, crowd control methods, exercises in maintaining order, and the like. The policemen are then assigned to various branches of the civilian police in the Gaza Strip.

On 30 December 2008, following an attack on buildings in the Gaza city government complex, the IDF Spokesperson stated that the air force had attacked three buildings in the complex, “in which the government’s activity is concentrated, and which support financing, planning, and carrying out terrorist acts.” The announcement continued: “Attacking this strategic governmental objective was executed following the prolonged firing of the Hamas terror organization at Israeli territory, and in the framework of IDF

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<sup>17</sup> HCJ 3799/02, Adalah et al. v. OC Central Command et al .

activity to strike at the governmental infrastructure and the military wing.” Two days later, on 1 January 2009, following the attack on the building of the Legislative Council and the Ministry of Justice, the IDF Spokesperson’s Office issued a similar announcement: “Attacks on strategic governmental objectives, which are part of Hamas’ government apparatus, is a direct response to the prolonged firing of the Hamas terror organization at communities in southern Israel.”

As opposed to other announcements made by the IDF Spokesperson regarding various bombing and shelling throughout the operation, the above announcements did not claim that the buildings served any military purposes, such as munitions storage or cover for armed Palestinians. This disparity indicates that the reason for striking these targets was not related to the purposes for which they were being used.

Statements by Israeli officials, according to which Israel deems everything connected to Hamas a legitimate target, strengthen this conclusion. In an article published in the *Washington Post*, Major Avital Leibovich, of the IDF Spokesperson’s Office, said that the military had indeed expanded the list of its targets, in comparison with previous operations, contending that Hamas uses civilian activity to cover up its military actions. Consequently, she argued, “everything related to Hamas is a legitimate target.”

The deputy chief of staff, Maj. Gen. Dan Harel, at a meeting with heads of local authorities in southern Israel said as follows:

We are striking not only terrorists and launchers, but the entire Hamas administration, and all its arms... We are striking government buildings, manufacturing plants, security branches, and so forth. We demand governmental responsibility from Hamas and we do not distinguish between the various branches. Following the operation, no Hamas building will be left standing.<sup>18</sup>

It is clear that Hamas is responsible for the firing of rockets at Israelis. However, as the governing authority in the Gaza Strip, it is also responsible for the functioning of daily life. As such, it must supervise the activity of all civil systems in Gaza – welfare, health, housing, law, among others – and ensure public order also by means of the police.

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<sup>18</sup> Tova Dadon, "The Deputy Chief of Staff in Kiryat Gat: The Worst is Yet to Come", *Ynet*, 29 February 2008.

Therefore, even if Hamas is a “hostile entity” whose principal objective is to oppose the existence of the State of Israel, this does not mean that every action it takes is intended to harm Israel, or that every government ministry is a legitimate object of attack.

Indeed, media interviews of representatives of the IDF’s international law department, whose names were not made public, indicate there was a serious difference of opinion on the legality of striking these targets. *Ha’aretz* reported that only following pressure by the operational level was a legal interpretation found that would enable attacking police officers and other Hamas government targets. According to this interpretation, a "senior officer in the international law department" explains:

The manner in which Hamas operates... as we understand it, the whole governmental infrastructure is used for the organization’s terrorist needs, so that the distinctions are slightly different. We are adapting the targets to the case of a terrorist government.<sup>19</sup>

In another interview, given to *Yediot Aharonot*, the reporter pointed out that when representatives of the military Judge Advocate General’s Office were asked about the attack on the government buildings and on police officers, “they shifted uncomfortably in their seats, and for a few seconds there was silence in the room.” Ultimately, they gave the following explanation:

When a terrorist organization controls the government, all government ministries are used to fulfill the objectives of the terrorist organization. Why do you assume that the Palestinian transportation ministry serves only to set bus routes? Maybe it serves other purposes? ... Hamas does not make the separation that is customary in an orderly-run country. The apparatuses and positions are completely intermixed there. There are commanders who command an official force and also a secret combat force. Commanders of official forces have declared that they are part of the “resistance.” This connection between forces has created a situation in which separation is non-existent. Also, there was information that cannot be revealed.<sup>20</sup>

This explanation cannot justify attacks on all government ministries or justify treating them as legitimate military objects. It is clear from the above comments that the decision to attack patently civilian objects of the Hamas government was not based on precise

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<sup>19</sup> Yotam Feldman and Uri Blau, “Not Stopping at Grey,” Weekend Supplement, *Ha’aretz*, 23 January 2009.

<sup>20</sup> Moshe Ronen, “War has Rules,” 24 Hours Supplement, *Yediot Aharonot*, 19 January 2009.

information relating to the military activity taking place in these institutions, but on estimations regarding the way Hamas works. Such a definition of a “military object” contradicts international humanitarian law, according to which military objects can be defined only as those that make an effective contribution to military actions against Israel and only when it is clear that attacking them will provide Israel with a definite military advantage.

In addition, the comments quoted above clearly indicate that there was, at the very least, doubt as to the legality of attacking these objects under international humanitarian law. When a doubt exists whether civilian buildings – including residential dwellings, houses of worship, or schools – are also used for military purposes, they must continue to be treated as civilian objects.<sup>21</sup>

B'Tselem wrote to Israel's Attorney General, Menachem Mazuz, demanding clarifications on the attacks on civilian objects. The response, provided by the military's Judge Advocate General, completely ignored the questions raised in the letter. B'Tselem responded and continues to wait for a substantive reply.

## **Evacuation of wounded and attacks on medical teams**

During the operation, B'Tselem and other organizations received reports that Israel was preventing ambulances from reaching wounded persons, and that soldiers were preventing wounded persons from getting to hospitals. Some of the reports related to wounded persons who remained in "enclaves" created when the military advanced into the Gaza Strip, isolating residents behind the advancing forces. In other cases, wounded persons were afraid to leave their houses while the military was still in the area. In some cases, civilians tried to evacuate persons who had been wounded and remained in the street, but soldiers fired at them and they retreated. As a result, there were cases in which wounded people literally bled to death. Difficulties in evacuating the wounded increased after Israeli ground forces entered the Gaza Strip and subdivided it. Movement of medical

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<sup>21</sup> Article 52(3) of the First Additional Protocol to the Geneva Conventions, of 1977.

teams became almost impossible, as was access to hospitals in the central section of the Gaza Strip.

Attempts made by Israeli organizations, the Palestinian Red Crescent and the International Committee of the Red Cross to coordinate access for medical teams trying to reach wounded persons and evacuate them failed in many cases. In some cases, even where coordination was arranged, soldiers reportedly fired at ambulances. According to data supplied by the Palestinian Health Ministry, at least 16 medical-team personnel were killed during the operation.

The International Committee of the Red Cross deviated from its normal mode of operation and issued several public announcements warning of harm to wounded persons and medical teams. In an announcement on 7 January, which was issued after the military finally permitted evacuation of wounded from the Zeitun neighborhood in Gaza City, the Red Cross stated that Israel breached, in this case, international humanitarian law provisions requiring treatment and evacuation of wounded persons, and that the delay in evacuation of the wounded was unacceptable.

On 6 January 2009, eight human rights organizations petitioned the Supreme Court of Justice demanding that the military permit medical teams and ambulances to move about in the Gaza Strip and enable evacuation of wounded to hospitals. In response to the petition, the state contended that soldiers had been given unequivocal instructions to refrain from attacking medical teams and ambulances, and to enable residents who had been wounded to receive medical treatment and be evacuated to hospitals.<sup>22</sup> However, Israel immediately qualified this statement:

19. ... Reports of soldiers in the field, visual testimonies from observation posts, and intelligence information accumulated by the respondents indicate clearly and unequivocally that the terror activists sometimes use ambulances to carry out terrorist acts, and also sometimes disguise themselves as medical-team personnel. This is a mode of operation, rather than isolated and exceptional incidents. For example, according to classified information in the hands of the security forces, Hamas activists use ambulances to transport rockets and ammunition from place to

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<sup>22</sup> HCJ 201/09, *Physicians for Human Rights et al. v. the Prime Minister et al.*, Response on Behalf of the Respondent, 8 January 2009, sections 4 and 24.

place, and also to transport terror activists inside the Gaza Strip. Also, there is intelligence information that terror activists disguise themselves as medical teams to prevent their being hit by IDF gunfire – which is careful not to shoot at medical teams...

20. The respondents also will argue that the petitioners' claims should be directed primarily at the Palestinian side, which flagrantly breached and breaches international law, severely prejudices the trust that IDF forces are supposed to give to medical teams, ambulances, and hospitals, and thus often causes, *purely as a side-effect*, delay in treatment and evacuation of wounded and the ill, among other things, and also occasionally, unfortunately, harm of these teams.

21. The respondent will argue that, despite the fact that Hamas flagrantly breached and breaches the laws of war, the IDF operates in accord with the rules of international law applying to the matters raised in the petition. The state will argue that, to the extent that delay in evacuation and treatment of wounded occurs occasionally, and to the extent that medical teams are indeed struck, this is not done intentionally, but as an unintentional result of combat actions nearby. International law recognizes that such unintentional harm is not unlawful.<sup>23</sup>

These statements, which the state has made in the past, are aimed at justifying the harm caused to medical teams and the delay in treating and evacuating wounded during the hostilities. These claims are made without the events having been investigated and without examining whether the soldiers in fact acted properly.

The protection granted medical teams and wounded in international humanitarian law is broad and comprehensive. Civilian hospitals “may in no circumstances be the object of attack, but shall at all times be respected and protected by the Parties to the conflict.”<sup>24</sup> This protection applies also to “persons regularly and solely engaged in the operation and administration of civilian hospitals, including the personnel engaged in the search for wounded and sick civilians.”<sup>25</sup> Also, “each Party to the conflict shall facilitate the steps taken to search for the killed and wounded.”<sup>26</sup>

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<sup>23</sup> Ibid., sections 19-21. Identical comments were made in sections 23-25 of the updated response filed on behalf of the state on 13 January 2009.

<sup>24</sup> Fourth Geneva Convention, article 18.

<sup>25</sup> Ibid., article 20.

<sup>26</sup> Ibid., article 16.

Indeed, as the state's response argues, international humanitarian law recognizes that there will be circumstances in which these protections cannot be provided. The first exception states that the protection of hospitals and medical teams shall not cease "unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy."<sup>27</sup> The second exception states that in especially extreme cases, when the hostilities and military considerations make it impossible to enable medical teams to enter the area and evacuate the wounded, it is permissible to delay evacuation, but even in such instances, the law calls for the least possible delay.<sup>28</sup>

The state chooses to adopt these narrow exceptions and turn them into the main principle in an attempt to justify the military's conduct during the operation. However, these exceptions are intended to provide a response for extremely unusual situations and unexpected incidents, and not as a basis for setting policy during hostilities.

The argument that Palestinians abused ambulances has been raised numerous times by Israeli officials, primarily since the second intifada began, although Israel has almost never presented evidence to prove it. Such misuse of ambulances is absolutely prohibited and breaches international humanitarian law. However, even if it does occur, it does not justify prohibiting the movement of ambulances or shooting at ambulances and medical teams when they are being used and are acting lawfully.

Regarding evacuation of wounded persons as well, the state defends its actions on the grounds that fighting is taking place in the area and brandishes the statement that the delay is not intentional. However, preventing evacuation of wounded persons for a few days cannot be reconciled with the requirements of international humanitarian law, certainly with respect to areas in which the fighting had already ended and when the soldiers themselves were close at hand and could have provided aid.

Israel also argued before its Supreme Court that the military had prepared in advance to handle the wounded, and that it had established a "humanitarian situation room." In its

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<sup>27</sup> Ibid., article 19.

<sup>28</sup> Ibid., section 16 and 17. See also the First Additional Protocol to the Geneva Conventions, of 1977, article 10.

response to the court, the state listed the situation room's telephone number and invited all the organizations to contact it to coordinate evacuation of wounded persons. However, when B'Tselem and other organizations contacted this number, they received the reply that requests are only accepted via the ICRC and a refusal to handle the cases.

Especially grave is Israel's shirking of its responsibility regarding the delay in treatment of the wounded and the harm to the medical teams, and the attempt to place responsibility solely on Hamas. Israel is the one who prohibited ambulances from moving throughout the Gaza Strip, even in areas in which the fighting had ended, and it is Israel that refused to set up an effective mechanism for coordinating evacuation of the wounded. As a result, some people bled to death. Human rights organizations, journalists, and international bodies reported on this situation during the course of the operation, and Israeli decision-makers were well aware of it, yet did not change it. Accordingly, insisting that such harm is "purely a side effect" is feigned innocence and nothing more.

## **Collapse of civilian infrastructure and public services**

During Operation Cast Lead, civilian infrastructure and public services in the Gaza Strip collapsed almost completely. The brief daily cease-fires Israel instituted after the first few days of fighting were insufficient to meet the population's needs.

At the beginning of the operation, Gaza's power station, which provides one-third of electricity in the Gaza Strip, was closed after the fuel to operate it ran out. The military also struck several power lines running to Gaza from Israel and Egypt. As a result, residents received only 25 percent of the electricity they needed. The harm to the electric supply impaired water and sewage systems. At the peak of the hostilities, more than 800,000 people were without running water. Sewage from Gaza City flowed onto farmland; in Beit Hanun, sewage flooded the streets. The hospitals, which strained under the extreme case load, were forced to rely on generators. They also suffered from a shortage of medical equipment, replacement parts, and specialist physicians.

Residents also suffered from a shortage of food and basic commodities. Most of the bakeries closed due to the lack of flour, cooking gas, and electricity. International

agencies were unable to move about in the Gaza Strip and distribute food. The shortage led to a steep rise in food prices.<sup>29</sup>

The crisis described above was to be expected, given the poor condition of infrastructure and public services on the eve of the operation. In June 2007, following Hamas' takeover of the Gaza Strip, Israel closed the border crossings and greatly limited the entry of goods, including fuel, medical equipment, and replacement parts. Only goods Israel deemed "humanitarian" and basic foodstuffs such as flour, sugar, oil, rice, and salt, were allowed in.

The effects of this policy on the residents of Gaza were disastrous. People who previously worked to support their families became totally dependent on handouts of basic commodities and services. An OCHA report issued about two weeks before Operation Cast Lead described the severe crisis in the Gaza Strip and the effect of the blockade on its residents.<sup>30</sup> The report pointed out that most residents of Gaza were whole engaged in daily survival and in trying to meet their most basic needs – water, food, fuel, and the like – and that most of them stated they felt trapped "physically, mentally, and emotionally."

The report describes the severe damage to infrastructure as a result of the ongoing blockade. There was a chronic shortage of electricity in Gaza due to the severe restrictions Israel places on the entry of industrial fuel, which is intended solely for the power station, As a result, the power company has been forced to stop operations several times, causing prolonged power cuts. The shortage in electricity also affects the water and sewage systems: 80 percent of the water wells were not fully operational and others have ceased operation completely. 80 percent of the water supplied to Gazans does not meet the drinking-water standard of the World Health Organization. The shortage of chlorine, a result of Israel's refusal to allow importation of necessary quantities, increases

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<sup>29</sup> See the daily reports of the UN Office for the Coordination of Humanitarian Affairs (OCHA), available at [www.ochaopt.org](http://www.ochaopt.org).

<sup>30</sup> OCHA, Gaza Humanitarian Situation Report – The Impact of the Blockade on the Gaza Strip, 15 December 2008.

the risk of outbreak of diseases. Maintenance of the electrical, water, and sewage system was poor, but could not be repaired due to the prohibition Israel placed on the entry of construction materials and replacement parts into Gaza.

The economic situation of the residents deteriorated. According to statistics in OCHA's report, in the second quarter of 2008, unemployment reached 50 percent. In 2007, 79 percent of Gazan households lived under the poverty line and 70 percent lived in deep poverty. Figures of the Palestinian Industrialists Association indicate that, of the 3,900 factories that were operating in Gaza prior to the blockade, only 23 were still operational in the period preceding Operation Cast Lead, and 34,000 factory workers had been dismissed. 40,000 other workers – permanent and temporary – lost their jobs in the fishing and agricultural sectors, in part because of the prohibition on exports and the shortage of raw materials.

Hospitals and medical clinics continued to operate, but the level of their services was severely impaired. Most had to rely on generators because of the power cuts. The shortage of replacement parts and raw materials resulted in poor maintenance of medical equipment, and physical infrastructure could not be repaired. The blockade also created a shortage in personnel and medical specialists, inasmuch as Israel prevented medical staff to go abroad for in-service training and to improve their expertise.

This was the situation in the Gaza Strip on the eve of the operation. As a result, the population suffered immediate and serious harm, in that residents and the public services had already used up the emergency reserves that were available to them, and nothing was left for a time of crisis. Israel was well aware of the grave situation of the civilian population. Therefore, it should have prepared accordingly, before commencing the operation, and should have enabled the entry and stockpiling of goods, food and fuel so as to prevent such a rapid collapse.

## **Conclusion**

The extent of the harm to the civilian population in the Gaza Strip during Operation Cast lead is unprecedented. Only now is the full magnitude of the destruction coming to light and additional testimonies about what happened continue to surface. Whole families have

been wiped out. Children were killed before their parents' eyes. Some people watched as their loved ones bled to death. Clearly, even after the dead are buried and the rubble has been cleared away, the residents of the Gaza Strip will carry scars from this operation for a long time to come.

Images of the destruction in the Gaza Strip received prominent coverage around the world and various bodies called for the establishment of investigative committees of one kind or another, including demands to prosecute Israeli soldiers for the gravest of crimes. In Israel, however, official authorities prefer to hide behind sweeping declarations that the military acted properly during the operation.

Defense Minister Ehud Barak declared that the "IDF is one of the most moral armies in the world, if not the most moral of all, and employed every possible means to avoid injuring civilians."<sup>31</sup> Prime Minister Ehud Olmert declared:

During the operation, the State of Israel used its force with great sensitivity, in order to avoid, as much as possible, injuring civilians who are not involved in terror. In cases in which there was room for doubt whether attacking terrorists would harm innocent civilians – we avoided acting. There are not many countries that would act as we did.<sup>32</sup>

In response to B'Tselem's letter regarding intentional targeting of Palestinian government buildings, the Judge Advocate General, Brig. Gen. Avichai Mandelblit, wrote that:

The attacks that the IDF is carrying out in the Gaza Strip – by air, ground, and sea – are being conducted in compliance with the laws of war. The IDF is operating accompanied by legal advice that is intended to bring before decision makers in the IDF the legal aspects that apply to their conduct, and to provide them with the legal tools necessary to achieve the operational goals with which they are faced.

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<sup>31</sup> Ahiya Rabad, "Barak: The Operation Fundamentally Changed Reality," *Ynet*, 21 January 2009.

<sup>32</sup> "The Full Speech: Prime Minister Declares Ceasefire in Gaza," *Ynet*, 18 January 2009.

<http://www.ynet.co.il/articles/0,7340,L-3657794,00.html>

The JAG added that "while we regret, of course, any harm to civilians, we emphasize again that the responsibility for that lies solely at the doorstep of the Hamas organization, following its use of the civilian population for its despicable purposes."<sup>33</sup>

As with every body of law, international humanitarian law can be interpreted in different ways. However, it is clear that not every interpretation is acceptable and reasonable. The interpretation given by Israeli military legal advisers during Operation Cast Lead, which enabled, among other things, attacks on civilian objects, use of prohibited weapons, and prolonged delay of evacuation of wounded is unacceptable. The primary objective of international humanitarian law is to protect the civilian population from the horrendous effects of war. The understanding that harm to civilians is inevitable is built into its provisions, and the requisite balancing between military needs of the adversary sides and civilian harm has already been made. Using ambiguous terminology and narrow exceptions to justify such grave harm to civilians, in an attempt to create a semblance of compliance with the law, constitutes cynical use of a law that is primarily intended to distance civilians from the hostilities and minimize all harm to them.

It is possible that in at least some of these cases, the use Hamas made of the civilian population has implications for the legality of Israeli attacks that harmed civilians. However, the conduct of Hamas members cannot provide a sweeping justification for all Israeli actions during the operation and does not prove that every injury to civilians by the Israeli military resulted from prohibited Hamas conduct. As this document shows, in several instances there is grave suspicion that the injury to civilians resulted precisely from Israel's use of means and methods of warfare that do not distinguish between military and civilian objectives. In other cases, it appears that the anticipated harm to civilians was excessive in relation to the concrete and direct military advantage anticipated from the attack. In these cases at least, the military commanders cannot be exempted from responsibility for harm to civilians, regardless of Hamas behavior.

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<sup>33</sup> Quoted from the original (freely translated). Letter from the JAG, Brig. Gen. Avichai Mandelblit, to B'Tselem, 19 January 2009.

An initial overview of Israel's conduct during Operation Cast Lead raises grave suspicion that soldiers and commanders breached international humanitarian law during the hostilities. This suspicion relates not only to the conduct of individual soldiers, but primarily to policy decisions. In light of this, a public reckoning of Israeli actions is crucial; the Israeli public has the right to know what was done in its name in the Gaza Strip. After concrete facts are provided, it will be possible to formulate an informed position on the severe harm caused to civilians during the operation. Regarding this point, *Yediot Aharonot's* military correspondent, Ron Ben Ishai, noted:

Among many sectors of Israeli society too, a fervent argument is developing on the question whether the killing and destruction in the Gaza Strip were proportionate and necessary. This will compel the government and the IDF to prove, with facts and figures, before the nations of the world, that the use of force was proportionate to the threat and to methods of warfare of Hamas, and was used, having no other option, after all other means had been exhausted to safeguard the civilians.<sup>34</sup>

The scope and severity of the violations can be determined only in the framework of a comprehensive investigation that examines the information that was available to the military and its modes of operation. This investigation must be independent and effective, open to public review, and conducted within a reasonable time. Israel must initiate such an investigation, which examines, among others, the following questions:

- Were civilian objects the target of attacks, even if prohibited use was not made of them?
- Did the military respect the principle of proportionality, according to which, in every attack, the anticipated harm to civilians must not be excessive in relation to the direct anticipated military advantage?
- During the operation, did the military use weapons whose use is prohibited in the circumstances prevailing in the Gaza Strip – including White Phosphorous shells and indiscriminate weapons?
- Did soldiers shoot civilians who were not endangering their lives?

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<sup>34</sup> Ron Ben Ishai, "Who Really Destroyed Gaza?", *Ynet*, 20 January 2009.

- Did Israeli soldiers force civilians to perform dangerous assignments and otherwise use civilians as human shields?
- Were ambulances and medical teams attacked while performing their duties?
- Was there an unjustified delay in the evacuation and treatment of wounded persons, including in areas in which fighting was not taking place?