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Position Paper – Israeli Military Attacks on the Civilian Police Force and Government Buildings and Institutions of Hamas in Gaza

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This paper will examine the legality of the recent Israeli military attack on members of the civilian police force and the bombing of government buildings and Hamas institutions in Gaza carried out within the framework of “Operation Cast Lead”, launched by Israel on 27 December 2008.

On the first day of the attacks, the Israeli military fired a missile at a large group of Palestinian police cadets during their graduation ceremony at the police headquarters in Gaza City. Dozens of newly-qualified police officers, dressed in uniform, were killed in the attack. The Israeli government and military subsequently claimed that these police cadets were legitimate military targets. Later in the operations, the Israeli military intentionally bombed government buildings in Gaza, including the Legislative Council building, the Ministry of Justice, the Ministry of Transport and the Ministry of Communications. In total, 68 government buildings were completely destroyed or damaged.² The Israeli military claimed that these strikes on strategic government buildings constitute a part of Hamas’s mechanism of control, were “a direct response to the continued firing on communities in southern Israel by the Hamas terrorist organization.”³

The first part of this paper will present the principles of international humanitarian law (IHL) that apply to military operations; the second part will analyze the legal questions that arise from these military attacks.

Part I – The Legal Framework

Military operations are subject to the laws of war. These laws in their current form emerged as a compromise between two conflicting interests: on one hand the military interests of the parties to an armed conflict, and on the other the need to protect, to the greatest possible extent, civilian populations caught up in the fighting. Within the laws of war, four central principles of paramount importance can be identified:⁴ the principle of military necessity, the principle of distinction, the principle of proportionality, and the principle of preventing unnecessary suffering. The relevant principles for our discussion are:

The principle of military necessity: The laws of war allow attacks solely and exclusively in cases where the harm serves a military need; that is, to weaken or overcome the enemy or to

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² See the report on the situation in Gaza issued by the Office of the Humanitarian Coordinator, 3-5 February, 2009: http://www.ochaopt.org/documents/ocha_opt_gaza_humanitarian_situation_report_2009_02_05_english.pdf.

³ Official statement by an Israeli military spokesman, 1 January 2009, available at: http://dover.idf.il/IDF/News_Channels/art_mivzaim/09/01/0101.htm (Hebrew).

⁴ See Orna Ben Naftali and Yuval Shani, *International Law – Between War and Peace* (Ramat 2006), p. 147 (Hebrew).

bring the battle to an end. Only weakening the military forces of the enemy – not any act capable of harming the enemy's war effort – may be considered a legitimate military need.⁵

The principle of distinction: This principle, which is an expression of the principle of military need, states that even in times of war a distinction must be drawn between combatants and military targets on one hand, and civilians and civilian objects on the other. This principle prohibits direct attacks against civilians or civilian objects.⁶ Derived from this principle is a rule of customary international law which holds that civilians are protected against any attacks as long as they do not partake in the fighting.⁷ Thus attacks fail to make a distinction between combatants and civilians, or between military targets and civilian objects, are prohibited.⁸ Additional rules that reflect this principle include the prohibition on the use of materials or methods of warfare that are incapable of distinguishing between targets,⁹ the prohibition against treating a cluster of military targets as a single target,¹⁰ the duty to clarify the nature of the target before attacking it,¹¹ and the duty to give a warning, as far as possible, to enable civilians to distance themselves from the object under attack.¹²

The principle of proportionality: Disproportionate attacks are also prohibited. It is not enough to identify military targets as an object of attack. The principle of proportionality prohibits any military operation that is likely to cause a collateral or incidental loss of human life, damage to human life, damage to civilian objects, or a combination of the above, which is disproportionate to the direct and concrete military advantage anticipated.¹³ The application of the principle of proportionality calls for precautions to be taken to ensure that no collateral or incidental damage to human life or property is caused as a result of the attack that excessively exceeds the military advantage expected to be gained from the attack. If the collateral or incidental damage expected to result from the attack is disproportionate, then the attack should be called off.¹⁴

The application of these principles to the matters before us calls for examination of the questions of who is a civilian and what constitute civilian objects.

Who is a civilian? Anyone who is not a combatant

According to customary international law, a civilian is anyone who is not a combatant. Who, then, is a combatant? This group, of course, includes military personnel. It also includes persons who meet the conditions set forth in Article 1 of the Regulations Appended to the Fourth Hague Convention of 1907,¹⁵ which state that:

⁵ See *International Law – Between War and Peace*, p. 147.

⁶ Jean-Marie Henckaerts; Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol. 1: Rules; Rule 1, p. 3, and Rule 7, p. 25; see Articles 8.4 and 52(2) of Additional Protocol I to the Geneva Convention.

⁷ *Customary International Humanitarian Law*, Rule 6, p. 19.

⁸ Rules 11 and 12, Article 51(4) of Protocol I.

⁹ Rule 12, Article 51(4)(a) of Protocol I.

¹⁰ Rule 13, Article 51(5)(a) of Protocol I.

¹¹ Rule 16, Article 57(2)(a) of Protocol I.

¹² Rule 20, Article 57(2)(c) of Protocol I.

¹³ See Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, [1996] ICJ Rep. 226, 587; Rule 14, p. 46, Article 51(5)(b) of Protocol I; see also *International Law – Between War and Peace*, p. 154.

¹⁴ Rule 19; see also *Prosecutor v. Stanislav Galic* (Trial Judgment and Opinion) IT-98-29-T. International Criminal Tribunal for the former Yugoslavia (ICTY). 5 December 2003, paragraphs 57-60; available at: <http://www.unhcr.org/refworld/docid/4147fb1c4.html>.

¹⁵ See also Section 13 of the First and Second Geneva Convention, Section 4 of the Third Geneva Convention, and Section 43 of Protocol I.

The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

1. To be commanded by a person responsible for his subordinates;
2. To have a fixed distinctive emblem recognizable at a distance;
3. To carry arms openly; and
4. To conduct their operations in accordance with the laws and customs of war.

In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination “army.”

Significantly, members of armed groups (hereinafter: “armed struggle groups”) who are not military personnel and who do not comply with the conditions set forth in Article 1 of the Hague Regulations are not considered combatants, but civilians.¹⁶ At the same time, international law recognizes a reality in which, during armed conflicts, civilians participate in the fighting although they are not combatants. These civilians cannot participate in the fighting while also benefiting from the immunity conferred upon them as civilians.¹⁷ Accordingly, Section 51 (3) of Additional Protocol I to the Fourth Geneva Convention, which reflects customary international law,¹⁸ states that, “Civilians shall enjoy the protection afforded by this section, *unless and for such time as they take a direct part in hostilities*” [emphasis added].

As we have seen, international law contains no provision that stipulates that all members of an armed struggle group lose the protection conferred upon them as civilians under international law. In this context, the International Criminal Tribunal for the former Yugoslavia (hereinafter: “ICTY”) ruled as follows:

“The Trial Chamber finds that it is the specific situation of the victim at the moment the crime was committed that must be taken into account in determining his or her protection under Common Article 3. The Trial Chamber considers that relevant factors in this respect include the activity, whether or not the victim was carrying weapons, clothing, age and gender of the victims at the time of the crime. *While membership of the armed forces can be a strong indication that the victim is directly participating in the hostilities, it is not an indicator which in and of itself is sufficient to establish this.* Whether a person did or did not enjoy protection of Common Article 3 has to be determined on a case-by-case basis”¹⁹ [emphasis added].

This approach was also adopted by the Israeli Supreme Court in HCJ 769/02, *The Public Committee Against Torture in Israel v. The Government of Israel*²⁰ (hereinafter: “the assassinations case”), in which the court deliberated on the legality of Israel’s assassinations

¹⁶ A discussion of whether Hamas complies with the conditions for units to which international law gives the status of combatants, as set forth in Section 1 of The Hague Regulations or Section 43 of Protocol I, is beyond the scope of this paper. The same applies to the question of the classification of the conflict between Israel and the Palestinians as an international or a non-international conflict. See Section 1 (4) of Protocol I. For the purposes of the discussion in this position paper, we will start with the assumption according to which the State of Israel operates: that the members of the Palestinian armed struggle groups do not meet these conditions, and accordingly that the conflict in question is an international armed conflict.

¹⁷ The exception of the *levée en masse* applies in cases where the masses spontaneously take up available weapons and, without having time to organize themselves, resist an invasion or an occupation.

¹⁸ See *Customary International Humanitarian Law*, p. 20.

¹⁹ See *Prosecutor v. Halilovic*, ICTY, Case No. IT-01-48-T, Judgment, 16 November 2005, paragraph 34, available at: <http://www.un.org/icty/halilovic/trialc/judgement/index.htm>.

²⁰ HCJ 769/02, *The Public Committee Against Torture in Israel v. The Government of Israel* (not yet published), delivered on 14 December 2006.

policy. In the case, Israel claimed that its policy constituted a preventive measure against illegal combatants, posing a threat to the state and its residents. However, even though the Supreme Court adopted a stringent approach in the assassinations case, narrowing the definition of “civilian” and expanding the applicability of the exception that deprives civilians of protection, it did not determine that every member of an armed struggle group (including Hamas) was a legitimate target for attack.²¹

When are the conditions in which a civilian-combatant is deprived of protection met? The International Committee of the Red Cross (ICRC), which conducted a comprehensive study on customary IHL, reached the conclusion that there is no clear, consistent definition for this exception.²² Accordingly, we now present the three components that must be present in order to deprive a civilian of protection, “unless and for such time as they take a direct part in hostilities.”

The first component consists of “taking part in hostilities”. According to generally accepted opinion, “hostilities” are all of those actions which, according to their nature and purpose, are intended to cause damage to the army: “Hostile acts should be understood to be acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces.”²³ Actions of this type also include actions which were intended to cause harm to civilians.

The second component consists of “taking a direct part in hostilities”. Section 51 (3) of Protocol I to the Fourth Geneva Convention refers to civilians who take a direct part in hostilities (and who are as a result deprived of protection from attacks), by contrast to civilians who take an indirect part in hostilities. The latter, pursuant to the provisions of this section, continue to benefit from protection against attack. In the absence of a clear, consistent and generally agreed-upon definition of the word “direct” in the legal literature, scholars and the courts have chosen “to proceed from case to case, while restricting the purview of the dispute.”²⁴

With regard to what should be considered as taking a direct or an indirect part in hostilities, the ICRC’s official commentary on the Additional Protocols states that:

“Undoubtedly there is room here for some margin of judgment: to restrict this concept to combat and active military operations would be too narrow, while extending it to the entire war effort would be too broad, as in modern warfare the whole population participates in the war effort to some extent, albeit indirectly.”²⁵

²¹ For this criticism of the rulings see, Orna Ben-Naftali and Keren R. Michaeli, “We Must Not Make a Scarecrow of the Law: A Legal Analysis of the Israeli Policy of Targeted Killings”, 36 *Cornell International Law Journal* (2003) 233. See also Orna Ben-Naftali, “A Judgment in the Shadow of International Criminal Law,” 5 *Journal of International Criminal Justice* (2007) 322, Orna Ben-Naftali and Keren Michaeli, “Public Committee Against Torture in Israel v. Government of Israel,” 101 *American Journal of International Law* (2007) 459, and David Kremnitzer, “Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?”, 16 *The European Journal of International Law* (2005) 171.

²² See *Customary International Humanitarian Law*, p. 23.

²³ See Sandoz et al., *Commentary on the Additional Protocols* (1987), p. 618

²⁴ See the High Court of Justice ruling in the Assassinations Case, paragraph 34 and references there. See also, “Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?” and “We Must Not Make a Scarecrow of the Law: A Legal Analysis of the Israeli Policy of Targeted Killings”.

²⁵ See *Commentary on the Additional Protocols*, p. 516.

With regard to the “directness” of the part taken in the hostilities, Gasser has noted, “However, the term should not be understood too broadly. Not every activity carried out within a state at war is a hostile act.”²⁶

In determining directness, considerable weight is to be attributed to the relationship between the activity in which the civilian is involved and the harm caused to the enemy’s army. The Inter-American Commission on Human Rights determined that taking a direct part in hostilities must involve an act of violence that constitutes an immediate threat of real danger to the enemy.²⁷ According to Gasser, “All these activities, however, must be proved to be directly related to hostilities or, in other words to represent a direct threat to the enemy.”²⁸

This sentiment was expressed in the ICRC’s official Commentary on the Additional Protocols as follows:

“Direct participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and the place where the activity takes place.”²⁹

The third component is that of time. According to the exception, a civilian is deprived of protection and becomes a legitimate target only if he takes a direct part in hostilities, and only for the period of time during which he does so (“unless and for such time as”).

There are five approaches to determining the time component in the formula set forth above. The first relates to specific actions: as long as a civilian, at a given moment, is committing an action that is considered taking a direct part in hostilities, he constitutes a legitimate target for attack. According to the second approach, the civilian-combatant becomes a legitimate target from the first moment at which he took a direct part in the fighting for the first time, and remains such a target as long as he does not detach himself in an objectively identifiable manner. The third approach relates to membership and holds that as long as a civilian is a member of the armed struggle group he is considered a legitimate target. The fourth approach, which can be referred to as the limited membership approach, combines the test of taking a direct part in hostilities and the membership approach, so as to restrict the group of civilian-combatants who lose their protection to the members of the military arm of an armed struggle group. The remaining members of the group will be subject to the test of specific actions and the test of the directness of their contribution to the fighting. The fifth approach refers to the threat involved in the action as the rationale for attacking the civilian-combatant. When that threat is not real and severe the civilian should not be attacked; rather, he or she should be dealt with by the available means of law enforcement.³⁰

In cases of doubt over whether the person concerned is a civilian or combatant, international law states that the individual shall be presumed to be a civilian.³¹ As the ICTY ruled in the case of *Stanislav Galić*:

²⁶ See D. Fleck, *The Handbook of Humanitarian Law in Armed Conflicts* 32 (1995), p. 232.

²⁷ See Inter-American Commission on Human Rights, Third Report on Human Rights in Columbia, 811 (1999).

²⁸ See D. Fleck, *The Handbook of Humanitarian Law in Armed Conflicts* 32 (1995), p. 232.

²⁹ See *Commentary on the Additional Protocols*, p. 516.

³⁰ For a review of the various approaches, see: Harvard University Policy brief, International Humanitarian Law and Civilian Participation in Hostilities, October 2007, available at: <http://www.hpcrresearch.org/pdfs/ParticipationBrief.pdf>.

³¹ Section 50 (1) of Protocol I. See also the rules of customary law in *Customary International Humanitarian Law*, pp. 23-24.

“A person shall be considered to be a civilian for as long as there is a doubt as to his or her real status. The Commentary to Additional Protocol I explains that the presumption of civilian status concerns ‘persons who have not committed hostile acts, but whose status seems doubtful because of the circumstances.’ They should be considered to be civilians until further information is available, and should therefore not be attacked.”³²

And subsequently:

“In case of doubt as to the status of a person, that person shall be considered to be a civilian.”³³

The burden of proving that a civilian has lost the protection conferred upon him by law and has become a legitimate target for attack is a heavy one:

“[W]hen there is a situation of doubt, a careful assessment has to be made under the conditions and restraints governing a particular situation as to whether there are sufficient indications to warrant an attack. One cannot automatically attack anyone who might appear dubious.”³⁴

As stated above, the principle of distinction also calls for a distinction to be made in selecting the targets for attack, and prohibits attacks on civilian objects.

What are civilian objects?

Civilian objects are all objects that are not military.³⁵ This rule also has the status of customary international law.³⁶ Section 52(2) of Protocol I states as follows:

“Attacks shall be limited strictly to military objectives. 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.”

The ICRC’s official Commentary on the Additional Protocols states:

“A closer look at the various criteria used reveals that the first refers to objects which, by their ‘nature’, make an effective contribution to military action. This category comprises all objects directly used by the armed forces: weapons, equipment, transports, fortifications, depots, buildings occupied by armed forces, staff headquarters, communication centres etc.”³⁷

³² See *Prosecutor v. Stanislav Galic* (Trial Judgment and Opinion) IT-98-29-T. International Criminal Tribunal for the former Yugoslavia (ICTY). 5 December 2003, paragraph 50, available at: <http://www.unhcr.org/refworld/docid/4147fb1c4.html>.

³³ Ibid. paragraph 55.

³⁴ See *Customary International Humanitarian Law*, p. 24.

³⁵ See closing passage to Section 52 (1) to Protocol I.

³⁶ See Rule 7 on p. 25, Rule 8 on p. 29, Rule 9 on p. 32 and Rule 10 on p. 34 in *Customary International Humanitarian Law*.

³⁷ See Commentary on the Additional Protocols, p. 636.

Section 52(3) of Protocol I refers to cases of doubt with regard to the nature of the attack. The section states that:

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

Part 2 – Legal Analysis of the Events

Issue 1 – The legality of the attacks on members of Hamas, and in particular members of the civilian police

The facts: On 27 December 2008, the Israeli military fired a missile at a parade to mark the graduation of police cadets in the Gaza Strip, which was held at the police headquarters in Gaza City. Dozens of civilians were killed in the attack, the majority of whom were members of the civilian police force.³⁸ Following reports that most of the casualties were police, Israel’s Minister of Foreign Affairs Tzipi Livni declared on 28 December 2008 that the majority of the casualties had been in uniform.³⁹

In light of the legal principles presented above, the question is therefore whether the members of the civilian police force in the Gaza Strip were a legitimate target.

The State of Israel does not recognize members of Hamas as military personnel and does not recognize that they meet the criteria of Article 1 of the Hague Regulations. Thus in order to determine whether the attack on the civilian police force was legitimate, it is necessary first to determine whether the criteria that would deprive them of the protection afforded to civilians were met in this case. The facts that the policemen were wearing uniforms and were members of Hamas are not enough to deprive them of their protected status as civilians.

In addition to its status as an armed struggle group, Hamas is also a national religious movement that maintains an extensive network of religious, social and political institutions. Hence not every member of Hamas is a combatant. Moreover, since Hamas’s take-over of Gaza in July 2007, the organization has in practice been governing the Strip and administering its social and public life as an alternative regime to the Palestinian Authority. In this governing capacity the organization employs workers and bureaucrats – some of whom are members of Hamas and others are not – to fill civilian-administrative positions in the regime. The police units form a part of that regime, and as such are not necessarily members of the military arm of the organization.

³⁸ See the weekly report on the protection of civilians issued by the Office of the Humanitarian Coordinator, 24-31, December 2008 (291), available at: http://www.ochaopt.org/documents/ocha_opt_protection_of_civilians_weekly_2008_12_31_Hebrew.pdf.

³⁹ See the statement made by the minister at a briefing for foreign ambassadors held in Sderot on 12 December 2008, available at: http://www.mfa.gov.il/MFAHeb/Spokesman/2008/FM_Livni_briefs_foreign_diplomats_in_Sderot_281208 (Hebrew). See also a statement by Government Secretary Oved Yehezkel, at a briefing for correspondents that took place on Sunday, 28 December 2008: “Most of the Palestinian casualties were members of Hamas, who were in uniform and were even holding weapons.”

Pursuant to Section 43(3) of Protocol I, even an armed law enforcement agency or a paramilitary agency is not a part of the armed forces as long as the party to an armed conflict has not informed the other parties of the incorporation of such agencies into its armed forces. This stipulation applies even more forcefully to a civilian police force, whose role is law enforcement and maintaining public order. Accordingly, it is *prima facie* apparent that members of the civilian police force are not Hamas combatants and do not fulfill the functions of combatants.

Israel launched its attacks on Gaza in a surprise move; prior to the attack there were no initial exchanges of fire between Israeli soldiers and Hamas combatants. Moreover, most – if not all – of the targets that were attacked at the beginning of the military operation are located in the heart of the Strip a considerable physical distance away from the areas from which rockets were launched into Israeli territory. These two facts rule out the assumption that in the course of the attack, the Hamas members who were targeted for attack were involved in hostilities *at that time*. As stated above, the “directness” of participation in hostilities is derived from the function that is fulfilled by individuals. As the policemen were not related – at least not directly – to the combat activity, they do not meet the requirements of the exception that would deprive them of their immunity. In this case, an individual examination is required to determine the extent and duration of the involvement of each member of the police force, and whether each person regularly took a direct part in hostilities against Israel. The need for this individual examination prior to the attack and before depriving the policemen of their protection leads inevitably to the conclusion that the mass assassination perpetrated by Israel was illegal.

As stated above, in order for an attack to be legal, it must be directed against a legitimate target. As Israeli daily newspaper *Haaretz* reported, the “criminalization” of the policemen (in other words, the justification for harming them) was based on a definition of their status as a force of resistance to a potential Israeli incursion into Gaza, and not on individual information about each member of the police force.⁴⁰ In other words, it was the attack itself that altered the definitions of the intended victims. As a result, in the opinion of the Israeli military’s legal advisors, the role of the policemen changed from civilian enforcers of order to potential participants in hostilities, who are allowed to be attacked.⁴¹ This view is erroneous and runs counter to the principles of international law concerning military necessity and the principle of distinction, according to which the legality of the attack is dependent on the status of the object subject to attack. Furthermore, international law recognizes the phenomenon of *levée en masse* (mass conscription), but this recognition does not necessarily obviate the need for distinction to be drawn between combatants and civilians. According to such logic, it would always be possible to justify an attack on civilians because any civilian could potentially become part of a *levée en masse*.

It is not possible to justify the attack on the policemen as “collateral or incidental damage”, because the policemen themselves constituted the *a priori* objective of the attack. Under international law, recognition of the possibility of inadvertent harm to civilians is limited to, cases of collateral or incidental damage in attacks mounted against legitimate targets. This restricted recognition was not intended to allow deliberate harm to be caused to a civilian population or the breach of the principles of military necessity and distinction, and was certainly

⁴⁰ See Yotam Feldman and Uri Blau, “Operation ‘Cast Lead’: How the Judge-Advocate General’s Corps let the Israeli army win”, *Haaretz*, 23 January 2008, available at:

<http://www.haaretz.co.il/hasite/spages/1057768.html?more=1> .

⁴¹ Ibid.

not intended to run counter to the central purpose of IHL: to reduce the suffering incurred by a civilian population during an armed conflict.⁴² As the ICTY ruled in the case of *Stanislav Galić*:

“... [T]he Trial Chamber agrees with previous Trial Chambers that indiscriminate attacks, that is to say, attacks which strike civilians or civilian objects and military objectives without distinction, may qualify as direct attacks against civilians. It notes that indiscriminate attacks are expressly prohibited by Additional Protocol I. This prohibition reflects a well-established rule of customary law applicable in all armed conflicts...

“One type of indiscriminate attack violates the principle of proportionality. The practical application of the principle of distinction requires that those who plan or launch an attack take all feasible precautions to verify that the objectives attacked are neither civilians nor civilian objects, so as to spare civilians as much as possible. Once the military character of a target has been ascertained, commanders must consider whether striking this target is ‘expected to cause incidental loss of life, injury to civilians, damage to civilian objectives or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.’ If such casualties are expected to result, the attack should not be pursued. The basic obligation to spare civilians and civilian objects as much as possible must guide the attacking party when considering the proportionality of an attack. In determining whether an attack was proportionate it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack.”⁴³

The ICTY Court of Appeals confirmed the aforementioned rulings by the ICTY and added that it was not possible to justify an attack on civilians on the basis of military necessity. The Court of Appeals emphasized that, “There is an absolute prohibition on the targeting of civilians in customary international law” and that “the prohibition against attacking civilians and civilian objects may not be derogated from because of military necessity...”⁴⁴

Even the presence of a large number of combatants, who constitute a lawful target for attack, does not justify an attack on a concentration of civilians, as the harm to the civilian population will of necessity be disproportionate:

“Although the number of soldiers present at the game was significant, an attack on a crowd of approximately 200 people, including numerous children, would clearly be expected to cause incidental loss of life and injuries to civilians excessive in relation to the direct and concrete military advantage anticipated.”⁴⁵

Conclusion: Members of a civilian police should benefit from the protection which is conferred upon them as civilians under customary international law. Given that the conditions for the exception to this rule – i.e., taking a direct part in hostilities at the time of the attack – were not met, the attack ran counter to customary international humanitarian law.

Issue 2 - The legality of the attacks on government institutions and buildings

⁴² See *Elements of War Crimes under the Rome Statute of the International Criminal Court*, p. 161.

⁴³ Paragraphs 56-58 of the ICTY’s ruling.

⁴⁴ Ruling by the ICTY Court of Appeals in the *Galić* Case, paragraph 130.

⁴⁵ Ruling in the *Galić* Case, paragraph 387.

The facts: In the course of the “Operation Cast Lead” the Israeli military deliberately attacked Hamas government buildings and government institutions.⁴⁶ Among the attacked buildings were the Legislative Council, the Ministry of Justice, the Ministry of Transport and the Ministry of Communications. A total of 68 government buildings and 31 offices belonging to non-governmental organizations were completely destroyed or damaged during the operation.⁴⁷ According to an announcement made by the Israeli Army Spokesperson on 1 January 2009, “Last night, the Israel Air Force attacked the Legislative Council building and the Ministry of Justice in the government compound, which are located in Gaza City. The attack on strategic government objectives, which constitute part of Hamas’s mechanism of control, is a direct response to the continued firing on communities in southern Israel by the Hamas terrorist organization.”⁴⁸

In a report by the *Washington Post* on this policy, senior members of the Israeli military were quoted as declaring the target bank to have been expanded to include Hamas’s broad support network, and that the choice of targets was intended to weaken all of the aspects of Hamas and to harm its civilian infrastructure, not only its military arm:

“While previous Israeli assaults on Gaza have pinpointed crews of Hamas rocket launchers and stores of weapons, the attacks that began Saturday have had broader aims than any before. Israeli military officials said Monday that their target lists have expanded to include the vast support network that the Islamist movement relies on to stay in power in the strip. The choice of targets suggests that Israel intends to weaken all the various facets of Hamas rather than just its armed wing.”

“There are many aspects of Hamas, and we are trying to hit the whole spectrum, because everything is connected and everything supports terrorism against Israel,” said a senior Israeli military official who spoke on the condition of anonymity.

“Hamas’s civilian infrastructure is a very, very sensitive target. If you want to put pressure on them, this is how,” said Matti Steinberg, a former top adviser to Israel’s domestic security service and an expert on Islamist organizations⁴⁹ [emphasis added].

In addition, Maj. Avital Leibovitz, Head of the International Communications Section in the Israeli Army Spokesperson’s Office, was also cited in the *Washington Post* as stating that, “Anything affiliated with Hamas is a legitimate target.”⁵⁰

⁴⁶ See media reports, for example, *Haaretz*, 30 December 2008, “Operation ‘Cast Lead’: Israel Air Force attacked buildings of the Hamas government last night, 10 killed”, available at: <http://www.haaretz.co.il/hasite/spages/1051213.html> (Hebrew); *Haaretz*, 31 December 2008: “Last night: Israel Defense Forces bombed Ismail Haniyeh’s office and tunnels on the Egyptian border; attacks continuing”, available at: <http://www.haaretz.co.il/hasite/spages/1051548.html> (Hebrew).

⁴⁷ See the report on the situation in Gaza issued by the Office of the Humanitarian Coordinator, 3-5 February 2009: http://www.ochaopt.org/documents/ocha_opt_gaza_humanitarian_situation_report_2009_02_05_english.pdf.

⁴⁸ Official statement by an Israeli military spokesman, 1 January 2009, available at: http://dover.idf.il/IDF/News_Channels/art_mivzaim/09/01/0101.htm (Hebrew).

⁴⁹ See <http://www.washingtonpost.com/wp-dyn/content/story/2008/12/29/ST2008122900406.html>.

⁵⁰ Ibid.

This policy runs counter to the basic principles of customary international law, including the principle of military necessity and the principle of distinction. As explained above, these principles demand that a distinction be made between military targets and civilian objects, and are intended to prevent deliberate attacks on civilian objects. Generally speaking, government institutions are not included within the framework of military targets unless they conform to the criteria set forth in Section 52(2) of Protocol I. There is grave doubt as to whether the absolute or partial destruction of a certain building constituting a symbol of government or a government building confers a clear military advantage upon Israel in cases where the nature, purpose or use of the building in question do not make an effective contribution to military operations against it. The exception which permits harm to civilian objects is related to the test of military necessity, according to which it is permissible for combatant forces to cause harm to civilian objects only if that harm serves a *vital and immediate military need*; that is, to weaken or overcome the enemy or bring the battle to an end.⁵¹

Not every instance of harm to the enemy's war effort conforms to the test of military necessity. A committee established by the ICTY Office of the Prosecutor to review, inter alia, the legality of the NATO bombings of Yugoslavia and the bombing of the television station in Belgrade, determined that insofar as the bombing was directed at sabotaging Yugoslavia's military communications infrastructures, it met the test of military necessity. Had it transpired, however, that the purpose of the bombing was solely and exclusively to harm the morale of the Yugoslavian population and weaken support for the Slobodan Milošević regime, it would have failed the test of military necessity:

“... Disrupting government propaganda may help to undermine the morale of the population and the armed forces, but justifying an attack on a civilian facility on such grounds alone may not meet the ‘effective contribution to military action’ and ‘definite military advantage’ criteria required by the Additional Protocols (see paras. 35-36, above). The ICRC Commentary on the Additional Protocols interprets the expression ‘definite military advantage anticipated’ to exclude ‘an attack which only offers potential or indeterminate advantages’ and interprets the expression ‘concrete and direct’ as intended to show that the advantage concerned should be substantial and relatively close rather than hardly perceptible and likely to appear only in the long term (ICRC Commentary on the Additional Protocols of 8 June 1977, para. 2209). **While stopping such propaganda may serve to demoralize the Yugoslav population and undermine the government’s political support, it is unlikely that either of these purposes would offer the ‘concrete and direct’ military advantage necessary to make them a legitimate military objective. ...**”⁵² [Emphasis added].

Customary law specifies that a civilian target will enjoy protection from attack unless and for such time as it serves as a military target. This customary rule has been detailed in the following terms:

“It is clear that, in case of doubt, a careful assessment has to be made under the conditions and restraints governing a particular situation as to whether there are sufficient indications to warrant an attack. It can not automatically be assumed that any object that appears dubious may be subject to lawful attack. This is also

⁵¹ See *International Law – Between War and Peace*, p. 147.

⁵² Paragraph 76 of the committee's report. For the full report, see: http://kosova.org/de/allied_force/final_report/index.asp.

consistent with the requirement to take all feasible precautions in attack, in particular the obligation to verify that objects to be attacked are military objectives liable to attack and not civilian objects (see Rule 16).”⁵³

The very fact that a combatant is present within the civilian population does not cancel the civilian character of the population; nor does it imply that the population loses the protection to which it is entitled. As the ICTY ruled, “The population against whom the attack is directed is considered civilian if it is predominantly civilian”⁵⁴; and further that, “[T]he Appeals Chamber finds that the jurisprudence of the International Tribunal in this regard is clear: the presence of individual combatants within the population attacked does not necessarily change the fact that the ultimate character of the population remains, for legal purposes, a civilian one.”⁵⁵

As we have seen, the same logic that underlies the exception to depriving civilians of protection also applies with regard to depriving civilian objects of protection. Accordingly, the same restrictions and duties of care to ensure compliance with the conditions of the exception also apply to the matter before us.

Thus it is apparent that the attack on government buildings and institutions on the basis of the claim that they formed part of the Hamas regime is illegal. This illegality stems from the immunity enjoyed by these targets under IHL, and the fact that these attacks cannot be justified as falling within the scope of the exception that deprives the civilian objects of the protection to which they are entitled.

The implications of the breach of the laws of war: international crimes and individual criminal responsibility

Attacks that fail to distinguish between combatants and military targets and civilians and civilian objects constitute grave breaches of customary international law and are considered as war crimes.⁵⁶ Attacks that are perpetrated against a civilian population may also be considered crimes against humanity if they are committed “as part of a wide or systematic attack directed against any civilian population, with knowledge of the attack.”⁵⁷

As described above, Israel’s military attacks on policemen and the government buildings were the outcome of advanced planning and of a policy that was formulated jointly by the Israeli government and the Israeli military; they were carried out on a broad scale and in a systematic manner (that is, they included a large number of actions).⁵⁸ Accordingly, the attack on the

⁵³ See *Customary International Humanitarian Law*, p. 36.

⁵⁴ See, e.g., *Prosecutor v. Naletilic and Martinovic*, International Criminal Tribunal for the former Yugoslavia (ICTY), Trial Chamber, 31 March 2003, paragraph 235.

⁵⁵ See, *Prosecutor v. Stanislav Galic* (Appeal Judgment). IT-98-29-A. International Criminal Tribunal for the former Yugoslavia (ICTY). 30 November 2006. available at:

<http://www.unhcr.org/refworld/docid/47fd6b565.html>; see also *Prosecutor v. Akayesu*, International Criminal Tribunal for Rwanda (ICTR), Trial Chamber, 2 September 1998, paragraph 582.

⁵⁶ See Article 50 of the First Geneva Convention, Article 51 of the Second Geneva Convention, Article 130 of the Third Geneva Convention, Article 147 of the Fourth Geneva Convention; see also Article 8 of the Rome Statute of the ICC of 1998.

⁵⁷ Article 7 of the Rome Statute.

⁵⁸ See, e.g., Alon Ben David, article in *Jane’s*, 9 January, 2009; Avihai Mandelblat, “Consultancy Under Fire”, *Haaretz* Website, 29 January 2009; Amos Harel, “IAF begins an extensive offensive in Gaza; Palestinians report 155 killed”, *Haaretz*, 27 December 2008; Maya Bengal and Amir Buchbut, “Gaza: 205 killed in Israeli army attack; Livni: No one in Hamas will be immune”, *nrg* website, 27 December 2008; Amir Buchbut and Jackie Khoury, “IAF attack in Gaza: 3 Palestinians killed”, *nrg* website, 27 December 2008.

policemen is likely to be considered as a war crime pursuant to Article 8(2)(a)(1) and/or Article 8(2)(b)(1) of the Rome Statute of the International Criminal Court (ICC) and a crime against humanity pursuant to Article 7(1) of the statute, which concerns the deliberate killing of civilians or a deliberate attack on civilians who are not taking a direct part in the fighting.

The attack on the government buildings is also likely to be considered as a war crime pursuant to Article 8(2)(a)(1) and/or Article 8(2)(b)(8) and/or Article 8(2)(b)(13) of the Rome Statute, which prohibit the extensive destruction of property for reasons other than military necessity and a direct attack on civilian objects.

The attacks on the policemen and the government buildings also pass the threshold test set out in Article 8(1) of the Rome Statute, which requires the existence of a plan or a policy, or the broad-scale performance of the actions in question. In this context it should be noted that, notwithstanding the fact that the State of Israel is not a party to the Rome Statute, Article 7 and 8 of the statute, which concern war crimes and crimes against humanity, essentially reflect customary international law, and therefore apply to actions and/or omissions that run counter to the provisions thereof.

Since the unlawful attacks on the policemen and on governmental buildings and installations constitute severe breaches of customary international law and are considered international crimes, their perpetrators carry criminal accountability.

Under international law, persons who have committed war crimes and crimes against humanity bear individual or personal criminal responsibility (unless one of the defenses recognized under law is available to them).⁵⁹ Personal responsibility is founded on two bases: direct responsibility for the actual perpetration of an international crime, planning, inciting, or the giving of an order to commit such a crime; and/or “vicarious” (indirect) responsibility, which is likely to apply to military commanders (command responsibility) or civilian leaders (superior responsibility) with regard to international crimes committed by their subordinates. In order to establish vicarious criminal responsibility it is necessary to prove that a relationship of subordination existed between the commander or superior and the actual perpetrator (the test of actual control), and that the commander knew, or should have known, about the crimes.⁶⁰ In the case before us, all of these elements exist in view of the planning that was undertaken in advance and the policy that was adopted and openly declared. The requirements that apply to a military commander also apply to a political leader, who in fact constitutes part of the chain of military command, such as the Minister of Defense.⁶¹

⁵⁹ See Section 49 of the First Geneva Convention, Section 50 of the Second Geneva Convention, Section 129 of the Third Geneva Convention, Section 146 of the Fourth Geneva Convention; see also Section 8 of the Rome Convention. With regard to the defenses, see Sections 31 through 33 of the Rome Convention.

⁶⁰ See *International Law – Between War and Peace*, p. 291.

⁶¹ *Ibid.*, p. 296.