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Questions & Answers

Al-Haq's Legal Analysis on the Escalation of Attacks in the Gaza Strip between 8 and 21 November 2012

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1. What is the sequence of events that led to the escalation of attacks in the Gaza Strip?

Between 8 and 21 November 2012, the Gaza Strip has been under indiscriminate and disproportionate Israeli attacks. The escalation of attacks in the Gaza Strip began several days before Israel authorised the extrajudicial killing of Ahmad Sa'id al-Ja'bari, one of the leaders of the military wing of Hamas, on Wednesday 14 November 2012.

The previous week an unarmed Palestinian man, reportedly suffering from mental health difficulties, was shot and killed by Israeli military forces when he entered the buffer zone, a military no-go area that extends over approximately 17 per cent of the territory of the Gaza Strip barred to Palestinian access.¹

On Thursday 8 November, Israeli soldiers shot 13-year-old Ahmad Younis Abu Daqqa in the stomach during an incursion into the Gaza Strip. He died as a result of his injury. Two days later, Israeli forces launched at least four shells from tanks on an area where Palestinians were playing football, in Khan Younis governorate. Five civilians, including two children, died as a result. These incidents resulted in increased violence between Palestinian armed groups and Israel.

Attacks came from both sides until 13 November, when a truce was agreed. That truce was broken by Israel with the extra-judicial killing of Ahmad Sa'id al-Ja'bari, which was followed by the launching of the Israeli military operation, code-named 'Pillar of Defence.'

Al-Haq recalls that the recent escalation of violence erupted in the broader context of the ongoing Israeli occupation of the Gaza Strip, which includes the illegal regime of closure imposed by Israel since 2007.

Civilian deaths such as those witnessed in November 2012 are a common occurrence in the Gaza Strip. It would therefore be inaccurate and misleading to ignore abovementioned incidents and by default hold Palestinian armed groups responsible for the escalation of hostilities witnessed between Thursday 8 November and the ceasefire agreement reached on Wednesday 21 November 2012.

During the recent Israeli military operation, the Palestinian civilian population in the Gaza Strip paid a tragic price. Since the outbreak of attacks on 8 November, Al-Haq's preliminary documentation indicates a total of **173** Palestinian deaths of whom **113** were civilians, including **13** women and **38** children. Al-Haq reports at least **1,221** injuries, of whom **207** are women and **445** children. The attacks have caused severe destruction to infrastructure in the Gaza Strip, and left at least **78** homes, **14** mosques (**3** gravely damaged), **15** government buildings, **2** media offices, **3** cemeteries and **1** bank destroyed or severely damaged. Some **950** civilian buildings were totally or partially damaged.²

2. What is the legal framework applicable to the situation in the Gaza Strip?

Together with the West Bank, including East Jerusalem, the Gaza Strip is an integral and inseparable part of the Palestinian territory occupied by Israel since 1967. The Occupied Palestinian Territory (OPT) is recognised as a single territorial unit in which the Palestinian people have the right to exercise self-determination as established under international law.³

The law of belligerent occupation

Notwithstanding Israel's 2005 unilateral 'disengagement', the Gaza Strip remains under occupation, as affirmed by the ICRC,⁴ numerous States⁵ and UN bodies.⁶ Under Article 42 of the Hague Regulations Annexed to the Hague Convention IV Respecting the Laws and Customs of Wars on Land of 1907 (Hague Regulations), the application of the law of occupation is triggered by the establishment of a hostile power's 'effective control' over a foreign territory and its population. As affirmed by the International Tribunal for the Former Yugoslavia (ICTY), 'effective control' exists if "the occupying power has a sufficient force present, or the capacity to send troops within a reasonable time to make the authority of the occupying power felt."⁷ Israel has repeatedly demonstrated its capacity to meet this requirement to disastrous effect. Furthermore, Israel retains full control of the Gaza Strip's land borders, population registry, airspace and territorial sea.⁸

As long as Israel, as the Occupying Power in the Gaza Strip, maintains effective control over the occupied territory, it is bound by its obligations under international humanitarian law (IHL) as enshrined in the Hague Regulations and the Fourth Geneva Convention of 1949 (Fourth Geneva Convention).⁹ Furthermore, International Court of Justice (ICJ) jurisprudence¹⁰ and State practice confirm that obligations stemming from human rights conventions ratified by the Occupying Power also apply in occupied territory.¹¹

The applicability of the law of international armed conflicts

The Israeli occupation of the Gaza Strip in 1967 is the result of the international armed conflict fought against its neighbouring countries.¹² Common Article 2 of the Four Geneva Conventions of 1949 (Geneva Conventions) states: "The present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Power, even if the said occupation meets with no armed resistance."¹³

Accordingly, Common Article 2 also covers occupation after an international armed conflict,¹⁴ and, as such, every armed conflict between the Occupying Power and armed groups warrants classification as an international armed conflict following the applicability of the law of occupation.¹⁵ The escalation of attacks in the Gaza Strip is therefore subject to the provisions enshrined in the Hague Regulations and the Geneva Conventions.

3. Why is Israel's justification of 'self-defence' misleading?

Israel's invocation of Article 51 of the United Nations (UN) Charter for conducting its military operation, code-named 'Pillar of Defence,' is based on a legally flawed pretext, which ignores the continuing existence of an international armed conflict.

Article 2(4) of the UN Charter obliges "[a]ll Members [to] refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."¹⁶ The prohibition and its only exception of 'self-defence' are an integral part of *jus ad bellum*, which is defined as the set of criteria regulating the legality of the use of force before an armed conflict erupts.

In this regard, the ability of Israel to invoke the justification to 'self-defence' as provided for in a situation prior to the conflict is excluded because of the existing regime of military occupation. As such, the law that governs the way in which warfare is conducted (*jus in bello*) provides the applicable legal framework for regulation of Israel's conduct.

By distorting the applicable framework of international law, Israel attempts to create a façade of legitimacy for the claim of 'self-defence' to justify 'Operation Pillar of Defence,' and to evade international legal obligations.¹⁷

4. Why is Israel's use of the terrorism paradigm a distortion of international law?

Notwithstanding the lack of an internationally accepted definition of terrorism or a legal regime applicable to it, the UN Security Council has made it clear that any actions combating terrorism must "comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law."¹⁸ UN Human Rights Commission's expert on counter-terrorism and human rights, Robert Goldman, further stated that "[a]lthough humanitarian law proscribes terrorism, the fact that such acts are committed during an armed conflict does not alter either the legal status of the hostilities or of the parties involved or the duty of the parties to observe humanitarian law."¹⁹ In line with this, the International Committee of Jurists has concluded that the current legal framework of IHL and IHRL provides a sufficiently robust framework in which to address terrorism.²⁰

Therefore, Israel's claim that it is engaged in a conflict to combat alleged terrorism does not absolve it from its obligations as a party to that conflict. As such, IHL and IHRL remain the applicable bodies of law for any Israeli actions taken in the Gaza Strip no matter the pretext.

5. What constitute a legitimate military target?

The principle of military necessity

As dictated by the principle of military necessity, belligerent parties must assess whether a military advantage will be gained as a result of the attack against legitimate military targets. Even if the proposed action does not violate other rules of IHL – military necessity can never be used to offset violations of IHL – attacks not intended to contribute to the enemy's military defeat can never be justified by military necessity, because they serve no military purpose.

The principle of distinction

The cardinal principle of distinction requires the parties to a conflict to always distinguish between civilians and combatants. Attacks may only be directed against combatants. Members of the armed forces of a party to the conflict are combatants and identified as legitimate military targets.²¹ In addition, members of armed groups belonging to a party to the conflict are also considered combatants, if they fulfil the following four cumulative conditions:²²

- that of being commanded by a person responsible for his subordinates;
- that of having a fixed distinctive sign recognisable at a distance;
- that of carrying arms openly;

- that of conducting their operations in accordance with the laws and customs of war.

All persons not falling into the previous category of combatants are civilians and as such entitled to protection against direct attacks.²³ The exception to the prohibition of direct attacks against civilians stipulates that civilians may be directly targeted when and only for such time as they take direct part in hostilities.²⁴

An act amounting to direct participation in the hostilities must meet three cumulative requirements:²⁵

- a threshold regarding the harm likely to result from the act;
- a relationship of direct causation between the act and the expected harm;
- a belligerent nexus between the act and the hostilities conducted between the parties to an armed conflict.

In other words, an act carried out by a civilian amounts to direct participation in hostilities if the civilian's contribution is by its nature or purpose likely to cause actual harm to the other party.²⁶ At the same time, the act must be "specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another."²⁷ When in doubt as to whether a civilian is taking direct part hostilities, the person must be presumed to be protected against direct attack.²⁸

Therefore, the mere affiliation of civilians to Hamas, or any other Palestinian armed group, neither justifies attacks against them, nor abrogates their right to protection. Acts providing logistical support to armed groups, or carried out in physical proximity to armed groups do not themselves constitute direct participation in hostilities.

The principle of proportionality

In line with the cardinal principle of proportionality, parties to the armed conflict must ensure that, when launching an attack, the expected harm to civilians and civilian objects is not excessive in relation to the concrete and direct military advantage anticipated. Any attacks that violates the principle of proportionality is prohibited under customary law, as reflected in Article 51(5)(b) of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts of 1977 (Additional Protocol I).²⁹ As such, parties are obliged to carefully choose means and methods of attack to minimise civilian casualties and to cancel an attack should the harm to civilians exceed the expected military advantage.³⁰

6. How are civilian objects protected during armed conflict?

The prohibition of direct attacks against civilian objects, such as houses, apartments, school, hospitals, places of worship and cultural objects mirrors the protection afforded to civilians against direct attacks during armed conflict.³¹ In accordance with customary humanitarian law, as expressed in Article 52(2) Additional Protocol I, "attacks shall be limited strictly to military objectives."³² This classification limits the objects the parties to a conflict are allowed to target to "those [...] which by their nature, location, purpose or use make an effective contribution to military action," provided that attacks against such objects do not violate the principle of military necessity. Both elements need to be simultaneously present to constitute a military objective.³³

Civilian objects can become military objectives when they “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.”³⁴ Thus, for instance, a civilian car used to transport combatants or the basement of a house used to store weapons could become military objectives only by virtue of the effective contribution to a particular military action.

However, attacks against civilian objects that have become military objectives must adhere to the cardinal principles of military necessity and proportionality. Thus, any such attacks launched must offer a definite military advantage that reaches a certain threshold.³⁵ When in doubt as to whether a civilian object is used to make an effective contribution to military action, it shall be presumed not to be so used.³⁶ Before launching an attack, precautions to minimise damage to civilian objects must be taken.³⁷

Al-Haq’s preliminary documentation indicates that at least 6 ambulances have been hit by Israeli attacks. Notwithstanding the exception of their loss of protection if used outside their humanitarian function to commit harmful acts that make an effective contribution to the imminent attack against the enemy,³⁸ rules of IHL oblige the parties to the conflict to respect and protect military and civilian means of medical transportation.³⁹ The medical transport of civilians must be respected and protected in the same manner as civilian hospitals. As such, medical convoys cannot be attacked or harmed in any other way and their passage cannot be arbitrarily obstructed.⁴⁰

As a result of the illegal regime of closure imposed on the Gaza Strip by Israel since 2007, the Gaza Strip has not been able to fully recover from the devastation caused by Operation Cast Lead in 2008-2009. Further information collected by Al-Haq field researchers suggested a rapid decrease of the already limited amount of medical supplies during the escalation of attacks, severely affecting the ability of hospitals in the Gaza Strip to cope with the high number of casualties. Israel, as the Occupying Power of the Gaza Strip, is under the obligation to ensure that the occupied population living therein has adequate medical and food supplies.⁴¹

Al-Haq further documented Israeli attacks against media buildings in the Gaza Strip, despite the presence of journalists in the buildings at the time of the attacks. Article 79 of Additional Protocol I, reflective of customary law, stipulates that journalists must be considered civilians, provided that they take no action adversely affecting their status as civilians.⁴² As such, journalists, who in their professional capacity find themselves in areas of armed conflict, must be respected and protected as long as they are not taking a direct part in hostilities.⁴³

In addition to the prohibition of direct attacks against journalists, common to all civilians, States have indicated that parties to the conflict must “ensure the safety” of journalists and refrain from harassment or intimidation, as well as protecting representatives of the media against actions that would discourage them from carrying out their professional activities.⁴⁴

7. What are the relevant considerations of a ceasefire agreement between Palestinian armed groups and Israel under international law?

According to rules pertaining to armistices under Chapter V of the Hague Regulations, a ceasefire agreement suspends military operations between the belligerent parties,⁴⁵ either for an agreed limited time or until further notice is provided by one of the parties. If the ceasefire agreement between Hamas and Israel

contains a timeframe, both parties retain the right to unilaterally denounce it and immediately resume hostilities – particularly in cases of imminent danger or urgency – should any serious violation of the ceasefire agreement occur.⁴⁶

The conclusion of a ceasefire agreement merely suspends active hostilities, thus will not terminate the ongoing armed conflict between Israel and Palestinian armed groups in the Gaza Strip and the regime of military occupation of the whole OPT.

8. What are the responsibilities incumbent upon Israel?

Israel's indiscriminate and disproportionate attacks in the Gaza Strip, including the targeting of civilians and civilian objects, constitute violations of Israel's obligations under the Fourth Geneva Convention and of the customary provisions enshrined in Additional Protocol I. Some of these acts may also amount to grave breaches of the Fourth Geneva Convention under Article 147 and trigger individual criminal responsibility according to Article 146. Israel, as High Contracting Party to the Geneva Conventions, has undertaken an obligation, as per Common Article 1, "to respect and to ensure respect for the Conventions in all circumstances." In particular, with regard to violations of the Conventions that amount to grave breaches, Israel is under an obligation, as per Article 146 of the Fourth Geneva Convention, to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed grave breaches, and to investigate and prosecute individuals allegedly responsible for those violations.

By failing to respect its obligations under IHL when engaged in military operations, Israel as a State is responsible, under customary international law, for internationally wrongful acts within the meaning of Article 2 of the International Law Commission Draft Articles on States Responsibility for Internationally Wrongful Acts of 2001 (ILC Draft Articles)⁴⁷ which stipulates that "[t]here is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State." According to Article 1 of the ILC Draft Articles, "[e]very internationally wrongful act of a State entails the international responsibility of that State." Under Articles 30 and 31 of the ILC Draft Articles, the State responsible for an internationally wrongful act is obliged to:

- cease such act if it is still ongoing;
- offer appropriate assurances and guarantees of non-repetition; and
- provide for reparation for the damage caused.

9. How can individuals be held criminally responsible under international law?

Serious violations of IHL, in addition to triggering State responsibility, can also amount to war crimes, which entail individual criminal responsibility. The most serious forms of war crimes constitute grave breaches of the Fourth Geneva Conventions, which are listed in Article 147. This provision refers to a series of violations committed against civilians, such as wilful killing, wilfully causing great suffering or serious injury to body or health, and the extensive destruction of property not justified by military necessity and carried out unlawfully and wantonly. According to Article 146 of the Fourth Geneva Convention, "[t]he High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed," grave breaches of the Convention." Moreover, "[e]ach High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be

committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts.” Article 146 enshrines the principle of universal jurisdiction, which entails the obligation for a national jurisdiction to investigate and prosecute an offence regardless of any territorial or nationality link with the perpetrator, the victim or the territory where the offence was committed for the sole reason that that offence amounts to a grave breach to the Geneva Conventions.

A comprehensive conceptualisation of war crimes, including grave breaches to the Geneva Conventions, can be found in Article 8 of the Statute of the International Criminal Court (ICC Statute). Although neither Israel nor Palestine have ratified the ICC Statute, Article 8 is largely reflective of customary international law.

Amongst the crimes listed in Article 8 of the ICC Statute the following are particularly relevant for the purpose of this paper:

Grave breaches:

- Wilful killing;
- Wilfully causing great suffering, or serious injury to body or health;
- Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

War crimes:

- Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
- Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
- Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
- Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;

10. What are the responsibilities incumbent upon Third States?

As explained in question 8, Israel’s conduct in the Gaza Strip violates provisions of the Geneva Conventions. This triggers the responsibility of each High Contracting Party, under Common Article 1 of the Geneva Conventions, to ensure that the Conventions are respected by all. The obligation to ensure respect should not be seen as merely reinforcing States’ general obligation to respect, but entails a duty on States, whether engaged in a conflict or not, to take all possible steps to ensure that the rules enshrined in the Conventions are respected by all, and in particular by the parties to conflict.⁴⁸ Hence, all High Contracting Parties to the Geneva Conventions are under an obligation to ensure that Israel complies with the provisions of the Conventions, while engaging in military activities.

In addition, all High Contracting Parties to the Geneva Conventions are under an obligation, as per Article 146 of the Fourth Geneva Convention, to search for, investigate and prosecute individual responsible for grave breaches of the Convention.

Finally, the International Law Commission has observed that “some of [the rules of IHL] are, in the opinion of the Commission, rules which impose obligations of *jus cogens*,” also known as peremptory norms of international law.⁴⁹ The prohibition against grave breaches of the Geneva Conventions protects fundamental values enshrined in such treaties, which enjoy universal ratification and are largely reflective of customary international law.⁵⁰ As such, the prohibition against grave breaches of the Geneva Conventions should be considered amongst those rules of IHL that impose obligations of *jus cogens*.⁵¹

Article 41 of the ILC Draft Articles, reflective of customary international law, stipulates that where there are breaches of peremptory norms of international law, namely of *jus cogens*, all States are under an obligation not to recognise the situation as lawful, not to render aid or assistance in maintaining the illegal situation and to actively cooperate in order to bring to an end the illegal situation. Consequently, Third States are bound by these obligations in relation to Israel’s violations of international law in the Gaza Strip that amount to breaches of peremptory norms of international law.

ENDNOTES

¹ See further, Al-Haq, 'Shifting Paradigms Israel's Enforcement of the Buffer Zone in the Gaza Strip' (June 2011) <<http://www.alhaq.org/publications/publications-index/item/shifting-paradigms-israel-s-enforcement-of-the-buffer-zone-in-the-gaza-strip>> accessed 26 November 2012.

² For more details, Al-Haq, 'Palestinian Families Under Fire in the Gaza Strip' (Weekly Focus) (23 November 2012) <<http://www.alhaq.org/documentation/weekly-focuses/642-palestinian-families-under-fire-in-the-gaza-strip>> accessed 26 November 2012.

³ **Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory** (Advisory Opinion) ICJ Rep 2004, paragraph 118 (hereafter: **Advisory Opinion on the Wall**); and see, *inter alia*, UNGA 58/163 (22 December 2003) UN Doc. A/RES/58/163.

⁴ ICRC, 'Gaza: No End in Sight to Hardship and Despair' (20 May 2011) <<http://www.icrc.org/eng/resources/documents/interview/2011/palestine-israel-interview-2011-05-19.htm>> accessed 26 November 2012.

⁵ Ministry of Foreign Affairs of The Russian Federation, Information and Press Department, 'Press Release Concerning Completion of Withdrawal of Israeli Settlements and Military Infrastructure from Gaza Strip' (13 September 2005) <<http://unispal.un.org/UNISPAL.NSF/0/0CA77E912C1E0EA48525707B00600559>> accessed 26 November 2012; and, United Nations Latin American and Caribbean Meeting on the Question of Palestine, 'Caracas Declaration' (14 December 2005) paragraph 4 <<http://unispal.un.org/UNISPAL.NSF/5ba47a5c6cef541b802563e000493b8c/d3e0c3f96f0d6418852570d8006b685f?OpenDocument>> accessed 26 November 2012.

⁶ See, amongst others, UNSC Res 1860 (8 January 2009) UN Doc. S/RES/1860; UNGA Res 63/98 (18 December 2008) UN Doc. A/RES/63/98, paragraph 10; 'Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967, John Dugard' (21 January 2008) UN Doc. A/HRC/7/17, paragraph 9; 'Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967, Richard Falk' (11 February 2009) UN Doc. A/HRC/10/20, paragraph 4; and 'Report of the United Nations Fact-finding Mission on the Gaza Conflict' (25 September 2009) UN Doc. A/HRC/12/48, paragraph 74.

⁷ **Prosecutor v Naletilic and Martinovic** (Trial Chamber, Judgment) ICTY-IT-98-34-T (31 March 2003), paragraph 217 <http://www.icty.org/x/cases/naletilic_martinovic/tjug/en/nal-tj030331-e.pdf> accessed 26 November 2012.

⁸ In order to maintain such control, however, the Occupying Power is not required to keep its troops permanently stationed in the occupied territory. See, United States' 'The Law of Land Warfare: Field Manual No. 27-10', paragraph 356 (1956); and, United Kingdom's 'Manual of Military Law of War on Land', paragraph 11.3.2. (1958).

⁹ See further on Israel's occupation of the Gaza Strip, Al-Haq, 'Al-Haq's Rejoinder to Gisha's 'Scale of Control' Report: Israel's Continued Responsibility as the Occupying Power in the Gaza Strip' (December 2011) <<http://www.alhaq.org/advocacy/topics/gaza/511-al-hags-rejoinder-to-gishas-scale-of-control-position-paper-israels-continued-responsibility-as-the-occupying-power-in-the-gaza-strip>> accessed 26 November 2012; and, Al-Haq, "'Enemy Entity": A Deliberate Attempt by Israel to Obscure its Continued Occupation of the Gaza Strip' (Press release) (22 September 2007) <<http://www.alhaq.org/advocacy/topics/gaza/151-enemy-entity-a-deliberate-attempt-by-israel-to-obscure-its-continued-occupation-of-the-gaza-strip>> accessed 26 November 2012.

¹⁰ **The Legality of Threat or Use of Nuclear Weapons** (Advisory Opinion) ICJ Rep 1996, paragraph 25; **Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)** ICJ Rep 2005, paragraph 175; **Advisory Opinion on the Wall** (n 3) paragraph 102-113.

¹¹ In its **Advisory Opinion on the Wall**, the ICJ held specifically that Israel's obligations under the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Political Rights (ICESCR) and the Convention on the Rights of the Child (CRC) extended to its policies in the OPT. This position was espoused by the UN General Assembly (UNGA Res 2675 (XXV) (9 December 1970) UN Doc. A/RES/2675(XXV)), the UN Human Rights Committee ('Concluding Observations: Israel' (18 August 1998) UN Doc. CCPR/C/79/Add.93, paragraph 10 <<http://www.unhcr.org/refworld/docid/3ae6b0284.html>> accessed 20 November 2012) and the European Court of Human Rights (**Loizidou v Turkey** (Judgment) (18 December 1996) 23 European Human Rights Reports, 513 in E Benvenisti, 'Water Conflicts during the Occupation of Iraq' (2003) 97 American Journal of International Law, 863, fn. 18).

¹² In 1967, Israel engaged in an international armed conflict with Syria, Egypt and the Hashemite Kingdom of Jordan and occupied all the territories which had constituted Palestine under British Mandate. **Advisory Opinion on the Wall** (n 3) paragraph 73; and, UNSC Res 1860 (8 January 2009) UN Doc. S/RES/1860.

¹³ The Commentary to the Four Geneva Conventions confirm that "any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the

conflict lasts, or how much slaughter takes place." JS Pictet, **Commentary on the Fourth Geneva Convention** (ICRC, Geneva, 1958) 20.

¹⁴ As confirmed by the ICRC, A Paulus and M Vashakmadze, 'Assymetrical War and the Notion of Armed Conflict – a Tentative Conceptualization' (2009) 91 *International Review of the Red Cross*, 113, 115.

¹⁵ A Cassese, **International Law** (Oxford University Press, Oxford, 2005) 420.

¹⁶ This prohibition is a peremptory norm of international law, creating obligations owed by each State to the international community as a whole (*erga omnes*), and the only exception to this prohibition is the threat or the use of force in 'self-defence' as provided for a situation prior to the conflict.

¹⁷ See further, Al-Haq, 'Operation Cast Lead and the Distortion of International Law: A Legal Analysis of Israel's Claim to Self-Defence under Article 51 of the UN Charter'

<<http://www.alhaq.org/attachments/article/225/OperationCastLeadandtheDistortionofInternationalLaw.pdf>> accessed 26 November 2012.

¹⁸ UNSC Res 1456 (20 January 2003) UN Doc. S/RES/1456; UNSC Resolution 1373 (28 September 2001) UN Doc S/RES/1373.

¹⁹ Report of Independent Expert on the Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Robert Goldman (7 February 2005) UN Doc. E/CN.4/2005/103, paragraph 18.

²⁰ International Commission of Jurists, 'Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights' (2009) 14, 24-25 <<http://ejp.icj.org/IMG/EJP-Report.pdf>> accessed 26 November 2012.

²¹ JM Henckaerts and L Doswald-Beck, **Customary International Humanitarian Law - Volume I: Rules** (ICRC, Cambridge University Press, 2007) Rule 1.

²² Third Geneva Convention (1949) Article 4(2).

²³ Additional Protocol I (1977) Article 50, reflective of customary international law. See, JM Henckaerts and L Doswald-Beck, **Customary International Humanitarian Law** (n 21) Rule 5.

²⁴ Additional Protocol I (1977) Article 51(3), reflective of customary international law. See, JM Henckaerts and L Doswald-Beck, **Customary International Humanitarian Law** (n 21) Rule 6; N Melzer, **Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law** (ICRC, Geneva, 2009) 65.

²⁵ N Melzer, **Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law** (n 24) 46.

²⁶ C Pillod, Y Sandoz; C Swinarski, B Zimmermann (eds), **Commentary on the Additional Protocols** (ICRC, Geneva, 1987) 619.

²⁷ N Melzer, **Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law** (n 24) 46.

²⁸ *Ibid.*, 74-76.

²⁹ Article 51(5)(b) Additional Protocol I is reflective of customary international law. See, JM Henckaerts and L Doswald-Beck, **Customary International Humanitarian Law** (n 21) Rule 14.

³⁰ *Ibid.*, Rule 15.

³¹ Additional Protocol I (1977) Article 48. See further, JM Henckaerts and L Doswald-Beck, **Customary International Humanitarian Law** (n 21) Rule 9.

³² Articles 48 and 52(2) of Additional Protocol I (1977) are reflective of customary international law. See, JM Henckaerts and L Doswald-Beck, **Customary International Humanitarian Law** (n 21) Rule 7.

³³ C Pillod (*et al.*), **Commentary on the Additional Protocols** (n 26) 635.

³⁴ Additional Protocol I (1977) Article 52(2) (see fn. 33 above).

³⁵ C Pillod (*et al.*), **Commentary on the Additional Protocols** (n 26) 636.

³⁶ Additional Protocol I (1977) Article 52(3), reflective of customary international law. See, JM Henckaerts and L Doswald-Beck, **Customary International Humanitarian Law** (n 21) Rule 10.

³⁷ JM Henckaerts and L Doswald-Beck, **Customary International Humanitarian Law** (n 21) Rule 15.

³⁸ The ICRC identifies that medical convoys, equal in protection to hospitals, lose their protection when used to transport "healthy troops, arms or munitions and [for] the collection or transmission of military intelligence." See, JM Henckaerts and L Doswald-Beck, **Customary International Humanitarian Law** (n 21) Rule 29.

³⁹ Respectively, First Geneva Convention (1949) Article 35 and Fourth Geneva Convention (1949) Article 21.

⁴⁰ JM Henckaerts and L Doswald-Beck, **Customary International Humanitarian Law** (n 21) Rule 29.

⁴¹ Fourth Geneva Convention (1949) Article 55. See further, JS Pictet, **Commentary on the Fourth Geneva Convention** (n 13) 309-310.

⁴² Additional Protocol I (1977) Article 79 is reflective of customary international law. See, JM Henckaerts and L Doswald-Beck, **Customary International Humanitarian Law** (n 21) Rule 34.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ Hague Regulations (1907) Article 36.

⁴⁶ Hague Regulations (1907) Articles 36 and 40.

⁴⁷ International Law Commission, 'Draft Articles on States Responsibility for Internationally Wrongful Acts' (2001).

⁴⁸ See, L Boisson de Chazournes and L Condorelli, 'Common Article 1 of the Geneva Conventions revisited: Protecting collective interests' (2000) 82 *International Review of the Red Cross*, 67-87.

⁴⁹ UNGA Official Records, 'Report of the International Law Commission', 32nd Sess., supp. No. 10, at 98, UN Doc. A/35/10 (1980).

⁵⁰ According to the ICJ, "[i]t is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and 'elementary considerations of humanity' as the Court put it in its Judgment of 9 April 1949 in the **Corfu Channel** case (1. C. J. Reports 1949, p. 22), that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law."

Legality of the Threat or Use of Nuclear Weapons (n 10), paragraph 79.

⁵¹ In the case of **Prosecutor v. Kupreskic et al.**, the ICTY held that "most norms of international humanitarian law, in particular those prohibiting war crimes [...] are also peremptory norms of international law or *jus cogens*." **Prosecutor v. Kupreskic et al.**, (Judgment, Trial Chamber) ICTY-95-16-T (14 January 2000), paragraph 520. For a similar opinion, see A Cassese according to whom "the prohibition [of grave breaches of international humanitarian law] should be considered a peremptory norm of international law (*jus cogens*)." A Cassese, 'On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law' (1998) 9 *European Journal of International Law*, 6. See also, T Meron, 'The Geneva Convention as Customary Law,' (1987) 81 *American Journal of International Law*, 350; E. Schwelb, 'Some Aspects of International *Jus Cogens* as Formulated by the International Law Commission' (1967) 61 *American Journal of International Law*, 957.