



Shifting Paradigms

Israel's Enforcement of the Buffer Zone
in the Gaza Strip



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23 June 2011
Ref. No. 229/2011

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**Design & Printing: 3rd Dimension, Tel. 02 2413903/4, Fax. 02 2413901
Publisher: Al-Haq - © All Rights Reserved
ISBN: 978-9950-327-26-9**

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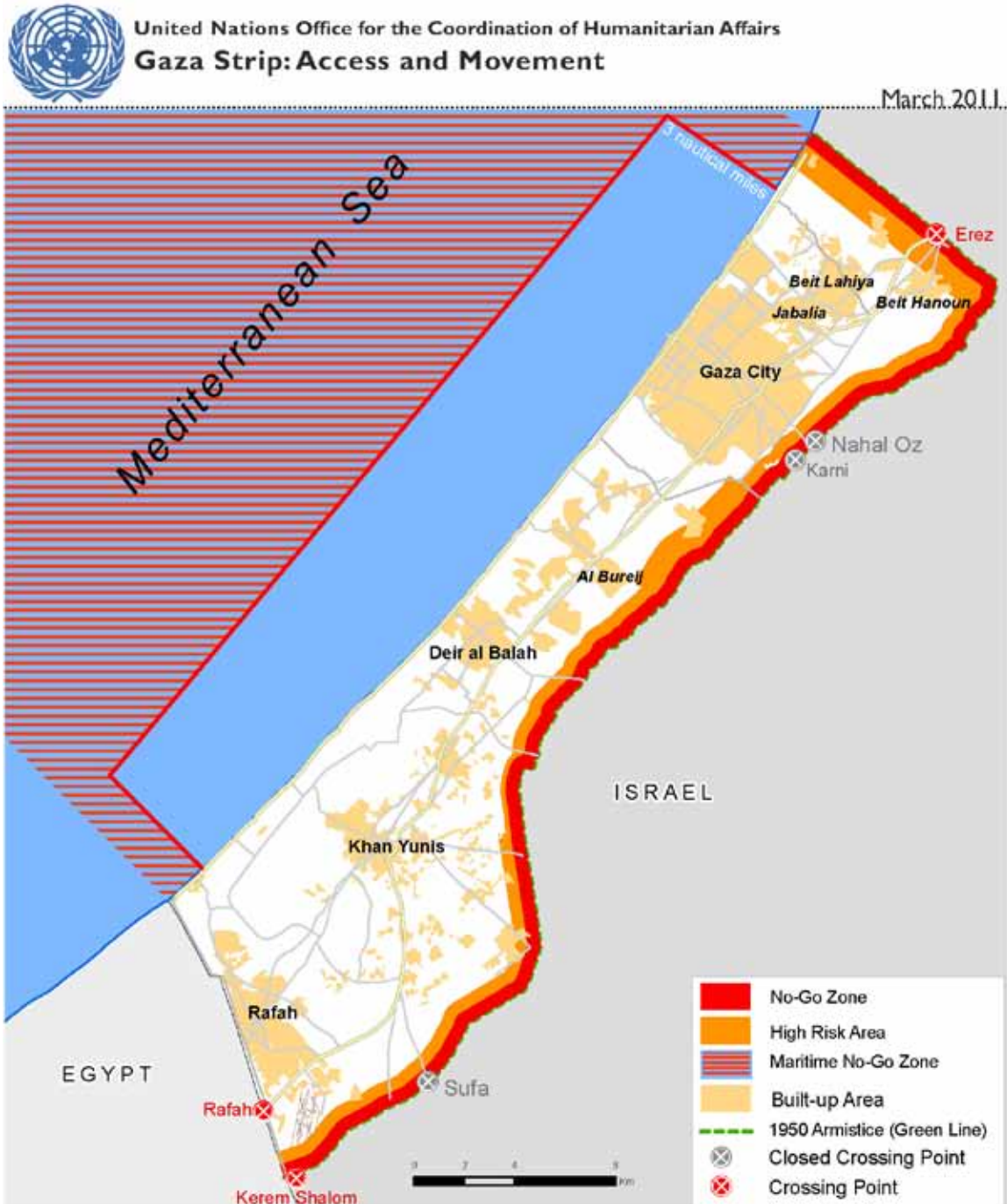
Acknowledgements

The author would like to thank Al-Haq's staff for their help in preparing the report, in particular to Valentina Azarov and Claudia Nicoletti for their insightful comments and to Shirin Abu Fanouneh for assisting in the research. Special gratitude must go to Al-Haq's field researcher Muhammad Abu-Rahma for his tireless work in collecting vital information and testimonies.

Cover photo: A Palestinian stone collector in Beit Lahiya – April 2010, Al-Haq©

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Source: www.ochaopt.org

1. Introduction

The so-called buffer zone is a military no-go area that extends within the Occupied Palestinian Territory (OPT) along the entire Gaza Strip's border with Israel as well as at sea. The buffer zone allegedly responds to the Occupying Power's legitimate security concerns; yet, Israel's unilateral expansion of this restricted area and its enforcement mechanisms seriously infringe upon the rights of protected persons and cause many civilian casualties.

Most of the buffer zone on land is located on agricultural land while the buffer zone at sea limits fishing activities to an area where fish has already been severely depleted. Furthermore, constrained by the harsh restrictions imposed by the four-year long Israeli illegal closure of the Gaza Strip and the lack of employment opportunities, many Palestinians have no other option of survival but to work collecting rubble in sites located within or in the vicinity of the buffer zone. This paper examines the enforcement methods of the buffer zone employed by the Israeli occupying forces under international humanitarian law and human rights law -focusing on the use of lethal force against civilians who are not taking part in hostilities - on the basis of the documentation collected by Al-Haq's field researchers in the Gaza Strip.

2. The "Undefined" Buffer Zone in the Gaza Strip

The precise depth and overall size of the buffer zone on land in the proximity of the fence along the border with Israel and along the Gaza Strip's shore are uncertain. Likewise, the parameters in terms of people access to the restricted area are similarly uncertain. Although the Occupying Power carries out land incursions into the buffer zone an average of 3-4 times every week and naval forces continuously patrol the coast, the buffer zone is not physically demarcated.¹ Additionally, the Occupying Power has failed to effectively inform the civilian population in the Gaza Strip of the extent of the buffer zone and the applicable regime.

2.1 Buffer Zone on Land

Since the beginning of the Second Intifada in September 2000, the land areas affected by restrictions in the Gaza Strip have been gradually widened. Until November 2008, when the ceasefire agreement

¹ United Nations Office for the Coordination of Humanitarian Affairs - occupied Palestinian territory (UN OCHA), 'Between the Fence and a Hard Place: The Humanitarian Impact of Israeli-Imposed restrictions on Access to Land and Sea in the Gaza Strip', Special Focus (August 2010) 15. <http://www.ochaopt.org/documents/ocha_opt_special_focus_2010_08_19_english.pdf> accessed 27 February 2011.

between Hamas and Israel collapsed,² access restrictions were implemented in most areas within 300 metres from the border. Following the collapse of the ceasefire agreement, Israel began expanding the restricted area up to 1,000-1,500 metres.³ Yet, in January 2009 the Occupying Power's air force dropped thousands of pamphlets along the border areas of the Gaza Strip containing misleading information.⁴ The pamphlet included rough maps of the Gaza Strip (see Annex) and the following statement signed by the military command:

'To the people of the Strip: Israel Defence Forces are warning against approaching the border line from a distance of 300 metres. Therefore, the Israel Defence Forces will take all the procedures to eliminate anyone who will be found in the zone. In case of necessity, the IDF will shoot fire without hesitation. Since you are warned, no excuses are accepted.'⁵

Currently, the buffer zone on land extends over approximately 17 per cent of the territory of the Gaza Strip and, depending on the specific area, farmers are effectively prevented from accessing land located up to 1,000-1,500 meters from the fence. Since it is estimated that approximately 95 per cent of the restricted area is arable land, the buffer zone on land extends over 35 per cent of the Gaza Strip's agricultural land.⁶ The restrictions and the enforcement of the buffer zone affect primarily but not only farmers whose houses and agricultural land are located within and in the immediate proximity of the buffer zone and whose income consequently has been markedly reduced.⁷ Many Palestinians in the Gaza Strip have opted to abandon their agricultural livelihood and seek income collecting rubble and scrap metal left after the evacuation of settlements during the 2005 Israel's unilateral "Disengagement Plan" and later, after the widespread destruction during the 2008-2009 Israeli military offensive code-named "Operation Cast Lead."⁸

Some rubble collection sites are located within or nearby the restricted areas, bringing consequent risks to this activity.⁹ Despite the risks, the economic hardship imposed by the Israeli illegal closure and the lack of employment opportunities have left many Palestinians, including children, with no option but to access dangerous areas in order to earn their living.¹⁰ Furthermore, the demand for building supplies to rehabilitate and reconstruct damaged and destroyed buildings, combined with

2 On 19 June 2008, a six-month ceasefire ("tahdiyeh" or "calm") agreement negotiated by Egypt took effect between Hamas and the Government of Israel, entailing a suspension of hostilities from both sides and an Israeli commitment to gradually relax access restrictions on goods and people.

3 UN OCHA, 'Between the Fence and a Hard Place' (n 1) 8.

4 Similar pamphlets were dropped again in May 2009 UN OCHA, 'Between the Fence and a Hard Place' (n 1) 15.

5 Unofficial translation.

6 UN OCHA, 'Between the Fence and a Hard Place' (n 1) 10.

7 Following the expansion of buffer zone in 2008, farmers' income from agriculture was reduced to less than a third or even larger losses of what it was previously. *Ibid* 22.

8 Between the second and fourth quarter of 2010 the number of people employed in the agricultural sector declined by 4,800; a remarkable decline since the last quarter of the year sees a seasonal increase in employment. UN OCHA, 'Easing the Blockade. Assessing the Humanitarian Impact on the Population on the Gaza Strip', Special Focus (March 2011) 8-9. <http://www.ochaopt.org/documents/ocha_opt_special_easing_the_blockade_2011_03_english.pdf> accessed 2 June 2011.

9 Some of these rubble collection sites are located in the north of the Gaza Strip, such as the areas of dismantled Israeli settlements and the former Erez industrial area, and in the south near the Gaza Airport in Rafah.

10 During the second half of 2010, 37.4 per cent of the population was unemployed (one of the highest unemployment rates in the world) while 52 per cent suffered from food insecurity and an additional 13 per cent were found vulnerable to food insecurity. Households with income and consumption below USD 5.1 per adult equivalent/day or, households showing decrease in total food and non-food expenditures, were defined as food insecure. *Ibid* 10.

the ongoing restrictions on the import of basic building materials as part of the four-year long illegal closure, has led to a significant increase in the number of people engaged in rubble collection.¹¹

2.2 Buffer Zone at Sea

As it has been the case with the buffer zone on land, since the beginning of the second Intifada Israel has been progressively implementing restrictions on fishermen's access to the sea. The initial 20 Nautical Miles (NM) agreed under the 1994 Gaza-Jericho Agreement between Israel and the Palestinian Liberation Organisation (PLO) were reduced to 12 NM under the never implemented 2002 Bertini Commitment. In 2006, the fishing zone was reduced to 6 NM off the coast. The latest expansion of the buffer zone in late 2008 reduced the fishing zone to 3 NM from the shore.¹² Furthermore, access to different coastal areas fluctuated over the years, making sea areas adjacent to the Gaza Strip totally inaccessible, such as Khan Yunis wharf, which was entirely closed during 2003-2004 and open for only 95 days in 2005.¹³

Nowadays, along most of Gaza Strip's coast the buffer zone begins at 3 NM from shore. In the north, Palestinians are totally prevented from accessing a 1.5 NM-wide strip along the maritime boundary with Israel, and a 1 NM-wide strip in the south, along the maritime boundary with Egypt. Overall, Palestinians are totally prevented from accessing 85 per cent of the maritime areas they are entitled to according to the 1994 Gaza-Jericho Agreement.¹⁴



Palestinian fishermen in Gaza City's harbour - March 2010, Al-Haq©

11 UN OCHA, 'Between the Fence and a Hard Place' (n 1) 14 and 25-26.

12 *Ibid* 10-11.

13 *Ibid*.

14 *Ibid* 11.

Currently, there are 4,400 fishermen in the Gaza Strip and a further 2,500 people working in the fishing industry (making and repairing boats and nets, trading with the fish, etc).¹⁵ When Israel began restricting access to fishing areas there were approximately 10,000 practising fishermen. Including fishing industry workers and families, it is estimated that the total population affected by the buffer zone restrictions at sea is 65,000.¹⁶ Moreover, the expansion of the buffer zone has cut down both the quantity and quality of the fishing catch. As a result, nearly 90 per cent of the fishermen are now considered either poor (with a monthly income of between 100 and 190 USD) or very poor (earning less than 100 USD per month), which constitutes a sharp increase from 2008 when 50 per cent of fishermen fell into these categories.¹⁷

3. Enforcement of the Buffer Zone

Israeli occupying forces employ different methods, including live ammunition, to enforce the buffer zone, both on land and at sea. On land, the Israeli occupying forces regularly fire shots in the direction of Palestinians working near these areas, far away from the “alleged” 300 metres and up to 1,500 metres.¹⁸ The Israeli army either enters the area and start shooting at the workers or uses snipers located along the border. In most cases, the workers have been wounded by gunfire when trying to hide or run away after hearing the first gunshots. Some of the rubble collectors were shot in vital parts of the body, such as the stomach and chest, and others in the lower parts of the body, mostly in the legs.¹⁹ The circumstances in which most of workers are shot at and the location of the wounds represent clear evidence that the Israeli occupying forces in some cases target the rubble collectors directly.²⁰

While we were collecting stones and loading them on carts (drawn by donkeys) approximately 30 heavily armed Israeli soldiers of the Special Forces unit came out from inside the Separation Fence, opened intensive fire and chased us. As I was running away with my peers, I sustained bullet wounds in my feet.

Extract from Al-Haq Affidavit No. 5413/2010.²¹ Given by 'Ayesh As'ad al-Sous, a resident of Beit Lahiya, Northern Gaza Governorate.

15 Out of 4,400 fishermen 3,700 are registered with the Palestinian fishermen syndicate. Muhammad Abu-Rahma, Al-Haq's field researcher in the Gaza Strip, Interview with Mr. Nizar 'Ayyash, president of the Fishermen's Syndicate (Gaza, 23 February 2011).

16 UN OCHA, 'Between the Fence and a Hard Place' (n 1) 12.

17 ICRC, 'Gaza Closure: Not Another Year', News Release, 14 June 2010. <<http://www.icrc.org/eng/resources/documents/update/palestine-update-140610.htm>> accessed 27 March 2011.

18 Report of the UN High Commissioner for Human Rights on the implementation of Human Rights Council resolutions S-9/1 and S-12/1 (UN Doc. A/HRC/16/71), paragraph 9.

19 The following incidents are but a few examples: on 5 July 2010, Ahmad Hamdan, 13 years old, was shot in his stomach; on 14 July 2010, Hmed Abeid, 13 years old, was shot in the shoulder and on 28 July Akram Sa'adeh, 19 years old, was shot in the chest.

20 Report of the UN High Commissioner for Human Rights (n 18), paragraph 9.

21 <<http://www.alhaq.org/pdfs/affidavit%20no.%205413%202010.pdf>>

Since the beginning of 2010, stone-collectors have been increasingly under attack by Israeli soldiers. In 2009, Al-Haq documented seven cases of rubble collectors injured by live ammunition in the vicinity of the buffer zone, whereas this number was 10 times higher during 2010, when 68 rubble collectors, of whom 15 children, were shot. In November 2010 alone, Al-Haq documented 15 cases of workers injured by gunfire. In other cases rubble collectors are arrested after being chased by the Israeli occupying forces. Most of the detainees are children, some of them as young as 11 years old.²²

The Occupying Power also enforces the buffer zone by levelling farm land and destroying or damaging private property located therein. Since the beginning of the second intifada in 2000, the Israeli army has gradually destroyed field crops and uprooted trees.²³ The bulk of the residential and agricultural structures that existed in these areas were destroyed after the expansion of buffer zone in 2008 and in their vast majority during the three weeks of the Israeli military offensive code-named "Cast Lead."²⁴ Since 2005, the Israeli army has destroyed within the buffer zone 305 water wells, 197 chicken farms, 377 sheep farms and 6 factories. In addition, 996 houses and 3 mosques were totally destroyed, 371 houses partially destroyed and 3 schools destroyed or severely damaged.²⁵



Erez former industrial area – October 2009, Al-Haq©

According to Al-Haq's documentation, fishermen are also targeted on a daily basis. In their struggle to survive and given the depletion of areas near the shore, Palestinian fishermen often have little choice but to sail into no-go zones at the risk of being shot by the Israeli navy. In any case, many incidents occurred outside the buffer zone, within the 3 NM. The Israeli navy surrounds Palestinian fishing boats in the sea, threatens the fishermen, confiscates their boats and nets and makes them swim towards warships where they are handcuffed and taken to Ashdod port in Israel. After being

²² On 30 March 2010 alone, 22 rubble collectors were arrested in the industrial area of Erez, Northern Gaza Strip, most of them were children.

²³ UN OCHA, 'Between the Fence and a Hard Place' (n 1) 16.

²⁴ *Ibid* 17.

²⁵ *Ibid* 19.

interrogated for hours or in some cases days, they are released at Erez crossing point and do not recover their boats or nets. In other cases, the Israeli occupying forces fire rockets and shoot bullets at the Palestinian boats at sea or on the shore in order to destroy them, thus preventing the fishermen from working. During 2010, Al- Haq documented the killing by the Israeli occupying forces of two fishermen and the wounding of other three (one of them of 14 years of age) by gunfire while they were in the sea.

As declared by the International Committee of the Red Cross (ICRC), 'Israel's enforcement of the buffer zone and frequent hostilities have resulted not only in civilian casualties and the destruction of civilian property but also in the impoverishment and displacement of numerous families.'²⁶

²⁶ ICRC , 'Gaza Closure: Not Another Year' (n 17).

Suddenly, a cruiser (an Israeli military boat that is constantly present in these waters, patrolling the beaches of the Gaza Strip) approached us. The Israeli occupying soldiers who were onboard the cruiser opened intensive fire on us. When I saw bullets hit the water near my fishing boat, I felt afraid. Then, we all sailed east (towards the beach). Our relatives' fishing boats stopped at sea a distance of almost 1,500 metres from the beach. We stopped at sea at a distance of two kilometres from the shore and a fishing boat belonging to Munther al-'Abed 'Ali Bakr (45 years old) joined us. Bakr's sons, 'Abed, Yousef Khamis Bakr and Ra'ed 'Abd-al-Fattah Bakr, were onboard the fishing boat. After the cruiser had left the area and started to sail west, my brother Rami switched off the engine and we began to throw fishing hooks in order to catch fish. We were in a safe area, where fishing was permitted, so we continued to fish for about two hours.

At around 9:15 am on the same day, I saw an Israeli cruiser sailing at a great speed from the north towards us. The Israeli occupying soldiers onboard the cruiser opened intensive fire on us. I saw the bullets hit the water around us. We wrapped the fishing hooks and put them on the fishing boat. In fear that we might get hurt, Rami switched on the boat's engine so that we could leave the area.

We fishermen are accustomed to attacks from Israeli boats. Often they open fire, arrest fishermen, and confiscate our fishing boats. While we were heading south in order to return to the harbour, the Israeli cruiser came close and intercepted our path. The cruiser, which had the registration number plate (884), was positioned about 100 metres west of us. Soldiers onboard the cruiser continued to fire at us. All the while, my brothers, my cousin Muhammad, and I were calling to the soldiers, requesting that they cease fire, but they did not take any notice. We waved to the soldiers with our clothes and lifted our arms so that they would cease fire, but in vain. As bullets hit the fishing boat, I heard someone scream beside me. I turned around to see my cousin Muhammad placing his hand on the right side of his waist underneath his chest. I lifted Muhammad's hand to examine him and saw a hole in his waist, from which blood was pouring out. I put my hand on his wound in order to stop the bleeding. Rami also put his hand on the bullet wound. Then, Muhammad stopped talking and the soldiers ceased fire. 'Umar and I stood up and started to shout at the soldiers and waved with our hands, which were dripping with blood. We requested that they offer first aid to Muhammad, but they did not respond to our calls.

Extract from Al-Haq Affidavit No. 5652/2010.²⁷ Given by Rani Sami 'Umar Bakr, a fisherman and a resident of the Ash Shati' refugee camp, Gaza Governorate, Gaza Strip.

27 <<http://www.alhaq.org/pdfs/aff-5652-2010.pdf>>.

4. Legal Analysis

4.1 Legal Status of the Gaza Strip as an Occupied Territory

In June 2004, Israel adopted a “disengagement plan” providing for the unilateral removal from the Gaza Strip of Israeli forces and civilians living in settlements. As a result, it declared ‘there will be no basis for claiming that the Gaza Strip is occupied territory.’²⁸ However, under the disengagement plan Israel continues to maintain control over Gaza’s border, air space and sea off the coast of the Gaza Strip.²⁹ In addition, Israel imposed illegal closures and limits to the fishing zone and no-go areas spreading over agricultural land near the border. It also continues to control the movement of people and goods in and out of the territory, Gaza’s telecommunications, water, electricity and sewage networks, as well as the population registry. Taken together, Israel’s total control of the airspace, coastal access and border crossings allows Israel substantial control over both the inhabitants and the economy of the Gaza Strip.

The recent limited opening of the Rafah crossing by Egypt³⁰ or a potential broader opening of that crossing would not change the status of the Gaza Strip as an occupied territory. Under international law the test for occupation is “effective control,” which 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.’³¹ Israel has repeatedly demonstrated its capacity to meet this requirement to disastrous effect. By virtue of such an effective control the Gaza Strip remains an occupied territory.

In September 2007, the Occupying Power declared the Gaza Strip a “hostile territory.”³² Nevertheless, the hostile territory designation was not accompanied by any factual change on the ground, which confirms Israel’s effective control as an Occupying Power.³³ The declaration did not succeed in changing the status of the Gaza Strip, and Israel’s responsibilities and obligations for the population living therein have not been altered.³⁴ Consequently, despite the disengagement plan and the “hostile territory” designation, under international law the Gaza Strip remains occupied and the international community continues to regard Israel as the Occupying Power there.³⁵

28 “Disengagement Plan - General Outline”, 15 April 2004 <<http://www.pmo.gov.il/PMOEng/Archive/Press+Releases/2004/Disengagement+Plan/Disengagement+Plan.htm>>; and “Overall Concept of the Disengagement Plan”, 15 April 2004 <<http://www.pmo.gov.il/PMOEng/Archive/Press+Releases/2004/Disengagement+Plan/DisengagementPlan.htm>>.

29 *Ibid.*

30 The Egyptian commitment concerning Rafah ostensibly provides for longer operating hours, no numerical limit on passengers, and visa-free travel, except for men aged 18-40. The expansion does not include regular transfer of goods, which are restricted to the Israeli-controlled crossings and subject to prohibitions on construction materials and export. Elior Levy, ‘Gaza’s Rafah Crossing opens’, *Ynetnews.com*, (28 May 2011) <<http://www.ynetnews.com/articles/0,7340,L-4074927,00.html>> accessed 2 June 2011.

31 *Prosecutor v Naletilic et al*, (Judgment, Trial Chamber) ICTY-98-34-T (31 March 2003), paragraph 217.

32 Israeli Ministry of Foreign Affairs, Security Cabinet Declares Gaza Hostile Territory, 19 September 2007. <<http://www.mfa.gov.il/MFA/Government/Communiques/2007/Security+Cabinet+declares+Gaza+hostile+territory+19-Sep-2007.htm>> accessed 2 June 2011.

33 Al-Haq Press Release, “‘Enemy Entity’: A Deliberate Attempt by Israel to Obscure its Continued Occupation of the Gaza Strip” (22 September 2007) <<http://www.alhaq.org/etemplate.php?id=334>>

34 C. James, ‘Mere Words: The ‘Enemy Entity’ Designation of the Gaza Strip’, (2009) 32 *Hastings International and Comparative Law Review* 643, 659.

35 UN Security Council resolution 1860 (2009) UN Doc SC/ 9567 and Human Rights Council resolution S-9/1 (2009) UN Doc A/HRC/S-9/L.1.

As the Occupying Power in the Occupied Palestinian Territory (OPT), Israel's obligations under international humanitarian law are set out primarily in the Regulations Annexed to the 1907 Hague Convention Respecting the Laws and Customs of War on Land (Hague Regulations), and the 1949 Fourth Geneva Convention. Furthermore, as repeatedly stated by the International Court of Justice (ICJ), the Occupying Power remains responsible for fulfilling its obligations stemming from human rights law in occupied territory.³⁶ In its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 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.³⁷

4.2 Israel's Enforcement of the Buffer Zone: Conduct of Hostilities versus Ordinary Policing

Under humanitarian law, the taking of human life is lawful in several circumstances. Enemy combatants may be killed, unless they are *hors de combat*, i.e, wounded, shipwrecked or prisoners of war. Civilians may be intentionally killed if, and for such time as they are taking a direct part in hostilities and they may also be incidentally killed as a result of collateral damage. Consequently, the principle of distinction between combatants and civilians is one of the cornerstones of international humanitarian law and the source of specific rules regulating the conduct of hostilities. It is therefore of particular importance that all feasible precautions be taken in determining whether a person is a civilian and, if so, whether he or she is directly participating in hostilities. In case of doubt, the person in question must be presumed to be a civilian protected against direct attack.³⁸

It is also important to bear in mind that armed conflict and occupation must be treated differently.³⁹ The protection of the protected persons, i.e., the Palestinian civilian population, underlies the legal framework applicable to an occupied territory and therefore governs the behaviour of Israel as an Occupying Power. As such, international law imposes upon it certain duties and restrictions, which do not arise in situations of armed conflict not involving occupation.⁴⁰ Of special relevance is the duty to restore public order and safety while respecting the laws in force in the occupied territory established by Article 43 of the Hague Regulations, reflective of customary international law.

³⁶ *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports (1996), paragraph 25; *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, ICJ Reports (2005), paragraph 175; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports (2004), paragraphs 102-113.

³⁷ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports (2004), paragraphs 107-112.

³⁸ Article 50 (1) Additional Protocol I, as reflective of customary international law. *Prosecutor v Blaskic* (Appeals Judgment) ICTY-95-14-A (29 July 2004), paragraphs 110-111; *Prosecutor v Kordic et al.* (Appeals Judgment) ICTY-95-14/2-A (17 December 2004), paragraph 97. Also ICRC *Interpretative Guidance on the Notion of Direct Participation on Hostilities under International Humanitarian Law* (Geneva 2009), 17 and 74-76.

³⁹ N. Burke, 'A Change in Perspective: Looking at Occupation Through the Lens of the Law of Treaties', (2008) 41 *New York University Journal of International Law and Politics* 103, 104.

⁴⁰ *Prosecutor v Naletilic et al.*, (Judgment) ICTY-98-34-T (31 March 2003), paragraph 214.



Palestinian stone collector in Beit Lahiya - April 2010, Al-Haq©

Public order is restored through police operations directed against civilians suspected of crimes or threatening public order and not through military operations, which are directed exclusively at combatants or civilians directly participating in hostilities.⁴¹ Police operations are governed by domestic law and international human rights law and are subject to many more restrictions than hostilities.⁴² The applicable standard for the use of force in this so-called law enforcement model is therefore described by rules of human rights law, which require law enforcement personnel to minimise the amount of force used and to effect an arrest where possible.⁴³

This claim is even more relevant in situations of “calm” occupation or in areas where actual fighting has died down and the occupying power has enough control over a situation to be able to carry out law enforcement operations.⁴⁴ Accordingly, in situations that are relatively calm, the use of potentially lethal force is governed by the law enforcement model.⁴⁵ If most of the territory is “calm” and there is a resumption of hostilities initiated by those challenging the occupation, then the conduct of hostilities model under the rules of international humanitarian law would once again apply, but only to the incident concerned.⁴⁶

41 M. Sassoli, ‘Legislation and maintenance of Public Order and Civil Life by Occupying Powers’, (2005) 16 *European Journal of International Law* 661, 665.

42 *Ibid.*

43 L. Doswald Beck, ‘The Right to Life in Armed Conflict: Does International Humanitarian Law Provide All the Answers?’ (2006) 864 *International Review of the Red Cross* 881, 892.

44 C. Droegge, ‘The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict’, (2007) 40 *Israel Law Review* 310, 347.

45 L. Doswald Beck (n 43) 892.

46 *Ibid* 893-894.

In spite of the complexities of the situation and the practical challenges faced in the Gaza Strip, the two models on the use of force must be differentiated in all cases and arguably the law enforcement model should be applied to regulate most of the daily activities of Israel as an Occupying Power.⁴⁷ In order to determine whether Israel is conducting hostilities when using lethal force in the buffer zone or exercising policing functions to ensure public order and safety pursuant to Article 43 of the Hague Regulations and Article 64(2) of the Fourth Geneva Convention, the situation on the ground must be analysed.

There are clashes between Israeli troops and Palestinian militants in the restricted area, Israeli land incursions, airstrikes from unmanned drones and shootings from tanks and the firing of rockets from the Gaza Strip into Israel.⁴⁸ All these activities amount to conduct of hostilities and as such they are governed by the rules applying in such circumstances.

On the other hand, both rubble collectors and fishermen are civilians trying to make a living within or in the vicinity of the buffer zone; they are not individuals directly taking part in hostilities. In this respect, presence in a restricted area or its vicinity is not equivalent to directly participating in hostilities.⁴⁹ Despite being conducted by the military, Israel's daily border patrolling of the Gaza Strip is part of its Occupying Power's administrative policing functions and, as such, they remain at all times governed by the specific international human rights standards applicable to police operations against civilians, which may never be conducted like hostilities against combatants.⁵⁰ Accordingly, when Israeli soldiers use lethal force to enforce the buffer zone they are bound by the relevant provisions of international human rights law.

Arguably, there is a stronger case for applying human rights law in occupation than in armed conflict, particularly in the case of the prolonged occupation of the OPT by Israel.⁵¹ Furthermore, Article 47 of the Fourth Geneva Convention, which proclaims the inviolability of the rights and safeguards of protected persons, prevents the Occupying Power from adopting harming measures in order to restore and maintain law and order.⁵² The basic nature of the protection provided by this provision reinforces the need to apply, when possible, a higher standard for the protection of civilians, namely that of international human rights law. Since the Hague Regulations and the Fourth

47 N. Lubell, 'Applicability of Human Rights Law in Situations of Occupation', (2006) 34 *Collegium* 50, 53.

48 Since the end of the Israeli operation code-named "Cast Lead," UN OCHA recorded the killing of four Israeli soldiers and the injury of another ten as a result of Palestinian fire in the vicinity of the border. During the same period, the Israeli army killed 41 members of Palestinian armed factions in the restricted areas (37 on land and four at sea), and injured another 26 (all on land). UN OCHA, 'Between the Fence and a Hard Place' (n 1) 18.

49 Report of the UN High Commissioner for Human Rights (n 18), paragraph 12.

50 M. Sassoli, A. Bouvier, *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law* (3rd Ed., ICRC, Geneva, 2011), Vol I, Chap. 14, 4.

51 M. Milanovic, 'Lessons for Human Rights and Humanitarian Law in the War on Terror: Comparing *Hamdan* and the *Israeli Targeted Killings Case*', (2007) 866 *International Review of the Red Cross* 373, 392.

52 J. Pictet, *Commentary of the Fourth Geneva Convention* (Geneva, ICRC, 1958), 272-274.

Geneva Convention do not explicitly regulate the Occupying Power's use of force,⁵³ human rights law relating to the right to life is suitable to supplement and interpret international humanitarian law rules relating to the use of force during occupation.⁵⁴ Ultimately, the restrictions imposed by human rights law are not at all incompatible with the overall fundamental aim and purpose of international humanitarian law, namely the desire to prevent unnecessary deaths.⁵⁵

4.3 Illegality of Israel's Actions

4.3.1 Unnecessary and Disproportionate Use of Lethal Force

Article 27(4) of the Fourth Geneva Convention authorises the Occupying Power to prohibit the access to certain areas as a security measure.⁵⁶ Nevertheless, even when measures of constraint are justified, they should not affect the fundamental rights of the protected persons,⁵⁷ especially the right to life and physical integrity. Security interests, however pressing, are no justification for abandoning the Occupying Power's responsibility for ensuring the well-being of the occupied population. Therefore, 'the law enforcement model also governs the use of force by the Occupying Power in providing for its own security, at least where there are no hostilities in the occupied territory.'⁵⁸

The principles of international human rights law applicable in contexts of use of lethal force draw significantly upon the Code of Conduct for Law Enforcement Officials (Code of Conduct) and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (Basic Principles), which require States to strictly regulate the use of force and firearms.⁵⁹ Although some of the provisions are guidelines rather than legal dictates, the substance of Article 3 of the Code of Conduct and Principle 9 of the Basic Principles reflects binding international law.⁶⁰ According to these provisions, the Occupying Power's law enforcement officials may use force only when strictly necessary and to

53 Article 46 of the Hague Regulations mentions specifically the right to life and Article 27 of the Fourth Geneva Convention sets out the general entitlement of protected persons 'in all circumstances, to respect for their persons [...]. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof [...]. On the other hand, Articles 43 of the Hague Regulations and 64 of the Fourth Geneva Convention, which entitle the Occupying Power to exercise potentially lethal force, do not provide any detail as to when it is lawful to resort to potentially lethal force in the occupied territory.

54 L. Doswald Beck (n 43) 892 and 903-904.

55 *Ibid.*

56 J. Pictet (n 52) 207.

57 *Ibid.*

58 Expert Meeting on the Right to Life in Armed Conflicts and Situations of Occupation, Report, University Centre for International Humanitarian Law (Geneva, 1-2 September 2005), 23 <http://www.adh-geneva.ch/docs/expert-meetings/2005/3rapport_droit_vie.pdf>. In October 2007, this Centre became the Geneva Academy of International Humanitarian Law and Human Rights.

59 Code of Conduct for Law Enforcement Officials adopted by the UN General Assembly resolution 34/169 of 17 December 1979; Basic Principles on the Use of Force and Firearms by Law Enforcement Officials adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990. The "law enforcement officials" who may use lethal force include all government officials who exercise police powers, including a State's military and security forces, operating in contexts where violence exists, but falls short of the threshold for armed conflict. Code of Conduct, Article 1, commentary (a) and (b); Basic Principles, Preamble, footnote 1.

60 Report of the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, 5 September 2006, (UN Doc. A 61/311), paragraph 35.

the extent necessary for the performance of their duty, emphasising that lethal force can only be used if there is an imminent threat of death or injury to the arresting officer or to a third person or if this is the only way to prevent the escape of a dangerous person.

Israel reportedly possesses technology capable of identifying a band of militants or an unarmed individual at all four battalion command centres along the Gaza Strip's border and employs spotters whose only function is precisely to report to the force on the ground whether a person entering the buffer zone is armed.⁶¹ The recent arrest in the buffer zone of Ayub Azam abu-Karim, charged with 32 counts including attempted murder, breaching Israeli national security and affiliation with Hamas, confirms Israel's ability to carry out arrests, even of allegedly high profile Palestinian militants.⁶² Yet, Israeli army uses lethal force against civilians systematically violating straightforward applicable legal rules.



Palestinian fishermen in the Gaza Strip - March 2010, Al-Haq©

Since the rubble collectors and fishermen neither pose a threat nor put up any resistance to their arrest, there are evidently 'less extreme measures' available to enforce the buffer zone than the use of lethal force.⁶³ As such, the Occupying Power's enforcement practices do not meet the necessity requirement, which under human rights law imposes an obligation to minimise the level of force

61 A. Pfeffer, 'IDF's Newest Heroes: Women Spotters on Gaza Border' *Haaretz*, (3 March 2010) <<http://www.haaretz.com/print-edition/news/idf-s-newest-heroes-women-spotters-on-gaza-border-1.264024>> accessed 3 April 2011. For a detailed account of Israeli remote controlled weapon stations along the Gaza Strip's border see UN OCHA, 'Between the Fence and a Hard Place' (n 1) 16.

62 Karim was arrested in May 2011 and charges against him were made public on 13 June. The indictment against Karim is comprised of 32 counts including attempted murder, conspiracy to commit murder, affiliation with an illegal entity, contacting a foreign agent, servicing an illegal entity, conspiracy to violate national security and breaching national security by giving information to an enemy agent; as well as a slew of contrabands and arms charges. H. Greenberg, 'Shin Bet nabs Gaza terrorist', *Ynetnews.org* (13 June 2011) <<http://www.ynetnews.com/articles/0,7340,L-4081723,00.html>> accessed 14 June 2011.

63 Article 3, commentary (c) Code of Conduct.

used and prioritise non-violent means. In addition, lethal force is intentionally and deliberately used against civilians who do not constitute a threat to life or serious bodily injury, therefore amounting to a disproportionate response.⁶⁴ The requirement of proportionality, which permits the intentional use of lethal force only 'in order to protect life,'⁶⁵ is additional to that of necessity. Taken together, these principles arguably demand that 'if all proportionate measures have proved insufficient to apprehend a suspect, he or she must be permitted to escape'⁶⁶ when there is not threat to other individuals' life.

Ultimately, despite the potential for civilian casualties, the Occupying Power has not disclosed the guidelines for civilians' safe behaviour; nor the results of any after-action review of the conformity of the operation with the legal requirements in order to ensure that a loss of life is not arbitrary. The lack of timely and thorough investigations into questionable incidents contributes to create an atmosphere of impunity in which many soldiers feel they can pull the trigger without coming under review. In a report on unauthorised settler outposts published in 2005, Talia Sasson, former head of the Israel's State Prosecution Criminal Department, held that 'IDF soldiers have the enforcement powers like those given to the police officers, by virtue of the procedure for enforcing the law in the territories [...]. In practice, however, IDF soldiers do not enforce the law, are not aware of the law enforcement procedure, and are not at all interested in functioning like police officers.'⁶⁷

In conclusion, the use of lethal force within the buffer zone against farmers, rubble collectors and fishermen is inconsistent with Israel's international legal obligations.⁶⁸ Insofar as the unlawful use of lethal force puts individuals' lives at risk, it further constitutes a violation of the right to life, even if nobody is killed or injured.⁶⁹ The right to life is also violated when rubble collectors or fishermen are not lethally injured but the Israeli occupying forces prevent victim from accessing available health care and, as a consequence, the person concerned dies.⁷⁰

4.3.2 Wilful Killing and Injuring of Protected Persons

Human rights law sets out the standards applicable to the Occupying Power's enforcement measures of the buffer zone. Yet, the conduct of the Israeli army regarding rubble collectors and fishermen, as an Occupying Power operating under the framework of international humanitarian law, not only constitute a blatant violation of human rights law provisions but it also amounts to grave breaches of the Fourth Geneva Convention.

64 *Nachova and Others v Bulgaria*, European Court of Human Rights (Grand Chamber), *Reports 205-VII*, paragraph 95.

65 Principle 9 of the Basic Principles.

66 Report of the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (n 60), paragraph 44.

67 Talia Sasson, Interim Report on the Subject of Unauthorized Outposts, (submitted to the government in March 2005) <<http://www.pmo.gov.il/NR/rdonlyres/0A0FBE3C-C741-46A6-8CB5-6CDC042465D/0/sason2.pdf>> accessed 28 March 2011 (in Hebrew).

68 Report of the UN High Commissioner for Human Rights (n 18), paragraph 12.

69 *Makaratzis v Greece* (App no. 50385/99) ECHR [GC], 20 December 2004, paragraphs 49-55; *Makhauri v Russia* (App 58701/00) ECHR, 4 October 2007, paragraph 117 for a similar conclusion in the context of armed conflict.

70 Human Rights Committee, *Mulezzi v The Democratic Republic of the Congo*, Communication No. 962/2001, 2004, paragraph 5.4.

The Fourth Geneva Convention expressly criminalises as grave breaches wilfully killing and wilfully causing great suffering or serious injury to body or health of protected persons.⁷¹ In international humanitarian law, wilfulness is interpreted broadly and also includes those cases where the perpetrator acts with reckless disregard of the result, especially in the case of killing.⁷²

Taking into consideration that Israeli occupying forces use live ammunition against fishermen, farmers and rubble collectors, it can be concluded that the military acts in a manner that manifests extreme indifference to the value of human life. Even if a higher threshold for the mental element is required, there can be no doubt that when live ammunition is fired against civilians, apart from the clear case of directly targeting them, death or serious injury leading to death is a likely consequence of the conduct.⁷³ The nature of the Israeli army's actions in the context of the enforcement of the buffer zone in the Gaza Strip indicates an intention to kill or inflict serious injury in reckless disregard for human life.⁷⁴ As a result, every killing of a fisherman, a farmer or a rubble collector allegedly amounts to a grave breach of the Fourth Geneva Convention and it is listed as such in the provision on war crimes of the Statute of the International Criminal Court (ICC).⁷⁵

Regarding those incidents resulting in serious injury to body, the International Tribunal for the former Yugoslavia (ICTY) found that 'the offence of wilfully causing great suffering or serious injury to body or health constitutes an act or omission that is intentional, being an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury.'⁷⁶ The ICTY further clarifies that serious harm is not limited to permanent and irremediable injury, but includes cases in which it results in a grave and long-term disadvantage to a person's ability to lead a normal and constructive life.⁷⁷

Certainly, Israel's shooting at civilian Palestinians, especially when they are running away or hiding is not an accidental act. Likewise, since the wounds are located either in vital parts of the body or in the legs, they are injuries that in the best case scenario prevent victims from working and providing for their families, when not suffering permanent injuries which impede leading a normal life. Therefore, each incident where fishermen, farmers or rubble collectors suffer serious body injury might amount to a grave breach of the Fourth Geneva Convention and it is listed as such in the provision on war crimes of the Statute of the ICC.⁷⁸

71 Article 147 of the Fourth Geneva Convention.

72 G. Werle, *Principles of International Criminal Law* (The Hague, T.M.C. Asser Press, 2009, Second Edition), marginal 1011.

73 *Prosecutor v Strugar* (Trial Judgment) ICTY-01-42-T (31 January 2005), paragraph 236; *Prosecutor v Delic*, (Judgment) ICTY-04-83-T (15 September 2008), paragraph 48.

74 *Prosecutor v Mucic et al* (Trial Judgment) ICTY-96-21-T (16 November 1998), paragraph 439.

75 Article 8(2)(a)(i) ICC Statute.

76 *Prosecutor v Mucic et al* (Trial Judgment) ICTY-96-21-T (16 November 1998), paragraph 511.

77 *Prosecutor v Krstic*, (Trial Judgment) ICTY-98-33-T (2 August 2001), paragraph 513.

78 Article 147 of the Fourth Geneva Convention and article 8 (2)(a)(iii) of the Rome Statute.

Even if Israel argues that it is conducting hostilities within the buffer zone and is not bound by any sort of obligation as an Occupying Power by virtue of its unilateral withdrawal from the Gaza Strip, the use of live ammunition in the buffer zone against civilians who are not directly taking part in hostilities violates the customary international law prohibition on targeting civilians.⁷⁹ The very fact of launching the attack, even without harming any individual, amounts to a war crime.⁸⁰

79 J. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law* (ICRC and Cambridge University Press, Cambridge, 2005), Volume I, Rule 1.

80 Article 8(2)(b)(iii) of the ICC Statute, reflective of customary law.

5. Conclusions and Recommendations

The amount of control exercised by the Occupying Power over the Palestinian territory and people gives it a wide variety of options to address alleged threats to its security. As the ICJ held in its Advisory Opinion on the Wall, Israel 'has the right, and indeed the duty, to respond in order to protect the life of its citizens [but] the measures taken are bound nonetheless to remain in conformity with applicable international law.'⁸¹ At a minimum, the Israeli occupying forces should at all times respect the basic international humanitarian law principles of distinction between combatants and civilians, necessity, proportionality and precaution in attack.

The broad and effective control exercised by Israel expands, in turn, the obligations it has under human rights law. Indeed, the standard of use of force under human rights law is much stricter than merely minimising incidental loss of life. Israel has not displayed due diligence in discharging its primary responsibility as an Occupying Power: the protection of the occupied civilian population. On the contrary, Israel's occupying forces use of live ammunition to enforce the buffer zone is a blatant violation of human rights law provisions on use of lethal force and clearly disregards the lives of the Palestinian fishermen, farmers and rubble collectors.

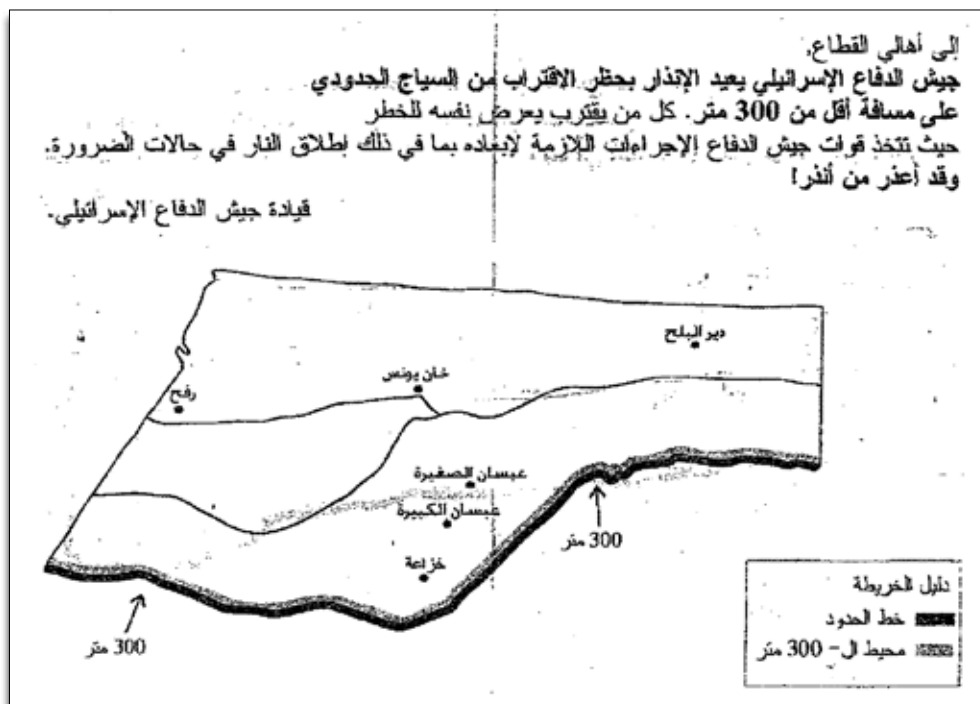
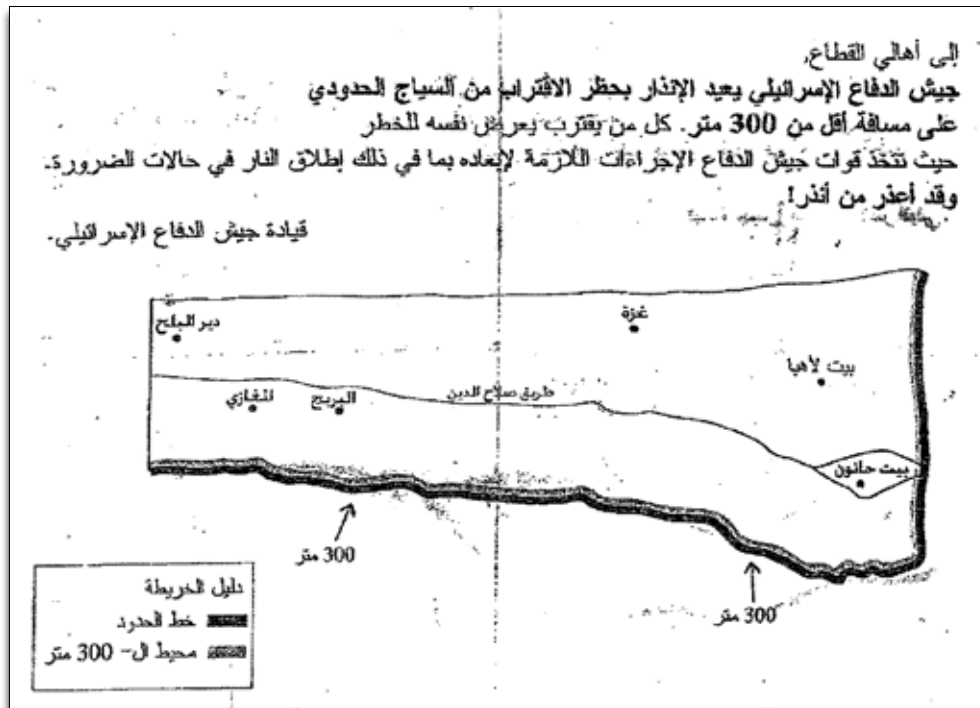
Israel's occupying forces conduct police operations against civilians working within or in the vicinity of the buffer zone as if they were conducting hostilities against combatants. A hostile environment does not absolve the military from its obligations to use force in a restrained, proportionate and discerning manner, and only when strictly necessary. The Occupying Power does not differentiate between the two models on the use of force and ignores that the law enforcement model should be applied to regulate its right and duty to restore public order and safety in the occupied territory. In this respect, Israel is under an obligation to set out, in concrete terms, the circumstances in which lethal force is to be used. It must further ensure that the army's law enforcement policies and practices in the OPT are reviewed and made compliant with applicable international law standards, and that rigorous training is provided to Israeli commanders and soldiers to defuse tense non-combatant situations without resorting to lethal force.

The Occupying Power must clearly demarcate the buffer zone and effectively inform the civilian population in the Gaza Strip of the extent and associate applicable regime. It must also limit the size of the restricted area to the extent strictly necessary to address its security concerns without disproportionately impacting the lives and livelihoods of the civilian population. Last but not least, Israel must conduct investigations of the killings and injuries which appear to violate international humanitarian law or human rights law. These investigations must be conducted in accordance with the international standards of independence, impartiality, thoroughness and effectiveness, providing victims with adequate remedy.

⁸¹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports (2004), paragraph 141.

Annex: pamphlets

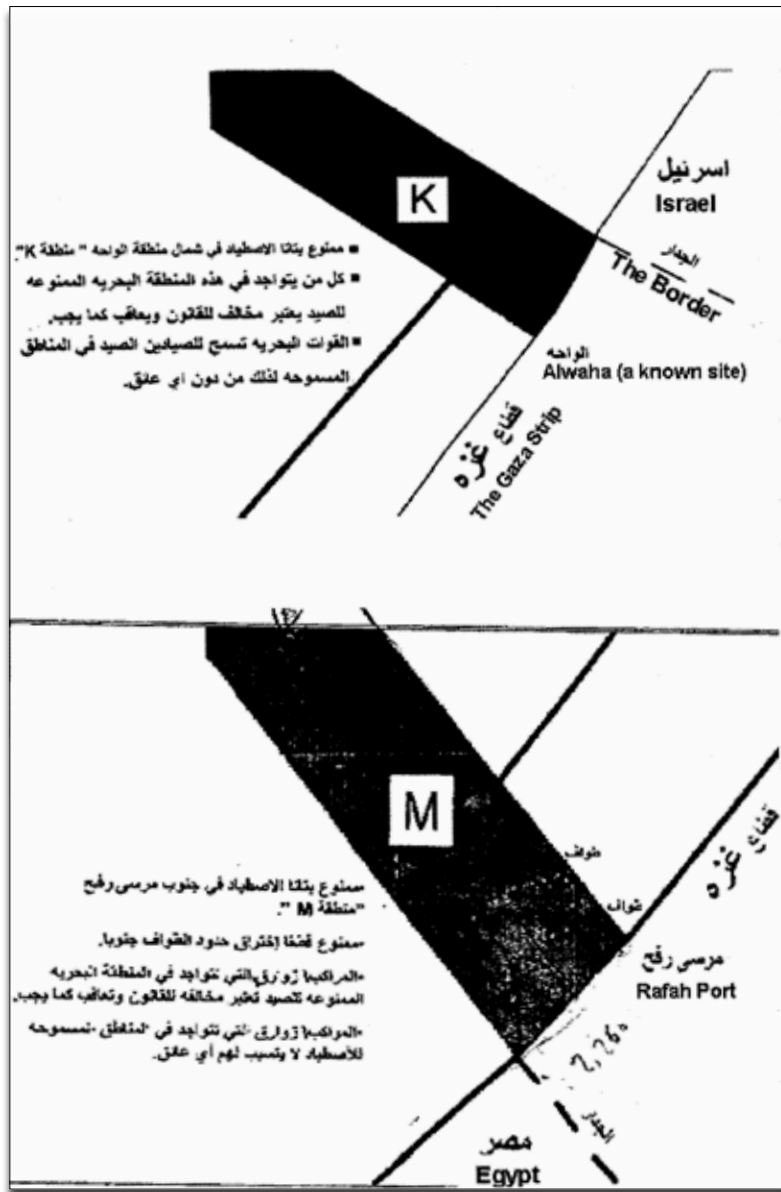
1. Gaza Strip land border "death zones" warning



2. Gaza Strip Fishing 'danger zones' warnings

Top: North of the Gaza Strip, Al-Waha. Black zone marked K is the "no-fishing" zone. The warning states: 'Fishing is prohibited in the north of zone K. Any person found in the 'no fishing' zone K is 'illegal' and will be punished.'

Bottom: South of the Gaza Strip, Rafah. Black zone marked M is the "no-fishing zone". The warning states: 'There is a complete prohibition on fishing south the Rafah port, in 'Zone M'. [...] The boats and ships found in the 'no-fishing zone' are considered out of law and will be punished.'



About Al-Haq

Al-Haq is an independent Palestinian non-governmental human rights organisation based in Ramallah, West Bank. Established in 1979 to protect and promote human rights and the rule of law in the Occupied Palestinian Territory (OPT), the organisation has special consultative status with the UN Economic and Social Council.

Al-Haq documents violations of the individual and collective rights of Palestinians in the OPT, regardless of the identity of the perpetrator, and seeks to end such breaches by way of advocacy before national and international mechanisms and by holding the violators accountable. The organisation conducts research; prepares reports, studies and interventions on the breaches of international human rights and humanitarian law in the OPT; and undertakes advocacy before local, regional and international bodies. Al-Haq also cooperates with Palestinian civil society organisations and governmental institutions in order to ensure that international human rights standards are reflected in Palestinian law and policies. The organisation has a specialised international law library for the use of its staff and the local community.

Al-Haq is the West Bank affiliate of the International Commission of Jurists - Geneva, and is a member of the Euro-Mediterranean Human Rights Network (EMHRN), the World Organisation Against Torture (OMCT), the International Federation for Human Rights (FIDH), Habitat International Coalition (HIC), and the Palestinian NGO Network (PNGO).