

# ISRAEL AND THE GAZA STRIP: WHY ECONOMIC SANCTIONS ARE NOT COLLECTIVE PUNISHMENT



# **Israel and the Gaza Strip: Why Economic Sanctions Are Not Collective Punishment**

Justus Reid Weiner<sup>1</sup>

Gilad Lindenfeld<sup>2</sup>

Ilia Binyamin<sup>3</sup>

Matityahu Wanderman<sup>4</sup>

Jennifer Lang<sup>5</sup>

Cover Photos: Israel Defense Forces transferring goods and medical supplies into Gaza through Kerem Shalom Crossing, July 19, 2014. (IDF/Flickr)

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Jerusalem Center for Public Affairs  
13 Tel Hai Street, Jerusalem, Israel  
Tel. 972-2-561-9281 Fax. 972-2-561-9112  
Email: [jcpa@netvision.net.il](mailto:jcpa@netvision.net.il)  
[www.jcpa.org](http://www.jcpa.org)

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## Executive Summary

- The economic measures that Israel uses against the Hamas proto-government in Gaza fall under legitimate uses of economic sanctions, and conform to the requirements set forth in Article 50 of the 1899 Hague Regulations; Articles 23, 43, 51, 54, 57, 59, 69, and 70 of the Fourth Geneva Convention; Article 75 of the Additional Protocol I to the Fourth Geneva Convention; and Article 4 of the Additional Protocol II to the Fourth Geneva Convention.
- Other global organizations and countries, including the United States, the European Union, and the United Nations routinely impose similar economic sanctions without being criticized. In fact, United Nations Security Council Resolutions 1373, 1456, and 1566 require that Israel prevent Hamas from obtaining funding and supplies that it could use for terrorist purposes. It should be kept in mind that Hamas, together with its sponsors, is among the entities included on the United States', Europe's, and others' lists of proscribed organizations.
- Many of those who claim Israel perpetrates collective punishment do the same or worse themselves. Over seventy years ago the Arab League began a boycott against Jews in what would become Israel along with those who did business with them, and many countries still enforce this ban. Israel is scathingly rebuked for limiting border crossings into and out of Gaza, but the world has remained silent as Lebanon, Syria, and Saudi Arabia have completely barred Israelis since the creation of the State of Israel in 1948. Egypt, which also borders Gaza, has stricter restrictions on its crossing than does Israel, yet this fact is often ignored when Israel is accused of 'choking' Gaza.
- Many supposed 'human rights' organizations that condemn Israel for committing war crimes do so out of bias rather than a true search for justice. The manner in which they single-mindedly focus on Israel's misdeeds, no matter how trivial, and downplay other countries' atrocities, shows their partiality. The NGOs' misuse of their roles is most glaring in the fact that they often must twist the definition of 'war crimes' or ignore legal safeguards in order to make their arguments.
- While no one questions that Gazan residents suffer hardships, the fault lies with Hamas, not Israel. Every Israeli soldier, civilian, and tourist left the Strip in 2005, giving Gaza the opportunity to build a thriving society and economy. Instead Hamas came to power through a combination of elections and violence, and diverted the area's resources toward further unprovoked attacks against Israel.
- The current sanctions were only put in place after nothing else stopped attacks from Gaza. Rather than being punitive measures against the general population, they specifically focus on items that can be used for military purposes for kidnapping and attacking Israelis. At times this does make life more difficult for civilians, as the same concrete and steel that are needed to build schools are also used to build tunnels for attacking Israelis.
- Israel regularly relaxes the restrictions, allowing larger quantities and a wider variety of items into Gaza, even violating United Nations Security Council resolutions in order to do so. Despite these attempts to improve the lives of Gazans, the new supplies are regularly stolen by Hamas and then used to attack Israeli civilians. Even ostensibly nonmilitary items, such as cement, are used to build tunnels into Israel.

## **I. Introduction**

Israel's policy of economic sanctions has been condemned by numerous UN bodies<sup>6</sup> and NGOs<sup>7</sup> as the imposition of 'collective punishment,' a term that carries very serious implications under international law, particularly within International Humanitarian Law (IHL). Among the negative ramifications this accusation creates, labeling Israel's conduct as 'collective punishment' opens a Pandora's Box that can lead to unjustified accusations of war crimes, distract from true cases of collective punishment, and undermine the legitimacy of the International Criminal Court (ICC). Israel's supporters, notably human rights lawyer Anne Herzberg,<sup>8</sup> have argued that these charges represent abuses of the legal system for use as a weapon against Israel.<sup>9</sup>

Within the framework of the laws of war, collective punishment is never tolerable. When such charges are repeatedly laid against Israel, the country is placed in the difficult position of having to constantly explain that its conduct is justified. At the same time, governments around the world use similar tactics to put pressure on other countries, but under the label of 'economic sanctions,' an accepted tool of diplomacy. Despite any spin that governments use to justify their actions or to castigate other governments, the two terms have distinct meanings. With an apt understanding of precisely what constitutes collective punishment, it will be much easier to explore and understand the concept of economic sanctions.<sup>10</sup>

Most of the controversial economic actions that Israel has taken focus on the Gaza Strip and its administering authority, Hamas, which is the Palestinian branch of the Muslim Brotherhood. Hamas won the majority of seats in Gaza's 2006 election, then forcibly evicted the rival Fatah faction, and has since remained in sole control of the Strip. It is designated as a terrorist organization by the United States State Department,<sup>11</sup> the European Union (EU),<sup>12</sup> Israel,<sup>13</sup> and many others.

## **II. Collective Punishment and Economic Sanctions in International Law**

### ***A. Collective Punishment in International Law***

Collective punishment is prohibited by various norms of IHL and has been proscribed by a large variety of international conventions since 1899.<sup>14</sup> Article 50 of the 1899 Hague Regulations provides that "[n]o general penalty, pecuniary or otherwise, can be inflicted on the population on account of the acts of individuals for which it cannot be regarded as collectively responsible."<sup>15</sup> This prohibition was later incorporated in Article 33 of the Fourth Geneva Convention (of 1949)<sup>16</sup> and then expanded by Article 75(2)(d) of Additional Protocol I and Article 4(2)(b) of Additional Protocol II to the Geneva Conventions (both of 1977).<sup>17</sup>

In addition to these instruments of treaty law, the prohibition on collective punishment has been recognized as reflecting international customary law.<sup>18</sup> Rule 103 of the International Committee of the Red Cross (ICRC) study on Customary International Humanitarian Law provides that the prohibition constitutes a customary rule applicable in both international and noninternational conflicts.<sup>19</sup> While not listed among the “grave breaches” of the Geneva Conventions<sup>20</sup> or in the Rome Statute of the ICC,<sup>21</sup> this customary rule has been affirmed in court cases dealing with war crimes, particularly the Special Court for Sierra Leone (SCSL) in the *Brima* case<sup>22</sup> and the Military Tribunal of Rome in the *Priebke* case, which recognized the rule as having been applicable during World War II.<sup>23</sup> It has been explicitly recognized as a serious violation of Article 3 common to the Geneva Conventions and Additional Protocol II<sup>24</sup> that is prosecutable under the Statute of the International Tribunal for Rwanda and the Statute of the Special Court for Sierra Leone.<sup>25</sup>

The opposition to collective punishment is rooted in one of the most fundamental concepts of criminal law, the principle of individual responsibility.<sup>26</sup> As articulated by Hugo Grotius, “the father of international law,”<sup>27</sup> this basic principle provides that “no one who is innocent of wrong may be punished for the wrong done by another.”<sup>28</sup> The scope of the prohibition has since been interpreted as including not only criminal sanctions but also a greater variety of sanctions imposed by forces in armed conflicts. Jean Pictet’s<sup>29</sup> *Commentary on the Fourth Geneva Convention*<sup>30</sup> provides that the prohibition does not “refer to punishments inflicted under penal law, i.e. sentences pronounced by a court after due process of law, but penalties of any kind inflicted on persons or entire groups of persons, in defiance of the most elementary principles of humanity, for acts that these persons have not [individually] committed.”<sup>31</sup> Similarly, the Commentary on Protocol I states that the scope of the prohibition should be interpreted broadly so as to cover “not only legal sentences but sanctions and harassment of any sort, administrative, by police action or otherwise.”<sup>32</sup> This interpretation has been affirmed by the SCSL,<sup>33</sup> and is also supported by the ICRC Study.<sup>34</sup> It is demonstrated in the ruling in the case of *Prosecutor v. Fofana and Kondewa*, in which the SCSL Appeals Chamber emphasized that the prohibition “must be understood in its broadest sense so as to include not only penalties imposed during normal judicial processes, such as sentences rendered after due process of law, but also any other kind of sanction such as a fine, confinement or a loss of property or rights.”<sup>35</sup>

The employment of collective punishment within a military action is determined by whether or not the action can be considered indiscriminate. For this purpose, Article 51 of the First Additional Protocol to the Fourth Geneva Convention defined an indiscriminate attack as “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”<sup>36</sup> Article 57 of the same Protocol then demands that the military take care not to harm the civilian population more than is necessary in order to achieve the military

objective.<sup>37</sup> Both of these Articles express clearly that there are circumstances in which civilians are unavoidably harmed.

The SCSL has played a particularly important role in developing the concept of collective punishment as a war crime.<sup>38</sup> In all but one of the Court's cases the accused have been charged with collective punishment, and three of its most prominent cases (*Prosecutor v. Fofana and Kondewa*, *Prosecutor v. Sesay, Kallon and Gbao*, and *Prosecutor v. Brima, Kamara and Kanu*) have incorporated convictions for collective punishment.<sup>39</sup> The SCSL has established and defined the crime of collective punishment as being composed of two elements: (i) "the indiscriminate punishment imposed collectively on persons for omissions or acts for which some or none of them may or may not have been responsible," and (ii) "the specific intent of the perpetrator to punish collectively."<sup>40</sup>

## **B. Definition and Different Types of Economic Sanctions**

While collective punishment is uniformly forbidden, economic sanctions are considered a legitimate use of political influence. In *Economic Sanctions Reconsidered*, one of the most significant studies of the subject, the authors describe sanctions as "part and parcel of international diplomacy, a tool for coercing target governments into particular avenues of response."<sup>41</sup> Sanctions have been used since ancient Greece, though they rose to greater prominence following World War I.<sup>42</sup> In the early 20<sup>th</sup> century they were primarily used to discourage military ventures, such as when the League of Nations used sanctions to coax Greece into withdrawing from Bulgaria in 1925 and the League's unsuccessful attempt to make Italy withdraw from Abyssinia in the 1930s.<sup>43</sup> They have, at times, even had the desired effect on major powers. Thus, England and France removed their troops from Egypt in 1956 due to threats of sanctions.<sup>44</sup>

Sanctions have also been used to sway internal matters in other countries. The United States' sanctions on the Dominican Republic, Brazil, Chile, and Nicaragua led, in part, to regime changes in each of the countries in the 1960s and 1970s.<sup>45</sup> At other times, sanctions have been declared in order to pressure a country to change its policies. The Jackson-Vanik Amendment to the Trade Act of 1974 applied limited sanctions to countries that restrict their citizens' human rights, particularly the right to emigrate.<sup>46</sup> The Amendment was an effort to punish the Soviet Union for refusing to allow its citizens, particularly Jewish *refuseniks*,<sup>47</sup> to emigrate. It ultimately played a large part in causing the USSR to free *refuseniks* and allow them to leave.<sup>48</sup> Possibly the most widely appreciated sanctions were those imposed on apartheid South Africa in the 1980s, when the European Community and the United States demanded that the country end its racially discriminatory legislation.<sup>49</sup>

Sanctions have also been used either as a precursor to, or in addition to, military action. In 1990 the United Nations imposed sanctions on Iraq after the latter invaded Kuwait. This did not induce Iraq's self-appointed president, Saddam Hussein, to withdraw. Unlike with Italy's invasion of Abyssinia, a coalition of thirty-four countries followed up by attacking and driving back the Iraqi forces in occupied Kuwait. The sanctions remained in place during and after the fighting, and most were not lifted until after Hussein was overthrown in 2003.<sup>50</sup> Similarly, the NATO-led attack on Libya in 2011 was accompanied by a UN Security Council resolution that sanctioned arms sales and flights to Libya.<sup>51</sup> These examples illustrate the utility of economic sanctions.

### ***C. IHL Norms Governing the Use of Economic Sanctions***

While IHL is clear on its prohibition of collective punishment, it is less so on permissible uses of economic sanctions. Instead it restricts itself to enforcing measures to protect the civilian population and to prevent the sanctioning power from overstepping its bounds. Articles 54,<sup>52</sup> 69,<sup>53</sup> and 70<sup>54</sup> of the Fourth Geneva Convention along with its Protocol Additional (I) of 1977, forbid intentionally starving the civilian population. Article 23 also requires states to allow the passage of humanitarian goods, but only if there is no danger of them being misappropriated for military purposes.<sup>55</sup> Article 59, which deals with the responsibilities of an Occupying Power in allowing free passage of relief consignments, also allows the Occupying Power to ensure that the goods will not be used for military purposes.<sup>56</sup>

#### **1. Armed Conflict According to the UN Charter**

The United Nations cannot suggest a blanket ban on economic sanctions, as Article 41 of its own charter permits the use of economic and diplomatic pressure to influence countries. The first example given in the Charter is, "include complete or partial interruption of economic relations."<sup>57</sup> There have been attempts, most notably by the Soviet and Third World countries, to equate economic pressure with the use of force. This not only contradicts the explicit arguments of the UN Charter's drafters, it would deny a key tool that enables countries to use diplomatic measures rather than going to war.<sup>58</sup> According to *Economic Sanctions Reconsidered*, the matter was finally resolved at the United Nations with the General Assembly Resolution 3314, "Definition of Aggression." The resolution specified what is considered aggression and, significantly, did not include economic measures.<sup>59</sup>

The UN Security Council has passed several resolutions that require member states to take measures against terrorism. Resolution 1373, passed in late September 2001, requires that all states shall “Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists.”<sup>60</sup> This was further clarified in Resolution 1456, which reaffirmed the demand for states to fight terrorism but also included language requiring them to remain within the limits of IHL.<sup>61</sup> Resolution 1566 then gave a clear definition of ‘terrorism’: criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act.<sup>62</sup>

Hamas openly admits that it attacks civilians and takes hostages in order to intimidate the Israeli population.<sup>63</sup> As a designated terror group,<sup>64</sup> the United Nations’ own resolutions require Israel to prevent Hamas from obtaining funding and weapons. It was with this background that Israel instituted its 2007 naval blockade targeting Gaza.<sup>65</sup> A naval blockade allows a belligerent to prevent the passage of all vessels, both enemy and neutral, to and from the ports and coastal areas of the enemy, irrespective of the cargo on board.<sup>66</sup> The San Remo Manual on International Law contains a widely accepted, though not legally binding, rubric of international law as it pertains to armed conflicts at sea. The Manual defines the proper and legitimate way to declare a blockade on an “other party to an armed conflict.” According to Articles 93 and 94 a notice to mariners should be delivered, informing them of the beginning date, the end date, and the geographical borders of the blockade.<sup>67</sup> The Israeli Ministry of Transport did so by announcing that “All mariners are advised that as of 03 January 2009, 1700 UTC,<sup>68</sup> Gaza maritime area is closed to all maritime traffic [sic] and is under blockade imposed by Israeli Navy [sic] until further notice,” along with the precise boundaries of the blockade.<sup>69</sup> States have used even stricter equivalents than would be practiced according to the terms of the San Remo Manual. Thus, when Britain blockaded Germany during World War I, it even declared food products to be contraband.<sup>70</sup> This Allied blockade led to almost 763,000 German deaths from starvation.<sup>71</sup>

## **2. Israeli ‘Occupation’ under Article 43 of the Hague Convention of 1907**

Article 43 of the 1907 Hague Convention forms the basis for the concept of a belligerent occupation, and, given the passing of time and its widespread adoption, is recognized as customary international law. In brief, it demands that the Occupying Power ensure that daily life continues with as little interference as possible. As it has always been interpreted, though, it gives the Occupying Power complete legislative authority.<sup>72</sup> As the British Foreign and Commonwealth Office pointed out in

November 2003, during the occupation of Iraq, “[t]here is no legal requirement under the law of occupation for UN authorization to enable an Occupying Power to exercise its functions. UN authority is only required to enable an Occupying Power to take actions that are not otherwise authorised by the law of occupation.”<sup>73</sup> Paragraph 2 of Article 64 of the same Hague Convention allows the Occupying Power to “subject the population of the occupied territory to provisions which are essential to enable the Occupying Power...to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.”<sup>74</sup> In the case of *Haw Pia v. The China Banking Corporation*, the Philippine Supreme Court ruled that the state was justified in liquidating enemy banks in the occupied territory.<sup>75</sup> Nevertheless, legal changes that were not based on security needs have been deemed incompatible with Article 43, such as when the British forces set up their own appeals court in Asmara, Italy, during World War II.<sup>76</sup>

Ensuring the continuity of daily life naturally necessitates some form of participation. Just as an Occupying Power is not allowed to disrupt the local pattern of life, neither can it refuse to take any action. The same Article 43 requires the Occupying Power to “take all measures in his power...to ensure, as far as possible, public order and safety.”<sup>77</sup> In order to ensure public order and safety, it is accepted unquestioningly that occupying powers would provide additional legislation. Within the West Bank and Gaza, new laws put in place by the Ottoman Turks, British, Jordanians, Egyptians, and Israelis are all recognized as valid. As an important distinction, though, Israel has not imposed Israeli law on either the West Bank or Gaza, because to do so would imply that it has annexed the two regions.<sup>78</sup>



2nd Lt. Nira Lee coordinates the entrance of Palestinian ambulances into the Gaza Strip. (IDF Blog)

#### *D. Do Israeli Economic Sanctions Constitute Collective Punishment?*

With a clear differentiation between collective punishment and economic sanctions, one can determine into which category Israel's policies fall. As stated above, the Geneva Conventions require a sanctioning power to permit the transfer of humanitarian goods. The official Commentary on the Protocols defines this as “(1) consignments of medical and hospital stores and objects necessary for religious worship; (2) consignments of essential foodstuffs, clothing, and tonics.”<sup>79</sup> It further explains the reasoning as “The former cannot be a means of reinforcing the war economy and can therefore be sent to the civilian population as a whole. On the other hand, consignments which fell into the second category are only entitled to free passage when they are to be used solely by children under fifteen, expectant mothers and maternity case.”<sup>80</sup>

Israel has not only upheld these standards set forth in the previous paragraph, but has far surpassed them. Even during the fifty-day Operation Protective Edge,<sup>81</sup> as rockets were falling near the border crossings, Israel allowed 997 tons of medical supplies to enter Gaza, and 268 ambulances to transport patients into Israel for urgent treatment.<sup>82</sup> In the first twenty-nine days of the fighting alone Israel allowed in 37,178 tons of food.<sup>83</sup> No one has claimed that Israel prevents religious supplies from reaching Gazans. In fact, the commonly protested restrictions, such as steel and concrete, do not fall under either of the above categories and, even if they did, there would be no certainty that they would be used solely by children and new or expectant mothers rather than militants in Gaza. In just the first week of Operation Protective Edge Israel discovered eighteen tunnels crossing from Gaza into Israel, the construction of which used about eight hundred thousand tons of concrete.<sup>84</sup> Khalid Mishal, the leader of Hamas, and Moussa Abu Marzouk, the



Entrance to a tunnel in Gaza. (Ibraheem Abu Mustafa/Reuters)

deputy head of the organization's political bureau, have admitted that they were built for the purpose of kidnapping Israelis.<sup>85</sup> As shown above, by the United Nations' own requirements Israel is not allowed to assist Hamas in building more tunnels, and must do what it can to deny Hamas the necessary supplies. Despite this, after the fighting quieted down, Israel once again loosened its restrictions on building materials in order to help the civilian population of Gaza rebuild.<sup>86</sup>

The difference between collective punishment and Israel's policy of economic sanctions is made clear when one is reminded of some of the well-known cases of collective punishment. One of the most straightforward examples is the Lidice Massacre committed by the Nazis during World War II. On May 27, 1942, Czech resistance fighters assassinated Reinhard Heydrich, the second in command of the SS and the Protector of Bohemia and Moravia.<sup>87</sup> As punishment, Hitler ordered that any village implicated in the assassination be destroyed.<sup>88</sup> The Gestapo intercepted a letter of a Lidice family who had a son in the Czech brigade of the British forces<sup>89</sup> and, on this basis, the German forces destroyed the village of Lidice in retaliation.<sup>90</sup> All of the village's 172 men over the age of sixteen and seven women were executed.<sup>91</sup> The remaining 195 women were deported to the Ravensbruck concentration camp.<sup>92</sup> Among the village's children, ninety were sent to the Gneisenau concentration camp and seven, each under a year old, were sent to be raised in Germany after examination by "racial experts."<sup>93</sup>

Aside from the brutality of the means employed, what distinguishes the Lidice Massacre from the Israeli economic sanctions is the element of individual responsibility. The people of Lidice were being punished for the assassination of Heydrich, an act in which they had no involvement. By contrast, the Israeli sanctions are targeting Hamas for the very acts the organization has committed. In this context a distinction must be made between the punishment of innocent individuals and the punishment of a guilty individual that unintentionally and unavoidably causes harm to innocent third parties.<sup>94</sup> The latter is permitted by IHL as long as the effect is proportionate to the expected military advantage.<sup>95</sup>

These allegations of collective punishment also fail to take note of a basic characteristic of the prohibition on collective punishment. As established in the *Lotus* case,<sup>96</sup> it is a basic tenet of international law that "Restrictions upon the independence of States cannot...be presumed."<sup>97</sup> This principle is reflected in Pictet's *Commentary*. In explaining Article 33 of the Fourth Geneva Convention, Pictet specified that it refers to acts of reprisal, a state's actions that are contrary to international law and are employed in response to the wrongful act of another state.<sup>98</sup> By contrast, the prohibition on collective punishment does not apply to acts of retorsion, internationally lawful acts whose validity does not require a prior wrongful act by another state.<sup>99</sup> Thus, Pictet states, "It would obviously be desirable for no retorsion to take place. What is most important, however, is respect for the rules of the Convention which embody the rights of protected persons, and it must

be admitted that a belligerent never agrees to accord privileges over and above the rights laid down in the Convention, except on condition of reciprocity.”<sup>100</sup> Consequently, the proscription of collective punishment does not apply to any action that is not supported by an independent injunction or requirement under international law.

### III. The Legal Framework for the Imposition of Israeli Economic Sanctions

A review of the Israeli sanctions shows that they were in response to rocket, missile, and mortar attacks and that they are directed at those materials used by Hamas for the purpose of its terrorist onslaught against Israel. The blockade has always held to sensible limits and its purpose has never been based on the assumption that people within Gaza should starve, or otherwise to deny them any essential object for their survival.<sup>101</sup> Israel has provided the option to deliver goods into Gaza through land to humanitarian missions, whether they are states or nongovernmental organizations – in accordance with Israel checking that no arms have been hidden on “neutral ships.”<sup>102</sup>

The necessity of this practice has been proven by ships such as the *Santorini*,<sup>103</sup> the *Karine A*,<sup>104</sup> and the *Klos-C*,<sup>105</sup> all of which attempted to smuggle large amounts of weaponry to Gaza. It is important to note that the blockade has not caused damage to the civilian population that is “excessive in relation to the concrete and direct military advantage.”<sup>106</sup>



Some of the weapons found aboard the *Klos-C*. (IDF Flickr)

## *A. The History of Israeli Economic Sanctions*

The Israeli economic sanctions are comprised of the land-crossings policy implemented in June 2007 following the Hamas takeover of the Gaza Strip, pursuant to which Israel reduced the amount of supplies it provided to Gaza and restricted movement to and from the Strip. This policy was supplemented with the imposition of a naval blockade in January 2009. The origins of the sanctions are found in the actions taken by Israel following its 2005 disengagement from Gaza.

### **1. September 2005 – June 2007**

On September 12, 2005, following the implementation of the disengagement plan, involving the eviction of some 8,500 Israeli civilians and the destruction of twenty-one villages from the Gaza Strip,<sup>107</sup> the commander of IDF Forces in Gaza terminated Israeli military rule over the region.<sup>108</sup> The following week, on September 20, the Israeli interior minister declared five crossings and land terminals between Israel and Gaza as “border stations.”<sup>109</sup> That November, Israel and the Palestinian Authority (PA)<sup>110</sup> signed the Movement and Access Agreement and Agreed Principles for Rafah Crossing. In this agreement Israel undertook various commitments with regard to the movement of persons and export of goods from Gaza. It also arranged the operation of the Rafah and Kerem Shalom crossings for the movement of persons and goods at the Egyptian border under the supervision of the EU.<sup>111</sup> In December 2005 the Ministerial Committee on National Security authorized the defense minister to decide on the opening and closing of the border crossings.<sup>112</sup> However, no formal policy was established before the Palestinian elections the following April.

Following Hamas’s victory at the polls, the Israeli government declared that “Subject to security considerations, the Gaza Strip crossings will be open in order to allow the entry of humanitarian



Israeli shipments of fruit into Gaza. (Reuters)

assistance into the Gaza Strip.”<sup>113</sup> This policy was challenged in the Supreme Court of Israel sitting as the High Court of Justice (HCJ)<sup>114</sup> in the case of *The Association for Civil Rights v. Defense Minister*, after the activity at the crossings was restricted and at times temporarily closed. The High Court found that in the circumstances of the hostilities between Israel and the terrorist organizations in Gaza, there was indeed a “military-security” justification for imposing certain restrictions on the movement of goods and persons through the border crossings.<sup>115</sup>

On June 25, 2006, two IDF soldiers were killed, four were injured and another, Gilad Shalit, was abducted after a Hamas cell penetrated Israel through an underground tunnel.<sup>116</sup> This attack was accompanied by the continued firing of missiles, rockets, and mortars at Israeli towns and attacks on the land crossings between Israel and Gaza.<sup>117</sup> In response to these attacks, Israel carried out combat operations against the terrorist organizations in the Strip.<sup>118</sup>

Despite the attacks on Israel and the subsequent border closures, Israel prioritized the entry of certain basic goods and products into Gaza.<sup>119</sup> During this period the entry of raw materials for construction, industry, and agriculture was generally permitted, but the amount of goods exported from Gaza was restricted.<sup>120</sup> In the same case of *The Association for Civil Rights v. Defense Minister*, the Court upheld the restrictions and stated that Israel’s policy of closing the crossings would be subject to serious and immediate security threats, and that giving preference to the entry of certain basic products is balanced, reasonable, and consistent with Israeli and international law.<sup>121</sup> The Court further noted that the state does not limit the passage of goods merely to essential basic products and acts in consideration of the humanitarian needs of Gaza’s civilian population.<sup>122</sup> The state’s general policy was to allow the entry of as much goods as required, subject to security requirements.<sup>123</sup> Thus, for example, the State allowed the entry of goods and equipment needed for various long-term infrastructure projects.<sup>124</sup>



The effects of a rocket from Gaza on a house in the Tel Aviv suburb of Rishon LeZion. (Miriam Alster/FLASH90)

## 2. June 2007 – June 2010

Even though it had prevailed in the previous year's election, in June 2007 Hamas seized total control of the Gaza Strip. This was soon followed by an escalation in rocket and mortar attacks targeting Israeli civilians, as well as attempted and 'successful' terror attacks on Israeli civilians and IDF forces at the border crossings, the border fence, and within Israeli territory.<sup>125</sup> In the year following Hamas's takeover 3,307 rockets and mortars were fired from Gaza,<sup>126</sup> compared to 1,777 in 2006.<sup>127</sup> In response to these attacks and the Hamas takeover, on September 19, 2007, Israel's Ministerial National Security Committee designated Gaza a "hostile territory" and decided to impose sanctions on the Hamas regime in the civilian sphere "in order to restrict the passage of various goods to the Gaza Strip and reduce the supply of fuel and electricity" and impose restrictions "upon the movement of persons to and from the Gaza Strip."<sup>128</sup> According to the Court ruling, these sanctions were to be implemented after a legal examination of their humanitarian ramifications and with "the intention to avoid a humanitarian crisis."<sup>129</sup> In light of Hamas's continued aggression, restrictions were placed on the passage of goods and fuel between Israel and Gaza, and trade with Gaza was prohibited.<sup>130</sup>

This new land-crossings policy was reviewed by the HCJ in *Al Bassiouni v. Prime Minister*, after the restrictions imposed on the supply of fuel and electricity were challenged. The Court held that, in accordance with its obligations under IHL, Israel is obligated to allow the passage of those goods required for the maintenance of the essential humanitarian needs of Gaza's civilian population.<sup>131</sup> At the same time, Israel is not required to allow the passage of nonessential items or quantities in excess of what is required for Gaza's basic humanitarian needs.<sup>132</sup> The HCJ found that the state had acted and was committed to continue acting in conformity with this standard.<sup>133</sup> The Court ruled that, while reducing the fuel and electricity supplies to Gaza did not harm the residents' "essential humanitarian needs," Israel had the legal obligation to facilitate the transfer of supplies to Gaza as well as to provide a portion of those supplies itself.

During the period from 2007 to 2010, the variety of goods allowed into Gaza was restricted to a "list of humanitarian products."<sup>134</sup> The inclusion of a product on this list was based on the following parameters: its "necessity for humanitarian needs"; the luxury status of the product; the legal/judicial obligation to permit the entrance of the product; implications of the product's use (would it be used for conservation, rebuilding, or development) while stressing the influence of its entrance on the status of the Hamas regime; security implications (can the product be used for military purposes); sensitivity to the needs of the international community; [and] the existence of alternatives.<sup>135</sup>

Prohibited items included cement, iron, and plaster.<sup>136</sup> The order of priorities for the entry of goods was set in the following manner: (1) medical supplies and medicine; (2) requests by international organizations for humanitarian aid and supplies for approved public projects; (3) agricultural materials; (4) goods for the private market in accordance with the order of priorities determined by the Gaza Strip Economic Committee, a representative of the Palestinian Authority.<sup>137</sup> It is important to make clear that with the exception of restrictions arising from the capacity of the crossings there was no limit on the amount of food entering Gaza.<sup>138</sup> There were, however, quotas on the entry of fuel and agricultural products.<sup>139</sup> The quota on fuel was approved by the Israeli Supreme Court in its ruling on the *Al Bassiouni* case.<sup>140</sup> The entry of agricultural products was restricted to twenty-six trucks per day, though this was not a strict limit and did not include agricultural produce transferred from the West Bank to Gaza in coordination with the Gaza Strip Economic Committee.<sup>141</sup> It should be noted, however, that a significant amount of Gaza's consumption is based on the supply of crops grown in the Strip.<sup>142</sup> In addition to the restrictions on fuel and agricultural products, for certain periods of time there were also restrictions imposed on the entry of other products, such as a quantitative limit on the number of trucks carrying shoes and clothing.<sup>143</sup> At other times the land crossings were also closed temporarily due to Palestinian rocket attacks targeting the crossings.<sup>144</sup> The first Israeli death during Operation Protective Edge occurred when a rocket struck the Erez Crossing and killed a civilian.<sup>145</sup> In such circumstances the activity at the crossings would typically decrease for several days before returning to the previous level.<sup>146</sup>

The movement of persons between Gaza and Israel was restricted to “exceptional humanitarian cases, with an emphasis on urgent medical cases.”<sup>147</sup> According to the Coordinator of Government



The IDF Medical Corps treating injured Palestinian civilians at the Erez Border Crossing. (IDF Flickr)

Activities in the Territories (COGAT), four out of every five requests for permits to receive medical treatment in Israel are accepted.<sup>148</sup> Requests are typically rejected when an applicant has a security background that prohibits him from entering Israel or when the PA prefers that the applicant receive treatment in Egypt or Gaza.<sup>149</sup> Ismail Haniyeh, the Hamas prime minister, has had no qualms about letting his mother-in-law,<sup>150</sup> sister,<sup>151</sup> brother-in-law,<sup>152</sup> daughter,<sup>153</sup> and granddaughter be treated in Israeli hospitals under this policy.<sup>154</sup> Even terrorists are treated in the same hospitals as their victims.<sup>155</sup> Ironically, their lives are saved by the very people they would happily murder.

With regard to monetary activity, due to the concern that money entering Gaza would be used to fund terrorist activities, all Israeli banks have suspended their working relationships with banks in the Strip.<sup>156</sup> Israel allowed into Gaza a fixed amount of money each month in order to pay the salaries of PA employees and the expenses and salaries of international organizations, at their request.<sup>157</sup> Israel also allowed money to leave Gaza at the request of the PA to replace worn-out bills.<sup>158</sup>

This land-crossings policy was supplemented with the imposition of a naval blockade, which Israel declared on January 3, 2009, during Operation Cast Lead.<sup>159</sup> All vessels attempting to transport humanitarian supplies to Gaza have since been directed to the Ashdod port and, after inspection, humanitarian supplies are sent to Gaza through the appropriate land crossings:<sup>160</sup> the Karni Crossing for goods; the Erez Crossing for the movement of persons between Israel and Gaza; the Sufa Crossing for construction aggregate; the Kerem Shalom Crossing for the movement of goods between Egypt and Gaza through Israel; or the Nahal Oz terminal for the transfer of fuel.<sup>161</sup>



Ismail Haniyeh, the prime minister of Hamas. (AP/Khalil Hamra)

### 3. June 2010 – Present

On June 20, 2010, the Israeli government altered its land-crossings policy by deciding to implement a number of measures intended to liberalize the entry of civilian goods into the Gaza Strip, while at the same time preventing the entry of weaponry and combat materials.<sup>162</sup> As part of the measures, Israel published a list of items that would not be allowed through. These were limited to “weapons and war material,” including dual-use items, which could be used for either civilian or military purposes.<sup>163</sup> Anything not on the list would be permitted to enter Gaza.<sup>164</sup> It was further decided to allow the entry of dual-use construction materials for PA-approved projects, such as schools, health facilities, housing, and sanitation, under international supervision.<sup>165</sup> The international supervision is intended to ensure that Hamas conforms to the restrictions imposed on these materials under international law, though their presence does not always guarantee that the local authorities will act responsibly; in December 2005, about one hundred PA security officers at Rafah “[forced] the unarmed European monitors to flee to a nearby IDF base.”<sup>166</sup> The land-crossings policy was further altered on December 8, 2010, when it was decided that, subject to certain restrictions, the export of goods to the West Bank and outside of Israel would be permitted.<sup>167</sup>

Since June 2010 the items that may not be imported into Gaza have been restricted to arms, munitions, and dual-use items specified in the Defense Export Control Order of 2008<sup>168</sup> and an additional list of dual-use items.<sup>169</sup> Those dual-use items for projects under international supervision that may be imported are also listed.<sup>170</sup> Israel’s Defense Export Control Order (Controlled Dual-Use Equipment), which regulates a portion of the dual-use items, incorporates the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies.<sup>171</sup> Other restricted dual-use items include: various chemical substances (*inter alia*, sulfur, ammonium nitrate, chlorate salts); communications equipment; communications disruption equipment; diving equipment; telescopes;<sup>172</sup> drilling equipment; glass fiber based raw materials; carbon fibers or graphite fibers; vessels; and epoxy resins.<sup>173</sup>

Following the 2012 ceasefire that ended Operation Pillar of Defense,<sup>174</sup> Israel also allowed gravel and other building materials to enter Gaza for the first time since 2007.<sup>175</sup> However, the following October Israel again suspended the transfer of building supplies to Gaza for eight weeks, after discovering a tunnel leading into Israel that had been built with cement designated for civilian construction.<sup>176</sup> The transfer policy has remained consistent since then, even during the latest round of fighting in Operation Protective Edge.<sup>177</sup> The only pause came when Israel temporarily closed the Kerem Shalom Crossing after a rocket was aimed at the site.<sup>178</sup>

## B. Occupation

### 1. Laws of Occupation

Israel's rights and responsibilities toward Gaza are largely based on the viewpoint that it is an 'occupying power.' Like many other charged terms that are associated with Israel, 'occupation' must be based on legal definitions, rather than emotive rhetoric. According to both the Hague Regulations of 1899 and the Fourth Geneva Convention of 1949, Israel cannot be considered an occupier.

Article 42 of the Hague Regulations of 1899 states that "territory is considered occupied when it is actually placed under the authority of the hostile army" and that "[t]he occupation extends only to the territory where such authority has been established and can be exercised."<sup>179</sup> After Israel's 2005 disengagement from Gaza, there have been no permanent IDF forces inside the Strip. The Fourth Geneva Convention refers to territory as occupied where the territory belongs to another "High Contracting Party"<sup>180</sup> (i.e., a state party to the convention) and the occupier "exercises the functions of government" in the occupied territory,<sup>181</sup> meaning that Israel must exercise effective control over Gaza in order to be an occupier. To clarify, it is important to note that the elected Hamas government is the *de facto* sovereign governor of the Gaza Strip and does not take direction from Israel, Egypt, or any other state or proto-state.<sup>182</sup> Therefore, there is no effective Israeli control in Gaza, as Israel does not have any functionality of government in Gaza, nor any authority or relation to the Hamas government. Mahmoud Zahar, one of Hamas's founders and a former foreign minister for the Gazan government, has even confirmed that Israel does not occupy the Strip. While organizers in the West Bank were preparing large demonstrations against Israel, Zahar was asked if Hamas would stage similar protests in Gaza. He responded that the Strip is no longer occupied, so there would be no reason to protest.<sup>183</sup>

Israel's opponents argue that Israel still has control over most of Gaza's borders and, at times, has sent in troops. As mentioned above, this ignores the true meaning of occupation in favor of its popular use as a charged term with which to vilify Israel. In a similar circumstance a decade ago, the International Committee of the Red Cross rightly declared in 2004 that Iraq was no longer occupied, even though there were hundreds of thousands of foreign troops still in the country.<sup>184</sup> Should the definition of 'occupied' be expanded to cover any situation in which one country has complete control over another's borders, then states like Lesotho, San Marino, and the Vatican would also be under permanent occupation.

The concept of occupation is also murky in the West Bank. Since 1994 the Palestinian Authority has governed the area, with Israel retaining some responsibilities. Palestinian leaders themselves do little to clarify the situation, as they simultaneously insist that Israel both occupies the West Bank and Gaza as well as invades Palestinian territories, which implies they are a separate entity.<sup>185</sup>

This odd situation was recognized in a 2012 report by former Israeli Supreme Court Justice Edmond Levy. In a ruling on an illegally built Jewish house, Levy pointed out that, prior to 1967, no country held internationally recognized sovereignty over the area, which makes the Fourth Geneva Convention inapplicable.<sup>186</sup> Although the report was heavily criticized around the world for “wish[ing] away [Israel’s] obligations under the law of occupation,”<sup>187</sup> it accords with other similar situations, such as Northern Cyprus, Western Sahara, and the Kuril Islands, none of which are regularly referred to as ‘occupations.’<sup>188</sup>

Since September 12, 2005, there has been no permanent Israeli security presence, no Israeli residents, and not even Israeli tourism anywhere in the Gaza Strip. At the time of its withdrawal, in an effort to encourage Gaza to thrive, Israel announced that it would establish bus and truck convoys between Gaza and the West Bank, and approved of building a Gazan seaport while also acknowledging the importance of an airport.<sup>189</sup> However, the following year the Palestinian Authority held elections in which Hamas won 74 of the 132 parliamentary seats.<sup>190</sup> Ariel Sharon, the Israeli prime minister at the time, said that he could not prevent Hamas from running or cancel the elections as he had no control over the voting.<sup>191</sup> If Israel had participated in the elections, perhaps then it would have been in a position to influence the results.

Even if Israel was still occupying Gaza, that would not prevent it from being within its rights to act as it does. In a landmark case of the Supreme Court of Israel discussing the legality of targeted killing in Gaza (in 2003), the High Court of Justice decided that the Israeli-Palestinian conflict is an



A missile is launched by an Iron Dome battery, a short-range missile defense system designed to intercept and destroy incoming rockets and artillery shells. (Getty Images/AFP)

“international armed conflict” that is beyond the borders of Israel. In the words of then-Supreme Court President Aharon Barak, “This law applies in any case of an armed conflict of international character – in other words, one that crosses the borders of the state – whether or not the place in which the armed conflict occurs is subject to belligerent occupation. This law constitutes a part of *jus in bello*. From the humanitarian perspective, it is part of international humanitarian law.”<sup>192</sup>

This decision makes it obvious that Israeli control of Gaza’s airspace and waters is also legal under international law. States have the right to sovereign control over their territorial air and coastal waters, and naval blockades are legal acts of war.<sup>193</sup> However, as previously argued, if Gaza is a separate sovereignty, then whenever it attacks Israel, it provides Israel the right to engage in acts of armed conflict as self-defense under Chapter 51 of the UN Charter.<sup>194</sup> This also means that Israel has the right to blockade Gaza and to establish economic sanctions against it.

One of the most often criticized aspects of Israel’s actions toward Gaza is its imposition of a naval blockade. This is frequently described as turning Gaza into “the world’s largest outdoor prison”<sup>195</sup> and even the United Nations has called it a “violation of international law.”<sup>196</sup> Like the larger question of collective punishment, these arguments are based on emotionally driven rhetoric rather than legal definitions.

Despite its complaints of being strangled, Hamas has not found Israeli conduct to be an obstacle in continuing to commit widespread terror. On a daily basis Hamas and its cooperators in Egypt use smuggling tunnels from Egypt to transfer fuel and arms into the Strip. Furthermore, Hamas,



Mortars on board the *Klos-C* ship intercepted by Israel on March 5, 2014. (IDF/Flickr)

in cooperation with Iran, produces “creative opportunities” to deliver missiles, rockets, mortars, and a wide range of other weapons by ship, from Iranian ports to Gaza, as discussed above.<sup>197</sup> Only Israeli countermeasures have significantly limited the widespread importation of both homemade and Iranian weapon-delivery systems. The most high-profile example of this occurred in 2004 when the IDF declared that it had intercepted the cargo ship *Klos-C* before it reached the Sinai Peninsula.<sup>198</sup> This seizure is evidence that Hamas is the governor of Gaza: it prepares the military infrastructure within Gaza; it develops international relations with other countries (Iran in this instance); and it controls the tunnels to Egypt and the border with it. It is hard to estimate just how many tunnels Hamas has constructed, as Israel and Egypt regularly announce that they have found up to hundreds of new ones.<sup>199</sup> So many tunnels are regularly dug that the suppliers of the *Klos-C* made space to include over two million kilograms of Iranian cement in one hundred shipping containers, each twenty feet long.<sup>200</sup>

## 2. Egypt

There is a twelve-kilometer-long border between Gaza and Egypt with a large crossing point at Rafah. After the 2005 disengagement, Israel handed control of Rafah over to the Palestinian Authority.<sup>201</sup> Since then, Israel has not controlled either side of the crossing. Despite the argument that Israel oppresses Gazans, Israel and Egypt, the two countries that are physically closest to Gaza, both enact similar measures against Hamas. Like Israel, Egypt sees the terrorist group as a danger and closed its borders with Gaza following Hamas’s takeover in 2007.<sup>202</sup> Relations between the two warmed briefly in 2012 and 2013, while the Muslim Brotherhood was in charge in Egypt, but sharply cooled again after Mohamed Morsi<sup>203</sup> was ousted from power. Last March Egyptian courts officially designated Hamas a terrorist group.<sup>204</sup>

Recently, Egypt has taken extreme measures to reduce smuggling and attacks by Gazans on Egyptians. After one incident in which an attack killed thirty Egyptian soldiers, Cairo ordered border towns demolished and displaced thousands of residents in order to create a five-hundred-meter buffer zone.<sup>205</sup> This move has largely been met with silence from the international community, unlike the widespread denunciations that follow Israel’s temporary border closings.<sup>206</sup>

## C. The Situation in Gaza

The current situation in Gaza is far better than the news reports imply. Per capita the Palestinians have received more foreign aid than almost any other group in the world.<sup>207</sup> The Palestinian

Authority alone received over \$1.25 billion from international donors in 2013.<sup>208</sup> In addition, UNRWA's<sup>209</sup> planned budget for 2015 is nearly a billion dollars.<sup>210</sup> Neither of these figures includes the electricity, food, medicine, and fuel that Israel supplies to Gaza.<sup>211</sup>

Thanks to all this support, Hamas is financially very successful. *Forbes* lists it as the second-richest terror group in the world, with a billion dollars at its disposal.<sup>212</sup> That is half the wealth of ISIS, despite Gaza constituting less than a half of one percent of the area under ISIS's control<sup>213</sup> and not providing any petroleum. Very little of this money, however, reaches the man in the street. Instead Hamas leaders enjoy large mansions while Gaza as a whole was recently ranked as the third poorest section of the Arab region, only standing above Sudan and Yemen.<sup>214</sup> Even when attractions have opened for Gazans, Hamas has often shut them down for offenses such as allowing "men and women [to be] seen mixing together."<sup>215</sup> A similar fate befell what was to be the first UNRWA Gaza Marathon in 2013, which was canceled after Hamas banned women from running.<sup>216</sup>

Despite the poverty that Hamas imposes on its citizens, the population of Gaza is comparatively healthy and well educated. In fact, according to the *CIA Factbook's* statistics for 2014, Gaza is a reasonably healthy place to live. Life expectancy in the Strip is 74.64 years, higher than Jordan (74.10 years), Russia (70.16 years), India (67.80 years), Iran (70.89 years), and Brazil (73.28 years).<sup>217</sup> Gaza also has a maternal death rate that is surprisingly low for an area that claims to be undergoing a humanitarian crisis (64 deaths per 100,000 live births). This is better than Egypt (66 deaths/100,000 live births), India (200 deaths/100,000 live births), Cuba (73 deaths/100,000 live births), and the Dominican Republic (150 deaths/100,000 live births).<sup>218</sup>

Likewise, contrary to common mythology that Gaza is "the most densely populated territory in the world,"<sup>219</sup> Gaza is less densely populated than an array of other locales, including a number of economic success stories. The population per square kilometer in Gaza at the end of 2012 was 4,583;<sup>220</sup> Hong Kong had 6,866 people per square kilometer, Singapore had 7,589, Monaco had 18,790, and Macao had 19,885.<sup>221</sup> Even a number of Israeli locations are comparable to ones in Gaza. Gaza City contains about 16,500 people per square kilometer.<sup>222</sup> Only 70 kilometers away, the Israeli city of Bnai Brak has over 21,000 people per square kilometer. Other nearby cities of Givatayim and Bat Yam have 16,329 and 15,913 people per square kilometer, respectively.<sup>223</sup>

Perhaps the most astonishing fact, in light of the sensationalist media coverage damning Gaza's prospects for a better future, is that Gaza's literacy rate stands at a staggering 95.3 percent.<sup>224</sup> This is far higher than India (62.8 percent), Egypt (73.9 percent), Iran (85 percent), and even wealthy oil states such as Saudi Arabia (87.2 percent) and the United Arab Emirates (90 percent). Even Israel has only a marginally higher rate at 97.1 percent.<sup>225</sup>

These discrepancies lead to two conclusions. The first is that the people of Gaza do not suffer from a ‘humanitarian crisis’ as the international media and human rights groups claim. Second, Gaza has the proper means, and receives the vital and essential goods it should, for survival and even more. Within this framework, the statistics clearly show that Gaza functions as an independent entity that does not depend on Israel.



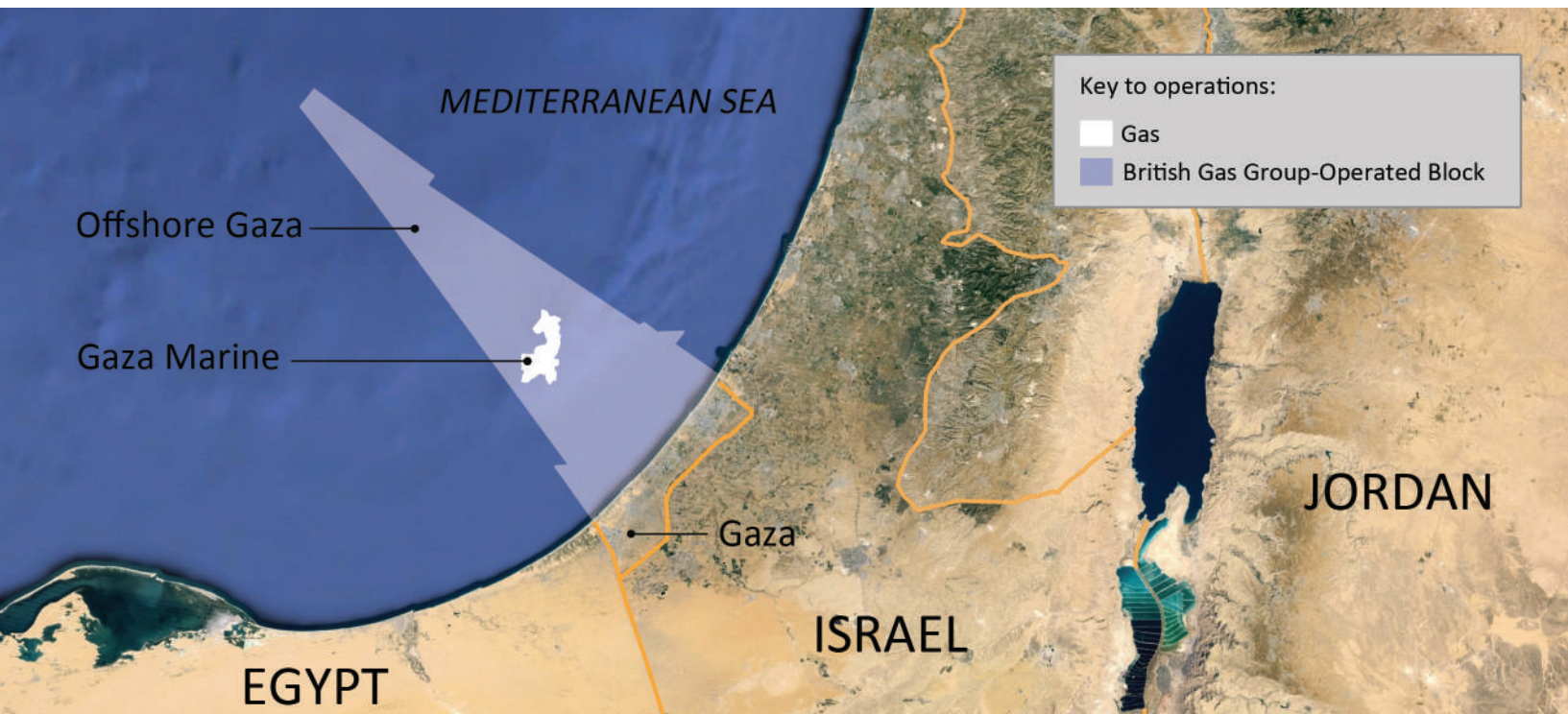
Palestinians shop at al-Andulusia mall in Gaza City on August 16, 2011. (AP/Hatem Moussa)

## **IV. Economic Perspectives regarding the Situation in Gaza**

### ***A. Hamas***

The responsibility for the humanitarian crisis in Gaza, to the extent it exists, ultimately rests on the shoulders of the local governing power, Hamas. As shown, the organization cynically exploits its people’s turmoil to gain sympathy and material support. Then, instead of using donated resources to improve the situation in Gaza, it expropriates them, thus leaving the general population worse off and in need of even more assistance.<sup>226</sup> This cruel cycle is further exacerbated by Hamas’s refusal to show any interest in improving relations with Israel.

Gaza has the potential to evolve into a totally independent economic entity, if it were not for Hamas’s self-destructive practices and its struggles with the PA and Israel. Notably, Hamas discovered a gas reserve, named Marine, three hundred meters from the shores of Gaza in February 2014.



Map of Gazan offshore gas deposits, discovered February 2014.

However, it still has not even started to expose or examine the site.<sup>227</sup> Gaza's offshore gas deposits (confirmed by British Gas) are worth an estimated \$6-7 billion.<sup>228</sup> If the Hamas government could stabilize the political situation long enough to install platforms to bring the gas to the surface, it would reap the benefits of these offshore gas deposits. Israel even offered an alternative option to purchase the gas, in order to provide the Palestinians an opportunity to dramatically revive their economy.<sup>229</sup> However, the core conflict regarding the gas production derives from the dissociation between the Hamas government, which controls Gaza and thus its offshore gas, and the Fatah-ruled government that rules the West Bank. Hamas ultimately refused to develop the potential gas because they did not want the PA or Israel to take any role in the project.<sup>230</sup> Comparatively, in 2007, Israel also found natural-gas reserves and a few months later it set up the Leviathan and Tamar gas fields off the coast of Haifa, as it understands the profitability of establishing these fields and their impact on its economy.<sup>231</sup>

Hamas has shown that it values its hatred of Israel over the wellbeing of its civilians. Recently, a charity group organized a trip for children from Gaza who had lost parents in the summer 2014 fighting. The orphans would visit Israeli communities that have suffered under rocket attacks, Arab villages within Israel, a school for both Jewish and Arab students, and ultimately meet with PA President Mahmoud Abbas. The Israeli security service gave its permission for the children to enter and travel around Israel, but the bus was stopped at the border leaving Gaza. Hamas officials declared that the children would not be allowed to cross into Israel and that it would

prevent similar trips from ever happening again.<sup>232</sup> According to Eyad al-Bozom, the spokesman for the Interior Ministry in Gaza, the children must not be allowed to set foot in Israel in order “to preserve the culture and tradition of our people.”<sup>233</sup> Further statements from Hamas explained that they believed the trip was “aimed to [sic] normalize our children with the Zionist occupation.”<sup>234</sup> Aside from visiting Abbas, all the locations on the trip’s itinerary were located within the pre-1967 armistice lines. By its statements, Hamas continues to demonstrate that it does not seek coexistence but rather to destroy the State of Israel completely.

Beyond encouraging the faulty narrative of a humanitarian crisis in Gaza, Hamas abuses the support that Israel and the international community provide in order to alleviate the effects of such a crisis. Fatah representatives have claimed that Hamas confiscated humanitarian goods that were sent to Gaza during Protective Edge, which it shared among its own members while selling the remainder on the black market.<sup>235</sup> This behavior did not begin over the past summer. In January 2009, during Operation Cast Lead, reports showed that Hamas seized portions of all the aid provided, even flour and medicine.<sup>236</sup> Similar incidents occurred in early 2008<sup>237</sup> and in 2010.<sup>238</sup> The latter specifically involved the goods sent on the Gaza Freedom Flotilla,<sup>239</sup> which gathered headlines for the naval raid on the Turkish merchant vessel *Mavi Marmara*. News media around the world carried stories about the Israeli raid, but there was little fanfare when Israel honored its word to let the permissible goods into Gaza, yet Hamas withheld the aid from people who disagreed with the organization. As one Gaza resident explained, “People who are not in with Hamas don’t see any of the relief goods or the gifts of money... Hamas supporters get prefabricated housing, furnishings and paid work. We get nothing.”<sup>240</sup> The problem of Hamas’s theft became so blatant that the United Nations suspended all shipments to Gaza following the 2009 incident.<sup>241</sup> Despite the UN’s using the same tactics as Israel, no one accused the international organization of imposing collective punishment.

## **B. Palestinian Authority**

Hamas and Fatah have struggled against each other for years. In the first five months of 2007, Hamas’s first year of rule in Gaza, 271 Palestinians were killed in internecine violence.<sup>242</sup> For comparison, 373 Palestinians were killed by Israeli forces in the entire year, the vast majority of whom were terrorists.<sup>243</sup> Conditions only became worse that June, when a civil war broke out over which group would control Gaza. During this fighting, all rules of war were ignored. Both sides threw prisoners off rooftops,<sup>244</sup> fought in hospitals, executed political prisoners, and Fatah-associated fighters used a press vehicle to attack Israeli soldiers.<sup>245</sup> Despite all this, neither the UN Security Council nor the General Assembly passed a single resolution about the widespread fighting and human rights violations.<sup>246</sup>

On April 23, 2014, Hamas and the Palestinian Authority announced that they would form a unity government.<sup>247</sup> A similar enterprise had been attempted in early 2011, but broke down during negotiations.<sup>248</sup> Once again, friction soon arose between the two groups in 2014 when the PA refused to pay salaries to the forty thousand people on Hamas's payroll.<sup>249</sup> Qatar, Hamas's largest financial supporter, offered to supply \$20 million but the banks in Gaza refused to take the money, possibly due to American pressure.<sup>250</sup> At other times, Hamas and Fatah have worked together to attack Israel. During Operation Protective Edge, Fatah-associated groups took credit for launching rockets at Israel.<sup>251</sup>

### ***C. International Opinion: UN, U.S., EU, Arab League, Turkey***

Despite the condemnations Israel receives, it is far from unique in utilizing economic sanctions. The United Nations, United States, European Union, Arab League, and Turkey, all of which regularly condemn Israel's economic actions directed at Hamas, also take similar or, at times, harsher measures than Israel has.

At one time or another during the 1990s alone, the United States imposed sanctions on 68 percent of the world's population.<sup>252</sup> During the same period the United Nations imposed sanctions on Libya, Afghanistan, Rwanda, Angola, Somalia, Liberia, Burundi, Ethiopia, Eritrea, Haiti, and Serbia and Montenegro.<sup>253</sup> The UN justified these actions by invoking Articles 41 and 42 of its Charter.

In addition, in 1990 the UN Security Council passed Resolution 661, which forbade all trade and payments with Iraq or occupied Kuwait. The only exceptions permitted were medicine and tightly regulated food provisions in order to relieve humanitarian emergencies.<sup>254</sup> These restrictions remained in place until Saddam Hussein's regime was toppled in 2003.<sup>255</sup>

Both the U.S. and the UN have imposed sanctions on Iran with the goal of stopping or limiting its nuclear program, though America has been sanctioning Iran at some level since the latter's 1979 revolution. The sanctions have primarily targeted organizations that assist Iran's missile and nuclear programs, as well as those that market its oil.<sup>256</sup>

Sanctions are even used between major powers. The U.S. and the European Union are currently sanctioning Russia for its actions in Ukraine<sup>257</sup> and, in response, Russia has sanctioned food products from the countries that are boycotting it.<sup>258</sup> Despite the suffering inflicted, neither side has been accused of perpetrating collective punishment.

The Arab League may be the most hypocritical in its attitudes toward sanctions. Building on previous anti-Jewish boycotts, the League responded to Israel's founding in 1948 with a complete boycott of Israeli products and services, non-Arab businesses that work with Israel, and planes or ships headed to Israel.<sup>259</sup> The implications of this boycott drew the most attention after the 1973 Yom Kippur War, when the major oil-producing Arab states declared an embargo on the U.S. During the five months that the embargo lasted, the price of oil shot up from \$3 per barrel to \$12. This led to drastic measures across the country, including gas stations restricting their sales and some towns even banning Christmas lights.<sup>260</sup> These actions stood out as particularly hypocritical, because for decades the same countries regularly lobbied to have the UN treat aggressive economic measures as equivalent to the use of armed force, which is forbidden by the UN.<sup>261</sup>

Israel is not alone in sanctioning Gaza. After Hamas won the 2006 elections, the Quartet on the Middle East, consisting of the United States, Russia, the European Union, and the United Nations, announced that it would not provide aid to the PA unless Hamas renounced violence and recognized Israel.<sup>262</sup> The sanctions ended after Hamas threw Fatah out of Gaza, at which point the restrictions on the West Bank were eased and Israel began its blockade of Gaza.<sup>263</sup>

#### ***D. NGOs: Amnesty International, B'Tselem, Human Rights Watch, BDS***

The harshest criticism of Israel usually comes from NGOs such as Amnesty International, Human Rights Watch, and B'Tselem.<sup>264</sup> Amnesty International has charged that "This humanitarian crisis [in Gaza] is a direct result of on-going collective punishment of ordinary men, women and children and is illegal under international law" and blamed Hamas's violence on Israel's blockade, despite the fact that the rockets preceded the blockade by six years.<sup>265</sup> NGO Monitor<sup>266</sup> has responded that when Amnesty International uses expressions like "unlawful attacks" or "disproportionate attacks and collective punishment," they apply the terms "arbitrarily, with no explanation of how they are appropriate to this situation under international law."<sup>267</sup>

B'Tselem describes its purpose as "[acting] primarily to change Israeli policy in the Occupied Territories and ensure that its government, which rules the Occupied Territories, protects the human rights of residents there and complies with its obligations under international law."<sup>268</sup> Following this model, the organization criticizes Israel while ignoring similar Palestinian actions, even if they are much more severe. For example, B'Tselem's website has a section for "Human shields,"<sup>269</sup> which focuses on the misdeeds of Israeli soldiers during the Second Intifada, with no mention of Palestinian terrorists hiding among monks in the Church of the Nativity in Bethlehem during the same time,<sup>270</sup> nor of the consistent and well-documented cases of firing rockets from

crowded civilian areas.<sup>271</sup> In fact, B'Tselem sent a petition to the High Court of Justice on May 5, 2002, the thirty-third day of the Church of the Nativity siege, claiming that Israel uses civilians as human shields, without including a word about the trapped monks.<sup>272</sup>

B'Tselem levels frequent accusations to the effect that Israel is perpetrating collective punishment against Palestinians. They have argued that destroying buildings from which attacks were carried out<sup>273</sup> and blocking roads while people throw Molotov cocktails<sup>274</sup> are both forms of collective punishment under Article 33 of the Fourth Geneva Convention. Even when Israel insisted on continuing to allow humanitarian goods through the Kerem Shalom Crossing despite rockets striking nearby,<sup>275</sup> B'Tselem claimed Israel was collectively punishing Gazans by not running the crossing at full capacity.<sup>276</sup>

The organization has claimed that Gazans are being unfairly punished by not being able to freely enter Israel, despite the fact that they are not Israeli citizens.<sup>277</sup> The implication that a noncitizen should have the right to enter and work in a country has no precedent, even under occupation. Germans following World War II and Iraqis after 2003 did not receive full access to the United States despite being under American occupation. Furthermore, if all countries must allow free passage to neighboring states then this would apply equally to Egypt (which only opened its border with Israel in 1982), Jordan (which opened its border with Israel in 1994), and Lebanon, Syria, and Saudi Arabia (all of whose borders with Israel are still closed).

Like B'Tselem, Human Rights Watch (HRW) clearly demonstrates a double standard between the way it treats Israel and the way it treats other countries or entities. Its 2014 World Report



Rocket launcher located in Gaza City, 50 meters from where most international reporters were staying and 100 meters from a clearly marked UN building. (France24)

on Israel/Palestine criticized “Israel’s punitive closure of the Gaza Strip” while acknowledging that Israel admitted a monthly average of 78,810 tons of construction material into Gaza. The organization mentioned more objectively in Egypt’s report that the North African country “also blocked all regular movement of goods at the crossing it controls.”<sup>278</sup> In the same 2014 Report, HRW did not mention the U.S. and the EU’s sanctions on Iran in those countries’ respective reports, though its report on Iran described accounts of how “unilateral financial and banking sanctions imposed against Iran by the United States and European Union had an adverse effect on access to specialized medicines and medical equipment.”<sup>279</sup> The organization only seems to oppose sanctions when Israel is enforcing them. In its most recent World Report, the organization highlighted an EU sanction against Israel as “One positive development in 2013.”<sup>280</sup>

HRW also condemned Israel for not responding strongly enough against private Israeli citizens who attacked Palestinians or Palestinian property, yet made no similar demand on Hamas, the controlling power in Gaza, to prevent rocket fire. In fact, the only time the report did criticize Hamas for not cracking down was for not arresting gunmen who killed accused collaborators, despite HRW itself admitting that Hamas proudly took credit for the killings.<sup>281</sup>

Aside from holding a double standard when it comes to Israel, HRW selects facts in order to fit its narrative of collective punishment. Thus, in the 2014 World Report, it criticized Israel for destroying illegally built Bedouin houses while never mentioning that the country did the same to illegally built Jewish houses.<sup>282</sup> Despite admitting that the demolished houses are built illegally, HRW regularly claims that it is Israel that breaks the law in demolishing the houses. According to the group, there is no possible reason for Palestinians in the West Bank or East Jerusalem to



Israeli children running for a bomb shelter. (IDF Flickr)

be evicted from their homes unless there is a military need.<sup>283</sup> Would they consider it a war crime to evict a Palestinian who does not pay his rent? In contrast to this tacit endorsement of illegal Palestinian construction, HRW considers permitting building in the West Bank by Jews to be a war crime, implicitly on the same level as Hamas shooting rockets at civilians.<sup>284</sup> Ken Roth, the head of HRW, seems to view Jewish Israelis living in the West Bank as so vile that he refused to condemn the kidnapping and murder of three teenagers this past summer without also stating that they were “attending school at [an] illegal settlement.”<sup>285</sup> Roth’s inappropriate equivalence appeared again two months later, when he tweeted a picture of a Hamas tunnel into Israel and suggested that it is impossible to know “if Hamas tunnel used to attack/capture combatant (IHL allows) or take hostage/attack civilian (illegal)? [sic]”<sup>286</sup>

HRW has admitted that Hamas uses building materials to dig military tunnels into Israel, yet still insists that Israel should allow concrete, steel, and other materials to enter Gaza without limits. They quickly dismissed any objections by stating that “Israel’s security concerns could be met by a monitoring regime rather than a blanket prohibition on imports.”<sup>287</sup> Presumably, this monitoring regime would be under the auspices of the United Nations, whose forces in and around Israel have helped terrorists hide in UNIFIL uniforms.<sup>288</sup> Within Gaza itself, UNRWA regularly allows Hamas to dictate their actions<sup>289</sup> and, in the recent round of fighting, Hamas used UNRWA schools to store rockets on multiple occasions.<sup>290</sup> In light of these problems, it is unlikely that Israel would trust the United Nations or other NGOs to protect its citizens.

Human Rights Watch’s biased treatment of Israel has become so pervasive that Robert Bernstein, the organization’s founder, published an op-ed in the *New York Times* in 2009 that criticized the group he had created. He also pointed to the unreliability of their sources, whose “[r]eporting often relies on witnesses whose stories cannot be verified and who may testify for political advantage or because they fear retaliation from their own rulers.”<sup>291</sup> Even activists have also spoken out against HRW and other ‘human rights’ groups. David Trimble, who received the Nobel Peace Prize in 1988, stated in 2004 that “One of the great curses of this world is the human rights industry” and that “They justify terrorist acts and end up being complicit in the murder of innocent victims.”<sup>292</sup>

When it helps its cause, HRW is upfront about its biases. In 2009 a delegation from HRW made a fundraising trip to Saudi Arabia. Sarah Leah Whitson, director of the Middle East and North Africa Division, was the top HRW representative for the trip. At the same time that HRW itself acknowledged that Saudi Arabia executed juvenile offenders<sup>293</sup> and required women to have a man’s permission in order to undergo surgery,<sup>294</sup> Whitson explained to her audience how HRW is fighting against “pro-Israel pressure groups.”<sup>295</sup> As part of her presentation, she showed a documentary explaining how the organization reports on Israel’s actions in Gaza and claimed that it is running out of money, partially because of its work on Israel.<sup>296</sup>

Jeffrey Goldberg of the intellectual magazine *The Atlantic* then contacted Ken Roth for HRW's side of the story. Roth did not take part in the trip but was informed of what had occurred. He refused to deny that Whitson had focused on HRW's actions against Israel and added that a representative of the Shura Council, Saudi Arabia's official religious leadership assembly, was present.<sup>297</sup> HRW did not disclose how much money it raised for future attacks on Israel. Given the unlimited wealth of Saudi Arabia, a theocracy that requires all of its citizens to be Muslim,<sup>298</sup> HRW should be carefully examined regarding the funds furnished by Arab countries. The same organization that urges others to be honest and open is, at the same time, known for holding its own secrets and encouraging a "culture of duplicity."<sup>299</sup> When will HRW send a delegation to North Korea to solicit sympathetic ears and positive first impressions? Transparency, anyone?

Whitson has often been accused of bias, particularly when it comes to Israel.<sup>300</sup> Before joining HRW she served on the board of the Arab-American Anti-Discrimination Committee's (ADC) New York chapter. While at the ADC, she met with then-UN Secretary-General Kofi Annan to encourage him to investigate Israel's actions in Jenin.<sup>301</sup> After former Israeli Prime Minister Ariel Sharon died, she published a scathing obituary on the HRW website in which she claimed that "Israeli justice authorities never conducted a criminal investigation to determine whether Sharon and other Israeli military officials bore criminal responsibility [for Sabra and Shatila]"<sup>302</sup> even though the Kahan Commission, headed by a Supreme Court justice (which she quoted in her previous paragraph), specifically ruled that the Lebanese Christian Phalangists were directly responsible for the massacre and "[n]o Israeli was directly responsible for the events which occurred in the camps."<sup>303</sup> Not only were Whitson's charges against Sharon inaccurate, she also applied her standards inconsistently. She was in the same position at HRW in 2004 when Yasser Arafat died, yet published no similar report on the man known as "the father of modern terrorism."<sup>304</sup>

The most ubiquitous group calling for economic warfare on Israel today is BDS, which stands for 'Boycott, Divestment, and Sanctions.' The movement focuses solely on Israel and encourages governments, universities, businesses, and individuals to refuse to engage with the country. While lobbying for economic pressure against Israel they simultaneously decry Israel's sanctions on Gaza as "collective punishment."<sup>305</sup> These boycotts have been calculated as causing a hundred million shekels (over \$25 million) of damage in agriculture alone last year.<sup>306</sup> Even the PA president, Abbas, has spoken out against BDS.<sup>307</sup> Indeed, BDS applies a blanket standard against any Israeli groups, both in the West Bank and within the pre-1967 armistice lines, as shown in their high-profile campaign against the company SodaStream. After SodaStream announced that it would move its factory out of the West Bank, BDS continued attacking the company for building its new plant in a city that is near a town currently subject to controversy.<sup>308</sup>

## ***E. International Criminal Court***

The International Criminal Court in The Hague was established by the Rome Statute of 1998 to be a central court for trying crimes of genocide, crimes against humanity, war crimes, and crimes of aggression.<sup>309</sup> Article 17 of the Rome Statute limits the Court's jurisdiction to cases in which the state that would initially have jurisdiction is unable or unwilling to honestly prosecute.<sup>310</sup> If the state provides a genuine investigation and finds that there is no reason to prosecute, then the ICC cannot intervene.

Israel has shown a willingness to investigate accusations of illegal activities committed in its name. Ten days after the final ceasefire ended Operation Protective Edge, Israel announced that it would begin criminal investigations into a number of alleged crimes committed during the fighting.<sup>311</sup> About three months later, the IDF advocate-general announced that eight more cases would be opened over events that had occurred during Protective Edge and that there remained one hundred more cases to be reviewed.<sup>312</sup>

Even if Israel did not pursue these claims on its own, the ICC would not be available. The ICC cannot prosecute individuals or territories that are not signatories to the Rome Statute unless the UN Security Council refers the cases to the Court.<sup>313</sup> Israel is not a signatory and, as 'Palestine' only has 'non-member observer state' status at the UN General Assembly, it cannot take an active part in the ICC.<sup>314</sup> In order for a court case dealing with Israel, the West Bank, or Gaza to come before the ICC, it would have to be raised by the Security Council. Amnesty International and others have pushed for the Court to act despite its restrictions, arguing that the ICC should be willing to overstep its boundaries in order to investigate Israel.<sup>315</sup> Fatou Bensouda, the current ICC prosecutor, responded that the Court could not and should not do so, adding, "This is neither good law nor does it make for responsible judicial action."<sup>316</sup>

## **V. Effectiveness of Economic Sanctions**

Even with the best intentions, there is no way to impose economic sanctions without harming the civilian population. Sanctions are generally intended to punish dangerous and corrupt leaders, who are willing to inflict the hardships on their people while continuing their own opulent lifestyles. Despite the international sanctions on Iraq, Saddam Hussein spent smuggled money to build seventy-five palaces and luxury complexes for himself while ignoring his people's needs and even neglected necessary sewage repairs in order to build moats for the palaces.<sup>317</sup> When the United Nations introduced the Oil-for-Food Programme to provide medicine and food for suffering Iraqi children, Hussein conspired with international business leaders and politicians to further enrich himself.<sup>318</sup>

The sanctions had a devastating effect on Iraq. Oil alone comprised 61 percent of the country's GNP in 1989.<sup>319</sup> Professor Richard Garfield<sup>320</sup> estimated that, between 1991 and 1998, "a minimum of 100,000 and a more likely estimate of 227,000 excess deaths among young children" resulted from the sanctions.<sup>321</sup> Denis Halliday, appointed the United Nations Humanitarian Coordinator in Baghdad in 1997, resigned the follow year over the sanctions policy, declaring, "I don't want to administer a programme that satisfies the definition of genocide."<sup>322</sup>

L. Paul Bremer III, who served as the civilian administrator of Iraq after the United States' 2003 invasion, commented, "While his people were starving – literally, in many cases, starving – while he was killing tens of thousands of people, Saddam and his cronies were taking money, stealing it, really, from the Iraqi people."<sup>323</sup> Although it is impossible to completely protect civilians from any and all harm, the important question is whether the sanctions achieve their desired goal without causing *undue* damage. This, understandably, is the same demand made in Article 57 of the First Additional Protocol to the Geneva Convention, to "take all feasible precautions...with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects."<sup>324</sup>

## VI. Conclusion and Outlook

International law provides a clear distinction between permissible uses of economic sanctions and forbidden forms of collective punishment. Israel's actions, both during active conflicts and relatively quieter periods, are clearly carried out in order to punish Hamas and limit its ability to harm Israeli civilians in what truly are indiscriminate acts of violence. By targeting materials that are used for weapons while providing necessary services and aid for the citizens of Gaza, Israel fulfills both the letter and the spirit of IHL. Israel even makes an effort to err on the side of being too lenient, at times violating UN Security Council resolutions in order to allow dangerous cargo into Gaza in the hope that it will benefit the people more than it will be used to harm Israelis.

There is no question that people living in Gaza suffer constant hardships and deprivations. Their conditions, though, are the fault of Hamas rather than Israel. The international community, including Israel, provides billions of dollars of support to the Palestinians each year, little of which reaches the hands of its intended recipients. Instead Hamas uses the money and supplies to further its 'struggle.' It then portrays the people that it oppresses as victims of Israel's malevolence in order to gain sympathy and further pecuniary assistance.

The people and organizations that accuse Israel of committing collective punishment enable Hamas to continue its duplicitous methods. It is impossible to know for certain whether the accusations are born of ignorance or malice, but the one-sided incriminations, while overlooking more egregious violations by the Palestinian leadership, create the appearance that a number of governments and NGOs are actively campaigning against Israel rather than for justice. To paraphrase Clausewitz, these critics treat law as a continuation of war by other means.

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## About the Author

Justus Reid Weiner is an international human rights lawyer and a member of the Israel and New York Bar Associations. He received his Juris Doctor degree from the School of Law (Boalt Hall), University of California, Berkeley. Weiner's professional publications have appeared in prominent law journals, monographs, and intellectual magazines. He is currently a scholar in residence at the Jerusalem Center for Public Affairs and an adjunct lecturer at The Hebrew University of Jerusalem. Weiner was formerly a visiting assistant professor at the School of Law, Boston University. He also practiced law as an associate in the international law firm White & Case and served as the director of American Law and External Relations at the Ministry of Justice specializing in human rights and other facets of public international law. The author wishes to express his appreciation to Mason Barnard and Mollie Adatto for their research assistance.

## Notes

1. Justus Reid Weiner is an international human rights lawyer and a member of the Israel and New York Bar Associations. He received his Juris Doctor degree from the School of Law (Boalt Hall), University of California, Berkeley. Weiner's professional publications have appeared in prominent law journals, monographs, and intellectual magazines. He is currently a scholar in residence at the Jerusalem Center for Public Affairs and an adjunct lecturer at The Hebrew University of Jerusalem. Weiner was formerly a visiting assistant professor at the School of Law, Boston University. He also practiced law as an associate in the international law firm White & Case and served as the director of American Law and External Relations at the Ministry of Justice specializing in human rights and other facets of public international law. The author wishes to express his appreciation to Mason Barnard and Mollie Adatto for their research assistance.
2. Gilad Lindenfeld is a second-year law student at The Hebrew University of Jerusalem.
3. Ilia Binyamin is a fourth-year student in law and government at the IDC Herzliya. He served in the IDF, first as an intelligence analyst and decipherer during the Second Lebanon War and later as a team leader in Naval Intelligence during Operation Cast Lead.
4. Matityahu Wanderman is completing his MA in history at The Hebrew University of Jerusalem.
5. Jennifer Lang graduated from the University of Illinois – Urbana-Champaign in 2013 with a BA in global studies with a focus on conflict resolution through tolerance, policy, and social action.
6. U.N. GAOR, 64th Sess., 4th C. Mtg. at 32, U.N. Doc A/RES/64/91 (Dec. 10, 2009); U.N. GAOR, 66th Sess., 4th C. Mtg. at 53, U.N. Doc. A/RES/66/76 (Dec. 9, 2011); Human Rights Council, A/HRC/RES/S-12/1 (2009); Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967, A/68/376, para. 5 (2013); Human Rights Council, Human Rights Situation in the Occupied Palestinian Territory, Including East Jerusalem – Report by the Secretary-General, A/HRC/24/30, para. 22 (2013).
7. Amnesty International, *Israel Blind to Violations, Deaf to Obligations: Israel's Human Rights Record* (Nov. 18, 2014, 12:27 PM), <http://www.amnesty.org/en/library/asset/MDE15/015/2013/en/c88f325d-74ba-434e-9db0-44b544eb732b/mde150152013en.pdf>; Amnesty International, *Trapped – Collective Punishment in Gaza* (Nov. 18, 2014, 12:26 PM), <http://www.amnesty.org/en/news-and-updates/feature-stories/trapped-collective-punishment-gaza-20080827>; International Committee of the Red Cross, *Gaza Closure: Not Another Year!* (Nov. 18, 2014, 12:25 PM), <https://www.icrc.org/eng/resources/documents/update/palestine-update-140610.htm>.
8. Anne Herzberg is the legal adviser for NGO Monitor and has written much on human rights organizations and international law.
9. Anne Herzberg, *NGO "Lawfare,"* NGO MONITOR (Nov. 19, 12:29 PM), <http://www.ngo-monitor.org/data/images/File/lawfare-monograph.pdf>.
10. It is beyond the scope of this article to evaluate the legalities of interrogation techniques, as revealed in the recent Committee Study of the Central Intelligence Agency's Detention and Interrogation Program. Instead the author has focused on the legal impact of modern warfare and diplomacy on civilian populations.
11. *Foreign Terrorist Organizations*, U.S. DEPARTMENT OF STATE (Nov. 18, 2:27 PM), <http://www.state.gov/j/ct/rls/other/des/123085.htm>.
12. *Freezing Funds: List of Terrorists and Terrorist Groups*, Europa (Nov. 18, 2014 2:29 PM), [http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/fight\\_against\\_terrorism/l33208\\_en.htm](http://europa.eu/legislation_summaries/justice_freedom_security/fight_against_terrorism/l33208_en.htm).
13. Bryony Jones, *Q&A: What is Hamas?*, CNN, Nov. 24, 2012, <http://edition.cnn.com/2012/11/16/world/meast/hamas-explainer>.
14. Convention (II) with Respect to the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, The Hague, July 29, 1899, Art. 50 (hereinafter 1899 Hague Regulations); Convention (IV), Respecting the Laws and Customs of War on Land, and its annex: Regulations Concerning the Laws and Customs of War on Land, The Hague, 18 October 1907, Art. 50 (hereinafter 1907 Hague Regulations); Convention Relative to the Treatment of Prisoners of War, Geneva, July 27, 1929, Art. 46 (hereinafter 1929 Geneva Convention); Art. 33 of Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Geneva, Aug. 12, 1949, Art. 33 (hereinafter Geneva Convention (IV)); Third Geneva Convention, Geneva, Aug. 12, 1949, Art. 87 (hereinafter Third Geneva Convention); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Art. 75(2)(d) (hereinafter Additional Protocol (I)); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, Art. 4(2)(b) (hereinafter Additional Protocol (II)).
15. 1899 Hague Regulations, *supra* note 14.
16. Geneva Convention (IV), *supra* note 14, Art. 33, which states: "No protected person may be punished for an offence he or she has not committed. Collective penalties and likewise, all measures of intimidation or terrorism, are prohibited." It should be noted that Article 33 relates to armed conflicts of an international character.
17. Additional Protocol I, *supra* note 14, Art 75. In addition to Protocol I, which relates to international armed conflicts, Art. 4(2)(b) of Protocol II applies the prohibition to noninternational armed conflicts.
18. JEAN-MARIE HENCKAERTS AND LOUISE DOSWALD-BECK, ICRC CUSTOMARY INTERNATIONAL HUMANITARIAN LAW VOLUME I AT 374 (Cambridge University Press 2009) (hereinafter ICRC Customary International Humanitarian Law).
19. *Id.*
20. Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, August 12, 1949, Art. 50 (hereinafter Geneva Convention (I)); Geneva Convention (II), *supra* note 14 Art. 51, Geneva Convention (III), *supra* note 14, Art. 130, Geneva Convention (IV), *supra* note 14, Art. 147, Additional Protocol (I), *supra* note 14, Articles 11 & 85.
21. Rome Statute of the International Criminal Court, Rome, July 17, 1998 (hereinafter Rome Statute).
22. SCSL, *Prosecutor v. Brima, Kamara and Kanu*, Case No. SCSL-04-16-T, T. Ch., Mar. 31, 2006, par. 674-75 (hereinafter *Prosecutor v. Brima, Kamara and Kanu*).
23. International Committee of the Red Cross, *Rule 103. Collective Punishments*, [https://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule103#refFn\\_12\\_5](https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule103#refFn_12_5); ICRC Customary International Humanitarian Law, *supra* note 18 at 374.

24. Additional Protocol (II), *supra* note 14; SCSL, *Prosecutor v. Sesay, Kallon & Gbao*, Case No. SCSL-04-15-A, T. Ch., Oct. 26, 2009, par. 123 (hereinafter *Prosecutor v. Sesay, Kallon & Gbao*).
25. U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/RES/955 (Nov. 8, 1994), Art. 3(b) & 4(b).
26. Geneva Convention (IV), *supra* note 14 at 225.
27. *Hugo Grotius*, ENCYCLOPEDIA BRITANNICA (Nov. 18, 2014, 3:06 PM), <http://www.britannica.com/EBchecked/topic/246809/Hugo-Grotius>.
28. HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES* 537-39 (Washington, DC: Carnegie Endowment for International Peace, Division of International Law 1925).
29. Jean Pictet was a Swiss jurist and vice-president of the ICRC, and the main architect of the Geneva Conventions and their Additional Protocols.
30. The Fourth Geneva Convention was an agreement on humanitarian considerations for civilians in war zones, adopted in 1949. The primary Conventions were followed by a number of Additional Protocols, two in 1977 and one in 2005, which added in new considerations that arose in the intervening decades. These additional protocols are not considered as forceful as the original convention because they have not been adopted as universally. Iran, Pakistan, and the United States have signed but not ratified either set, and thus are not bound by them.
31. OSCAR UHLER & HENRI COURSIER, COMMENTARY ON GENEVA CONVENTION IV at 225 (1958) (hereinafter *Commentary on Geneva Convention IV*).
32. INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON PROTOCOL I at 3054-55 (1987) (hereinafter *Commentary on Protocol I*).
33. *Prosecutor v. Brima, Kamara and Kanu*, *supra* note 22, par. 681; *Prosecutor v. Brima, Kamara and Kanu*, *supra* note 22, par. 222.
34. ICRC CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 18 at 374.
35. SCSL, *Prosecutor v. Fofana and Kondewa*, Case No. SCSL-04-14-A, App. Ct., May 28, 2008, para. 222 (hereinafter *Prosecutor v. Fofana and Kondewa*).
36. Protocol Additional (I), *supra* note 14.
37. *Id.*
38. Shane Darcy, *Prosecuting the War Crime of Collective Punishment*, 8 J. INT'L CRIM. JUST. 29, 29 (2010).
39. *Prosecutor v. Fofana and Kondewa*, *supra* note 35; *Prosecutor v. Sesay, Kallon & Gbao*, *supra* note 24; *Prosecutor v. Brima, Kamara and Kanu*, *supra* note 22.
40. *Prosecutor v. Fofana and Kondewa*, *supra* note 35, para. 224; *Prosecutor v. Sesay, Kallon & Gbao*, *supra* note 24, par. 126.
41. GARY CLYDE HUFBAUER, JEFFREY J. SCHOTT, & KIMBERLY ANN ELLIOTT, ECONOMIC SANCTIONS RECONSIDERED 5 (Peterson Institute for International Economics 1sted. 1985) (hereinafter *Economic Sanctions Reconsidered*).
42. *Id.* at 10.
43. *Id.* Abyssinia was located in modern-day Ethiopia.
44. *Id.*
45. *Id.* at 13.
46. Trade Relations with Countries Not Receiving Nondiscriminatory Treatment, 19 U.S.C. § 2432-34 (1975).
47. 'Refusenik' was the unofficial term for people in the Soviet Union who wanted to leave the country, particularly referring to Jews wishing to emigrate to Israel. Many were arrested on charges of treason and even sentenced to death. The Helsinki Watch organization, which later evolved into Human Rights Watch, was largely dedicated to observing the Soviet Union's treatment of *refusenik* prisoners.
48. NATAN SHARANSKY and RON DERMER, THE CASE FOR DEMOCRACY at xiv (Public Affairs 2006).
49. *European Community Approves Sanctions on S. Africa*, TIMES WIRE SERVICE; Sept. 11, 1985, [http://articles.latimes.com/1985-09-11/news/mn-7171\\_1\\_south-africa](http://articles.latimes.com/1985-09-11/news/mn-7171_1_south-africa); Comprehensive Anti-Apartheid Act of 1986, 22 U.S.C. § 5001 (1986).
50. U.N. SCOR, 58th Sess., 4761st mtg., U.N. Doc. S/RES/1483 (May 22, 2003).
51. U.N. SCOR, 66th Sess., 6498th mtg., U.N. Doc. S/Res/1973 (Mar. 17, 2011).
52. Protocol (I), *supra* note 14.
53. *Id.*
54. *Id.*
55. *Commentary on Geneva Convention IV* *supra* note 31 at 182.
56. *Id.* at 322.
57. Charter of the United Nations, San Francisco, June 26, 1945, Art. 41 (hereinafter *UN Charter*).
58. DAVID ALLEN BALDWIN, ECONOMIC STATECRAFT 353 (Princeton: Princeton University Press 1985) (hereinafter *Economic Statecraft*).
59. *See* *Economic Statecraft*, *supra* note 58 at 339; U.N. GAOR, 29th Sess., 6th C. Mtg. at 86, U.N. Doc. A/RES/3314 (Dec. 14, 1974).
60. U.N. SCOR, 56th Sess., 4385th mtg., U.N. Doc. S/RES/1373 (Sept. 28, 2001).
61. U.N. SCOR, 58th Sess., 4688th mtg., U.N. Doc. S/RES/1456 (Jan. 20, 2003).
62. U.N. SCOR, 60th Sess., 5053rd mtg., U.N. Doc. S/RES/1566 (Oct. 8, 2004).
63. Jack Khoury, *Hamas Claims Responsibility for Three Israeli Teens' Kidnapping and Murder*, HAARETZ, Aug. 21, 2014, <http://www.haaretz.com/news/diplomacy-defense/1.611676>.
64. Bryony Jones, *Q&A: What is Hamas?*, CNN, Nov. 24, 2012, <http://edition.cnn.com/2012/11/16/world/meast/hamas-explainer>.
65. Justus Reid Weiner, *International Law and the Fighting in Gaza* (2008), available at <http://www.jcpa.org/text/puzzle1.pdf>.
66. U.S. NAVY, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 7-9, July 2007 ed. 2007.
67. San Remo Manual on International Law Applicable to Armed Conflicts at Sea, June 12, 1994, Art. 93-94 (hereinafter *San Remo Manual*).

68. 'UTC' refers to 'Coordinated Universal Time,' a successor to Greenwich Mean Time that is carefully regulated and used around the world for precision.
69. File No. 1/2009, Ministry of Transport (Jan. 6, 2009), *available at* <http://asp.mot.gov.il/en/shipping/notice2mariners> (hereinafter Naval Blockade Notice).
70. UK WAR CABINET, MEMORANDUM TO WAR CABINET ON TRADE BLOCKADE (Jan. 1, 1917), *available at* [http://www.nationalarchives.gov.uk/pathways/firstworldwar/spotlights/p\\_memo\\_blockade.htm](http://www.nationalarchives.gov.uk/pathways/firstworldwar/spotlights/p_memo_blockade.htm).
71. UK NATIONAL ARCHIVES, THE BLOCKADE OF GERMANY, *available at* <http://www.nationalarchives.gov.uk/pathways/firstworldwar/spotlights/blockade.htm> (last visited Dec. 14, 2014).
72. Edmund H. Schwenk, *Legislative Power of the Military Under Article 43*, 54 Yale L.J. 393, 395 (1945).
73. Spelling follows the original British English. RESPONSE TO QUESTIONS FROM THE COMMITTEE, MEMORANDUM FROM THE FOREIGN AND COMMONWEALTH OFFICE (May 13 and 22, 2003) (<http://www.parliament.the-stationery-office.co.uk/pa/cm200203/cmselect/cmfa/405/405we04.htm>).
74. Commentary on Geneva Convention IV *supra* note 31 at 334.
75. Kaiyan Homi Kaikobad, *Problems of Belligerent Occupation: The Scope of Powers Exercised by the Coalition Provisional Authority in Iraq, April/May 2003-June 2004*, 54 Int'l & Comp. L.Q. 253, 257 (2005).
76. *Id.* at 258.
77. Annex to Hague Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art 43, 36 Stat. 2277, T.S. No. 539.
78. Justus Weiner, *Human Rights in the Israeli Administered Areas During the Intifada: 1987-1990*, 10 Wis. Int'l L.J. 185, 199-200 (Spring 1992).
79. 'Tonic' refers to medicinal cures.
80. Commentary on Geneva Convention IV *supra* note 31 at 180.
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107. *In Defense of Disengagement*, THE WALL STREET JOURNAL, July 11, 2006, <http://www.wsj.com/articles/SB115258526159203046>.
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110. Following the signing of the Oslo Accords in 1993, Yasser Arafat's Palestinian Liberation Organization (PLO) was recognized as the legitimate representative of the Palestinian people, and renamed the Palestinian Authority (sometimes the Palestinian National Authority). It is made up of a number of different parties, the largest of which is Fatah. From 1993 until 2006 the PA presided over both the West Bank and Gaza, but following the 2006 Palestinian election and the 2007 Gazan civil war, the PA and Hamas function as separate and rival entities, with the PA ruling the West Bank and Hamas ruling Gaza. Throughout this article 'Palestinian Authority' is used to refer to the government in the West Bank and 'Fatah' for associated groups or individuals.
111. Agreement on Movement and Access & Agreed Principles for Rafah Crossing, *available at* <http://www.mfa.gov.il/mfa/foreignpolicy/peace/mfadocuments/pages/agreed%20documents%20on%20movement%20and%20access%20from%20and%20to%20gaza%2015-nov-2005.aspx>.
112. HCJ 5841/06, *supra* note 108 para 3.
113. ISR. MINISTRY OF FOREIGN AFFAIRS, CABINET COMMUNIQUE (SPECIAL SESSION) (Apr. 11, 2006), *available at* <http://www.mfa.gov.il/mfa/pressroom/2006/pages/cabinet%20communiqué%2011-apr-2006.aspx>.
114. The HCJ's role is to protect human rights and the rule of law. Recently there have been a number of activist judges serving on the Israeli Supreme Court who have used their authority to interpret the Court's jurisdiction broadly, including over actions that took place outside of the pre-1967 armistice lines.
115. HCJ 5841/06, *supra* note 108 para 7.
116. Turkel, *supra* note 94 at 29.
117. *Id.* at 30.
118. HCJ 5841/06, *supra* note 108 para 1.
119. *Id.* at para 1, 8-9.
120. Turkel, *supra* note 94 at 30.
121. *Id.* at para 9.
122. *Id.* at para 6.
123. *Id.*
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131. Al-Bassiouni, *supra* note 125 at §11.
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139. *Id.*
140. Al-Bassiouni, *supra* note 125 at §17-21.
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