



11 August 2014

VIA FACSIMILE ( [REDACTED] ) &  
OVERNIGHT DELIVERY SERVICE

Mr Yves Daccord, Director-General  
Headquarters, International Committee of the Red Cross  
[REDACTED]

**Re: Unbalanced and Biased Comments Regarding the Conflict in Gaza.**

Dear Mr Daccord:

By way of introduction, the European Centre for Law and Justice (ECLJ) is an international, Non-Governmental Organisation (NGO), dedicated, *inter alia*, to the promotion and protection of human rights and to the furtherance of the rule of law in international affairs. The ECLJ has held Special Consultative Status before the United Nations/ECOSOC since 2007<sup>1</sup>.

We are concerned by a number of recent comments by the ICRC or ICRC employees which insinuate that Israel is committing war crimes while barely mentioning actions by Hamas operatives who are, without a doubt, repeatedly violating International Humanitarian Law (IHL). For example, on 21 July 2014, the ICRC released a statement condemning “in the strongest terms” the shelling of the Al Aqsa Hospital in Gaza<sup>2</sup>. The ICRC has also condemned the damage to the Palestine Red Crescent branch in Gaza on 9 July when a “dozen staff and volunteers were wounded and three ambulances destroyed”<sup>3</sup>. The ICRC stated that it “deplores outright the casualties and the damage caused at the Palestine Red Crescent branch in Jabaliya”<sup>4</sup>. The ICRC further condemned the bombing of Gaza’s water infrastructure and reminded the parties of their duty to “distinguish between military objectives and civilian objects”<sup>5</sup>. While condemning Israeli strikes, the ICRC has utterly failed to recognise—much less condemn—Hamas’ responsibility for repeatedly turning otherwise protected sites (such as hospitals, schools, and mosques) into legitimate military targets by using such sites to fire rockets at Israel, as military headquarters, and as weapons

<sup>1</sup>*Consultative Status for the European Centre for Law and Justice*, U.N. DEP’T ECON. & SOC. AFF., <http://esango.un.org/civilsociety/consultativeStatusSummary.do?profileCode=3010> (last visited 25 July 2014).

<sup>2</sup>*ICRC Condemns The Shelling of Gaza’s Al Aqsa Hospital*, ICRC (21 July 2014), <http://www.icrc.org/eng/resources/documents/news-release/2014/07-21-gaza-al-aqsa-hospital.htm>.

<sup>3</sup>*Israel Occupied Territory: Civilians And Medical Workers Pay Price Of Conflict*, ICRC (10 July 2014), <http://www.icrc.org/eng/resources/documents/news-release/2014/israel-palestine-gaza-civilian-medical.htm>.

<sup>4</sup>*Id.*

<sup>5</sup>*Gaza Water In The Line Of Fire*, ICRC (15 July 2014), <http://www.icrc.org/eng/resources/documents/news-release/2014/14-07-israel-palestine-gaza-water.htm>.

storage sites. The ICRC has also failed to recognise the fact that Hamas attempts to use, and has used, civilians as human shields to deter Israel Defense Forces (IDF) from striking legitimate military targets. In light of such unbalanced reports, the purpose of this letter is three-fold.

**First**, this letter outlines the series of egregious events initiated by Hamas militants, which gave Israel no choice but to respond in self-defence. **Second**, the letter discusses applicable laws of armed conflict that Israel has consistently followed and Hamas has repeatedly violated. **Third**, we urge the ICRC to be balanced in its criticism and strongly and consistently address the unlawful actions taken by Hamas militants in firing its rockets indiscriminately, in using civilians as human shields, and in turning otherwise protected civilian sites into military targets, all in clear violation of the IHL.

## FACTS LEADING TO THE CURRENT ISRAELI-PALESTINIAN CONFLICT

The 12 June kidnapping of three Israeli teenagers in the West Bank appears to have sparked the current Israeli-Palestinian conflict<sup>6</sup>. In response to the kidnappings, Israel launched Operation Brother's Keeper in the West Bank, a search-and-rescue mission to find the missing teens<sup>7</sup>. The Israeli investigation identified two Hamas operatives as suspects<sup>8</sup>. While Hamas did not openly claim responsibility for the kidnappings, Hamas officials publicly praised the kidnappings and subsequent murder of the three Israeli teens as "heroic"<sup>9</sup>, in itself a despicable act.

On 28 June, six rockets were launched from Gaza into Israel<sup>10</sup>. In response, Israel struck twelve targets in Gaza on 29 June<sup>11</sup>. On 30 June, the bodies of the three Israeli teens were found<sup>12</sup>. Following the discovery of the slain Israeli teens, a Hamas spokesman warned that if Prime Minister Netanyahu "brings a war on Gaza, the gates of hell will open to him"<sup>13</sup>. On 1 July, Israel launched thirty-four air strikes on Gaza in response to eighteen rockets fired at Israel from Gaza<sup>14</sup>. On 7 July, IDF announced from its Twitter account the commencement of "Operation Protective Edge in #Gaza against #Hamas, in order to stop the terror #Israel's citizens face on a daily basis"<sup>15</sup>. As of 1 August, Hamas militants had fired over 2,900

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<sup>6</sup>*Murdered Israeli Teens Mourned In Joint Funeral, As Israel Launches Strike Against Hamas*, FOX NEWS (1 July 2014), <http://www.foxnews.com/world/2014/07/01/israeli-teens-found-dead/>.

<sup>7</sup>Lea Speyer, *360 Arrested As Operation Brothers Keeper Enters 12th Day*, BREAKING ISRAEL NEWS (24 June 2014), <http://www.breakingisraelnews.com/17063/269-terrorists-arrested-operation-brothers-keeper-enters-12th-day/#kswx537rQzX62L97.97>.

<sup>8</sup>*Id.*; see also *Murdered Israeli Teens Mourned*, *supra* note 6.

<sup>9</sup>Ari Soffer, *Watch: Hamas Official Heaps Praise On 'Heroic' Kidnap Operation*, ARUTZ SHEVA (18 June 2014), [http://www.israelnationalnews.com/News/News.aspx/181891#.U8\\_wQLGf-ik](http://www.israelnationalnews.com/News/News.aspx/181891#.U8_wQLGf-ik).

<sup>10</sup>*Israeli Air Strikes Hit Targets In Gaza*, AL JAZEERA (29 June 2014), <http://www.aljazeera.com/news/middleeast/2014/06/israeli-airstrikes-attack-targets-gaza-201462984832208983.html>.

<sup>11</sup>*Id.*

<sup>12</sup>Ben Wedeman & Dana Ford, *Missing Israeli Teens Found Dead In West Bank*, CNN (30 June 2014), <http://www.cnn.com/2014/06/30/world/meast/israel-missing-teenagers/>.

<sup>13</sup>*Id.*

<sup>14</sup>Dan Kedmy, *Israel Hammers Gaza Strip Over Kidnapped Teens' Deaths*, TIME (1 July 2014), <http://time.com/2944876/israel-hammers-gaza-strip-over-kidnapped-teens-deaths/>.

<sup>15</sup>Marcy Kreiter, *Israel Mounts Operation To End Gaza Rocket Fire*, INT'L BUS. TIMES (7 July 2014), <http://www.ibtimes.com/israel-mounts-operation-end-gaza-rocket-fire-1621462>.

rockets at Israel<sup>16</sup>, the Palestinian death toll in Gaza had exceeded 1,400, and the Israeli death toll had reached fifty-nine<sup>17</sup>.

### INTERNATIONAL LAW RECOGNISES ISRAEL'S INHERENT RIGHT OF SELF-DEFENCE IN DEFENDING AGAINST A NON-STATE ACTOR LIKE HAMAS

As a general rule, the threat and use of force against a U.N. member state are prohibited by international law<sup>18</sup>. Nonetheless, Article 51 of the U.N. Charter recognises "the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations"<sup>19</sup>. It is essential to note that Article 51 does not *create* the right of self-defence: it is an inherent right of all states under customary international law<sup>20</sup>. This inherent right of self-defence (and the responsibility for determining when self-defence is appropriate) lies, as it always has, with the government of each state. Customary international law also recognises the right of self-defence against non-State actors<sup>21</sup>, like the terrorist group Hamas and its Islamist allies in the Gaza Strip.

Additionally, when acting in self-defence, international law "does not require a defender to limit itself to actions that merely repel an attack: *a state may use force in self-defence to remove a continuing threat to future security*"<sup>22</sup>. Further, the standard for self-defence does not limit the defender to a totally like-kind response, but provides the necessary flexibility to reduce or eliminate the threat. In other words, the degree of force employed in self-defence can be considerably greater than that used in the original armed attack<sup>23</sup>.

*Israel Has Correctly Invoked Its Inherent Right To Defend Its Citizens and Territory Against the Hamas Threat.*

Hamas militants began the current conflict by kidnapping and killing three Israeli teens and by launching rockets at Israeli civilians<sup>24</sup>. Israel responded on 29 June by launching air strikes against military targets in Gaza<sup>25</sup>. Because Israel, as a sovereign state, has the inherent right to defend its territory and citizens, it is legally justified in engaging in the current conflict against Hamas. Since the conflict began, Hamas has repeatedly refused to accept a number of ceasefire proposals<sup>26</sup>, while Israel has consistently honoured ceasefire

<sup>16</sup>IDF Spokesperson, *Israel Defense Forces*, TWITTER (31 July 2014, 11:00 PM), <https://twitter.com/IDFSpokesperson/status/495086588238376960>.

<sup>17</sup>Jason Burke, *Gaza 'Faces Precipice' As Death Toll Passes 1,400*, THE GUARDIAN (31 July 2014), <http://www.theguardian.com/world/2014/jul/31/gaza-faces-precipice-death-toll-tops-1400>.

<sup>18</sup>See, e.g., U.N. Charter, art. 2(4) ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.").

<sup>19</sup>U.N. Charter, art. 51.

<sup>20</sup>David B. Rivkin et al., *Preemption and Law In The Twenty-First Century*, 5 CH. J. INT'L L., 467, 476 (2005).

<sup>21</sup>See, e.g., *Armed Activities on the Territory of the Congo (Dem. Rep. Congo, v. Uganda)*, 2005 I.C.J. ¶ 11 (17 Dec.) (separate opinion of Judge Simma), available at <http://www.icj-cij.org/doCKET/files/116/10467.pdf>.

<sup>22</sup>SEAN D. MURPHY, *PRINCIPLES OF INTERNATIONAL LAW* 447 (2006) (emphasis added).

<sup>23</sup>ROSALYN HIGGINS, *PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT* 232 (1995); see also CHRISTOPHER GREENWOOD, *ESSAYS ON WAR IN INTERNATIONAL LAW* 80 (2006).

<sup>24</sup>*Murdered Israeli Teens Mourned*, supra note 6.

<sup>25</sup>*Israeli Airstrikes Hit Targets In Gaza*, supra note 10.

<sup>26</sup>Harriet Sherwood, *Gaza Crisis: How The Game Has Changed Since Egypt's Tabling Of Ceasefire Plan*, THE GUARDIAN (21 July 2014), <http://www.theguardian.com/world/2014/jul/21/gaza-crisis-how-game-changed-since-egypt-tabling-ceasefire-plan>.

requests to allow humanitarian assistance into Gaza<sup>27</sup>. As of 1 August, at least four ceasefire agreements had been announced during the conflict<sup>28</sup>. The fourth negotiation resulted in an agreement to have a seventy-two hour ceasefire. Hamas militants broke the ceasefire a mere ninety minutes after it had begun by attacking Israeli soldiers<sup>29</sup>.

Although, the death toll among Israeli and Palestinian civilian populations is not the same, the vast majority of Palestinian civilian deaths can be directly attributed to Hamas' violations of IHL. As will be discussed below, Israel attempts to limit incidental damage caused by its military strikes, while Hamas openly invites incidental damage within Gaza. Further, Hamas specifically targets Israeli civilians. But for Israel's Iron Dome defence system's successful interception of thousands of Palestinian rockets, the Israeli civilian death toll could have been much higher.

## ATTACKING A LEGITIMATE MILITARY TARGET IS NOT A WAR CRIME

Article 52 of Additional Protocol I requires that "attacks shall be limited strictly to military objectives"<sup>30</sup>. Military objectives are in turn defined as "those objects which by their nature, location, purpose or use make an *effective* contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a *definite* military advantage"<sup>31</sup>. Notably, "[t]he presence of a protected person may not be used to render certain points or areas immune from military operations"<sup>32</sup>.

Since the beginning of Operation Protective Edge, many international organisations—including the ICRC—have roundly and publicly condemned Israel's actions in damaging or destroying specific targets. Among such targets have been hospitals, schools, places of worship, and civilian areas which are normally protected objects under the IHL. In ICRC's own words, however, "[i]n combat areas it often happens that purely civilian buildings or installations are occupied or used by the armed forces and such objectives may be attacked, provided that this does not result in excessive losses among the civilian population"<sup>33</sup>. Determining whether incidental injury or collateral damage violates the law requires analysis of the military advantage anticipated by striking the relevant military target. Many states, including the United States, judge military advantage in the context of the entire operation, not just an isolated part<sup>34</sup>. The "security of the attacking forces" is also a critical part of the consideration in assessing military advantage<sup>35</sup>. The standard is intended to prevent

<sup>27</sup>Jodi Rudoren & Anne Barnard, *Israeli Military Invades Gaza. With Sights Set On Hamas Operations*, N.Y. TIMES (17 July 2014), <http://nyti.ms/1nA2HQ5>.

<sup>28</sup>Heather Saul, *Israel-Hamas 72-Hour Ceasefire Crumbles As Dozens Killed In Gaza Shelling*, INDEP. (1 Aug. 2014), <http://www.independent.co.uk/news/world/middle-east/israelgaza-conflict-kerry-warns-72hour-unconditional-ceasefire-is-a-respite-not-an-end-9641781.html>.

<sup>29</sup>*U.S. Calls Hamas Attack 'Barbaric' Violation Of Gaza Ceasefire*, CNN, REUTERS, (1 Aug. 2014), <http://www.reuters.com/article/2014/08/01/us-mideast-gaza-whitehouse-idUSKBN0G143S20140801>.

<sup>30</sup>ICRC, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 52, 8 June 1977, 1125 UNTS 3 [hereinafter Protocol I].

<sup>31</sup>*Id.* (emphasis added).

<sup>32</sup>*Id.* art. 28.

<sup>33</sup>ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ¶ 1953, at 620–21 (1987) (emphasis added), available at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/Commentary\\_GC\\_Protocols.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/Commentary_GC_Protocols.pdf).

<sup>34</sup>2 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT'L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: PRACTICE ¶¶ 328–29, 332, 334, 336–37, 339, at 184–85 (2005).

<sup>35</sup>*Id.* ¶¶ 329, 331, 336, 339, at 184–85.

“[m]anifestly disproportionate collateral damage inflicted in order to achieve operational objectives”<sup>36</sup>.

Evidence concerning each attack complained about during the current Israel-Hamas conflict shows that Hamas was using otherwise protected sites for military purposes and not for their intended, protected purpose. As such, the otherwise protected sites had become legitimate military targets. An analysis of actions taken by each party to the conflict (i.e., Israel and Hamas) provides ample evidence that Hamas, not Israel, is the party committing war crimes. Although a recent ICRC statement says that “[t]his is not about who is to blame for not respecting this or that specific rule of war, or even about whether the expected military advantage outweighs the collateral damage”<sup>37</sup>, the tone and tenor of ICRC comments show that the ICRC is in fact accusing Israel of responding disproportionately. The vast majority of ICRC statements single out Israeli attacks in which civilian casualties occur, yet fail to mention whether the targeted site was a legitimate military objective. Since it is well-known from readily available, public sources that Hamas not only admits (but brags about) what it is doing, ICRC’s statements are not only biased, but they, in effect, condemn the only party to the conflict that seeks to abide by the law (Israel) and turn a blind eye toward the party that consistently violates the law (Hamas), thereby encouraging further violations of the very law the ICRC claims to be upholding.

Incidental damage on both sides may occur during an armed conflict. Such damage, including deaths and injuries of innocent civilians, does not automatically (or necessarily) constitute a war crime. Only “willful killing” or “[i]ntentionally directing attacks against civilian objects, that is, objects which are not military objectives,” constitute a war crime<sup>38</sup>. The following discussion will show that each site that Israeli forces targeted was a legitimate military objective. Civilian casualties alone do not render those attacks unlawful. Only civilian casualties that are excessive in relation to the importance of the military objective are forbidden, and the ICRC lacks all evidence to make any determination about the importance of the military objective to Israel’s campaign (which is based on intelligence solely in the possession of the Israeli forces), especially since such a determination depends on “circumstances ruling at the time” of an attack, not on circumstances as viewed by third parties like the ICRC after the attack. The discussion also shows which party is responsible for the willful killing of civilians in violation of IHL.

#### TURNING AN OTHERWISE PROTECTED OBJECT INTO A LEGITIMATE MILITARY TARGET IS A WAR CRIME

*By Intentionally Placing Its Weapons Caches, Firing Sites, and Military Headquarters in Civilian Areas, Hamas Is Solely Responsible for Incidental Harm to Civilians that Occurs When Israel Must Deal With Such Sites.*

*Each party* to a conflict has a duty, “to the extent feasible, to remove civilian persons and objects under its control from the vicinity of military objectives” as set forth in Article

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<sup>36</sup>Stefan Oeter, *Methods and Means of Combat*, in *THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW* 119, 135 (Dieter Fleck ed., 2d ed. 2008).

<sup>37</sup>Jacques de Maio, *ICRC Invokes The Humanitarian Imperative, Stop The Killing!*, ICRC (29 July 2014), <http://www.icrc.org/eng/resources/documents/statement/2014/07-29-gaza-stop-the-killing.htm>.

<sup>38</sup>UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, art. 8(2)(b)(ii), 17 July 1998 [hereinafter Rome Statute].

58(a) of Additional Protocol I<sup>39</sup>. Furthermore, “in no event may civilians be used to shield military objectives”<sup>40</sup>. In the context of the current conflict, both Hamas and Israel are required to do everything feasible to avoid locating military objectives near dense civilian populations<sup>41</sup> and are forbidden to use civilians as human shields.

This obligation is explicitly established by Article 51 of Additional Protocol I and is considered a reflection of customary international law:

The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations<sup>42</sup>.

The prohibition on the use of human shields is reiterated in Article 28 of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, which again prohibits the use of civilians “to render certain points or areas immune from military operations”<sup>43</sup>. Furthermore, under the Rome Statute, the use of humans to shield a military target constitutes a war crime<sup>44</sup>. Such use of civilians to shield military targets is contrary to the principle of distinction and violates the obligation to take feasible precautions to separate civilians and military objectives<sup>45</sup>.

Article 48 of Additional Protocol I sets forth the following basic rule of distinction: “In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives”<sup>46</sup>. The ICRC recognises that “the parties [to a conflict] are obliged to take all feasible precautions to spare the civilian population”, pointing to the “distinction that must be made between civilians and those directly participating in hostilities” and recognising that such a distinction lies “at the heart of international humanitarian law”<sup>47</sup>.

These rules apply to “each” party to the conflict. Hamas and Israel are legally obligated to minimise their operations near civilians. While the ICRC recognises that this obligation applies equally to “each party” to the conflict, the ICRC has overwhelmingly

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<sup>39</sup>Protocol I, *supra* note 30, art. 58(a). Although Israel is not bound by Additional Protocol I as a matter of treaty obligation, Israel recognizes that the protocol reflects customary international law. MFA, OPERATION IN GAZA: FACTUAL AND LEGAL ASPECTS 38 (2008).

<sup>40</sup>Customary Int’l Humanitarian Law, Rule 23, Location of Military Objectives outside Densely Populated Areas, ICRC, *available at*, [http://www.icrc.org/customary-ihl/eng/print/v1\\_cha\\_chapter6\\_rule23](http://www.icrc.org/customary-ihl/eng/print/v1_cha_chapter6_rule23).

<sup>41</sup>Israel-Lebanon Ceasefire Understanding, art. 3 (1996).

<sup>42</sup>Protocol I, *supra* note 30, art. 51(7).

<sup>43</sup>Convention (IV) relative to the Protection of Civilian Persons in Time of War, art. 28, 12 August 1949.

<sup>44</sup>Rome Statute, *supra* note 38, art. 8(2)(b)(xxiii).

<sup>45</sup>Customary Int’l Humanitarian Law, Rule 97, Human Shields, ICRC, *available at* [http://www.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter32\\_rule97](http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter32_rule97).

<sup>46</sup>Protocol I, *supra* note 30, art. 48.

<sup>47</sup>*Civilian and Medical Workers Pay Price of Conflict*, *supra* note 3.

criticised Israel for targeting certain sites and objects and has been silent about Hamas' actions that have turned otherwise protected sites and objects into legitimate military objectives—a violation of IHL. By so doing, the ICRC, in fact, implicitly encourages Hamas to continue violating IHL by providing it a significant propaganda victory over Israel every time innocent women and children are killed or injured by an Israeli attack on a legitimate military target that Hamas has intentionally located in a civilian area. As such, because it fails to identify, criticise, and condemn Hamas' actions, the ICRC is complicit in Hamas' cynical ploy to endanger its own citizens and in the resulting harm befalling civilians in the Hamas-controlled Gaza Strip.

Hamas intentionally shirks its duty to avoid civilian casualties in order to dissuade Israel from striking certain targets and attempts to garner political support when an Israeli strike on that target is successful. Hamas militants frequently and indisputably “operate in civilian areas, draw return fire to civilian structures, and on some level benefit in the diplomatic arena from the rising casualties”<sup>48</sup>. Hamas has intentionally located its military compounds and weapons caches in or next to civilian houses, mosques, and hospitals<sup>49</sup>. Where is the ICRC condemnation? But for such violations by Hamas, Israel would have no need to attack such sites, thereby precluding civilian casualties.

*Using Places of Worship for Military Purposes is a War Crime.*

According to Article 16 of the Additional Protocol I, places of worship are protected objects<sup>50</sup>. To “use [such objects] in support of the military effort” constitutes a war crime<sup>51</sup>. While the international community has condemned Israel for attacking mosques (not a war crime in itself, unless indiscriminately targeted), nobody has condemned Hamas for using such places of worship for military purposes. ICRC silence in this regard is deafening and only encourages further Hamas violations.

On 12 July, Israel struck a mosque in Gaza<sup>52</sup>. The mosque was located near civilian homes and another religious site<sup>53</sup>. Although normally a protected object, Hamas had turned the mosque into a military objective by storing a cache of rockets there<sup>54</sup>. On 22 July, an IDF paratrooper was killed by an anti-tank missile fired from within the Khan Younis mosque<sup>55</sup>. The ICRC has condemned Israel for attacking the Khan Younis area, without mentioning that Hamas had invited such attacks by engaging in military operations<sup>56</sup>. While Hamas is openly and notoriously committing war crimes, the lack of such information in ICRC statements gives Hamas a pass, in effect, encouraging Hamas to continue to jeopardise the lives of its own civilian population.

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<sup>48</sup>Anne Barnard & Jodi Rudoren. *Israel Says That Hamas Uses Civilian Shields, Reviving Debate*. N.Y. TIMES (23 July 2014). <http://www.nytimes.com/2014/07/24/world/middleeast/israel-says-hamas-is-using-civilians-as-shields-in-gaza.html> (emphases added).

<sup>49</sup>*Id.*

<sup>50</sup>Protocol I, *supra* note 30, art. 16.

<sup>51</sup>*Id.*

<sup>52</sup>*Israel Airstrike Hits Gaza Mosque, Death Toll Tops 120*, MASHABLE (12 July 2014). <http://mashable.com/2014/07/12/israel-airstrike-gaza-mosque/>.

<sup>53</sup>*Id.*

<sup>54</sup>*Id.*

<sup>55</sup>Barnard, *supra* note 48.

<sup>56</sup>*Israel Airstrike Hits Gaza Mosque, supra* note 52.

*Using Schools for Military Purposes is a War Crime.*

Schools are also protected sites. Hamas located a rocket launch site near a complex of Gaza City schools<sup>57</sup>. On 16 July, the United Nations Relief and Works Agency (UNRWA) discovered twenty rockets hidden in a vacant Gaza school<sup>58</sup>. Using the building as a weapons storage site turned that structure into a legitimate military target. More alarmingly, it has been reported that the rockets discovered by the UNRWA were returned to Hamas by U.N. officials<sup>59</sup>. This rewards unlawful behaviour. Again on 22 July, UNRWA found more rockets in a second Gaza school<sup>60</sup>. The school in which the rockets were found in the second incident is located between two other schools that house 1,500 displaced persons<sup>61</sup>. Hamas' intentional placement of weapons in or near schools has been confirmed by U.N. Secretary-General Ban Ki Moon. Secretary-General Moon "expresse[d] outrage, and regret, at the placing of weapons in a UN-administered school"<sup>62</sup>. Secretary-General Moon also acknowledged that the location of weapons in such schools transform them into "military targets"<sup>63</sup>. Unfortunately, the ICRC has not condemned Hamas for committing a war crime by using schools for military purposes. Instead, it has criticised Israel for attacking them, even though they were legitimate military targets.

*Using Civilian Neighbourhoods for Military Purposes is a War Crime.*

While Israel expends significant resources on building shelters and anti-missile equipment to protect its civilians from rockets fired indiscriminately from the Gaza Strip, Hamas, instead of building shelters to protect the population of Gaza, diverts such resources to build tunnels in civilian areas for military uses<sup>64</sup>, including under mosques, schools, and UN facilities. These tunnels were constructed and have been used by Hamas militants to enter and attack Israel<sup>65</sup>. IDF forces have found at least thirty tunnels since the beginning of Operation Protective Edge<sup>66</sup>; ten tunnel openings were found underneath the Shujaiya neighbourhood<sup>67</sup>. Moreover, Hamas has fired over 140 rockets from the Shujaiya neighbourhood into Israel<sup>68</sup>.

By placing the entrances to its tunnel network within the densely populated Shujaiya neighbourhood and firing rockets from the same area, Hamas intended to use the civilian

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<sup>57</sup>Barnard, *supra* note 48.

<sup>58</sup>*Rockets Found At UN Gaza School Went Missing*, WASH. POST (23 July 2014), [http://www.washingtonpost.com/world/middle\\_east/rockets-found-at-un-gaza-school-have-gone-missing/2014/07/23/e117e206-12c7-11e4-ac56-773e54a65906\\_story.html](http://www.washingtonpost.com/world/middle_east/rockets-found-at-un-gaza-school-have-gone-missing/2014/07/23/e117e206-12c7-11e4-ac56-773e54a65906_story.html); see also *UNRWA Strongly Condemns Placement Of Rockets In School*, UNRWA (17 July 2014), <http://www.unrwa.org/newsroom/press-releases/unrwa-strongly-condemns-placement-rockets-school>.

<sup>59</sup>*Rockets Found*, *supra* note 58.

<sup>60</sup>*Id.*; see also *UNRWA Condemns Placement Of Rockets, For A Second Time, In One Of Its Schools*, UNRWA (22 July 2014), <http://www.unrwa.org/newsroom/press-releases/unrwa-condemns-placement-rockets-second-time-one-its-schools>.

<sup>61</sup>*Rockets Found*, *supra* note 58.

<sup>62</sup>Josh Levs et al., *Deaths Mount In Gaza And Israel As U.S. Pushes Cease-Fire*, CNN (22 July 2014), <http://www.cnn.com/2014/07/21/world/meast/mideast-crisis/>.

<sup>63</sup>*Rockets Found*, *supra* note 58.

<sup>64</sup>*The Price Of Hamas' Underground Terror Network*, IDF BLOG (26 July 2014), <http://www.idfblog.com/blog/2014/07/26/price-hamas-underground-terror-network/>.

<sup>65</sup>Levs, *supra* note 62.

<sup>66</sup>*The Price of Hamas' Underground Terror Network*, *supra* note 64.

<sup>67</sup>*Shuja'iya: Hamas' Terror Fortress In Gaza*, ISRAEL DEFENSE FORCES (20 July 2014), <http://www.idfblog.com/blog/2014/07/20/shujaiya-hamas-terror-fortress-gaza/>.

<sup>68</sup>*Id.*



population as a shield, thereby “render[ing] [the Shujaiya neighbourhood] immune from [Israeli] military operations”<sup>69</sup>. This is a clear and unambiguous violation of IHL and constitutes a war crime under the Rome Statute<sup>70</sup>. Where is the ICRC condemnation?

*Using Hospitals for Military Purposes is a War Crime.*

It is well-known that Hamas also uses hospitals as cover for its military operations. Hamas placed a rocket cache next to the Jabaliya Indonesian Hospital<sup>71</sup>. Hamas stored weapons in the Al Wafa hospital<sup>72</sup> and frequently fired on IDF troops from the Al Wafa Hospital with light weapons, anti-tank missiles, and rockets<sup>73</sup>. Al Wafa hospital is close enough to the Israeli border that one can view Israel from the hospital<sup>74</sup>. A tunnel opening used by Hamas was located adjacent to the Al Wafa hospital<sup>75</sup>. As such, Israel determined that the Al Wafa hospital was not being used for its normal protected purpose and was instead being used as a military installation, making it a legitimate military target<sup>76</sup>. An IDF video showing the targeting of the Al Wafa Hospital shows extensive secondary explosions after the initial Israeli air strike, vindicating Israel’s position that the hospital was used by Hamas as a weapons storage facility.

Similarly, Hamas created the danger to the Al Aqsa hospital by turning the area nearby into a military target by storing anti-tank missiles in the hospital’s immediate vicinity<sup>77</sup>. IDF forces did not intentionally target the hospital and stopped the attack when they realised the damage being done to the hospital<sup>78</sup>. But, once again, it was Hamas which violated IHL: it was Hamas which endangered the hospital.

Hamas turned the hospitals into legitimate military targets when it conducted military operations from or near them. As such, these “purely civilian buildings [were] occupied [and] used by [Hamas] and such objectives may be attacked”<sup>79</sup>.

*Targeting Formerly Protected Sites That Are Being Used for Military Purposes is Not a War Crime.*

As the ICRC is well aware, Article 52 of the Additional Protocol I recognises that “a place of worship, a house or other dwelling or a school,” although generally protected, can sometimes be used to make “an effective contribution to military action”, and the law allows attacking it if such an object makes “an effective contribution to military action and whose total or partial destruction . . . offers a definite military advantage”<sup>80</sup>.

<sup>69</sup>Convention (IV) relative to the Protection of Civilian Persons in Time of War, art. 28, 12 August 1949.

<sup>70</sup>See *supra* note 44 and accompanying text.

<sup>71</sup>*Id.*

<sup>72</sup>*Israel Bombs Gaza’s Only Rehab Hospital: Staff Forced To Evacuate Paralyzed Patients After Shelling*, DEMOCRACY NOW (18 July 2014).

[http://www.democracynow.org/2014/7/18/israel\\_bombs\\_gazas\\_only\\_rehab\\_hospital](http://www.democracynow.org/2014/7/18/israel_bombs_gazas_only_rehab_hospital).

<sup>73</sup>Stuart Winer, *WATCH: IDF Targets Hospital Used As Hamas Command Center*, TIMES OF ISRAEL (23 July 2014), <http://www.timesofisrael.com/idf-targets-hospital-hamas-used-as-firing-position/>.

<sup>74</sup>*Israel Bombs Gaza’s Only Rehab Hospital*, *supra* note 72.

<sup>75</sup>*Id.*

<sup>76</sup>*Id.*

<sup>77</sup>Levs, *supra* note 62.

<sup>78</sup>Nicholas Casey & Asa Fitch, *Gaza Hospital Attack Caught Civilians In Crossfire*, WALL ST. J. (23 July 2014), <http://online.wsj.com/articles/gaza-hospital-attack-caught-civilians-in-crossfire-1406158568>.

<sup>79</sup>*Commentary on the Additional Protocols*, *supra* note 33.

<sup>80</sup>Protocol I, *supra* note 30, art. 52.

Because Hamas uses otherwise protected buildings and facilities to store weapons, to serve as command centers, or as locations from which to fire at Israeli forces, they become legitimate military targets. Such facilities make an “effective” contribution to Hamas’ military action and the destruction of which offers a “definite” military advantage to Israel. As such, by converting otherwise protected civilian buildings into legitimate military targets, Hamas violates the IHL. On the other hand, Israel’s targeting such legitimate military targets does not automatically or necessarily constitute a violation of IHL.

*Hamas’ Indiscriminate Firing Into Israel Constitutes a War Crime.*

Indiscriminate attacks are those that are launched without consideration as to where harm will fall<sup>81</sup>—*just like Hamas rocket attacks into southern Israel*. Indiscriminate attacks are defined as

- (a) [T]hose which are not directed at a specific military objective; [and]
- (b) [T]hose which employ a method or means of combat which cannot be directed at a specific military objective<sup>82</sup>[.]

Specifically, attacks are indiscriminate if they are “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>83</sup>. When Hamas fires rockets into Israel, not knowing where they will land, there is no “concrete and direct military advantage anticipated”, and, hence, such firing violates IHL.

Hamas has fired more than 2,900 rockets into Israel since 8 July 2014<sup>84</sup>. At least 280 rockets intended to land in Israel landed inside Gaza instead<sup>85</sup>, meaning, *inter alia*, that Hamas is killing and injuring its own people. Taking into consideration the inaccuracy of Hamas’ rockets alone allows one to conclude that Hamas rocket attacks are indiscriminate because they are a “means of combat which cannot be directed at a specific military objective”<sup>86</sup>. Yet, Hamas openly boasts that its rockets “accurately target the homes of the Israelis and the Zionists”<sup>87</sup>. As such, by its own admission, Hamas’ rocket fire is not directed at a “specific military target,” but rather at civilian homes, thereby establishing—without question—a war crime. Accordingly, ICRC’s denunciation should be loud and clear. Yet, it remains muted. Why?

**IN COMPLIANCE WITH IHL, ISRAEL TAKES NECESSARY PRECAUTIONS  
BEFORE STRIKING A MILITARY TARGET NEAR CIVILIANS**

In accordance with its obligation to “take all *feasible* precautions to spare the civilian population”<sup>88</sup>, Israel makes incredible efforts to “remove civilian persons and objects . . .

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<sup>81</sup> See *id.* art. 51(4).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* art. 51(5)(b) (emphasis added).

<sup>84</sup> IDF Spokesperson, *supra* note 16.

<sup>85</sup> *Hamas Launches Rockets On Civilians In Gaza*, IDF Blog (31 July 2014), <http://www.idfblog.com/blog/2014/07/31/hamas-launches-rockets-civilians-gaza/>.

<sup>86</sup> Protocol I, *supra* note 30, art. 51(4)(b).

<sup>87</sup> Steven Emerson, *Hamas Claims Rockets Only Target Jews*, ALGEMEINER (28 July 2014), <http://www.algemeiner.com/2014/07/28/hamas-claims-rockets-only-target-jews/>.

<sup>88</sup> *Civilian and Medical Workers Pay Price of Conflict*, *supra* note 3.

from the vicinity of military objectives<sup>89</sup>—even when those persons are not under Israel’s control—before engaging in a military strike.

Before striking the tunnels in the Shujaiya neighbourhood, for example, Israel dropped leaflets, made phone calls, and sent text messages to warn civilians to evacuate the area<sup>90</sup>. In response to the Israeli efforts, Hamas expressly commanded the residents of Shujaiya to ignore the IDF’s warnings<sup>91</sup>. Furthermore, at the ICRC’s request, the IDF agreed to a two-hour humanitarian ceasefire during the course of striking the Hamas tunnels in the Shujaiya neighbourhood<sup>92</sup>. When Hamas ignored the ceasefire<sup>93</sup>, the ICRC did not condemn Hamas.

Prior to the Israeli strike on the Al Wafa hospital, Israel repeatedly warned the hospital staff that the hospital was a legitimate military target. According to Dr. Basman Alashi, the executive director of the Al Wafa hospital, Israel warned the hospital staff through daily telephone calls beginning eleven days in advance that the hospital was a target and that the hospital should be evacuated<sup>94</sup>. By 22 July, all hospital personnel had been evacuated<sup>95</sup>. Only then was the hospital struck, because Hamas forces continued to fire from the building<sup>96</sup>.

These facts demonstrate the steps Israel takes before striking a military target in an area where civilians may be present. Israel attempts to distinguish military targets from civilians by using precise air strikes and smart munitions: Israel effectively warns civilians of imminent attacks through the distribution of leaflets, repeated telephone calls, text messages, and various other methods of alert, even when it disadvantages Israeli military operations. Conversely, by intentionally placing weapons and militants in civilian areas, Hamas transforms them into legitimate military targets. Hamas does so to blur the line between civilian and military targets. Hamas also encourages, and at times demands, civilians to ignore Israel’s warnings. Accordingly, it is Hamas—not Israel—that is violating the IHL. As such, Hamas should be held solely responsible for the vast majority of civilian casualties in the current conflict, and the ICRC should be loudly condemning Hamas violations. Instead, it criticises Israel. That is shameful and despicable. Despite the insinuations in ICRC statements, the events in Gaza are not occurring in a vacuum. Hamas’ actions subvert the principles of IHL, whereas Israel’s actions seek at all times to comply with the spirit and letter of IHL. In that light, the ICRC has lost its moral authority by siding, for all intents and purposes, with Hamas terrorists.

## CONCLUSION

In a recent article, the ICRC discussed an Israeli strike on a seven-storey building in Gaza. In the article, the ICRC made the following statement:

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<sup>89</sup>Protocol I, *supra* note 30, art. 58(a).

<sup>90</sup>*Shuja'iya: Hamas' Terror Fortress*, *supra* note 67.

<sup>91</sup>*Id.*

<sup>92</sup>*Id.*

<sup>93</sup>*Id.*

<sup>94</sup>*Israel Bombs Gaza's Only Rehab Hospital*, *supra* note 72.

<sup>95</sup>Winer, *supra* note 73.

<sup>96</sup>*Id.*

The ICRC engages in discussion with “both parties” about the “rules of war”. We talk about principles such as “precautions in attack”, “legitimate targets”, “concrete military advantage” and “proportionality”. We remind everybody that if an attack is expected to cause “excessive incidental civilian casualties” in relation to the concrete and direct military advantage anticipated, it must be cancelled or suspended. We say loudly and clearly that in this war, as in any other, it is not acceptable that soldiers minimize their risks at the expense of civilians on the other side. We also say it is not acceptable to use civilians as human shields, in any conflict. We attend diplomatic conferences, we organize workshops, we “raise awareness” among belligerents to “minimize casualties”<sup>97</sup>.

Such statements are both self-serving and misleading—especially when it is clear that one side (Israel) is making herculean attempts to fully comply with IHL and the other side ( Hamas) could essentially care less. There is no moral equivalency here. Readily available evidence establishes beyond doubt that Hamas is routinely, openly, and notoriously violating the IHL. Yet, Israel is singled out by the ICRC and others for actions it would have preferred to avoid altogether, but for the incessant attacks on Israeli soil from Hamas-controlled Gaza.

Nowhere do these ICRC statements mention how Hamas built tunnels in civilian areas or stored weapons in hospitals and schools, or that the Israeli military warns civilians (the very civilians Hamas put in danger in the first place) through various means before attacking a military target. The above quoted paragraph does not state which party to the conflict is violating the “rules of war”. While Hamas spends millions of dollars to dig tunnels in civilian areas to attack Israel<sup>98</sup> and puts Palestinian civilians (whom Hamas purports to represent) in the line of fire, Israel builds shelters for its people. While Hamas brags about its use of human shields<sup>99</sup>, Israel makes conscious attempts to abide by the rules of war to protect civilians. After reading the ICRC’s account of Palestinian injuries, coupled with references to the rules of war, one is inexorably led to believe—*albeit wrongly*—that Israel is violating those laws. This type of rhetoric undermines the integrity and legitimacy of an organisation like the ICRC. Such one-sided criticism is not only unjustified, but also dangerous, reprehensible, and morally bankrupt. It encourages Hamas to continue to violate IHL with impunity at the expense of innocent civilians. At the very least, an organisation like the ICRC should be expected to even-handedly report the facts, criticise the real aggressor, and have the courage to say which party is responsible for taking innocent lives. That apparently is not the case.

The ICRC has not condemned Hamas for firing thousands of rockets into Israel to create terror and attack innocent Israeli civilians. The rules of war were adopted, *inter alia*, to protect civilian lives. They can only do so if they are enforced in an even-handed manner. So far, the ICRC and its employees are attacking the wrong party. Israel seeks to comply with IHL. Only the blind—or those intentionally blinding themselves to the truth—could criticise

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<sup>97</sup>Maio, *supra* note 37.

<sup>98</sup>See Editorial Board, *The U.S. Should Push For The Disarming Of Hamas In Gaza-Israel Cease-Fire*, WASH. POST (23 July 2014), [http://www.washingtonpost.com/opinions/the-us-should-push-for-the-disarming-of-hamas-in-gaza-israel-cease-fire/2014/07/23/7c2d1d9e-1284-11e4-8936-26932bcfd6ed\\_story.html](http://www.washingtonpost.com/opinions/the-us-should-push-for-the-disarming-of-hamas-in-gaza-israel-cease-fire/2014/07/23/7c2d1d9e-1284-11e4-8936-26932bcfd6ed_story.html) (estimating the cost of each tunnel that Hamas has dug to be roughly one million dollars).

<sup>99</sup>See Elad Benari, *Watch: Hamas Spokesman Encourages Using Civilians As Shields*, ARTUZ SHEVA (7 July 2014), <http://www.israelnationalnews.com/News/News.aspx/182729#.U9kmg7Gf-ik> (reporting a video of Hamas spokesman Sami Abu Zuhri explicitly encouraging Palestinians to adopt the strategy of becoming human shields and lauding its effectiveness and its display of the brave character of Palestinians).

Israel and give Hamas a pass. Given the ICRC's blatant bias, it is difficult to fathom why Israel—or any Western nation seriously committed to the principles of IHL—would cooperate with ICRC officials in the future.

We, therefore, respectfully urge ICRC officials to thoroughly examine what they say before they say it. We further urge the ICRC to examine the facts to determine which party in the Gaza conflict really seeks to comply with IHL and which does not. An objective, honest, evaluation will, we are confident, lead you to conclude that Israel is the only party seeking to meet the requirements of IHL. As such, Israel should be commended, not vilified, for its efforts to carry out its IHL obligations in the face of a determined, fanatical, unprincipled foe which intentionally and indiscriminately attacks Israeli civilians and uses its own civilian population as human shields.

Respectfully submitted.



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