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The Right to Food in Gaza: Israel's Obligations Under International Law

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I. Introduction

On December 27, 2008 Israel launched a series of airstrikes against targets in the Gaza strip,¹ marking the beginning of Operation Cast Lead (OCL),² a 22-day military campaign against Hamas.³ Israel officially launched OCL in “defense of its citizens, who have been and continue to be deliberately attacked by the Hamas terrorist organization.”⁴ Although Israel pledged⁵ to abide by the International Humanitarian Law (IHL) requirements of “distinction”⁶ and “proportionality,”⁷ OCL

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¹ See Paddy Allen, *The Israeli Attacks on Gaza*, THE GUARDIAN, Jan. 19, 2009, <http://www.guardian.co.uk/world/interactive/2009/jan/03/israelandthepalestinians>.

² Operation Cast Lead is the name adopted for the offensive by the Israeli Government. See Israeli Defense Forces, *Senior Military Officials Brief the International Press on Operation Cast Lead*, Jan. 19, 2009, http://dover.idf.il/IDF/English/News/the_Front/08/oper/default.htm.

³ For the purposes of this paper, “Hamas” is meant to encompass both the official organization and other anti-Israeli militant groups operating in the Gaza strip.

⁴ ISRAEL MINISTRY OF FOREIGN AFFAIRS, RESPONDING TO HAMAS ATTACKS FROM GAZA – ISSUES OF PROPORTIONALITY, Background Paper 1 (Dec. 2008), http://www.mfa.gov.il/NR/rdonlyres/A1D75D9F-ED9E-4203-A024-AF8398997029/0/Responding_to_Hamas_Attacks_from_Gaza_december_2008.pdf [hereinafter IMFA Background Paper].

⁵ See *id.*

⁶ Distinction requires that parties to a conflict take steps to distinguish between military and civilian targets and forbids targeting of the latter. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 13(2), June 8, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391 [hereinafter Protocol I] (“The civilian population as such, as well as individual civilians, shall not be

inflicted major destruction on Gaza.⁸ By the time Israel and Hamas independently announced unilateral ceasefires on January 18, 2009,⁹ approximately 1,440 people had been killed and another 5,380 injured.¹⁰

OCL took place at a time when basic goods and food stores in Gaza were already in short supply due to Israel's blockade of the territory; in place since June 2007.¹¹ There is no clear end to this blockade in sight. Rockets continue to be fired into Israel despite Hamas' public condemnation¹² and Israel has conditioned any border concessions on the release of captured Israeli Defense Force (IDF) soldier Gilad Shalit.¹³ Israel does claim however, that at all times, sufficient humanitarian aid is allowed into Gaza and that any restrictions are the result of security concerns that the blocked aid will benefit Hamas;¹⁴ especially so-called "dual-use"¹⁵ items. Critics of Israel's border policies espouse a

the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.”).

⁷ Proportionality requires that parties to a conflict use methods of warfare that cause the least collateral damage to the civilian population as possible under the circumstances. *Id.* art. 52(2) (“Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”).

⁸ See United Nations Office for the Coordination of Humanitarian Affairs, *Occupied Palestinian Territory*, 33 HUMANITARIAN MONITOR 1, 1 (Jan. 2009), available at http://www.ochaopt.org/documents/ocha_opt_humanitarian_monitor_2009_01_15_english.pdf [hereinafter *OPT HUMANITARIAN MONITOR*]. John Holmes, UN Under-Secretary for Humanitarian Affairs, stated upon his return from Gaza, “[t]he destruction I saw was devastating – both in human and material terms.” *Id.*

⁹ Isabel Kershner, *Truce Starts for Israel and Hamas in Gaza*, N.Y. TIMES, June 20, 2008, <http://www.nytimes.com/2008/06/20/world/middleeast/20mideast.html> (last visited May 4, 2009).

¹⁰ See *OPT HUMANITARIAN MONITOR*, *supra* note 8, at 2. It should be noted that the overall number of people killed during OCL as well as the percentage of civilians amongst those killed is hotly debated. See, e.g., *Israel disputes Gaza death rates*, BBC NEWS, http://news.bbc.co.uk/1/hi/world/middle_east/7966718.stm (last visited May 11, 2009) (according to Israel “1,166 Palestinians were killed of whom 709 are described as ‘terror operatives’ from the militant group Hamas.”).

¹¹ Heather Sharp, *Guide: Gaza Under Blockade*, BBC WORLD NEWS, http://news.bbc.co.uk/2/hi/middle_east/7545636.stm (last visited May 12, 2009).

¹² In a rare move, Hamas has condemned the firing of rockets into Israel in the current political climate. See Ibrahim Barzak, *Hamas, in Rare Move, Condemns Gaza Rocket Fire*, ASSOCIATED PRESS, Mar. 12, 2009, <http://www.foxnews.com/wires/2009Mar12/0,4670,MLIsraelPalestinians,00.html>. As of March 12, 2009, 170 rockets had been fired into Israel after Hamas announced its ceasefire. *Id.*

¹³ *Israel Says Gaza Blockade Goes on Until Soldier is Freed*, REUTERS NEWS SERVICE, Mar. 17, 2009, <http://www.reuters.com/article/middleeastCrisis/idUSLH62622>.

¹⁴ *HARDtalk: Isaac Herzog Interview* (BBC World News television broadcast Feb. 5, 2009), <http://news.bbc.co.uk/2/hi/programmes/hardtalk/7875065.stm>, (Herzog, an Israeli Cabinet Minister, stated to interviewer Stephen Sackur that humanitarian aid cannot be “candy to Hamas” and that Israel has the right to withhold aid in cases where the aid may be redirected to Hamas). Israel's concerns are legitimate, as Hamas has seized aid shipments in the past; however, the UN relief agencies involved have responded immediately and suspended aid operations until Hamas returned the goods. See *Gaza: UN Suspends Aid Operation After Second Hamas-Linked Theft of Supplies*, U.N. NEWS CENTRE, Feb. 6, 2009, <http://www.un.org/apps/news/story.asp?NewsID=29802&Cr=gaza&Cr1=unrwa>; *UN to Resume Aid Supplies to Gaza*, BBC NEWS, Feb. 9, 2009, http://news.bbc.co.uk/2/hi/middle_east/7879624.stm. The two thefts were of shipments of blankets, flour and rice and Hamas returned all of the goods and admitted their confiscation was a “mistake.” *Id.*

¹⁵ Alastair Sharp, *Gaza Aid Troubled by Logistics, Closures, Disunity*, REUTERS NEWS SERVICE, Mar. 2, 2009, <http://www.reuters.com/article/topNews/idUSTRE52026F20090302> (reporting that “since the war ended on Jan. 18,

contrary view, asserting that vital supplies are being arbitrarily denied entry into Gaza.¹⁶ Some human rights groups have even accused Israel of using the blockade to collectively punish Gaza's residents.¹⁷

This paper examines Israel's border policies in light of the impact on civilian food access in Gaza. In doing so, both human rights and humanitarian law will be discussed in turn, as each confers certain rights on individuals and duties on States vis-à-vis access to food. Furthermore, in light of the unclear nature of the conflict in Gaza (international or non-international) and disputes over whether Israel legally "occupies" Gaza, Israel's food-related duties internationally, domestically and as an occupying power will be examined where appropriate.

II. The Human Right to Adequate Food

The human right to adequate food is mentioned in the Universal Declaration of Human Rights of 1948 (Universal Declaration)¹⁸ and laid out in detail in the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹⁹ The Universal Declaration and the ICESCR are two of five landmark human rights documents which combine to form the international bill of rights²⁰ and as such, the right is considered both fundamental in nature²¹ and expansive in scope.²² The right to adequate food is also supported by language in other important legal instruments,

Israel has not allowed in many materials deemed of dual use – useful for both civilians and militants – including cement and steel rods.”).

¹⁶ See *Israel-OPT: Aid Reaching Gaza, but is it Enough?*, INTEGRATED REGIONAL INFO. NETWORKS (IRIN), Jan. 28, 2009, <http://www.irinnews.org/Report.aspx?ReportId=82615>. According to the report, “Israel says 453 trucks entered Gaza 18-23 January, but only about half of them carried humanitarian aid – not nearly enough for 1.5 million Gazans, say UN agencies and international aid groups.” *Id.*

¹⁷ See, e.g., Human Rights Watch, *Israel/Egypt: Choking Gaza Harms Civilians*, Feb. 18, 2009, <http://www.hrw.org/en/news/2009/02/18/israelegypt-choking-gaza-harms-civilians>; Amnesty Int'l, *Gaza Blockade-Collective Punishment*, 5, AI Index MDE 15/021/2008, July 2008, available at <http://www.amnesty.org/en/library/asset/MDE15/021/2008/en/6300b18f-49de-11dd-9394-c975c4bd488d/mde150212008eng.pdf>; *Gaza: Situation at Border Crossings 'Intolerable,' Ban Says*, U.N. NEWS CENTRE, Mar. 10, 2009, <http://www.un.org/apps/news/story.asp?NewsID=30138&Cr=gaza&Cr1=#>.

¹⁸ Universal Declaration of Human Rights art. 25(1), G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) (“Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food . . .”).

¹⁹ International Covenant on Economic, Social and Cultural Rights art. 11, Dec. 16, 1966, 1966 U.S.T. 521, 993 U.N.T.S. 3, [hereinafter ICESCR]. Israel has signed and ratified the ICESCR. See UNITED NATIONS, MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL, vol. XX, chapter IV-3 Human Rights, International Covenant on Social Economic and Cultural Rights, 2, available at <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-3.en.pdf>.

²⁰ U.N. Office of the High Comm’r for Human Rights, *Fact Sheet No. 2 (Rev. 1) The International Bill of Rights*, (Dec. 10, 1948), available at <http://www.unhchr.ch/html/menu6/2/fs2.htm>.

²¹ The right to food is considered a “foundational” right inherent in the most basic of rights – the right to life. See U.N. Econ. and Soc. Council, *General Comment 12: Substantive Issues Arising in the Implementation of the International Covenant on Economic Social and Cultural Rights*, ¶ 4, U.N. Doc. E/C.12/1999/5 (May 12, 1999) [hereinafter *General Comment 12*], available at <http://www.unhchr.ch/tbs/doc.nsf/0/3d02758c707031d58025677f003b73b9?Opendocument>, (“The Committee affirms that the right to adequate food is indivisibly linked to the inherent dignity of the human person and is indispensable for the fulfilment of other human rights enshrined in the International Bill of Rights.”).

²² For a detailed discussion of the right to food, including its sources and broad scope, see Laura Niada, *Hunger and International Law: The Far-Reaching Scope of the Right to Food*, 22 CONN. J. INT’L L. 131 (2006).

including the International Covenant on Civil and Political Rights (ICCPR),²³ Convention on the Elimination of Discrimination Against Women (CEDAW),²⁴ and Convention on the Rights of the Child (CRC),²⁵ and has presumptively attained the status of customary international law.²⁶

The primary formulation of the human right to adequate food is provided in Article 11 of the ICESCR, which requires State Parties to “recognize the right of everyone to an adequate standard of living for himself and his family, including [*inter alia*] adequate food . . . [and] the fundamental right of everyone to be free from hunger”²⁷ Thus, the right to adequate food actually encompasses two distinct rights: the right to food security (through either self-production or adequate income)²⁸ and the “fundamental” right to be free from hunger.²⁹ Although actions taken to effectuate each of these twin rights are typically intertwined, States have an immediate obligation to ensure the “fundamental” right of freedom from hunger, while bearing in mind the ultimate, long-term objective of overall food security both domestically and internationally.³⁰ Accordingly, the fundamental right to be free from hunger is non-derogable, “even in times of natural or other disasters.”³¹

²³ International Covenant on Civil and Political Rights art. 1, Dec. 16, 1966, 999 U.N.T.S. 171, [hereinafter ICCPR] (stating that “in no case may a people be deprived of its own means of subsistence.”).

²⁴ Convention on the Elimination of All Forms of Discrimination Against Women art. 12(2), *adopted* Dec. 18, 1979, 1249 U.N.T.S. 13 (requiring that State Parties guarantee, to women, “adequate nutrition during pregnancy and lactation”).

²⁵ Convention on the Rights of the Child art. 24(2)(c), *adopted* Nov. 20, 1989, *entered into force* Sept. 2, 1990, 1577 U.N.T.S. 3, 28 I.L.M. 1448 (Nov. 20, 1989) (State Parties must “take appropriate measures” to, *inter alia*, “combat disease and malnutrition . . . through, *inter alia* . . . the provision of adequate nutritious foods and clean drinking-water.”). The tangential implications of the right to adequate food in the ICCPR, CEDAW and CRC underscore the fundamental nature of the right itself as one of the core, indivisible human rights which are necessary preconditions to the enjoyment of all other rights.

²⁶ See Niada, *supra* note 22, at 173-76 (discussing the arguments for and against recognizing the right to adequate food as customary law and concluding, at page 176, that “there is a strong case for identifying a ‘modern’ international customary norm on the right to food, comprehensive and constantly updating.”); see also Special Rapporteur on the Right to Food, *Report of the Special Rapporteur on the right to food*, ¶ 10, *delivered to the General Assembly*, U.N. Doc. A/63/278 (Oct. 21, 2008) (asserting that the right to adequate food is customary international law) [hereinafter *Report of the Special Rapporteur*].

²⁷ ICESCR, *supra* note 19, art. 11.

²⁸ See *General Comment 12*, *supra* note 21, ¶ 6 (“The right to adequate food is realized when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement. The *right to adequate food* shall therefore not be interpreted in a narrow or restrictive sense which equates it with a minimum package of calories, proteins and other specific nutrients.”) (emphasis in original). *Accord Report of the Special Rapporteur*, *supra* note 26, ¶ 9 (“The right to adequate food is realized when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement.”); U.N. General Assembly Third Committee, 63rd Session, STATEMENT ON AGENDA ITEM 64 (B) THE RIGHT TO FOOD, U.N. Doc. A/C.3/63/L.42/Rev.1, ¶ 9 (Nov. 17, 2008), *available at* <http://daccessdds.un.org/doc/UNDOC/LTD/N08/607/03/PDF/N0860703.pdf?OpenElement> [hereinafter STATEMENT ON RIGHT TO FOOD].

²⁹ Human Rights Council Resolution 7/14, ¶ 2, U.N. Doc. A/HRC/RES/7/14 (Mar. 27, 2008), *available at* <http://www.cetim.ch/en/documents/Annex-resolution-7-14.pdf> [hereinafter Resolution 7/14] (reaffirming “the fundamental right of everyone to be free from hunger, so as to be able to fully develop and maintain his or her physical and mental capacities.”).

³⁰ For a discussion of the dual concepts that compose the general human right to adequate food, see Niada, *supra* note 22, at 151-52 (concluding that “States have a duty to immediately realize the right to be free from hunger” but that “[r]esponding to minimum needs, however, is only the baseline action necessary to comply with the right to food [because] States have an explicit duty to progressively implement the comprehensive right to food.”) (internal citations omitted).

³¹ *General Comment 12*, *supra* note 21, ¶ 6.

Guaranteeing immediate food needs involves more than the mere daily provision of the minimum caloric intake necessary to sustain life. Instead, in the words of Olivier De Schutter, the UN Special Rapporteur on the right to adequate food, fulfillment of the right:

is about being guaranteed the right to feed oneself, which requires not only that food be available (that the ratio of production to the population be sufficient), but also that it be accessible – that each household either have the means to produce its own food or have sufficient purchasing power to buy the food it needs.³²

Similarly, the UN Committee on Social and Cultural Rights has stated:

the core content of the right to adequate food implies [t]he availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, [] acceptable within a given culture; [and t]he accessibility of food in ways that are sustainable and do not interfere with the enjoyment of other human rights.³³

Under the Committee’s definitions, “dietary needs” are based on individualized human physiological requirements,³⁴ “adverse substances” include anything that may compromise safe consumption³⁵ and “acceptability” requires recognition of “non nutrient-based values attached to food.”³⁶ “Availability” and “accessibility” combine to guarantee either direct (self-production) or indirect (market systems) access to food that meets the above-mentioned criteria, and requires that such access be secure and sustainable.³⁷

The ICESCR goes beyond some human rights instruments, which create rights without laying out concurrent duties, and contains both general and specific implementation requirements. Article 11 places a duty on States to “take appropriate steps to ensure the realization [of the] right [to adequate food].”³⁸ Specifically, States should take steps:

(a) [t]o improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources; [while]

³² See Report of the Special Rapporteur, *supra* note 26, ¶ 9.

³³ General Comment 12, *supra* note 21, ¶ 8.

³⁴ *Id.* ¶ 9 (requiring a “mix of nutrients for physical and mental growth, development and maintenance, and physical activity that are in compliance with human physiological needs at all stages throughout the life cycle and according to gender and occupation.”).

³⁵ *Id.* ¶ 10 (requiring “a range of protective measures by both public and private means to prevent contamination of foodstuffs through adulteration and/or through bad environmental hygiene or inappropriate handling at different stages throughout the food chain; care must also be taken to identify and avoid or destroy naturally occurring toxins.”).

³⁶ *Id.* ¶ 11 (“Cultural or consumer acceptability implies the need also to take into account, as far as possible perceived non nutrient-based values attached to food and food consumption and informed consumer concerns regarding the nature of accessible food supplies.”) (emphasis in original).

³⁷ *Id.* ¶ 12-13.

³⁸ ICESCR, *supra* note 19, art. 11.

(b) [t]aking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.³⁹

Additionally, the general ICESCR implementation clause contained in Article 2 places additional affirmative duties on States, requiring:

[e]ach State Party to . . . take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.⁴⁰

Aside from the specific requirements within the ICESCR itself, there are three types of general responsibilities placed on States by all human rights: “the obligations to *respect*, to *protect* and to *fulfil*.”⁴¹ The obligation to respect is a prohibition, forbidding State interference with existing access to food.⁴² The obligation to protect requires States to take steps to prevent non-state actors from engaging in similar interference.⁴³ The obligation to fulfill (or facilitate) requires States to “pro-actively engage in activities intended to strengthen people’s access to and utilization of resources and means to ensure their livelihood, including food security.”⁴⁴ The right to fulfill also requires States to take immediate responsive action whenever individuals or groups are “unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal” and to “[provide] that right directly.”⁴⁵

The scope of a State’s obligations to respect, protect and fulfill depends on whether the population in question is located domestically or abroad, as the primary obligations placed on States by the right to adequate food (and generally by human rights) are domestic.⁴⁶ Domestically, a State violates the requirements of the ICESCR right to adequate food if it “fails to ensure the satisfaction of, at the very least, the minimum level required to be free from hunger.”⁴⁷ Furthermore

“[s]hould a State party argue that resource constraints make it impossible to provide access to food for those who are unable by themselves to secure such access, the State has to demonstrate that every effort has been made to use all the resources at its disposal . . . [to meet] those minimum obligations.”⁴⁸

³⁹ *Id.*

⁴⁰ *Id.* art. 2.

⁴¹ See *General Comment 12*, *supra* note 21, ¶ 15 (emphasis in original).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Niada, *supra* note 22, at 153 (Niada observes that this is primarily due to the fact that “it is the home Government that has been perceived as wielding the most conspicuous amount of power over its subjects.”).

⁴⁷ *General Comment 12*, *supra* note 21, ¶ 17.

⁴⁸ *Id.*

The obligation to respect is universal and as such it is incumbent upon each State to ensure that its actions do not compromise rights extraterritorially under both general customary international law⁴⁹ and in the specific context of the right to adequate food.⁵⁰ The extraterritorial obligations created by the right to adequate food are especially important in the realm of trade, as even general trade sanctions or non food-related trade blockades often cause great civilian suffering, including famines.⁵¹

In sum, the right to adequate food, guaranteed by Article 11 of the ICESCR is actually composed of two separate rights which each place a series of requirements on States. To satisfy the demands of Article 11, each State must immediately ensure that the population under its direct control is free from hunger, while taking steps towards ensuring long-term domestic food security. Additionally, States must refrain from taking action that would compromise the right to food extraterritorially. Finally, in cases of famine, States are strongly encouraged to actively participate in relief actions and are strictly forbidden from actively hindering ongoing actions.

III. Humanitarian Law Obligations and Civilian Food Access

IHL, unlike human rights law, does not create individual rights but instead protects rights by placing specific obligations on States during times of armed conflict. As such, the duties placed on each State differ, depending on whether it is a party to the conflict and/or an occupying power or third party, and whether the conflict itself is international in scope. To account for the various possibilities applicable to the conflict in Gaza, three categories of food provision requirements under IHL will be examined: (1) the obligations placed on all States during international armed conflicts; (2) the additional duties placed on occupying powers during international conflicts; and (3) the obligations placed on a State engaged in a non-international conflict.

A. General Requirements During International Armed Conflicts

The fourth Geneva Convention Relative to the Protection of Civilian Persons in Times of War (“Geneva IV”),⁵² along with its first Additional Protocol of 1977 (“Protocol I”),⁵³ lay out the fundamental protections for civilians during all international conflicts.⁵⁴ Article 23 of Geneva IV commands that all States shall “allow the free passage of all consignments” of medical supplies, as

⁴⁹ See *Trail Smelter Case* (U.S. v. Can.), 3 Int'l Arb. Awards 1905, 1936 (R.I.A.A. 1938); *Corfu Channel Case* (U.K. v. Alb.), 1949 I.C.J. 4, 18 (Apr. 9).

⁵⁰ *General Comment 12*, *supra* note 21, ¶ 36-37 (“State Parties should take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food and to provide the necessary aid when required [and should also] . . . refrain at all times from food embargoes or similar measures which endanger conditions for food production and access in other countries.”).

⁵¹ For an overview of the unintended collateral harm caused to civilian populations by the imposition of trade sanctions, see Karima Bennouna, *Towards a Human Rights Approach to Armed Conflict: Iraq 2003*, 11 U.C. DAVIS J. INT'L L. & POL'Y 171, 184 (2004).

⁵² Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287, 6 U.S.T. 3516 [hereinafter Geneva IV].

⁵³ Protocol I, *supra* note 6.

⁵⁴ Geneva IV, *supra* note 52, arts. 1-2 (“The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances [T]he present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.”); Protocol I, *supra* note 6, art. 1(3) (“This Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in the situations referred to in Article 2 common to those Conventions.”).

well as foodstuffs for children under fifteen years old, pregnant women and new mothers through any blockade, even if the goods are destined for the territory of the “adversary.”⁵⁵ Each State does however, have the right to search consignments to verify their contents and specify the time, place and manner of passage of aid through its territory.⁵⁶ Additionally, Article 70 of Protocol I further requires parties to a conflict to “allow and facilitate rapid and unimpeded passage of *all relief consignments* . . . even if such assistance is destined for the civilian population of the advers[ary]” in cases where an occupied territory is “not adequately provided” with essential supplies.⁵⁷ Article 70 of Protocol I thus extends the scope of Article 23 to all foodstuffs destined for the civilian population, rather than solely those intended for children and new or expectant mothers.⁵⁸

Free passage of foodstuff consignments may only be suspended if a State has “serious reasons for fearing” that: (1) the aid will be diverted; (2) the aid will be ineffectively controlled by the aid-distributing State or organization; or (3) “definite advantage may accrue to the military efforts or economy of the enemy” by the delivery of the aid.⁵⁹ However, any limitation on aid claimed by a State under one of these exceptions is limited to a short-term suspension of aid while such concerns are addressed and are not meant to allow an extended suspension of aid.⁶⁰ Furthermore, the doctrine of proportionality extends to the “military advantage to the adversary” exception and cannot be invoked by the mere fact that humanitarian aid will indirectly benefit the economy of the adversary.⁶¹

B. The Duties of an Occupying State

A State is considered to legally “occupy” all territory it exercises “authority over” according to the 1907 Hague Convention on the Laws and Customs of War on Land.⁶² Article 6 of Geneva IV places the duties of an occupying power on any State that “exercises the functions of government” over a territory.⁶³ The exercise of authority has been interpreted by the International Court of Justice

⁵⁵ Geneva IV, *supra* note 52, art. 23.

⁵⁶ *Id.*

⁵⁷ Protocol I, *supra* note 6, art. 70 (emphasis added).

⁵⁸ *Id.* (Article 70 gives “priority” to children and new and expectant mothers in distribution of aid, but does not limit consignments of foodstuffs solely to this group); *see also* INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 821 (Yvez Sandoz et al. eds., Martinus Nijhoff 1987) [hereinafter COMMENTARY ON ADDITIONAL PROTOCOLS].

⁵⁹ Geneva IV, *supra* note 52, art. 23(a)-(c).

⁶⁰ OSCAR UHLER, HENRI COURSIER ET AL., 4 COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949 311 (1958) [hereinafter COMMENTARY ON GENEVA CONVENTIONS].

⁶¹ COMMENTARY ON ADDITIONAL PROTOCOLS, *supra* note 58, at 827 (“[I]t is clear that [any relief] action, even if it goes to the civilian population needing it, to some extent relieves the burden on the economy of the receiving Party. However, this is a question of proportionality: there is no way in which one could weigh the humanitarian considerations of an action destined to ensure the survival of a civilian population lacking essential supplies against the military advantage that such an action could have for the receiving Party, which would in any case be minimal and indirect.”).

⁶² *E.g.*, Convention (IV) Respecting the Laws and Customs of War on Land art. 42, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277 (“Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.”).

⁶³ Geneva IV, *supra* note 52, art. 6 (“In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143”); *accord* Protocol I, *supra* note 6, art. 3(b) (“The application of the Conventions and of this Protocol shall

as requiring a showing of “effective control” by a State.⁶⁴ Israel’s complete control over Gaza’s borders⁶⁵ strongly suggests that Israel exercises the requisite effective control to legally occupy Gaza’s borders, although it is unclear whether Israel’s control continues within Gaza itself.

That Israel presumptively occupies Gaza’s borders suggests greater concurrent duties regarding the provision of humanitarian aid to Gazan civilians. Article 55 of Geneva IV places on the occupying State “the duty of ensuring the [existence of] food and medical supplies [for] the population . . . to the fullest extent [possible],” stating that such State should “bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate.”⁶⁶ Additionally, Article 59 requires an occupying State to “agree to relief schemes” in cases where the civilian population is “inadequately supplied.”⁶⁷ This duty to accept relief for an inadequately supplied occupied territory is “unconditional” and consists of duties to “agree” to an aid plan and to “facilitate” the implementation of said plan.⁶⁸ Finally, Article 60 confirms that the affirmative duties of Article 55 continue, regardless of any ongoing international aid efforts under Article 59.⁶⁹

Protocol I adds additional food provision duties to Occupying Powers. Article 54 protects “objects indispensable to the survival of the civilian population,” and in doing so, outlaws starvation as a method of warfare or any actions that “attack, destroy, remove or render useless objects indispensable to the survival of the civilian population [including] foodstuffs . . . or for any other motive.”⁷⁰ Article 54 also anticipates and rejects the possibility of removing essential foodstuffs that may partially sustain enemy forces, allowing only the removal of foodstuffs used “as sustenance *solely* for the members of [adverse] armed forces; [or] . . . in direct support of military action.”⁷¹ In fact,

cease, in the territory of Parties to the conflict, on the general close of military operations and, in the case of occupied territories, on the termination of the occupation . . .”).

⁶⁴ See, e.g., *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 65 (June 27) (holding that for “conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that the State had effective control of the . . . operations in the course of which the alleged violations were committed.”); *accord Prosecutor v. Tadic*, Case No. IT-94-1-T, Judgment, ¶ 584-88. (May 7, 1997) (following the effective control test as formulated in the *Military and Paramilitary Activities* judgment and noting that “the relationship of de facto organs or agents to the foreign Power includes those circumstances in which the foreign Power ‘occupies’ or operates in certain territory solely through the acts of local de facto organs or agents.”).

⁶⁵ Although the Rafah crossing is on the border between Egypt and Gaza, it has been closed pursuant to an agreement between Israel and Egypt since June 10, 2007. See U.N. Office for the Coordination of Humanitarian Affairs, *Report No. 85: Implementation of the Agreement on Movement and Access and Update on Gaza Crossings*, 1, (Feb. 4-17, 2009), available at http://www.ochaopt.org/documents/ocha_opt_movement_and_access_no85_2009_02_17_english.pdf.

⁶⁶ Geneva IV, *supra* note 52, art. 55. Article 55 is applicable only during actual hostilities and for one year following cessation thereof. *Id.* art. 6. However, it is likely that OCL constituted active hostilities, continuing Israel’s obligations for one year.

⁶⁷ *Id.* art. 59 (“If the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief schemes on behalf of the said population, and shall facilitate them by all the means at its disposal.”). Article 6 enumerates Article 59 as one of a group of Articles that apply as long as the occupying power exercises government functions within the relevant territory. *Id.* art. 6. Border security and prescribing regulations on imports and exports is a government function.

⁶⁸ COMMENTARY ON GENEVA CONVENTIONS, *supra* note 60, at 320.

⁶⁹ Geneva IV, *supra* note 52, art. 60 (“Relief consignments shall in no way relieve the Occupying Power of any of its responsibilities under Articles 55, 56 and 59.”).

⁷⁰ Protocol I, *supra* note 6, art. 54(1)-(2).

⁷¹ *Id.* art. 54(3)(a)-(b) (emphasis added).

even this narrow exception contains a caveat, restoring protection to the foodstuffs if their removal would put the civilian population in danger of starvation or forced relocation.⁷²

Article 69 of Protocol I reaffirms the duties placed on occupying powers under Articles 55 and 59 of Geneva IV and requires the occupying State to “also ensure the provision of clothing, bedding, means of shelter, other supplies essential to the survival of the civilian population of the occupied territory and objects necessary for religious worship.”⁷³ Furthermore, Articles 69 and 70 of Protocol I are designed as a binary, where “a territory under the control of a Party to the conflict is definitely covered by one or the other of [Articles 69 and 70’s] provisions on relief,” despite possible “differences of opinion with regard to the concept of occupation.”⁷⁴

C. Humanitarian Law Applicable to Non-International Armed Conflicts

Although Israel’s effective control over Gaza’s border appears firmly established, the argument that Israel maintains effective control throughout Gaza, as a result of control of the border, is considerably tenuous since Hamas exerts considerable local control. Furthermore, Gaza is not a traditional sovereign State and it is unclear whether Hamas or the PA is a legitimate governing power in the territory. As such, it is theoretically possible that the conflict between Israel and Hamas is a non-international armed conflict. In such a case, the only IHL protections applicable are those laid out in the second Protocol Additional to the Geneva Conventions (“Protocol II”).

Due to the fact that a non-international conflict involves only one State, such State continues to owe the affected civilian population their full panoply of rights throughout the conflict, including the obligations to respect, protect and fulfill human rights.⁷⁵ In fact, the United Nations Economic and Social Council has stated that State “prevention of access to humanitarian food aid in internal conflicts or other emergency situations” is a clear violation of the ICESCR right to adequate food.⁷⁶ In light of these preexisting duties, requirements on States involved in non-international conflicts are less than those placed on States during periods of international conflict or occupation.

Article 14 of Protocol II mirrors that of Protocol I, forbidding the use of “starvation . . . as a method of combat” and prohibiting the removal of indispensable civilian objects, including, *inter alia*, foodstuffs.⁷⁷ Protocol II also requires the State involved to agree to relief actions when urgently needed. Article 18, paragraph 2 states:

⁷² *Id.* art. 54(3)(b).

⁷³ *Id.* art. 69.

⁷⁴ COMMENTARY ON ADDITIONAL PROTOCOLS, *supra* note 58, at 816-17.

⁷⁵ The only limitation on the obligations of the State to guarantee the full panoply of rights to civilians during non-international conflict is internal to the body of human rights law itself, which requires States to ensure the rights of its population to the extent possible. Therefore, if the non-State opposing force controlled a territory, the State would simply not be able to take the necessary steps to ensure the rights of the population therein. This is not the case in Gaza, as Israel controls Gaza’s borders and thus has a great amount of control over the realization of the right to adequate food of Gaza’s population, making it incumbent on Israel to open the borders to the extent necessary to respect, protect and fulfill that right.

⁷⁶ *General Comment 12, supra* note 21, ¶ 19.

⁷⁷ Protocol Additional (No. II) to the Geneva Conventions of August 12 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts art. 14, Dec. 7, 1978, 1977 U.N.J.Y.B. 135, 1977 Misc. 19. [hereinafter Protocol II]. Starvation is defined for purposes of IHL as “the action of subjecting people to famine, i.e., extreme and general scarcity of food.” COMMENTARY ON ADDITIONAL PROTOCOLS, *supra* note 58, at 1456.

[i]f the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as food-stuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned.⁷⁸

Articles 14 and 18 mutually reinforce one another and between them “do not allow the argument of military necessity to be used to justify starving the civilian.”⁷⁹ As such, while blockades and sieges remain legal under Protocol II, they cannot be so restrictive as to block foodstuffs necessary to support the civilian population.⁸⁰ In fact, “[e]xcept for the case where supplies are specifically intended as provisions for combatants, it is prohibited to destroy or attack objects indispensable for survival, even if the adversary may benefit from them,”⁸¹ because “[t]he prohibition would be meaningless if one could invoke the argument that members of the government’s armed forces or armed opposition might make use of the objects in question.”⁸² Thus, in cases of non-international armed conflict domestic obligations under human rights law remain fully applicable with humanitarian law offering some general protection of civilian food rights.

IV. Conclusion: Israel’s Border Policies in Light of Applicable International Law

Although there is much dispute over the gravity of the current humanitarian situation in Gaza, it is virtually uncontested that many Gazan civilians are suffering as a result of Israel’s blockade of the territory. Basic infrastructure and agricultural lands have been damaged or destroyed and food rations have become increasingly scarce.⁸³ Also, Israel continues to carry out aerial raids targeting the network of underground smuggling tunnels running between Gaza and Egypt.⁸⁴ Israel, nonetheless, maintains that all necessary supplies are entering Gaza in an efficient fashion and that only contraband and goods destined for Hamas are being denied.⁸⁵ Conversely, the UN Office for the Coordination of Humanitarian Affairs (UNOCHA),⁸⁶ along with secretary general Ban Ki-moon⁸⁷ and civil society organizations such as Human Rights Watch,⁸⁸ have all roundly condemned Israel’s

⁷⁸ Protocol II, *supra* note 77, art. 18(2).

⁷⁹ COMMENTARY ON ADDITIONAL PROTOCOLS, *supra* note 58, at 1457.

⁸⁰ *Id.* (noting the continuing legality of sieges or blockades only when “directed exclusively at combatants.”).

⁸¹ *Id.* at 1458.

⁸² *Id.* at 1459.

⁸³ See U.N. Office for the Coordination of Humanitarian Affairs, *Field Update on Gaza from the Humanitarian Coordinator*, (Mar. 17-23, 2009), available at http://www.ochaopt.org/documents/ocha_opt_gaza_humanitarian_situation_report_2009_03_23_english.pdf.

⁸⁴ *Israeli Jets Target Gaza Tunnels*, BBC NEWS, Jan. 28, 2009, http://news.bbc.co.uk/2/hi/middle_east/7855086.stm.

⁸⁵ See generally Press Release, Israel Ministry of Foreign Affairs, *Increased Humanitarian Aid to Gaza After IDF Operation* (Mar. 22, 2009), http://www.mfa.gov.il/MFA/Government/Communiques/2009/Increased_humanitarian_aid_Gaza_after_IDF_operation_Jan_2009.htm; see also *HARDtalk: Isaac Herzog Interview*, *supra* note 14.

⁸⁶ See OPT HUMANITARIAN MONITOR, *supra* note 8.

⁸⁷ See *Gaza: Situation at Border Crossings ‘Intolerable’ Ban Says*, *supra* note 17.

⁸⁸ See *Choking Gaza Harms Civilians*, *supra* note 17 (stating that “Israel should urgently end its unlawful restrictions on desperately needed humanitarian aid and basic goods entering Gaza, Human Rights Watch said today. Security concerns do not justify overly broad limitations on the delivery of food, fuel, and other essential supplies.”).

border policies and claimed that Israel is illegitimately blocking vital humanitarian aid from entering Gaza.

Controversy apart, the restrictions on Gaza's borders has definitely hampered Gaza's ability to import essential goods. Food stores in the territory are low,⁸⁹ lines have swelled at food distribution agencies,⁹⁰ and basic food-related supplies such as cooking oil are scarce.⁹¹ Meanwhile, Israel recently pledged to "enable the entry into Gaza of foodstuffs – without restriction – from all relevant sources and after verification,"⁹² offering hope that the food situation in Gaza will improve moving forward.

Israel should honor its recent pledge to allow all foodstuffs into Gaza, as this action is demanded by international law. If Israel is engaged in an international armed conflict with Hamas, it must still allow the free passage of necessary food-related goods into Gaza. If Israel occupies Gaza's borders, Israel must directly ensure the availability of sufficient food in the territory and must allow unfettered humanitarian food relief through the blockade. Finally, if Israel is merely involved in a non-international conflict, it must not arbitrarily deny the entry of urgently needed foodstuffs, and it has a continuing duty under the human right to adequate food to guarantee the freedom from hunger of Gazans. Finally, even if Israel is not currently engaged in an armed conflict with Hamas and is not in effective control of Gaza, it is incumbent on Israel not to exercise its authority over Gaza's border in any manner that compromises the human right to adequate food of Gazans.

Simply put, there is no justification under international law for any State to block legitimate food-related aid destined for a civilian population in need. By all accounts the general citizenry of Gaza is in such need, and thus Israel must honor its recent pledge and confine its blockade to goods which are non food-related or goods it can demonstrate will be used primarily by Hamas itself. Israel's desire to cripple the ability of militants to fire rockets into its territory, although compelling and legal, led to a blockade that violated international law in exchange for marginal security benefits.

⁸⁹ See *ISRAEL-OPT: Food Insecurity Increasing After War*, INTEGRATED REGIONAL INFO. NETWORK (IRIN), Feb. 19, 2009, <http://www.irinnews.org/report.aspx?ReportId=83016>. According to the report, 10% of Gaza's chickens and 17% of cattle, sheep and goats were killed during OCL and 18% of Gaza's total agricultural lands were destroyed, creating supply shortages and running up the cost of foodstuffs. *Id.*

⁹⁰ According to John Ging, director of UN Relief and Works Agency for Palestine Refugees in the Near East operations in Gaza, as of Feb. 9, 2009, 900,000 people were queuing for food aid in Gaza, with the agency only able to feed 30,000 of these people. See *Press Conference on Humanitarian Situation in Gaza*, U.N. DEP'T OF PUBLIC INFO., Feb. 9, 2009, http://www.un.org/News/briefings/docs/2009/090209_Gaza.doc.htm.

⁹¹ See FIELD UPDATE ON GAZA FROM THE HUMANITARIAN COORDINATOR, *supra* note 83.

⁹² *Id.*