

May 28, 2009

The Honorable Hillary Rodham Clinton  
Secretary of State  
United States Department of State  
2201 C Street, N.W.  
Washington, D.C 20002

Dear Madam Secretary:

This is in response to the widely circulated letter to you from ten U.S. Attorneys General, dated March 30, 2009. In that letter ("the AG letter") the ten Attorneys General conveyed "their strong support for the State of Israel's actions in Gaza."

In this letter we will provide both facts and international law showing flaws in each of the following points made in the AG letter:

**1. Self-defense:** The AG letter states that "the State of Israel's actions are taken in furtherance of its right to self-defense provided under Article 51 of the United Nations Charter that provides that 'Nothing in the present Charter shall impair the inherent right of individual ... self-defense if an armed attack occurs against a Member of the United Nations....'" The AG letter alleges thousands of rockets and mortars fired by Hamas from Gaza at Israeli civilians since June 2005.

**2. War Crimes:** The AG letter asserts that "Hamas is guilty beyond a reasonable doubt of a war crime in that it has violated Article 48 of Additional Protocol 1 to the Geneva Convention of 1949 which provides that '...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.'"

**3. Human Shields:** The AG letter further asserts that "Hamas has also committed atrocities against the Palestinian civilian population under its control in Gaza by using these civilians as shields for its criminal conduct. As recently noted by the Wall Street Journal, '...Hamas deliberately locates its security forces in residential neighborhoods. This is intended to both deter Israel from attacking in the first place as well as turn world opinion against the Jewish state when it does attack.'"

**4. Proportionate Response:** The AG letter's conclusion states, "Hamas's continuous rocket and mortar attacks on Israel's civilian population are a *casus bellum*. As in all wars, the appropriate response is not a 'proportionate one,' but one measured to bring an end to the acts of war."

**5. Intentional Acts:** The AG letter's conclusion further states that " Hamas's intentional acts of launching rockets at civilians were in no way comparable to Israel's acts in directing its response to the source of Hamas's military attacks that unintentionally caused harm to Palestinian civilians."

**6. Flourishing Palestinian State:** The AG letter further states that " Israel withdrew from Gaza in 2005 but Hamas, instead of establishing a flourishing, independent Palestinian State, has used this occasion to cause a civil war with the Palestinian Authority, leading to a coup d'etat in 2007-- all to the detriment of the Palestinian civilian population living in Gaza."

**1. Were Israel's actions in furtherance of its right of Self-Defense?** The AG letter ignores facts about the Hamas rocket fire that the Israeli Government's Ministry of Foreign Affairs provides: First, Israel had already successfully ended Hamas rocket fire. Thus there was absolutely no need for military action. Israel accomplished this feat without dropping a single bomb on Gaza and without sending a single soldier into Gaza: Israel announced an Egyptian-brokered six-month ceasefire that began on June 19, 2008. According to the Israeli Ministry of Foreign Affairs website, that ceasefire was so successful that it brought "calm" to towns near Gaza. In an article titled, "One Month of Calm Along the Israel-Gaza Border," dated July 27, 2008, the Israeli Ministry of Foreign Affairs (MFA) website states:

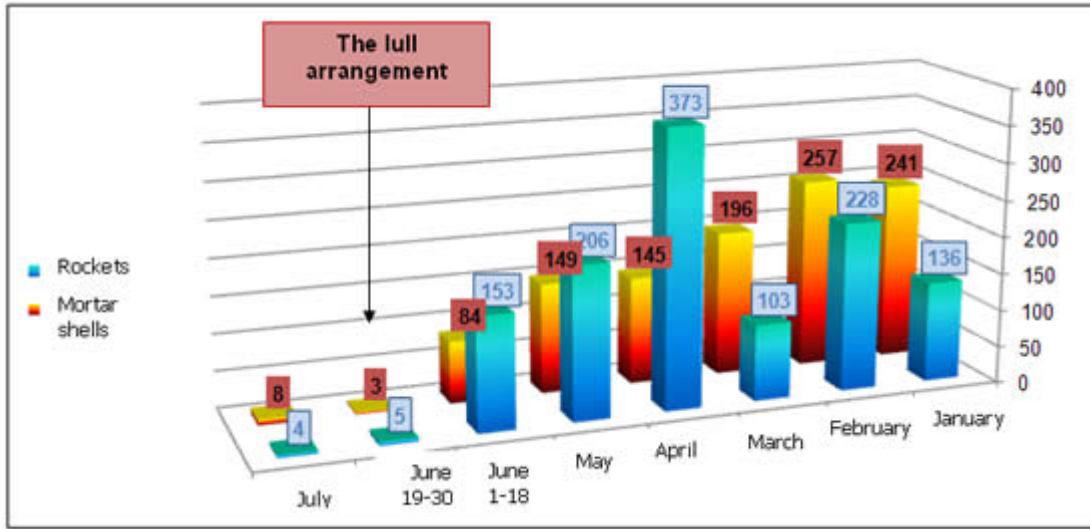
"More than one month has passed since the calm agreement went into effect, with only sporadic violations by the terrorist organizations. Signs of normal life can be seen in towns on both sides of the Israel-Gaza Strip border."

<http://www.mfa.gov.il/MFA/Terrorism+Obstacle+to+Peace/Hamas+war+against+Israel/One+month+of+calm+in+Gaza+28-Jul-2008.htm>

The same site goes on to quote extensively from a report issued by a pro-Israeli government research organization, the Intelligence and Terrorism Information Center at the Israel Intelligence Heritage & Commemoration Center (IICC):

"During its first month, the lull arrangement resulted in a **significant drop** in rocket and mortar fire at Israel. A relative calm has settled over Sderot and Israeli population centers near the Gaza Strip, occasionally broken by rockets and mortar bombs fired by terrorist organizations which oppose the lull (mostly local Fatah networks, with the Palestinian Islamic Jihad violating the lull only on one occasion)."

Rocket and mortar fire during the lull compared to the months preceding it



(The graph reads from right to left and shows 300 to over 500 rockets and mortars fired each month from January to June 18. That number declined to 8 for the rest of June and 12 for almost all of July.

The IICC report continues:

"The cessation of the intensive fighting which had been going on before the lull has allowed the residents of Sderot and of western Negev population centers, as well as Gaza Strip residents, to return to normal life."

The IICC report then goes on to state,

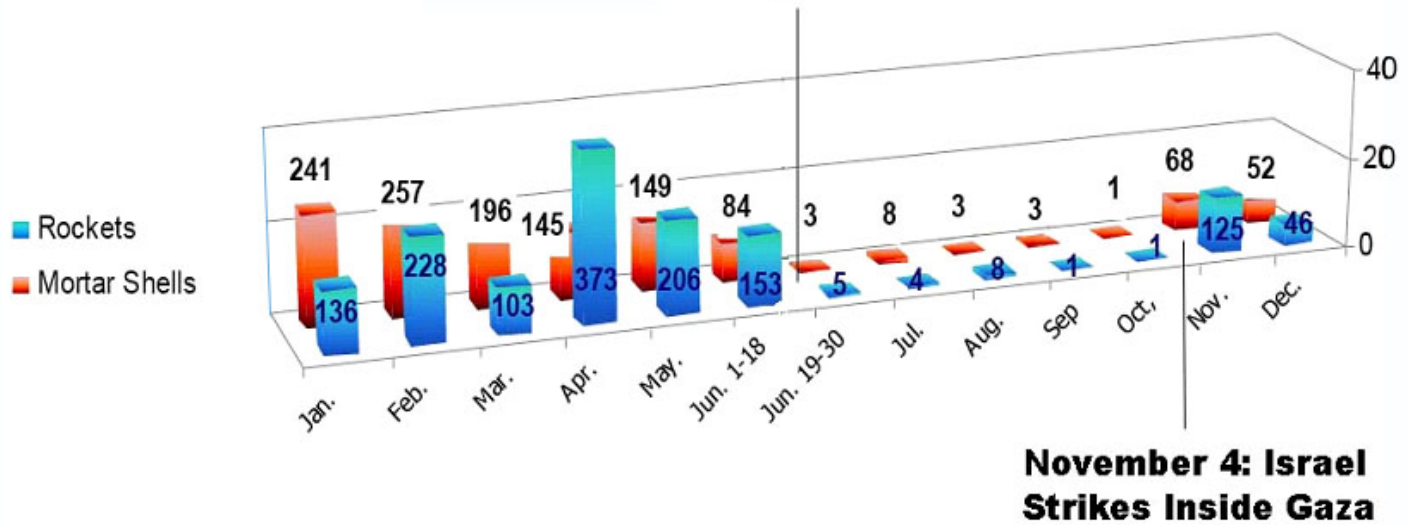
"Publicly, Hamas leaders have stated time and again that the lull is a Palestinian national interest. On several occasions, Hamas members have arrested Fatah operatives who were involved in firing at Israel and confiscated their arms."

This authoritative report on the Israeli Ministry of Foreign Affairs website demonstrates Israeli government satisfaction (after only five weeks) that its ceasefire had substantially ended Hamas rocket fire. The report also shows that Hamas was working to eliminate rocket fire from other groups, especially Fatah, the main group running the Palestinian Authority in Ramallah.

The rocket and mortar fire from such dissident groups in the Gaza strip declined further over the next few months--down to only 1 rocket and 3 mortars in September and 1 rocket and 1 mortar in October, as shown by the graph on page 10 of the December 2008 "Six Months of the Lull Arrangement" report from the IICC, available on its website at [http://www.terrorism-info.org.il/malam\\_multimedia/English/eng\\_n/pdf/hamas\\_e017.pdf](http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/pdf/hamas_e017.pdf) and at <http://www.themediaoasis.com/Hamasrockets.htm#enforce>

Rocket and mortar fire from Gaza into Israel through December 16, 2008

**June 19: Lull Arrangement takes effect**



**WHY ROCKET FIRE RESUMED ON NOVEMBER 5**

Israel sent soldiers into Gaza and launched an airstrike on Gaza on November 4, killing 6 Hamas members, as described in the six-month IICC report and in a *New York Times* article, "Israeli Strike is First in Gaza Since Start of Cease Fire," by Isabel Kershner, Nov 4, 2008 [http://www.nytimes.com/2008/11/05/world/middleeast/05mideast.html?\\_r=1](http://www.nytimes.com/2008/11/05/world/middleeast/05mideast.html?_r=1). According to the *Times* article Israel claimed that it attacked to destroy a tunnel Hamas was digging some 270 yards inside Gaza.

After Israel's November 4 attack, Hamas responded with a barrage of rocket and mortar fire. According to the six-month IICC report, 46 rockets and 16 mortars were launched from Gaza on November 5. During the rest of November and December Israel invaded Gaza nine more times, about once a week, according to the weekly reports of the Palestine Center for Human Rights [http://www.pchrgaza.org/files/W\\_report/English/2007/weekly2007.html](http://www.pchrgaza.org/files/W_report/English/2007/weekly2007.html). Israel's incursions were each accompanied by airstrikes on Gaza, killing dozens of residents. During that same period Hamas and other Palestinian groups launched 193 rockets and mortars from Gaza in November and 98 in the first two weeks of December according to the IICC report. No Israelis were killed during this period.

On November 20 the largest circulation daily Israeli newspaper reported:

Defense Minister Ehud Barak addressed the current situation in the region, saying "the recent waves of rocket attacks are a result of our operations, which have resulted in the killing of 20 Hamas gunmen." <http://www.ynetnews.com/articles/0,7340,L-3626260,00.html>.

Ehud Barak is a former Israeli Prime Minister. Thus, at the highest level, Israel admitted that its military operations were responsible for the rocket fire.

November 4 was a day the world's attention was focused on the presidential elections in the U.S. and the historic victory by Barack Obama. November 4 was a day Israel's violation of the ceasefire would very likely be crowded out of front page coverage.

The following summarizes the facts that are not disputed:

- (1) the ceasefire was successful from June 19 to November 4, providing more than four months of "calm" for both sides, the data showing a nearly complete stopping of rocket fire on Israel
- (2) Hamas observed and enforced the ceasefire, arresting Fatah operatives who sought to fire rockets during the cease fire
- (3) Israel launched a raid and airstrikes on Gaza on November 4 killing 6 Hamas members, breaking the ceasefire
- (4) Hamas responded to Israel's November 4 attack by resuming rocket and mortar fire from Gaza
- (5) Israel continued with additional lethal incursions and airstrikes in Gaza between November 4 and December 27
- (6) Ehud Barak admitted on November 20 that the rocket fire from Gaza was a result of Israel's operations that killed 20 Hamas gunmen
- (7) Israel escalated with massive airstrikes on December 27 and a ground invasion on January 3

Based on these facts, the assertion that Israel was acting in furtherance of its right of self-defense is flawed.

***International Law related to the Israeli government's attack on November 4:*** On November 4 Israel did not observe its obligation under Article 2 of the UN Charter to settle its disputes by peaceful means and refrain from the threat or use of force.

<http://www.yale.edu/lawweb/avalon/un/unchart.htm>. Instead Israel chose to use military force starting on November 4 in violation of the effective ceasefire. The existence of the successful ceasefire demonstrated that peaceful resolution was possible. Nor did Israel observe Articles 33 to 38 of the UN Charter that describe the mechanisms Israel could have chosen for peaceful resolution of issues that arose during the ceasefire.

Israel is also subject to obligations under the Nuremberg Principles which sets out as punishable under international law the crime against peace for "planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances." <http://www.icrc.org/ihl.nsf/FULL/390>

Aggression is defined in Article 2 of UN General Assembly (UNGA) Resolution 3314:

Article 2: The First use of armed force by a State in contravention of the Charter shall constitute prima facie evidence of an act of aggression....

<http://home.earthlink.net/~platter/aggression/3314.html>

The first use of armed force by Israel was both in violation of the ceasefire agreements or assurances Israel had given and in contravention of the UN Charter, which is an international treaty. To invade and bomb Gaza on November 4 may make Israeli political and military leaders

liable under the Nuremberg Principles for their act of aggression and for the escalation by Israeli forces into the full scale air and ground attack on Gaza that followed.

***The blockade is collective punishment and an act of aggression:*** In addition, the blockade Israel implemented against Gaza, denying food, medicine, fuel, water purification equipment, and other necessities, constitutes collective punishment, a violation of Article 33 of the Fourth Geneva Convention. In addition, Article 3 of UNGA 3314 states that “the blockade of the ports or coasts of a State by the armed forces of another State” qualifies “as an act of aggression.” While Palestine may not yet be a fully developed state, an occupying power, such as Israel, owes the territories it occupies, such as Gaza, a greater duty than it owes to other states. Under Article 55 of the Fourth Geneva Convention:

To the fullest extent of the means available to it the Occupying Power has the duty of ensuring the food and medical supplies of the population; it should, in particular, bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate. <http://www.unhcr.ch/html/menu3/b/92.htm>.

Because of its greater duty as occupying power, the Israeli government blockade of Gaza qualifies as a more egregious violation than were it merely engaging in a normal form of aggression by blockading another state.

A “White Paper on the Legal Issues Implicated in the Most Recent Israeli Attacks on Gaza,” (“the IADL White Paper”) prepared by the International Association of Democratic Lawyers (IADL) and the International Committee of the National Lawyers Guild can be found at <http://www.iadllaw.org/files/WHITE%20PAPER%20ON%20GAZA.pdf>

***Self-defense is inapplicable in occupied territory:*** In addition to the facts described above being inconsistent with an Israeli self-defense claim, the self-defense provision in Article 51 of the UN Charter, cited in the AG letter, does not actually apply to acts originating in a territory under military occupation against the occupying power. On the contrary, Article 7 of UNGA Resolution 3314 provides that people living under such alien domination have the right to self-determination and the right “to struggle” to achieve their self-determination. Thus, while Israel was exercising its control over the borders of Gaza by blockading all access to and from Gaza--thus clearly demonstrating its continuing role as occupying power--Israel cannot legally claim self-defense from acts against that occupation and against that blockade. Therefore, even if Israel could show that armed groups in Gaza had initiated the armed conflict Israel would have no self-defense claim. But in this case, the fact is that Israel initiated the armed conflict during an effective ceasefire with its November 4 attack. So both the facts and the law deny Israel its self-defense claim.

The AG letter suggests that because Israel withdrew from Gaza in 2005 the occupation ended then. However, Israel has repeatedly used its army, navy, and air force to enter or bomb Gaza at will since 2005. Israel has repeatedly engaged in “targeted assassinations” in Gaza. Israel controls Gaza’s air space, and territorial waters. It directly controls all Gaza’s border crossings with Israel and indirectly monitors and controls passage through the Rafah crossing between Gaza and Egypt. Palestinians in Gaza require Israel’s consent to travel to and from Gaza, to take

their goods to Palestinian and foreign markets, to acquire food and medicine, and to access fuel, water and electricity. Without Israel's permission, the Palestinian Authority (PA) cannot perform basic governmental functions such as providing social, health, security, and utility services, developing the Palestinian economy, and allocating resources. In addition, Israel still maintains control of Gaza's population registry. Thus, as Human Rights Watch pointed out, "Israel remains an occupying power in the Gaza Strip even though it withdrew its military forces and illegal civilian settlers in August and September 2005." Human Rights Watch, *Israel: Threatened Sanctions on Gaza Violate Laws of War*, Sep. 20, 2007 <http://hrw.org/english/docs/2007/09/20/isrlpa16920.htm>.

**2. Is Hamas Liable for a War Crime?** The AG letter correctly identifies the principle of distinction, a rule under Article 48 of the Additional Protocol I of the Fourth Geneva Convention. The AG letter raises an issue as to whether Hamas failed to distinguish between the civilian population and combatants and whether Hamas directed its rockets only at military targets. We certainly do not support any rockets being fired from Gaza that may strike Israeli civilians. It very well may be that the homemade rockets used by Hamas were so inaccurate that they could not be used without violating the principle of distinction. It is worth noting that most of the rockets are so primitive that they have actually landed in open fields. No Israeli civilians were killed by Hamas rockets during the period from June 19 to December 27, when Israel escalated its attack. Three Israeli civilians were killed by rocket fire during the December 27 to January 18 Israeli invasion of Gaza. Both the acts and the consequences of those acts are factors that may be considered in determining whether rules of war were violated and the gravity of the violation. We understand that this issue will be investigated by the Commission established by the UN Human Rights Council under the leadership of South African judge and former International War Crimes Prosecutor Richard Goldstone. While Hamas has agreed to cooperate with that impartial investigation, Israel has not.

*Is Israel Liable for War Crimes?* The Goldstone Commission is also charged with investigating accusations of Israeli war crimes against Palestinians. Numerous authoritative sources have cited Israeli forces for violating the rules of war, including the rule about distinguishing civilian and military targets that was cited in the AG letter. These sources include a group of Israeli soldiers who participated in Israel's invasion <http://haaretz.com/hasen/pages/1072475.html>, two Israeli human rights organizations, B'tselem and Physicians for Human Rights-Israel, Amnesty International, Human Rights Watch, and a delegation of eight U.S. lawyers, members of the National Lawyers Guild (NLG), who visited Gaza in February.

For example, the NLG delegation to Gaza found evidence that Israeli forces:

- intentionally targeted civilians
- used weapons, such as artillery and white phosphorus, that inherently could not be used in a way that distinguished civilian and military targets in the densely populated Gaza strip
- used weapons, such as white phosphorus, that caused great suffering
- compelled civilians to serve as human shields
- compelled civilians to serve in the forces of the Israeli military
- unlawfully confined civilians
- failed to care for wounded people

- interfered with ambulance workers seeking to care for the wounded
- destroyed farms
- targeted civilian facilities, including hospitals, schools, mosques, UN facilities, and government buildings serving civilian needs
- extensively destroyed civilian property not justified by military necessity
- engaged in reprisals against and collectively punished the entire civilian population of Gaza for acts they did not personally commit

The report of the NLG delegation is available at  
<http://www.nlg.org/NLGGazaDelegationReport.pdf>

These acts made Israel, its political and military leaders, and those soldiers who carried out the illegal acts, liable for violation of Articles 3, 16, 18, 20, 23, 27, 31-34, 51, 53, 55-56, 59-60 and 63 of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949 and for some of the grave breaches of that convention specified in Article 147 <http://www.unhchr.ch/html/menu3/b/92.htm>. These acts also made them liable for violation of Articles 10, 12, 14-15, 21, 35, 41, 48, 51-54, 57, 59 and 75 of Additional Protocol I of the Fourth Geneva Convention <http://www.unhchr.ch/html/menu3/b/93.htm>. While Israel is not a party to Additional Protocol I, in the case of the Public Committee Against Torture in *Israel v. The Government of Israel*, HCJ 769/02, the Israeli High Court of Justice stated that “the customary provisions of the first Protocol [Additional Protocol I] are part of Israeli law.” [http://elyon1.court.gov.il/Files\\_ENG/02/690/007/a34/02007690.a34.pdf](http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf)

***Israel’s actions were illegal reprisals:*** The massive air and naval bombing and invasion by the Israeli military from December 27 to January 18 was ineffective at stopping rocket fire at Israel. The ceasefire that began June 19 was effective. Rather than “defending” Israel from the rockets, the Israeli military operations that began on November 4 and escalated on December 27 provoked the rocket fire. According to the Israeli Government Ministry of Foreign Affairs website, 571 rockets and 205 mortar shells landed on Israeli territory during the period of Israel’s assault from December 27 to January 18 <http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Palestinian+terror+since+2000/Missile+fire+from+Gaza+on+Israeli+civilian+targets+Aug+2007.htm>. The number of rockets and mortars fired during the 23 days of Israel’s “Operation Cast Lead” is much higher than the number during any full month in 2008.

These facts are not consistent with Israel’s claim that it had to use military force to defend itself from rocket fire. Rather they appear to be consistent with Israel using November 4, election day in the U.S., to initiate military operations with the expectation that Hamas would respond with rocket fire, setting up a pretext for engaging in illegal reprisal to attempt to crush Palestinian resistance to the occupation.

While at one time reprisals were legal they are no more. After World War II, with the adoption of the UN Charter, reprisals became illegal and member nations were required to settle disputes peacefully. As pointed out in the IADL White Paper, the facts about the massive force Israel directed against the civilian population and civilian neighborhoods from December 27 to January 18 that killed 1300 Palestinians and destroyed thousands of homes, and Israel’s continuing



blockade of Gaza, indicate that Israel was and is actually trying to crush the resistance Palestinians offer to the continuing Israeli occupation of their land.

In view of the fact that Israel's military actions provoked rather than stopped rockets, and to the extent Israeli leaders couched their military actions in terms of self-defense, they in fact acknowledged that they took prohibited reprisals against a broad spectrum of Palestinian civilians to pressure those who are resisting the occupation and asserting the Palestinian right to self-determination.

Even if some actions taken by Palestinians resisting the occupation and blockade were illegal, Israeli violence against Palestinian civilians were illegal reprisals, not self-defense.

**3. Did Hamas use civilians as human shields?** The AG letter charges that Hamas committed atrocities against the Palestinian civilian population by locating its security forces in residential neighborhoods. First, in the heavily populated Gaza strip there is little place either for the Palestinian combatants or for the civilian population to go. Second, human rights organizations, including the NLG delegation of U.S. lawyers, found cases in which houses and entire residential neighborhoods were destroyed and civilians were killed and wounded, although survivors reported that there were no Palestinian combatants in these houses or in these neighborhoods.

Third, it should be recognized that Article 51(8) of Additional Protocol I of the Fourth Geneva Convention provides that

"Any violation of these prohibitions [such as locating combatants in a civilian neighborhood] shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians, including the obligation to take the precautionary measures provided for in Article 57."

Article 57 includes the requirements to spare the civilian population, verify that the targets are not civilian, use methods of attack that avoid harm to civilians, refrain from deciding to launch an attack that could cause loss to civilians excessive in relation to the concrete and direct military advantage anticipated, and cancel or suspend such an attack once launched.

Fourth, it was the Israeli armed forces that attacked those civilians and those neighborhoods. The blame for acts decided upon by Israeli political and military leaders that were directed against civilian targets and infrastructure, including houses filled with civilians and entire residential neighborhoods, cannot be shifted to Palestinian combatants based on unverified allegations that they were present.

**4. Proportionality:** While the AG letter alludes to the principle of proportionality, it uses the concept differently from the way proportionality is defined and used in the rules of international law applicable in armed conflict. The AG letter uses the term proportionate as the relationship between the size of the military response and the size of the military attack it was confronting. The letter states that "the appropriate response is not a 'proportionate one' but one measured to bring an end to the acts of war." Actually, as shown above, the Israeli government had already brought about an end to rocket fire with the effective ceasefire that started on June 19. The Israeli

government was the first to attack and to violate that effective ceasefire on November 4. Since the Israeli government was not confronting any attack at all on November 4 when it attacked and killed 6 Hamas members, the AG letter simply has it wrong. The Israeli government could have retained the calm that ceasefire produced simply by not breaking the ceasefire and initiating lethal acts of war on November 4.

Once the Israeli government initiated military conflict on November 4 it still had the opportunity to bring about an end to acts of war by resuming the ceasefire. Instead, consistent with the admission by Israeli Defense Minister Ehud Barak on November 20 (referred to above) that the Hamas rocket fire was a response to Israeli military operations, the Israeli government opted for repeated incursions and bombings, all leading up to its massive escalation on December 27.

Proportionality, as used in such international law as Article 57 of Protocol I of the Geneva Convention, actually is concerned with whether the impact on civilians from a particular military action, whether offense or defense, is likely to be excessive in relation to the anticipated concrete and direct military advantage from that military action. Israel's use of such indiscriminate weapons as fighter jets, artillery, tanks, and white phosphorus shells in heavily populated areas caused thousands of civilians to be killed or severely injured. It was because the Israeli forces used methods that had grossly disproportionate impact on civilians compared to any concrete and direct military advantage that the Israeli forces could anticipate that observers, such as the NLG delegation, found that Israeli forces violated both the principle of proportionality and the principle of distinction.

**5. Were Hamas' attacks on civilians intentional while Israel's were unintentional?** During the massive bombing and invasion of Gaza Israel's then Foreign Minister, Tzipi Livni, admitted that it was a good thing that her government's military forces went "wild." As quoted in *The Independent* on 13 January, 2009:

"Israel's Foreign Minister, Tzipi Livni, said yesterday that Israel was deliberately 'going wild' in its use of military force in order to restore its deterrence capability. 'We have proven to Hamas that we have changed the equation. Israel is not a country upon which you fire missiles and it does not respond. It is a country that when you fire on its citizens it responds by going wild – and this is a good thing.'"

<http://www.independent.co.uk/news/world/middle-east/israeli-cabinet-divided-over-fresh-gaza-surge-1332024.html>

The Israeli Foreign Minister's admission that Israel went "wild," the results for the civilian population of Israel's operations in Gaza, the testimony of survivors, and the testimony of some Israeli soldiers <http://haaretz.com/hasen/spages/1072475.html>, stand in sharp contrast to the contention in the AG letter that Israel's attacks on Palestinian civilians were unintentional.

**6. Who is responsible for the failure to establish a flourishing Palestinian State?** The AG letter suggests that when Israel withdrew its illegal settlers and soldiers from Gaza in 2005 Hamas could have established "a flourishing independent Palestinian State." However, the AG letter omits mention of the fact that Israel repeatedly bombed the territory, sent in soldiers, destroyed houses and farms, and used its retained control over the borders to prevent exports and imports, while preventing access and trade between Gaza and the West Bank, causing suffering,

including severe malnutrition. Israel further tightened the blockade after Hamas leaders won election in January 2006. Thus, the Israeli government played an important role in preventing "a flourishing independent Palestinian State."

**Conclusion**

Therefore, we call upon you to support the UN Human Rights Council investigation and to initiate a U.S. investigation, as provided under the Arms Export Control Act, and to immediately end export of U.S. weapons to Israel. We also call upon you to announce an immediate end to U.S. participation in the blockade of Gaza.

Sincerely,

Marjorie Cohn  
President  
National Lawyers Guild