

DOCUMENTS AND SOURCE MATERIAL

INTERNATIONAL

A1. UN SPECIAL RAPPORTEUR ON THE SITUATION OF HUMAN RIGHTS IN THE PALESTINIAN OCCUPIED TERRITORIES RICHARD FALK, REPORT TO THE HUMAN RIGHTS COUNCIL, GENEVA, 17 MARCH 2009 (EXCERPTS).

The report, requested by the Human Rights Council at its special session convened 9 January 2009 during Operation Cast Lead (OCL), focuses on the international law and human rights issues raised by Israel's sustained military assault on Gaza conducted from 27 December 2008 to 18 January 2009. Like earlier reports by the current Special Rapporteur on the situation of human rights in the Palestinian occupied territories, the American jurist Richard Falk, it is not based on an actual visit to Gaza: since his appointment in March 2008, Falk has been twice refused entry into Israel in his official capacity (most recently during OCL, when he was deported after detention at Ben-Gurion airport).

In assessing the legality of the operation, the report, which takes into account the situation in Gaza in the year prior to the assault, challenges the widespread emphasis on whether Israeli force was disproportionate in relation to Palestinian threats to Israeli security in order to foreground the prior question of whether Israeli force was legally justified at all. The report also introduces the idea of a new type of war crime: denying a population the right to flee a conflict zone ("refugee denial"). An important part of the report not reproduced here relates to the Special Rapporteur's main recommendation: the need to convene a special expert investigation into the allegations of war crimes, including detailed recommendations on the scope of the inquiry, applicable international criminal law, and mechanisms of accountability. The report's recommendations formed part of the basis for the United Nations fact-finding mission commissioned in April 2009, headed by South African judge Richard Goldstone and charged with conducting an inquiry into Israeli and Palestinian actions during OCL.

The 18-page report, prepared 11 February 2009 and delivered to the Human Rights Council on 17 March 2009, can be found online at www.obchr.org. Footnotes have been omitted for space considerations.

II. Introductory Clarifications

3. A conceptual complexity arises from the nature of the participants in this conflict with respect to international law. International law governing the use of force has developed over time to regulate the behavior of states in their relations with one another. Without in any way questioning the unity of the occupied Palestinian territory, it is important to come to terms with the reality of Gaza as sealed off from the rest of occupied Palestine and not directly represented, given its present administrative structure, in international diplomatic arenas. . . .

4. With regard to Gaza there is a further concern with respect to the nature of the legal obligations of Israel toward the Gazan population. Israel officially contends that after the implementation of its disengagement plan in 2005 it is no longer an occupying power, and therefore is not responsible for observance of the obligations set forth in the Fourth Geneva Convention. That contention has been widely rejected by expert opinion, by the de facto realities of effective control, and by official pronouncements by, for instance, the UN High Commissioner for Human Rights and the Secretary-General (A/HRC/8/17), the General Assembly in its Resolutions 63/96 and 63/98, and the Security Council in its Resolution 1860. Since 2005, Israel has completely controlled all entry and exit routes by land and sea and asserted control over Gazan airspace and territorial waters. By imposing a blockade, in effect since the summer of 2007, it has profoundly affected the life and wellbeing of every single person living in Gaza. Therefore, regardless of the international status of the occupied Palestinian territory with respect to the use of force, the obligations of the Fourth Geneva Convention, as well as those of international human rights law and international criminal law, are fully applicable. . . .

III. Inherent Illegality

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7. It is the view of the Special Rapporteur that the most important legal issue raised by an investigation of the recent military operations concerns the basic Israeli claim to use modern weaponry on a large scale against an occupied population living under the confined conditions that existed in Gaza. This involves trying to establish whether, under the conditions that existed in Gaza, it is possible with sufficient consistency to distinguish between military targets and the surrounding civilian population. If it is not possible to do so, then launching the attacks is inherently unlawful and would seem to constitute a war crime of the greatest magnitude under international law. On the basis of the preliminary evidence available, there is reason to reach this conclusion.

8. Considering that the attacks were directed at densely populated areas, it was to some extent inevitable and certainly foreseeable that hospitals, religious and educational sites, and UN facilities would be hit by Israeli military ordinance, and that extensive civilian casualties would result. As all borders were sealed, civilians could not escape from the orbit of harm. For authoritative and more specific conclusions on these points, it will be necessary to mount an investigation based on knowledge of Israeli weaponry, tactics, and doctrine to assess the degree to which, in concrete cases, it would have been possible, given the battlefield conditions, to avoid nonmilitary targets and to spare Palestinian civilians to a greater extent. Even without this investigation, on the basis of available reports and statistics, it is possible to draw the important preliminary conclusion that, given the number of Palestinian civilian casualties and degree of devastation of nonmilitary targets in Gaza, the Israelis either refrained from drawing the distinction required by customary and treaty international law or were unable to do so under the prevailing combat conditions, making the attacks impossible to reconcile with international law. On the basis of existing information, the principal results of the military operation were as follows:

- A total of 1,434 Palestinian were killed. Of these, 235 were combatants; 960 civilians reportedly lost their lives, including 288 children and 121 women; 239 police officers were also killed; the majority (235) in air strikes carried out the first day. A total of 5,303 Pales-

tinians were injured, including 1,606 children and 828 women. . . .

- Homes and public infrastructure throughout Gaza, especially in Gaza City, sustained extensive damage, including several UN facilities; an estimated 21,000 homes were either totally destroyed or badly damaged.
- A total of 51,000 people were internally displaced in makeshift shelters that provided minimal protection, while others fled to homes of friends and relatives that seemed slightly safer.

9. There is no way to reconcile the general purposes and specific prescriptions of international humanitarian law with the scale and nature of the Israeli military attacks commenced on 27 December 2008. The Israeli attacks with F-16 fighter bombers, Apache helicopters, and long-range artillery from the ground and sea were directed at an essentially defenseless society of 1.5 million persons. As recent reports submitted to the Council by the Special Rapporteur emphasized, the residents of Gaza were particularly vulnerable to physical and mental damage from such attacks as the society as a whole had been brought to the brink of collapse by 18 months of blockade that restricted the flow of food, fuel, and medical supplies to sub-subsistence levels and was responsible, according to health specialists, for a serious overall decline in the health of the population and of the health system. Any assessment under international law of the attacks of 27 December should take into account the weakened condition of the Gazan civilian population resulting from the sustained unlawfulness of the preexisting Israeli blockade that violated Articles 33 (prohibition on collective punishment) and 55 (duty to provide food and health care to the occupied population) of the Fourth Geneva Convention. . . .

IV. Nonexhaustion of Diplomatic Remedies

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11. It is a requirement of international customary law, as well as of the Charter of the UN, Article 2, paragraph 4, interpreted in the light of Article 1, paragraph 1, that recourse to force to resolve an international dispute should be a last resort after the exhaustion of diplomatic remedies and peaceful alternatives, even in circumstances where a valid claim of self-defense exists, absent a condition of urgency, assuming for

the moment that an occupying power can ever claim a right of self-defense. . . . In the context of protecting Israeli society from rockets fired from Gaza, the evidence overwhelmingly supports the conclusion that the cease-fire in place as of 19 June 2008 had been an effective instrument for achieving this goal, as measured by the incidence of rockets fired and with regard to Israeli casualties sustained.

12. The graph below, based on Israeli sources, shows the number of Palestinian rockets and mortar shells fired each month in 2008, with the period of the cease-fire stretching basically from its initiation on 19 June to its effective termination on 4 November when Israel struck a lethal blow in Gaza that reportedly killed at least six Hamas operatives. It dramatically demonstrates the extent to which the cease-fire was by far the most secure period with respect to the threats posed by the rockets:

[The graph shows a total of 11 Palestinian rockets and mortar shells fired in the 4 full months during which the cease-fire was in force (July through October) and 839 fired during the first 4 months of the year (January through April).]

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14. Beyond this, records show that, during the cease-fire, it was predominantly Israel that resorted to conduct inconsistent with the undertaking, and Hamas that retaliated. According to the above-mentioned study ["Reigniting Violence: How Do Cease-fires End?", by N. Kanwisher, H. Haushofer, and A. Biletzki, 24 January 2009], during a longer period, from 2000 to 2008, it was found that in 79 percent of the violent interaction incidents it was Israel that broke the pause in violence. In the course of events preceding the attacks of 27 December, the breakdown of the truce followed a series of incidents on 4 November in which Israel killed a Palestinian in Gaza, mortars were fired from Gaza in retaliation, and then an Israeli air strike was launched that killed an additional six Palestinians in Gaza; in other words, the breakdown of the cease-fire seems to have been mainly a result of Israeli violations, although this offers no legal, moral, or political excuse for firing of rockets aimed at civilian targets, which itself amounts to a clear violation of international humanitarian law.

15. Furthermore, Hamas leaders have repeatedly and formally proposed extending the cease-fire, including for long periods. . . .

16. The continuing refusal of Israel to acknowledge Hamas as a political actor, based on the label of "terrorist organization," has obstructed all attempts to implement human rights and address security concerns by way of diplomacy rather than through reliance on force. This refusal is important for reasons already mentioned (see para. 8 above), namely, that the population density in Gaza means that reliance on large-scale military operations to ensure Israeli security cannot be reconciled with the legal obligations under the Fourth Geneva Convention to protect to the extent possible the safety and wellbeing of the occupied Gazan population.

17. There are several relevant conclusions that demonstrate this link between relying on nonviolent options and the requirements of international humanitarian law:

- The temporary cease-fire was impressively successful. . . .
- The Palestinian side adhered to the cease-fire with relatively few exceptions. . . .
- The Hamas leadership appears ready at present to restore the cease-fire provided that the blockade is unconditionally lifted. . . .
- If substantiated by further investigation, this overall pattern prevailing at the time the attacks were launched would undermine the claim by Israel that its recourse to force was "necessary" and "defensive," both features of which must be present to support a valid claim under international law of self-defense.
- On the above basis, the contention that the use of force by Israel was "disproportionate" should not divert our attention from the prior question of the unlawfulness of recourse to force. If for the sake of argument, however, the claim of self-defense and defensive force is accepted, it would appear that the air, ground, and sea attacks by Israel were grossly and intentionally disproportionate when measured against either the threat posed or harm done, as well as with respect to the disconnect between the high level of violence relied upon and the specific security goals being pursued. . . .

V. Refugee Denial

18. In an unprecedented belligerent policy, Israel refused to allow the entire civilian

population of Gaza, with the exception of 200 foreign wives, to leave the war zone during the 22 days of attack that commenced on 27 December. As the UN High Commissioner for Refugees stated on 6 January 2009, Gaza is “the only conflict in the world in which people are not even allowed to flee.” All crossings from Israel were kept closed during the attacks, except for rare and minor exceptions. By so doing, children, women, sick and disabled persons were unable to avail themselves of the refugee option to flee from the locus of immediate harm resulting from the military operations of Israel. This condition was aggravated by the absence of places to hide from the ravages of war in Gaza, given its small size, dense population, and absence of natural or man-made shelters.

19. International humanitarian law has not specifically and explicitly at this time anticipated such an abuse of civilians, but the policy as implemented would suggest the importance of an impartial investigation to determine whether such practices of “refugee denial” constitute a crime against humanity as understood in international criminal law. The initial definition of crimes against humanity, developed in relation to the war crimes trials after World War II, is “murder, extermination, enslavement, deportation, and other inhumane acts done against any civilian population.” More authoritative is the definition contained in Article 7(1)(k) of the Rome Statute, according to which crimes against humanity includes “inhumane acts . . . intentionally causing great suffering, or serious injury to body or to mental or physical health.” Refugee denial under these circumstances of confined occupation is an instance of “inhumane acts,” during which the entire civilian population of Gaza was subjected to the extreme physical and psychological hazards of modern warfare within a very small overall territory.

20. The small size of Gaza and its geographic character also operated to deny most of the population remaining within its borders an opportunity to internally remove itself from the combat zones. In this sense, the entire Gaza Strip became a war zone, although the actual combat area on the ground was more limited. . . . In this respect, the option to become an internally displaced person was, as a practical matter, unavailable to the civilian population, although some civilians sought relative safety in shelters that were made available on an emergency basis for a tiny fraction of the

population, mainly through the efforts of . . . the UN Relief and Works Agency [UNRWA] and other UN and NGO efforts. In some situations, the shelters were not always treated as sanctuaries by the Israeli armed forces. Six UNRWA emergency shelters were damaged during Operation Cast Lead.

VII. The Broader Setting of the Attacks

40. At the conclusion of the present report, it seems appropriate to reaffirm the connection between Israeli security concerns and the Palestinian right of self-determination. As long as Palestinian basic rights continue to be denied, the Palestinian right of resistance to occupation within the confines of international law and in accord with the Palestinian right of self-determination is bound to collide with the pursuit of security by Israel under conditions of prolonged occupation. In this respect, a durable end to violence on both sides requires an intensification of diplomacy with a sense of urgency, and far greater resolve by all parties to respect international law, particularly as it bears on the occupation as set forth in the Fourth Geneva Convention.

A2. INTERNATIONAL CRISIS GROUP, “GAZA’S UNFINISHED BUSINESS,” GAZA CITY, RAMALLAH, JERUSALEM, WASHINGTON, AND BRUSSELS, 23 APRIL 2009 (EXCERPTS).

International Crisis Group’s (ICG) 50-page report in the wake of OCL examines the war’s toll and fallout for Gaza, the West Bank, and Israel, as well as prospects for a lasting cease-fire, Gazan reconstruction, and intra-Palestinian reconciliation in light of current realities. The excerpts below focus on Egypt’s role, both in Gaza and with regard to the “regional cold war.” Footnotes have been omitted for space considerations. The full report can be found online at www.crisisgroup.org.

A. Egypt

1. Background

. . . Throughout [the war], Cairo’s position was guided by several considerations. Ever since Hamas’s January 2006 electoral victory, and especially since its June 2007 takeover of Gaza, it has viewed the Islamist group’s strengthening warily. Its lens was, in this respect, essentially domestic. Hamas enjoys a close association with Egypt’s increasingly influential Muslim Brothers, a