

Internationales und Europäisches Strafverfahrensrecht

Herausgegeben von Hans-Heiner Kühne und Robert Esser

Oded Friedmann

The Possibility of the ICJ and the ICC Taking Action in the Wake of Israel's Operation "Cast Lead" in the Gaza Strip

A Jurisdiction and Admissibility Analysis

INTRODUCTION

1. The Gaza armed conflict of 2008/2009

The Gaza armed conflict between the State of Israel and Hamas, began on 27 December 2008 at 11:30 AM with the launch of a military offensive by the Israel Defense Forces (“IDF”) against Hamas targets within the Gaza Strip. The offensive – known as Operation “Cast Lead” – consisted, at first, of aerial, naval and ground artillery fire (from outside Gaza) and was expanded to include a ground offensive on 3 January 2009.

Israel, which consistently maintained that the offensive was action taken in self-defense¹, set three objectives for its operation in Gaza: (i) Stopping the incessant rocket attacks aimed at Israeli civilians from Gaza, (ii) dealing Hamas a forceful blow, and (iii) fundamentally changing the situation in Gaza².

During and following Operation “Cast Lead”, Israel was severely criticized by many in the international community for the force used by the IDF – especially in light of the fact that the conflict took place in the heart of one of the most densely populated areas in the world³ – and the devastating results of the conflict. Such criticism eventually became very serious accusations of international law violations, which shall be discussed in further detail below.

On 18 January 2009 at 2:00 AM, the Israeli offensive ceased, with the last IDF soldiers leaving Gaza on 21 January 2009.

1.1. The situation in the region prior to the Israeli offensive

Israel has been engaged in an ongoing armed conflict with Hamas (and other militant Palestinian organizations) since the massive outbreak of armed terrorist violence and hostilities in October 2000 (known as the *Al Aqsa Intifadah*).

Mortars started to be fired from Gaza into and around Sderot – a town of some 20,000, about 1.5 km from Gaza – and nearby villages in 2001⁴. Crude

1 The State of Israel, *The Operation in Gaza, 27 December 2008 - 18 January 2009: Factual and Legal Aspects* (2009), para. 72.

2 Israel Ministry of Foreign Affairs, *Operation Cast Lead: Israel Strikes Back Against Hamas Terror in Gaza* (2009).

3 More than 1.5 million people populate the Gaza strip on a territory of barely 360 square kilometers.

4 From this point and until the beginning of the Israeli offensive in the Gaza strip, Hamas (and other militant organizations such as “Palestinian Islamic Jihad” and the “Popular Resistance Committees”) launched more than 12,000 rockets and mortar rounds from

home-made Qassam rockets followed, initially with a maximum range of 3-4 km, but progressively upgraded to reach 12-15 km by 2005. In recent years, longer-range Qassam rockets fired from Gaza have begun to reach further into Israel, notably Ashkelon, a major town some 20 km north of Gaza with a population of 120,000. While most Qassam rockets initially fell to the south of the town, away from the populated areas, since early 2008 Grad-type rockets – apparently smuggled into Gaza – have reached the center and north of Ashkelon, as well as Netivot, some 20 km east of Gaza⁵. By late 2008, a total of one million Israeli civilians – almost 15% of Israel’s population – were directly threatened, as some of Israel’s largest cities, including Ashdod (with a population of 210,000) and Be’er Sheva (with a population of over 185,000), could be reached by rockets fired from Gaza. In addition to the civilian population, the increased range of the Hamas rockets directly threatened Israeli strategic installations, such as major electricity and gas storage Facilities⁶.

In September 2005, Israel completed its disengagement from the Gaza Strip, which was approved by the Israeli Government on 6 June 2004⁷. The disengagement included a full withdrawal of Israeli settlers and armed forces from the Gaza Strip and led to controversy with regard to the legal status of the latter⁸.

In January 2006, Hamas won the Palestinian parliamentary elections, securing 74 of the 132 seats in the Legislative Council⁹. This political victory did not improve the reality on the ground or change Hamas’ agenda with regard to its cross-border attacks against Israel, which on 25 June 2006 reached a new cli-

the Gaza Strip at towns in Southern Israel. In all, 18 Israeli civilians, including four children, have been killed by rocket and mortar attacks from Gaza since June 2004, when the first fatality from such attacks occurred. Hundreds of other civilians have been injured, several very seriously.

5 Amnesty International, *Israel/Gaza – Operation ‘Cast Lead’: 22 Days of Death and Destruction* (2009), p. 69.

6 The State of Israel, *The Operation in Gaza: Factual and Legal Aspects*, *supra* note 1, para. 49.

7 The Independent Fact Finding Committee on Gaza to the League of Arab States, *No Safe Place* (2009), para. 19.

8 Despite the Israeli disengagement of 2005, Israel maintained effective control over the Gaza strip (including control over Gaza’s six land crossings, complete control of Gaza’s airspace and territorial waters, continued military incursions and rocket attacks, and control over the Palestinian population registry, which determines who may reside in Gaza and who may leave / enter the territory) and thus – in the eyes of many – continued to fulfill the *de facto* requirements of an occupying power.

9 The Independent Fact Finding Committee on Gaza to the League of Arab States, *supra* note 7, para. 23.

max, when Palestinian terrorists from Gaza attacked an Israeli army post on the Israeli side of the southern Gaza Strip border. During the attack the terrorists killed two IDF soldiers, wounded four others and captured the Israeli soldier Corporal Gilad Shalit¹⁰. Shalit has been held by Hamas incommunicado in an undisclosed location for 1941 days until his release – as part of a prisoner swap between Israel and the Hamas – on 18 October 2011.

The results of the Palestinian parliamentary elections led to a violent power struggle between the Fatah Group¹¹ – led by the President of the Palestinian Authority, Mahmoud Abbas – and Hamas. In June 2007, the latter violently seized control of the Gaza Strip by persecuting some of the leaders and members of Fatah and neutralizing the Palestinian Authority's military and political power in Gaza. The final result of this struggle was a Palestinian movement divided into two quasi-states or enclaves: a Hamas-controlled Gaza and a Palestinian Authority-controlled West Bank¹². As a result of Hamas gaining control over the Gaza Strip, Israel imposed a blockade¹³ on Gaza, limiting the quantity and type of goods that were permitted to be transferred from Israel into Gaza¹⁴, in order to prevent the smuggling of arms and stop the firing of rockets and other attacks

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- 10 The Israeli Government responded to this action on 27 June 2006 by launching Operation "Summer Rains". The two stated goals of the operation were to (i) secure the release of Corporal Shalit, and (ii) stop the ongoing rocket attacks from the Gaza Strip into Israel. Operation "Summer Rains" ended in September 2006. Two additional Israeli offensives into the Gaza strip followed Operation "Summer Rains": Operation "Autumn Clouds" (1-7 November 2006) and Operation "Warm Winter" (28 February to 3 March 2008). The goal of both operations was to put an end to the intensifying rocket attacks from the Gaza strip.
 - 11 Fatah is a major Palestinian political party and the largest fraction of the Palestine Liberation Organization (PLO).
 - 12 Cordesman, Anthony H., *The "Gaza War": A Strategic Analysis*, Center for Strategic & International Studies (2009), p. 6.
 - 13 The scope and duration of the Israeli blockade on Gaza made it very controversial in the eyes of many in the international community. As a result, Israel has been accused of (i) collectively punishing the population of Gaza, (ii) flagrantly violating its obligations under the Fourth Geneva Convention, (iii) violating the Gaza population's basic rights regarding freedom of movement, adequate standard of living and work, and (iv) deliberately devastating the Gaza economy.
 - 14 The blockade on the Gaza Strip led to a great increase in smuggling of goods into Gaza through tunnels under the Gaza-Egypt border. Over time, the underground tunnels became a lifeline for the Gaza economy and the only way to obtain certain products in the Gaza Strip. Several hundred tunnels run under the Gaza-Egypt border. The tunnels are owned by a number of local merchants and supervised by Hamas, which issues individual operating licenses and collects taxes from their use.

against Israel. The Israeli blockade on the Gaza Strip led to further intensification of rocket fire from Gaza into Israel, and on 19 September 2007, Israel's security cabinet declared the Gaza Strip a "hostile entity"¹⁵ and announced it would begin cutting electricity and fuel to the Hamas-run territory in an effort to stop near-daily rocket fire into Israel.

On Thursday, 19 June 2008 at 06:00 AM, Hamas and Israel agreed to a six month ceasefire (*Tahadiya*)¹⁶. The (unwritten) agreement was negotiated indirectly through Egyptian good offices and was effected without the two parties ever meeting each other in direct talks and without either of them having to make any political concessions¹⁷. The ceasefire between Israel and Hamas did not last the agreed upon six months, as on 4 November 2008, Israel launched an incursion into Gaza, killing 6 and injuring 7 others¹⁸. As a result, Hamas renewed its rocket fire into Israel and on 19 December 2008 unilaterally¹⁹ declared the end of the ceasefire.

1.2. The twenty-two day armed conflict between Israel and Hamas

The Israeli offensive in Gaza commenced on 27 December 2008 with aerial strikes against Hamas infrastructure, as well as rocket and mortar launching units. In addition to clear military objectives (such as command posts, training camps and weapons stores used in the planning, preparation, guidance and execution of attacks against Israel), the Israeli Air Force targeted Hamas infrastructure, which was occupied and used by the governmental / civilian arm of Hamas (the Palestinian Legislative Council, various ministries, administrative structures and civilian police stations)²⁰. Despite coming under heavy international criti-

15 The Independent Fact Finding Committee on Gaza to the League of Arab States, *supra* note 7, para. 402; Israel Ministry of Foreign Affairs, *Security Cabinet Declares Gaza Hostile Territory* (2007).

16 The Independent Fact Finding Committee on Gaza to the League of Arab States, *supra* note 7, para. 35.

17 Halevy, Efraim, "Israel's Hamas Portfolio", *Israel Journal of Foreign Affairs* 2.3 (2008), p. 46.

18 The Independent Fact Finding Committee on Gaza to the League of Arab States, *supra* note 7, para. 23.

19 The State of Israel, *The Operation in Gaza: Factual and Legal Aspects*, *supra* note 1, para. 60.

20 The State of Israel, *The Operation in Gaza: Factual and Legal Aspects*, *supra* note 1, para. 235; Amnesty International, *supra* note 5, p. 9.

cism²¹ for attacking these targets, the Israeli Government has maintained that despite its governmental and social function in the Gaza Strip, Hamas remains a terrorist organization and many of its alleged civilian elements are in reality active components of its terrorist and militant efforts²². With regard to the targeting of the Hamas civilian police force²³, Israel has argued that there is proof that Hamas' civilian police force was part of the organization's armed forces in the course of the conflict and, therefore, could be considered a legitimate military target under the Law of Armed Conflict²⁴.

On 3 January 2009, one week into the Gaza operation, the IDF commenced its ground operations as dozens of Israeli tanks took position in various locations inside the Gaza Strip – mostly in the east and north of Gaza. On 10 January 2009, the IDF expanded the ground maneuver by entering deeper into the urban areas of the Gaza Strip, in order to take control of and dismantle rocket launching sites positioned in those areas. In total, nine Israeli soldiers were killed²⁵ and 336 were injured during fighting in the Gaza strip²⁶.

During the Gaza armed conflict, the armed wing of Hamas (and other militant Palestinian groups) launched rockets and mortars²⁷ on a daily basis into towns and villages in southern Israel, as well as against Israeli military positions and patrols inside Gaza and along Gaza's perimeter. According to Israeli authorities, 571 rockets and 205 mortar shells landed in Israel during the 22 days of armed conflict, killing four (three civilians and one soldier)²⁸ and injuring 182

21 The Independent Fact Finding Committee on Gaza to the League of Arab States, *supra* note 7, paras. 458-464; Amnesty International, *supra* note 5, pp. 8-9.

22 The State of Israel, *The Operation in Gaza: Factual and Legal Aspects*, *supra* note 1, para. 235.

23 In the morning of 27 December 2008, some 240 Hamas police officers were killed in bombardments of police stations across the Gaza Strip in the first moments of Operation "Cast Lead" – including scores who were killed when the first Israeli air strikes targeted the police cadets' graduation parade in the central police compound in Gaza City.

24 The State of Israel, *The Operation in Gaza: Factual and Legal Aspects*, *supra* note 1, paras. 238-248.

25 Four of the IDF soldiers killed during the conflict were killed in two separate "friendly fire" incidents, which occurred on 5 and 6 January 2009 in northern Gaza.

26 Israel Ministry of Foreign Affairs, *IDF Operation in Gaza: Cast Lead* (2009).

27 The rockets fired by Palestinian armed groups include Grad or Katyusha rockets with a range of about 35 km, home-made short-range Qassam rockets and locally manufactured mortars. All are unguided projectiles, which cannot be directed at specific targets.

28 United Nations Fact-Finding Mission on the Gaza Conflict, *Human Rights in Palestine and Other Occupied Arab Territories*, UN Doc. A/HRC/12/48, 25 September 2009 (hereinafter "Goldstone Report"), para 31.

others. In addition, several civilian homes and other structures were damaged, some extensively²⁹.

1.2.1. Armed conflict in a densely populated area

Both Hamas and Israel have been the targets of wide spread, severe international criticism based on the methods they chose to deploy during the Gaza conflict, despite the fact that it took place in a very densely populated area.

Hamas was accused – both by Israel³⁰ and by members of the international community³¹ – of gravely endangering Palestinian civilians by launching rockets from residential areas, locating military equipment in and near civilian homes / facilities and using empty homes, properties and other civilian facilities³² as combat positions during armed confrontations with Israeli forces. As a result of such tactics, Hamas was accused of using the civilian population of Gaza as a “human shield”³³. In addition, Israel has claimed to have seized information, which proves Hamas’ tactic of booby trapping homes, roads and schools with mines and explosives, in order to inflict casualties on IDF forces – while ignoring the severe danger to the local civilian population³⁴.

The accusations against Israel, on the other hand, focused on its disregard for civilian lives and property, reflected in the severe force, methods and weapons it chose to use during the armed conflict with Hamas³⁵. In addition, Israel was accused of deliberately causing a humanitarian crisis in the Gaza Strip, in order to increase the internal pressure on the Hamas leadership by collectively punishing Gaza’s civilian population³⁶.

29 Amnesty International, *supra* note 5, p. 66.

30 The State of Israel, *The Operation in Gaza: Factual and Legal Aspects*, *supra* note 1, para. 141.

31 Amnesty International, *supra* note 5, pp. 3, 4, 74, 75.

32 Israel has presented proof for the fact that Hamas’ main base of operations during the Gaza conflict was located inside Shifa Hospital in Gaza City.

33 The deliberate placement of civilians in or around combat targets to deter an enemy from attacking those targets.

34 The State of Israel, *The Operation in Gaza: Factual and Legal Aspects*, *supra* note 1, para. 181.

35 Goldstone Report, *supra* note 28, paras. 62, 593, 594, 1919.

36 Amnesty International, *supra* note 5, p. 51; The Independent Fact Finding Committee on Gaza to the League of Arab States, *supra* note 7, para. 435; Goldstone Report, *supra* note 28, paras. 1330, 1331.

1.2.1.1. The controversial use of white phosphorus and flechettes

During its Gaza offensive, the IDF made use of white phosphorus, which is a pyrophoric chemical (self-igniting at contact with air) intended primarily as an obscurant to provide cover for troop movements on the battlefield. It does so by releasing thick white smoke as it burns³⁷. White phosphorus is extremely dangerous for humans, as it causes deep burns through muscle and down to the bone, continuing to burn until deprived of oxygen³⁸. After the Gaza conflict has ended, Israel explained that the restrictions on the use of incendiary weapons under Protocol III to the 1980 Convention on Certain Conventional Weapons³⁹ (“CCW”) were observed at all times. Furthermore, the small number of exploding munitions containing white phosphorous, which were used during the conflict, were fired only at open unpopulated areas and were used only for marking and signaling, not in an anti-personnel capacity⁴⁰. With regard to smoke projectiles containing white phosphorous⁴¹, Israel asserted that such projectiles contained relatively small amounts of white phosphorus and that they were used exclusively to create smoke screens for military requirements⁴². Despite the fact that the use of white phosphorus is not prohibited under International Humanitarian Law⁴³, Israel has been heavily criticized by many in the international community for its decision to use the dangerous chemical – in particular in light of the obvious disproportion between the risk the chemical posed to the civilian population in the conflict area and the military benefits it offered⁴⁴.

Flechettes (3.5 cm-long steel darts, sharply pointed at the front, with four fins at the rear⁴⁵) are an additional weapon used by the IDF during the Gaza

37 It can also be used to mark targets, to “trace” the path of bullets and as an incendiary weapon. It can be dispersed by artillery shells, grenades, and rockets.

38 Amnesty International, *supra* note 5, p. 28.

39 Officially known as the United Nations Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects as amended on 21 December 2001.

40 The State of Israel, *The Operation in Gaza: Factual and Legal Aspects*, *supra* note 1, para. 407.

41 The second and main type of munitions containing white phosphorous employed by the IDF during Operation “Cast Lead”.

42 The State of Israel, *The Operation in Gaza: Factual and Legal Aspects*, *supra* note 1, para. 409.

43 Amnesty International, *supra* note 5, p. 31; Goldstone Report, *supra* note 28, para. 901.

44 Goldstone Report, *supra* note 28, para. 893.

45 5,000 to 8,000 of these darts are packed into shells, which are generally fired from tanks. The shells explode in the air and scatter the flechettes in a conical pattern over an area of about 300m x 100m.

armed conflict and severely criticized by members of the international community⁴⁶. Due to the fact that flechettes are an area weapon – designated to be used against massed infantry attacks or squads of troops in the open – highly unsuitable for use in urban settings⁴⁷, the question of their use in the Gaza Strip has already reached the Israeli Supreme Court, sitting as the High Court of Justice, in 2002. The latter has ruled that flechettes were not covered by the CCW and, therefore, not illegal under the Law of Armed Conflict⁴⁸. Despite the fact that International Humanitarian Law does not prohibit the use of flechettes in all circumstances, many members of the international community maintain that by using such weapon in predominantly civilian areas during the Gaza armed conflict, Israeli forces have violated customary international law⁴⁹.

1.2.1.2. The destruction of civilian property in the Gaza Strip

Although destruction of private civilian property and infrastructure is an inescapable by-product of every armed conflict, the IDF was severely criticized for the destruction and damage it caused in the Gaza Strip by demolishing civilian houses / structures, agricultural land and infrastructure⁵⁰. This criticism was based on (i) the sheer scale of destruction caused, and (ii) the view that much of the destruction was wanton, deliberate and unnecessary⁵¹. Following the Gaza conflict, the State of Israel confirmed that extensive damage has been caused to private civilian property during the conflict, but claimed that the vast majority of IDF activities, which caused the destruction and damage, were demanded by the necessities of war and, thus, complied with the Law of Armed Conflict⁵².

1.2.1.3. The humanitarian situation during the conflict

The fact that during a time of armed conflict – particularly when the combat operations take place in densely populated urban areas – the tragic suffering of the civilian population in the combat zone cannot be completely avoided is beyond dispute. The difference of opinion between members of the international com-

46 Amnesty International, *supra* note 5, p. 40.

47 *Ibid.*, pp. 38-39; Goldstone Report, *supra* note 28, paras. 903, 1924.

48 *Physicians for Human Rights v. OC Southern Command*, Israel Supreme Court, sitting as the High Court of Justice (27 April 2003).

49 Goldstone Report, *supra* note 28, para. 880; The Independent Fact Finding Committee on Gaza to the League of Arab States, *supra* note 7, para. 472; Amnesty International, *supra* note 5, p. 40.

50 The State of Israel, *The Operation in Gaza: Factual and Legal Aspects*, *supra* note 1, paras. 436, 439, 442.

51 Amnesty International, *supra* note 5, p. 55.

52 The State of Israel, *The Operation in Gaza: Factual and Legal Aspects*, *supra* note 1, paras. 437, 442.

munity and the Government of Israel relates to the question, whether the latter fulfilled its obligations regarding the humanitarian needs of Gaza's civilian population during the conflict. Many in the international community argue that the Israeli occupation of Gaza did not end with Israel's unilateral disengagement in 2005⁵³. Thus, as an occupying power, Israel was duty-bound under the Fourth Geneva Convention⁵⁴ and to the full extent of the means available to it, to ensure the supply of foodstuff, medical and hospital items and other goods, to adequately meet the humanitarian needs of the population of the Gaza Strip without qualification⁵⁵. Despite the fact that the quantity of humanitarian goods – particularly foodstuff – allowed into Gaza significantly increased during the military operations⁵⁶, the effects of the long-term Israeli blockade on the Gaza Strip⁵⁷ and the intense fighting led to a humanitarian crisis, in which everyone⁵⁸ suffered from the lack of basic necessities. The conditions of life created by Israel in the Gaza Strip led many to believe the humanitarian suffering of Gaza's civilian population was deliberate as part of Israel's war plan against Hamas⁵⁹.

Israel, on the other hand, argued that it implemented a far reaching effort to try to ensure that the humanitarian needs of Gaza's civilian population were met and that Hamas was the one interested in creating a humanitarian crisis in Gaza – as part of its war plan against Israel⁶⁰. The Israeli humanitarian efforts in Gaza included (i) increasing and ensuring the supply of humanitarian aid, such as food, medical supplies and fuel, through the crossing points⁶¹, (ii) coordination of evacuations⁶² and other humanitarian movements within the Gaza Strip and

53 See *supra* note 8.

54 Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War (12 August 1949).

55 Goldstone Report, *supra* note 28, para. 28.

56 The average number of truckloads allowed into Gaza by Israel increased from 35 (before the conflict) to 122 (during the conflict).

57 On 31 December 2008, as a rare exception, Egypt opened the Rafah Crossing – Gaza's only border not with Israel – on a daily basis to allow injured from the Gaza Strip into Egypt and medical equipment from Egypt into the Gaza Strip. For other movement of people, the Rafah Crossing has been almost completely blocked during the conflict.

58 Amnesty International, *supra* note 5, p. 52.

59 See *supra* note 36.

60 The State of Israel, *The Operation in Gaza: Factual and Legal Aspects*, *supra* note 1, para. 277.

61 See *supra* note 56.

62 A special medical coordination center was set up in the Gaza Coordination and Liaison Administration ("CLA"), under the command of an officer with the rank of Major. The coordination center dealt with assistance to civilians in danger and with evacuation of