

## On the Criminal Responsibility of the Israeli Army in Gaza

By Fatmeh El-'Ajou<sup>1</sup>

On 22 April 2009, the Israeli army released the findings of five operational debriefings ordered by the Chief of Staff of the Israeli army to examine complaints raised by human rights organizations and the Israeli and international media regarding harm to Palestinian civilians and civilian infrastructure, medical facilities and personnel, and UN facilities, as well as the use of phosphorus weapons during the offensive in Gaza which took place from 27 December 2008 – 18 January 2009. According to the findings of the debriefings, the army “acted during the fighting in accordance with international law and maintained a high professional and ethical level” and the killing of civilians resulted from errors and operational mishaps.<sup>2</sup>

The testimonies collected from the victims of the “Cast Lead” military operation, as well as the various media reports and publications issued by local and international human rights organizations, clearly indicate that intentional injury was caused to civilians and civilian targets.<sup>3</sup> As a result of the military operation, 1,434 Palestinians were killed, including 235 fighters. The 960 civilians who lost their lives included 288 children and 121 women. In addition, 239 policemen were killed. Moreover, 5,303 Palestinians suffered injuries including 1,606 children and 828 women.<sup>4</sup> More than 4,000 homes were completely destroyed and about 17,000 homes were partially demolished during the course of the military operation.<sup>5</sup>

The killing and injuring of civilians, as well as the widespread destruction of private property, are a direct result of Israel's policy of collective punishment vis-à-vis the Gaza Strip, a means of exerting pressure on the Hamas government. This policy intensified with the declaration of the Gaza Strip as “hostile territory” in September 2007, which blurred the distinction between civilians and civilian targets, and combatants and military targets. This policy was given explicit expression during the military operation itself in pronouncements by government officials and military commanders who declared that the campaign was aimed at “searing public consciousness” in Gaza against Hamas and against the resistance to Israel. This sentiment was also expressed in the explicit declarations by top Israeli officials; they stated, *inter alia*, that Israel will not distinguish between the different aspects of the Hamas organization ruling the Gaza Strip and that it considers all members of Hamas to be “terrorists” who constitute legitimate targets for assassination.<sup>6</sup> The many testimonies published during and after the

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<sup>1</sup> Staff attorney with Adalah.

<sup>2</sup> ‘Cast Lead’ Investigations: *The IDF Maintained a High Ethical and Professional Level*. See: [http://dover.idf.il/IDF/News\\_Channels/today/09/04/2202.htm](http://dover.idf.il/IDF/News_Channels/today/09/04/2202.htm) [Hebrew]

<sup>3</sup> See the Palestinian Center for Human Rights-Gaza, *Israeli Military Offensive on the Gaza Strip*, available at: <http://www.pchrgaza.org/files/PressR/English/2008/gaza.html>; see also the websites of Al Mezan, Physicians for Human Rights – Israel, B'Tselem, HRW and Amnesty International reports on ‘Cast Lead’

<sup>4</sup> See *Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967*, Richard Falk, 17 March 2009. Available at: <http://www.adalah.org/features/opts/A.HRC.10.20.pdf>

<sup>5</sup> UNICEF information note on the Gaza crisis, 22 January 2009: <http://domino.un.org/unispal.nsf/361eea1cc08301c485256cf600606959/57f38297573ae8938525754700525c48!OpenDocument>

<sup>6</sup> Griff Witte and Sudarsan Raghavan, ‘All-Out War’ Declared on Hamas, Israel Expands List of Targets to Include Group’s Vast Support Network in Gaza:

<http://www.washingtonpost.com/wp-dyn/content/story/2008/12/29/ST2008122900406.html>

See also the remarks by then Foreign Minister, Tzipi Livni, on 31 December 2008, stating that Israel – like Hamas – would not honor the principle of distinction: “They don’t make a distinction, and neither should we.” Amnon Meranda, *Tibi: Politicians Counting Palestinian Bodies*, Ynet, 29 December 2008. See also the remarks by the

operation about the excessive force employed during the fighting and the lenient rules of engagement conveyed to the soldiers in the field,<sup>7</sup> also demonstrate intent – or at least indifference regarding the harm inflicted upon the civilian population and the civilian infrastructure throughout the Gaza Strip.

In these circumstances, it is clear that operational debriefings are not sufficient to refute the serious suspicions that arise from the testimonies of Palestinian victims and the picture of devastation in Gaza, which suggest that war crimes and crimes against humanity were indeed committed during the course of “Cast Lead.” In order to conduct a true and serious examination of these suspicions, an independent and effective investigation is required.<sup>8</sup> The general statement declaring that there was no intentional targeting of civilians and that the damage was proportional does not refute these serious suspicions. This type of declaration is arbitrary because, in order to determine that the killing and destruction was legal, it is necessary to examine whether there was a military need for each attack that resulted in injury to a civilian or damage to private property, and whether the target was legal and if the force employed was proportional. Such an investigation must be based on a comprehensive and objective examination of the facts and on the collection of testimony from eyewitnesses and victims and not only on operational debriefings conducted by the army itself, and which, by their nature, are designed for operational needs. These debriefings cannot serve as a substitute for a criminal investigation aimed at discovering the truth and clarifying the question of criminal responsibility.

Moreover, reports indicate that the Israeli army’s position is that violations of the laws of armed conflict and international crimes are only committed in the case of intentional attacks against civilians.<sup>9</sup> This position contradicts Israeli and international criminal law. According to both domestic and international criminal law, criminal responsibility not only exists in the case of a mental element of intent, but also in the case of a lesser element such as recklessness or negligence.<sup>10</sup> Indeed, the Rome Statute of the International Criminal Court lists many offenses for which recklessness is sufficient as a mental element for committing the offense. For example, to establish the offense listed in Article 8(2)(a)(i) of the Rome Statute, entitled war crime of “willful killing,” it is stated that “the term ‘willful’ encompasses reckless acts.” Customary international law also recognizes offenses that suffice with recklessness as a mental element for establishing criminal responsibility for their commission.<sup>11</sup> The rulings of

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deputy chief of staff, Major General Dan Harel, in a meeting with mayors in southern Israel as reported by Tova Dadon, *Deputy Chief of Staff in Kiryat Gat: The Worst is Still Ahead of Us*, Ynet, 29 December 2008; and by Yotam Feldman and Uri Blau, *They Don't Stop at Gray*, Haaretz Magazine, 23 January 2009; and Moshe Ronen, *In War, There are Rules*, 24 Hours Supplement, Yedioth Ahronoth, 19 January 2009.’

<sup>7</sup> See Alex Fishman, *Winograd, You're Free to Go*, Friday Magazine, Yedioth Ahronoth, 23 January 2009.

<sup>8</sup> *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Execution*, Recommended by the Economic and Social Council's Resolution 1989/65 of 24 May 1989. <http://www.unhchr.ch/html/menu3/b/54.htm>. See also: Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (Mr. Philip Alston), 8 March 2006, [http://www.extrajudicialexecutions.org/reports/E\\_CN\\_4\\_2006\\_53.pdf](http://www.extrajudicialexecutions.org/reports/E_CN_4_2006_53.pdf)

<sup>9</sup> See the Israeli army's report on the operational debriefings and also the response of the state to the Israeli Supreme Court petition in H CJ 9594/03, **B'Tselem et al. v. Military Advocate General** (pending).

<sup>10</sup> For Israeli law see S. Z. Feller, *Elements of Criminal Law*, Volume A, 1984, p. 516; see also sections 20(A)(1),(2) and 20(B) of the Penal Code, 1977. For international law see G. Werle and F. Jessberger, *Principles of International Criminal Law*, Cambridge University Press, 2005, p. 115 and K. Dörmann, "Elements of War Crimes under the Rome Statute of the International Criminal Court, Sources and Commentary," ICRC 2003.

<sup>11</sup> See *Ibid. Principles of International Criminal Law*, p. 134.

international criminal tribunals (ICTR and ICTY) can be a source for international offenses for which recklessness is considered sufficient for constituting the mental element:

“It may be concluded from the cases rendered by the ad hoc tribunals that **the notion ‘willful’ includes ‘intent’ and ‘recklessness,’ but excludes ordinary negligence.** This view is supported by various decisions emerging from post-second world war trials in which it was stated in general terms that willful neglect, if it amounts to recklessness, i.e. gross criminal or wicked negligence, or gross and criminal disregard of his/her duties, is sufficient for the mens rea. This view is also found in the ICRC commentary on Art. 85(3) AP I and was explicitly underlined by the ICTY in the above-mentioned Delalic case. **In the cases of willful killing committed by fault of omission, if death is the foreseeable consequence of such omission, intent can be inferred.**”<sup>12</sup>

Negligence can also serve as a basis for criminal offenses in special circumstances, particularly in situations involving the criminal responsibility of commanders.<sup>13</sup>

The lack of an independent and effective investigation coupled with the adoption of a limited and incorrect interpretation by the law enforcement authorities in Israel (both its military and civilian arms) for finding criminal responsibility during military activity has led to a culture of impunity among soldiers and officers.<sup>14</sup> This policy is reflected in the small number of criminal investigations and the rare issuances of indictments for killing civilians since the outbreak of the second Intifada in 2000, including cases in which there were serious suspicions that war crimes had been committed during the course of military operations, such as the operations conducted in 2004 (called “Operation Rainbow” and “Operation Days of Penitence”), despite the dozens of complaints asking to open criminal investigations into these acts. Further, a petition challenging the policy of not opening criminal investigations into the killing and injury of civilians who were not involved in hostilities has been pending before the Israeli Supreme Court for six years without resolution.<sup>15</sup> This culture of impunity expresses contempt for the sanctity of human life and other basic rights of the residents of the Gaza Strip, and flagrant disregards the directives of international law, which demand an independent and effective investigation into suspicions of criminal offenses.

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<sup>12</sup> See *Elements of War Crimes under the Rome Statute of the International Criminal Court*, p. 42. See **Prosecutor v. Blaškić**, ICTY (Appeals Chamber) judgment of 29 July 2004, para 34; **Prosecutor v. Stakić**, ICTY (Trial Chamber) judgment of 31 July 2003, para 587, 642; **Prosecutor v. Kayishema and Ruzindana**, ICTR (Trial Chamber) judgment of 21 May 1999, para 146.

<sup>13</sup> See Article 28 of the Rome Statute of the International Criminal Court. See also: *Principles of International Criminal Law*, p. 133

<sup>14</sup> See Yesh Din report: *Exceptions: Prosecution of IDF Soldiers During and After the Second Intifada, 2000-2007*, available at: <http://www.yeshdin.org/sys/images/File/Exceptions%5BEng%5D%5B1%5D.pdf>

<sup>15</sup> See HCJ 9594/03, **B'Tselem v. The Military Advocate General** (pending); see also HCJ 3292/07, **Adalah et al. v. Attorney General et al.** (asking for the opening of criminal investigations into the killing of civilians and the extensive destruction of property during two military operations in Gaza in 2004) (pending).