

Misdirected Fire:

The UNHRC Report on Gaza

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Brief Analysis

PolicyWatch #1504 is second in a two-part series on the legal issues associated with Israel's recent war in the Gaza Strip. PolicyWatch #1497, "[Examining the Conduct of IDF Operations in Gaza](http://www.washingtoninstitute.org/templateC05.php?CID=3034) (<http://www.washingtoninstitute.org/templateC05.php?CID=3034>)," dealt with how the Israeli military fought the war (Jus In Bello). This piece addresses questions surrounding the underlying legality of the war itself (Jus Ad Bellum).

In March, the UN Human Rights Council's (UNHRC) special rapporteur for the Palestinian territories, Richard Falk, published a report on Operation Cast Lead that makes far-reaching allegations against Israel and the potential illegality of its actions in Gaza. These assertions, however, rather than having a factual or legal basis, are essentially political in nature. Now that the United States is to be a member of the council, it should ensure that future reports are more balanced and credible.

Background

During the Bush administration, the United States decided not to serve as a member of the UNHRC, fearing that its presence would give credibility to the flawed international body. This past week, the Obama administration reversed this policy, announcing it would join the council. The United States will face in the UNHRC an organization that has disproportionately condemned Israel while seeming to ignore the gross human rights violations of other countries. Since June 2006, the UNHRC has dealt more frequently with the Israeli-Palestinian conflict than with any other conflict in the world, highlighting it in nine out of ten regular and special sessions. In each case, Israel has been singled out as the party in breach of human rights, drawing particular ire from the council.

Operation Cast Lead

Falk's report focuses on Operation Cast Lead and, with a few exceptions, on alleged Israeli crimes and transgressions. Falk's overarching conclusion is that Israel's recourse to force was "not legally justified given the circumstances and diplomatic alternatives available, and was potentially a crime against peace." In Falk's analysis, the operation should not have been launched, since Israel was unable to distinguish military targets from the surrounding civilian population. Falk notes that 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 well-being of the occupied Gazan population." Falk concludes that the operation was "a war crime of the greatest magnitude under international law."

Falk dismisses the Israeli argument that the operation was conducted in self-defense in response to ongoing Hamas rocket attacks after Israel's withdrawal in August 2005 (although the six-month ceasefire between June and December 2008 was largely observed by both sides). Falk states that Israel had alternative diplomatic means to stop the rocket attacks and that "the Palestinian side adhered to the ceasefire, with relatively few exceptions, and relied on violence almost exclusively in reactive modes, while Israel failed to implement its undertaking to lift the blockade and seems mainly responsible for breaking lulls in the violence."

Falk also accuses Israel of humanitarian violations in Gaza, based on his contention that it remains the territory's occupying power. Falk views Israel's blockade of Gaza, a policy in place since Hamas won the Palestinian elections in January 2006, as sufficient legal proof to consider the territory under Israeli control -- in other words, that Israel is fully responsible for Gaza. According to Falk, Israel, as the occupying power, cannot claim to act in self-defense and that "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 of which must be present to support a valid claim under international law of self-defense."

Finally, Falk asserts that even if Israel had the right to self-defense, the response was disproportionate to the threat, stating that "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."

Flaws in Falk's Arguments

Many of the report's arguments are problematic. First, little evidence supports Falk's contention that Israel could have used diplomacy instead of military action in dealing with the Gaza crisis. Falk argues that diplomacy had not achieved any results up until the operation and therefore had not run its course. He conveniently avoids Hamas's openly espoused policy of simultaneously utilizing various means in their struggle with Israel, for example, launching rocket attacks while mediated talks on prisoner releases are taking place in Cairo. The argument also fails to account for ongoing attempts to stop the rocket attacks and lift the blockade after Israel left Gaza in 2005. For instance, he does not mention that Israel wanted to extend the ceasefire that ended on December 19, and that Hamas annulled it -- rejecting the peaceful approach.

Falk's argument that a military attack must only be launched if there is a clear distinction between legitimate military targets and the surrounding civilian population is also problematic because it does not take context into account. During the conflict, Hamas intentionally integrated its fighters and military equipment (including rocket launchers) into the civilian population, rendering it impossible for Israel to distinguish between Hamas members and civilians with complete certainty. Israel nonetheless took many steps to try and avoid civilian casualties.

The crux of Falk's reasoning is that as long as there is no successful diplomatic solution, any attack is illegal. And by using his innovative interpretation, Hamas attacks are deemed responses to Israeli attacks and therefore cannot justify Israeli self-defense. Falk's view that Israel is still an occupying power is also inaccurate, since Israel does not fully control all of Gaza's exit and entry points. In fact, Egypt, which controls the Rafah crossing, has refused to open the crossing to Hamas, despite demonstrations in the Arab world throughout the conflict.

Ultimately, Falk's analysis and conclusions, were they adopted, would leave Israel in a problematic position. Israel would have no right to respond to attacks from Gaza, either militarily (as in operation Cast Lead) or non-militarily (as in the blockade), since in Falk's view both are transgressions of international law as well as the laws of warfare.

Conclusions

Falk's report does not help establish whether transgressions or crimes occurred during Operation Cast Lead. This is doubly unfortunate because not only is the issue important and should be investigated thoroughly, but by omitting facts, presenting a case without solid evidence, and completely disregarding the actions of one of the warring sides -- Hamas -- the report's findings could very well undermine future investigation by the UN or other international bodies.

It is imperative, therefore, that the international community, in particular the United States and the EU, generate high-quality, factual, evidence-based reports concerning the war in Gaza. Doing so will not only ensure that this important issue is dealt with in a fair and consistent manner, but also ameliorate other conflicts. In its new position as a member of the UNHRC, the United States should not shy away from this difficult challenge.

Magnus Norell, a Fulbright scholar, is a visiting fellow at The Washington Institute, where his research focuses on the 2006 conflict between Israel and Hizballah. ❖

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