

**OPTIONS FOR THE PROSECUTION OF CRIMES
ARISING FROM OPERATION CAST LEAD**

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It is clear that serious crimes were committed by the Israel Defence Forces (IDF) in its Operation Cast Lead. A number of independent reports including the Goldstone report to the Human Rights Council, the report of Independent Fact-Finding Committee on Gaza to the Arab League, the Martin Commission report to the UN Secretary General on attacks on UN premises, and reports by Human Rights Watch, Amnesty International, Physicians for Human Rights and the National Lawyers Guild, support the conclusion that war crimes and crimes against humanity were committed by the IDF in its Operation. Those who dispute this, such as the US House of Representatives, the US government and many European states, have clearly either not read the evidence presented by these reports or have decided that Israel is above the law. I would like to believe that the European States which voted against the Goldstone report in the General Assembly have not read the report but I fear that they have the reports and have decided that the norms of international Humanitarian law applicable to other states do not apply to Israel.

The Security Council will not refer the case of Gaza to the International Criminal Court under Article 13(b) of the ICC Statute. The US will veto any such move and all four of the remaining permanent members have indicated that they will not support such a move.

The Palestinian Authority has made a declaration under Article 12(3) of the ICC Statute accepting the jurisdiction of the ICC in respect of crimes committed in Palestine. The ICC Prosecutor, Luis Moreno Ocampo, is considering whether to initiate investigations into crimes committed in Operation Cast Lead but he must first be satisfied that Palestine qualifies as a state and that Palestine has jurisdiction over crimes committed by Israelis in Palestine. In my view Palestine may not be a state for all purposes but it does qualify as a state in terms of the Rome Statute of the ICC. Likewise Palestine has the competence to try Israelis for crimes committed in its territory. But this is my view. For the ICC Prosecutor to exercise jurisdiction will be a bold step politically and one that will infuriate both America and many European states, party to the ICC Statute. On the positive side, such a move would show that the ICC is willing to investigate a situation outside Africa and take the heat off the ICC for its decision to prosecute the President of Sudan. Given the political risks, I fear that one cannot rely on such a decision on the part of the ICC Prosecutor.

The ICC has jurisdiction over crimes committed in the territory of a state party and by nationals of a state party. Israel is not a party to the ICC Statute but many of its soldiers involved in the Gaza war are dual nationals of Israel and states such as Britain, France, Australia, Canada and South Africa which are parties to the Rome Statute. This means that such states may prosecute their nationals if it can be shown that they are responsible for committing war crimes in the course of the Gaza conflict.



Evidence of this kind will be difficult to obtain but is not impossible.

If a state is unwilling or unable prosecute a dual national it is possible for the ICC Prosecutor himself to initiate such proceedings under Articles 15(1) and 17(1)(a) of the ICC Statute – the provisions under which he has initiated an investigation into crimes committed in Kenya.

In South Africa two NGOs have requested the National Prosecuting Authority to investigate the involvement of some 75 South Africans in the Gaza war. Face Book entries prove that they have done service in the IDF but whether they were involved in the Gaza war and whether they were responsible for committing crimes is uncertain. In August of this year a senior officer in the IDF, David Benjamin, a dual South Africa/ Israeli national, visited South Africa to speak to a Jewish cultural group.

South African NGOs found an entry on a website in which he claimed responsibility for directing the war in Gaza. On this basis an attempt was made to obtain a warrant for his arrest in South Africa. The National Prosecuting Authority, however, failed to respond in time and Benjamin was able to leave South Africa despite protests calling for his arrest. This matter too has been raised with the ICC Prosecutor and there is a possibility that if the South Africa National Prosecuting Authority fails to take action the ICC Prosecutor may assume jurisdiction under Article 15 and 17.

This brings me finally to universal jurisdiction – the subject of today's conference.

If a state's laws permit a person to be prosecuted before its courts for war crimes and crimes against humanity, it is possible for prosecutions to be brought in such countries. But this is not the easiest of tasks. First, few states recognize universal jurisdiction of this kind. And most that do, require the local Minister of Justice or prosecuting authority to initiate action rather than a private person or NGO. And, in practice, such permission is hard to obtain. For instance in South Africa a request for such action has been with the National Prosecuting Authority since August and no decision has yet been taken.

In countries that allow proceedings to be initiated in the exercise of universal jurisdiction by private individuals or NGOs, there are still obstacles. First, courts in the West, where most universal jurisdiction statutes are to be found, tend to see Israel as a normal democratic state that should be allowed to handle such matters itself without interference from foreign courts. Second, evidence must be obtained in a presentable form from a foreign land – in this case Gaza. Nothing harms the concept of universal jurisdiction more than sloppy, unprepared proceedings.

The Arab League is aware of the problem of unprepared applications and is considering establishing an investigative unit that will examine the cases highlighted in the Report of the IFFC and the Goldstone Report and collect evidence in a presentable form. Such evidence might be used either by the ICC or by national courts. This is an encouraging development.



It is essential that crimes committed in Gaza in 2008-2009 be investigated and prosecuted. If this does not happen the credibility of international criminal justice will suffer. Western nations employ a double standard in dealing with human rights and humanitarian law. On the one hand, they urge prosecution in Darfur, Uganda, the Congo, Zimbabwe and Sri Lanka, but, on the other hand, they are determined to protect Israel from scrutiny. Israel must, in the eyes of the West, be protected at all costs. This means that one cannot expect action from the UN or the EU. The responsibility is therefore on courts – the ICC and national courts – to ensure that justice is done. Those intent of securing justice should therefore concentrate their efforts on such courts.

