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Operation Cast Lead and the Distortion of International Law A Legal Analysis of Israel's Claim to Self-Defence under Article 51 of the UN Charter

On the morning of 27 December 2008, the Israeli occupying forces launched 'Operation Cast Lead,' a wide-ranging military operation against the Gaza Strip. After 22 days of unrelenting aerial attacks coupled with intensive ground incursions, the death toll exceeded 1,400 Palestinians, a majority of them civilians including women and children, with over 5,000 more wounded. The excessive civilian casualties were compounded by the unprecedented destruction of civilian infrastructure across the Gaza Strip including hospitals, schools, mosques, civilian homes and United Nations (UN) compounds. The UN Secretary-General Ban Ki Moon described the extent of death and destruction across the Gaza Strip as "shocking and alarming"¹ and condemned Israel's "excessive use of force"² against the Gaza Strip.

In the morning hours preceding the initiation of the operation, Israeli Ambassador to the UN, Gabriela Shalev, dispatched a brief to the UN Secretary-General announcing, "after a long period of utmost restraint, the government of Israel has decided to exercise, as of this morning, its right to self-defence ... as enshrined in Article 51 of the Charter of the United Nations."³ The Israeli claim to 'self-defence' as the legal pretext for 'Operation Cast Lead' received wide and generally unconditional support from the international diplomatic community as justification for the military assault against the Gaza Strip.

Israel's invocation of Article 51 of the UN Charter as the pretext for 'Operation Cast Lead' is however based on two legally untenable assumptions. First, Israel maintains that the Gaza Strip is no longer occupied and therefore Israel bears no responsibility for the territory. Second, Israel's claim of self-defence fails to take into account the broader international armed conflict in which 'Operation Cast Lead' was launched. Cumulatively, such assumptions distort the applicable framework of international law to the Occupied Palestinian Territory (OPT), including the Gaza Strip, in an attempt to create a façade of legitimacy for the claim of 'self-defence' as the justification for 'Operation Cast Lead'.

The Legal Status of the Gaza Strip

Together with the West Bank, including East Jerusalem, the Gaza Strip is an integral and inseparable part of the Palestinian territory occupied by Israel since 1967.⁴ The OPT is recognised as a single territorial unit over which the Palestinian people's right to self-determination is enshrined in international law.⁵ Israel, however, maintains that its

¹ See Al-Jazeera, "Ban demands probe into Gaza attacks", available at: <<http://english.aljazeera.net/news/middleeast/2009/01/200912013138315261.html>>

² *Ibid.*

³ Letter to UN Secretary General, S/2008/816 – 27/Dec/08, identical letters dated 27 December 2008 from the Permanent Representative of Israel to the UN addressed to the Secretary-General and to the President of the Security Council.

⁴ As recently confirmed by the UN Security Council Resolution 1860, 8 January 2009.

⁵ See International Court of Justice (ICJ), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, at para. 118. See also, *inter alia*, General Assembly Resolution 58/163 of 22 December 2003.

unilateral disengagement from the Gaza Strip in 2005 relinquished its effective control over that part of the OPT, and in consequence the Gaza Strip is no longer occupied, effectively relieving Israel of its obligations under international humanitarian law as the Occupying Power. However, the very text of the 'Disengagement Plan' itself, coupled with Israel's subsequent practices, makes clear that the Gaza Strip remains under Israeli occupation.

Article 42 of the Hague Regulations of 1907 provides that, "territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised."⁶ Existing jurisprudence reveals the test of occupation to be "effective control," which exists if the military forces of the adversary could, "at any time they desired assume physical control of any part of the country."⁷ This test has been reiterated by various international courts and tribunals, including the International Criminal Tribunal for the former Yugoslavia, which ruled that one of the guidelines for determining occupation was whether "the occupying power has a sufficient force present, or the capacity to send troops within a reasonable time to make the authority of the occupying power felt."⁸

By declaring that "Israel will guard and monitor the external land perimeter of the Gaza Strip, will continue to maintain exclusive authority in Gaza air space, and will continue to exercise security activity in the sea off the coast of the Gaza Strip,"⁹ the text of the 'Disengagement Plan' itself reveals Israel's intention to maintain effective control over the Gaza Strip. Furthermore, despite the unilateral withdrawal of stationed troops and settlers, Israel continues to exert its military control over the Gaza Strip through a continuous flow of military operations in and against the Gaza Strip.¹⁰ In addition to military control, Israel also maintains administrative control over the population of the Gaza Strip through the exclusive control over the movement of goods and people, the civil population registry, and the tax and revenue system. Thus, the Gaza Strip and its inhabitants remain under Israeli effective control and, therefore, occupied.

Self-Defence under Public International Law

The adoption of the UN Charter in 1945 marked the formal prohibition on the use of force under international law. Article 2(4) of the UN Charter maintains that all Member States "shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any manner inconsistent with the purpose of the United Nations."¹¹ This prohibition however, is not absolute; Article 2(4) must be read in conjunction with Article 51 of the Charter. Notwithstanding authorisation from the UN Security Council, Article 51 is the exclusive legal foundation for the unilateral use of force under international law and provides that all States have the "inherent right of individual or collective self-defence if an armed

⁶ Article 42, Regulations Annexed to Hague Convention (IV) Concerning the Laws and Customs of War on Land, 18 October 1907.

⁷ *Hostages* case, United Nations War Crimes Commission, Law Reports of Trials of War Criminals, Volume VIII, 1949, at p. 56.

⁸ The *Prosecutor v Naletilic and Martinovic*, ICTY Trial Chamber, Case No.IT-98-34-T, para. 217.

⁹ Overall concept of the Disengagement Plan, Article 3(i)(1).

¹⁰ In addition to 'Operation Cast Lead,' 'Operation Summer Rains' and 'Operation Autumn Clouds' in 2006, and 'Operation Hot Winter' in 2008, are among numerous large-scale Israeli military operations directed against the Gaza Strip since Israel's unilateral "disengagement."

¹¹ Article 2(4), Charter of the United Nations, 26 June 1945.

attack occurs against a Member of the United Nations.”¹² Any use of force outside of these contexts is strictly prohibited under international law and may amount to an act of aggression.¹³

Article 51 of the UN Charter forms the basis of what is known as *jus ad bellum* – the law regulating Member States resort to the use of force under public international law. ‘Operation Cast Lead’ however, was launched within the context of a prolonged occupation and the framework of international law applicable during armed conflict and occupation is international humanitarian law, which forms the basis of *jus in bello* – the laws regulating the means and methods of armed conflict. The distinction between the two is of fundamental importance as they are mutually exclusive. Once within the ambit of *jus in bello*, the time when self-defence can be invoked under *jus ad bellum* has passed, as the resort to force has already occurred and any future use of force is regulated exclusively by international humanitarian law.

Operation Cast Lead and International Humanitarian Law

The legal framework applicable to ‘Operation Cast Lead’ is international humanitarian law, which regulates the conduct of hostilities during armed conflict and occupation, not the laws regulating a State’s resort to force under public international law. The ability for Israel to invoke Article 51 of the UN Charter as the legal pretext for ‘Operation Cast Lead’ was excluded on 7 June 1967, the day the Palestinian territory came under the effective control and therefore occupation of the Israeli armed forces, rendering Israel the Occupying Power and bound by the provisions of the Fourth Geneva Convention.

As the Occupying Power, Israel bears specific legal obligations in relation to the OPT, including the Gaza Strip. Such responsibilities encompass extensive, and in some cases extremely detailed obligations on the part of Israel vis-à-vis the civilian population, including the legal obligation to ‘ensure’ adequate food and medical supplies¹⁴ and the functioning of medical, public health and hygiene services.¹⁵ Furthermore, Israel also has a concurrent obligation to treat the occupied population, at all times and in all circumstances, humanely.¹⁶ International humanitarian law also places restrictions on the means and methods of combat that all Parties to the conflict are permitted to employ during any military operation. Thus, any attacks by Israel against the Gaza Strip, or response to attacks emanating from the Gaza Strip, must conform to the principles of international humanitarian law.

Under international humanitarian law, the principle of military necessity is the exclusive legal justification for any military operation. Military necessity encompasses the measures which are essential to attain legitimate goals during armed conflict and which are lawful in accordance with international humanitarian law.¹⁷ Following from this definition, military action must be intended towards the military defeat of the opposing

¹² *Ibid.*, Article 51.

¹³ Although no consensus exists, an act of aggression can be understood as the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. See United Nations General Assembly Resolution 3314 (XXIX), 14 December 1974.

¹⁴ Article 55, Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949.

¹⁵ *Ibid.*, Article 56.

¹⁶ *Ibid.*, Article 27.

¹⁷ Yves Sandoz; Christophe Swinarski, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC/Martinus Nijhoff, Geneva/The Hague, 1987), p. 392, para. 1389.

forces and must offer a direct contribution towards this goal. Furthermore, military necessity is integrated into the laws of armed conflict; it is thus restricted by the principles of distinction and proportionality and cannot justify violations of international humanitarian law.

During military operations, Israel is obliged to distinguish, at all times, between the civilian population and combatants, and between civilian objects and military objectives; and accordingly to direct its operations exclusively against military targets.¹⁸ Furthermore, the principle of proportionality dictates that launching an attack, which may be expected to cause incidental loss of civilian life, injury to civilians or damage to civilian objects, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.¹⁹ Prior to launching a military attack Israel is obliged to provide “effective advance warning” of attacks that “may affect the civilian population”²⁰ and take precautions in the choice of means and methods of attack with a view of avoiding and minimising civilian casualties.²¹ The Fourth Geneva Convention also provides for the creation of “neutralized zones” for the purposes of further protecting the civilian population from the dangers arising from military operations.²² Israel however, not only failed to evoke this provision during ‘Operation Cast Lead’ but there exists *prima facie* evidence that Israeli forces intentionally directed attacks against UN compounds sheltering civilians from the hostilities.²³

Contrary to such obligations, a prominent feature of ‘Operation Cast Lead’ was disproportionate and often indiscriminate military attacks against densely populated civilian centres throughout the Gaza Strip. Al-Haq fieldworkers extensively documented the systematic failure of Israel to effectively distinguish between civilian and military objectives during attacks and a clearly identifiable lack of proportionality between the death and injury of civilians, destruction of civilian property and the concrete military advantage offered from such attacks. Indiscriminate and disproportionate attacks constitute war crimes, where they result in wilful killing and extensive unlawful destruction of property, such attacks may amount to grave breaches of the Fourth Geneva Convention, entailing individual criminal liability for those who planned, ordered or executed such operations.

Conclusion

Israel’s reliance on self-defence misconstrues international law in an attempt to evade international legal obligations by failing to take account of the legal context in which ‘Operation Cast Lead’ was launched; 42 years of occupation of the Palestinian territory equating to an international armed conflict. Despite the widespread acceptance of Israel’s pretext, the legal status of the OPT excludes the application of Article 51 of the UN Charter as a result of the prolonged occupation. ‘Operation Cast Lead’ cannot be isolated from the broader international armed conflict from which it was launched, a legal context where Israel’s claim to self-defence holds no validity under international law.

¹⁸ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law – Volume I: Rules* (Cambridge, Cambridge University Press, 2005), Rule 1, p. 3.

¹⁹ *Ibid.*, Rule 14, p. 46.

²⁰ Codified under Article 57(2)(c) of Additional Protocol I to the Geneva Conventions, and reflective of customary international law, See *ibid.*, Rule 20, p. 62.

²¹ See *supra* note 18, Rule 17, p. 56.

²² Article 15, Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949.

²³ For more see Al-Haq, *Nowhere Left to Hide in the Gaza Strip*, 16 January 2009, available at <http://www.alhaq.org/etemplate.php?id=414>