From ***Armed Groups and International Law***, 15 Nov 2023, https://www.armedgroups-internationallaw.org/2023/11/15/some-reflections-on-the-use-of-force-in-the-recent-escalation-of-the-israeli-palestinian-conflict/

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Some Reflections on the Use of Force in the Recent Escalation of the Israeli-Palestinian Conflict

Note: this is a translation of a blog post originally published by SIDIBlog, Blog of the Italian Society of International Law and EU Law, on 15 Oct 2023. The author would like to thank Dr Afonso Seixas-Nunes for the translation. For a more up to date analysis, see, among others, Haque and O'Connell

1. Introduction

As it is known, on Saturday 7 October, some Palestinian militias attributable to Hamas launched a high number of rockets against Israel and breached the border that separates the Gaza Strip from Israel. The attacks hit some Israeli villages and sowed terror among the civilian population. Credible reports have identified massacres of Israeli civilians (including elderly people, women, and children) and more than 200 hostages. As expected, the Israeli reaction was not long in coming. The government led by Benjamin Netanyahu has ordered a total siege of the Gaza Strip by cutting off water and electricity and launched an unprecedented bombing campaign. A land invasion by Israeli military forces appears to be imminent. At the moment, 1,300 Israeli deaths and 1,799 Palestinian deaths and 6,388 wounded have been reported, but the figures are disputed and both tolls must be considered provisional.

Conscious of opposite views throughout the ongoing conflict and deeply moved by friends and colleagues caught in the conflict in both Israel and Palestine, this post aims to draw attention to the rules on the use of force in occupied territory, already addressed on my monograph on this topic (Longobardo 2018a).

This analysis has, however, a caveat. Our attention is focused on the norms of *jus contra bellum* (or *jus ad bellum*) and those of *jus in bello* (or international humanitarian law, or law of armed conflict), but because of extension constraints,

other important legal issues relating to the escalation of recent days (e.g. the role of international human rights law) will not be fully addressed.

2. Why Hamas' Action Should not be Considered an Act of Resistance Against Israel as the Occupying Power

The United Nations Security Council, the General Assembly, the International Criminal Court, and the International Committee of the Red Cross have considered the Gaza Strip as an integral part of the Palestinian Territory (along with East Jerusalem and the West Bank), still under Israeli occupation despite Israel withdrawing its troops in 2005. This status is widely accepted, at least since 2007, because of the authority Israel effectively exercises over the borders of the small territory of the Gaza Strip, including its maritime and air territory, and because of its control over water and energy supplies (see mote references in Longobardo 2018a, pp. 36-38; Dinstein, pp. 297-303 and, lastly, the summary by Jaber and Bantekas). Moreover, Art. 42 of the Hague Regulations of 1907, which codifies the customary definition of occupied territory, does not allude to any requirement towards a mandatory presence of enemy troops for a state of occupation to exist (see, generally, Grignon, pp. 1593-1596).

Accordingly, the first question that should be asked is whether the population of the occupied territory can ever take up arms against the occupying power. Although, in recent years, the question has been addressed mainly on the context of the war on terrorism (see the excellent analysis by Megret), the answer is positive: international law does not prohibit the population of an occupied territory from taking up arms against the occupier. A perfect example is the history of our grandfathers and grandmothers who fought the Nazi occupation. To frame this question is, however, theoretically challenging, but we can summarise the debate in the following terms. First, it is now clear that the law of occupation, as codified by the Hague Regulations of 1907 and the Fourth Geneva Convention of 1949, does not impose a duty of obedience on the population of the occupied territory towards the occupying power (see Art. 45 of the Hague Regulations of 1907 and Art. 68(3) of the Fourth Geneva Convention of 1949; in doctrine, see generally Baxter, and more recent references in Longobardo 2018a, pp. 137-141). Second, under certain conditions, those who participate in the resistance against the occupying power have the right to be treated as combatants and enjoy the status of 'prisoners of war' (see Art. 4(A)(2) of the Third Geneva Convention of 1949). Third, the principle of self-determination of peoples as codified by the United Nations General Assembly (Art. 1(2) UNC) supports the legitimacy of the struggle against the occupying power (see Res. 2649 (XXV), 30 November 1970; contrary to what Schmitt claims, Res. 2649 does not concern exclusively to unarmed resistance, since Res 35/35, 14 November 1980 expressly mentions armed struggle; it is important to notice that in matters of the self-determination of peoples these two resolutions have acquired a normative character according to the International Court of Justice, in the Opinion on the *Chagos Islands*, par. 151-153). Fourth, some regional international human rights treaties provide for

resistance against the occupying power as a human right (see Art. 20(2) of the 1981 African Charter on Human and Peoples' Rights; Art. 2(4) of the Arab Charter on Human Rights of 2004). Fifth, the difficulty of States to agree on a general definition of terrorism is directly related to the fact that some States want to exclude the actions of movements of resistance against the occupying power from the definition of terrorism (Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996, Eighth session (28 June–2 July 2004), A/59/37, Annex II, pp. 10-11); rather, some conventions on terrorism excluded resistance against the occupying power from their field of their application (see references in Longobardo 2018a, pp. 159-162). Moreover, it is also important to recall that some non-aligned states from the global South have repeatedly considered resistance against the occupying power as an act self-defense pursuant to Art. 51 of the UN Charter (see, for example, the separate opinion of Judge Ammoun, Advisory Opinion on Namibia (South West Africa) of 1970, par. 12; more generally, see Abi-Saab, pp. 437-438, note 8). Nonetheless, this interpretation is not universally accepted because for many self-defense, as defined in the UN Charter, is as an exclusive a right of States (Dugard, pp. 168-187).

Following the above, it can be concluded that resistance against the occupying power is not prohibited under international law, but rather, it is supported by certain international law rules. However, there is no subjective right to resistance (and, in fact, as we will see below, the occupying power can legitimately react to acts of resistance).

The first point to address is whether Hamas's actions can be configured as an act of resistance against the occupying power. It would be hard to question that the breaking of the land blockade on the Gaza Strip – through which the occupation is maintained – is an act of resistance against the occupying power. On the other hand, it cannot be argued that the massacre of Israeli civilians could be an act of resistance. It is impossible to postulate any possible connection between such atrocities and a legitimate fight for the end of occupation. To argue that resistance against the occupying power is permitted under international law does not mean that said resistance is permitted 'with every means', as unfortunately affirmed by the title of a recent essay (Hammouri).

The word 'resistance' describes an empirical reality that does not correspond to a formal notion in international law, neither in *jus contra bellum* nor *jus in bello*. It describes actions involving the use of force which, like any action involving the use of force, must comply with the relevant rules of *jus in bello*. Even if resistance is not prohibited by international law, as it is argued, it must follow the rules of international humanitarian law. It is undisputed that Hamas' attacks on the 7 October violated almost every possible rule of international humanitarian law.

International humanitarian law distinguishes international armed conflicts from non-international armed conflicts. Most scholars (e.g., Cassese, p. 420; Akande, pp. 46-

47; Longobardo 2018a, pp. 226-229; Dannenbaum; contra, e.g., Annoni, pp. 1006-1009) and Israeli jurisprudence (e.g., Targeted Killings case, para. 18) classify the armed conflict between Israel and Gaza as an international armed conflict. For the majority of commentators, such classification derives from the fact that the Gaza Strip is an occupied territory. The attempt of applying simultaneously two different legal regimes – international armed conflicts for the relations between the occupying power and the local population and that of non-international armed conflicts to the use of force – simply does not make a sound legal argument.

From the information and data gathered until today, it appears clear that Hamas' actions violate *jus in bello* in what concerns the launch of indiscriminate attacks (prohibited by Art. 51(4) of the First Additional Protocol of 1977); direct attacks on civilians (prohibited therein, Art. A1(1) and (2)); attacks launched for the sole purpose of sowing terror (prohibited therein, Art. 51(2)); and hostage-taking (prohibited therein, Art. 75(2)(c), and by Art. 34 of the Fourth Geneva Convention). Further violations will probably come to light (there are, for example, testimonies of sexual violence and torture on civilians).

The rules just mentioned are part of customary law and their violation gives place to criminal responsibility for war crimes, both under international humanitarian law (so-called "serious breaches" regime; Art. 85(5) API) and under the Statute of the International Criminal Court (Art. 8 ICC Statute). There are also grounds for considering Hamas' members responsible for crimes against humanity, as there is no doubt that killings, extermination, deportations, illegitimate detentions and forced disappearances occurred in the context of a widespread and systematic attack against the Israeli civilian population, as part of a well-defined plan (ibid., Art. 7). Therefore, it can be concluded that Hamas' actions are illegal under international humanitarian law and its members are likely responsible for war crimes and crimes against humanity (see also Dannenbaum, Ohlin, Dill). This clarification is important since the Prosecutor of the International Criminal Court has opened an investigation into alleged international crimes committed in Palestine or by Palestinian citizens. International law in no way justifies, supports, or legitimizes what Hamas has committed against Israeli civilians.

3. Israel's Response Violates International Law

If there is no doubt that a state – even an occupying power – has the right, as well as the duty, to defend its civilians, we must be careful to identify the correct normative source concerning Israel reaction to the Hamas' attacks on the 7th of October.

In certain fora, references are often made to a right to self-defense by Israel. The International Court of Justice, however, in the well-known 2004 Advisory Opinion on Legality of the Wall in the West Bank, stated that Israel cannot invoke the Art. 51 of the UN Charter against attacks coming from occupied territory (para. 139). Contrary to what has been supported by some commentators (e.g. Sarzo; Schmitt), I agree with

the Court's conclusion (as I explain in Longobardo 2018a, chapter 3). Indeed, a situation of wartime occupation is a situation of armed conflict where the *jus contra bellum* was already activated (in our case, with the Six Day War of 1967). It follows, therefore, that the occupying power cannot invoke *jus contra bellum* in relation to any operation conducted in occupied territory. It follows that legitimate defense pursuant to Art. 51 of the UN Charter «has no relevance» for Israel's reaction, to quote the Court.

Israel's duty to defend civilians derives from the law of occupation. The cornerstone of the administration of the occupying power is Art. 43 of the Hague Regulations of 1907. According to that provision, the occupying power has the duty to restore and ensure, as far as possible, public order and civil life in occupied territory. This rule has been interpreted by national and international case law as the basis of the occupying power's entitlement to protect its citizens in occupied territory (see references in Longobardo 2018a, pp. 170-171). This creates an important counterweight to the lack of an obligation of obedience on the part of the local population: international humanitarian law does not prohibit resistance but the occupying has the authority to repress it. Clearly, the occupying power's right to protect its citizens also applies to citizens of the occupying power outside the occupied territory, as in the case of the Hamas attacks on Israel.

While there is therefore no doubt that Israel can and must defend its citizens, international humanitarian law binds all Israel's actions. *Jus in bello* applies to all parties in a conflict without distinction (as clarified by para. 4 of the preamble of the First Additional Protocol of 1977; see generally Koutroulis). Even assuming – in opposition to what has been argued – that the Israeli action is legitimate under Art. 51 of the UN Charter, the International Law Commission has clarified that self-defence cannot be used as an excuse to justify violations of *jus in bello* (Draft Articles on the Responsibility of States for Internationally Wrongful Acts of 2001, Commentary on Art. 21, para. 3). It is therefore necessary to verify whether the Israeli actions, currently underway and for legitimate defensive purposes, are in accordance with jus in bello.

Israel announced the Gaza Strip' s total siege. The Gaza Strip was already in extremely precarious living conditions due to the blockade of land, sea and airspace already imposed by Israel (see extensively Report of the Special Rapporteur Michael Lynk on the situation of human rights in the Palestinian territories occupied since 1967, 15 July 2020, paras. 53-71). The Israeli Defense Minister also declared: «I have ordered a complete siege on the Gaza Strip. There will be no electricity, no food, no fuel, everything is closed. […] We are fighting human animals and we are acting accordingly." (translation by The Times of Israel). Massive bombings followed, of what appear to be civilian housing compounds in the Gaza Strip, with the collapse of the electrical infrastructure serving the entire area (including hospitals).

It is the best understating of the law (see Dannenbaum, with references to broader works by the same author on the subject) that the policy of blocking the entry of foodstuffs would constitute a violation of the prohibition on starvation pursuant to international humanitarian law (Art. 54 of the First Additional Protocol 1977). The Supreme Court of Israel has indeed confirmed such obligation as customary law binding Israel's actions with respect to the Gaza Strip (see Jaber Al-Bassiouni Ahmed, paras. 13-15). This rule is strengthened, in situations of occupation, by the obligation for the occupying power to provide food and medical supplies to the population of an occupied territory if it is not sufficiently supplied pursuant to Art. 55 of the Fourth Geneva Convention of 1949. Said rule does not include any exception.

As it is known, starvation is a war crime under the Statute of the International Criminal Court (Art. 8(2)(b)(xxv)). Therefore, it should be concluded that the total blockade allows and promotes starvation. The intentionality of such conduct is reinforced in light of the absence of a clear humanitarian corridor and the recent bombing of the Rafah crossing between the Gaza Strip and Egypt, the only portion of the border not controlled by Israel (see also Dill).

At this point, the question is to understand how international humanitarian law allows Israel to react against Hamas, without compromising the Gaza Strip's civilian population protection under international humanitarian law. Hamas fighters do not enjoy the protection afforded to civilians because they are combatants or because they can be classified as civilians taking part in hostilities (Dannenbaum). However, their presence in the Gaza Strip does not undermine the civilian character of the civilian population in the Gaza Strip (Art. 50(3) of the First Additional Protocol 1977: «The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character»). Furthermore, according to Art. 50 of the Hague Regulations of 1907 and Art. 33 of the Fourth Geneva Convention, the occupying power cannot subject the entire population of the occupied territory (Gaza Strip, in this case) to a collective penalty or punishment for an act committed by some of its members (Hamas).

This applies both in relation to the ban on starvation and in relation to the civilian losses and damage to civilian property that are occurring due to the massive Israeli bombings. Israel is required to observe the principles of precaution, distinction, and proportionality in any military operation in the Gaza Strip. Some violations of these principles may entail individual responsibility for war crimes. The increasing numbers of Palestinian civilian losses reported in recent days seem to indicate the lack of Israeli will to follow IHL rules, as denounced by some Special Rapporteurs of the Human Rights Council and various NGOs (Dill again). The International Criminal Court also has jurisdiction in this area, since the alleged crimes committed on the Palestinian Territory fall within the territorial jurisdiction of the Court and are currently being examined by the Prosecutor.

On this point, at the moment it is not possible to conclude further, since the relevant rules of international humanitarian law apply according to the relevant information which the attacker (in this case, Israel) was aware at the time. As far as today, the relevant information is not currently available in order to allow a better assessment (see Wuerzner's criticisms). In any case, it is generally accepted, at least in light of the work of commissions of enquiries dispatched by the Human Rights Council, that when there is a lack of information on the part of the attacker, for the purposes of State responsibility, it is possible to infer that violations occurred from the known facts (Longobardo, forthcoming).

Finally, for the sake of the argument, it is important to recall that international humanitarian law is no longer governed by the principle of reciprocity. The statement by the Israeli Energy Minister on 12 October is therefore surprising and worrying: «no electrical switch will be lifted, no water hydrant will be opened and no fuel truck will enter until the Israeli hostages are returned home. Humanitarian for humanitarian». The rules of *jus in bello* protect fundamental interests of the international community as a whole (e.g., Condorelli and Boisson de Chazournes; Benvenuti) and, as such, apply regardless of whether the opposing party applies them or not. The statement made by the Israeli Minister seems to allude to the concept of war reprisals, considered illegal by Art. 51(6) of the First Additional Protocol and, according to some chambers of the Criminal Tribunal for the Former Yugoslavia, also illegal under customary law (see Prosecutor v. Zoran Kupreški?, IT-95-16-T, 14 January 2000, para. 531; Prosecutor v. Milan Marti?, IT-95-11-R61, 8 March 1996, para. 10). On the same line of argument, the International Committee of the Red Cross, based on the opposition of some States, concluded in 2005 that the ban on reprisals against protected persons outside of hostilities is customary law, and that there is also strong trend towards the crystallization of a similar prohibition on reprisals against civilians involved in the conduct of hostilities (Henckaerts and Doswald-Beck, pp. 519-523). In my view, from the fact that the protection of civilians is a fundamental interest of the international community as a whole, we must necessarily conclude that State A cannot violate international humanitarian law in response to the behavior of Atate B, since such violation would affect all the members of the international community (see Longobardo 2018b, pp. 396-397). It is no coincidence that the International Law Commission concluded that the adoption of countermeasures cannot violate the norms of international humanitarian law regarding reprisals (Draft Articles on the Responsibility of States for Internationally Wrongful Acts of 2001, art. 50(1)(c)). The Israeli Energy Minister's argument therefore does not seem to be convincing.

4. Conclusions

In the last decades and in the last days, the debate on the Israeli-Palestinian conflict has been poisoned by a certain hooligans' attitude – even by some scholars: "my team is right; no, mine is right". The present conflict presents a series of horrors that we internationalists call violations of international law and international crimes. From

what is currently known, Hamas fighters appear to be responsible for war crimes and crimes against humanity for the atrocities committed in southern Israel. This fact, however, does not make attacks against defenseless Palestinian civilians permissible. In light of the available data, Israel appears to be responsible for the violation of international humanitarian law (and possibly war crimes). The prohibition on killing civilians, on taking hostages, the criminalisation of starvation, the prohibition on indiscriminate attacks, should be considered as cornerstones of humanity. The horrors we have witnessed in recent days should invite us to reflect on long-term solutions for the Israeli-Palestinian crisis and on the need to defend the principles and rules of international law (especially international humanitarian law), in the interest of civilian victims.