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Operation Cast Lead: Drawing the Battle Lines of the Legal Dispute

by Dr. Avril McDonald*



Courtesy of UN Photo, by Jean-Marc Ferre

Participants during the ninth Special Session of the Human Rights Council concerning the situation in Gaza.

INTRODUCTION

ON SATURDAY, 27 DECEMBER 2008, ISRAEL COMMENCED OPERATION CAST LEAD, A MILITARY OPERATION DIRECTED AGAINST TARGETS WITHIN THE 360 KM² GAZA STRIP. The first phase of the operation consisted of aerial bombardment. Then, on 3 January 2009, Israeli Defense Forces (“IDF”) launched a ground invasion. The operation ceased on 18 January 2009 following unilateral declarations of ceasefire, first by Israel and then Hamas. By then more than 1,400 Palestinians had been killed, approximately 700–900 of whom were estimated by human rights organizations to be non-combatants. Hamas rocket attacks against southern Israeli towns killed thirteen Israeli civilians.

This note does not opine on what precipitated Operation Cast Lead or who was to blame for starting it, nor does it offer definitive conclusions regarding the lawfulness of the military operations of either side. The aim, rather, is to identify the contours of the legal framework in which the events of 27 December–18 January can be assessed.

As the claim has been made that Operation Cast Lead was preceded and precipitated by a breach of the *jus ad bellum*, i.e., an act of aggression, the paper begins with a brief discussion of the relationship between *jus ad bellum* and *jus in bello*, i.e., international humanitarian law (IHL). It then examines whether the events of 27 December–18 January can be characterized as an armed conflict and, if so, which kind; who are the parties; and what is the applicable law. The piece concludes by offering some preliminary remarks on certain aspects of the conduct of the hostilities, which raise *prima facie* concerns.

JUS AD BELLUM AND ITS RELATIONSHIP WITH JUS IN BELLO

Israel and Hamas have accused each other of committing acts of aggression, and characterized their respective responses as acts of self-defense. In several statements, Israel has claimed that Operation Cast Lead was an exercise of its right to self-defense, offering as evidence of Hamas’s aggression its rocket attacks on Israel and refusal to extend the June 2008 truce. Hamas, in turn, has cited as evidence of Israeli aggression the fact that in November 2008 Israel sent soldiers into the Gaza Strip to destroy a tunnel, which it said Hamas was using to smuggle weapons into the territory. During that operation, Israel killed six people. Hamas claimed these actions breached its truce with Israel and responded by firing more than 35 rockets into Israel. Declaring that these rocket attacks breached the

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truce, Israel launched Operation Cast Lead with the averred intention of stopping the rocket attacks.

An examination of the credibility of the respective claims of self-defense, and the myriad legal issues arising from them, exceeds the scope of this contribution. In any event, in order to assess the lawfulness of their use of force under *jus in bello*, it is not necessary to determine whether or not Israel or Hamas committed an act of aggression, whether either of them had a right of self-defense, or whether any such right was exercised lawfully or might itself have violated *jus ad bellum*. Here, it is only important to recall that while *jus ad bellum* and *jus in bello* are related bodies of law insofar as both are concerned with regulating the use of armed force, *jus in bello* remains autonomous from *jus ad bellum*.

The converse is not, however, the case: where an initial use of force is sufficient to trigger an armed conflict, the legality of the initial and all subsequent uses of force must be determined under the rules of *jus ad bellum* and *jus in bello*. It is conceivable that a particular use of force could be lawful under *jus ad bellum* and yet unlawful under *jus in bello*, and it is equally possible that an unlawful resort to force could comport with the laws of war. Moreover, even a state (or potentially a non-state actor) with a right of self-defense could exercise it in such a way as to breach *jus ad bellum* and *jus in bello*, for example by using force that was disproportionate under *jus ad bellum* and *jus in bello*.

Israel has conflated the two bodies of law: it has countered accusations that it was in breach of *jus in bello* with claims that it was acting in self-defense. Parties to an armed conflict are not absolved of their duty to comply with the laws of war even where a right to self-defense exists. Equally, a breach of *jus ad bellum* (or indeed *jus in bello*) by an opposing party does not justify or excuse breaches of *jus in bello*.

THE EXISTENCE OF AN ARMED CONFLICT AND ITS CHARACTER, THE PARTIES AND THE APPLICABLE LAW

It would undeniably be desirable to characterize the situation in Gaza during the three weeks of Operation Cast Lead as an armed conflict, in order to ensure that the civilian population of Gaza could benefit from the widest possible protection of international law. The law of armed conflict aims primarily to protect civilian populations from the worst effects of hostilities. The law imposes obligations on the parties to conduct their military

operations so as to minimize impact on persons who are not participants and on civilian objects, including basic infrastructure.

Yet, it would be rash to automatically assume the existence of an armed conflict in this case, or to presuppose the character of any such conflict. As this section indicates, while there are legal arguments supporting the existence of an armed conflict, there are also legal obstacles to characterizing the hostilities as either one of the two types of armed conflict recognized by IHL: an international armed conflict or a non-international armed conflict.

While not every breach of *jus ad bellum* by one state against another automatically results in an international armed conflict, any resulting armed conflict would be deemed international. The character of an armed conflict preceded by an armed attack involving a state actor and a non-state actor, however, is not obvious. The character of an armed conflict resulting from the use of force by a state against a territory, which it occupies, but which was not previously sovereign, is also ambiguous.

NO ARMED CONFLICT TOOK PLACE

The first possibility is that no armed conflict took place in Gaza between 27 December 2008 and 18 January 2009. Whether or not there was a breach of *jus ad bellum* by Hamas or Israel before the launching of Operation Cast Lead, it can be argued that any such breach did not trigger an armed conflict under the law. While force which was separate and distinct from the force regulated by *jus ad bellum* was used by Israel and various Palestinian non-state actors, such use of force had a legal character other than armed conflict.

INTERNATIONAL ARMED CONFLICT

The second possibility is to consider that the situation during the three-week period in question was an armed conflict of an international character. Several legal arguments can be offered to support this view.

The first is that Palestine is a state, albeit one that has not been universally recognized. This view is not without some legal justification. Whether one applies the criteria of statehood set out in the Montevideo Convention or the more widely accepted constitutive theory of statehood, Palestine might be considered a state. With regard to the Montevideo criteria, Palestine has a permanent population; defined territory, albeit one whose borders

are disputed (but this is true for many states); a government; and some capacity to enter into relations with other states. Even if the more onerous constitutive theory is applied, Palestine might be considered a state as it has been recognized by almost 100 states, including two Security Council members. This is far more than have recognized Kosovo, for example. In 1998 the Palestine National Council proclaimed the State of Palestine, but this could be regarded as much a political act as a legal one.

Arguments against the existence of a Palestinian state include that its control over its own borders is limited, as is its capacity to enter into international relations. In addition, its existence as a state is hotly disputed, including by the majority of Security Council members. The search for a two-state solution suggests that the existence of a Palestinian state is an aspiration rather than a fact.

An alternative possibility would be to argue that the conflict was international on the basis of Article 1(4) of 1977 Protocol Additional to the Geneva Conventions and Relating to the Protection of Victims of International Armed Conflicts (Protocol I). Article 1(4) extends the application of the law of international armed conflict to situations that are not traditional armed conflicts between two states but ones in which ‘peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, . . .’¹ The problem with this approach is, even if a Palestinian right of self-determination is recognized—and there is widespread support for this view, not the least of which is the acknowledgement, even by Israel, of a two state solution—the customary law status of Article 1(4) is disputed.

A third argument is that the events between 27 December and 18 January were just the latest phase in an ongoing international armed conflict, which did not end with the June 2008 truce.

NON-INTERNATIONAL ARMED CONFLICT

If the situation in Gaza between 27 December and 18 January cannot be considered an international armed conflict, this does not imply that by default it must be a non-international armed conflict. According to common Article 3 of the 1949 Geneva Conventions Relative to the Protection of Civilian Persons in Time of War, a non-international armed conflict takes place on the territory of a High Contracting Party.

The situation in this case is unusual insofar as the Gaza Strip (and the OPT as a whole) is not a High Contracting Party to the Geneva Conventions (although the Palestinian Liberation Organization did try to accede to the Conventions), nor is it the territory of a High Contracting Party. Even if it is occupied territory—an assertion, which Israel disputes—that does not make it Israeli territory. While common Article 3 does not elaborate on the conditions precedent to the existence of a non-international armed conflict, the Commentary thereon of the International Committee of the Red Cross (ICRC) does identify some possible criteria.

Amongst the ICRC criteria that could be problematic in this case is a requirement that “the Party in revolt against the *de jure* Government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention.”² Israel is not the *de jure* government of the Gaza Strip even if it remains the *de jure* occupying power, and while Hamas clearly has an organized military arm it is not organized



Courtesy of Juan J. Samper

Gaza

along the lines of a regular military force but in a more cellular manner. Notwithstanding such legal obstacles, it does not seem unreasonable to consider the conflict to have been at least a non-international armed conflict to which common Article 3 applied, bearing in mind the view of the ICRC Commentary that ‘the scope of application of the article must be as wide as possible,’³ and that the criteria offered to distinguish armed conflict from mere acts of banditry are suggestive only.

The situation was certainly factually distinguishable from a riot or an unorganized and short-lived insurrection. If the situation can be considered a conflict at all, arguably at a minimum, common Article 3 can apply without having to determine the exact nature of the conflict, given that the Article applies to all armed conflicts regardless of their character. And, as already noted, it would be in the interest of the civilian population of Gaza to consider the law of armed conflict as the main legal paradigm regulating the conduct of Operation Cast Lead and the military operations conducted by Hamas, *inter alia*.

WHO ARE THE PARTIES?

Determining the parties here might seem obvious—Israel and Hamas. But, the issue is more complex than that. On the one side, there seems to have been one state party: Israel. On the other side, there is at least one *prima facie* non-state actor: Hamas. Hamas, however, is not the only armed group operating on the territory of Gaza. Others include Islamic Jihad, the Democratic Front for the Liberation of Palestine, and the Popular Front for the Liberation of Palestine. Some of these groups claimed responsibility for some of the rockets fired at Israel. The relationships between them and Hamas will have to be legally determined in ascertaining the responsibility of Hamas for hostile acts carried out against Israel from the territory of Gaza.

PROTECTION OF THE CIVILIAN POPULATION

The applicable IHL will depend on how the conflict is characterized. Yet, regardless of whether any conflict is found to be international or non-international in character, protection of the civilian population from the worst effects of the hostilities would

be legally guaranteed. For example, the direct targeting of the civilian population and the use of indiscriminate and disproportionate force are equally prohibited under the law applicable in either international or non-international armed conflict, as a matter of treaty and/or customary law.

As noted by the Appeals Chamber of the Yugoslav Tribunal in the Tadic Case,⁴ a “gradual extension to internal armed conflict of rules and principles concerning international wars has also occurred as regards *means and methods of warfare*” [emphasis in the original].⁵ Moreover, the 2005 study by the ICRC of customary IHL found that almost all of the rules regulating the conduct of hostilities in an international armed conflict also apply in non-international conflicts.⁶ The customary law status of all of the important rules, especially the principle of distinction between combatants and civilians, means they would bind Israel even where it is not a party to them.

Also applicable during an armed conflict, as *lex generalis* to IHL’s *lex specialis*, are those parts of human rights law that have not been derogated from.⁷

ASPECTS OF THE CONDUCT OF THE HOSTILITIES RAISING *PRIMA FACIE* CONCERNS

The high civilian death toll of the hostilities provoked calls for an independent investigation. Charges of violations of humanitarian law, and even war crimes, have been leveled against both sides. It would be premature for this short contribution to pronounce on the issue, but it is salient to identify some aspects of the conduct of the hostilities giving rise to particular concerns. Almost all of the potential violations are of the principle of distinction, combined with the principle of precaution. Here, space permits reference to three aspects of the conduct of the hostilities which raise red flags: the deliberate targeting of protected civilians and civilian objects; indiscriminate attacks, including the disproportionate use of force; and, the use of human shields.

DELIBERATE TARGETING OF PROTECTED CIVILIANS

Both Israel and Hamas have tacitly admitted to *prima facie* deliberate targeting of civilians enjoying the presumption of protection under IHL. Israel claimed the primary objective of Operation Cast Lead was to destroy Hamas’s ‘infrastructure of terror’. To this end, the IDF targeted not only people and objects that are military objectives by nature, such as members of armed groups and weapons stores, but also persons employed as part of the Hamas civilian infrastructure, in particular the police and police stations. A particularly controversial example of this was Israel’s missile strikes on police headquarters in Gaza City during a graduation ceremony for cadets. Israel has also made clear its policy to target anyone who held a leadership position within Hamas.

Hamas also attacked non-combatants. On its website, it has claimed responsibility for firing rockets and mortars against mostly military objectives (in the main, military bases but also ‘Zionist soldiers’) but also at Israeli civilians.⁸

Prima facie, IHL divides the population into two groups, namely combatants and non-combatants (civilians), and only a person who is a combatant is targetable at all times during an armed conflict. Anyone who is not a combatant is by default a civilian, and such a person enjoys immunity from attack, unless and for such time as he takes a direct part in hostilities.⁹

It is obvious, though, that IHL implicitly distinguishes between four categories of persons for the purposes of targeting, of which two consist of members of organized armed forces. These two are (1) combatants who are members of states’ armed forces and (2) ‘quasi’ or so-called unlawful combatants who in relation to non-international armed conflicts are members of the organized armed forces referred to in common Article 3 or the ‘dissident armed forces or other organized armed groups’ mentioned in Article 1 of Additional Protocol II. For the purposes of targeting, arguably the members of category 2 can be assimilated with the lawful combatants in category 1, i.e., they can be targeted at all times, unless they are *hors de combat* or have laid down their arms. The third category (3) consists of civilians who take a direct part in hostilities; and the fourth category (4) contains civilians who do not take a direct part in hostilities. The civilians in category (3) are targetable only if and when they are preparing for, carrying out or returning from an act of direct participation in hostilities. The members of category (4) are never directly targetable, although some casualties among this category are acceptable during a lawful attack on a military objective provided they are not disproportionate in relation to the military necessity of the strike.

The lawfulness of targeting anyone will thus depend on which category they fall into and what they were actually doing at the time they were targeted. Thus, a major challenge for any person or body charged with investigating potential war crimes carried out in Gaza during the period in question by either side will be to determine whether the persons (and objects) targeted were in fact lawful military objectives and, in particular, whether persons enjoying the presumption of protection had in fact lost it, either through being combatant members of organized armed groups or civilians taking a direct part in hostilities.

From the perspective of Israel’s strikes, the controversy really concerns members of Hamas other than persons with a permanent military function. This includes persons who might have had a civilian function within the organization, and persons who exercised some form of state or semi-state but non-military function for the administration, without necessarily being members of Hamas. Operation Cast Lead clearly targeted the Hamas civilian as well as military infrastructure. This meant that many of the soft (personnel) targets were enjoyed at least the presumption of protection. The onus was therefore on Israel to ascertain in each and every case whether the person or object targeted had lost its protected status. Here, it should be noted that, *prima facie*, a police station by its nature is not a military objective, and it could only be transformed into one if through its location, purpose or use it made an effective contribution to military action and if its total or partial destruction, capture or neutralization, in the circumstances at the time, offered a definite military advantage.¹⁰

As far as the Hamas strikes are concerned, *prima facie* its direct attacks on IDF forces or objects or against Israeli civilians participating in hostilities would not be prohibited under IHL. However, its attacks against protected Israeli civilians not participating in hostilities would constitute a *prima facie* violation of IHL.

INDISCRIMINATE ATTACKS

The hostilities provoked allegations of indiscriminate attacks by both sides. Indiscriminate attacks are prohibited by both

conventional and customary IHL applicable in both international and non-international armed conflicts.¹¹ Most suspect incidents seem to have combined a lack of discrimination with a lack of precaution, as required under Article 57 and 58 of Additional Protocol I. Examples include the manner in which white phosphorous was used by the IDF, and Qassam or Grad rockets used by Hamas. Although the use of white phosphorous is not prohibited but only restricted under Protocol III to the 1980 Certain Conventional Weapons Convention, it was deployed by Israel against objects enjoying the presumption of protection (e.g., schools) and in a manner which did not seem to comport with the principle of precaution in attack and of protection of civilians against the effects of attacks. Hamas and other armed groups launched unguided rockets at Israel with no apparent concern for where they would land.

Disproportionate use of force is a type of indiscriminate attack. Under IHL, a disproportionate attack is one “which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”¹² A disturbing aspect of Operation Cast Lead were the on-the-record threats by several Israeli political leaders that disproportionate force would be used in Gaza. Such assertions are not in themselves proof that disproportionate attacks were in fact carried out: proportionality must be judged and measured in relation to each and every attack. However, where disproportionate uses of force can indeed be shown, such statements may serve as evidence of criminal intent. What needs to be stressed is that the proportionality of an attack is measured in relation to its military necessity. Proportionality is not based on any equivalence of numbers injured or killed between the parties.

USE OF HUMAN SHIELDS

Amongst myriad other aspects of the hostilities arousing concerns are accusations by each side against the other of the use

of human shields to discourage targeting of military objectives. Israel claims that the higher Palestinian casualties are partially attributable to Hamas’s use of human shields. While it is premature to pronounce on the veracity of these allegations, it is worth noting that as a legal argument regarding proportionality, this is unfounded. The use of human shields by a party to an armed conflict is a violation of IHL and a war crime in both international and non-international armed conflicts.¹³ Yet, it in no way relieves the opposing side of its responsibility to factor this into its proportionality calculations and to take all necessary precautions to minimize harm to the civilian population.¹⁴

CONCLUSION

Civilians were not the only casualties of this three-week war. Throughout the conflict over Palestine, and no less so during Operation Cast Lead, both sides have waged a fierce propaganda war. Among the misrepresentations of IHL propagated during Operation Cast Lead were the following: an act of aggression justifies or at least excuses violations of IHL; the obligation to observe IHL is subject to reciprocity—that one party may not have observed the principle of distinction allows the other party to ignore it; and difficulties in distinguishing between persons who participate in hostilities and those who do not relieves a party from the obligation to give persons enjoying the presumption of civilian status the benefit of the doubt.

The military operations that took place in the Gaza Strip demonstrated the difficulties of compliance with IHL in asymmetrical wars, but also the acute necessity of doing so. The foundational principles of IHL that ensure the protection of civilians caught in the middle of armed conflicts took a severe beating in this conflict. In order to restore the rule of IHL, it will be necessary for some of the potential violations of IHL to be impartially investigated and for those responsible to be held criminally responsible. The price of doing nothing is diminution of the value of IHL in protecting civilians during armed conflicts. **HRB**

ENDNOTES: Operation Cast Lead

¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I) art. 1(4), June 8, 1977 U.N.T.S. 3 [hereinafter Protocol I Additional to the Geneva Convention].

² INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC), COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949 at 35, ref. 0203, Dec. 30, 1952.

³ *Id.* at 36.

⁴ *Prosecutor v. Tadic*, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 96–127 (2 Oct. 2, 1995).

⁵ *Id.* at ¶119.

⁶ See JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (Cambridge Univ. Press 2005).

⁷ For the applicability of human rights law in the Occupied Territories, see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. ¶ 108 (July 9).

⁸ See, e.g., Press Release, Ezedeem Al Qassam Brigades, Al Qassam Brigades fired eight rockets at Sderot settlement, (Nov. 14, 2008) available at <http://www.alqassam.ps/english/index.php?action=showsta&sid=1282> (lasted visited April 25, 2009).

⁹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I) art. 51(3), June 8, 1977 U.N.T.S. 3.

¹⁰ See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 52(2) June 8, 1977, 1125 U.N.T.S. 609.

¹¹ See Protocol I Additional to the Geneva Convention, art. 51(4); ICRC *supra* note 2, at rule 12.

¹² Protocol I Additional to the Geneva Convention, art. 51(5)(b).

¹³ See Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV), art. 28, Aug. 12, 1949, 75 U.N.T.S. 287; Protocol I Additional to the Geneva Convention, arts. 50(3), 51; ICRC, *supra* note 2, at rule 97.

¹⁴ Protocol I Additional to the Geneva Convention, art. 51(8).