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An Evaluation of the Israel-Gaza Conflict Under
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Israel's Defence

An Evaluation of the Israel-Gaza Conflict Under Public International Law

Introduction

On the morning of 7 October 2023, numerous Hamas terrorists invaded Israeli territory. At the same time, several thousand missiles were fired from the Gaza Strip towards Israel. More than 1,200 people were killed and more than 4,000 wounded, most of them civilians. In addition, the attackers took more than 240 people hostage and abducted them to the Gaza Strip.¹

In response to the attacks, Israel has been launching air strikes targeting Hamas's infrastructure. According to the Palestinian health authority, which is controlled by Hamas, so far more than 11,000 Palestinians have been killed. This information, however, cannot be independently verified.² It is likely, though, that apart from a number of supporters of the terrorist organisation, the vast majority of the victims have been uninvolved civilians. Since late October, the Israeli military has also been carrying out ground operations in the Gaza Strip.

As we know, the political situation in the Middle East is highly complex, and the legal situation is no less intricate. Nevertheless, it is possible to identify certain cornerstones of public international law which define the legal framework of current events and allow us to make recommendations for political action.

Ius ad Bellum

The prohibition of the use of force in Art. 2 (4) UN Charter and its equivalent in customary public international law forbid the use of military force between states. Palestine's status as a state, however, remains a contested issue. Although 139 states of the 193 member states of the United Nations currently recognise the State of Palestine, under public international law this recognition is merely of declaratory value. It carries no constitutive effect. There are other de facto characteristics that define statehood and that are of decisive importance here, namely territory, people and government, and it is doubtful whether the Palestinian Authority exercises the latter. Accordingly, the United States, Canada and most European countries – including Germany – do not regard Palestine as a state.³

* Editing status: 13 November 2023.

1 ZDF 2023.

2 Ibid.

3 Wissenschaftliche Dienste des Deutschen Bundestages [Research Services of the German Bundestag] 2019 (with further references).

Nevertheless, the current *ius ad bellum* regime gives states the right of self-defence, also against non-state attackers, as per Art. 51 UN Charter and customary public international law.⁴ Given the attack's scope and the degree of coordination it displayed, there is no doubt that Israel's extensive military operation, including the use of ground forces, against Hamas is covered by the right of self-defence. The same applies to Israeli responses to attacks from Lebanese and Syrian territory.

The right of self-defence is limited only by the principle of proportionality. Often it is difficult to assess whether a self-defence measure meets the requirements of necessity and proportionality.⁵ However, the planned destruction of the Hamas terrorist organisation seems to be proportionate in view of the repeated attacks that have taken place in recent years and the sad peak of some 1,200 people being killed in one single day.⁶ This is all the more true if, as at present, Hamas continues its missile attacks on Israel.

Ius in Bello

We must clearly differentiate between *ius ad bellum* and *ius in bello*, the latter of which is also referred to as international humanitarian law.⁷ Regardless of who is the offender and who is the legitimate defender, *ius in bello* governs the conduct of armed forces in an armed conflict. There is no doubt that the events unfolding in Israel and Gaza amount to an armed conflict – but not to a war, because a war can only take place between states recognised under public international law, and only if it is declared by one of these states.⁸ In this respect, Prime Minister Netanyahu's declaration that Israel was at war is irrelevant under public international law.⁹ Apart from having certain political implications, it merely serves to justify specific measures, such as the mobilisation of about 360,000 reservists, under national constitutional law.¹⁰

It is questionable, however, whether this armed conflict is an international or a non-international conflict. It is argued, for example, that Israel, despite its withdrawal from the Gaza Strip in 2005, is still an occupying power in the area once belonging to Egypt and occupied by Israel in the Six Day War of 1967. Accordingly, the current fighting would have to be regarded as an armed conflict taking place between the 'occupying power and rebel or insurgent groups – whether or not they are terrorist in character –', thus amounting to an international armed conflict 'that crosses the borders of the state'.¹¹ If we assume that Israel is no longer an occupying power, it would only be fighting against terrorists who are not linked to any state. In that case, we would be talking about a non-international conflict.¹²

⁴ For the current discussion in the public international law community, cf. Dau 2018; Bajrami 2022.

⁵ Cf. Randelzhofer/Nolte 2012: marginal 59 ff.

⁶ The current military operations, however, will only result in the elimination of Hamas's military capabilities.

⁷ Given the law's concept and content, it is more accurate to call it the law of armed conflict, cf. Haslinger/Stadlmeier 2021: marginal 2408 ff.

⁸ Cf. Art. 2 common to all Geneva Conventions.

⁹ Cf. Prime Minister's Office 2023.

¹⁰ Coster/Cornwell 2023.

¹¹ Cf. Supreme Court of Israel 2006.

¹² Schmitt 2023.

Whether the current armed conflict between Hamas and Israel is classified as an international or non-international conflict is relevant for the purpose of establishing which specific rules of international humanitarian law apply in this case. However, the respective rules only differ in some areas. The basic principles of international humanitarian law apply to both types of conflict. These principles provide, for example, that uninvolved civilians must not be harmed deliberately, that indiscriminate attacks are prohibited, and that civilians must be spared as much as possible. International humanitarian law basically oscillates between two principles: military necessity on the one hand and the need to protect civilians and other persons requiring protection on the other. They are balanced by the principle of proportionality, which is more accurately a prohibition of exercising excessive force. This principle prohibits attacks in which the human losses among the civilian population are disproportionate to the expected concrete and immediate military advantage – and are thus excessive. Accordingly, not every civilian injured or killed is evidence of a war crime. Although it comes as a bitter realisation, the dictum of the doyen of the *ius in bello*, Yoram Dinstein, cannot be disputed: “War is not a chess game, collateral damage can be lawful.”¹³

As a result, air strikes that also hit civilian targets are not *per se* a violation of public international law, especially if the buildings targeted were misused for command posts or weapons arsenals, such as the mosque destroyed by Israel in the West Bank.

However, the complete – but so far, it seems, only partially implemented – siege of the Gaza Strip, which was announced by Israel immediately after the Hamas terrorist attacks, halting the supply of electricity, water, fuel, food and everything else, does pose legal problems.¹⁴ Sieges *per se* are not illegal under international humanitarian law. A complete siege, however, is only permitted under strict conditions and as a temporary measure,¹⁵ whereas any collective punishment against the civilian population, including starvation, is explicitly prohibited.¹⁶

This might be one of the reasons why Israel resumed the small-scale water supply in the southern part of the Gaza Strip shortly afterwards,¹⁷ and a few days later, the Egyptian border crossing with the Gaza Strip was opened for the limited delivery of humanitarian aid. At the end of October, Israel also announced its intention to facilitate the delivery of aid to the Gaza Strip. Moreover, it has pointed out that 90 percent of the water consumed came from the Gaza Strip itself and that there was currently no shortage of food in Gaza.¹⁸ Nevertheless, the ongoing siege remains something that should be closely monitored from an public international law perspective in the further course of the conflict.¹⁹ In the end, it is to be hoped that the Palestinian civilian population in the Gaza Strip will soon be provided with more humanitarian aid.

However, it is also beyond doubt that by its blockade of Gaza, Israel is not trying to harm the civilian population but Hamas. This is highlighted by the fact that Israel has

¹³ Dinstein 2011.

¹⁴ Turak et al. 2023.

¹⁵ Lauterbach 2023.

¹⁶ As mentioned in an interview with Stefan Talmon: von Hein 2023.

¹⁷ United Nations Office for the Coordination of Humanitarian Affairs 2023.

¹⁸ ORF 2023.

¹⁹ Accordingly, the Prosecutor of the International Criminal Court Karim Khan pointed out that impeding relief supplies as provided by the Geneva Conventions may constitute a crime within the Court's jurisdiction, cf.: FAZ 2023.

repeatedly called on the civilian population to leave the northern Gaza Strip. Although not required by public international law, the Israeli armed forces even warn inhabitants of attacks on their buildings allowing not only them but also enemy combatants to escape in time.²⁰

In an ongoing conflict, the biggest challenge is to assess whether the available information is valid, especially if one party to the conflict is a terrorist organisation. The latter became evident after the Al-Ahli Hospital in Gaza was hit by a rocket, which was most likely accidentally launched by Palestinian Islamic Jihad, an ally of Hamas.²¹ In any event, some restraint is required when it comes to classifying ongoing military operations as war crimes²² since sweeping statements must neither replace the assessment of legal issues nor the identification of the actual circumstances of the individual case.

International Criminal Law

The terrorist attacks by Hamas on Israel on 7 October are a different matter. They were clearly aimed at the civilian population and do not only constitute serious violations of international humanitarian law, but also fall within the scope of several crimes under international criminal law. Pursuant to Art. 8 Rome Statute of the International Criminal Court (ICC Statute), the wilful killing of civilians of all ages and gender, the mutilation, torture, rape and unlawful detention of soldiers and the taking of civilian hostages are war crimes.

In addition, we must assume that the attacks also constitute a crime against humanity. According to Art. 7 ICC Statute, this is the case if individual acts, such as murder, are ‘committed as part of a widespread or systematic attack directed against a civilian population’. This is likely to have been the case with the attacks of 7 October, which claimed the lives of about 1,200 Israelis. It is also possible that the attacks fall within the complex and narrow scope of genocide in accordance with Art. 6 ICC Statute. The killing of members of an ethnical group represents the material element of the crime; this requirement is met. The mental element of genocide, which is narrowly interpreted in rulings in international criminal law, requires the ‘intent to destroy, in whole or in part,’ a protected group as such. In this context, destruction means ‘physical destruction’.²³ According to the rulings of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, the intent to physically destroy a protected group may also be proven by objective evidence in an overall assessment.²⁴ In view of Hamas’s consistent brutality evident in the killing of entire families during the attacks on 7 October and the public call to indiscriminately kill Jews as it appears in the Hamas’s Charter²⁵, we can assume that the group is willing to destroy

²⁰ Die Welt 2023: 2.

²¹ Although so far it has not been conclusively determined who is responsible for the explosion, the currently known evidence suggests that it was caused by a misfired rocket by *Palestinian Islamic Jihad*, an ally of Hamas, cf.: Baig et al. 2023.

²² Similarly put by Sari 2023.

²³ Werle/Jessberger 2020: marginal 869 ff.

²⁴ Ibid., marginal 936.

²⁵ Cf. Pfahl-Traugher 2011.

Israel. This means that the criteria for three of the four so-called core crimes that international criminal law seeks to punish are met.

Israel is not a signatory to the ICC Statute, whereas Palestine has been a signatory since 2015, in spite of the fact that its statehood has been contested. According to the International Criminal Court's perspective – which is not without its problems – the crucial question is whether Art. 12 ICC Statute is applicable to Palestine and not whether it is a state as laid down in the general rules of public international law. Consequently, this would allow the Court to pursue the massacres committed by Hamas terrorists on Israeli territory. Actions carried out on Palestinian territory – irrespective of whether they were carried out by Israelis or Palestinians – generally speaking also fall under the jurisdiction of the International Criminal Court.²⁶

Conclusion

In view of sometimes irritating calls for a so-called differentiation or contextualisation of the events currently unfolding in Israel and Gaza, two essential aspects must be pointed out very clearly: The Hamas terrorist organisation has no right to attack Israel, while Israel, without a doubt, is exercising its legitimate right of self-defence. In addition, the Hamas terrorist organisation – being a *hostis humani generis*, like Islamic State – has deliberately killed and abused uninvolved civilians, committing crimes under international criminal law. In doing so, it has not only been willing to accept casualties within the Palestinian civilian population, it has even deliberately provoked them by deploying units in civilian facilities. The armed forces of the democratic state of Israel are not aiming to harm uninvolved civilians. On the contrary, they are trying to avoid damage to the civilian population as much as possible.

In the light of the foregoing, it is more than unfortunate that Germany merely abstained from voting on the Gaza resolution of the UN General Assembly. With 121 votes in favour, 14 against and 44 abstentions, the resolution calls for an 'immediate, durable and sustained humanitarian truce' for the Gaza Strip as well as for the 'continuous, sufficient and unhindered' provision of lifesaving supplies and services and the release of all civilian hostages. The resolution does neither explicitly condemn the terrorist attacks by Hamas nor acknowledge Israel's right of self-defence.²⁷ Germany's attempt to justify its abstention by claiming it was striving to prevent a conflagration in the region is not really convincing²⁸, since the resolution's failure to clearly name the perpetrator of the terrorist attacks and the legitimate defender will not help to prevent a conflagration in the Middle East. In fact, quite the opposite is the case – this might even create a breeding ground for terrorist propaganda.

²⁶ This opinion is shared by Karim Khan, Prosecutor of the International Criminal Court, cf.: Deutsch 2023.

²⁷ United Nations News 2023.

²⁸ As stated by the German Federal Minister for Foreign Affairs Annalena Baerbock, cf.: RND 2023.

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