

Operation Cast Lead and International Law

Robbie Sabel

A combination of factors has led to particular interest in issues of international law in the study of Operation Cast Lead. These factors include the amorphous political status of the Gaza Strip; the problem of application of the rules of war to asymmetrical warfare between a modern military and urban guerrillas; the role of the UN Security Council; the involvement of European and other states in attempts to resolve the dispute; the intensive involvement of NGOs in Gaza; the widespread coverage by the international press and particularly Arab TV; the increasing involvement of judicial discourse in Israeli society and the IDF; and attempts by Palestinian organizations and their supporters to brand Israel's campaign and tactics as illegal.

The article that follows reviews several international law issues that are particularly related to the operation in Gaza.

Self Defense against Urban Guerrillas

International law and the UN Charter recognize the inherent right of states to use force in self defense against an armed attack. The right applies even if the attack is by irregular forces. Following 9/11, the UN Security Council explicitly recognized the right of states to self defense against terrorist attacks. However, if the area from where the attack occurred is under the military occupation of the state being attacked, then it could be argued that the applicable law is that of the Fourth Geneva Convention, which deals with the rights of the occupying

Dr Robbie Sabel, visiting professor of international law at the Hebrew University of Jerusalem and at Tel Aviv University, and former legal advisor to Israel's Ministry of Foreign Affairs

power to arrest and take legal action against violators of the law. If Gaza was under Israeli military occupation prior to the campaign, then Israel, according to this argument, should have simply arrested the Hamas rocket firing teams.

Occupation, however, requires effective control; only then do the laws of occupation apply. Clearly there was not sufficient Israeli control, if control at all, to allow police type actions. The legal status of Gaza is not clear and in the absence of effective control and ability to carry out police type actions, Israel correctly invoked its right to use force in self defense against attacks emanating from Gaza. The applicable law is thus the law of armed conflict.

Proportionality in the Use of Force?

To justify the claim of self defense, the use of force must be in proportion to the attack. A minor border incident does not warrant a full armed conflict in response. Proportionality can be measured not only against an individual attack but against an accumulation of attacks if they were part of a pattern. Regarding Operation Cast Lead, the Hamas attack by thousands of rockets clearly justified a response of armed attack.

Once armed conflict develops, international law does not require proportionality of response. A state defending itself may strive to cause disproportionate damage to its enemy's military targets and capabilities.

Once parties are in armed conflict, the rule of proportionality is no longer applicable or relevant, except as regards civilian casualties. The rules of war do not impose a game type of equilibrium. In an armed conflict a party is entitled to use superior force to destroy the enemy's armed forces and military capabilities and not only to respond in kind. The UN Security Council authorized the US and its allies to defeat Saddam Hussein's military, not just to force it to vacate Kuwait. An aggressor state or organization must take into account that it is liable to meet a potential victim state that will use "disproportionate force" to defend itself.

Application of Laws of War to an Asymmetrical Conflict

Hamas has not denied that its attacks were targeted at Israeli towns; such attacks are a violation of the laws of war. Furthermore Hamas used civilians to shield its combatants, which is also a violation of the laws of war. There are reports that the Hamas leadership headquarter

was located in the basement of a hospital, a further egregious violation. Reciprocity, which is normally an essential element of international law, did not exist in this conflict. Nevertheless, the IDF correctly saw itself as being bound by the laws of war in its conduct, notwithstanding the total disregard of these rules by its opponents.

Civilian Casualties

Where combat takes place in a built up area, civilian casualties are a tragic but inevitable consequence of a military operation. International law obligates that if there are civilians close to military targets, efforts must be made to minimize civilian casualties, and the civilian casualties may not be disproportionate to the military advantage to be gained. Hamas frequently fired from civilian areas. In the Gaza operation, the IDF repeatedly warned civilians of impending attacks, using leaflets and mass telephone messages. Civilian casualties apparently constituted about one third to one half of all casualties. It does not appear that any other military has ever taken such steps to minimize civilian casualties, nor is there any other similar conflict on record in a built up area where the percentage of civilian casualties in relation to combatant casualties was lower than in Operation Cast Lead.

Civilian Targets

A civilian target, including a mosque (or church or synagogue) that is used for military purposes such as storing weapons and ammunition, loses its immunity from attack and becomes a legitimate target. Any other rule would lead to granting an illogical advantage to an enemy hiding weapons in such a building. Israel had information that a certain hospital was used for hiding the leading staff of Hamas. Nevertheless Israel refrained from attacking the hospital because of the civilian casualties that would be caused by such an attack. The civilian police in itself not a military target, but where the police is part of the military establishment, as it was under Hamas, it becomes a legitimate target.

Phosphorous Shells

Like every military in the world, Israel uses phosphorous shells in flares and smoke shells, and for marking targets. Such shells are standard equipment in all NATO militaries as well as the Arab states'

armed forces. They are of course dangerous to handle when burning but absolutely legal. The International Committee of the Red Cross has confirmed that there was no evidence that these shells were used in Gaza in any irregular way.

Supplies to the Civilian Population in Gaza

Classic laws of law permitted total embargos, as was done during the Second World War. Modern laws prohibit starvation of civilians as a means of warfare. Israel took the unprecedented step of allowing the large scale delivery of food and medical supplies from its territory into Gaza while actual fighting continued. Furthermore, Israel applied a unilateral ceasefire of some three hours every day to ensure distribution of such food and medicine.

Iranian Responsibility

A state selling weapons is not normally legally responsible for the results of their use. However, Iran trained Hamas operatives and financed and supplied rockets to Hamas, knowing that the rockets were to be used against civilian targets. This could well entail legal responsibility by Iran for the actions of Hamas.

Conclusion

The principal legal criticism of Israeli tactics in Operation Cast Lead appears to revolve around the issue of proportionality. It could be questioned what is a proportionate response to an attack of some four thousand Hamas rockets targeted at civilian towns over a period of three years. Beyond that, however, it is relevant to emphasize that once armed conflict develops, international law does not require proportionality of response. A state defending itself may indeed strive to cause disproportionate damage to its enemy's military targets and military capabilities. Let the attacking state or organization beware.