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the Law of War and member of International Law Association, the *Netherlands Society of International Law,* and of the Netherlands Military Law Society *(Militair Rechtelijke Vereniging)*. Together with Kinga Tibori-Szabó, he has authored "*The Use of Force and the International Legal System*" (CUP, forthcoming in December 2023).

The ongoing armed conflict in Gaza raises many questions, issues and emotions relating to the background of the conflict, the almost unprecedented savagery of the attack by Hamas on southern Israel on 7 October and the widespread destruction and deprivation caused by the intense bombardment of Gaza and denial of adequate relief to alleviate the condition of the civilian population- to name but several of the most poignant issues related to the conflict. Within that debate, the question is asked by some whether Israel can invoke the right of self-defence as a legal basis for its operations in Gaza. Related to that question is the argument that since Gaza is (according to some experts) an occupied territory, or has a status equivalent to being occupied, Israel may not rely on self-defence as a justification for its armed response to the attack by Hamas of 7 October 2023 (here) . This, in turn, hinges on the relevance and interpretation of the 2004 Advisory Opinion by the International Court of Justice on the Legal Consequences of the Construction of a Wall on Occupied Palestinian Territory and its application to the present conflict. According to one train of argument, the Court's treatment of self-defence in that case renders a plea of self-defence by Israel in response to an attack originating from Gaza inapplicable.

This short contribution will examine the relevance of that case and its application to the present reliance on self-defence by Israel to the conflict in Gaza. In it, I will argue that Gaza is not and has not been under the effective control of Israel for many years; that the premise in the ICJ ruling that self-defence is inapplicable when a State exercises effective control over the territory where the attack originated barring exceptional circumstances is therefore irrelevant to the present situation in Gaza and that there is no bar to the exercise of self-defence in response to an attack by a non-State actor, as the Court opined in its 2004. However, I will also point out that even assuming Israel has a right to exercise self-defence, this in no way absolves it from the duty to respect international humanitarian law and international human rights law in the conduct of its operations and the treatment of the civilian population in Gaza. Likewise, the rights of both Israel and the Palestinian people to security and self-determination are not affected by the manner in which the present conflict was initiated or by the way it is being conducted by both the parties to it.

Is Gaza under the effective control of Israel?

Article 42 of the Hague Regulations of 1907 gives the generally accepted definition of occupied territory: “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”. Clearly, the definition requires that there is a military presence by the occupying power on the territory which is occupied and requires further that the occupier is capable of exercising control over the territory it has placed under occupation. While the military presence need not necessarily be continuous and omni-present throughout the territory, it is hard to see how territory where the occupier has no military presence whatsoever- other than as a result of conducting extensive military operations to establish such a presence and exercises no civil or military authority over the population- can qualify as an occupation in the sense of that definition. Nevertheless, many organizations and experts continue to qualify Gaza as an ‘occupied territory’, including various branches of the UN, the European Union and the ICRC. Hamas nonetheless takes the position that Gaza is no longer occupied (here).

This is based largely on the premise that Israel maintains effective control over Gaza by virtue of its control over Gazan airspace and territorial waters, its control over all but one of the entry points into Gaza, its control over the supply of electricity and other basic amenities to the territory and its general military and technological superiority. While all the abovementioned points are true to a greater or lesser extent, it stretches the notion of “effective control” beyond the breaking point to argue that Israel really is in effective control over a territory it cannot enter- except by conducting bombardments by air or artillery, or by conducting large scale military operations to establish temporary or longer-term control over part or all of the territory. The fact that Israel can cut supplies of essential goods and services, cut off most access to the outside world, carry out air raids and conduct larger scale operations in Gaza is indicative of its military superiority and ability to blockade or besiege Gaza almost at will. But blockade and besiegement of a territory do not amount to occupation or exercise of effective control on the ground in Gaza any more than they did in say Leningrad between 1941-1943 when German forces surrounded the city, blocked access from outside and could bomb and shell it at will for most of the period in question. There may be some merit in holding up the legal fiction that Gaza is occupied for the purpose of applying certain provisions of humanitarian law to protect the population and reiterating the fact that the population of Gaza, alongside the population of the West Bank (which is still clearly under Israeli occupation), are entitled to exercise the right of self-determination through the establishment of an independent sovereign State in the context of what is referred to as the “two State solution” within the territory of the former mandate of Palestine. But the important point here is that Gaza is not under the effective control of Israel (and has not been for many years). If it were, why would a major military offensive involving the bulk of the IDF (including most of its reservists) conducting large scale operations over weeks and perhaps

months be necessary to "eradicate" the control that Hamas exercises on the ground in Gaza? So whatever designation one wishes to apply to Gaza, one that clearly does not fit is that it is under the effective control of Israel- barring a major military effort that may take weeks to accomplish and has cost thousands of lives and undoubtedly will cost many thousands more before it is accomplished- if that is in fact even feasible.

2004 Advisory Opinion

In its 2004 Advisory Opinion, the ICJ devoted two short paragraphs to the question of whether self-defence could apply to justify the construction of a wall (or barrier, or fence, depending on who is describing it) on occupied Palestinian territory, ostensibly as a means of preventing infiltration by persons set on committing acts of violence in Israel. It started by quoting Article 51 of the UN Charter "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations until the Security Council has taken the measures necessary to maintain international peace and security". It then went on to jump to a conclusion, not reflected in the text of Article 51, namely that self-defence applies only in the event of an attack being conducted by or attributable to a State. That limitation is one that is not to be found in either the text of Article 51 or the preparatory work leading to its adoption. Although much State practice in the period following the adoption of the Charter until 2001 was ambivalent regarding the exercise of self-defence in response to attacks by non-State armed groups, the practice since then- along with ample indications of a growing acceptance of reliance on self-defence in response to attacks by non- State armed groups over a period spanning some two decades- makes such a limitation increasingly untenable. In any case, for those interested, the arguments of a colleague and myself regarding the reasons why self-defence can be applicable to attacks by non-State actors can be found here.

The Advisory Opinion then went on to point out that Israel exercises effective control over the territory where the wall was constructed (the 'wall' is located in the West Bank, which was and still is under Israeli military occupation) and that since the security threat that the construction of the wall was supposed to address originated from territory under effective Israeli control and the threat was not directed or controlled from outside the territory (as was the case in UN Security Council resolutions 1368 and 1373 relating to the 9-11 attack on the World Trade Center and Pentagon in 2001), the right of self-defence was inapplicable to the situation the wall was supposed to address (here).

There is general agreement that self-defence applies when an armed attack originating or controlled from outside the territory of the State that is the target of the attack, or from outside territory under its effective control. It is reasonable to assume that self-defence does

not normally apply when the attack originates on the target State's territory unless it is controlled from abroad. But to simply transfer what the ICJ said in relation to a situation where it was clear that Israel exercised effective control over the territory where the threat originated and apply it in a totally different context is less than a persuasive use of the case as authority for determining whether the right of self-defence could apply to an attack originating from a territory which is not under effective control. The situation in Gaza when the attack of 7 October 2023 took place bears no resemblance whatsoever to the situation the Court was addressing in its advisory opinion – and the statement of the Court relating to the inapplicability of self-defence as a justification for the construction of a security wall/barrier in the West Bank is itself irrelevant to the question whether self-defence is applicable to the attack by Hamas on Israel on 7-10- 2023. That should be determined on the basis of whether the use of force by Hamas originated from territory outside Israel or territory under its effective control and whether it meets the threshold of an armed attack under Article 51 and related customary law. The answer to those questions is that Hamas conducted the attack across an international frontier/demarcation line separating Israel from Gaza; that Gaza was not under the effective control of Israel when the attack took place; and that the attack was by any yardstick serious enough to be deemed an 'armed attack' under Article 51, thereby opening the possibility that Israel could invoke the right of self-defence in response to it

Conclusions

Needless to say, the fact that Israel may rely on the right of self-defence as a legal basis to conduct operations against Hamas and preclude the possibility of recurring attack from the same source does not absolve either Israel or Hamas from their obligations to respect international humanitarian law and where applicable, international human rights law in the conduct of their respective operations and treatment of persons under their control. Hamas has no right to slaughter and abduct civilians and Israel has no right to deny basic humanitarian relief, conduct operations in an indiscriminate manner- whereby thousands of civilians are killed or displaced or use denial of basic amenities as a means of pressure on Hamas to release the hostages it has taken -amounting to a form of collective punishment of the civilian population. Likewise, it is clear that self-defence is not a cure for the underlying disease. While neutralizing Hamas' military capability to conduct operations and repeat attacks on Israel is perfectly legal and probably necessary, it is no substitute for a long-term solution posed by the ongoing rounds of conflict and retaliation that have taken place since Israel withdrew from Gaza in 2007. Only a negotiated settlement ending in a viable two State solution offers any prospect of ending the seemingly endless cycle of violence in the relations between Israel and the Palestinians. Unfortunately, that seems a distant prospect at present.