The Jus ad Bellum and the War in Gaza

Gill, T.D.

DOI
10.1163/18754112-27030002
Publication date
2024
Document Version
Final published version
Published in
Journal of International Peacekeeping
License
CC BY

BRILL
NIJHOFF

JOURNAL OF INTERNATIONAL PEACEKEEPING
27 (2024) 249–263

JOUP
brill.com/joup

The *Jus ad Bellum* and the War in Gaza

T.D. Gill
Emeritus Professor of Military Law, University of Amsterdam, Amsterdam, The Netherlands
t.d.gill@uva.nl

Received 18 May 2024 | Accepted 24 October 2024 | Published online 20 December 2024

Abstract

This article examines some of the main arguments relating to the applicability and relevance of the right of self-defence to the ongoing war in Gaza. It starts by discussing the question whether Israel has the right to invoke self-defence in response to the attack by Hamas of 7 October 2023. Questions examined include the relevance of the *Wall* advisory opinion of 2004 to the invocation of self-defence, the status of Gaza as occupied territory in October 2007 and the applicability of self-defence to attacks by non-State actors. It then goes on to discuss how the principles of necessity and proportionality in the context of the exercise of self-defence regulate the application of force and whether Israel's conduct of the war meets those criteria and focuses particular attention on the impact of obstruction of relief supplies on the right of self-defence. This piece was submitted in May 2024 and does not examine or discuss events that have occurred since then.

Keywords

self-defence – Gaza – occupation – non-State actors – necessity – proportionality

1 Introduction

Much has been written on the question whether Israel has complied with the law of armed conflict (international humanitarian law, IHL/LOAC) in the conduct

Published with license by Koninklijke Brill BV | DOI:10.1163/18754112-27030002
 | ISSN: 1875-4104 (print) 1875-4112 (online)

of its operations against Hamas with comparatively little being said regarding the question to what extent Hamas has even made a pretence of compliance with that body of law. Likewise, there has been discussion on whether Israel can rely on the right of self-defence as its legal basis for using force in response to the attack conducted by Hamas on 7 October 2023, although this topic has received less attention than the question of compliance with IHL/LOAC has. Opinions are clearly divided between those who reject any applicability of self-defence as a justification for Israel's military operations in Gaza and those who argue that self-defence is, in principle, applicable to the situation created by the 7 October attack and operates alongside IHL/LOAC in determining what the level of acceptable force is in the context of the ongoing conflict in Gaza.[1]

The rejectionist body of opinion has advanced essentially three separate if somewhat related arguments underlying the position that Israel has no claim to the *invocation* of self-defence. Firstly, on the grounds that Gaza was under occupation and hence under the effective control of Israel at the time of the occurrence of the attack of 7 October. This argument hinges on the relevance of the advisory opinion of the International Court of Justice (ICJ) on the Construction of a Wall in Occupied Palestinian Territory of 2004 (*Wall* advisory opinion) to the situation in Gaza in October 2023 and the statement of the ICJ in that context that self-defence does not apply to territory under occupation amounting to effective control of the territory where the attack originated.[2] Secondly, some rejectionists base their position on a restrictive interpretation of the right of self-defence which takes the position that no right of self-defence exists in response to attacks by non-State actors and consequently the right of self-defence is inapplicable to an attack by Hamas

1 Among those denying that self-defence can be invoked are Francesca Albanese UN Special Rapporteur on Human Rights and occupied Palestinian Territories, a number of States speaking in the UN Security Council and the views of some authors. See Sydney Morning Herald Podcast 12 November 2023 on https://www.youtube.com/watch?v=q9fSeU-wrDg for the views of Dr. Albanese. For the views of various states see i.a. UN Official Records. S/PV.9439 16-10-2023. Experts contesting Israel's right to invoke self-defence include i.a. R. Wilde, on the Opinio juris blog dated 9/11/2023 https://opiniojuris.org/2023/11/09/israels-war-in-gaza-is-not-a-valid-act-of-self-defence-in-international-law/.
The opposite point of view arguing that Israel has a right to invoke self-defence is the position of another group of States, the EU and various authors. The position of the States supporting Israel's claim of self-defence can be found in the UN Security Council records referred to above and in subsequent sessions. The EU position can be found here https://www.eeas.europa.eu/eeas/israelpalestine-what-eu-stands_en An example of an author with a clearly stated position acknowledging the applicability of self-defence to the attack of 7 October is that by N. Tsagourias dated 1/12/2023 on the Articles of War blog here https://lieber.westpoint.edu/israels-right-self-defence-against-hamas/.

2 See Legal Consequences of the Construction of a Wall on Occupied Palestinian Territory Advisory Opinion of 9 July 2004, *ICJ Reports* (2004), p. 136, para. 139 at p. 194.

as a non-State actor. A variation on this position is that since Article 2(4) of the Charter prohibiting the use of force in international relations applies only between States and since Article 51 is an 'exception' to the prohibition, Article 2(4) cannot have been violated by Hamas as a non-State actor.[3] Therefore the right of self-defence as an 'exception' to the prohibition laid down in Article 2(4) cannot apply in relation to the attack by Hamas.[4]

I will discuss these points successively and advance arguments why I think that while there is room for some disagreement on the applicability of occupation law to Gaza and on the precise scope of the right of self-defence, there are no conclusive arguments that would rule out a plausible invocation of self-defence by Israel in response to the attack of 7 October. I will then go on to discuss whether Israel's campaign against Hamas in the weeks and months since the attack has met the requirements for the lawful *exercise* of the right of self-defence, including, in particular, the limits provided for in the principles of necessity and proportionality *ad bellum.* In that context I will discuss some points on the relationship between the law governing the use of force (*jus ad bellum*) and the law of armed conflict and explain why I think that while there are very strong indications that Israel's operations may have violated various rules of the law of armed conflict, this does not automatically imply that Israel's right of self-defence is terminated. I will then conclude by considering whether Israel's overall response to the attack of 7 October has met the criteria for lawful exercise of the right of self-defence.

2 Arguments Relating to the Possibility of Invoking Self-Defence in Response to the Attack of 7 October 2023

2.1 *Was Gaza Occupied and under Effective Israeli Control at the Time of the Attack?*

One important point that is related to whether Israel can invoke the right of self-defence hinges on the question of the occupied status of Gaza at the

3 The question of whether self-defence applies in principle to an attack by an autonomous armed group acting independently from control by a State is a longstanding one that predates the Gaza conflict. For comprehensive treatment of that question and references to sources both in support of and opposed to such application see eg. T.D. Gill and K. Tibori Szabo, 'Twelve Key Questions on Self-Defense against Non-State Actors', 95 *International Law Studies* (2019), 467 *et seq.*

4 This is the position taken by M. Milanovic in his post on the EJIL Talk blog dated 14/11/2023 see here https://www.ejiltalk.org/does-israel-have-the-right-to-defend-itself/. For a clear and convincing contrary opinion see the post by Tsagourias referred to in n. 1 above.

time of the attack by Hamas of 7 October 2023 and whether occupation or some variant thereof automatically amounts to effective control of a territory, thereby precluding any reliance on self-defence, at least according to the *Wall* advisory opinion of 2004. One would think the answer to this question is straightforward. Occupation is defined in Article 42 of the Hague Regulations on Land Warfare of 1907 as "territory which has been placed under the authority of the hostile army" and "occupation extends only to the territory where such authority has been established and can be exercised". This would clearly seem to imply that occupation is based on physical presence of a hostile army in the occupied territory which administers the territory under its control or at the least exercises a substantial degree of hierarchical supervision of the administering authority. That is certainly how it has been interpreted since this provision was adopted and throughout its history, with the sole possible exception of Gaza since the Israeli disengagement of 2005.[5]

This exception is based on a theory of "functional occupation" that takes the position that as long as the Occupying Power exercises some degree of control through the possession of technical and military superiority and a substantial degree of control over access, the territory remains under occupation. Supporters of this approach include various UN bodies, the ICRC and human rights organizations such as Amnesty International and Human Rights Watch, along with various experts. The functional approach in relation to Gaza relies on Israeli exercise of aerial and maritime surveillance over the territory, control of all entry and exit points except one and control of the public utilities such as the supply of drinking water and electricity to the territory, along with the use of electronic sensors on the perimeter which supposedly gave the Israeli army the ability to effectively monitor and control hostile activity, despite the lack of physical presence on the ground.[6]

However, the theory seems designed to fit one situation which makes it less than persuasive as an interpretation of a treaty provision such as Article 42 HR. Gaza is the one and hitherto only situation in which this theory has been applied. Clearly the situation in Gaza did not fit neatly into the ordinary meaning of effective control and the theory of functional occupation seems to be a way

5 On the question of the occupied status of Gaza see *inter alia*, Michael W. Maier, 'Israel-Hamas 2023 Symposium: The Question whether Gaza is Occupied Territory' on the Articles of War blog dated 15/12/2023, see here https://lieber.westpoint.edu/question-whether-gaza-occupied-territory/ His piece contains multiple references to supporters of both positions concerning the occupied status of Gaza.

6 The "functional occupation" thesis was first put forward by Aeyal Gross in a post on the *Opinio Juris* blog dated 23/12/2012 'Rethinking Occupation: The Functional Approach' see here http://opiniojuris.org/2012/04/23/rethinking-occupation-the-functional-approach/.

to try and get past that inconvenient fact. However, functional occupation does not necessarily amount to occupation in the sense of Article 42 HR since it lacks both the elements of physical control and exercise of administrative authority which are crucial in determining whether territory is occupied or not. It also doesn't reflect the fact that the only entity exercising administrative authority over Gaza prior to the attack of 7 October, was Hamas, which was obviously not doing so in order to further Israel's interests or working under Israeli supervision. To be sure, Israel had clear military superiority and had the technical means to monitor at least some of the activity within the territory and its control over key entry points and utilities placed it in a position to cut off regular access at will. But that is not necessarily the same thing as exercise of effective control. A territory can be encircled and subject to blockade of essential goods or services without being occupied. Likewise aerial superiority and maritime blockade do not add up to occupation. Nevertheless, there is a cogent case to be made that some obligations of Israel, arising from either IHL or human rights law or both, relating to the duty to ensure adequate provision of relief goods (food, drinking water, medical supplies) and other basic amenities are or in any case should be applicable to the situation in Gaza in view of the large degree of dependence of the population on the provision of such supplies, Israel's control of most of the access points and the longstanding relationship of Israel to the territory. But even if that were to amount to a status of some sort of qualified occupation, it does not automatically translate into effective control over the territory.[7]

The fact that Hamas has been able to gain access to a huge arsenal of rockets and other military grade weaponry, plan and execute a large scale attack on Israeli territory and that it has taken the IDF, the most formidable military force in the region, months of intensive fighting to (re)establish a substantial degree of control over much of Gaza would seem to clearly indicate that whatever level of control Israel exercised over Gaza prior to the attack of 7 October was significantly less than effective. It certainly does not amount to anywhere near the level of control Israel exercised and continues to exercise over the West Bank and East Jerusalem, which are and have been under continuous occupation since 1967. That is the level of control the ICJ was referring to in its 2004 *Wall* advisory opinion in which it made a brief reference to the lack of relevance of self-defence as a justification for the construction of the Wall in the West Bank to prevent infiltration into its territory.[8] The fact

7 On the residual obligations of Israel relating to Gaza see e.g. Hanne Cuyckens, 'Is Israel Still an Occupying Power in Gaza?' 63 *Neth. Int. L. Rev.* (2016), 275 at 290–293.

8 See n. 2 above.

that Gaza is part of the Palestinian territory which also includes all of the West Bank and East Jerusalem for the purposes of denoting which territories are subject to varying degrees of control by Israel and are entitled to exercise self-determination under G.A. Resolution 2625 through the establishment at some point of an independent State likewise does not necessarily amount to Gaza being under belligerent occupation at the time of the attack by Hamas, simply because other parts of the Palestinian territory remained under occupation.[9] Still less does it mean that whatever level of control Israel exercised at that time amounted to effective control in the sense the ICJ was referring to in its advisory opinion twenty years earlier based on an entirely different factual context than the one prevailing in Gaza in 2023. Hence, the relevance of the ICJ *Wall* Advisory Opinion to the question whether self-defence was excluded on the basis of supposed effective control by Israel over Gaza is far from being clear or dispositive of the question whether Israel is barred from invoking self-defence.

2.2 *Is Self-Defence Only Applicable at the State vs. State Level?*

There is a longstanding debate whether the right of self-defence is only applicable to attacks conducted by States. A restrictive view of self-defence held by a substantial number of States and a group of authors takes the position that attacks by non-State armed groups do not allow for the exercise of self-defence. This view is supposedly backed up by the ICJ in its rendition of self-defence in two of its decisions, including the previously mentioned *Wall* advisory opinion.[10] On the other side of the debate is a significant number of

9 GA Res. 2625 (1970) 'Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations', 24/10/1970 restated and elaborated the basic principles in the UN Charter including the right of external self-determination providing for the establishment of an independent State. It related this right to three situations, one of which is "alien occupation" which is an indirect reference to the occupied status of the Palestinian territories. This was reiterated in GA Res. 62/146 of 4/3/2008 'The Right of the Palestinian People to Self-determination' which referred back to Res. 2625. Resolution 2625 a.k.a. "The Friendly Relations Declaration" was referred to by the ICJ as an indication of the element of *opinio juris* in customary law in its 1986 decision on the merits in the *Nicaragua* case, see para. 191, p. 101.

10 Contrary to what is often stated as an indisputable fact, the ICJ has in fact never categorically ruled out the applicability of self-defence in response to an armed attack by a non-State entity. In the previously cited *Wall* advisory opinion (n. 3 above) it simply stated that infiltration from occupied territory where effective control exists into the defending State's territory does not qualify as a situation to which self-defence would apply. It expressly noted that such a situation did not equate to the type of situation that underlaid the UN Security Council resolutions 1368 and 1373 of 2001, although it

States from different regions and political alignments, a number of UN Security Council resolutions that refer to self-defence in relation to attacks conducted by non-State armed groups, the practice of several international organizations and the position of an appreciable number of authors who take the position that self-defence can be triggered by attacks conducted by non-State armed groups operating from outside the targeted State(s) and that neither Article 51, nor the customary component of the right of self-defence restrict the use of force in self-defence to the inter-State level.[11]

This is not the place to reproduce that debate. There are reasonable arguments on both sides, although I have taken the position, writing alongside my co-author Tibori Szabo in a number of recent publications, that self-defence is a customary primary right of States that was incorporated into the UN Charter at a relatively late stage of the negotiation process that provides for a State to exercise self-defence individually or collectively in response to an ongoing or manifestly imminent armed attack originating or controlled from outside the territory of the defending State(s), regardless whether the author of the attack is a State acting directly, or indirectly through a proxy, or the armed attack is conducted by an autonomous armed group that operates independently of any direct control by a State. Its exercise is subject to the customary principles of necessity, proportionality and immediacy *ad bellum* and additionally subject to a number of other conditions contained in the Charter and in customary law; primarily the duty to report the exercise of self-defence to the UN Security Council as soon as is practicable and to provide sufficient evidence of the authorship of the attack it is responding to when that is less than clear. While one can agree or disagree with the arguments put forward by either body of opinion in that debate, no fair and reasonable assessment can conclude that there is a clear and conclusive consensus that international law bars recourse to self-defence in situations where the author of the armed attack is not a State. There is simply far too much practice and legal opinion to the contrary to support such a conclusion. Consequently, it is open to a State to have recourse to self-defence in response to an armed attack

admittedly made an *obit*er remark that Article 51 provides for self-defence by a State against an attack by another State. Neither the text of Article 51, nor its drafting history support that statement. In the *Armed Activities* case (Democratic Republic of the Congo v. Uganda) of 2005, the Court stated that since the legal and factual circumstances for the exercise of self-defence by Uganda were not present, that there was therefore no need to pronounce on the question of the applicability of self-defence to attacks by non-State irregular forces (para. 147 at p. 223).

11 See n. 3 above. In that article we explore the contending positions on the applicability of self-defence to attacks conducted by non-State actors in depth.

by an autonomous armed group and it will depend upon the circumstances whether the recourse to self-defence is credible and is seen to be exercised in accordance with the legal principles governing its exercise.

Likewise, the fact that Article 2 (4) of the Charter prohibiting the threat or use of force in international relations is addressed to States does not mean that self-defence in response to an attack by a non-State actor is ruled out because self-defence must be construed simply as an "exception" to the prohibition contained in Article 2(4).[12] As an examination of the drafting history and the position of various authors demonstrate, self-defence is a primary right of States alongside its secondary status as a circumstance precluding wrongfulness in the law of international responsibility, and its exercise is governed by the conditions contained in the right itself which has dual legal basis in the Charter and in customary law. Neither the Charter nor customary components of the right of self-defence predicate its exercise on responding to a violation of Article 2(4) by a State. The right is triggered by the occurrence of an armed attack, not by a violation of Article 2(4) and its driver and limitations are contained in the principles of necessity and proportionality *ad bellum*. These relate to occurrence of an armed attack, the availability of feasible alternatives and the degree of force required to mount an effective defence to the attack and have no direct relationship to Article 2(4) or the law of international responsibility.

While self-defence may be a response to a violation of Article 2(4) in many cases, there is no reason to assume that Article 51 of the Charter was intended to serve exclusively as an "exception" to Article 2(4) any more than the collective security system of the UN is simply an "exception" to that provision. Both are built into the Charter and customary law set of rules and principles prohibiting the threat or use of force and providing for the use of force to maintain or restore international peace and security by the UN Security Council in response to any number of threats to or breaches of the peace, which may or may not constitute violations of Article 2(4), and to provide for the right of States to defend themselves in response to armed attack until such time the Council is able to exercise effective collective measures that can operate alongside or in place of the exercise of self-defence. Hence, there is no compelling and conclusive reason to exclude recourse to self-defence in response to an attack by a non-State armed group, either on the basis of a restrictive reading of Article

12 See *i.a.* the post by Tsagourias referred to in n. 1 above in which he gives convincing arguments why self-defence is not dependent on a violation of Article 2(4). For a treatment of the drafting history of Article 51 and its status as a pre-existing primary right of States at the time the Charter was negotiated and adopted see, *i.a.* T.D. Gill and K. Tibori Szabo. *The Use of Force and the International Legal System,* Cambridge Univ. Press (2023), 97–103.

51 or because self-defence is supposedly a simple adjunct to the prohibition of the use of force by States in the form of a legally sanctioned countermeasure to a violation of Article 2(4) of the Charter. Since the attack by Hamas constituted an armed attack originating from territory that was not under the effective control of Israel at the relevant time and there is no generally accepted bar to the invocation by Israel of the right of self-defence as such, there is no reason to conclude that Israel was precluded from invoking self-defence in response to that attack., I will now turn to the question of the function of the right of self-defence and whether Israel has exercised this right in conformity with the conditions pertaining to its exercise.

3 The Function of the *Jus ad Bellum* and Its Application in the Gaza Conflict

3.1 *The Function of the Right of Self-Defence and Its General Relationship to the Law of Armed Conflict*

Self-defence has a dual function in the context of regulating the use of force. Firstly, it provides a legal basis for resorting to the use of force by a State in response to an armed attack. In the absence of a credible claim to invoke self-defence, any unilateral use of force by a State against another State or across an international frontier or international demarcation line is per se unlawful. Secondly, it sets down permissible limits and objectives for the use of force through the framework of the principles of necessity, proportionality and immediacy *ad bellum.* A necessity of self-defence denotes the occurrence of or manifest threat of imminent armed attack to which no other feasible alternatives are available to ward off the attack and prevent the recurrence of renewed attack from the same author in the immediate future where such threat is credibly present. Proportionality in the context of self-defence refers to the requirement that self-defence must not exceed what is required under the circumstances to halt the attack and forestall renewed or recurring attack from the same author within the immediate future when there is a real threat of recurring attack. While it implies a balance between the scale of the attack and the measures taken in defence, it is primarily qualitative rather than quantitative in nature in that it lays down a requirement that the measures taken must not exceed what is required to mount an effective defence and is in any case not a manifestation of some variety of *lex talionis* providing for a comparison in the amount of harm inflicted by the defender in retaliation to the harm resulting from the initial attack. Immediacy has two facets. One is directly related to necessity in determining when recourse to self-defence

is permissible in response to an imminent threat of armed attack which is in the process of being undertaken but has not yet materialized. The other facet refers to a requirement to exercise self-defence within a reasonable timeframe subsequent to the occurrence of the attack, subject to conditions of reasonableness so as to differentiate it from punitive reprisal.[13]

Clearly the principles of necessity and proportionality *ad bellum* are only meaningful if they apply continuously throughout the recourse to force alongside other applicable bodies of international law, including, but not limited to the law of armed conflict. IHL/LOAC has the function of regulating hostilities alongside its other primary function of providing for humane treatment of persons directly affected by the conflict or in the power of the adversary party and has detailed rules regarding permissible means and methods of warfare and the targeting of persons and objects subject to attack. Considerations of necessity and proportionality *ad bellum* apply alongside it in certain aspects of targeting and in determining the permissible temporal and geographical scope of the application of force together with laying down the legitimate objectives of the use of force, thereby limiting it to what is required to meet those objectives which in relation to self-defence is to ward off and if necessary forestall renewed attack. Force which exceeds those limitations would be unnecessary and disproportionate and therefore would lack a legal basis. The separation of the *jus ad bellum* and the law of armed conflict is about equal application of the rules of IHL/LOAC to all parties in an international armed conflict (between two or more States) regardless of the justifications for resorting to force. Related to the principle of belligerent equality is the rule of combatant privilege providing for immunity of ordinary combatants from prosecution for engaging in what otherwise would be unlawful acts under domestic law, as long as they conduct themselves in accordance with the rules of IHL/LOAC. The separation of *ad bellum/in bello* law is therefore not about the exclusion of any other body of international law once an armed conflict is in progress. Hence the various bodies of applicable international law operate alongside each other within their respective spheres of application and form a coherent and in some cases interlocking system of obligations and prerogatives (sometimes referred to as belligerent "rights") which govern the resort to armed force and the conduct of hostilities during an armed conflict.[14]

In situations where self-defence is undertaken in response to an armed attack with substantial effects on the targeted State triggering a large scale and protracted armed conflict, the rules of IHL/LOAC will regulate the conduct

13 *Id.* 109–111.

14 *Id.* 317–320.

of hostilities at the tactical and operational levels while the principles of necessity and proportionality *ad bellum* will apply at the strategic level to set out the overall limits and objectives of the defending party. Those principles provide that force must be used to ward off the attack and forestall recurrence or continuation of the attack. Force which exceeds what is required under the circumstances to achieve that lawful objective would be excessive and no longer have a legal basis in self-defence. Self-defence is a right to conduct an effective defence against an ongoing, recurring or imminent attack as long as the necessity of self-defence remains operative. It is not a *carte blanche* to pursue other objectives that have no direct relationship to achieving that purpose.

On the other hand, IHL/LOAC rules relating to the conduct of hostilities provide that 'attacks' (synonymous with combat operations in IHL/LOAC) may only be directed at persons and objects subject to attack and thus constituting military objectives. It further provides that attacks directed against military objectives that would cause excessive harm to civilians and civilian property in relation to the concrete and direct military advantage anticipated at the time of the attack or which otherwise indiscriminately strike civilians and civilian objects and military objectives without distinction are prohibited. In addition, IHL/LOAC lays down a requirement that all feasible precautions must be taken to prevent or avoid as far as possible harm to civilians and civilian property in the conduct of operations. These rules apply in targeting specific military objectives, the overall military advantage of 'winning the war' has no bearing on whether an attack is permissible under IHL/LOAC. Hence a specific attack or series of attacks may violate the rules of IHL/LOAC on the conduct of hostilities without necessarily automatically amounting to force which exceeds the basic purpose of self-defence referred to above. It is also possible that a specific attack or operation might be conducted in conformity with IHL/LOAC targeting rules while lacking a legal basis or exceeding the limits of lawful self-defence. Consequently, the two bodies of law operate within their respective sphere of application, but any resort to force must conform to the requirements of both bodies of law to be lawful under international law as a whole. Nevertheless, despite the separate purposes and spheres of application of the two bodies of law, there can well be a degree of overlap in the way they operate to regulate and limit the use and application of force. So while not every violation of IHL/LOAC targeting rules will necessarily terminate the right of self-defence, methods of warfare which clearly amount to excessive force, or which otherwise significantly harm civilians without either being directed at obtaining any lawful military advantage or in any way contributing to a lawful

defence against attack will be unlawful under both bodies of law. We will now examine how this applies in the current conflict in Gaza.[15]

3.2 *Applying the Right of Self-Defence to the Conflict in Gaza: Has Israel's Conduct of the War Exceeded the Limitations to the Lawful Exercise of Self-Defence?*

There is a sharp division of opinion concerning the legality of the targeting methods used by the Israeli Defence Force which has resulted in large numbers of civilian casualties and widespread destruction of civilian dwellings, hospitals and the infrastructure inside Gaza. Many observers take the position that the degree of destruction and high number of civilian casualties amount to clear violations of IHL/LOAC which in some cases may well constitute war crimes. Others point to the way Hamas has used civilians and protected objects as a shield for its operations and the unavoidable risks associated with urban warfare as explanations for this degree of damage and the extremely high number of casualties In any case the extent of damage and the number of civilian casualties raise serious and legitimate questions regarding Israel's adherence to IHL/LOAC rules on the conduct of hostilities.[16] These questions are addressed elsewhere in this edition of the journal. Whether or not the level of destruction caused by the Israeli operations against Hamas has resulted in a disproportionate use of force in the context of the right of self-defence is a debatable question which is difficult to answer conclusively. As stated above, violations of the law of armed conflict that have no feasible connection to the purpose of responding to an armed attack and forestalling continued attack by the same actor would render continued exercise of self-defence unlawful, but at the time of writing that is not a conclusion that is self-evident. I wish, however, to focus on one specific question within the overall debate and how it relates to the question of whether Israel can continue to rely on self-defence as a legal justification for its ongoing operations, or whether it has crossed the line of permissible response- to what was and remains an almost unprecedentedly savage attack by Hamas on civilians and the taking of a large

15 *Id.* 320–325.

16 See e.g. the *Economist* 13/4/2023, 'Harsh Judgments: The IDF Stands Accused of Military and Moral Failures in Gaza', 33–34 and '"Who Is in Control" Questions Are Mounting about the Israeli Army's Use of AI in Gaza', 35–36; BBC Verify, Merlyn Thomas and Jake Horton, 'Six Months on How Close Is Israel to Eliminating Hamas?' 6/4/2024. See https://www.bbc.com/news/world-middle-east-68745681. An example of an expert who withholds judgment on whether the IDF has violated IHL/LOAC rules on targeting on the basis of the available evidence is Michael Schmitt, Israel-Hamas Symposium 2023 'Attacking Hamas Part II, the Rules' on the Articles of War Blog 7/12/2023, here https://lieber.westpoint.edu/category/israel-hamas-2023-symposium/page/4/.

number of hostages, ranging from infants to persons in their 80s, as a sort of human war booty on 7 October 2023. That question concerns the use by Israel of the access of relief supplies to the civilian population of Gaza as a method of warfare and as a bargaining chip in order to coerce Hamas into accepting Israeli terms on the release of hostages and for a ceasefire.

There is convincing evidence that the lack of access to relief supplies over a prolonged period of time has had a major negative impact on the civilian population of Gaza and that this is at least partially due to a deliberate policy on the part of Israel to use the provision of relief supplies as a means of pressure. The lack of food, adequate clean drinking water, medical supplies and other basic amenities is well documented and has been pointed out to Israel by its friends and foes alike. It has also resulted in widespread consternation in the way Israel has refused to open additional entry points for relief goods until after major pressure by its closest ally, in the way Israel has openly used the provision of relief supplies to advance its position on release of the hostages taken by Hamas and as a consequence of the targeting of relief convoys and aid workers on multiple occasions. The fact that during cease fire negotiations or during ceasefires that have been concluded, a significant increase in the amount of relief supplies has generally taken place is a strong indication that it is perfectly possible for Israel to ensure adequate relief supplies are admitted and made available to the civilian population whenever it so chooses. On the other hand it strengthens the argument that refusal to admit adequate supplies is a deliberate policy aimed at forcing Hamas and its supporters to make concessions.[17]

One hardly needs to point out that starvation of civilians as a method of warfare is prohibited and that prohibition applies equally to the denial of other essential goods to mitigate the suffering of an encircled and heavily bombarded population. But aside from its status as a prohibited method of warfare under IHL/LOAC, not to mention under international human rights law, it is also a method of warfare that makes no appreciable contribution to

17 There are multiple reports of the denial of adequate supply of relief goods and its impact on the civilian population in Gaza over a prolonged period of time since the outbreak of the conflict and the use of such deliveries as a means of coercing Hamas. These include observers from the UN, the ICRC, NGOs and individuals. A few examples will have to suffice: HRW and Oxfam 'Israeli Forces' Conduct in Gaza' 19/3/2024 https://www.hrw.org/news/2024/03/19/israeli-forces-conduct-gaza 'Famine Imminent in Gaza, Humanitarian Officials Tell Security Council, Calling for Immediate Ceasefire, UN Security Council Press Releases SC/15604, 27/2/2024 https://press.un.org/en/2024/sc15604.doc.htm; Atlantic Council, Lisandra Novo, 'Humanitarian Aid Cannot Be Weaponized, Gazans Are Depending on It', 18/10/2023. https://press.un.org/en/2024/sc15604.doc.htm.

the legitimate defence of Israel and as such can be considered to have exceeded the permissible limits to the exercise of self-defence. This is the result not of a temporary lapse or unavoidable consequence of warfare, but of a sustained and implacable refusal to make even a good faith effort to ensure adequate relief supplies are allowed into the territory over a prolonged period of time.[18] No one would deny that release of the hostages is a legitimate war aim of Israel, but the use of access to relief supplies as a means to bring this about is unacceptable under IHL/LOAC and under international human rights law. But more to the point in this discussion, it serves no legitimate purpose in the context of the exercise of self-defence in response to the attack by Hamas of 7 October and is therefore unnecessary and disproportionate in the context of Israel's reliance on self-defence and serves as a bar to continued exercise of that right until such time as Israel continuously, and without posing undue restrictions, delays or procedural barriers, makes and ensures adequate provision for the supply of all essential goods and services to the civilian population of Gaza, in the event a necessity of self-defence were still to be present.

4 Concluding Remarks

In the preceding paragraphs I have set out reasons why despite disagreements over the status of Gaza as occupied territory and the scope of the right of self-defence, Israel had a credible basis to invoke the right of self-defence in response to the attack of 7 October. It would defy the ordinary meaning of the term

18 Israel declared a total blockade of Gaza two days after the attack of 7/10/2023. Since then, the supply of relief goods and other basic amenities has varied between nothing for the first two weeks to a mere trickle in the following weeks until more substantial deliveries begin to arrive during the ceasefire that lasted for a week starting 24/11/2023. However, after the ceasefire lapsed, the supply of aid went back down dramatically and the population was experiencing a hunger crisis by late December. A month later the situation had worsened to famine conditions for some 570,000 persons. The situation continued to worsen through March into early April, despite air drops and a tragic and controversial attack on 1 April on an aid convoy of the World Food Kitchen agency bringing in supplies via a new sea route from Cyprus. Under strong pressure from the Biden Administration, the Israeli authorities finally agreed to allow a significant increase in relief shipments from early April onward. The entire chronology and record of arbitrary denial of goods is well documented. See *i.a.* ABC News 'Gaza Aid Timeline: How the Hunger Crisis Unfolded amid the Israel-Hamas War' at https://abcnews.go.com/International/gaza-aid-timeline-hunger-crisis-unfolded-amid-israel/story?id=109361183.
CNN News 'Anesthetics, Crutches, Dates. Inside Israel's Ghost List of Items Arbitrarily Denied Entry into Gaza' at https://edition.cnn.com/2024/03/01/middleeast/gaza-aid-israel-restrictions-investigation-intl-cmd/index.html.

"effective control" to conclude that because of the very arguable applicability of certain portions of occupation law and/or human rights law relating to the provision of adequate means of sustenance to the civilian population due to the particular circumstances relating to Israel's relationship to Gaza, this translated into exercising effective control over the territory at the time the attack took place. The facts since that attack speak for themselves and stand squarely in the way of concluding Israel possessed effective control over Gaza when it has yet to establish complete control over the territory after over half of year of intensive fighting. Likewise, while reasonable minds may differ over the scope of self-defence, there is equally no reasonable bar to Israel's right to invoke self-defence in the wake of an armed attack of the scale and intensity of that perpetrated by Hamas. I have also made a number of observations on the respective functions of the law relating to the use of force and the law of armed conflict and applied them to the situation in Gaza. In doing so, I have advanced arguments that while one or more violations of IHL/LOAC may not terminate Israel's right to rely on self-defence as the legal justification for its operations in Gaza, the persistent denial of adequate relief goods to the civilian population over a prolonged period of time has no relationship to the legitimate aim of defence against the attack of 7 October or the possibility of recurrence of that attack and that it therefore renders continued reliance on self-defence untenable until such time as it permanently abstains from continuing with using provision of relief supplies as a means of pressure on Hamas to meet some of its demands or as a form of collective punishment of the civilian population for its purported support of Hamas.

Of course, self-defence is not a panacea for the issues relating to Israel's security, much less for the problems of the region; only a viable two State solution involving an independent Palestinian State in all the territories Israel has occupied or continues to occupy since the 1967 War offers any prospect of a definite resolution of the much broader and longstanding situation relating to Israel and Palestine than the present conflict in Gaza. Nor do I have any illusion that my position on these questions will make an iota of difference to the further conduct of the war by either side, but if it has made a useful contribution to the ongoing debate on the role that international law can and should play in the context of regulating and where possible avoiding the use of force, then it has served its purpose.

Biographical Note

T.D. Gill is Emeritus Professor of Military Law at the University of Amsterdam and member of the editorial board of this journal.