

THE SITUATION IN ISRAEL AND GAZA: LEGAL ANALYSIS

1. Noting with great concern the events in Israel and Palestine since 7 October 2023, this paper provides an initial legal analysis of certain conduct undertaken by the armed forces of Israel and Hamas during the ongoing conflict. The deterioration of the humanitarian situation, the escalation of hostilities, and the rhetoric surrounding hostilities requires an immediate response from States. This legal analysis focuses on assessing potential violations of the core rules of International Humanitarian Law applicable in all types of armed conflict and assessing whether certain incidents as verified by reliable sources could potentially constitute international crimes. It then puts forth practical recommendations for States to prevent additional civilian casualties. The information provided herein is current as of 23 October 2023.
2. The actions of Israel and Hamas in the ongoing conflict are subject to regulation under International Humanitarian Law, which mandates adherence to fundamental principles notably, humanity, the distinction between civilians and those directly participating in hostilities, civilian objects and military objects, proportionality, precaution and military necessity. Additionally, certain obligations stemming from International Human Rights also apply in this context, including the prohibition of torture, taking hostages, and incitement to violence through racial hatred.¹

A. RELEVANT CONDUCT OF HAMAS

3. On 7 October 2023, the Islamic Resistance Movement (Hamas) initiated a large-scale attack on Israel, launching thousands of missiles from Gaza into Israel. Concurrently, armed groups entered Israel from Gaza, attacked police stations and exchanged gunfire with Israeli forces. Armed groups also attacked Israeli civilians resulting in a significant number of deaths and casualties. Members of armed groups from Gaza took hostages, including women, children and the elderly.² On the same day, members of armed groups from Gaza attacked the Supernova Festival, a public event attended by a large number of young people resulting in a large number of civilian deaths. Media reports have also highlighted an attack by armed groups from Gaza on the Kfar Aza kibbutz, in which, a large number of civilian deaths occurred, including women and children.³ At the time of writing, Hamas continues to fire indiscriminately hundreds of rockets into Israel. The number of people killed in Israel has reached 1,400 and at least 4,121 wounded.⁴
4. On 7 October 2023, Hamas's Al-Qassam Brigades top military commander stated, "We announce a military operation against the Israeli occupation, which comes in response to the continued Israeli crimes against the Palestinian people and violations at the Al-Aqsa Mosque."⁵ Palestinian Authority President Mahmoud Abbas reportedly stated that the "policies, programs and decisions of the Palestine Liberation Organization (PLO) are what represent the Palestinian people as the sole legitimate representative of the Palestinian people, and not the policies of any other organization."⁶

B. LEGAL ANALYSIS

5. The conduct by armed groups from Gaza may amount to the commission of war crimes under Article 8 of the Rome Statute of the International Criminal Court (the Rome Statute), including wilful killings, taking of hostages, outrages upon personal dignity, and intentionally directing attacks against civilians and civilian objects. Given the widespread and systematic nature of the acts targeting civilians, the conduct of members of armed groups from Gaza may amount to crimes against humanity under the Rome Statute, including the crimes against humanity of: murder, enforced disappearance, persecution, and other inhumane acts, including against those hostages taken back to Gaza.

¹ Human Rights Committee, general comment No. 29 (2001).

² Hamas has released the videos of some of the hostages, see for instance <https://www.wsj.com/livecoverage/israel-hamas-war-gaza-palestinians/card/hamas-releases-video-of-21-year-old-hostage-GmzQdRjYDOGVYqm2forQ>

³ <https://www.amnesty.org/en/latest/news/2023/10/israel-palestinian-armed-groups-must-be-held-accountable-for-deliberate-civilian-killings-abductions-and-indiscriminate-attacks/>

⁴ <https://reliefweb.int/report/occupied-palestinian-territory/hostilities-gaza-strip-and-israel-flash-update-16>

⁵ <https://hamas.ps/en/post/4967/Statement-by-Hamas-s-Al-Qassam-Brigades-top-military-commander>

⁶ <https://english.wafa.ps/Pages/Details/138321>

C. RELEVANT CONDUCT OF THE ISRAELI DEFENCE FORCES

6. In response to the attacks by armed groups from Gaza, Israeli Defense Forces (IDF) launched 'Operation Iron Swords,' a military operation. This has involved a severe bombardment of Gaza on an unprecedented scale— IDF reported to media on Thursday 12 October 2023 that it had dropped 6000 bombs weighing 4000 tons on Gaza since 7 October 2023.⁷ The airstrikes appear to have targeted civilians and densely populated areas including markets, schools, hospitals, mosques, and civilian convoys. They have caused significant damage to humanitarian services and infrastructure essential to the preservation of life in Gaza, including at least 18 facilities of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNWRA). Hospitals supported by Doctors Without Borders (MSF) and the World Health Organisation have also been affected by the bombardment, and health workers have been killed and injured.⁸ IDF has repeatedly launched airstrikes on the Palestinian side of Rafah gate, Gaza's sole border crossing with Egypt.⁹ These airstrikes have significantly disrupted the delivery of essential humanitarian aid to the Gaza Strip and hindered civilians from securing protection.
7. Highly inflammatory language at the highest levels of government preceded the military actions. Israel's Finance Minister Bezalel Smotrich stated "In war you have to be brutal... We need to deal a blow that hasn't been seen in 50 years and take down Gaza."¹⁰ Israeli Prime Minister Benjamin Netanyahu said in a nationally televised address: "What we will do to our enemies in the coming days will reverberate with them for generations."¹¹ Netanyahu warned people living in Gaza to leave as he vowed to turn parts of the territory "into rubble" in revenge for a "black day."¹²
8. The Israeli Defence Ministry ordered a "total blockade" of the Gaza strip, preventing the entry of food, water, medicine, fuel or electricity, and has to date, indicated it will not reverse this decision without the release of hostages.¹³ News media has reported that lifesaving equipment in Gazan hospitals will stop working, directly impacting patients.¹⁴ Major. General Ghassan Alian, Head of Coordination of Government Activities in the Territories (COGAT), stated: "Human animals must be treated as such. There will be no electricity and no water [in Gaza], there will only be destruction. You wanted hell, you will get hell."¹⁵ Israeli Defence Minister Yoav Gallant stated: "I have ordered a complete siege on the Gaza Strip. There will be no electricity, no food, no fuel, everything is closed. We are fighting human animals and we act accordingly."¹⁶ Israel Head of State President Isaac Herzog stated: "It's an entire nation that is responsible. It is not true this rhetoric about civilians not being aware, not involved. It's absolutely not true. They could have risen up [against Hamas]."¹⁷

⁷ <https://www.wsj.com/livecoverage/israel-hamas-war-gaza-strip/card/israeli-air-force-says-it-has-dropped-6-000-bombs-on-gaza-QK1aSnupiGqytMVO86PU>

⁸ <https://www.doctorswithoutborders.org/latest/israeli-airstrikes-kill-civilians-and-damage-msf-clinic-gaza>;
https://www.emro.who.int/images/stories/palestine/oPt-emergency-situation-report-issue_5.pdf?ua=1

<https://www.cbc.ca/news/world/health-workers-gaza-killed-1.6992828>

⁹ <https://www.ohchr.org/en/press-releases/2023/10/israeloccupied-palestinian-territory-un-experts-deplore-attacks-civilians>, <https://www.ohchr.org/en/press-releases/2023/10/un-expert-warns-new-instance-mass-ethnic-cleansing-palestinians-calls>

¹⁰ <https://apnews.com/article/palestinians-israel-military-prisoners-hostage-hamas-soldiers-e75729364f8c0b453da272365c16d136#:~:text=Israel's%20powerful%20finance%20minister%2C%20settler,he%20was%20quoted%20as%20saying.>

¹¹ <https://www.dailymail.co.uk/news/article-12613503/Israel-rains-fire-Gaza-air-strikes.html>

¹² <https://news.sky.com/story/benjamin-netanyahu-warns-people-to-leave-gaza-as-he-vows-to-reduce-parts-of-the-territory-into-rubble-12979786>

¹³ https://twitter.com/Israel_katz/status/1712356130377113904?s=20

¹⁴ <https://www.aljazeera.com/features/2023/10/12/time-running-out-for-gaza-families-with-hospitals-facing-power-blackout>

¹⁵ https://www.timesofisrael.com/liveblog_entry/cogat-chief-addresses-gazans-you-wanted-hell-you-will-get-hell/

¹⁶ https://www.timesofisrael.com/liveblog_entry/defense-minister-announces-complete-siege-of-gaza-no-power-food-or-fuel/

¹⁷ <https://reliefweb.int/report/occupied-palestinian-territory/ceasefire-gaza>

9. Both the bombardment and the siege of Gaza have had a major impact on the civilian population of Gaza. At time of writing, media reports indicate there have been at least 4,385 people have been killed, including 1,756 children and 967 women; a further 13,561 persons were injured.¹⁸ Humanitarian actors have also been affected – as of 23 October 2023, UNWRA reported that 29 of its staff had been killed, while a further 17 have been injured since 7 October 2023.¹⁹ On 12 October 2023, rights groups and media reported that Israel had used white phosphorus bombs in its attacks on Gaza City, as well as in its attacks across the Israeli-Lebanon border,²⁰ impacting hundreds of civilians.²¹
10. On Friday 13 October 2023, the UN reported Israel has given a 24-hour deadline for everyone in the northern part of the Gaza Strip - home to about 1.1 million people - to evacuate to the south. Israeli military directly addressed Gaza City residents, telling them to leave for their "safety and protection."²² Multiple actors, including the United Nations Secretary – General²³ and the Special Rapporteur on the human rights of internally displaced persons²⁴, have underscored that the movement of a population of this size and deprived of essential supplies and basic services within this timeframe is not achievable, and is likely to cause further devastating humanitarian consequences. Many, including patients in medical facilities, will not be able to leave. Israeli army's order to people in northern Gaza and Gaza city to evacuate to the south of the Gaza Strip does not negate the obligation to distinguish between civilian and those directly participating in hostilities incumbent on Israel as a party to the conflict.

D. LEGAL ANALYSIS

11. The above conduct taken by IDF members during Operation Iron Swords may amount to the commission of war crimes under Article 8 of the Rome Statute of the International Criminal Court (the Rome Statute), including: willful killing, indiscriminate and intentionally directing attacks against civilians and civilian objects or attacks that cause disproportionate civilian harm, intentionally directing attacks against humanitarian workers, extensive destruction of property, not justified by military necessity and carried out unlawfully and wantonly. Such conduct may also violate the prohibition of collective punishment, which must be respected at all times under International Humanitarian Law.²⁵
12. Given the widespread and systematic nature of acts that appear to target civilians, conduct of IDF forces involved in Operation Iron Swords may amount to crimes against humanity under the Rome Statute, including the crimes against humanity of: murder, extermination, persecution, forcible transfer of population, and other inhumane acts.
13. According to customary international law, all parties to a conflict, be it international or non-international in nature, have the obligation to allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need and must refrain from deliberately impeding its delivery.²⁶
14. The Office of the Prosecutor of the International Criminal Court currently has an investigation into the situation of the State of Palestine. Per the decision of the Pre-Trial Chamber of the International Criminal Court on 21 February 2021, the territorial scope of this jurisdiction extends to Gaza and the West Bank,

¹⁸ <https://www.unrwa.org/resources/reports/unrwa-situation-report-11-gaza-strip-and-west-bank-including-east-jerusalem>

¹⁹ <https://www.unrwa.org/resources/reports/unrwa-situation-report-11-gaza-strip-and-west-bank-including-east-jerusalem>

²⁰ <https://www.hrw.org/news/2023/10/12/israel-white-phosphorus-used-gaza-lebanon>, <https://citizenevidence.org/2023/10/13/israel-opt-identifying-the-israeli-armys-use-of-white-phosphorus-in-gaza/> <https://www.washingtonpost.com/world/2023/10/13/white-phosphorus-chemical-what-is/>

²¹ <https://www.aa.com.tr/en/middle-east/israel-used-white-phosphorus-bombs-in-gaza-claim-medical-sources/3015950>

²² <https://www.bbc.com/news/live/world-middle-east-67096916>

²³

<https://news.un.org/en/story/2023/10/1142347#:~:text=On%20Friday%2C%20UN%20Secretary%2DGeneral,order%20without%20devastating%20humanitarian%20consequences.>

²⁴ Special Rapporteur on the human rights of internally displaced persons

²⁵ ICRC, Rule n. 103 <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule103>

²⁶ ICRC, Rule n. 55, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule55>

including East Jerusalem. Crimes within the jurisdiction of the International Criminal Court include crimes against humanity, war crimes and genocide.

E. IMPACT ON CIVILIAN POPULATIONS

15. Respect for the fundamental principles of international humanitarian law (humanity, distinction, military necessity and proportionality) is critical to preventing civilian casualties in armed conflict. The Geneva Conventions and their additional protocols set minimum standards for all parties to the conflict. Both Hamas and the Israeli Defence Forces have failed to adequately distinguish between those directly participating in hostilities and civilian populations.²⁷
16. At time of writing 5,785 people in total (4,385 Palestinians, 1400 Israeli) have been killed according to media reporting.²⁸ The label of terrorism cannot be used to justify or excuse attacks on civilian populations. Both the bombardment and the siege of Gaza, comprising over 2.2 million Palestinian people, nearly half of whom are under the age of 18, may amount to collective punishment. The civilian population of Gaza, particularly children, should not be punished as a result of the actions of Hamas.
17. The use of inflammatory rhetoric by both sides is highly concerning. History has shown that when an enemy is explicitly dehumanized, it serves as both a warning sign and a contributing factor to the potential commission of even more heinous atrocities, including ethnic cleansing and potentially genocide. Especially concerning are the explicit utterances by senior figures within the Israeli Defence Forces, specifically those by Major General Ghassan Alian, Defence Minister Yoav Gallant (outlined above), which refer to “human animals” in justifying attacks which significantly and disproportionately impact civilian populations. Dehumanisation is consistently identified as a risk factor and a warning sign for mass atrocities, including in the United Nations Framework of Analysis for Atrocity Crimes: A Tool for Prevention (2014, 2018), prepared by the Special Advisors to the UN Secretary General on the Prevention of Genocide and on the Responsibility to Protect.

F. THIRD STATES OBLIGATIONS UNDER INTERNATIONAL LAW

18. In addition to setting out requirements for the conduct of parties to an armed conflict, international law sets out obligations for ‘third states’ not parties to the armed conflict. Obligations have been generated through treaty and through customary international law.
19. Common Article 1 of the Geneva Conventions states “The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.” ICRC Commentary on this article confirms this entails the obligation to abstain from conduct violating international humanitarian law and to exert their influence, to the degree possible, to stop violations of the Conventions and bring them to an end²⁹. This obligation is not limited to stopping ongoing violations but includes an obligation to prevent violations when there is a foreseeable risk that they will be committed and to prevent further violations in case they have already occurred.³⁰
20. Under Article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide, Contracting Parties undertake to *prevent* genocide from occurring. The physical acts of genocide include (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part. Under the Convention, Contracting Parties must also criminalize direct and public incitement to commit genocide.

²⁷ <https://www.icrc.org/en/document/joint-statement-jagan-chapagain-secretary-general-ifrc-and-robert-mardini-director-general>

²⁸ <https://reliefweb.int/report/occupied-palestinian-territory/israel-destroys-quarter-northern-gaza-strip-palestinian-death-toll-exceeds-4000-enar>; <https://reliefweb.int/report/occupied-palestinian-territory/hostilities-gaza-strip-and-israel-flash-update-13>

²⁹ ICRC, Rule n. 144.

³⁰ *ibid*

21. States should not render aid nor assistance to States that are engaged in violations, or they will also be legally responsible.³¹ Where states are committing serious breaches of obligations arising under peremptory norms, other states are also under a positive duty to cooperate in order to bring to an end serious breaches of international law.³² In the current context, third States bears an obligation to take all possible measures to maintain the integrity of international humanitarian law and ensuring that even in times of conflict the fundamental principles of humanity and the rule of law are respected and upheld.
22. The Resolution adopted by the General Assembly on 16 September 2005 (A/RES/60/1) (2005 World Summit Outcome), and incorporated into many UN Security Council resolutions and Human Rights Council resolutions, Responsibility to Protect (R2P), affirms that each state has the responsibility to protect its own populations from war crimes, crimes against humanity, ethnic cleansing, and genocide, including the prevention of such crimes. The international community has the responsibility to encourage and assist individual states in meeting that responsibility.
23. Under the Responsibility to Protect (R2P), all States, including those in the region and Israel, have a responsibility to prevent the commission of the listed international crimes and protect the civilian population. This includes ensuring humanitarian corridors are established.
24. Given this responsibility, it is alarming that a number of states have pledged to provide military or financial support to parties involved in the armed conflict or have intimated that they may become involved in the armed conflict, with full knowledge of crimes outlined above. Such support will significantly increase the likelihood of further human rights violations, international crimes, and civilian suffering.
25. De-escalation of hostilities is essential. In addition to the violence in Gaza, violence is also escalating in the West Bank, and on Israel's norther border with Lebanon. There is a risk that the armed conflict will escalate further exacerbating an already horrific situation.

G. RECOMMENDATIONS

26. **States must urgently act to:**
 - a) **Ensure that all States comply with their obligations under the United Nations Charter. They must refrain from exercising use of force to solve disputes and from taking further actions to endanger international peace and security.**
 - b) **Exert every effort to facilitate mediation and the peaceful resolution of the conflict, aiming for an immediate cessation of hostilities.**
 - c) **Ensure their own compliance with their obligations under international law, in particular, the obligation not to encourage, aid or assist in violations of the Geneva Conventions, and the obligation to bring erring Parties to a conflict back to an attitude of respect for the Conventions.**
 - d) **Increase pressure on parties to the conflict to ensure their full compliance with international humanitarian law, and the responsibility to protect.**
 - e) **Request parties to the conflict to eliminate rhetoric or conduct that is discriminatory, dehumanising, polarising or persecutory, and, wherever possible, to end the dissemination of such rhetoric, including on social media.**
 - f) **Increase support for the delivery of life-saving humanitarian aid to civilian populations affected by the ongoing armed conflict, while ensuring the uninterrupted flow of current aid.**

³¹ Cfr. United Nations, International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, Art 16

³² Cfr. United Nations, International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, Art 41.

Simultaneously, establish a humanitarian corridor to enable and facilitate the swift and unimpeded passage of humanitarian relief for civilians in need.

- g) Ensure the safeguarding of humanitarian and medical missions and personnel.**
- h) Ensure hostages are treated humanely and they are all immediately released.**
- i) Provide clear, unequivocal commitment to ensuring those who have perpetrated crimes, under international law, including senior members of Hamas and of the IDF, are held to account.**
- j) Provide significantly increased financial and logistic support to the ongoing investigation of the Office of the Prosecutor of the International Criminal Court into the situation of the State of Palestine.**
- k) Ensure that business enterprises registered in their jurisdiction respect human rights in Gaza and Israel and don't contribute to, nor facilitate, the commission of international crimes.**

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