

## **LEGAL BRIEF: 2023 HOSTILITIES IN ISRAEL AND GAZA**

December 2023

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**List of acronyms and abbreviations**

AP	Additional Protocol to the Geneva Conventions
ARSIWA	Draft Articles on Responsibility of States for Internationally Wrongful Acts
art/arts	article/articles
CIHL	Customary international humanitarian law
CRC	Convention on the Rights of the Child
GC/GCs	Geneva Convention/Geneva Conventions
HCJ	High Court of Justice
HRW	Human Rights Watch
ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the former Yugoslavia
IDPs	Internally displaced persons
IHL	International humanitarian law
IHRL	International human rights law
OCHA	UN Office for the Coordination of Humanitarian Affairs
OHCHR	Office of the UN High Commissioner for Human Rights
oPt	occupied Palestinian territory
PA	Palestinian Authority
para/paras	paragraph/paragraphs
PIJ	Palestinian Islamic Jihad
PLO	Palestine Liberation Organization
r/rr	rule/rules
UN	United Nations
UNICEF	United Nations Children's Fund
UNRWA	UN Relief and Works Agency for Palestine Refugees in the Near East
US	United States
WHO	World Health Organization

## Executive summary

This legal brief aims to provide an assessment of violations of international humanitarian law (IHL) committed, respectively, by Hamas-led armed groups from Gaza (Hamas forces) and by the Israeli military in the hostilities between them during the time period from 7 October to 8 November 2023.

The legal analysis in the brief is based primarily upon provisions of IHL that form part of customary international law, which means that they are applicable and binding upon all parties to an armed conflict, whether States or non-State armed groups. These include provisions the violation of which may amount to war crimes.

There is clear evidence – emanating from witness testimonies, photographs, audio recordings, video footage, often recorded by the perpetrators themselves, forensic analysis, and the accounts of first responders – that the attacks by Hamas forces starting on 7 October 2023 entailed serious violations of the most fundamental norms of IHL, which amount to war crimes. Hamas forces have fired thousands of indiscriminate rockets towards Israeli population centres. Members of these forces infiltrated southern Israeli towns and cities, where they directly targeted and killed hundreds of civilians and soldiers *hors de combat*, and injured thousands more. These acts were in clear violation, respectively, of the prohibitions against indiscriminate attacks, direct attacks against civilians and civilian objects, and acts of violence whose primary purpose is to spread terror among the civilian population; the killings perpetrated constituted the war crime of murder or wilful killing. Evidence further compellingly indicates that Hamas forces committed acts of torture, cruel, inhuman, or degrading treatment, mutilation, rape, and mistreatment of the dead. They also abducted more than 200 Israeli and foreign nationals to Gaza as hostages; indiscriminately attacked and destroyed civilian objects; and carried out acts of pillage. Finally, Hamas forces failed to comply with their obligation to take precautions against the effects of attacks, and there are indications that they violated the prohibition on the use of human shields.

In response, Israel has been carrying out large-scale aerial and ground attacks on Gaza since 7 October, which have killed thousands, injured many more, destroyed entire neighbourhoods, and displaced around 1.5 million Gaza residents. There are serious grounds for concern that in the course of these attacks, the Israeli military has acted in disregard of the IHL rules on the conduct of hostilities. This emanates from public statements by political and military officials of various ranks that imply permission to use unconstrained force, as well as the high number of casualties and extensive damage inflicted on large swathes of Gaza's civilian infrastructure: in the span of just a few weeks, more than 10,000 people have been killed, many thousands more injured, and over 1 million displaced; entire residential blocs, places of worship, hospitals, and schools, including those serving as shelters, have been laid to waste. Specifically, there are serious concerns that the Israeli military has carried out indiscriminate attacks and failed to distinguish between civilians and civilian objects on the one hand, and military objectives on the other. There are also serious grounds for concern that Israeli forces have carried out attacks that foreseeably caused excessive civilian casualties and damage to civilian objects, in breach of the principle of proportionality. Finally, the Israeli

military has failed to comply with the duty to take precautions in attack, including by means of giving several purported 'warnings' to the residents of north Gaza to relocate south that would expose civilians to significant additional harm.

In addition to heavy bombardment and ground incursions, Israel also imposed what it called a 'complete siege' on Gaza and cut off the entry of food, water, electricity, and fuel, plunging the more than 2 million residents of the Strip, long mired in a state of poverty and deprivation since Israel's imposition of a closure in 2007, further into humanitarian catastrophe. The disastrous impact of this measure, taken together with statements by Israeli officials which suggest that the entire population of Gaza is being held responsible for the 7 October attacks by Hamas forces, strongly support the conclusion that Israel has imposed a collective punishment, which is absolutely prohibited under international law and constitutes a war crime. Furthermore, there are grounds for concern that Israel has been using starvation as a method of warfare and rendered useless objects indispensable for the survival of the civilian population, both courses of conduct that IHL interdicts; the intentional starvation of civilians is a war crime. Finally, Israel has failed to comply with its obligation to allow for the safe passage of humanitarian relief to all civilians in need.

The analysis concludes with recommendations for the parties to the armed conflict, i.e., Israel and Hamas forces; third States; the Prosecutor of the International Criminal Court (ICC); and other monitoring and accountability bodies, including the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel. Notably, Hamas forces must immediately and unconditionally release all the hostages, unharmed; fully and unconditionally abide by all applicable rules of international law, in particular the IHL rules on the conduct of hostilities, as well as the rules regarding the treatment of persons in the power of a party to the conflict; treat the dead with dignity and facilitate the return of the remains of the dead to their families; and allow for and facilitate the rapid and unimpeded passage of humanitarian relief for all civilians in need. Israel must also fully and unconditionally abide by all applicable rules of international law, in particular the IHL rules on the conduct of hostilities, as well as the rules regarding the treatment of persons in the power of a party to the conflict; refrain from imposing measures of collective punishment on the civilian population in Gaza and repeal all such measures currently in place; refrain from interfering with goods, services, and infrastructure essential for the survival and subsistence of the civilian population such as water, food, and electricity; and allow for and facilitate the rapid and unimpeded passage of humanitarian relief for all civilians in need, amongst other obligations. Third States must, in particular, ensure respect for international law by means of not encouraging, aiding, or assisting violations of IHL by the parties to the conflict, and by taking proactive steps to bring about their compliance with IHL.

## Purpose, methodology, and scope

*This legal brief aims to provide an assessment of violations of IHL committed, respectively, by Hamas-led armed groups from Gaza and by the Israeli military in the hostilities between them.*

To that end, the brief draws on a factual account of events derived from a range of publicly available sources of information, which the authors have endeavoured to verify primarily by cross-referencing from a large and diverse set of credible sources. The brief then analyses the facts emerging from these materials in light of IHL with a particular focus on fundamental provisions of this body of law that all parties to any armed conflict must respect.

The time period of events covered is **7 October until 8 November 2023**.

The scope of these assessments is not exhaustive, particularly in view of the rapid pace of developments on the ground. The Diakonia IHL Centre will endeavour to prepare additional notes covering, among other things, developments in the hostilities in the period after 8 November, violence against Palestinians by Israeli forces and Israeli settlers, as well as other repressive measures being imposed by the Israeli authorities in the occupied Palestinian territory (oPt) and in Israel, including those targeting civil society.

### Note on the applicable legal framework

The legal analysis presented in this brief is based on IHL, and predominantly on the rules regulating the conduct of hostilities in armed conflict. While there is no dispute that these rules apply to the current hostilities between Israel and armed groups in Gaza, there are different views as to whether these hostilities are governed by the rules of international or non-international armed conflicts. The arguments in favour of each of these diverging views are complex and merit careful consideration.<sup>1</sup> However, for the purposes of the analysis here, it is not necessary to decide between them, nor does the analysis attempt to do so. Instead, the analysis relies on IHL rules that have been deemed applicable in both international and non-international armed conflicts as a matter of customary international law.<sup>2</sup> As such, the rules informing this analysis apply to the case at hand irrespective of whether the hostilities are occurring in the context of an international or a non-international armed conflict. In the

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<sup>1</sup> For an analysis of the complexities surrounding this matter see eg Marko Milanovic, 'Lessons for Human Rights and Humanitarian Law in the War on Terror: Comparing Hamdan and the Israeli Targeted Killings Case' (2007) 89(866) Intl Rev Red Cross 373 <[https://international-review.icrc.org/sites/default/files/irrc\\_866\\_8.pdf](https://international-review.icrc.org/sites/default/files/irrc_866_8.pdf)> accessed 30 November 2023. When adjudicating cases concerning previous rounds of hostilities between Israel and armed groups in Gaza, the Israeli Supreme Court sitting as High Court of Justice (HCJ) had ruled that the applicable body of law is that of international armed conflicts. Eg *The Public Committee against Torture in Israel v. Government of Israel* HCJ 769/02 (14 December 2006) (Targeted Killings Case). For an argument suggesting that the current hostilities should be regarded as a non-international armed conflict see Michael N Schmitt, 'The Legal Context of Operations al-Aqsa Flood and Swords of Iron' (*Articles of War*, 10 October 2023) <<https://lieber.westpoint.edu/legal-context-operations-al-aqsa-flood-swords-of-iron/>> accessed 30 November 2023. For classification of hostilities in occupied territory generally, see Marco Longobardo, *The Use of Armed Force in Occupied Territory* (CUP 2018) 205-226.

<sup>2</sup> In this regard, we rely on the study on customary IHL by the International Committee of the Red Cross (ICRC), which we consider to be an authoritative account of the rules of customary IHL and of related State practice. See 'Customary IHL Database' (ICRC, first published in 2005) <<https://ihl-databases.icrc.org/en/customary-ihl>> accessed 30 November 2023 (CIHL).

few instances where a provision referenced here does not apply equally in international and non-international armed conflicts, this is noted.

Except where noted otherwise, the analysis here is also not contingent on the applicability of the IHL provisions which form the law of occupation.<sup>3</sup> The question of whether these provisions remain binding on Israel with respect to Gaza has been the subject of ongoing debate ever since Israel unilaterally withdrew its forces and dismantled Israeli settlements in the Strip in 2005. Some have argued that the law of occupation continues to apply in its entirety.<sup>4</sup> Others have maintained that it does not apply at all.<sup>5</sup> In distinction from both of these positions, the Diakonia IHL Centre, like others, has taken the view that Israel remains bound by provisions of the law of occupation as a function of its enduring effective control over Gaza, where and to the extent that it in fact retains such control.<sup>6</sup> Since the defining characteristic of occupation is factual (the fact of effective control), any position taken on this matter necessarily depends on an assessment of the facts as they currently stand. Undertaking such an assessment under the volatile conditions pertaining while hostilities are raging is a difficult feat to perform. During the period analysed in this brief, it could nevertheless be stated with confidence that Israel retained its control over the movement of people, goods, and resources in and out of Gaza.<sup>7</sup> Pursuant to the functional approach, this control engenders certain responsibilities under the law of occupation which are referenced

<sup>3</sup> The provisions of IHL which form the law of occupation are found in Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907, 205 CTS 277 (Hague Regulations); Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 28 (GC IV); in certain provisions of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, came into force 7 December 1978) 1125 UNTS 3 (AP I); and in customary norms of IHL.

<sup>4</sup> Eg Human Rights Council, 'Report of the Special Rapporteur John Dugard on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967', A/HRC/7/17 (21 January 2008), para 11; Mustafa Mari, 'The Israeli Disengagement from the Gaza Strip: An End of the Occupation?' (2005) 8 YB Intl Humanitarian L 356.

<sup>5</sup> Eg Israeli HCJ, *Jaber Al-Bassiouni Ahmed and Others v. Prime Ministers and Minister of Defence*, Case no. 9132/07, 27 January 2008, para 12; Hanne Cuyckens, 'Is Israel Still an Occupying Power in Gaza?' (2016) 63 Netherlands Intl L Rev 275 (arguing that Israel's responsibility towards Gaza after the implementation of its disengagement plan is founded on general IHL, potentially complemented by international human rights law (IHRL)); Yuval Shany, 'Faraway, So Close: The Legal Status of Gaza after Israel's Disengagement' (2005) 8 YB Intl Humanitarian L 359 (arguing that Israel's ongoing responsibilities towards Gaza derive from IHRL).

<sup>6</sup> Eg 'COVID-19 in Gaza: Health-Related Obligations' (*Diakonia IHL Centre*, 19 December 2020) <<https://www.diakonia.se/ihl/news/covid-19-in-gaza-health-related-obligations/>> accessed 30 November 2023; Aeyal Gross, *The Writing on the Wall: Rethinking the International Law of Occupation* 204-215 (CUP 2017); Tristan Ferraro, 'Determining the Beginning and End of an Occupation Under International Humanitarian Law' (2012) 94(885) Intl Rev Red Cross

133 <<https://www.icrc.org/data/rx/fr/assets/files/review/2012/irrc-885-ferraro.pdf>> accessed 30 November 2023; '(Re)-introducing the functional approach to occupation' (*Gisha*, 15 December 2015) <<https://gisha.org/en/re-introducing-the-functional-approach-to-occupation/>> accessed 30 November 2023.

<sup>7</sup> See in this regard the assessment of the Geneva Academy's Rule of Law in Armed Conflicts (RULAC) project in respect of Gaza: 'The events that have unfolded since Hamas' attack on 7th October 2023 do not warrant a change in the classification of the situation in the Gaza Strip as an instance of military occupation. While they can affect the range of applicable norms, they do not appear to have affected the elements on which that classification stood'. 'Military occupation of Palestine by Israel' (*Geneva Academy*, last updated 28 November 2023) <<https://www.rulac.org/browse/conflicts/military-occupation-of-palestine-by-israel#collapse6accord>> accessed 30 November 2023.



here. By contrast, the degree of control that Israel had within Gaza itself, before and immediately after its troops began their land invasion of the Strip, was far less clear, and the brief has consequently refrained from referencing provisions of the law of occupation that require such control.<sup>8</sup>

Irrespective of questions relating to the law of occupation, it is clear that all parties concerned must at the very least respect the basic humanitarian protections applicable during the conduct of hostilities and fundamental guarantees applicable in all situations of armed conflict. It is on these protections that the analysis here is focused. Accordingly, while some might insist that more protections than outlined here may be applicable, there should be no dispute that the legal framework referenced here must be respected.

Lastly, the focus of this brief is on (potential) violations of IHL and related war crimes. It will not address concerns relating to other areas of international law such as debates about *jus ad bellum* (and, relatedly, about the right to self-defence), or allegations that one or the other party to the conflict, or both, have committed crimes against humanity or genocide.

### **Roadmap for using the brief**

For better orientation of readers less familiar with the context, the brief first provides an **overview of key historical developments** from the first half of the 20<sup>th</sup> century. Thereafter, the brief is structured in six parts.

**Part 1** provides background detailing the events between 7 October and 8 November 2023 that are the focus of the analysis in this brief.

**Part 2** assesses the violations of IHL committed by Hamas and other armed groups, namely, attacks on civilians, wilful killings, and murder; unlawful deprivation of liberty and hostage taking; torture, cruel, inhuman, and degrading treatment; mistreatment of the dead; destruction and pillage of property; and failure to take precautions against the effects of attacks and use of human shields.

**Part 3** describes the factors that affect the analysis of IHL violations, notably the availability of information relevant to the tests for compliance and explains how certain conclusions can nevertheless be drawn.

**Part 4** assesses the violations of the IHL rules on the conduct of hostilities by Israel, with a systematic analysis of compliance with the principles of distinction, proportionality, and precautions.

**Part 5** assesses the violations of IHL associated with cutting off Gaza's supply of indispensable resources and preventing the passage of humanitarian relief for civilians in need.

**Part 6** concludes the analysis with some recommendations for the parties to the conflict, third States, and other actors, that are relevant for the continued conduct of hostilities as well as for accountability efforts.

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<sup>8</sup> For this reason, we have refrained, for instance, from referencing the prohibition on forcible transfer established in GC IV art 49.

## Overview of key historical developments

*For better orientation of readers less familiar with the Israeli-Palestinian context, the following section briefly surveys key developments from the first half of the 20<sup>th</sup> century until the present.*

For four centuries, the land between the Jordan River and the Mediterranean Sea was part of the Ottoman Empire. In 1922, following the First World War, historical Palestine – home to Muslims, Christians, and Jews – was placed under British Mandate.<sup>9</sup> In 1947, with the Mandate drawing to a close, the British government entrusted the newly created United Nations (UN)<sup>10</sup> with resolving the longstanding dispute about the fate of the land.<sup>11</sup> On 29 November that year, the UN General Assembly adopted a resolution recommending the partition of the territory into an ‘Arab State’ and a ‘Jewish State’, with Jerusalem, including Bethlehem, to be placed under international administration as *corpus separatum*.<sup>12</sup> Thereafter, fighting broke out between the Jewish (Yishuv) and (Arab) Palestinian community<sup>13</sup> and, subsequently, between the State of Israel – which was proclaimed on 14 May 1948, the day the British Mandate expired<sup>14</sup> – and Arab States. By the end of the war, Israel had acquired more territory than had been allocated to it under the UN ‘partition plan’ (West Jerusalem, in the Naqab/Negev in the south, and in the Galilee in the north), while Transjordan seized the West Bank (including East Jerusalem), and Egypt the Gaza Strip.<sup>15</sup> Throughout the war 1947-1949, at least 700,000 Palestinians across historical Palestine – a majority of the population at the time<sup>16</sup> – were expelled or fled from their homes, a vast majority of whom were not allowed to return;<sup>17</sup> their land and property was often confiscated

<sup>9</sup> Mandate for Palestine, confirmed by the Council of the League of Nations on 24 July 1922.

<sup>10</sup> Eg ‘Historical Timeline on the Question of Palestine’ (UN) <<https://www.un.org/unispal/historical-timeline/>> accessed 30 November 2023.

<sup>11</sup> During the First World War, the British had made conflicting promises over the land: ‘Arab independence’ (Hussein-McMahon Correspondence, 1915-1916), an agreement with France to divide the Middle East into spheres of influence, with Palestine under British domination (Sykes-Picot Agreement, 1916), and a ‘national home for the Jewish people’ (Balfour Declaration, 1917). Eg Avi Shlaim, *War and Peace in the Middle East* (rev and updated edn, Penguin Books 1995) 11-12. Marking the culmination of centuries of European antisemitism, the Second World War and the Holocaust – the State-sponsored systematic persecution and mass murder (genocide) of European Jews by Nazi Germany – had a profound impact on the Zionist movement. Eg Omri Boehm, *Haifa Republic: A Democratic Future for Israel* (NY Review Books 2021).

<sup>12</sup> General Assembly resolution 181 (II), adopted on 29 November 1947.

<sup>13</sup> Eg Rashid Khalidi, *The Iron Cage: The Story of the Palestinian Struggle for Statehood* (Oneworld Publications 2006) 125-139; Benny Morris, *1948. The First Arab-Israeli War* (Yale UP 2008) 75-179.

<sup>14</sup> Declaration of Independence of the State of Israel, issued at Tel Aviv, 14 May 1948.

<sup>15</sup> Eg Rashid Khalidi, ‘The Palestinians and 1948: The Underlying Causes of Failure’ in Eugene L. Rogan and Avi Shlaim (eds) *The War for Palestine: Rewriting the History of 1948* (CUP 2007) 12; Morris (n 13) 180-391; Rashid Khalidi, *The Hundred Years’ War on Palestine* (Profile Books 2020) 55-95.

<sup>16</sup> Eg Joseph Krauss, ‘In Israel’s Call for Mass Evacuation, Palestinians Hear Echoes of Their Original Catastrophic Exodus’ *The Associated Press* (Jerusalem, 14 October 2023) <<https://apnews.com/article/israel-palestinians-gaza-evacuation-history-nakba-a1bec1ee3477573e80b39b4044a48111>> accessed 30 November 2023.

<sup>17</sup> Eg Khalidi (n 13) 1-8. Amongst historians, there is a debate as to whether there was a pre-existing plan (as opposed to a mere ‘aspiration’) to systematically expel Palestinians, and whether explicit expulsion orders were given or mere verbal ‘understandings’ were imparted. Eg Walid Khalidi, ‘Plan Dalet: Master Plan for the Conquest of Palestine’ (1988) 18 *J Palestine Studies* 4; Ilan Pappé, *The Ethnic Cleansing of Palestine* (Oneworld

by the State,<sup>18</sup> and around 500 Palestinian villages were uprooted,<sup>19</sup> an experience denoted by the term ‘al-Nakba’ (catastrophe) in Arabic.<sup>20</sup>

In June 1967, war broke out once again between Israel and neighbouring States, in the course of which Israel took control of the West Bank, including East Jerusalem (from Jordan), and the Gaza Strip (from Egypt);<sup>21</sup> around 300,000 Palestinians were displaced from their homes in the territory newly occupied by Israel (events referred to as ‘al-Naksa’ or setback in Arabic).<sup>22</sup> Shortly thereafter, Israel annexed East Jerusalem, including the Old City, and created extended municipal boundaries of ‘Greater Jerusalem’ encompassing the western and eastern, formerly Jordanian-controlled part of the city as well as several West Bank villages, where Israeli domestic law is applied.<sup>23</sup> In the years that followed, the Israeli government permitted and encouraged the establishment of military-civilian, and later fully civilian, settlements in the oPt;<sup>24</sup> as of 2023, it is estimated that some 200,000 Israeli settlers live in East Jerusalem, and another 500,000 live in the rest of the West Bank.<sup>25</sup> In the West Bank,

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Publications 2007); R. Khalidi (2020) (n 15) 72-75 (all maintaining that the expulsions amounted to ‘ethnic cleansing’). For a contrasting view see Benny Morris, *The Birth of the Palestinian Refugee Problem, 1947-1949* (CUP 1987) 286 (insisting that ‘[t]he Palestinian refugee problem was born of war, not by design’).

<sup>18</sup> This was by means of the so-called ‘Absentee Property Law’ of 1950, which remains in effect until this day. Eg ‘Absentees’ Property Law’ (*Adalah*) <<https://www.adalah.org/en/law/view/538>> accessed 30 November 2023; ‘The Application of the Absentee Property Law in East Jerusalem: CA 54/82 Levy v. ‘Afaneh (Judgment of February 19, 1986)’ (*HaMoked*, 1 October 2013) <<https://hamoked.org/document.php?dID=Documents3449>> accessed 30 November 2023.

<sup>19</sup> Eg Amandas Ong, ‘“My village”: Destroyed in the Nakba, Rebuilt Memory by Memory’ *Al Jazeera* (Doha, 15 May 2023) <<https://www.aljazeera.com/features/longform/2023/5/15/recreating-a-palestinian-village-75-years-after-the-nakba>> accessed 30 November 2023.

<sup>20</sup> Eg Walid Khalidi, *All That Remains: The Palestinian Villages Occupied and Depopulated by Israel in 1948* (Institute for Palestine Studies 1992); Morris (n 17). Palestinians use the term ‘the continuous Nakba’ to denote ongoing displacement and dispossession across the oPt. Eg Yara Hawari, ‘Palestine Sine Tempore?’ in William Gallois (ed), *Rethinking the History of Empire* (Routledge 2020) 11.

<sup>21</sup> For a detailed account of the 1967 war, which is variously called the ‘Six-Day War’ (in Israel), the ‘June War’, or ‘al-Naksa’ (literally the ‘setback’; the latter two are prevalent in Arabic-speaking countries in the Middle East including the oPt), see Michael Oren, *Six Days of War: June 1967 and the Making of the Modern Middle East* (OUP 2002) and R. Khalidi (2020) (n 15) 96-137. Israel also took control of the Golan Heights from Syria and of the Sinai Peninsula from Egypt; it annexed the former in 1981 and returned the latter following the conclusion of the Egyptian-Israeli peace treaty in 1979.

<sup>22</sup> Munir Nuseibah, ‘The Second Nakba: Displacement of Palestinians in and after the 1967 Occupation’ *Orient XXI* (Paris, 1 June 2017) <<https://orientxxi.info/magazine/the-second-nakba-displacement-of-palestinians-in-and-after-the-1967-occupation,1875>> accessed 30 November 2023; Zena Al Tahhan, ‘The Naksa: How Israel Occupied the Whole of Palestine in 1967’ *Al Jazeera* (Doha, 4 June 2018) <<https://www.aljazeera.com/features/2018/6/4/the-naksa-how-israel-occupied-the-whole-of-palestine-in-1967>> accessed 30 November 2023.

<sup>23</sup> Eg Adv. Yotam Ben-Hillel, ‘The Legal Status of East Jerusalem’ (*Norwegian Refugee Council (NRC)*, December 2013) <<https://www.nrc.no/globalassets/pdf/reports/the-legal-status-of-east-jerusalem.pdf>> accessed 30 November 2023.

<sup>24</sup> Eg Gershom Gorenberg, *The Accidental Empire: Israel and the Birth of the Settlements, 1967-1977* (Macmillan Publishers 2007).

<sup>25</sup> Tia Goldenberg, ‘Israeli Settler Population in West Bank Surpasses 500K’ *The Associated Press* (Jerusalem, 2 February 2023) <<https://apnews.com/article/politics-israel-government-palestinian-territories-west-bank-e5660155117bf5d3a713efe45888b4d5>> accessed 30 November 2023.

Israel has imposed a series of ‘draconian’<sup>26</sup> military orders, at present numbering over a thousand,<sup>27</sup> on Palestinians over the decades; Israeli settlers are subject to Israeli civil law.<sup>28</sup>

In 1987, Palestinians launched the First Intifada, a popular uprising, across the oPt and Israel, in protest against two decades of Israeli military occupation.<sup>29</sup> Propelled by the events of the Intifada and the end of the Cold War, at the time promising to usher in a new era in international politics,<sup>30</sup> the Oslo process between Palestinians and Israelis commenced in September 1993 with the signing of the Declaration of Principles.<sup>31</sup> A series of interim agreements between Israel and the PLO,<sup>32</sup> deemed the representative of the Palestinian people,<sup>33</sup> resulted in the creation of the PA and partial Israeli withdrawal from Gaza and Jericho.<sup>34</sup> Later, the West Bank (excluding East Jerusalem) was divided into Areas A, B, and C, with the PA gaining full control of Area A and control over civilian affairs in Area B; Israel retained full control of Area C,<sup>35</sup> which makes up around 60% of the West Bank and is the location of most of the settlements.<sup>36</sup> Around the time of the Oslo process, the Israeli authorities started imposing access and movement restrictions and a permit system for

<sup>26</sup> ‘Born Without Civil Rights: Israel’s Use of Draconian Military Orders to Repress Palestinians in the West Bank’ (*Human Rights Watch (HRW)*, 17 December 2019) <<https://www.hrw.org/report/2019/12/17/born-without-civil-rights/israels-use-draconian-military-orders-repress>> accessed 30 November 2023.

<sup>27</sup> Eg ‘Military orders’ (*Military Court Watch*) <<https://www.militarycourtwatch.org/page.php?id=SNHdhRow9Pa30432AKJqGwVetO9>> accessed 30 November 2023.

<sup>28</sup> Eg ‘The Israeli Occupation of the West Bank and the Crime of Apartheid: Legal Opinion’ (*Yesh Din*, June 2020) <<https://s3-eu-west-1.amazonaws.com/files.yesh-din.org/Apartheid+2020/Apartheid+ENG.pdf>> accessed 30 November 2023.

<sup>29</sup> Eg Avraham Sela, ‘The First Intifada: How the Arab-Israeli Conflict Was Transformed’ *Haaretz* (Tel Aviv, 13 December 2012) <<https://www.haaretz.com/2012-12-13/ty-article/.premium/first-intifada-a-watershed-moment/0000017f-f0c7-df98-a5ff-f3eff7690000>> accessed 30 November 2023; R. Khalidi (2020) (n 15) 168-206.

<sup>30</sup> Eg Francis Fukuyama, ‘The End of History?’ (1989) *The National Interest* 3.

<sup>31</sup> Declaration of Principles on Interim Self-Government Arrangements (‘Oslo I Accord’), signed in Washington DC, 13 September 1993. The Declaration of Principles was a framework agreement that envisaged a series of negotiations and interim agreements between Israel and the Palestine Liberation Organization (PLO) (later the Palestinian Authority (PA)) that would ultimately culminate in a ‘final status agreement’ dealing with the so-called ‘final status issues’, listed in Article V(3) of the Declaration: ‘Jerusalem, refugees, settlements, security arrangements, borders, relations and cooperation with other neighbours, and other issues of common interest’. Eg Shlomo Ben-Ami, *Scars of War, Wounds of Peace: The Israeli-Arab Tragedy* (Weidenfeld & Nicolson 2005) 201-239; R. Khalidi (2020) (n 15) 168-206.

<sup>32</sup> For a history of the PLO, see Yezid Sayigh, *Armed Struggle and the Search for State: The Palestinian National Movement, 1949-1993* (first published 1997, OUP 2011).

<sup>33</sup> Letters of Mutual Recognition, 9 September 1993. Eg Ian Black, ‘From the Archive, 10 September 1993: Israel and Palestine Reach Historic Agreement’ *The Guardian* (London, 10 September 2013) <<https://www.theguardian.com/theguardian/2013/sep/10/israel-plo-oslo-agreement-1993>> accessed 30 November 2023.

<sup>34</sup> Agreement on the Gaza Strip and the Jericho Area (‘Gaza-Jericho Agreement’), signed in Cairo, 4 May 1994.

<sup>35</sup> Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (‘Oslo II Accord’), signed in Washington DC, 28 September 1995.

<sup>36</sup> Eg Noga Kadman, ‘Acting the Landlord: Israel’s Policy in Area C, the West Bank’ (*B’Tselem*, June 2013) <[https://www.btselem.org/publications/summaries/201306\\_acting\\_the\\_landlord](https://www.btselem.org/publications/summaries/201306_acting_the_landlord)> accessed 30 November 2023.

Palestinians in the West Bank and Gaza,<sup>37</sup> which have exacerbated over time and persist to this day.<sup>38</sup> The Oslo process collapsed in the summer of 2000 without a ‘final status agreement’;<sup>39</sup> the Second Intifada erupted in September that year, in the course of which Palestinian armed groups perpetrated suicide attacks, and the Israeli military carried out large-scale operations in West Bank cities.<sup>40</sup> The Israeli authorities also started constructing the so-called ‘separation barrier’, which is not located on the ‘Green Line’ (the armistice line of 1949 and Israel’s internationally recognised sovereign border); rather, at some points it extends deeply into the West Bank, including East Jerusalem, effectively separating 9 per cent of the territory from the remainder of the oPt.<sup>41</sup> In a 2004 advisory opinion, the International Court of Justice (ICJ) noted that ‘[t]he construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated régime, are contrary to international law’.<sup>42</sup>

In 2005, following the end of the Second Intifada, Israel unilaterally withdrew its ground forces from the Gaza Strip and dismantled existing Israeli settlements there.<sup>43</sup> As per the Sharon government’s ‘Disengagement Plan’, Israel nonetheless retained control over Gaza’s external borders, airspace, and territorial waters off the coast.<sup>44</sup> In the summer of 2007,

<sup>37</sup> Eg Na’ama Carmi, ‘Oslo: Before and After. The Status of Human Rights in the Occupied Territories’ (*B’Tselem*, May 1999)

<[https://www.btselem.org/sites/default/files/publications/199905\\_oslo\\_befor\\_and\\_after\\_eng.pdf](https://www.btselem.org/sites/default/files/publications/199905_oslo_befor_and_after_eng.pdf)> accessed 30 November 2023.

<sup>38</sup> See eg ‘Movement and Access in the West Bank | August 2023’ (*UN Office for the Coordination of Humanitarian Affairs (OCHA) oPt*, 25 August 2023) <<https://www.ochaopt.org/2023-movement>> accessed 30 November 2023.

<sup>39</sup> For contrasting narratives over the failure of the Camp David II summit in July 2000, see Robert Malley and Hussein Agha, ‘Camp David: The Tragedy of Errors’ *New York Review of Books* (New York, 9 August 2001) <<https://www.nybooks.com/articles/2001/08/09/camp-david-the-tragedy-of-errors/>> accessed 30 November 2023; Benny Morris, ‘Camp David and After: An Exchange (1. An Interview with Ehud Barak)’ *New York Review of Books* (New York, 13 June 2002) <<https://www.nybooks.com/articles/2002/06/13/camp-david-and-after-an-exchange-1-an-interview-wi/>> accessed 30 November 2023.

<sup>40</sup> Eg ‘Al-Aqsa Intifada Timeline’ *BBC News* (London, 29 September 2004) <[http://news.bbc.co.uk/2/hi/middle\\_east/3677206.stm](http://news.bbc.co.uk/2/hi/middle_east/3677206.stm)> accessed 30 November 2023.

<sup>41</sup> Eg ‘The Humanitarian Impact of 20 Years of the Barrier - December 2022’ (*OCHA oPt*, 30 December 2022) <<https://www.ochaopt.org/content/humanitarian-impact-20-years-barrier-december-2022>> accessed 30 November 2023.

<sup>42</sup> *Legal Consequences of the Construction of a Wall* (Advisory Opinion) 2004 <<https://www.icj-cij.org/sites/default/files/case-related/131/131-20040709-ADV-01-00-EN.pdf>> accessed 30 November 2023 [163(3)(A)].

<sup>43</sup> Mark Oliver, Simon Jeffery, and agencies, ‘Soldiers Evict Gaza Settlers’ *The Guardian* (London, 17 August 2005) <<https://www.theguardian.com/world/2005/aug/17/israel4>> accessed 30 November 2023.

<sup>44</sup> ‘The Disengagement Plan - General Outline’ (*Government of Israel*, 18 April 2004) <<https://reliefweb.int/report/occupied-palestinian-territory/disengagement-plan-general-outline>> accessed 30 November 2023. Israel also controls the population registry. Eg ‘The Population Registry’ (*Gisha*, 14 November 2011) <<https://gisha.org/en/the-population-registry/>> accessed 30 November 2023. The exception to Israel’s control of Gaza’s land perimeter is the Rafah crossing with Egypt, which is controlled by the Egyptian authorities. Those wishing to leave must also register in advance with the de facto authorities in Gaza. Eg ‘Movement In and Out of Gaza: Update Covering August 2023’ (*OCHA oPt*, 18 September 2023) <<https://www.ochaopt.org/content/movement-and-out-gaza-update-covering-august-2023>> accessed 30 November 2023.

Hamas seized control of Gaza,<sup>45</sup> whereupon Israel imposed a closure (often referred to as a blockade in general language) severely restricting any movement in and out of Gaza by land, air, or sea, leaving the Gaza Strip mired in a state of deep economic and humanitarian crisis.<sup>46</sup> The Israeli security cabinet at the time also designated Gaza as an ‘enemy entity’;<sup>47</sup> since then, there have been periodic hostilities between Israel and Hamas and other armed groups from Gaza in December 2008-January 2009, November 2012, July-August 2014, May 2021, August 2022,<sup>48</sup> and May 2023.<sup>49</sup> Between March 2018 and December 2019, thousands of Palestinians in Gaza protested near the Gaza border fence as part of the ‘Great March of Return’ demonstrations;<sup>50</sup> more than 200 Palestinians were killed and over 35,000 injured by Israeli forces.<sup>51</sup> Gaza is home to over 2 million Palestinians, most of whom are refugees or descendants of refugees from the Nakba.<sup>52</sup>

In the West Bank, including East Jerusalem, concerns persist about access and movement restrictions,<sup>53</sup> excessive use of force by Israeli security forces,<sup>54</sup> continued expansion of settlements,<sup>55</sup> including the ‘legalisation’ of settlement outposts which are considered illegal even under Israeli law but often tacitly accepted by the authorities,<sup>56</sup> and attacks by violent

<sup>45</sup> For accounts of Hamas’ history, ideology, and strategies see eg Tareq Baconi, *Hamis Contained: The Rise and Pacification of Palestinian Resistance* (Stanford UP 2018); Shaul Mishal and Avraham Sela, *The Palestinian Hamas: Vision, Violence, and Coexistence* (Columbia UP 2006).

<sup>46</sup> ‘Gaza Up Close’ (*Gisha*, 28 June 2023) <<https://features.gisha.org/gaza-up-close/>> accessed 30 November 2023.

<sup>47</sup> Mark Tran and agencies, ‘Israel Declares Gaza “Enemy Entity”’ *The Guardian* (London, 19 September 2007) <<https://www.theguardian.com/world/2007/sep/19/usa.israel1>> accessed 30 November 2023.

<sup>48</sup> Eg ‘Timeline: Israel’s Attacks on Gaza Since 2005’ *Al Jazeera* (Doha, 7 August 2022) <<https://www.aljazeera.com/news/2022/8/7/timeline-israels-attacks-on-gaza-since-2005>> accessed 30 November 2023.

<sup>49</sup> Eg ‘Israel and the Occupied Territories: May 2023 Armed Hostilities Facts & Figures’ (*ICRC*, 22 June 2023) <<https://www.icrc.org/en/document/israel-and-occupied-territories-may-2023-armed-hostilities-facts-figures>> accessed 30 November 2023.

<sup>50</sup> Eg ‘Unwilling and Unable: Israel’s Whitewashed Investigations of the Great March of Return Protests’ (*Palestinian Centre for Human Rights (PCHR) and B’Tselem*, December 2021) <[https://www.btselem.org/sites/default/files/publications/202112\\_unwilling\\_and\\_unable\\_eng.pdf](https://www.btselem.org/sites/default/files/publications/202112_unwilling_and_unable_eng.pdf)> accessed 30 November 2023.

<sup>51</sup> ‘Humanitarian Snapshot: Casualties in the Context of Demonstrations and Hostilities in Gaza (30 Mar 2018 - 30 September 2019)’ (*OCHA oPt*, 30 September 2019) <<https://www.unocha.org/publications/report/occupied-palestinian-territory/humanitarian-snapshot-casualties-context-demonstrations-and-14>> accessed 30 November 2023; ‘Two Years On: People Injured and Traumatized During the “Great March of Return” Are Still Struggling’ (*UN*, 6 April 2020) <<https://www.un.org/unispal/document/two-years-on-people-injured-and-traumatized-during-the-great-march-of-return-are-still-struggling/>> accessed 30 November 2023.

<sup>52</sup> Krauss (n 16).

<sup>53</sup> Eg ‘Restrictions on Movement’ (*B’Tselem*, 11 November 2017) <[https://www.btselem.org/freedom\\_of\\_movement/](https://www.btselem.org/freedom_of_movement/)> accessed 30 November 2023.

<sup>54</sup> ‘Data on Casualties’ (*OCHA oPt*) <<https://www.ochaopt.org/data/casualties>> accessed 30 November 2023.

<sup>55</sup> Eg ‘30 Years After Oslo – The Data that Shows How the Settlements Proliferated Following the Oslo Accords’ (*Peace Now*, 11 September 2023) <<https://peacenow.org.il/en/30-years-after-oslo-the-data-that-shows-how-the-settlements-proliferated-following-the-oslo-accords>> accessed 30 November 2023.

<sup>56</sup> Eg Hagar Shezaf, ‘Netanyahu Orders to Connect 12 Illegal Outposts to Electrical Grid, a Week to Israeli Election’ *Haaretz* (Tel Aviv, 24 February 2020) <<https://www.haaretz.com/israel-news/elections/2020-02-24/ty-article/.premium/netanyahu-authorizes-west-bank-outposts-connection-to-electrical-grid/0000017f-e341-d75c-a7ff-ffcd2d450000>> accessed 30 November 2023.

settlers leading to the displacement of Palestinian communities,<sup>57</sup> amongst other issues. These patterns have deteriorated rapidly and sharply under the current, most right-wing government in Israel's history, with 2023 marking the deadliest year for Palestinians in the West Bank, including East Jerusalem, to date,<sup>58</sup> 'the highest daily average of settler-related incidents'<sup>59</sup> ever recorded, and heightened tensions in Jerusalem, particularly around the Haram al-Sharif/Temple Mount.<sup>60</sup> All the while, the government has been taking aggressive steps to further advance and entrench the settlement enterprise.<sup>61</sup> On the other side of the 'Green Line', attempts to change Israel's political-constitutional order as part of the so-called 'judicial overhaul' have drawn mass protests, with critics fearing a weakening of the separation of powers as well as judicial oversight over the executive and legislative branches of government,<sup>62</sup> and in the long run a further entrenchment of Israel's control over the oPt.<sup>63</sup> As regards civic space generally, it is well-documented that the Israeli authorities as well as the PA and the Hamas-controlled de facto authorities in Gaza have been implementing a range of measures that negatively impact the operations of civil society actors working in or on the context, with Palestinian organisations bearing the brunt of repression.<sup>64</sup> Numerous Palestinian, Israeli, and international human rights organisations<sup>65</sup> as well as Special

<sup>57</sup> Eg 'Settler Violence = State Violence' (*B'Tselem*, 25 November 2021) <[https://www.btselem.org/settler\\_violence](https://www.btselem.org/settler_violence)> accessed 30 November 2023.

<sup>58</sup> 'Israeli-Palestinian Death Toll Highest Since 2005: UN Envoy' (*UN News*, 21 August 2023) <<https://news.un.org/en/story/2023/08/1139922>> accessed 30 November 2023; 'Protection of Civilians Report | 8-21 August 2023' (*OCHA oPt*, 28 August 2023) <<https://www.ochaopt.org/poc/8-21-august-2023>> accessed 30 November 2023. 2023 is the deadliest year since OCHA started systematically recording fatalities and injuries in 2005.

<sup>59</sup> 'Fact Sheet: Displacement of Palestinian Herders Amid Increasing Settler Violence – September 2023' (*OCHA oPt*, 21 September 2023) <<https://www.unocha.org/publications/report/occupied-palestinian-territory/fact-sheet-displacement-palestinian-herders-amid-increasing-settler-violence-september-2023>> accessed 30 November 2023.

<sup>60</sup> Eg 'Israel/OPT: Second Night of Horror at Al-Aqsa Mosque' (*Amnesty International*, 6 April 2023) <<https://www.amnesty.org/en/latest/news/2023/04/israel-opt-second-night-of-horror-at-al-aqsa-mosque/>> accessed 30 November 2023; Mick Krever and Kareem Khadder, 'Divisive Israeli Minister Visits Key Jerusalem Holy Site, Drawing Condemnation' *CNN* (Jerusalem, 27 July 2023) <<https://edition.cnn.com/2023/07/27/europe/ben-gvir-visit-israel-jerusalem-intl/index.html>> accessed 30 November 2023.

<sup>61</sup> Eg 'Annexation as a Process in the Making: The First Nine Months of the Netanyahu-Smotrich-Ben Gvir Government' (*Peace Now*, 20 September 2023) <<https://peacenow.org.il/en/annexation-as-a-process-in-the-making-the-first-nine-months-of-the-netanyahu-smotrich-ben-gvir-government>> accessed 30 November 2023.

<sup>62</sup> Hadas Gold and Amir Tal, 'Israel's Democracy Is at a Crossroads as Its Top Court Debates a Law Limiting Its Power. Here's What to Know' *CNN* (Jerusalem, 13 September 2023) <<https://edition.cnn.com/2023/09/12/middleeast/israel-judicial-overhaul-supreme-court-intl/index.html>> accessed 30 November 2023.

<sup>63</sup> Eg Michael Schaeffer Omer-Man, 'Why Israel's Opposition Won't Talk About the Real Goal of Judicial Overhaul' *+972 Magazine* (21 February 2023) <<https://www.972mag.com/judiciary-annexation-levin-zionism/>> accessed 30 November 2023.

<sup>64</sup> 'Timeline: Shrinking Space in Israel-Palestine' (*Diakonia IHL Centre*, last updated 5 October 2023) <<https://www.diakonia.se/ihl/jerusalem/shrinking-space/interactive-timeline-shrinking-space/>> accessed 30 November 2023.

<sup>65</sup> Eg 'Joint Parallel Report to the United Nations Committee on the Elimination of Racial Discrimination on Israel's Seventeenth to Nineteenth Periodic Reports' (*Al-Haq and others*, 10 November 2019) <[https://www.alhaq.org/cached\\_uploads/download/2019/11/12/joint-parallel-report-to-cerd-on-israel-s](https://www.alhaq.org/cached_uploads/download/2019/11/12/joint-parallel-report-to-cerd-on-israel-s)

Rapporteurs on the situation of human rights in the oPt<sup>66</sup> have described Israel's control over Palestinians as apartheid.

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[17th-19th-periodic-reports-10-november-2019-final-1573563352.pdf](#)> accessed 30 November 2023; Yesh Din (n 28); 'A Regime of Jewish Supremacy from the Jordan River to the Mediterranean Sea: This Is Apartheid' (*B'Tselem*, January 2021)

<[https://www.btselem.org/sites/default/files/publications/202101\\_this\\_is\\_apartheid\\_eng.pdf](https://www.btselem.org/sites/default/files/publications/202101_this_is_apartheid_eng.pdf)> accessed 30 November 2023; 'A Threshold Crossed: Israeli Authorities and the Crimes of Apartheid and Persecution' (*HRW*, April 2021) <[https://www.hrw.org/sites/default/files/media\\_2021/04/israel\\_palestine0421\\_web\\_0.pdf](https://www.hrw.org/sites/default/files/media_2021/04/israel_palestine0421_web_0.pdf)> accessed 30 November 2023; 'Israel's Apartheid Against Palestinians: Cruel System of Domination and Crime Against Humanity' (*Amnesty International*, February 2022)

<<https://www.amnesty.org/en/documents/mde15/5141/2022/en/>> accessed 30 November 2023.

<sup>66</sup> 'Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967, John Dugard', A/HRC/4/17, 29 January 2007; 'Israel's 55-Year Occupation of Palestinian Territory is Apartheid – UN Human Rights Expert' (*Office of the UN High Commissioner for Human Rights (OHCHR)*, 25 March 2022) <<https://www.ohchr.org/en/press-releases/2022/03/israels-55-year-occupation-palestinian-territory-apartheid-un-human-rights>> accessed 30 November 2023.



## 1. Background: Events from 7 October to 8 November 2023

On 7 October 2023, armed groups from Gaza led by Hamas carried out a ‘multi-pronged attack’<sup>67</sup> against Israel involving indiscriminate rocket fire on Israeli cities and towns, which continued as of 8 November,<sup>68</sup> and an assault on southern Israeli towns, where members of the armed groups went on a rampage killing, brutalising, and kidnapping Israeli and foreign citizens,<sup>69</sup> most of them civilians, including children;<sup>70</sup> the Israeli authorities and a nongovernmental commission have also documented multiple acts of sexual violence.<sup>71</sup> One first responder in Kibbutz Be’eri described seeing ‘the bodies of scores of men, women and children gunned down or blown up by militants’.<sup>72</sup> A reservist working with the forensics unit of the Israeli military to identify bodies was quoted saying: ‘We saw chopped-up bodies ... Many shots to the head, as if one was not enough. A woman whose eyes were shot out’;<sup>73</sup>

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<sup>67</sup> ‘A Second October War in Israel-Palestine’ (*International Crisis Group*, 9 October 2023)

<<https://www.crisisgroup.org/middle-east-north-africa/east-mediterranean-mena/israelpalestine/second-october-war-israel>> accessed 30 November 2023.

<sup>68</sup> ‘Hostilities in the Gaza Strip and Israel | Flash Update #33’ (*OCHA oPt*, 8 November 2023)

<<https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-33>> accessed 30 November 2023.

<sup>69</sup> ‘Escalation in the Gaza Strip and Israel | Flash Update #1’ (*OCHA oPt*, 7 October 2023)

<<https://www.ochaopt.org/content/escalation-gaza-strip-and-israel-flash-update-1>> accessed 30 November;

‘Hostilities in the Gaza Strip and Israel | Flash Update #8’ (*OCHA oPt*, 14 October 2023)

<<https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-8>> accessed 30 November 2023.

<sup>70</sup> ‘Israel: Palestinian Armed Groups Must be Held Accountable for Deliberate Civilian Killings, Abductions and Indiscriminate Attacks’ (*Amnesty International*, 12 October 2023)

<<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/>> accessed 30 November 2023; OCHA oPt Flash Update #33 (n 68).

<sup>71</sup> Eg ‘Israeli Forensic Teams Describe Signs of Torture, Abuse’ *Reuters* (Ramla, 14/15 October 2023)

<<https://www.reuters.com/world/middle-east/israeli-forensic-teams-describe-signs-torture-abuse-2023-10-15/>> accessed 30 November 2023;

Laura E. Adkins, ‘Top IDF Chief Confirms Rape and Other “Crimes Against Humanity” in Oct. 7 attack’ *The Forward* (Jerusalem, 21 October 2023) <<https://forward.com/fast-forward/566249/israeli-officials-and-civilian-responders-describe-evidence-of-rape-and-other-atrocities-in-hamas-attack/>> accessed 30 November 2023;

Emily Rose and Herbert Villarraga, ‘Rescue Workers Recount Horrors Found in Kibbutz Attacked by Hamas’ *Reuters* (Jerusalem, 17 October 2023)

<<https://www.reuters.com/world/middle-east/rescue-workers-recount-horrors-found-kibbutz-attacked-by-hamas-2023-10-17/>> accessed 30 November 2023;

Josh Breiner, ‘Israeli Police Collect Eyewitness Testimony of Gang Rape During Hamas Attack’ *Ha’aretz* (Tel Aviv, 8 November 2023) <<https://www.haaretz.com/israel-news/2023-11-08/ty-article/israeli-police-collect-eyewitness-testimony-of-gang-rape-during-hamas-attack/0000018b-b025-d3c1-a39b-bee5ef400000>> accessed 30 November 2023.

See also a recent position paper by Physicians for Human Rights-Israel (PHRI), which surveys these reports and calls for ‘an investigation of crimes against humanity’. ‘Sexual & Gender-Based Violence as a Weapon of War’ (*PHRI*, November 2023) <[https://www.phr.org.il/wp-content/uploads/2023/11/5771\\_Sexual\\_Violence\\_paper\\_Eng-final.pdf](https://www.phr.org.il/wp-content/uploads/2023/11/5771_Sexual_Violence_paper_Eng-final.pdf)> accessed 30 November 2023.

<sup>72</sup> David Clarke and Sophie Meyer, ‘The Deadly Hamas Rampage across Southern Israel’ *Reuters* (London, 12 October 2023) <<https://www.reuters.com/graphics/ISRAEL-PALESTINIANS/MASSACRES/zgporzedjvd/>>

accessed 30 November 2023.

<sup>73</sup> Peter Wilke, ‘“I Only Knew that From the Nazis”: Israeli Forensic Experts Identify Tortured and Burned Bodies’ *Politico* (Ramla, October 15 2023) <<https://www.politico.eu/article/i-only-knew-that-from-the-nazis-what-israeli-forensics-have-been-seeing-for-days/>> accessed 30 November 2023.

another member of the forensics team said that several persons had been burned alive.<sup>74</sup> In response, Israel launched a large and unprecedented offensive in Gaza,<sup>75</sup> pummelling the densely populated Strip – a territory roughly the size of Philadelphia<sup>76</sup> and home to 2.3 million residents<sup>77</sup> – with a constant barrage of heavy airstrikes and shelling<sup>78</sup> and imposing a ‘complete siege’,<sup>79</sup> wreaking devastation and plunging Gaza even deeper into humanitarian catastrophe. A spokesperson for the United Nations Children’s Fund (UNICEF) said on 31 October that ‘Gaza has become a graveyard for thousands of children. It’s a living hell for everyone else’.<sup>80</sup> In early November, the Israeli military was increasingly carrying out ground raids inside Gaza<sup>81</sup> and had reportedly divided the Strip into a northern and southern part;<sup>82</sup>

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<sup>74</sup> Ibid.

<sup>75</sup> Barak Ravid, ‘Israel Moves to “New Phase” of War with Hamas in Major Incursion in Gaza’ (*Axios*, 28 October 2023) <<https://www.axios.com/2023/10/27/israel-hamas-ground-invasion-gaza>> accessed 30 November 2023. The offensive is unprecedented in the number of casualties and level of destruction inflicted on civilian infrastructure. Eg ‘Hostilities in the Gaza Strip and Israel | Flash Update #9’ (*OCHA oPt*, 15 October 2023) <<https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-9>> accessed 30 November 2023; OCHA Flash Update #33 (n 68); ‘UN Security Council Emergency Briefing on “The Situation in the Middle East, Including the Palestinian Question”’ (*United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA)*, 30 October 2023) <<https://www.unrwa.org/newsroom/official-statements/un-security-council-emergency-briefing-situation-middle-east>> accessed 30 November 2023. Israeli Prime Minister Benjamin Netanyahu himself reportedly said: ‘We are striking our enemies with *unprecedented* might (emphasis added)’. See ‘“Only the Beginning” Says Netanyahu as Israel Makes First Raids into Gaza’ *Reuters* (Jerusalem, 13 October 2023) <<https://www.reuters.com/world/middle-east/now-is-time-war-says-israels-military-chief-2023-10-12/>> accessed 30 November 2023.

<sup>76</sup> Lee Ying Shan, ‘What Is the Gaza Strip? What You Need to Know About the Territory at the Heart of the Israel-Hamas War’ *CNBC News* (17 October/2 November 2023) <<https://www.cnbc.com/2023/10/17/what-is-the-gaza-strip-and-who-controls-it.html>> accessed 30 November 2023.

<sup>77</sup> ‘Why Is Israel Attacking South Gaza After Telling People to Go There?’ *Reuters* (London, 26 October 2023) <<https://www.reuters.com/world/middle-east/why-is-israel-attacking-south-gaza-after-telling-people-go-there-2023-10-25/>> accessed 30 November 2023.

<sup>78</sup> Eg ‘Hostilities in the Gaza Strip and Israel | Flash Update #13’ (*OCHA oPt*, 19 October 2023) <<https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-13>> accessed 30 November 2023.

<sup>79</sup> Hadas Gold and others, ‘Israeli Defense Minister Orders “Complete Siege” of Gaza, as Hamas Threatens Hostages’ *CNN* (Jerusalem and Gaza, 9 October 2023) <<https://edition.cnn.com/2023/10/09/middleeast/israel-gaza-hamas-fighting-monday-intl-hnk/index.html>> accessed 30 November 2023.

<sup>80</sup> ‘Gaza Has Become a Graveyard for Thousands of Children’ (*UNICEF*, 31 October 2023) <<https://www.unicef.org/turkiye/en/press-releases/gaza-has-become-graveyard-thousands-children>> accessed 30 November 2023.

<sup>81</sup> Nidal Al-Mughrabi and Emily Rose, ‘Israeli Defense Chief Says Troops Will Soon See Gaza “From Inside”’ *Reuters* (Gaza/Jerusalem, 19/20 October 2023) <<https://www.reuters.com/world/middle-east/us-reports-deal-with-egypt-restart-aid-gaza-protests-rock-middle-east-2023-10-18/>> accessed 30 November 2023; Isabel Debre, Julia Frankel, and Samy Magdy, ‘Netanyahu Says the Gaza War Has Entered a New Stage and Will Be “Long and Difficult”’ *The Associated Press* (Jerusalem, 29 October 2023) <<https://apnews.com/article/israel-hamas-war-news-10-28-2023-c9bd7ecc5f4a9fe9d46486f66675244c>> accessed 30 November 2023; Nidal Al-Mughrabi and Emily Rose, ‘Israel Strikes Dense Gaza Camp, Says It Kills Hamas Commander’ *Reuters* (Gaza/Jerusalem, 31 October 2023) <<https://www.reuters.com/world/middle-east/hamas-says-it-fires-israeli-troops-pressing-gaza-ground-assault-2023-10-31/>> accessed 30 November 2023.

<sup>82</sup> Najib Jobain, Jack Jeffery, and Lee Keath, ‘Israeli Forces Cut Off North Gaza to Isolate Hamas as an Advance on the Urban Center Looms’ *The Associated Press* (Khan Younis, 7 November 2023) <<https://apnews.com/article/israel-hamas-war-news-11-6-2023-51286d15dddd77ae0dd7ea76ee52bc71>> accessed 30 November 2023.

exchanges of fire along the Israeli-Lebanese border<sup>83</sup> intensified and rocket fire from Syria<sup>84</sup> and Yemen<sup>85</sup> had been reported, while Israel had attacked Syrian territory, including the airports in Damascus and Aleppo,<sup>86</sup> raising the spectre of a wider regional conflagration.

Around 1,200 Israeli and foreign citizens in Israel were killed, according to the Israeli authorities, 859 of whom were civilians and police officers, and of those whose age has been identified, 33 were children.<sup>87</sup> Around 5,400 others were injured in Israel (figure reported by the Israeli authorities);<sup>88</sup> the number of hostages taken into Gaza was estimated to be 239 (number reported by the Israeli authorities), including around 30 children, according to media reports.<sup>89</sup> As of 8 November, the number of Israeli soldiers killed in Gaza since the start of Israel's ground operations was 33, according to Israeli sources.<sup>90</sup> Between 7 October and 8 November, 10,569 Palestinians in Gaza were killed, 67% of whom were reportedly women and children (who were far more likely civilians rather than fighters), while around 2,450 others were missing and believed to be trapped underneath the rubble, more than half of them children (around 1,350; figures provided by the Ministry of Health in Gaza).<sup>91</sup> Around

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<sup>83</sup> Eg Hugo Bachega, 'Residents Leave as Tension Grows at Israel-Lebanon Border' *BBC News* (London, 20 October 2023) <<https://www.bbc.co.uk/news/world-middle-east-67158836>> accessed 30 November 2023.

<sup>84</sup> Eg 'Israel Strikes Syrian Army Assets after Rocket Launches, Israeli Military Says' *Reuters* (London, 25 October 2023) <<https://www.reuters.com/world/middle-east/israel-strikes-syrian-army-assets-after-rocket-launches-israeli-military-says-2023-10-24/>> accessed 30 November 2023.

<sup>85</sup> Eg 'Yemen's Houthis Say They Launched Missiles, Drones at Israel' *Reuters* (Dubai, 31 October 2023) <<https://www.reuters.com/world/middle-east/israel-warns-possible-hostile-aircraft-near-red-sea-city-eilat-2023-10-31/>> accessed 30 November 2023.

<sup>86</sup> Eg 'Israel Fires Back after Syrian Shells Land in Israeli Territory - Military' *Reuters* (Jerusalem, 10 October 2023) <<https://www.reuters.com/world/middle-east/israel-fires-back-after-syrian-shells-land-israeli-territory-military-2023-10-10/>> accessed 30 November 2023; 'Israel Strikes Back after Syria Rockets Set Off Sirens, Military Says' *Reuters* (Jerusalem, 14 October 2023) <<https://www.reuters.com/world/middle-east/israel-strikes-back-after-shooting-syria-sets-off-sirens-military-2023-10-14/>> accessed 30 November 2023; 'Israeli Attack on Syrian Aleppo Airport Puts It Out of Service' *Reuters* (Cairo, 14 October 2023) <<https://www.reuters.com/world/middle-east/israeli-attack-syrian-aleppo-airport-puts-it-out-service-2023-10-14/>> accessed 30 November 2023; Albert Aji, 'Syria Says Israeli Airstrikes Hit Airports in Damascus and Aleppo, Damaging Their Runways' *The Associated Press* (Damascus, 12 October 2023) <<https://apnews.com/article/syria-israel-airstrikes-aleppo-damascus-airports-gaza-0fad08c8cad6ddcbaea20be7d8acf59e>> accessed 30 November 2023; 'Syria Says Israel Hit Damascus, Aleppo Airports Again Amid Gaza Bombing' *Al Jazeera* (Doha, 22 October 2023) <<https://www.aljazeera.com/news/2023/10/22/syria-says-israel-hit-damascus-aleppo-airports-again-amid-gaza-bombing>> accessed 30 November 2023.

<sup>87</sup> 'Hostilities in the Gaza Strip and Israel | Flash Update #46' (*OCHA oPt*, 21 November 2023) <<https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-46>> accessed 30 November 2023. The figures cited by the Israeli authorities have not been subject to external independent verification.

<sup>88</sup> 'Hostilities in the Gaza Strip and Israel - Reported Impact | Day 33' (*OCHA oPt*, 8 November 2023) <<https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-reported-impact-day-33>> accessed 30 November 2023; 'Hostilities in the Gaza Strip and Israel - reported impact | Day 45' (*OCHA oPt*, 20 November 2023) <<https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-reported-impact-day-45>> accessed 30 November 2023. The figures cited by the Israeli authorities have not been subject to external independent verification.

<sup>89</sup> OCHA oPt Flash Update #33 (n 68). The figures cited by the Israeli authorities have not been subject to external independent verification.

<sup>90</sup> Ibid. The figures cited by the Israeli authorities have not been subject to external independent verification.

<sup>91</sup> Ibid. The figures cited by the de facto authorities in Gaza have not been subject to external independent verification.

26,475 others were injured (figure from the Ministry of Health in Gaza, reported by OCHA on 8 November).<sup>92</sup> It was additionally reported that the bodies of Palestinians killed in Israel on 7 October and thereafter – who were members of the armed groups, according to the Israeli authorities – were being withheld from their families;<sup>93</sup> there were also reports of mistreatment of the dead.<sup>94</sup>

The hostilities have been the deadliest to date between Israel and armed groups from Gaza, far surpassing the 2014 Gaza war, which had a death toll of 2,251 Palestinians and 74 Israelis over the span of a month and a half.<sup>95</sup> Furthermore, the initial assault by armed groups from Gaza on 7 October marked ‘the bloodiest in Israel’s history’;<sup>96</sup> United States (US) President Joe Biden called it ‘the deadliest day for Jews since the Holocaust’.<sup>97</sup> According to Save the Children, the number of children reported killed in just the first three weeks of the hostilities in Gaza was ‘more than the number killed in armed conflict globally – across more than 20 countries – over the course of a whole year, for the last three years’.<sup>98</sup>

On 9 October, Israeli Defence Minister Yoav Gallant had announced a ‘complete siege’<sup>99</sup> of the Gaza Strip, suspending the entry of water, food, fuel, and electricity reportedly to put pressure on Hamas to release the hostages (fuel and electricity having been cut since the beginning of hostilities on 7 October).<sup>100</sup> Due to the lack of fuel, Gaza’s only domestic power

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<sup>92</sup> OCHA oPt Reported Impact Day 33 (n 88). The figures cited by the de facto authorities in Gaza have not been subject to external independent verification.

<sup>93</sup> See eg Evan Dyer, ‘Israeli Officials Show Unseen Video from October 7 Attack’ (*CBC News*, 2 November 2023) <<https://www.cbc.ca/news/politics/israel-hamas-gaza-palestinian-1.7016989>> accessed 30 November 2023. The withholding of bodies is a longstanding issue of concern; as of February 2023, it was estimated that Israel was holding the bodies of more than 300 Palestinians. See eg Noura Erakat and Rabea Eghbariah, ‘The Jurisprudence of Death: Palestinian Corpses & the Israeli Legal Process’ *Jadaliyya* (8 February 2023) <<https://www.jadaliyya.com/Details/44797>> accessed 30 November 2023; ‘Israeli High Court Greenlights Holding Palestinian Bodies as Bargaining Chips’ (*B’Tselem*, 22 October 2019) <[https://www.btselem.org/routine\\_founded\\_on\\_violence/20191022\\_hcj\\_greenlights\\_holding\\_palestinian\\_bodies\\_as\\_bargaining\\_chips](https://www.btselem.org/routine_founded_on_violence/20191022_hcj_greenlights_holding_palestinian_bodies_as_bargaining_chips)> accessed 30 November 2023.

<sup>94</sup> Catalina Marchant de Abreu, ‘Video of Palestinian Body Dragged by Israeli Army Vehicle Was Filmed in Israel, Not Gaza’ *France24* (Paris, 1 November 2023) <<https://www.france24.com/en/tv-shows/truth-or-fake/20231101-video-of-palestinian-body-dragged-by-israeli-army-vehicle-filmed-in-israel-not-gaza>> accessed 30 November 2023.

<sup>95</sup> OCHA oPt Flash Update #9 (n 75); Joseph Krauss, ‘Urban Battle from Past Gaza War Offers Glimpse of What an Israeli Ground Offensive Might Look Like’ *The Associated Press* (Jerusalem, 16 October 2023) <<https://apnews.com/article/israel-gaza-hamas-military-urban-battle-89e45b149f3b88cd647cf6376dbfe0ac>> accessed 30 November 2023.

<sup>96</sup> ‘Hamas’s Attack Was the Bloodiest in Israel’s History’ *The Economist* (London, 12 October 2023) <<https://www.economist.com/briefing/2023/10/12/hamass-attack-was-the-bloodiest-in-israels-history>> accessed 30 November 2023.

<sup>97</sup> ‘Biden Calls Hamas Attack on Israel “the Deadliest Day for Jews Since the Holocaust”’ *The Associated Press* (New York, 12 October 2023) <<https://www.youtube.com/watch?v=Bs5fz0YXDac>> accessed 30 November 2023.

<sup>98</sup> ‘Gaza: 3,195 Children Killed in Three Weeks Surpasses Annual Number of Children Killed in Conflict Zones Since 2019’ (*Save the Children*, 29 October 2023) <<https://www.savethechildren.net/news/gaza-3195-children-killed-three-weeks-surpasses-annual-number-children-killed-conflict-zones>> accessed 30 November 2023.

<sup>99</sup> Gold and others (n 79).

<sup>100</sup> OCHA oPt Flash Update #9 (n 75); OCHA oPt Flash Update #33 (n 68). Israeli officials allege, and officials of some other countries reportedly agree, that Hamas has been stockpiling fuel and other essential supplies. See

plant shut down; as of 11 October at 2 pm local time,<sup>101</sup> Gaza has been completely without electricity,<sup>102</sup> hence reliance is placed on generators to keep hospitals and other critical infrastructure operational.<sup>103</sup> Israel's heavy and near-constant bombardment has inflicted (severe) damage on schools and hospitals (including those functioning as shelters),<sup>104</sup> the Jabalia<sup>105</sup> and other densely populated refugee camps,<sup>106</sup> mosques,<sup>107</sup> and churches,<sup>108</sup> and led to large-scale destruction of 'entire residential blocks'.<sup>109</sup> At the time of writing, i.e., early November, the number of internally displaced persons (IDPs) was reportedly around 1.5 million, many of whom were sheltering in extremely dire conditions amidst overcrowding and lack of basic services.<sup>110</sup> On 13 October, the Israeli army had directed the residents of northern Gaza – who number more than 1.1 million – to move south, which drew fierce criticism from the international community.<sup>111</sup> Such 'directives' to relocate were reiterated

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eg Matthew Rosenberg and Maria Abi-Habib, 'As Gazans Scrounge for Food and Water, Hamas Sits on a Rich Trove of Supplies' *The New York Times* (New York, 27 October 2023)

<<https://www.nytimes.com/2023/10/27/world/middleeast/palestine-gazans-hamas-food.html>> accessed 30 November 2023.

<sup>101</sup> OCHA oPt Flash Update #8 (n 69).

<sup>102</sup> OCHA oPt Flash Update #33 (n 68).

<sup>103</sup> OCHA oPt Flash Update #9 (n 75); OCHA oPt Flash Update #33 (n 68).

<sup>104</sup> Eg OCHA oPt Flash Update #13 (n 78); 'Gaza: UNRWA School Sheltering Displaced Families Is Hit' (*UNRWA*, 17 October 2023) <<https://www.unrwa.org/newsroom/official-statements/gaza-unrwa-school-sheltering-displaced-families-hit>> accessed 30 November 2023.

<sup>105</sup> Eg Nidal Al-Mughrabi and Emily Rose, 'Israel Strikes Dense Gaza Camp, Says It Kills Hamas Commander' *Reuters* (Gaza/Jerusalem, 31 October 2023) <<https://www.reuters.com/world/middle-east/hamas-says-it-fires-israeli-troops-pressing-gaza-ground-assault-2023-10-31/>> accessed 30 November 2023; 'Escalation in the Gaza Strip and Israel | Flash Update #3' (*OCHA oPt*, 9 October 2023) <<https://www.ochaopt.org/content/escalation-gaza-strip-and-israel-flash-update-3>> accessed 30 November 2023.

<sup>106</sup> Eg 'Al-Shati Refugee Camp In Ruins From Continuous Airstrikes' *NBC News* (Gaza City, 29 October 2023) <<https://www.nbcnews.com/video/al-shati-refugee-camp-in-ruins-from-continuous-airstrikes-196654661548>> accessed 30 November 2023.

<sup>107</sup> Eg 'Footage Shows Scale of Destruction After Israeli Air Strikes on Gaza' *BBC News* (Khan Younis/Gaza City, 8 October 2023) <<https://www.bbc.com/news/av/world-middle-east-67045650>> accessed 30 November 2023; Raja Abdulrahim and Ameerah Harouda, 'Israeli Airstrikes Hit Marketplace and Mosques in Gaza, Killing Dozens' *New York Times* (New York, 9 October 2023) <<https://www.nytimes.com/2023/10/09/world/middleeast/israel-gaza-market-air-strike-jabaliya.html>> accessed 30 November 2023.

<sup>108</sup> Nidal Al-Mughrabi, 'Orthodox Church Says It Was Hit by Israeli Air Strike in Gaza' *Reuters* (Gaza, 20 October 2023) <<https://www.reuters.com/world/orthodox-church-says-it-was-hit-by-israeli-air-strike-gaza-2023-10-20/>> accessed 30 November 2023.

<sup>109</sup> Emily Mae Czachor and Faris Tanyos, 'Maps and Satellite Images Reveal Gaza Devastation as Israel Retaliates for Hamas Attack' *CBS News* (New York, 12 October 2023) <<https://www.cbsnews.com/news/israel-war-satellite-images-reveal-gaza-strip-devastation-hamas-attack/>> accessed 30 November 2023.

<sup>110</sup> OCHA oPt Flash Update #33 (n 68).

<sup>111</sup> Helen Regan and others, 'Israel Tells 1.1 Million Gazans to Evacuate South. UN Says Order Is "Impossible"' *CNN* (Gaza and Jerusalem, 13 October 2023) <<https://edition.cnn.com/2023/10/13/middleeast/israel-gaza-hamas-war-friday-intl-hnk/index.html>> accessed 30 November 2023; 'WHO Pleads for Immediate Reversal of Gaza Evacuation Order to Protect Health and Reduce Suffering' (*WHO*, 13 October 2023) <<https://www.who.int/news/item/13-10-2023-who-pleads-for-immediate-reversal-of-gaza-evacuation-order-to-protect-health-and-reduce-suffering>> accessed 30 November 2023; 'Time Is Running Out For Children in Gaza—UNICEF' (*UNICEF*, 13 October 2023) <<https://www.unicef.org/press-releases/time-running-out-children-gazaunicef>> accessed 30 November 2023; 'Israel Must Rescind Evacuation Order for Northern Gaza

on several occasions, including on 21 October, with the military reportedly dropping leaflets threatening that anyone who chooses to stay in north Gaza ‘might be identified as an accomplice in a terrorist organisation’,<sup>112</sup> and on 28 October, via an English-language video published on the social media platform X (formerly Twitter),<sup>113</sup> while Gaza was under ‘telecommunications shutdown’.<sup>114</sup> As of 8 November, the Erez and Kerem Shalom crossings with Israel remained closed.<sup>115</sup> Between 21 October and 8 November, the Israeli authorities allowed a total number of 756 trucks to pass through the Rafah crossing to deliver direly needed humanitarian assistance (though no fuel, which would be needed to keep generators running in light of the electricity blackout, and only a fraction of other relief items needed);<sup>116</sup> it is estimated that before the hostilities, an average of 500 aid trucks entered Gaza every working day.<sup>117</sup> Already on 13 October, UNRWA had warned that Gaza ‘is on the brink of collapse’;<sup>118</sup> since then, the toll of human suffering only increased further and Gaza slipped into unmitigated humanitarian disaster: residents turned to consuming ‘non-potable water sources, including high-salinity and brackish-quality water from agricultural wells’;<sup>119</sup> doctors performed surgeries on patients without anaesthetics;<sup>120</sup> parents wrote their children’s

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and Comply With International Law: UN Expert’ (*UN*, 13 October 2023)

<<https://www.un.org/unispal/document/israel-must-rescind-evacuation-order-for-northern-gaza-and-comply-with-international-law/>> accessed 30 November 2023; ‘Gaza: Nowhere to Go, As Humanitarian Crisis Reaches “Dangerous New Low”’ (*UN News*, 13 October 2023) <<https://news.un.org/en/story/2023/10/1142282>> accessed 30 November 2023.

<sup>112</sup> ‘Israel Tells Gazans to Move South or Risk Being Seen as “Terrorist” Partner’ *Reuters* (Gaza, 22 October 2023) <<https://www.reuters.com/world/middle-east/israel-tells-gazans-move-south-or-risk-being-seen-terrorist-partner-2023-10-22/>> accessed 30 November 2023.

<sup>113</sup> Israel Defense Forces, ‘An Urgent Message for the Residents of Gaza’ (X, 28 October 2023) <<https://twitter.com/IDF/status/1718240244129059167>> accessed 30 November 2023. The Israeli military clarified that ‘[they]’ve said this countless times for over two weeks’, including in the Arabic language. Israel Defense Forces (X, 28 October 2023) <<https://twitter.com/IDF/status/1718275509224714382>> accessed 30 November 2023.

<sup>114</sup> ‘Hostilities in the Gaza Strip and Israel | Flash Update #22’ (*OCHA oPt*, 28 October 2023) <<https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-22>> accessed 30 November 2023.

<sup>115</sup> OCHA oPt Flash Update #33 (n 68).

<sup>116</sup> *Ibid.* It has also been reported that Jordan has provided emergency medical supplies via an airdrop. Eg ‘Jordan Says Air Force Dropped Urgent Medical Aid to Gaza’ *Reuters* (London, 6 November 2023) <<https://www.reuters.com/world/middle-east/jordan-says-air-force-dropped-urgent-medical-aid-gaza-2023-11-06/>> accessed 30 November 2023.

<sup>117</sup> ‘Hostilities in the Gaza Strip and Israel | Flash Update #21’ (*OCHA oPt*, 27 October 2023) <<https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-21>> accessed 30 November 2023.

<sup>118</sup> ‘Gaza Abyss: Civilians Are Dying at the World’s Watch’ (*UNRWA*, 13 October 2023) <<https://www.unrwa.org/newsroom/official-statements/gaza-abyss-civilians-are-dying-world%E2%80%99s-watch-unrwa-urges-protection>> accessed 30 November 2023.

<sup>119</sup> ‘Child Casualties in Gaza “A Growing Stain On Our Collective Conscience”’ (*UNICEF*, 24 October 2023) <<https://www.unicef.org/press-releases/child-casualties-gaza-growing-stain-our-collective-conscience>> accessed 30 November 2023.

<sup>120</sup> Bel Trew, ‘Patients Operated On Without Anaesthetic in Gaza as WHO Runs Out of Medicine’ *The Independent* (Tel Aviv, 19 October 2023) <<https://www.independent.co.uk/news/world/middle-east/patients-anaesthetic-who-medicine-gaza-b2431993.html>> accessed 30 November 2023.

names on their bodies to help with identification should they be killed;<sup>121</sup> and the ICRC warned that '[h]ospitals risk turning into morgues without electricity'.<sup>122</sup>

While hostilities rage between Israel and armed groups from Gaza, tensions have been boiling over in the West Bank, including East Jerusalem, where Israeli forces killed 150 Palestinians (including 44 children) and injured another 2,397 (including at least 253 children) between 7 October and 8 November.<sup>123</sup> During the same time period, settlers killed eight Palestinians, including one child, and injured 64 others.<sup>124</sup> On 19 and 20 October alone, in Nur Shams refugee camp near Tulkarm, Israeli forces killed 13 Palestinians, including six children; one Israeli soldier was reportedly killed as well.<sup>125</sup> On multiple occasions, Israel carried out airstrikes also in the West Bank.<sup>126</sup> According to OCHA, the week preceding 16 October was 'the deadliest ... for West Bank Palestinians since OCHA began recording casualties in 2005'.<sup>127</sup>

Violent attacks and retaliation by Israeli settlers increased markedly since 7 October,<sup>128</sup> drawing strong international criticism;<sup>129</sup> a total of 222 settler attacks resulting in casualties (28 attacks), property damage (160 attacks), or both (34 attacks) were recorded since 7 October until 8 November.<sup>130</sup> OCHA also documented that at least 905 Palestinians, amongst

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<sup>121</sup> Abeer Salman and others, 'Names Written on Children's Bodies Speak to the Fears of Gazan Parents Amid the Israel-Hamas War' *CNN* (Gaza, 23 October 2023) <<https://edition.cnn.com/2023/10/23/middleeast/gaza-hospitals-doctors-disaster-intl-hnk/index.html>> accessed 30 November 2023.

<sup>122</sup> 'Israel and the Occupied Territories: Hospitals Risk Turning into Morgues Without Electricity; Hostages Must Be Released Immediately' (*ICRC*, 12 October 2023) <<https://www.icrc.org/en/document/israel-and-occupied-territories-hospitals-risk-turning-morgues-without-electricity-hostages-must-be-released>> accessed 30 November 2023.

<sup>123</sup> OCHA oPt Flash Update #33 (n 68).

<sup>124</sup> *Ibid.*

<sup>125</sup> OCHA oPt Flash Update #13 (n 78); 'Hostilities in the Gaza Strip and Israel | Flash Update #14' (*OCHA oPt*, 20 October 2023) <<https://ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-14>> accessed 30 November 2023.

<sup>126</sup> 'Israeli Raid on West Bank Camp Kills 12 Palestinians, Officials Say' *Reuters* (Ramallah, 19/20 October 2023) <<https://www.reuters.com/world/middle-east/five-palestinians-killed-west-bank-clashes-with-israeli-forces-ministry-2023-10-19/>> accessed 30 November 2023; 'Israel Strikes Militant Compound under West Bank Mosque, Military Says' *Reuters* (Ramallah, 22 October 2023) <<https://www.reuters.com/world/middle-east/israeli-jets-strike-west-banks-jenin-two-killed-palestinian-medics-2023-10-21/>> accessed 30 November 2023; 'Israeli Drone Strike in West Bank Kills Three Palestinians, Officials Say' *Reuters* (Ramallah, 25 October 2023) <<https://www.reuters.com/world/middle-east/israeli-drone-strikes-palestinians-during-west-bank-raid-military-says-2023-10-25/>> accessed 30 November 2023.

<sup>127</sup> 'Hostilities in the Gaza Strip and Israel | Flash Update #10' (*OCHA oPt*, 16 October 2023) <<https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-10>> accessed 30 November 2023.

<sup>128</sup> 'The Other Mass Displacement: Settlers Advance on West Bank Herders' (*OCHA oPt*, 1 November 2023) <<https://www.ochaopt.org/content/other-mass-displacement-while-eyes-are-gaza-settlers-advance-west-bank-herders>> accessed 30 November 2023.

<sup>129</sup> See eg 'Israël/Territoires Palestiniens - Violences Perpétrées Par Les Colons Contre La Population Palestinienne (29 Octobre 2023)' (*French Ministry of Foreign Affairs*, 29 October 2023) <<https://www.diplomatie.gouv.fr/fr/dossiers-pays/israel-territoires-palestiniens/actualites-et-evenements/2023/article/israel-territoires-palestiniens-violences-perpetrees-par-les-colons-contre-la>> accessed 30 November 2023; Aamer Madhani, Seung Min Kim, and Colleen Long, 'Biden Condemns Retaliatory Attacks by Israeli Settlers Against Palestinians in the West Bank' *The Associated Press* (Washington DC, 26 October 2023) <<https://apnews.com/article/biden-west-bank-settlers-israel-hamas-war-0a2f38878720c962a20d9286315cde94>> accessed 30 November 2023.

<sup>130</sup> OCHA oPt Flash Update #33 (n 68).

them 356 children, from 15 herding communities were forced out of their homes due to settler violence, threats thereof, or access restrictions; another 135 Palestinians were displaced due to home demolitions.<sup>131</sup> Furthermore, thousands of workers from Gaza were reportedly detained by Israel after their work permits were revoked following the 7 October attacks; there are severe concerns that they were subjected to ill-treatment while in custody.<sup>132</sup> On 3 November, thousands were reportedly sent back to Gaza via the Kerem Shalom crossing,<sup>133</sup> following an Israeli cabinet decision to this effect;<sup>134</sup> at least two workers reportedly died in custody, while some were kept in detention for further questioning.<sup>135</sup> The Israeli authorities also imposed access and movement restrictions for residents of the West Bank, including East Jerusalem,<sup>136</sup> as well as a range of measures curtailing freedom of expression and assembly both in the oPt and in Israel.<sup>137</sup>

Since 8 November, the cut-off for the account of events and corresponding legal analysis provided in this brief, the humanitarian situation in Gaza has further markedly declined, especially as regards the state of health care facilities.<sup>138</sup> Severe fighting was reported around

<sup>131</sup> OCHA oPt Flash Update #33 (n 68).

<sup>132</sup> 'Israel Refuses to Reveal Information About Thousands of Gaza Residents Being Held in Israeli Detention Facilities' (*Gisha*, 19 October 2023) <<https://gisha.org/en/illegally-detained-workers-october-2023-en/>> accessed 30 November 2023; 'Thousands of Palestinian Permit-Holders From Gaza Are Being Held in Israel Secretly and Illegally' (*Gisha*, 24 October 2023) <<https://gisha.org/en/unlawfully-detained/>> accessed 30 November 2023; Hagar Shezaf and Chen Maanit, 'Gazan Workers Describe Inhuman Treatment at Israeli Detention Centers Since Outbreak of War' *Haaretz* (Tel Aviv, 26 October 2023) <<https://www.haaretz.com/israel-news/2023-10-26/ty-article/.premium/gazan-workers-describe-inhuman-treatment-at-israeli-detention-facilities-since-war-started/0000018b-6631-d473-a5fb-66f9fa930000>> accessed 30 November 2023.

<sup>133</sup> Nidal Al-Mughrabi, 'Israel Sends Thousands of Cross-Border Palestinian Workers Back to Gaza' *Reuters* (Gaza, 3 November 2023) <<https://www.reuters.com/world/middle-east/thousands-gazan-workers-sent-back-israel-occupied-west-bank-witnesses-2023-11-03/>> accessed 30 November 2023.

<sup>134</sup> 'Israeli Cabinet Decision to Return Gaza Workers to the Strip' (*Gisha*, 3 November 2023) <<https://gisha.org/en/israeli-cabinet-decision-to-return-gaza-workers-to-the-strip/>> accessed 30 November 2023.

<sup>135</sup> Hagar Shezaf, 'Two Gazan Laborers Die in Israeli Custody, Army Fails to Open Investigation' *Ha'aretz* (Tel Aviv, 6 November 2023) <<https://www.haaretz.com/israel-news/2023-11-06/ty-article/.premium/two-gazan-laborers-die-in-israeli-custody-army-fails-to-open-investigation/0000018b-a4d2-d9c0-a5fb-edda0c250000?ts=1699816630307>> accessed 30 November 2023.

<sup>136</sup> See eg 'The Other Mass Displacement: Settlers Advance on West Bank Herders' (*OCHA oPt*, 1 November 2023) <<https://www.ochaopt.org/content/other-mass-displacement-while-eyes-are-gaza-settlers-advance-west-bank-herders>> accessed 30 November 2023.

<sup>137</sup> See eg 'Crackdown on Freedom of Speech of Palestinian Citizens of Israel' (*Adalah*, 24 October 2023) <<https://www.adalah.org/en/content/view/10926>> accessed 30 November 2023; Arno Rosenfeld, 'Dozens of Israelis Arrested For Social Media Posts Defending Gaza, Advocates Say' *Forward* (New York, 18 October 2023) <<https://forward.com/fast-forward/565699/dozens-of-arrested-for-posts-defending-gaza/>> accessed 30 November 2023; 'Israeli Police Impose Sweeping Ban on Demonstrations Against Offensive on Gaza' (*Adalah*, 20 October 2023) <<https://www.adalah.org/en/content/view/10919>> accessed 30 November 2023.

<sup>138</sup> 'Gaza Hospitals Caught in the Middle of Israel-Hamas War' *AFP/France24* (Gaza Strip, 15 November 2023) <<https://www.france24.com/en/live-news/20231115-gaza-hospitals-caught-in-the-middle-of-israel-amas-war>> accessed 30 November 2023; Isabel Debre, 'Hospitals Have Special Protection under the Rules of War. Why Are They in the Crosshairs in Gaza?' *The Associated Press* (Jerusalem, 11 November 2023) <<https://apnews.com/article/israel-amas-war-gaza-hospitals-be55b16dd18e55be1b8ad395163ca19b>> accessed 30 November 2023.



Gaza City, with the Israeli army closing in on several hospitals including Al-Rantisi,<sup>139</sup> Al-Quds,<sup>140</sup> Al-Shifa – Gaza’s largest hospital, where on 15 November 179 bodies were buried in a mass grave, according to the Ministry of Health in Gaza<sup>141</sup> – and the Indonesian Hospital in Beit Lahia;<sup>142</sup> Al-Awda Hospital in Jabalia was reportedly struck on 21 November, killing four people, including three doctors, and injuring many others.<sup>143</sup>

OCHA documented that as of 3 December, only four hospitals in north Gaza were partially operational, with two others offering just dialysis; none of these reportedly had capacity to conduct surgeries. 12 hospitals in the south of Gaza were only partially functional as well.<sup>144</sup> A World Health Organization (WHO) official had said on 17 November that ‘the health system is on its knees’,<sup>145</sup> and that there is ‘clearly not enough support for this endless need’<sup>146</sup> resulting from the ongoing fighting and the humanitarian catastrophe that has ensued. Since 8 November, casualty numbers in Gaza have further risen dramatically, with at least 15,523 Palestinians killed as of 3 December, according to the Gaza Ministry of Health, of whom around 70% were reportedly women and children, and many more feared trapped underneath the rubble.<sup>147</sup>

<sup>139</sup> Najib Jobain and Jack Jeffery, ‘Medics and Patients, Including Babies, Stranded as Battles Rage Around Gaza Hospitals’ *The Associated Press* (Khan Younis, 14 November 2023) <<https://apnews.com/article/israel-hamas-war-news-11-13-2023-c98faefe9d5bb213d3e44cf9defd5990>> accessed 30 November 2023.

<sup>140</sup> ‘Hostilities in the Gaza Strip and Israel | Flash Update #39’ (*OCHA oPt*, 14 November 2023) <<https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-39>> accessed 30 November 2023; Nidal Al-Mughrabi and Dan Williams, ‘Israeli Tanks Outside Gaza Hospital, Biden Hopes for “Less Intrusive” Action’ *Reuters* (Gaza/Jerusalem, 13/14 November 2023) <<https://www.reuters.com/world/middle-east/largest-gaza-hospital-not-functioning-amid-israeli-assault-2023-11-12/>> accessed 30 November 2023.

<sup>141</sup> ‘Hostilities in the Gaza Strip and Israel | Flash Update #40’ (*OCHA oPt*, 15 November 2023) <<https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-40>> accessed 30 November 2023.

<sup>142</sup> Dan Sabbagh, ‘IDF Closes in on Indonesian Hospital in Gaza as 12 People Reportedly Killed’ *The Guardian* (Jerusalem, 20 November 2023) <<https://www.theguardian.com/world/2023/nov/20/israel-hamas-war-al-shifa-gaza-palestine-hostages-idf-military-claim-footage-cctv-security-camera>> accessed 30 November 2023.

<sup>143</sup> OCHA oPt Flash Update #46 (n 87).

<sup>144</sup> ‘Hostilities in the Gaza Strip and Israel | Flash Update #58’ (*OCHA oPt*, 3 December 2023) <<https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-58>> accessed 4 December 2023.

<sup>145</sup> ‘Gaza: “Endless Needs” Reflect Spiralling Situation as Hospitals Shut Down, WHO Warns’ (*UN News*, 17 November 2023) <<https://news.un.org/en/story/2023/11/1143697>> accessed 30 November 2023.

<sup>146</sup> *Ibid.*

<sup>147</sup> OCHA oPt Flash Update #58 (n 144).

A temporary humanitarian pause entered into effect on 24 November at 7 am local time,<sup>148</sup> and lasted until 1 December at around 7 am.<sup>149</sup> In this time frame, over 100 hostages held in Gaza and more than 200 Palestinians detained in Israeli prisons were released.<sup>150</sup>

A detailed account of events, which is updated regularly, is available on the IHL Centre's website.<sup>151</sup>

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<sup>148</sup> 'Hostilities in the Gaza Strip and Israel | Flash Update #49' (*OCHA oPt*, 24 November 2023) <<https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-49>> accessed 30 November 2023.

<sup>149</sup> Wafaa Shurafa, Bassem Mroue, and Julia Frankel, 'Israel Strikes Gaza After Truce Expires, in Clear Sign that War has Resumed in Full Force' *The Associated Press* (Deir al-Balah, 1 December 2023) <<https://apnews.com/article/israel-hamas-war-news-12-1-2023-c944c736efdf8993c7a17cf683d6e364>> accessed 1 December 2023.

<sup>150</sup> Wafaa Shurafa, Melanie Lidman, and Jack Jeffery, 'Mediators Scrambling for Israel-Hamas Truce Extension, as Hostages-for-Prisoners Swaps Get Harder' *The Associated Press* (Deir al-Balah, 1 December 2023) <<https://apnews.com/article/israel-hamas-war-news-11-30-2023-ea1a8fad4e2f4a394e5427a7c5815d38>> accessed 1 December 2023.

<sup>151</sup> '2023 Hostilities and Escalating Violence in the oPt | Account of Events' (*Diakonia IHL Centre*, last updated 17 November 2023) <<https://www.diakonia.se/ihl/news/2023-hostilities-in-gaza-and-israel-factual-account-of-events/>> accessed 30 November 2023.

## 2. Assessment of violations of IHL committed by Hamas forces

A large and compelling body of evidence provides strong indication that armed groups from Gaza led by Hamas (Hamas forces)<sup>152</sup> committed serious and widespread violations of IHL and, relatedly, that members of these groups perpetrated acts constituting war crimes<sup>153</sup> during the attack they launched against Israel on Saturday 7 October 2023, which Hamas dubbed ‘Operation Al-Aqsa Flood’, and in subsequent indiscriminate attacks. The evidence in question is comprised of multiple witness accounts, forensic analysis of human remains, and a range of other materials including audio-visual recordings made and in many cases disseminated by the perpetrators themselves, as well as security camera footage, and other visual imagery and audio recordings.<sup>154</sup> While it must be acknowledged that the veracity of these sources has not yet been confirmed in all cases, and some reports that have been published may be false or inaccurate, there is already extensive credible information that either incontrovertibly or strongly supports the conclusion that Hamas forces have committed acts which violate the most fundamental prohibitions established in IHL.<sup>155</sup>

### Attacks on civilians, wilful killings, and murder

For one thing, it cannot credibly be questioned that Hamas forces violated the principle of distinction, which is the cornerstone of the rules of IHL regulating the conduct of hostilities. This principle requires parties to an armed conflict to at all times distinguish the civilian population and civilian objects from military objectives, and to direct their operations only

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<sup>152</sup> The term ‘Hamas forces’ is used here as shorthand for all the armed groups involved in the Hamas-led attack. It should not be understood to imply that all the armed groups involved are legally or otherwise affiliated with or embedded within Hamas.

<sup>153</sup> War crimes are serious violations of IHL that give rise to individual criminal responsibility. For details see eg Diakonia IHL Centre, *Easy Guide to International Humanitarian Law* (4th rev edn, 2021), 32, <<https://www.diakonia.se/ihl/news/easy-guide-to-international-humanitarian-law/>> accessed 30 November 2023.

<sup>154</sup> ‘Hamas Leaves a Trail of Terror in Israel’ *New York Times* (New York, 10 October 2023) <<https://www.nytimes.com/2023/10/10/world/middleeast/israel-gaza-war-hamas-deaths-killings.html>> accessed 30 November 2023; Daniel Boffey and Sam Jones, ‘Israel’s Darkest Day: The 24 Hours of Terror That Shook the Country’ *The Guardian* (London, 13 October 2023) <<https://www.theguardian.com/world/2023/oct/13/israel-darkest-day-24-hours-of-terror-hamas-gaza>> accessed 30 November 2023; Zoeann Murphy and others, ‘Survivors of Hamas’s Rampage in Israel Recount the Horrors They Saw’ *The Washington Post* (Washington, 13 October 2023) <[https://www.washingtonpost.com/world/interactive/2023/survivors-hamas-attack/?itid=hp-banner-main\\_p003\\_f002](https://www.washingtonpost.com/world/interactive/2023/survivors-hamas-attack/?itid=hp-banner-main_p003_f002)> accessed 30 November 2023; Casey Tolan et al, ‘Slain Hamas Militants’ Body Camera Videos Show the Preparation and Tactics Behind Their Terror Attack on Israel’ *CNN* (Atlanta, 26 October 2023) <<https://edition.cnn.com/interactive/2023/middleeast/hamas-attack-body-cam-videos-invs-dg/?fbclid=IwAR1-VM-g8S2vKfF4wjGd3X2OJuulLvoE3FUAZsCA1-jhkgcxK0vd8e9Fu4>> accessed 30 November 2023. For a compilation of video recordings from various sources published by the Israeli military see ‘Graphic Raw Footage: Massacre Across Israel from the Eyes of Hamas’ (18 October 2023) <<https://www.youtube.com/watch?v=wAFDI63yvNQ>> accessed 30 November 2023.

<sup>155</sup> The prohibitions in question, referenced here below, are norms of customary international law that are binding both in international and in non-international armed conflict. As such, these provisions are binding on the non-State armed groups that perpetrated the attack in Israel irrespective of the question (on which there are diverging views) of whether the hostilities between Israel and these armed groups should be governed by the rules applicable to international armed conflicts or by those applicable to non-international armed conflicts.

against the latter.<sup>156</sup> Related provisions expressly prohibit direct or indiscriminate attacks against civilians and civilian objects, and further prohibit acts or threats of violence the primary purpose of which is to spread terror among the civilian population.<sup>157</sup> In clear breach of these provisions, both Hamas and the Palestinian Islamic Jihad (PIJ) have indiscriminately fired thousands of rockets at inhabited areas in Israel.<sup>158</sup> Moreover, Hamas forces that infiltrated Israeli territory directly attacked civilians, killing many hundreds and injuring thousands more.<sup>159</sup> The available evidence indicates that civilians who were unarmed and clearly posed no threat to their assailants, including children and infants, were gunned down in acts of mass killing or otherwise intentionally shot and killed.<sup>160</sup> This included the massacre of hundreds of people attending an outdoor musical festival,<sup>161</sup> the killing of hundreds more civilians in murderous raids on Israeli kibbutzim, towns, and villages located near Gaza, and the apparent execution of civilians who had been taken hostage.<sup>162</sup> Such killings of civilians taking no active part in hostilities are absolutely prohibited in both international and non-international armed conflicts. Indeed, acts of such kind fall within the definition of murder or wilful killing that are among the serious violations of IHL prohibited at any time in any place

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<sup>156</sup> AP I art 48. As established in CIHL rr 1 and 7, this provision is reflective of customary international law in both international and non-international armed conflicts. So too are the other treaty provisions cited here below, unless stated otherwise. As such, these provisions are binding in the case at hand, despite the fact that Israel is not a party to the two Additional Protocols to the Geneva Conventions, and even while Hamas forces are non-State actors.

<sup>157</sup> AP I arts 51(2), 51(4), and 52(1); CIHL rr 1, 2, 7, 11, and 12. For the purposes of these rules, the concept of indiscriminate attack encompasses attacks which do not or cannot be directed at a specific military objective, as well as attacks the effects of which cannot be limited as required by IHL. Indiscriminate and widespread shelling has been deemed an example of an act of violence the primary purpose of which is to spread terror among the civilian population, as were other acts of the type attributed to Hamas forces in their attack, including assault, rape, abuse, torture, and mass killings. See Commentary to CIHL r 2 and sources cited there; ‘An interview with Ben Saul on International Humanitarian Law in the context of the Israel-Gaza Crisis’ (*International Centre for Counter-Terrorism (ICCT)*, 31 October 2023) <<https://www.icct.nl/publication/interview-ben-saul-international-humanitarian-law-context-israel-gaza-crisis>> accessed 30 November 2023.

<sup>158</sup> Josef Federman and Issam Adwan, ‘Hamas Surprise Attack out of Gaza Stuns Israel and Leaves Hundreds Dead in Fighting, Retaliation’ *The Associated Press* (Jerusalem, 8 October 2023) <<https://apnews.com/article/israel-palestinians-gaza-hamas-rockets-airstrikes-tel-aviv-11fb98655c256d54ecb5329284fc37d2>> accessed 30 November.

<sup>159</sup> Patrick Kingsley, Aaron Boxerman, and Gabby Sobelman, ‘“There Were Terrorists Inside”: How Hamas’s Attack on Israel Unfolded’ *The New York Times* (Jerusalem, 8 October 2023) <<https://www.nytimes.com/2023/10/08/world/middleeast/israel-hamas-attack.html>> accessed 30 November; ‘Hostilities in the Gaza Strip and Israel | Flash Update #28’ (*OCHA oPt*, 3 November 2023) <<https://ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-28>> accessed 30 November 2023.

<sup>160</sup> Ibid.

<sup>161</sup> According to an Israel Police report, the death toll at the music festival was 364. Some of the casualties were reportedly inadvertently struck by an Israeli combat helicopter as it fired at Hamas forces. Josh Breiner, ‘Israeli Security Establishment: Hamas Likely Didn’t Have Advance Knowledge of Nova Festival’ *Haaretz* (Tel Aviv, 18 November 2023) <<https://www.haaretz.com/israel-news/2023-11-18/ty-article/.premium/israeli-security-establishment-hamas-likely-didnt-have-prior-knowledge-of-nova-festival/0000018b-e2ee-d168-a3ef-f7fe8ca20000?lts=1701376369094>> accessed 30 November 2023.

<sup>162</sup> Meg Kelly and Sarah Cahlan, ‘Video Shows Apparent Death of Israeli Hostages in Hamas Custody’ *Washington Post* (Washington, New York, London, 9 October 2023) <<https://www.washingtonpost.com/investigations/2023/10/09/israel-hamas-hostage-death/>> accessed 30 November 2023.

whatsoever, whether committed by civilian or by military agents, and constitute war crimes.<sup>163</sup>

It has been reported that some of the persons killed by Hamas forces were medical personnel who were tending to the wounded.<sup>164</sup> Under IHL, medical personnel must be respected and protected in all circumstances, and lose their protection only if they commit, outside their humanitarian function, ‘acts harmful to the enemy’.<sup>165</sup> In the reported incidents, the medical personnel concerned were performing their humanitarian function when they were killed. Killing them was consequently a violation of IHL. In instances where the victims were under the control of the assailants at the time they were killed, this act also falls within the definition of the war crime of wilful killing or murder discussed above.<sup>166</sup>

Based on video recordings made by the perpetrators themselves, it has further been reported that Hamas forces killed unarmed soldiers who were effectively in their power at the time,<sup>167</sup> and who consequently appear to have been *hors de combat*.<sup>168</sup> Attacks against persons *hors de combat* are prohibited under IHL,<sup>169</sup> and deliberately killing such persons likewise constitutes the war crime of wilful killing or murder.<sup>170</sup> Relatedly, ordering that no quarter will be given (i.e., that there shall be no survivors), threatening an adversary therewith, or conducting hostilities on this basis is prohibited,<sup>171</sup> and constitutes a war crime.<sup>172</sup>

### Unlawful deprivation of liberty and hostage taking

There is also incontrovertible evidence that Hamas forces captured many civilians – including elderly people, as well as children, among them infants and babies – and took them

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<sup>163</sup> The rules applicable to international armed conflicts establish that wilful killing of civilians is a grave breach of GC IV, and that acts of murder are prohibited at any time and place and whoever the perpetrator. See GC IV art 147; AP I art 75(2)(a)(i). Murder is prohibited in non-international armed conflict in GCs art 3 and in Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, came into force 7 December 1978) 1125 UNTS 609 (AP II) art 4(2)(a). These acts are defined as war crimes in international and non-international armed conflicts, respectively, in the Rome Statute of the ICC (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (ICC Statute) arts 8(2)(a)(i) and 8(2)(c)(1).

<sup>164</sup> Eitan Glickman, ‘Paramedic Amit Mann’s Final Conversation: “She Saved Lives Until Her Last Moment”’ *YNet* (Tel Aviv, 11 October 2023) <<https://www.ynetnews.com/article/h1vtskmwa>> accessed 30 November 2023.

<sup>165</sup> GC IV art 20; AP I art 15; GCs art 3; AP II art 9(1); CIHL r 25.

<sup>166</sup> ICC Statute arts 8(2)(a)(i) and 8(2)(c)(1).

<sup>167</sup> The recordings were retrieved from a Hamas gunman who was later killed by Israeli forces. See Patrick Kingsley and Ronen Bergman, ‘The Secrets Hamas Knew About Israel’s Military’ *New York Times* (New York and Jerusalem, 13 October 2023) <<https://www.nytimes.com/2023/10/13/world/middleeast/hamas-israel-attack-gaza.html>> accessed 30 November 2023.

<sup>168</sup> A person is regarded as *hors de combat* if (a) they are in the power of an adverse party; (b) they are defenceless because of unconsciousness, shipwreck, wounds or sickness; or (c) they clearly express an intention to surrender; provided they abstain from any hostile act and do not attempt to escape. AP I art 41(2); CIHL r 47.

<sup>169</sup> AP I art 41; CIHL r 47.

<sup>170</sup> ICC Statute arts 8(2)(a)(i) and 8(2)(c)(i).

<sup>171</sup> Hague Regulations, art 23(d); AP I arts 40; CIHL r 46.

<sup>172</sup> ICC Statute arts 8(2)(b)(xii) and 8(2)(e)(x).

hostage.<sup>173</sup> Many Israeli soldiers were also captured and are being held hostage.<sup>174</sup> Under the circumstances in which these acts were perpetrated, the capturing of civilians by the armed groups concerned ( Hamas, the PIJ, and possibly other factions) would constitute a violation of the prohibition on arbitrary deprivation of liberty, which is applicable in situations of armed conflict,<sup>175</sup> even if these civilians were not being held hostage. This violation is especially egregious in the case of the detention of children, who are entitled to special protection in times of armed conflict,<sup>176</sup> and who should not be detained except where necessary as a measure of last resort for legitimate grounds (such as protecting others from harm), and for the shortest appropriate period of time.<sup>177</sup> In this case, clearly no such justifications for detaining children exist.

Hostage taking, which is an inherently unlawful deprivation of liberty, is distinguished from other forms of deprivation of liberty occurring in armed conflict because it is a form of detention which is accompanied by a threat to kill, injure, or continue to detain in order to compel a third party to do or to abstain from doing any act as an explicit or implicit condition for the release of the hostage.<sup>178</sup> In the present case, Hamas has made it plain that it intends to hold the soldiers and civilians it has detained as bargaining chips to secure the release of persons detained by Israel.<sup>179</sup> It has also threatened to kill them in an effort to compel Israel to refrain from attacking homes in Gaza without prior warning.<sup>180</sup> It is thus clearly acting with the specific intent that defines hostage taking. The act of holding persons hostage, be they soldiers or civilians, is a serious violation of IHL,<sup>181</sup> and is defined as a war crime.<sup>182</sup>

Hamas is required to release the persons it is holding hostage unconditionally without delay, and unharmed. It is continually violating IHL and committing an ongoing war crime for such time as it holds persons hostage. The execution of hostages in its custody, which Hamas forces have reportedly already perpetrated, and which senior Hamas officials have threatened to

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<sup>173</sup> 'Hamas's Hostages' *New York Times* (New York, 11 October 2023)

<<https://www.nytimes.com/2023/10/11/briefing/isreal-hamas-hostages.html>> accessed 30 November 2023.

<sup>174</sup> Evan Hill and others, 'Hamas Took at least 64 Captives into Gaza, Visual Evidence Suggests' *Washington Post* (Jerusalem, London, Washington, 12 October 2023)

<<https://www.washingtonpost.com/investigations/2023/10/12/israel-hostage-count-videos/>> accessed 30 November 2023; 'Cassandra Vinograd and Isabel Kershner, 'Israel's Attackers Took About 240 Hostages. Here's What to Know About Them' *New York Times* (New York, 2 November 2023)

<<https://www.nytimes.com/article/israel-hostages-hamas-explained.html>> accessed 30 November 2023.

<sup>175</sup> CIHL r 99.

<sup>176</sup> GC IV arts 24, 50, 76, and 89; AP I art 70(1); AP II art 4(3); Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC) art 38(4).

<sup>177</sup> CRC art 37(b). The applicability of the CRC in circumstances of armed conflict has been confirmed, inter alia, by the ICJ, see *Legal Consequences of the Construction of a Wall* (Advisory Opinion) 2004 <<https://www.icj-cij.org/sites/default/files/case-related/131/131-20040709-ADV-01-00-EN.pdf>> accessed 30 November 2023 [103-106].

<sup>178</sup> International Convention against the Taking of Hostages (adopted 17 December 1979, entered into force 3 June 1983) 1316 UNTS 205 art 1(1).

<sup>179</sup> Rachel Briggs, 'Why Has Hamas Taken Hostages?' (*Chatham House*, 11 October 2023)

<<https://www.chathamhouse.org/2023/10/why-has-hamas-taken-hostages>> accessed 30 November 2023.

<sup>180</sup> Hamas's Hostages (n 173).

<sup>181</sup> CIHL r 96.

<sup>182</sup> ICC Statute arts 8(2)(a)(viii) and 8(2)(c)(iii).

continue to do in retaliation for Israeli attacks in Gaza,<sup>183</sup> would constitute additional acts of murder, which as observed above is a serious violation of IHL and a war crime.

The failure of Hamas and of other armed groups holding civilians and Israeli soldiers in captivity to disclose information about the persons they are holding or to allow any contact with them constitutes a violation of the prohibition on enforced disappearance,<sup>184</sup> and of the related duty to take steps to prevent disappearances, including through the registration of persons deprived of their liberty.<sup>185</sup> It is also in violation of the rule requiring respect for family life,<sup>186</sup> and of the related rule mandating that persons deprived of their liberty be allowed to correspond with their families (subject to reasonable conditions relating to frequency and the need for censorship).<sup>187</sup> It further violates the rule that each party to the conflict must take all feasible measures to account for persons reported missing as a result of armed conflict, and to provide their family members with information it has on their fate.<sup>188</sup> At the very least, the ICRC ought to have been given access to the persons being held in captivity in order to restore contacts between them and their families, and to verify the conditions of their detention.<sup>189</sup>

### **Torture, cruel, inhuman, and degrading treatment**

IHL mandates that civilians and persons *hors de combat* be treated humanely,<sup>190</sup> and correspondingly prohibits subjecting them to any form of torture, cruel, inhuman, or degrading treatment, or to acts of mutilation.<sup>191</sup> Torture, mutilation, wilfully causing great suffering, cruel treatment, and outrages upon personal dignity, in particular humiliating and degrading treatment, also constitute war crimes.<sup>192</sup>

Witness testimonies and video recordings made and disseminated by the perpetrators themselves<sup>193</sup> indicate that Hamas forces acted in complete contravention of these provisions, subjecting civilians and captured soldiers to cruel, inhuman, and degrading treatment. This included, for instance, burning down houses with their residents inside with

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<sup>183</sup> Hamas's Hostages (n 173); Kelly and Cahlan (n 162); Jamie Dettmer, 'The Coming Gaza Hostage Crisis' *Politico* (Arlington, 10 October 2023) <<https://www.politico.eu/article/hamas-gaza-israel-palestine-hostages-war-executions/>> accessed 30 November 2023.

<sup>184</sup> CIHL r 98.

<sup>185</sup> CIHL r 123.

<sup>186</sup> CIHL r 105.

<sup>187</sup> CIHL r 125. Persons deprived of their liberty should also be allowed to receive visitors to the degree practicable (CIHL r 126). Depending on how one would evaluate practicability in this case, this rule too may have been violated.

<sup>188</sup> CIHL r 117.

<sup>189</sup> In international armed conflicts, detaining powers have an obligation to grant the ICRC such access. See GC III art 126; GC IV art 76 and 143; CIHL r 124. In non-international armed conflicts, the ICRC may offer its services to the parties with a view to having such access. Such offers must be examined in good faith, and may not be refused arbitrarily. See GCs common art 3; CIHL r 124.

<sup>190</sup> GCs art 3; GC IV arts 5 and 27; AP 1 art 75(1); AP II art 4(1); CIHL r 87.

<sup>191</sup> GCs art 3; GC IV art 32; AP I art 75(2); AP II art 4(2); CIHL rr 90 and 92.

<sup>192</sup> ICC Statute arts 8(2)(a)(ii) and (iii), 8(2)(b)(x), 8(2)(b)(xxi), 8(2)(c)(i) and (ii), and 8(2)(e)(xi).

<sup>193</sup> Some of the videos in question, containing disturbing images, have been archived here: 'Hamas Atrocities Documentation Center' <<https://t.me/HamassADC>> accessed 30 November 2023.

the apparent intention to induce families to exit the homes in which they had sought refuge,<sup>194</sup> and many recorded instances of violent and humiliating mistreatment of captured persons.<sup>195</sup> Emergency workers who removed the remains of victims who had been killed during the attack testified that the bodies they discovered bore signs of extremely cruel forms of physical abuse, including multiple instances in which people, many of whom were children, appeared to have been burned alive and mutilated.<sup>196</sup> Such accounts, as well as forensic analysis that has since been conducted,<sup>197</sup> provide compelling evidence that acts of torture, mutilation, and wilful infliction of great suffering were perpetrated.

First responders further testified that it was evident from bodily remains they retrieved that some women and girls had been raped before being killed.<sup>198</sup> Allegations that the outrages committed by Hamas forces included acts of rape have been voiced, among others, by Israel's Prime Minister Benjamin Netanyahu and, following him, US President Joe Biden.<sup>199</sup> These allegations were later confirmed by other Israeli sources including the chief spokesperson for the Israeli military, as well as other officials and a nongovernmental commission that has reportedly assembled an extensive body of evidence indicating that rape and sexual abuse had been carried out systematically.<sup>200</sup> This evidence reportedly included eyewitness testimonies about gang rape and murder during the attack by Hamas forces.<sup>201</sup> Allegations of gender-based crimes, with an emphasis on murder and hostage taking, rape, and other forms

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<sup>194</sup> For witness accounts of this practice, see eg 'Golan's Story: A Father's Account of Survival in the Attack on an Israeli Kibbutz' (*The Daily Podcast, The New York Times*, 13 October 2023) <<https://www.nytimes.com/2023/10/13/podcasts/the-daily/israel-hamas-kibbutz.html>> accessed 30 November 2023; 'Hamas Attack on Israel Kibbutz Be'eri Captured by Mothers' WhatsApp Group' *BBC News* (London, 13 October 2023) <<https://www.bbc.com/news/world-middle-east-67105618>> accessed 30 November 2023; Ruth Margalit, 'The Devastation of Be'eri' *The New Yorker* (New York, 19 October 2023) <<https://rb.gy/cvyfp>> accessed 30 November 2023.

<sup>195</sup> Joyce Sohyun Lee and Imogen Piper, 'Videos show captives in Gaza and Israel' *The Washington Post* (Washington, 7 October 2023) <<https://www.washingtonpost.com/world/2023/10/07/videos-show-captives-gaza-israel/>> accessed 30 November 2023.

<sup>196</sup> Eg "'The Horror': Israeli Collecting Corpses Near Gaza' *France 24* (Paris, 13 October 2023), <<https://www.france24.com/en/live-news/20231012-the-horror-israeli-collecting-corpses-near-gaza>> accessed 30 November 2023; Margalit, *ibid*.

<sup>197</sup> Peter Hirschberg, 'Israeli Forensic Teams Describe Signs of Torture, Abuse' *Reuters* (Ramla, October 15 2023) <<https://www.reuters.com/world/middle-east/israeli-forensic-teams-describe-signs-torture-abuse-2023-10-15/>> accessed 30 November 2023; Wilke (n 73); Kevin Sieff, 'Israel's Missing: Forensic Workers Struggle to Put Names to the Dead' *The Washington Post* (Tel Aviv, 31 October 2023) <<https://www.washingtonpost.com/world/2023/10/31/israel-attack-victims-forensic-identification/>> accessed 30 November 2023.

<sup>198</sup> PHRI (n 71); Rose and Villarraga (n 71); Wilke (n 73); Shira Rubin, 'Israel Investigates an Elusive, Horrific Enemy: Rape as a Weapon of War' *The Washington Post* (Tel Aviv, 25 November) <<https://www.washingtonpost.com/world/2023/11/25/israel-hamas-rape-sexual-violence/>> accessed 30 November 2023.

<sup>199</sup> Arno Rosenfeld, 'What We Know About Accounts of Sexual Assault During the Hamas Attack' *Forward* (New York, 11 October 2023) <<https://forward.com/news/564318/sexual-assault-rape-proof-hamas-idf-israel-gaza/>> accessed 30 November 2023.

<sup>200</sup> Adkins (n 71); Hirschberg (n 197); Rubin (n 198); PHRI (n 71); Hilo Glazer, 'The Scope of Hamas' Campaign of Rape Against Israeli Women Is Revealed, Testimony After Testimony' *Haaretz* (Tel Aviv, 30 November 2023) <<https://www.haaretz.com/israel-news/2023-11-30/ty-article-magazine/.highlight/hamas-campaign-of-rape-against-israeli-women-is-revealed-testimony-after-testimony/0000018c-2144-da36-a1de-6767dac90000>> accessed 30 November 2023.

<sup>201</sup> Breiner (n 71); Rubin (n 198).



of sexual violence are also the subject of an ongoing investigation by the UN Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel.<sup>202</sup> Such acts of rape and sexual violence violate IHL,<sup>203</sup> and constitute a war crime.<sup>204</sup>

### Mistreatment of the dead

Videos and photographs taken during the course of the attacks by Hamas forces in Israel and additional images taken upon their return to Gaza, which have been disseminated online and authenticated, depict mistreatment of the dead and indicate that acts of mutilation have been committed. This includes, among others, images of militants parading the bodies of the dead, posing with their feet placed on the heads of the deceased, and images of beheaded Israeli soldiers.<sup>205</sup> Reports and images released by Israeli sources provide further indication that the bodies of the victims of the Hamas attacks had been mutilated.<sup>206</sup>

Such practices violate the prohibition on outrages upon personal dignity established in IHL,<sup>207</sup> which is understood to include any such mistreatment of the dead.<sup>208</sup> Accordingly, all parties to the conflict must take all possible measures to prevent the dead from being despoiled, and mutilation of dead bodies is prohibited.<sup>209</sup> The commission of such acts constitutes a war crime.<sup>210</sup> Mistreatment of the dead, for example parading the bodies of the deceased, may also amount to a violation of the prohibition of torture or other ill-treatment, due to the mental pain and suffering inflicted on their relatives or members of their community.<sup>211</sup>

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<sup>202</sup> 'Commission of Inquiry collecting evidence of war crimes committed by all sides in Israel and Occupied Palestinian Territories since 7 October 2023' (OHCHR, 10 October 2023) <<https://www.ohchr.org/en/press-releases/2023/10/commission-inquiry-collecting-evidence-war-crimes-committed-all-sides-israel>> accessed 30 November 2023; 'Call for submissions on gender-based crimes since 7 October 2023' (OHCHR/Human Rights Council) <<https://www.ohchr.org/en/hr-bodies/hrc/co-israel/call-submissions-gender-based-crimes-7-October-2023>> accessed 30 November 2023.

<sup>203</sup> GCs art 3; AP I art 75(2); AP II art 4(2); CIHL r 93.

<sup>204</sup> In addition to the aforementioned war crimes of cruel and inhuman treatment and commission of outrages upon personal dignity, acts of rape and sexual violence are expressly defined as a war crime in ICC Statute arts 8(2)(b)(xxii) and 8(2)(c)(e)(vi).

<sup>205</sup> Hadas Gold and others, 'Hamas Captures Hostages as Israelis Share Photos of Those Missing' *CNN* (Atlanta, 8 October 2023) <<https://edition.cnn.com/2023/10/07/middleeast/hostages-hamas-israel-gaza/index.html>> accessed 30 November 2023. Some disturbing images of this kind have been archived at Hamas Atrocities Documentation Center (n 193).

<sup>206</sup> John Davison, Humeyra Pamuk, and Sabine Siebold, 'Israel Releases Images of Slain Children to Rally Support after Hamas Attack' *Reuters* (Jerusalem, Tel Aviv, Brussels, 13 October 2023) <<https://www.reuters.com/world/nato-ministers-shown-horrific-video-hamas-attack-2023-10-12/>> accessed 30 November 2023; Rose Villarraga (n 71)

<sup>207</sup> AP I art 75(1); GCs art 3(1)(c); CIHL r 90.

<sup>208</sup> *Commentary on the Third Geneva Convention: Convention (III) relative to the Treatment of Prisoners of War* (2nd ed, ICRC 2020) (2020 Commentary on GC III), Common art 3, para 704 <<https://ihl-databases.icrc.org/ihl/full/GCIII-commentary>> accessed 30 November 2023.

<sup>209</sup> CIHL rr 90 and 113; GCs art 3(1)(c); 2020 Commentary on GC III, Common art 3, para 647.

<sup>210</sup> ICC Statute arts 8(2)(b)(xxi) and 8(2)(c)(ii), and Elements of Crimes, ICC-ASP/1/3 (Rome, 9 September 2002).

<sup>211</sup> 2020 Commentary on GC III, Common art 3, para 675.

Parties to the conflict must endeavour to facilitate the return of the remains of the deceased upon request by their families.<sup>212</sup> This obligation is unconditional; the return of the dead cannot be used as a bargaining chip to coerce the family or the party to which the deceased belonged to do or refrain from doing something. The Hamas forces, which have not yet returned any of the bodies of the persons they killed in their attack, are in violation of this rule as well.

### **Destruction and pillage of property**

The Hamas forces' violations of the principle of distinction have come in the form of attacks on civilian objects as well as attacks on civilians. In addition to indiscriminate rocket fire into civilian urban areas which struck and damaged civilian dwellings and infrastructure, the Hamas forces raided and intentionally set fire to civilian homes.<sup>213</sup> Acts of wanton destruction of civilian objects were compounded by acts of pillage. In this regard, video recordings by the perpetrators as well as footage from security cameras in some of the inhabited areas that were attacked documented incidents in which militants can be seen looting the bodies of persons who had been killed and taking possession of their property (e.g., stealing a car after killing its passengers),<sup>214</sup> and witness accounts, corroborated by video recordings, describe how civilian homes were ransacked.<sup>215</sup>

In addition to the prohibition on launching attacks against civilian objects,<sup>216</sup> IHL prohibits destruction of the property of an adversary in any circumstances other than where required by imperative military necessity.<sup>217</sup> Such destruction of property constitutes a war crime.<sup>218</sup> Pillage too is prohibited under IHL,<sup>219</sup> and constitutes a war crime.<sup>220</sup>

### **Failure to take precautions against the effects of attacks and use of human shields**

By embedding its forces within the civilian population of Gaza and launching attacks from such locations,<sup>221</sup> Hamas has knowingly exposed the civilian population under its control to the risk of being harmed by Israeli counterattacks. In so doing, it has acted in complete contravention of the IHL rule which provides that 'to the maximum extent feasible', parties to an armed conflict must: (a) endeavour to remove the civilian population, individual civilians, and civilian objects under their control from the vicinity of military objectives; (b)

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<sup>212</sup> CIHL r 114.

<sup>213</sup> See accounts of this practice and visual documentation in the sources cited at n 194.

<sup>214</sup> For an account of such acts, see eg Boffey and Jones (n 154).

<sup>215</sup> Eg Mothers' WhatsApp Group (n 194); Kingsley and Bergman (n 167).

<sup>216</sup> AP I arts 48 and 52(1); CIHL r 7. Mounting such an attack is a war crime. See ICC Statute art 8(2)(b)(ii).

<sup>217</sup> CIHL r 50.

<sup>218</sup> ICC Statute arts 8(2)(b)(xiii) and 8(2)(e)(xii).

<sup>219</sup> Hague Regulations art 28; GC IV art 33; AP II art 4(2)(g); CIHL r 52.

<sup>220</sup> ICC Statute arts 8(2)(b)(xvi) and 8(2)(e)(v).

<sup>221</sup> Eg, 'What is a Human Shield and How Has Hamas Been Accused of Using Them?' *The Guardian* (London, 30 October 2023) <<https://www.theguardian.com/world/2023/oct/30/human-shield-israel-claim-hamas-command-centre-under-hospital-palestinian-civilian-gaza-city>> accessed 30 November 2023; 'IDF Releases What it Says is Evidence of Hamas Using Civilian Infrastructure to Launch Attacks' *CNN* (Atlanta, 5 November 2023) <[https://edition.cnn.com/middleeast/live-news/israel-hamas-war-gaza-news-11-05-23/h\\_f5bf4ef2a7a6a9c8bfa377c2c48213d8](https://edition.cnn.com/middleeast/live-news/israel-hamas-war-gaza-news-11-05-23/h_f5bf4ef2a7a6a9c8bfa377c2c48213d8)> accessed 30 November 2023.

avoid locating military objectives within or near densely populated areas; and (c) take the other necessary precautions to protect the civilian population, individual civilians, and civilian objects under their control against the dangers resulting from military operations.<sup>222</sup>

When a party to an armed conflict not only fails to take precautions against the effects of attacks by its adversary, but knowingly places civilians or persons *hors de combat* under its control in the same location as a military object with the specific intent of trying to prevent its adversary from targeting those military objectives, it is committing the act of using human shields, which is a violation of IHL and a war crime.<sup>223</sup> While at this point it may not yet be possible to establish conclusively whether Hamas has indeed been acting with such specific intent, there are, at the very least, serious grounds for concern that it has been doing so. Indeed, based on an analysis of Hamas' actions and statements, some commentators have already surmised that it has used and is continuing to use civilians, including persons it has captured and the civilian population of Gaza, as human shields.<sup>224</sup> Moreover, the Israeli military has accused Hamas of using medical and humanitarian facilities as a shield for its operations, and published photographs, diagrams, and audio recordings in support of an allegation – which Hamas and the hospital administration denied – that the main hospital in Gaza, Al-Shifa Hospital, had been used as a shield for tunnels, command posts, and other infrastructure serving Hamas' combat operations.<sup>225</sup>

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<sup>222</sup> AP I art 58; CIHL r 22.

<sup>223</sup> The use of human shields is explicitly prohibited in AP I art 51(7) (see also GC III art 23(1); GC IV art 28). It is defined as a war crime in ICC Statute art 8(2)(b)(xxiii). While these provisions apply to international armed conflicts, the prohibition on the use of human shields has been deemed applicable in non-international armed conflicts as well. See CIHL r 97.

<sup>224</sup> Eg Briggs (n 179); Ben Samuels, 'Biden on Gaza Humanitarian Crisis: "Innocent Palestinians Used as Hamas Human Shields"' *Haaretz* (Washington, 15 October 2023) <<https://www.haaretz.com/israel-news/2023-10-15/ty-article/.premium/biden-on-gaza-humanitarian-crisis-innocent-palestinians-used-as-hamas-human-shields/0000018b-307a-da5e-abef-b97f404f0000>> accessed 30 November 2023; Sean O'Grady, 'A Million Palestinians Have Become Human Shields For Hamas' *The Independent* (London, 14 October 2023) <<https://www.independent.co.uk/voices/israel-hamas-palestine-invasion-human-shields-war-b2429205.html>> accessed 30 November 2023.

<sup>225</sup> See eg 'Israeli Military Says Hamas Hiding Tunnels, Operations Centres in Gaza Hospital' *Reuters* (Jerusalem, 27 October 2023) <<https://www.reuters.com/world/middle-east/israeli-military-says-hamas-hiding-tunnels-operations-centres-gaza-hospital-2023-10-27/>> accessed 30 November 2023. After seizing control of the hospital, the Israeli military later uncovered tunnels underneath it and granted foreign media outlets access to them. Israel maintains that these served as a Hamas hideout, which Hamas and the hospital administration have denied. Ronen Zvulun, 'Israeli Army Displays Tunnel Beneath Al Shifa It Says Served as Hamas Hideout' *Reuters* (Gaza, 22/23 November 2023) <<https://www.reuters.com/world/middle-east/israeli-army-displays-tunnel-beneath-al-shifa-it-says-served-hamas-hideout-2023-11-22/>> accessed 30 November 2023; Victor Caivano, 'Israel Unveils What It Claims is a Major Hamas Militant Hideout Beneath Gaza City's Shifa Hospital' *The Associated Press* (Gaza City, 23 November 2023) <<https://apnews.com/article/israel-palestinians-war-gaza-shifa-tunnels-hamas-c71ebee136e018fd5a3572a54040f73e>> accessed 30 November 2023. In this regard, it is worth noting that AP I art 12(4) expressly provides that '[u]nder no circumstances shall medical units be used in an attempt to shield military objectives from attack'.

### **3. Factors affecting analysis of IHL violations: Information gaps, inculpatory statements, and non-reciprocity**

The preliminary assessment of events presented above indicates that acts committed by Hamas forces entailed serious violations of IHL implicating the direct perpetrators and others responsible in the commission of war crimes. This assessment is based on information available in the immediate aftermath of the events and is, in all likelihood, incomplete. As more information surfaces and is analysed and substantiated, a more accurate and complete account of the events and of the full scale of the violations committed is likely to emerge.

The next sections of this analysis turn attention to the actions undertaken by Israel during the course of the offensive it has mounted in response to the attack by Hamas forces, an offensive which the Israeli military initially dubbed 'Operation Swords of Iron', and which the Israeli cabinet later declared to be a war with Hamas.<sup>226</sup> As will be elaborated, Israel's offensive has involved the imposition of a 'siege' and massive use of force with devastating humanitarian consequences. Unlike the attack by Hamas forces, which these forces themselves documented and broadcasted in real or near-real time in an apparent effort to publicise rather than obscure the illicit acts they perpetrated, many key details about the Israeli military campaign are not public knowledge. Indeed, as is typically the case with military operations, much about them is classified and shrouded in secrecy. Thus, while it is clear that Israel's actions have had catastrophic humanitarian consequences for the civilian population of Gaza – cutting the entire population of the Strip off from life-sustaining resources and other crucial goods, and mounting a relentless bombardment that has claimed thousands of lives, injured many thousands more, and decimated homes and crucial infrastructure – much of the information needed to formulate a conclusive legal evaluation of these actions has not been disclosed.

At the time of writing, outside the decision-making circles in Israel, it is not known, for instance, who and what were the intended targets of most Israeli attacks, or what information the Israeli military had gathered about the civilians and civilian objects surrounding those targets at the time of the attack. Nor is anything known about the quality of the intelligence the Israeli military had about these targets and their surroundings, and certainly not about

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<sup>226</sup> Susannah George and others, 'Israel Formally Declares War Against Hamas as More Than 1,000 Killed on Both Sides', *Washington Post* (Sderot, 9 October 2023) <<https://www.washingtonpost.com/world/2023/10/08/israel-hamas-war-gaza/>> accessed 30 November 2023.

the way such intelligence is considered in targeting decisions. These and other information gaps<sup>227</sup> are an impediment to conclusive legal analysis.<sup>228</sup>

Known facts about the intensity of the force that Israel has used in its attacks, about the nature of the densely populated environments in which these attacks were launched, and about the levels of destruction and suffering that they have caused, do provide important indications in support of the conclusion that violations have been committed by Israel. However, for all their significance, these indications alone do not suffice to draw incontrovertible conclusions, particularly when bearing in mind claims that the Israeli attacks caused high levels of devastation because the Hamas fighters and other military objectives who were the legitimate targets of the attacks were largely embedded in a tunnel network located underneath densely populated civilian areas or otherwise located amongst the civilian population.<sup>229</sup>

In this case, more than in many others in which States are engaged in hostilities, there are nevertheless additional indicators creating strong grounds for concern that Israel has in fact committed violations of IHL, including violations which may implicate those responsible in the commission of war crimes. These derive primarily from Israeli decision makers' own words. Indeed, statements by senior Israeli political officials and military commanders, cited throughout this note, demonstrate alarming disregard for the IHL rules designed to protect civilians from the ravages of war and, on the contrary, reveal reckless indifference to civilian suffering or even a desire to inflict harm on civilians.

Some such statements were made by officials who may not be directly involved in operational decision-making, but these are nevertheless noteworthy because they reflect an attitude of unabashed defiance of international norms which is sufficiently pervasive for political leaders to advocate openly for blatantly unlawful practices. This was the case, for instance, when Ariel Kallner, a Member of the Knesset for the Likud party which leads the governing coalition, called for the mass expulsion of Palestinians in what would amount to ethnic cleansing by stating the following:<sup>230</sup>

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<sup>227</sup> When it comes to the 'siege' that Israel has declared on Gaza, while key facts are known and the calamitous humanitarian implications were clearly foreseeable, it might nevertheless be argued that Israel's intent in imposing the siege is not sufficiently established to assert that it committed the IHL violation (and war crime) of starvation of civilians as a method of warfare, or that it committed an act of collective punishment. See, however, Tom Dannenbaum, 'The Siege of Gaza and the Starvation War Crime' (*Just Security*, 11 October 2023) <<https://www.justsecurity.org/89403/the-siege-of-gaza-and-the-starvation-war-crime/>> accessed 30 November 2023.

<sup>228</sup> Marco Sassòli, 'Assessing the Conduct of Hostilities in Gaza – Difficulties and Possible Solutions' (*Articles of War*, 30 October 2023) <<https://lieber.westpoint.edu/assessing-conduct-hostilities-gaza-difficulties-possible-solutions/>> accessed 30 November 2023.

<sup>229</sup> Daphné Richemond-Barak, 'Israel Faces a Vicious Underground Battle against Hamas' *Financial Times* (London, 15 October 2023) <<https://www.ft.com/content/0fda1689-3c5e-49c7-ac84-15c10008eca5>> accessed 30 November 2023; Daphné Richemond-Barak, *Underground Warfare* (OUP 2017).

<sup>230</sup> Ariel Kallner (X, 7 October 2023) <<https://twitter.com/ArielKallner/status/1710769363119141268>> accessed 30 November 2023 [translated from Hebrew].

- ‘Right now, one goal: Nakba! A Nakba that will overshadow the Nakba of 48. Nakba in Gaza and Nakba to anyone who dares to join! ... Because there is no turning back, and there is no other way ...’

After viewing graphic footage culled from material documenting atrocities perpetrated by Hamas forces on October 7, another Knesset Member from the Likud party, former Minister of Information Galit Distel Atbaryan, published a post on the social media platform X. The post, which was deemed to have violated the platform’s rules, contained the following passage:<sup>231</sup>

- ‘...Hate the enemy.  
Hate the monsters.  
Any vestige of internal bickering is a maddeningly stupid waste of energy.  
Invest this energy in one thing;  
Erasing all of Gaza from the face of the earth.  
Let the Gazan monsters run to the southern fence and flee to Egyptian territory.  
Or die.  
And may they die a bad death.  
Gaza should be erased.  
And fire and columns of smoke on the heads of the Nazis in Judea and Samaria.  
Jewish wrath that will shake the earth throughout the world.  
A vengeful and cruel IDF is needed here.  
Anything less is immoral.  
Simply unethical’.

In a similar, though perhaps even more alarming vein, Israel’s Minister of Jewish Heritage, Amihai Eliyahu, commented during a radio interview that dropping an atomic bomb on the Gaza Strip is ‘an option’. After his comments were denounced by other cabinet members and by Prime Minister Netanyahu, who suspended him from cabinet meetings, Eliyahu tried to walk back his comment saying, ‘Anyone reasonable would understand that the comment was metaphorical. But we definitely need to respond powerfully and *disproportionately* to terrorism’.<sup>232</sup>

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<sup>231</sup> Galit Distel Atbaryan (X, 1 November 2023)

<<https://twitter.com/GalitDistel/status/1719689095230730656>> accessed 30 November 2023 [translated from Hebrew]. The post appears with the following message: ‘This Post violated the X Rules. However, X has determined that it may be in the public’s interest for the Post to remain accessible’.

<sup>232</sup> Dan Williams, ‘Netanyahu Disciplines Israeli Minister Who Voiced Openness to Hypothetical Nuclear Option in Gaza’ *Reuters* (Jerusalem, 5 November 2023) <<https://www.reuters.com/world/middle-east/netanyahu-disciplines-israeli-minister-who-voiced-openness-hypothetical-nuclear-2023-11-05/>> accessed 30 November 2023; Amichay Eliyahu (X, 5 November 2023) <[https://twitter.com/Eliyahu\\_a/status/1721078048097771859](https://twitter.com/Eliyahu_a/status/1721078048097771859)> accessed 30 November 2023 (emphasis added).

At a more senior level of political authority, Israel's **Energy Minister Israel Katz** issued a series of statements expressing an intention to impose measures of collective punishment:

- 'For years we supplied Gaza with electricity, water and fuel. Instead of saying thank you, they sent thousands of human animals to slaughter, murder, rape and kidnap babies, women and the elderly – that's why we decided to stop the flow of water, electricity and fuel and now their local power station has collapsed and there is no electricity in Gaza. We will continue to tighten the siege until the Hamas threat to Israel and the world is removed. What was will not be'.<sup>233</sup>
- 'So far we have transferred 54,000 cubic meters of water and 2,700 megawatts of electricity to Gaza per day. ... Without fuel, even the local electricity will shut down within days and the pumping wells will stop within a week. So shall be done to a nation of murderers and butchers of children. What was will not be'.<sup>234</sup>
- 'Humanitarian aid to Gaza? No electrical switch will be turned on, no water hydrant will be opened and no fuel truck will enter until the Israeli abductees are returned home. Humanitarian for humanitarian. And no one will preach us morals'.<sup>235</sup>
- 'The line has been crossed. We will fight the terrorist organization Hamas and destroy it. All the civilian population in gaza [sic] is ordered to leave immediately. We will win. They will not receive a drop of water or a single battery until they leave the world'.<sup>236</sup>
- 'Hamas is robbing the "humanitarian aid" to the Palestinian people. There's no reason to give them anything until we eliminate Nazi Hamas'.<sup>237</sup>
- 'I supported the agreement between Prime Minister Netanyahu and President Biden to supply water to the southern Gaza region because it was also in Israel's interest. I strongly oppose the opening of the blockade and the introduction of goods into Gaza on humanitarian grounds. Our commitment is to the families of the murdered and the kidnapped hostages – not to the Hamas murderers and those who aided them'.<sup>238</sup>

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<sup>233</sup> Israel Katz (X, 11 October 2023) <[https://twitter.com/Israel\\_katz/status/1712083122227909116](https://twitter.com/Israel_katz/status/1712083122227909116)> accessed 30 November 2023 [translated from Hebrew].

<sup>234</sup> Israel Katz (X, 10 October 2023) <[https://twitter.com/Israel\\_katz/status/1711659347590156417](https://twitter.com/Israel_katz/status/1711659347590156417)> accessed 30 November 2023 [translated from Hebrew].

<sup>235</sup> Israel Katz (X, 12 October 2023) <[https://twitter.com/Israel\\_katz/status/1712356130377113904](https://twitter.com/Israel_katz/status/1712356130377113904)> accessed 30 November 2023 [translated from Hebrew].

<sup>236</sup> Israel Katz (X, 13 October 2023) <[https://twitter.com/Israel\\_katz/status/1712876230762967222](https://twitter.com/Israel_katz/status/1712876230762967222)> accessed 30 November 2023.

<sup>237</sup> Israel Katz (X, 16 October 2023) <[https://twitter.com/Israel\\_katz/status/1713898358044074397](https://twitter.com/Israel_katz/status/1713898358044074397)> accessed 30 November 2023.

<sup>238</sup> Israel Katz (X, 16 October 2023) <[https://twitter.com/Israel\\_katz/status/1713807517816348906](https://twitter.com/Israel_katz/status/1713807517816348906)> accessed 30 November 2023 [translated from Hebrew].

Sentiments conducive to collective punishment were also expressed by Israel's State

**President Isaac Herzog**, who said:

- 'It's an entire nation out there that is responsible. It's not true, this rhetoric about civilians ... not aware, not involved, it's absolutely not true. They could have risen up, they could have fought against that evil regime which took over Gaza in a coup d'état, but we're at war ... we will fight until we'll break their backbone'.<sup>239</sup>

**Minister of Defence Yoav Gallant**, who is directly involved in operational decision-making, and whose statements are therefore especially telling when it comes to assessing Israel's approach in the conduct of hostilities, expressed a similar sentiment:

- 'I have ordered a complete siege on the Gaza Strip. There will be no electricity, no food, no water, no fuel, everything is closed ... We are fighting human animals and we are acting accordingly'.<sup>240</sup>

**Prime Minister Benjamin Netanyahu**, at the pinnacle of the Israeli decision-making process, also issued statements indicative of an attitude of disregard for the humanitarian protections established in IHL:

- 'The [Israeli military] will immediately use all its strength to destroy Hamas' capabilities. We will cripple them to the point of destruction and we will take revenge with might for this black day they have brought upon the State of Israel and its citizens ... All the places where Hamas is organized, of this city of evil, all the places where Hamas hides, operates from – we will turn them into cities of ruins. I say to the residents of Gaza: get out of there now, because we will act everywhere and with all the strength'.<sup>241</sup>
- 'What we will do to our enemies in the coming days will reverberate with them for generations'.<sup>242</sup>
- 'You must remember what Amalek has done to you, says our Holy Bible, and we do remember, and we are fighting ...'<sup>243</sup> (alluding to the biblical edict to the Israelites commanding them to completely eradicate their archenemy the Amalekites)

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<sup>239</sup> Rageh Omaar, 'Israeli President Isaac Herzog Says Gazans Could Have Risen Up to Fight "Evil" Hamas' *ITV News* (London, 13 October 2023) <<https://www.itv.com/news/2023-10-13/israeli-president-says-gazans-could-have-risen-up-to-fight-hamas>> accessed 30 November 2023.

<sup>240</sup> Oliver Holmes and Ruth Michaelson, 'Israel Declares Siege of Gaza as Hamas Threatens to Start Killing Hostages' *The Guardian* (Jerusalem, 10 October 2023) <<https://www.theguardian.com/world/2023/oct/09/israel-declares-siege-on-gaza-as-hamas-claims-israeli-strikes-killed-captives>> accessed 30 November 2023.

<sup>241</sup> Benjamin Netanyahu (X, 7 October 2023) <<https://twitter.com/netanyahu/status/1710744539403571430>> accessed 30 November 2023 [translated from Hebrew].

<sup>242</sup> Holmes and Michaelson (n 240).

<sup>243</sup> 'Israel-Hamas War: "We Will Fight and We Will Win", Says Benjamin Netanyahu' *Sky News* (London, 28 October 2023) <<https://news.sky.com/video/israel-hamas-war-we-will-fight-and-we-will-win-says-benjamin-netanyahu-12995212>> accessed 30 November 2023.



Most revealingly of all, when it comes to assessing the operational approach of the Israeli military, were statements by **Israeli military leaders and spokespeople** which indicate an attitude of indifference or disregard for constraints on the use of force imposed by IHL:

- '[T]he emphasis is on damage and not on accuracy'.<sup>244</sup>
- 'Gaza will never look the same'.<sup>245</sup>
- 'We are not taking any chances ... When our soldiers are manoeuvring we are doing this with massive artillery, with 50 aeroplanes overhead destroying anything that moves'.<sup>246</sup>

These statements, and others like them, were clearly made in pained and angry response to the outrages perpetrated by Hamas forces, but they cannot be dismissed as merely impassioned rhetoric. For one thing, the unchecked expression of such sentiments by political and military leaders exhibits and enhances a culture of disrespect for the law and for its underlying humanitarian values. It sets a tone for others, including subordinates in the military, and there is a high risk that it will encourage modes of conduct that violate IHL and inflict unwarranted human suffering.<sup>247</sup>

Moreover, the 'complete siege' that was declared on Gaza and the massive and unrelenting force with which the Israeli military has in fact conducted its operations indicate that the mindset reflected in such statements has also manifested in the planning and execution of Israel's ensuing actions. In this regard, it must be recalled that even the perpetration of egregious violations of IHL by one party to an armed conflict does not, in any way or under any circumstances, justify the commission of violations against civilians by the opposing party.<sup>248</sup> To do so is to go against the very essence of IHL, which seeks to remove civilians and

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<sup>244</sup> Bethan McKernan and Quique Kierszenbaum, "'Emphasis Is On Damage, Not Accuracy': Ground Offensive into Gaza Seems Imminent' *The Guardian* (Re'im (Gaza Envelope), 10 October 2023) <<https://www.theguardian.com/world/2023/oct/10/right-now-it-is-one-day-at-a-time-life-on-israels-frontline-with-gaza>> accessed 30 November 2023.

<sup>245</sup> Yaniv Kubovich, "'Gaza Will Never Look the Same,' Israeli Army Chief Says in First Public Comments Since War with Hamas Began' *Haaretz* (Tel Aviv, 12 October 2023) <<https://www.haaretz.com/israel-news/2023-10-12/ty-article-live/idf-strikes-gaza-overnight-prioritizing-attacks-on-senior-officials/0000018b-221a-d010-a59f-bb7bf0400000>> accessed 30 November 2023.

<sup>246</sup> Statement by a former commander of the Gaza division of the Israeli military quoted in James Shotter and others, 'The Tactics Behind Israel's Ground Offensive' *Financial Times* (Jerusalem, Tel Aviv, and London, 29 October 2023) <<https://www.ft.com/content/92a31b6e-a5b7-4533-96ed-89d14e6c2b14>> accessed 30 November 2023.

<sup>247</sup> Expert studies have repeatedly shown that such dehumanisation of the enemy may enable violations of IHL, a risk which is all the more acute when the dehumanising attitude is accompanied by statements apparently authorising unlimited use of force. See eg Daniel Muñoz-Rojas and Jean-Jacques Frésard, 'The Roots of Behaviour in War: Understanding and Preventing IHL Violations' (*ICRC*, October 2004) 8-9 <<https://shop.icrc.org/he-roots-of-behaviour-in-war-understanding-and-preventing-ihl-violations-pdf-en.html>> accessed 30 November 2023; Amy H. McCarthy, 'Erosion of the Rule of Law as a Basis for Command Responsibility under International Humanitarian Law' (2018) 18(2) *Chicago J of Intl L* 553, 584-587.

<sup>248</sup> In limited and exceptional cases, acts that would otherwise be unlawful under IHL can lawfully be resorted to in international armed conflicts as an enforcement measure in reaction to unlawful acts of an adversary. Such acts, known as belligerent reprisals, are subject to stringent conditions (see CIHL r 145). Belligerent reprisals and similar countermeasures could not in any way render attacks that unlawfully harm civilians or

civilian objects from the circle of violence with a view to preserving elementary considerations of humanity, and to ensure that even armed conflict, with all the human suffering it inevitably entails, does not descend into unmitigated barbarism.

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civilian objects lawful. Indeed, it is prohibited to resort to belligerent reprisals against protected persons and protected objects in international armed conflicts (see GC IV art 33(3); AP I arts 20, 51(6), 52(1), 53(c), 54(4), 55(2), 56(4); CIHL rr 146-147), and in non-international armed conflicts the belligerents do not have a right to resort to reprisals and are prohibited from taking countermeasures against persons not taking direct part in hostilities (see CIHL r 148).

## 4. Assessment of violations of IHL rules on the conduct of hostilities by Israel

This section assesses the implementation by Israel of three fundamental principles of IHL regulating the conduct of hostilities. These principles, examined in turn, are the principle of distinction, the principle of proportionality, and the principle of precautions, which apply equally in all theatres of operations – air, ground, and sea.<sup>249</sup>

In this regard, it should be underlined that under IHL, every attack – meaning every single attack Israel has carried out since 7 October – must independently comply with the rules on the conduct of hostilities.<sup>250</sup> The justification that a party has for resorting to armed force, no matter how compelling it may be, does not, in any way, relieve it of its obligation to abide by IHL.<sup>251</sup> Violations of IHL by one party, no matter how egregious they may be, can never justify violations against civilians by the other party.<sup>252</sup>

For the purposes of analysis, this section examines a small sample of the many attacks that Israel conducted in the period under review. This should in no way be understood to constitute a complete account, but rather an illustration of emblematic issues.

### Operational environment and indications of general approach

The Gaza Strip is a densely populated area, with approximately 2.3 million people living in an area of 360 square kilometres (or 140 square miles).<sup>253</sup> At the outset of the present hostilities, much of the population was concentrated in Gaza City and in other densely populated urban environments. Hamas forces are reportedly embedded within these same areas, operating especially from an elaborate and well-fortified tunnel network located beneath civilian infrastructure.<sup>254</sup> Mounting a military offensive in such an environment poses serious operational and humanitarian challenges.<sup>255</sup> In particular, it requires identifying means and methods of attack that can effectively strike the adversary while at the same time respecting

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<sup>249</sup> AP I art 49(3).

<sup>250</sup> AP I art 49.

<sup>251</sup> Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (Elgar, 2019) para 3.10.

<sup>252</sup> CIHL r 140; GCs common art 1; 2020 Commentary on GC III, para 221.

<sup>253</sup> Jon Gambrell and Isabel Debre, 'A Spiderweb of Hamas Tunnels in Gaza Strip Raises Risks for an Israeli Ground Offensive' *The Associated Press* (Jerusalem, 29 October 2023) <<https://apnews.com/article/israel-palestinians-hamas-tunnels-warfare-15453b5729e38aeb55af5b419835a5eb>> accessed 30 November 2023.

<sup>254</sup> Peter Beaumont, "'A Spider's Web of Tunnels': Inside Gaza's Underground Network Being Targeted by Israel' *The Guardian* (Jerusalem, 28 October 2023) <<https://www.theguardian.com/world/2023/oct/28/a-spiders-web-of-tunnels-inside-gazas-underground-network-being-targeted-by-israel>> accessed 30 November 2023. The Gaza Strip has been described by the Israeli military as 'layers' – 'one layer for the civilians and then another for Hamas'. Israel Defense Forces (X, 12 October 2023) <<https://twitter.com/IDF/status/1712282365924343910>> accessed 30 November 2023.

<sup>255</sup> John Spencer, 'Underground Nightmare: Hamas Tunnels and the Wicked Problem Facing the IDF' (*Modern War Institute*, 17 October 2023) <<https://mwi.westpoint.edu/underground-nightmare-hamas-tunnels-and-the-wicked-problem-facing-the-idf/>> accessed 30 November 2023.

the protections established in IHL with a view to safeguarding civilians and civilian infrastructure, and avoiding unnecessary and excessive harm to them.<sup>256</sup>

The massive devastation that Israeli attacks have caused, as well as statements by the most senior Israeli officials raise concern that the approach taken by Israel in the face of this challenge was to focus on destruction of enemy targets, employing massive force for that purpose, while paying insufficient regard to humanitarian consequences and to the protections established in IHL. Prime Minister Benjamin Netanyahu, for instance, stated that one of the objectives of the operation is ‘to exact an immense price from the enemy, within the Gaza Strip’, and that the offensive will continue ‘[without] limitations ... until the objectives are achieved’.<sup>257</sup> Similarly, it was reported that the Defence Minister, Yoav Gallant, stated that he has ‘released all restraints’ in the fight against Hamas.<sup>258</sup>

Every State has an obligation to respect and ensure respect for IHL.<sup>259</sup> The obligation to ensure respect encompasses, at the very least, an obligation to ensure that a State’s own armed forces respect the law. By contrast, the statements quoted above and others like them appear to legitimise the use of unrestrained force, which is entirely at odds with both the spirit and letter of IHL, the very purpose of which is to impose constraints on parties to the conflict with a view to limiting the humanitarian consequences of armed conflict.<sup>260</sup>

### **The principle of distinction**

The principle of distinction requires that parties to the conflict distinguish at all times between civilians and combatants (and fighters) on the one hand, and between civilian objects and military objectives on the other. Attacks can only be directed against combatants (and fighters) and military objectives.<sup>261</sup> Intentionally directing an attack against the civilian population or individual civilians, or against civilian objects is a war crime.<sup>262</sup>

#### *Combatants and civilians*

Combatants are all members of the armed forces of a party to the conflict.<sup>263</sup> When it comes to non-State parties to an armed conflict, it is now widely accepted that the armed forces

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<sup>256</sup> David Wallace and Shane Reeves, ‘Targeting Gaza’s Tunnels’ (*Articles of War*, 14 November 2023) <<https://lieber.westpoint.edu/targeting-gazas-tunnels/>> accessed 30 November 2023.

<sup>257</sup> Prime Minister of Israel (X, 7 October 2023) <<https://x.com/IsraeliPM/status/1710867504917008760?s=20>> accessed 30 November 2023.

<sup>258</sup> Amir Tal, ‘Israeli Defense Minister: “Gaza Will Never Return to What It Was”’ *CNN* (Atlanta, 10 October 2023) <[https://edition.cnn.com/middleeast/live-news/israel-hamas-war-gaza-10-10-23/h\\_72b24198b48f49dae4a02f53b6f9da81](https://edition.cnn.com/middleeast/live-news/israel-hamas-war-gaza-10-10-23/h_72b24198b48f49dae4a02f53b6f9da81)> accessed 30 November 2023.

<sup>259</sup> GCs common art 1; CIHL r 139.

<sup>260</sup> Eg, Nils Melzer, *International Humanitarian Law: A Comprehensive Introduction* (ICRC, 2016) 17 <<https://library.icrc.org/library/docs/DOC/icrc-4231-002-2019.pdf>> accessed 30 November 2023.

<sup>261</sup> CIHL rr 1 and 7; AP I art 48; AP II art 13(2).

<sup>262</sup> CIHL r 156; ICC Statute arts 8(2)(b)(i), 8(2)(b)(ii) and 8(2)(e)(i). Intentionally directing attacks against civilian objects is not listed as a war crime in the ICC Statute.

<sup>263</sup> Except for medical and religious personnel (CIHL r 3).

consist of those members who have a continuous combat function ('fighters'), meaning a function to take direct part in hostilities.<sup>264</sup>

Civilians are persons who are not members of the armed forces (of a State or a non-State actor).<sup>265</sup> Civilians are protected against attacks, unless and for such time as they take a direct part in hostilities.<sup>266</sup> Those who are in the government or belong to the political wing of a non-State actor are civilians and, as such, protected against attacks. This is the case even where they play a significant role in managing the finances of the State or non-State party they belong to; the decisive factor for targeting purposes is membership in the armed forces with a continuous combat function.<sup>267</sup> Similarly, journalistic activities, for example reporting on the ongoing hostilities, do not constitute direct participation in hostilities, even if the reporting is biased or amounts to propaganda in favour of the opposing party to the conflict.<sup>268</sup> In case of doubt as to the status of the person, they must be considered a civilian.<sup>269</sup>

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<sup>264</sup> See Nils Melzer, 'Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law' (ICRC, 2009) 32-36 <<https://www.icrc.org/en/doc/assets/files/other/icrc-002-0990.pdf>> accessed 30 November 2023. It should be noted that Israel takes a more expansive approach as to which members of an armed group can be targeted, rejecting that it is only those with a continuous combat function (State of Israel, 'The 2014 Gaza Conflict: Factual and Legal Aspects' (May 2015) para 264 and references therein <<https://mfa.gov.il/ProtectiveEdge/Documents/2014GazaConflictFullReport.pdf>> accessed 30 November 2023).

<sup>265</sup> CIHL r 5; AP I art 50(1).

<sup>266</sup> CIHL r 6; AP I art 51(3); AP II art 13(3). An individual is considered to be taking a direct part in hostilities when engaging in an act that is part of the conduct of hostilities between parties to an armed conflict. An authoritative analysis published by the ICRC has concluded that in order for an act to qualify as direct participation in hostilities, it must meet the following cumulative criteria:

1. **Threshold of harm:** the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack, and
2. **Direct causation:** there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part, and
3. **Belligerent nexus:** the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another.

See Melzer (n 264) 46-64.

<sup>267</sup> The Israeli army has shared a diagram of the structure of Hamas, including, among others, its ministries, local authorities, and social service branch (Israel Defense Forces (X, 17 October 2023) <<https://x.com/IDF/status/1714213357396296183?s=20>> accessed 30 November 2023). The diagram was shared with the note '[t]his is who's responsible for Hamas' attacks against Israeli civilians', suggesting that the members of the group are perceived the same, regardless of whether they belong to the military or the civilian wing, presumably also for targeting purposes. This reading is further supported by a list of Hamas members killed, shared by the army, which includes eg the head of international relations of the political bureau (Israel Defense Forces (X, 16 October 2023) <<https://x.com/IDF/status/1713896361714766026?s=20>> accessed 30 November 2023). This is an over-broad interpretation of the applicable rules, and thus a violation of IHL.

<sup>268</sup> CIHL r 34; AP I art 70(1). For a detailed overview of the international legal framework on the protection of media personnel, see 'The Legal Framework Safeguarding Freedom of the Press and Protections for Media Personnel' (Diakonia IHL Centre, May 2023) <<https://www.diakonia.se/ihl/news/legal-brief-on-press-freedom-and-protections-for-media-personnel/>> accessed 30 November 2023.

<sup>269</sup> Commentary to CIHL r 6; AP I art 50(1).

### *Military objectives and civilian objects*

Military objectives are those objects which by their nature, location, purpose, or use make an effective contribution to military action and whose partial or total destruction, capture, or neutralisation, in the circumstances ruling at the time, offers a definite military advantage.<sup>270</sup> The key part of the definition is the ‘military’ qualifier (which qualifies both parts of the two-tiered definition: the character of the object, and the advantage anticipated). Accordingly, objects which merely make financial contributions (‘war-sustaining objects’), as well as objects whose destruction would provide a psychological advantage, as opposed to a military one, fail to meet the description of military objectives.<sup>271</sup>

Civilian objects are objects that are not military objectives.<sup>272</sup> In case of doubt as to the status of an object normally dedicated to civilian purposes, such as a place of worship, a house, or a school, it must be presumed to be a civilian object.<sup>273</sup>

### *Approach to targeting*

There are grounds for concern that Israel is pursuing an overexpansive approach in the selection of the targets against which it is directing attacks, and that it is consequently acting in breach of the rule that only combatants (or, in the case of non-State armed groups, fighters) and military objectives can be made the object of an attack. An indication of such an overexpansive approach emerges, for instance, from the following statement by an Israeli military spokesperson:

*Whenever we have intelligence that indicates the whereabouts of a senior Hamas official or military commander, we strike in that location. And the places where we know that Hamas has infrastructure, whether it is financial or construction or command and control, collection of intelligence, research and development, whatever it is, if it belongs to Hamas, we are striking it.*<sup>274</sup>

There are two issues here. First, on the targeting of persons, not every Hamas official, senior or otherwise, automatically qualifies as a lawful target. As explained above, only members of the armed forces (combatants or fighters) are legitimate targets under IHL. Strikes directed against individuals in the government or political wing thus raise concern that individuals who should be regarded as civilians rather than fighters are being targeted. One such case is the targeting of the Gazan economy minister, Juad Abu Smallah, allegedly because he was ‘managing the Hamas’ funds’ and he ‘designated the funds to financing and directing the

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<sup>270</sup> CIHL r 8; AP I art 52(2).

<sup>271</sup> Sassòli (n 251) para 8.308. It should be noted that some States interpret the notion of military objectives so as to include objects which make an ‘effective contribution to the war-fighting or war-sustaining capability of an opposing force’ (US DoD Manual (2016), para 5.6.6.2). However, this does not appear to reflect the view of the majority of States (Michael N Schmitt, ‘Cyber Operations and the Jus in Bello: Key Issues’ (2011) 87 Intl L Stud Ser US Naval War Col 89, 97).

<sup>272</sup> CIHL r 9; AP I art 52(1).

<sup>273</sup> Commentary to CIHL r 10; AP I art 52(3).

<sup>274</sup> Israel Defense Forces (n 254).

terror in and out of the Gaza strip [sic]'.<sup>275</sup> This is reflective of the declared broader goals of the operation, to destroy not only the military capabilities but also the 'governing capabilities' of Hamas and 'topple' its rule in the Strip.<sup>276</sup>

Second, on the targeting of objects, not every infrastructure that apparently 'belongs' to Hamas is by default a military objective. To qualify as such, the object's nature, location, purpose, or use must make an effective contribution to military action, and there must be a definite military advantage to be gained from attacking it in the circumstances ruling at the time. Israel has targeted several banks, among them the Islamic National Bank and the First Bank, allegedly because they provide funding for Hamas. Per the limitations on the scope of military objectives described above, attacking objects that make merely financial contributions to the war effort is in contravention of IHL.<sup>277</sup>

In another instance, it was also reported that the Israeli military targeted the Islamic University of Gaza 'that trains Hamas engineers'.<sup>278</sup> The Israeli military also claimed that Hamas had turned the university into 'a training camp for weapons development and military intelligence', and used it for weapons production.<sup>279</sup> If a place is dedicated to producing weapons, as in the case of a weapons factory, there would be little doubt that it meets the definition of a military objective. Even if the claim that the university was used to produce weapons is true, assuming this production took place in a confined area, it does not necessarily turn the entire complex into a military objective.<sup>280</sup> This would in turn mean that

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<sup>275</sup> 'Israel kills Palestinian Economy Minister, Hamas Official in Gaza Strike, IDF says' *Haaretz* (Tel Aviv, 10 October 2023) <<https://www.haaretz.com/israel-news/2023-10-10/ty-article-live/900-israelis-killed-2-400-wounded-in-war-with-hamas/0000018b-17bd-d465-abbb-17bf23000000#626475234>> accessed 30 November 2023.

<sup>276</sup> Israel Defense Forces (X, 9 October 2023) <<https://x.com/IDF/status/1711158369552138326?s=20>> accessed 30 November 2023; Prime Minister of Israel (X, 8 October 2023) <<https://x.com/IsraeliPM/status/1710867499955150943?s=20>> accessed 30 November 2023; 'IDF Spokesman: 258 Families of Fallen Israelis Were Notified; Logic Behind Bombardment Is to "Topple" Hamas Rule' *Haaretz* (Tel Aviv, 13 October 2023) <<https://www.haaretz.com/israel-news/2023-10-13/ty-article-live/israels-war-on-hamas-enters-day-7-un-says-over-423-000-palestinians-in-gaza-displaced/0000018b-2675-d1bc-a58b-6ff7c4290000#193781371>> accessed 30 November 2023.

<sup>277</sup> 'Hamas – Israel War: Real Time Updates' (*Israel Defense Forces*, 8, 11 and 17 October 2023) <<https://www.idf.il/en/mini-sites/hamas-israel-war-articles-videos-and-more/real-time-updates/>> accessed 30 November 2023.

<sup>278</sup> 'IDF: "We Have Attacked the Islamic University of Gaza that Trains Hamas Engineers"' *Haaretz* (Tel Aviv, 11 October 2023) <<https://www.haaretz.com/israel-news/2023-10-11/ty-article-live/1-200-israelis-killed-2-400-wounded-as-israel-targets-hamas-leaders-in-airstrikes/0000018b-1d16-d08b-adeff68d470000#1115801617>> accessed 30 November 2023.

<sup>279</sup> Israel Defense Forces (X, 11 October 2023) <<https://x.com/IDF/status/1712028977567605168?s=20>> accessed 30 November 2023; Israel Defense Forces (n 277).

<sup>280</sup> There are diverging views as to whether the military use of a part of a building, eg a specific floor therein, can transform the entire building into a military objective. It has been reported that Israel argues for the conversion of the entire building into a military objective (John J. Merriam and Michael N Schmitt, 'Israeli Targeting: A Legal Appraisal' (2015) 68(4) *Naval War College Rev* 15, 25-26 <<https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=1264&context=nwc-review>> accessed 30 November 2023). The ICRC appears to take the opposite view (Laurent Gisel (ed), 'The Principle of Proportionality in the Rules Governing the Conduct of Hostilities under International Humanitarian Law' (*ICRC and Université Laval*, 2018) 37-38 <[https://www.icrc.org/en/download/file/79184/4358\\_002\\_expert\\_meeting\\_report\\_web\\_1.pdf](https://www.icrc.org/en/download/file/79184/4358_002_expert_meeting_report_web_1.pdf)> accessed 30 November 2023).

those who plan the attack must take into account expected damage to the complex and its civilian use in the proportionality assessment (see below).

Aside from the alleged use of the university for weapons production, the other stated justifications for the attack reflect an approach that could give rise to the conclusion that any institute offering specialist training that can have military relevance, or any person with such specialist skills, can be deemed a lawful target of attack. Such a conclusion would however be at odds with the law. That a university provides engineering training does not turn it into a military objective, not even if some of those engineers go on to join the armed wing of Hamas and develop weapons for it.

Israeli strikes have also impacted numerous residential buildings, mosques, churches, and UNRWA schools sheltering displaced persons.<sup>281</sup> These are under normal conditions civilian objects and cannot be targeted unless they become military objectives, which would for example be the case if they were being used as a command and control centre for military operations.<sup>282</sup> Where an object that is ordinarily used for civilian purposes is used for military purposes, it is still incumbent upon the attacking party to make sure the object meets the military objective test and is indeed a lawful target, and also that other rules regulating the conduct of hostilities are adhered to. Even if these civilian objects were not directly targeted, the anticipated incidental effects on them from attacks on other targets would still have to be considered in the proportionality assessment (see below).

There have also been reports of hospitals, ambulances, and medics being hit or even targeted.<sup>283</sup> Medical units, transports, and personnel are protected by special regimes under IHL.<sup>284</sup> Their special protection ceases only if they commit, or are used to commit, outside their humanitarian function, acts harmful to the enemy, and only after due warning is given and remains unheeded.<sup>285</sup> In such a case, the attacking party is not absolved of all responsibility;<sup>286</sup> it must still comply with the principle of proportionality and the duty to take precautions in attack.<sup>287</sup> Where there are no known indications that a medical facility that

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<sup>281</sup> OCHA oPt Reported Impact Day 33 (n 88).

<sup>282</sup> The Israeli military has on multiple occasions insisted that this was indeed the case. Eg in these instances, the army claimed that the mosques it attacked housed operational situation rooms used by Hamas. Israel Defense Forces (X, 8 October 2023) <<https://x.com/IDF/status/1710949407586238615?s=20>> accessed 30 November 2023; Israel Defense Forces (X, 22 October 2023) <<https://twitter.com/IDF/status/1715886726160204049?s=20>> accessed 30 November 2023.

<sup>283</sup> OCHA oPt Reported Impact Day 33 (n 88); 'Attacks on Health Care in Gaza Strip Unacceptable, Says WHO' (WHO, 4 November 2023) <<https://www.emro.who.int/media/news/attacks-on-health-care-in-gaza-strip-unacceptable-says-who.html>> accessed 30 November 2023; PRCS (X, 11 October 2023) <<https://x.com/PalestineRCS/status/1712122111672586635?s=20>> accessed 30 November 2023; MSF International (X, 7 October 2023) <<https://x.com/MSF/status/1710665419164373462?s=20>> accessed 30 November 2023.

<sup>284</sup> CIHL rr 25 and 28-29.

<sup>285</sup> Ibid.

<sup>286</sup> Contrary to the assertion of the Israeli military, the responsibility is not only upon Hamas. Israel Defense Forces (X, 31 October 2023) <<https://twitter.com/IDF/status/1719344183742255583>> accessed 30 November 2023.

<sup>287</sup> Sassòli (n 251) paras 8.28-8.29. It should be noted that the obligation to give warning in this case is absolute and different from the duty to give effective advance warnings of attacks that may affect the civilian population, unless circumstances do not permit. AP I art 57(2)(c); CIHL r 20.



was attacked was being used to commit harmful acts against Israel, there are serious concerns that Israel's conduct was in violation of its obligation to respect medical units, transports, and personnel. Directly targeting medical units, transports, and personnel constitute war crimes both in international and non-international armed conflicts.<sup>288</sup>

### *Human shields*

The Israeli military has repeatedly emphasised that ' Hamas uses the people of Gaza as human shields by embedding itself among them in schools, mosques, and hospitals', and that they 'operate inside and under civilian buildings'.<sup>289</sup> They have also claimed that '[e]very building that falls in Gaza is a building from which Hamas executes their terrorist activities. They do it knowing we will be *forced to strike* the buildings'.<sup>290</sup> As discussed above,<sup>291</sup> the use of human shields is prohibited under IHL.<sup>292</sup> Any violation of this prohibition by Hamas does not, however, provide a justification for Israel to direct its attacks in disregard of the civilian status of the persons being used as human shields. Indeed, these persons remain civilians, whether they are voluntarily or involuntarily functioning as human shields. While there is little controversy that involuntary human shields do not lose their protection against attacks, whether acting as a voluntary human shield amounts to direct participation in hostilities (and thus entails a loss of protection against attacks during such time) is disputed.<sup>293</sup> Regardless, it should be noted that in practice, it may be virtually impossible to discern voluntary from involuntary human shields, and in case of doubt, they must be considered civilians.<sup>294</sup>

### *Indiscriminate attacks*

Indiscriminate attacks are attacks which (1) are not directed at a specific military objective; (2) employ a method or means of combat which cannot be directed at a specific military objective; or (3) employ a method or means of combat the effects of which cannot be limited as required by IHL; and, consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.<sup>295</sup> Indiscriminate attacks are

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<sup>288</sup> CIHL r 156; ICC Statute arts 8(2)(b)(xxiv) and 8(2)(e)(ii). It should be noted that under the ICC Statute, these acts constitute a crime when committed against listed objects and persons 'using the distinctive emblems of the Geneva Conventions in conformity with international law'.

<sup>289</sup> Israel Defense Forces (X, 29 October 2023) <<https://twitter.com/IDF/status/1718426727288803524>> accessed 30 November 2023.

<sup>290</sup> Israel Defense Forces (X, 22 October 2023) <<https://twitter.com/IDF/status/1715870954331496746>> accessed 30 November 2023 (emphasis added).

<sup>291</sup> See text to nn 222-225 above 'Failure to take precautions against the effects of attacks and use of human shields'.

<sup>292</sup> AP I art 51(7); CIHL r 97.

<sup>293</sup> 'Conduct of Hostilities' (ICRC Online Casebook) <[https://casebook.icrc.org/law/conduct-hostilities#ii\\_8](https://casebook.icrc.org/law/conduct-hostilities#ii_8)> accessed 30 November 2023.

<sup>294</sup> Commentary to CIHL r 6.

<sup>295</sup> AP I art 51(4); CIHL r 12.

prohibited under IHL.<sup>296</sup> Launching an indiscriminate attack constitutes a war crime both in international and non-international armed conflicts.<sup>297</sup>

Israeli military spokesperson Daniel Hagari openly declared that in the offensive, ‘the emphasis is on damage and not accuracy’,<sup>298</sup> which raises concern that the principle of distinction in general and the prohibition of indiscriminate attacks in particular are not being respected. The intensity of the counteroffensive suggests that this statement is being acted upon: on day 6 of the hostilities, the Israeli Air Force announced that it had dropped ‘about 6,000 bombs against Hamas targets’ in Gaza,<sup>299</sup> which is reportedly equal to the number of bombs that the US dropped in Afghanistan over the course of *an entire year* – in a much larger and much less densely populated area than the Strip.<sup>300</sup> According to OCHA, on day 9 of the hostilities, the fatality toll had surpassed that of the 2014 hostilities, which lasted more than 50 days.<sup>301</sup>

It has also been made clear by the Israeli military that achieving its stated overall goal of destroying Hamas ‘means destroying this tunnel network’.<sup>302</sup> As noted earlier, the dense urban environment on top of a vast network of tunnels and intermingling of civilians and civilian objects with military objectives complicates the operational environment and raises important legal issues, including under the rule prohibiting indiscriminate attacks. Even if the tunnels are (individually) military objectives and qualify as lawful targets for specific attacks,<sup>303</sup> they must be distinguished from civilian objects and civilians above ground that

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<sup>296</sup> AP I art 51(4); CIHL rr 11-12. See also text at n 157 above.

<sup>297</sup> CIHL r 156; ICC Statute arts 8(2)(b)(i), 8(2)(b)(ii) and 8(2)(e)(i). The CIHL study lists the war crime as ‘launching an indiscriminate attack *resulting in* loss of life or injury to civilians (or damage to civilian objects in international armed conflicts)’ (emphasis added). Under the ICC Statute, the crimes of intentionally directing attacks at civilians or civilian objects are interpreted so as to include indiscriminate attacks (see Kai Ambos (ed), *Rome Statute of the International Criminal Court: Article-by-Article Commentary* (Beck, Hart and Nomos 2022) 404-405 and 410).

<sup>298</sup> McKernan and Kierszenbaum (n 244). In the same speech, the spokesperson also said: ‘Gaza will eventually turn into a city of tents. There will be no buildings’ (Omar Shakir, Yasmine Ahmed and Akshaya Kumar, ‘We Are Seeing Urgent Signs of More Mutual Mass Atrocities to Come in Israel and Gaza’ *The Guardian* (London, 20 October 2023) <<https://www.theguardian.com/commentisfree/2023/oct/20/urgent-signs-mutual-mass-atrocities-israel-gaza-war>> accessed 30 November 2023).

<sup>299</sup> Israeli Air Force (X, 12 October 2023) <<https://x.com/IAFsite/status/1712484101763342772?s=20>> accessed 30 November 2023.

<sup>300</sup> Shira Rubin and others, ‘Israel Says It Will End Hamas Rule in Gaza as Casualties Soar’ *The Washington Post* (Tel Aviv, 12 October 2023) <<https://www.washingtonpost.com/world/2023/10/12/israel-seeks-end-hamas-gaza-war/>> accessed 30 November 2023. Another comparison was made to the operation by the coalition against the so-called ‘Islamic State’ across Syria and Iraq, where approximately 2,500 bombs were dropped *per month* (Charles Lister (X, 12 October 2023) <[https://x.com/Charles\\_Lister/status/1712522371020521848?s=20](https://x.com/Charles_Lister/status/1712522371020521848?s=20)> accessed 30 November 2023).

<sup>301</sup> OCHA oPt Flash Update #9 (n 75).

<sup>302</sup> Israel Defense Forces (X, 29 October 2023) <<https://twitter.com/IDF/status/1718579456799805531>> accessed 30 November 2023.

<sup>303</sup> There are various interpretations of how the tunnels, individually or as a network, could constitute a military objective. One view is that tunnels qualify as a military objective by their nature since they ‘serve as lines of communication, military headquarters, means of offensive warfare, or weapons caches, they resemble military bases, ammunition depots, and other objects that have traditionally been regarded as military by nature’. Richmond-Barak, *Underground Warfare* (n 229) 178-179. Another view is that treating the tunnels as a ‘collection of potential military objectives analyzed by their practical use or future intended purpose, rather than one vast target’ is more appropriate. Wallace and Reeves (n 256).

remain protected from direct attacks and cannot be attacked indiscriminately.<sup>304</sup> A building does not automatically become part of a military objective simply because it is located above a tunnel. Indeed, ‘targeting an area because tunnels are believed to exist below could be viewed as indiscriminate’,<sup>305</sup> and possibly a war crime.

One of the main ways in which the Israeli military is reportedly advancing its destruction of the tunnel network (and some of its attacks against other targets) is by using explosive weapons. Explosive weapons are not by nature indiscriminate weapons,<sup>306</sup> and the use of these weapons in populated areas is thus not per se a prohibited method of warfare. However, there has proven to be a significant likelihood that due to its wide impact areas, the use of explosive weapons in populated areas will have indiscriminate effects, in contrast to the requirements of IHL.<sup>307</sup> These risks are particularly high in a place like the Gaza Strip, which is an especially densely populated area.<sup>308</sup> It must be clear to anyone, first and foremost to those who plan and execute the attacks, that the ongoing heavy employment of explosive weapons in such an area will in all probability have indiscriminate effects on the civilian population and civilian objects,<sup>309</sup> in violation of IHL, and such attacks may constitute war crimes. These risks are particularly salient for the type of explosive weapons that are frequently used to hit subterranean targets, and which are reportedly employed by the Israeli military against tunnels in Gaza.<sup>310</sup> So-called ‘bunker buster’ bombs can weigh around 2,000

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<sup>304</sup> They are also protected from the effects of such attacks, and attacks directed against military objectives underground must not cause excessive incidental harm to the civilians and civilian objects.

<sup>305</sup> Wallace and Reeves (n 256).

<sup>306</sup> Explosive weapons are defined as ‘munitions activated by the detonation of a high explosive substance creating primarily a blast – and – fragmentation effect, and their delivery systems’ (‘Explosive Weapons with Wide Area Effects: A Deadly Choice in Populated Areas’ (ICRC, 2022) 22 <<https://www.icrc.org/en/document/civilians-protected-against-explosive-weapons>> accessed 30 November 2023).

<sup>307</sup> Ibid; ‘Explosive Weapons in Populated Areas: Humanitarian, Legal, Technical and Military Aspects’ (ICRC, 2015) <<https://shop.icrc.org/expert-meeting-explosive-weapons-in-populated-areas-pdf-en.html>> accessed 30 November 2023.

<sup>308</sup> Dea Bankova and others, ‘The Deteriorating Situation in Gaza’ *Reuters* (London, 10 October 2023) <<https://www.reuters.com/graphics/ISRAEL-PALESTINIANS/MAPS/movajdladpa/2023-10-10/the-deteriorating-situation-in-gaza/>> accessed 30 November 2023.

<sup>309</sup> See below ‘Principle of proportionality’ on the exceptionally high possible incidental harm that use of explosive weapons in densely populated areas may cause.

<sup>310</sup> Oded Yaron and Ben Samuels, ‘Revealed: The Munitions U.S. Supplied Israel for Gaza War’ *Haaretz* (Tel Aviv, 16 November 2023) <<https://www.haaretz.com/israel-news/security-aviation/2023-11-16/ty-article/.premium/shells-laser-guided-missiles-and-bunker-busters-the-munitions-the-u-s-supplied-israel/0000018b-d3b9-dffa-adeb-f7b990750000>> accessed 30 November 2023. In one instance, ‘bunker busters’ may have been used in Jabalia, a densely populated neighbourhood and Gaza’s largest refugee camp; visual analysis from the site identified multiple craters, including one about 12 metres in size. Emma Graham-Harrison, Manisha Ganguly, and Elena Morresi, ‘Cratered Ground and Destroyed Lives: Piecing Together the Jabalia Camp Airstrike’ *The Guardian* (London, 1 November 2023) <<https://www.theguardian.com/world/2023/nov/01/jabalia-camp-airstrike-gaza>> accessed 30 November 2023. According to UNRWA, the Jabalia refugee camp extends over an area of 1.4 square kilometres and is home to 116,011 registered refugees; this figure does not represent the overall number of residents, which is likely higher. ‘Jabalia Camp’ (UNRWA, last updated July 2023) <<https://www.unrwa.org/where-we-work/gaza-strip/jabalia-camp>> accessed 30 November 2023.

pounds and are known to also heavily impact structures above ground,<sup>311</sup> so their use in densely populated civilian areas may produce indiscriminate effects and, thus, constitute an indiscriminate attack.

Another means of combat that raises concerns under the prohibition of indiscriminate attacks is the reported use of white phosphorus by Israel, an allegation which the Israeli authorities have denied.<sup>312</sup> Much like explosive weapons, the use of weapons with incendiary effects in populated areas is highly likely to have indiscriminate effects.<sup>313</sup> More generally, the use of white phosphorus is regulated by the rules on the conduct of hostilities, including the prohibition of means of warfare which are of a nature to cause superfluous injury or unnecessary suffering.<sup>314</sup> If used as an incendiary weapon, additional restrictions apply: its use is prohibited if it is feasible to render a legitimate target *hors de combat* by a less harmful means, and subject to an obligation to take particular care to avoid or minimise civilian harm.<sup>315</sup>

Concerns about indiscriminate attacks also arose when the Israeli military announced that it had engaged over 200 targets in one single neighbourhood (Al-Furqan), which was described as a ‘terrorist hotspot’, or a ‘nest of terror’.<sup>316</sup> While in theory it is possible for such a high number of military objectives to exist in such close proximity to one another, the pejorative

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<sup>311</sup> Speaking about the 2016 bombardment of the city of Aleppo in Syria, a UN official said previously that ‘[i]f ... confirmed, the systematic indiscriminate use of such weapons in areas where civilians and civilian infrastructure are present may amount to war crimes’. ‘Security Council Briefing on the Situation in Syria, Special Envoy Staffan de Mistura’ (*UN Political and Peacebuilding Affairs*, 25 September 2016) <<https://dppa.un.org/en/security-council-briefing-situation-syria-special-envoy-staffan-de-mistura-0>> accessed 30 November 2023.

<sup>312</sup> ‘Israel/OPT: Identifying the Israeli Army’s Use of White Phosphorus in Gaza’ *Amnesty International* (13 October 2023) <<https://citizenevidence.org/2023/10/13/israel-opt-identifying-the-israeli-armys-use-of-white-phosphorus-in-gaza/>> accessed 30 November 2023; Patrick Wintour, ‘Israel Denies Using White Phosphorus Munitions in Gaza’ *The Guardian* (London, 13 October 2023) <<https://www.theguardian.com/world/2023/oct/13/israel-military-white-phosphorus-gaza-lebanon>> accessed 30 November 2023. Israel had pledged to refrain from using white phosphorus in densely populated areas in 2013 (‘Israel: Strengthen White Phosphorus Phase-Out’ (*HRW*, 18 May 2013) <<https://www.hrw.org/news/2013/05/18/israel-strengthen-white-phosphorus-phase-out>> accessed 30 November 2023).

<sup>313</sup> ‘From Condemnation to Concrete Action: A Five-Year Review of Incendiary Weapons’ (*HRW and International Human Rights Law Clinic (Harvard Law School)*, November 2015) 19 <<https://hrp.law.harvard.edu/wp-content/uploads/2022/10/Incendiaries-5-year-review-final.pdf>> accessed 30 November 2023; Human Rights Council, ‘Report of the Independent International Commission of Inquiry on the Syrian Arab Republic’ (2017) UN Doc A/HRC/34/64 para 59.

<sup>314</sup> CIHL r 70; AP I art 35(2).

<sup>315</sup> CIHL rr 84-85. See also ‘Phosphorus Weapons – the ICRC’s view’ (*ICRC*, 17 January 2009) <<https://www.icrc.org/en/doc/resources/documents/interview/weapons-interview-170109.htm>> accessed 30 November 2023.

<sup>316</sup> Israel Defense Forces (X, 11 October 2023) <<https://x.com/IDF/status/1711927566670434371?s=20>> accessed 30 November 2023; ‘IDF Attacks 200 Targets in Gaza’s Al-Furqan Neighbourhood’ *Haaretz* (Tel Aviv, 10 October 2023) <<https://www.haaretz.com/israel-news/2023-10-10/ty-article-live/900-israelis-killed-2-400-wounded-in-war-with-hamas/0000018b-17bd-d465-abb-17bf23000000#365228534>> accessed 30 November 2023. Many other neighbourhoods were also heavily bombarded, including refugee camps. See eg ‘Gaza’s Rimal Neighbourhood Wiped out by Israeli Airstrikes’ *Al Jazeera* (Doha, 11 October 2023) <<https://www.aljazeera.com/gallery/2023/10/11/photos-rimal-neighbourhood-the-beating-heart-of-gaza-wiped-out>> accessed 30 November 2023.

references to the neighbourhood itself raise questions as to whether each target in itself met the definition of military objectives or, rather, were all treated in aggregation as a single military objective. The prohibition of indiscriminate attacks, derived directly from the principle of distinction, explicitly prohibits attacks that treat a number of distinct military objectives in populated areas as a single military objective.<sup>317</sup> Indeed, even a very dense presence of military objectives in an area does not in itself turn the whole area, for example a neighbourhood, into a legitimate target. Such attacks, if indeed conducted indiscriminately, are also possibly war crimes.

It should also be noted that IHL specifically prohibits acts or threats of violence the primary purpose of which is to spread terror among the civilian population.<sup>318</sup> ‘Indiscriminate and widespread shelling’ and ‘regular bombardment of cities’ are cited as examples of such prohibited acts of violence.<sup>319</sup> While at the time of writing it is not possible to establish conclusively that Israel’s heavy and near-constant bombardment of densely populated areas in Gaza is done with the specific, and primary, intent to spread terror, the intensity of the attacks gives rise to concerns that this may be the case.<sup>320</sup> These concerns are exacerbated by Israeli military intelligence sources quoted in a recent media report.<sup>321</sup>

While these illustrative incidents and overall patterns raise serious concerns that Israel is failing to respect the principle of distinction, the Israeli military’s (social) media publications insist by contrast that great emphasis is being placed on the striking of military targets belonging to Hamas, their fighters, tunnels, bunkers, command positions, and places from where they launch rockets.<sup>322</sup> Even if Israel is indeed targeting such objectives as these publications maintain, it must be recalled that the existence of legitimate military target(s) is only one factor; other rules regulating the conduct of hostilities must be respected as well. Indeed, IHL protects civilians not only from being directly targeted, but also from the effects of hostilities. Accordingly, even where the specific target *is* legitimate, for the attack to be lawful the targeting decision must additionally abide by the principles of proportionality and precautions.

If, in the alternative, the identified target is not a legitimate military target, any attacks directed at it will always be unlawful. It would thus not be possible to justify the attack at all, much less to claim that it was proportionate, or that sufficient precautions had been taken.

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<sup>317</sup> AP I art 51(5)(a); CIHL r 13.

<sup>318</sup> CIHL r 2 and its Commentary; AP I art 51(2); AP II art 13(2).

<sup>319</sup> Commentary to CIHL r 2.

<sup>320</sup> The International Criminal Tribunal for the former Yugoslavia (ICTY) has held that the purpose (‘intent’) ‘can be inferred from the circumstances of the acts or threats, that is from their nature, manner, timing and duration’ (*Prosecutor v. Galić* (Appeals Chamber Judgement) ICTY-98-29-A (30 November 2006) [104].

<sup>321</sup> Yuval Abraham, “‘A Mass Assassination Factory’: Inside Israel’s Calculated Bombing of Gaza’ +972 Magazine (30 November 2023) <<https://www.972mag.com/mass-assassination-factory-israel-calculated-bombing-gaza/>> accessed 30 November 2023. According to this report: ‘The bombing of power targets [i.e., high-rise buildings and private residences, amongst others], according to intelligence sources who had first-hand experience with its application in Gaza in the past, is mainly intended to harm Palestinian civil society: to “create a shock” that, among other things, will reverberate powerfully and “lead civilians to put pressure on Hamas,” as one source put it.’

<sup>322</sup> Israel Defense Forces, (X, 9 October 2023) <<https://x.com/IDF/status/1711438415588213236?s=20>> accessed 30 November 2023.

## The principle of proportionality

The principle of proportionality is a cardinal rule of IHL, which ensures that if the principle of distinction has been met and there is indeed a lawful target, any harm caused to civilians as a result of an attack on that target will be balanced against the military advantage sought. The principle of proportionality includes a requirement to assess (1) the concrete and direct military advantage anticipated, and (2) the expected incidental civilian harm, and to then (3) weigh the anticipated advantage against the expected civilian losses, to confirm that the latter is not excessive in relation to the former.<sup>323</sup> This step-by-step assessment must be carried out for all targeting, including deliberate or pre-planned operations, as well as dynamic targeting.<sup>324</sup>

The proportionality principle requires an attack-by-attack assessment; both the military advantage anticipated and the civilian harm expected must pertain to a specific attack at hand, meaning ‘a finite operation with defined limits’,<sup>325</sup> not the entire military operation or campaign as a whole.<sup>326</sup> Where ‘an attack [is] carried out in a concerted manner in numerous places’, it ‘can only be judged in its entirety’.<sup>327</sup> At the same time, multiple clearly distinct military objectives in an area must not be treated as a single objective.<sup>328</sup> In practical terms, this means that the Israeli military must identify what concrete and direct military advantage it anticipates gaining in every specific attack. An operational context that is too widely defined would deprive ‘concrete and direct’ – the qualities attached to military advantage – of meaning. The reasons that motivated going to war (*jus ad bellum* considerations), regardless of their legitimacy, must not be conflated with considerations during the conduct of hostilities. If this distinction is not maintained, there is a risk that the significance of a potential military victory, a distant aim, will inappropriately inflate the perceived military advantage in a manner that might be thought to justify even very high degrees of civilian harm.<sup>329</sup>

Additionally, ‘intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects ... which would be

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<sup>323</sup> AP I art 51(5)(b); CIHL r 14.

<sup>324</sup> ICRC and Université Laval Proportionality Report (n 280) 59.

<sup>325</sup> Ibid 17.

<sup>326</sup> AP I art 49(1) defines the notion of ‘attacks’ as ‘acts of violence against the adversary...’. The tests in the rules regulating the conduct of hostilities apply to each and every specific attack. Regarding the principle of proportionality, some States have interpreted that the military advantage anticipated should refer to the ‘advantage anticipated from the military attack considered as a whole’, the outer limits of which are not exactly clear, but it has been stressed that this should remain a ‘finite operation with defined limits’ and cannot extend to the ‘armed conflict as a whole’. Commentary to CIHL r 14 and the references cited in fn 27; ICRC and Université Laval Proportionality Report (n 280) 13-14 and references cited in fn 43; Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (4<sup>th</sup> ed, CUP 2022) paras 521-522.

<sup>327</sup> Commentary to AP I art 57, para 2218.

<sup>328</sup> AP I art 51(5)(a) and its Commentary, paras 1973, 2218; CIHL r 13.

<sup>329</sup> It has also been suggested that ‘the military advantage ... is nothing like before’ as Hamas presents an ‘existential threat on Israel’, ‘has revealed itself to be an enemy that is much more stronger and more sophisticated’, and that there are indications that ‘they have only one aim ... destruction of the State of Israel and the murdering of all Israelis’. Pnina Sharvit Baruch, ‘Israel at War: Laws of Armed Conflict’ (INSS Israel, *YouTube*, 24 October 2023) <<https://www.youtube.com/watch?v=4wmx-wQDQHU>> accessed 30 November 2023. Again, the anticipated military advantage for each and every attack must be ‘concrete and direct’, and such general assessments are insufficient to demonstrate proper considerations of proportionality.

*clearly* excessive in relation to the concrete and direct *overall* military advantage anticipated' constitutes a war crime.<sup>330</sup> The elements of the war crime are slightly different and apply in the context of establishing individual criminal responsibility. To be clear, this does not change the definition of the IHL rule on proportionality, which demands that it is respected by parties to the conflict for every single attack, not just on the general level of the entire offensive operation.<sup>331</sup>

### *Challenges in evaluating compliance with the proportionality rule*

Implementing this principle entails the complex exercise of weighing two very different values against each other (harm to civilians or civilian objects on the one hand, and military advantage on the other). For several reasons, it is also difficult for commentators or external reviewers to assess compliance with this principle accurately.

First, the test demands an ex-ante assessment of the expected military advantage and anticipated civilian harm that could and should have been reasonably foreseen, but analysis conducted by others is invariably ex post facto with the benefit of hindsight about what actually transpired.<sup>332</sup> The civilian harm that is indeed evident at that stage might differ significantly from what was actually (or reasonably ought to have been) expected at the time the decision was taken.

Second, the intelligence available to the commander responsible for this assessment is generally not fully accessible publicly, which means any external evaluation can only make inferences based on what known facts indicate.<sup>333</sup> IHL does not impose an obligation of transparency as to the classified intelligence that the belligerent launching the attack had about the military advantage it expected to gain.<sup>334</sup>

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<sup>330</sup> ICC Statute art 8(2)(b)(iv) (emphasis added). This is specifically in the context of international armed conflicts. Additionally, 'launching an indiscriminate attack resulting in death or injury to civilians, or an attack in the knowledge that it will cause excessive incidental civilian loss, injury or damage' is also listed as a war crime in non-international armed conflicts, on the basis of State practice, Commentary to CIHL r 156.

<sup>331</sup> It was explicitly stated by the ICRC, at the Rome Conference on the ICC Statute, that the addition of the word 'overall' to the definition of the crime could not be interpreted as changing existing law. Commentary to CIHL r 14.

<sup>332</sup> Sassòli (n 251) para 8.322; Dinstein (n 326) para 532.

<sup>333</sup> Sassòli (n 251) para 8.322. In conducting this analysis, the public statements made by Israel (notably the Israeli military, including the Israeli Air Force, and certain political leadership) on their official webpages, social media accounts, and reported by the media, were reviewed. There is some support for relying on inferences to derive conclusions about compliance with the rules on the conduct of hostilities (notably the principle of precautions), absent the disclosure of relevant refuting information by the relevant party to the conflict. Eg Human Rights Council, 'Report of the United Nations Fact-Finding Mission on the Gaza Conflict', A/HRC/12/48 (25 September 2009) para 595; Marco Longobardo, 'Human Rights Council's Fact-Finding Missions and the Assessment of Violations of the Principle of Precaution in Attack in the Absence of Cooperation by the Attacker' in Gloria Gaggioli and Emilie Max (eds), *The Role of Human Rights Mechanisms in Implementing International Humanitarian Law* (Edward Elgar) (forthcoming).

<sup>334</sup> Notwithstanding operational interests and sensitivities that constrain public disclosure of intelligence guiding such decisions, there is some support for greater transparency. Eg Human Rights Council, 'Report of the Detailed Findings of the Independent Commission of Inquiry established pursuant to Human Rights Council Resolution S-21/1', A/HRC/29/CRP.4 (24 June 2015) para 228; Asaf Lubin, 'The Reasonable Intelligence Agency' (2022) 47 Yale J Intl L 119, 148-149.

Third, while proportionality assessments need to be undertaken for each attack, public statements by the attacking party are typically general in nature, and it is consequently not possible to infer from them conclusively whether the approach taken by the commanders responsible for specific attacks adhered to the requirements of the law.

### *Approach to proportionality*

These challenges notwithstanding, the general approach reflected in the Israeli military's public statements, publicly available information about the population and infrastructure in Gaza,<sup>335</sup> as well as the scope of destruction that Israel's attacks have left in their wake raise serious doubts about whether it has adhered to the principle of proportionality.<sup>336</sup>

An example of a series of attacks resulting in a number of casualties and scope of destruction that engenders such concern were the aforementioned attacks in the Rimal neighbourhood (and surrounding areas), which was where the Israeli army's main airstrikes were carried out overnight from 9 to 10 October.<sup>337</sup> 'Unprecedented Israeli bombardment'<sup>338</sup> left a large part of the neighbourhood 'reduced to rubble',<sup>339</sup> effectively wiping out the 'heart of Gaza City'.<sup>340</sup> According to the Ministry of Health in Gaza, more than 400 fatalities were recorded across the Strip overnight from 9 to 10 October, in the span of 24 hours.<sup>341</sup> The 31 October strikes on Jabalia refugee camp have also raised 'serious concerns that these are disproportionate attacks that could amount to war crimes'.<sup>342</sup> To reiterate, Jabalia is very densely populated and Gaza's largest refugee camp; covering an area of only 1.4 square kilometres, it is home

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<sup>335</sup> This includes information such as the population location and density, and locations of infrastructure located above ground, at ground level, and underground that consists of (critical) public infrastructure, hospitals, and schools. It has been reported that the Israeli military has also been tracking movements of Gazans, and therefore had up-to-date information about population movements and changes in locations to inform its assessments. Patrick Kingsley and Ronen Bergman, 'Tracking Cellphone Data by Neighborhood, Israel Gauges Gaza Evacuation' *New York Times* (Jerusalem and Tel Aviv, 16 October 2023) <<https://www.nytimes.com/2023/10/16/world/middleeast/gaza-invasion-israel-cellphone-data.html>> accessed 30 November 2023.

<sup>336</sup> 'Israel and the Occupied Territories: Evacuation Order of Gaza Triggers Catastrophic Humanitarian Consequences' (ICRC, 13 October 2023) <<https://www.icrc.org/en/document/israel-and-occupied-territories-evacuation-order-of-gaza-triggers-catastrophic-humanitarian-consequences>> accessed 30 November 2023.

<sup>337</sup> 'Hostilities in the Gaza Strip and Israel | Flash Update #4' (OCHA oPt, 10 October 2023) <<https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-4>> accessed 30 November 2023.

<sup>338</sup> Issam Adwan, 'Unprecedented Israeli Bombardment Lays Waste to Upscale Rimal, the Beating Heart of Gaza City' *The Associated Press* (Gaza City, 11 October 2023) <<https://apnews.com/article/gaza-rimal-israel-hamas-incursion-war-0411aa82d51fc801c117213e508a1a1d>> accessed 30 November 2023.

<sup>339</sup> Josef Federman and Issam Adwan, 'Palestinians Scramble for Safety as Israel Pounds Sealed-Off Gaza Strip to Punish Hamas' *The Associated Press* (Jerusalem, 11 October 2023) <<https://apnews.com/article/israel-palestinians-gaza-hamas-airstrikes-hostages-bf6c42f84526c4d9416978c8effd932a>> accessed 30 November 2023.

<sup>340</sup> Adwan (n 338).

<sup>341</sup> OCHA oPt Flash Update #4 (n 337).

<sup>342</sup> UN Human Rights (X, 1 November 2023)

<<https://twitter.com/UNHumanRights/status/1719783887633527153>> accessed 30 November 2023.



to over 110,000 residents.<sup>343</sup> The 31 October strikes reportedly killed at least 50,<sup>344</sup> and possibly more than 100 persons,<sup>345</sup> and ‘destroy[ed] an entire quarter with 30 residential buildings’.<sup>346</sup>

Public statements by the Israeli military (and political leadership) provide indications as to their approach when deciding on the attacks that caused such devastation. At the outset of the counteroffensive, the stated objective was ‘degrading until 100% completion of all of Hamas’ military capabilities’ to ultimately ensure that ‘Hamas won’t be able to strike Israeli civilians ever again’,<sup>347</sup> and to ‘exact an immense price from the enemy’.<sup>348</sup> As regards the choice of means employed in pursuit of this goal, the Israeli military has indicated that it has dropped ‘hundreds of tons’ of bombs in attacks on the Gaza Strip because the ‘emphasis is on damage and not on accuracy’.<sup>349</sup> The strikes against Gaza were forewarned to be ‘bigger than before and more severe’ in response to the scale of the incursion by Hamas.<sup>350</sup> Indeed, the campaign has been deadlier and more widespread than other recent hostilities; within the first eight days, the fatality toll had already greatly exceeded that of the 2014 hostilities,<sup>351</sup> and in the first month approximately 45% of all residential housing units were destroyed or damaged.<sup>352</sup>

Apart from concerns arising from statements of this kind and from the scope of devastation inflicted on Gaza, indications that the principle of proportionality has not been adhered to can also be derived from careful analysis of the constitutive elements of the principle.

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<sup>343</sup> UNRWA (n 310).

<sup>344</sup> ‘Hostilities in the Gaza Strip and Israel | Flash Update #25’ (*OCHA oPt*, 31 October 2023) <<https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-25>> accessed 30 November 2023.

<sup>345</sup> A media report cites figures of around 120 dead on 31 October, as reported by hospital officials. David Gritten, ‘Jabalia: Israel Air Strike Reportedly Kills Dozens at Gaza Refugee Camp’ *BBC* (London, 31 October 2023) <<https://www.bbc.com/news/world-middle-east-67276822>> accessed 30 November 2023. OCHA has reported that ‘[a]t least 195 Palestinian were killed and about 800 injured in less than 24 hours between 31 October and 1 November, in two rounds of Israeli airstrikes on Jabalia Refugee Camp, in northern Gaza, according to the MoH in Gaza’. ‘Hostilities in the Gaza Strip and Israel | Flash Update #27’ (*OCHA oPt*, 2 November 2023) <<https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-27>> accessed 30 November 2023.

<sup>346</sup> OCHA oPt Flash Update #25 (n 344).

<sup>347</sup> Israel Defense Forces (n 322); ‘Correction: Statement by PM Netanyahu’ (*Israel Prime Minister’s Office*, 7 October 2023) <<https://www.gov.il/en/departments/news/event-statement071023>> accessed 30 November 2023.

<sup>348</sup> ‘PM Netanyahu’s Remarks at the Start of the Security Cabinet Meeting’ (*Israel Prime Minister’s Office*, 7 October 2023) <<https://www.gov.il/en/departments/news/event-cabinet071023>> accessed 30 November 2023.

<sup>349</sup> Yaniv Kubovich and Eden Solomon, ‘IDF Spokesman: Tonight There Were No Infiltrations through the Fence, There May Be a Few More Terrorists in Israeli Territory’ *Haaretz* (Tel Aviv, 10 October 2023) <<https://www.haaretz.co.il/news/politics/2023-10-10/ty-article-live/0000018b-1645-d465-abb-16f71d060000#1720386730>> accessed 30 November 2023 [translated from Hebrew].

<sup>350</sup> Roland Oliphant and James Rothwell, ‘Israel Urges Gaza Civilians to Flee – Even Though They Have No Exit Route’ *The Telegraph* (Jerusalem, 10 October 2023) <<https://www.telegraph.co.uk/world-news/2023/10/11/israel-warns-gaza-civilians-aggressive-operation-hamas/>> accessed 30 November 2023.

<sup>351</sup> OCHA oPt Flash Update #9 (n 75).

<sup>352</sup> OCHA oPt Reported Impact Day 33 (n 88).

*Concrete and direct military advantage anticipated*

For the purposes of the principle of proportionality, the advantage to be gained from the attack must be military in nature, as distinct from a political or other gain. Two qualifiers are attached to the military advantage – ‘concrete’ and ‘direct’. The term ‘concrete and direct’ is understood to convey that the military advantage must be ‘substantial and relatively close’.<sup>353</sup> More specifically, ‘concrete’ has been understood to refer to ‘real or tangible, definable and quantifiable’, and to require a certain likelihood.<sup>354</sup> ‘Direct’ implies a certain causal relation between the attack and the military advantage.<sup>355</sup> While protection of civilians may appear to be a counter-factor to military advantage, this is not necessarily the case. Indeed, when the military aims being pursued by the party conducting an attack encompass the protection of civilians, the mitigation of civilian harm may itself constitute a military advantage.<sup>356</sup>

*Incidental civilian harm expected*

The incidental civilian harm from an attack includes loss of civilian life, injury to civilians, and damage to civilian objects, or a combination thereof, which must be evaluated in advance for each attack in itself as well. In general, civilian life would be valued over civilian property.<sup>357</sup> Recalling the previous section regarding the principle of distinction, civilian persons and objects must not be directly targeted; therefore, it follows that any civilian harm should only be incidental.

A challenge in assessing civilian harm arises when an object that is normally used for civilian purposes – such as a house or other shelter, school, or mosque – is suspected of being used for military purposes.<sup>358</sup> Where such an object makes an effective contribution to military action and a definite military advantage is expected from its destruction, capture, or neutralisation – and thus it is a legitimate military objective – it may be attacked, but such an attack must still not cause excessive civilian losses.<sup>359</sup> The civilian harm, such as the ‘impact of the attack on the civilian part or component of the object [...] or on the simultaneous civilian use or function of the object’, must still be considered in the assessment of proportionality.<sup>360</sup> Depending on the circumstances, the harm inflicted on the civilian use of the object could render such an attack disproportionate. Indeed, where military objectives may be intermingled with civilians and civilian objects, it is ‘imperative that the

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<sup>353</sup> Yves Sandoz, Christophe Swinarski, and Bruno Zimmermann (eds) *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Convention of 12 August 1949* (ICRC 1987) (Commentary on AP I/AP II), para 2209. Eg Sassòli (n 251) para 8.319.

<sup>354</sup> ICRC and Université Laval Proportionality Report (n 280) 17-18. Eg Sassòli (n 251) para 8.319.

<sup>355</sup> ICRC and Université Laval Proportionality Report (n 280) 19. Eg Sassòli (n 251) para 8.319.

<sup>356</sup> ICRC and Université Laval Proportionality Report (n 280) 29-30.

<sup>357</sup> ICRC and Université Laval (n 280) 63. There could be an argument for exceptions to this, especially if it involved critical infrastructure.

<sup>358</sup> Such objects are sometimes referred to as so-called ‘dual-use objects’, but this is a category which does not exist in IHL, since a civilian object is defined negatively to include any object which is not a military objective.

<sup>359</sup> Commentary to AP I art 51, para 1953.

<sup>360</sup> ICRC and Université Laval Proportionality Report (n 280) 37-38. For an opposing view see Ori Pomson, ‘The ICRC’s Statement on the Israel-Hamas Hostilities and Violence: Discerning the Legal Intricacies’ (*Articles of War*, 16 October 2023) <<https://lieber.westpoint.edu/icrc-statement-israel-hamas-hostilities-violence-discerning-legal-intricacies/>> accessed 30 November 2023.

proportionality assessment be conducted with utmost care'.<sup>361</sup> Where there is doubt as to whether the object is civilian or military, the interests of the civilian population should prevail, and it should be presumed to be civilian.<sup>362</sup>

According to the Israeli military, 'Israeli intelligence indicates that Hamas are hiding among Gazan civilians, inside Gazan homes and schools, hospitals and mosques',<sup>363</sup> and in operational updates published regarding specific airstrikes conducted, the Israeli Air Force referred to mosques used for 'weapons storage', as an 'operational command center', and other 'operational infrastructure'.<sup>364</sup> Without full access to said intelligence, the purported military advantage cannot be independently verified. In any case, even if these civilian objects were indeed used for such military purposes, the Israeli military must still assess the expected harm caused to civilians, such as civilians present in the blast or fragmentation radius who would potentially be killed or injured as a result of the attack.<sup>365</sup> Residential buildings, schools where people are sheltering in safety, and places of worship can all be expected to contain a significant number of civilians.<sup>366</sup> According to data consolidated by OCHA, in the first month of hostilities, over 40,000 housing units were destroyed and over 222,000 were damaged; 278 educational facilities and at least three churches and 66 mosques were also damaged.<sup>367</sup>

### *Reverberating effects*

It is increasingly accepted that the incidental civilian harm component of the proportionality assessment does not only comprise the direct or immediate effects from the attack on the targeted object, but can and should also encompass reverberating effects (provided they have a causal link to the attack).<sup>368</sup> Unlike the calculus for the anticipated military advantage which is explicitly limited to 'concrete and *direct*', the expected civilian harm to be assessed is not qualified.<sup>369</sup>

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<sup>361</sup> ICRC Explosive Weapons Report (n 306) 98.

<sup>362</sup> AP I art 52(3); Commentary to CIHL r 10. This is also consistent with the principle of distinction.

<sup>363</sup> Israel Defense Forces (X, 9 October 2023), <<https://twitter.com/idf/status/1711138315628372110?s=46>> accessed 30 November 2023.

<sup>364</sup> Eg, Israeli Air Force (X, 8 October 2023), <<https://x.com/IAFsite/status/1710771293019128016?s=20>> accessed 30 November 2023 [translated from Hebrew]; Israeli Air Force (X, 10 October 2023), <<https://x.com/IAFsite/status/1711606261731520805?s=20>> accessed 30 November 2023. The updates from the Israeli military make multiple references to various civilian infrastructure being used for military purposes. IDF Editorial Team, ' Hamas-Israel War: Real Time Updates' (*Israel Defense Forces*) <<https://www.idf.il/en/mini-sites/hamas-israel-war-articles-videos-and-more/real-time-updates/>> accessed 30 November 2023.

<sup>365</sup> ICRC Explosive Weapons Report (n 306) 84-85.

<sup>366</sup> Ruth Michaelson, 'More than 900 Dead in Gaza Since Saturday as Shelling Hits School, Hospitals and Homes' *The Guardian* (Jerusalem, 10 October 2023) <<https://www.theguardian.com/world/2023/oct/10/830-dead-in-gaza-since-saturday-as-shelling-hits-school-hospitals-and-homes>> accessed 30 November 2023.

<sup>367</sup> OCHA oPt Reported Impact Day 33 (n 88).

<sup>368</sup> Isabel Robinson and Ellen Nohle, 'Proportionality and Precautions in Attack: The Reverberating Effects of Using Explosive Weapons in Populated Areas' (2016) 98(901) *Intl Rev Red Cross* 107, 108-109 <[https://international-review.icrc.org/sites/default/files/irc\\_97\\_901-9.pdf](https://international-review.icrc.org/sites/default/files/irc_97_901-9.pdf)> accessed 30 November 2023. Reverberating effects are 'those effects [which are] not directly and immediately caused by the attack, but [are] nevertheless the product thereof'. Michael N Schmitt, 'Wired Warfare: Computer Network Attack and *Jus in Bello*' 84(846) *Intl Rev Red Cross* 365, 392 <[https://www.icrc.org/en/doc/assets/files/other/365\\_400\\_schmitt.pdf](https://www.icrc.org/en/doc/assets/files/other/365_400_schmitt.pdf)> accessed 30 November 2023.

<sup>369</sup> Emphasis added.

This could also include the ‘cumulative effect of repeated attacks and the successive degradation of infrastructure’,<sup>370</sup> particularly while hostilities persist in an area.<sup>371</sup> Critical civilian infrastructure can be irreversibly damaged, disrupting essential services, with compounding humanitarian consequences given the interdependency and interconnectedness of essential service infrastructure.<sup>372</sup> For example, disruption of energy supply can have a domino effect on the continuity of the water supply and sanitation services, and the functioning of hospitals. These effects can extend beyond the immediate vicinity of the impact zone.<sup>373</sup> Hostilities can also trigger the displacement of people seeking safety, which can affect their access to essential infrastructure and services for basic needs.<sup>374</sup> In a protracted conflict, this is exacerbated by pre-existing strain on services and infrastructure.

In practice, it is not entirely clear what reverberating effects ought to be considered in the proportionality assessment since the notion is not specifically defined in IHL. The scope of reverberating effects has been contentious, with varied and evolving views on the types of harm that should be included.<sup>375</sup> Furthermore, it is challenging to determine which reverberating effects are indeed reasonably foreseeable. Nevertheless, it is clear that ‘using explosive weapons with a wide impact area against military objectives in populated areas carries a substantial risk of causing significant direct and indirect civilian harm, and of falling afoul of the rule of proportionality’.<sup>376</sup> The position of the ICRC, shared by the IHL Centre, is that reasonably foreseeable reverberating effects of planned attacks must be considered in the proportionality assessment.<sup>377</sup>

Such reverberating effects have been significant in the case of Israeli attacks in Gaza during the present hostilities, as the civilian population’s access to food, water, and other essential goods, life-saving and other medical care (particularly given exposure to diseases), and other essential services, shelter, etc. have been and will continue to be adversely affected.<sup>378</sup> The heavy restrictions on the entry of life-saving supplies in the past weeks, discussed in the next section, have exacerbated these effects. These reverberating consequences could and should

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<sup>370</sup> Sassòli (n 251) para 8.321, citing the ICRC position.

<sup>371</sup> See also the ICTY going a step further and suggesting that such cumulative effects in themselves have legal significance based on the Martens Clause: ‘[I]n case of repeated attacks, all or most of them falling within the grey area between indisputable legality and unlawfulness, it might be warranted to conclude that the cumulative effect of such acts entails that they may not be in keeping with international law. Indeed, this pattern of military conduct may turn out to jeopardise excessively the lives and assets of civilians, contrary to the demands of humanity’. (*Prosecutor v. Kupreskic et al* (Trial Chamber Judgement) ICTY-95-16-T (14 January 2000 [526])).

<sup>372</sup> ICRC Explosive Weapons Report (n 306) 42-43.

<sup>373</sup> *Ibid.*

<sup>374</sup> *Ibid.*, 50-53.

<sup>375</sup> ICRC and Université Laval Proportionality Report (n 280) 46-48; Sassòli (n 251) para 8.321; Dinstein (n 326) para 537.

<sup>376</sup> ICRC Explosive Weapons Report (n 306) 101.

<sup>377</sup> ‘International Humanitarian Law and the Challenges of Contemporary Armed Conflicts’ (October 2015) 52 <<https://www.icrc.org/en/download/file/15061/32ic-report-on-ihl-and-challenges-of-armed-conflicts.pdf>> accessed 30 November 2023; ICRC Explosive Weapons Report (n 306) 96.

<sup>378</sup> OCHA oPt Reported Impact Day 33 (n 88); OCHA oPt Flash Update #33 (n 68); ‘Risk of Disease Spread Soars in Gaza as Health Facilities, Water and Sanitation Systems Disrupted’ (*WHO*, 8 November 2023) <<https://www.emro.who.int/media/news/risk-of-disease-spread-soars-in-gaza-as-health-facilities-water-and-sanitation-systems-disrupted.html>> accessed 30 November 2023.

have been reasonably foreseen by Israel, not least because there is ample information about such effects caused by similar Israeli attacks in Gaza during previous hostilities.

It should also be noted that even prior to 7 October, Gaza already suffered from degraded infrastructure resulting from damage and destruction incurred during recurrent hostilities (in 2008-2009, 2012, 2014, 2018, 2021, 2022, and earlier in 2023).<sup>379</sup> Due, in part, to the closure that Israel has imposed on Gaza since 2007, which severely restricted (and in the case of some items altogether prevented) the passage of goods, reconstruction and recovery has been further limited for a long time.<sup>380</sup> The number of civilians with long-term injuries also spikes after each period of hostilities in Gaza.<sup>381</sup>

Humanitarian assistance cannot be used as a mitigating factor to lower the assessment of the reverberating effects expected to materialise.<sup>382</sup> An attack that is expected to cause excessive and therefore disproportionate harm cannot be otherwise justified with the anticipation of mitigating humanitarian relief. The UN, ICRC, and other actors have been providing humanitarian assistance to the extent possible, and other States may have pledged and delivered humanitarian aid packages since the hostilities began on 7 October, but Israel as the party to the conflict retains the obligation to ensure that it does not cause excessive harm in the first instance. Rather, it has been suggested that the need for such humanitarian action might be an indication that the proportionality assessment of the relevant party should be reconsidered.<sup>383</sup>

#### *Assessment of proportionality*

The proportionality assessment requires the person making the assessment, typically the military commander, to employ ‘common sense and good faith’.<sup>384</sup> The notion of ‘reasonable military commander’ has been used as the standard for an objective determination of

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<sup>379</sup> Writing in 2014, some of The Elders had stated that ‘Israeli bombs, missiles, and artillery have pulverised large parts of Gaza, including thousands of homes, schools, and hospitals’. See Jimmy Carter and Mary Robinson, ‘Gaza: A Cycle of Violence That Can Be Broken’ (*The Elders*, 4 August 2014) <<https://theelders.org/news/gaza-cycle-violence-can-be-broken>> accessed 30 November 2023; ‘Devastating Aftermath of Israel-Gaza Escalation’ (ICRC, 18 June 2021) <<https://www.icrc.org/en/document/devastating-aftermath-of-israel-gaza-escalation>> accessed 30 November 2023.

<sup>380</sup> Gisha (n 46); UN Conference on Trade and Development, ‘Developments in the Economy of the Occupied Palestinian Territory’ TD/B/EX(74)/2 (11 September 2023) para 45 <[https://unctad.org/system/files/official-document/tdbex74d2\\_en.pdf](https://unctad.org/system/files/official-document/tdbex74d2_en.pdf)> accessed 30 November 2023. The Israeli military has however persistently contended that Hamas exploits humanitarian aid and diverts a significant portion of building materials to its tunnel-building activities. IDF Editorial Team, ‘Hamas’ Exploitation of Humanitarian Aid’ (*Israel Defense Forces*, 25 January 2018) <<https://www.idf.il/en/mini-sites/the-hamas-terrorist-organization/hamas-exploitation-of-humanitarian-aid/>> accessed 30 November 2023.

<sup>381</sup> This is based on information provided by the UNRWA Rimal Health Centre Orthopaedic Team, August 2023.

<sup>382</sup> ICRC and Université Laval Proportionality Report (n 280) 51; Emanuela-Chiara Gillard, ‘Proportionality in the Conduct of Hostilities: The Incidental Harm Side of the Assessment’ (*Chatham House*, December 2018) paras 67-69 <<https://www.chathamhouse.org/sites/default/files/publications/research/2018-12-10-proportionality-conduct-hostilities-incident-harm-gillard-final.pdf>> accessed 30 November 2023.

<sup>383</sup> ICRC and Université Laval Proportionality Report (n 280) 51.

<sup>384</sup> Commentary to AP I art 57, para 2208. This does not change the fact that all involved in decision-making are obliged to implement this in practice, but the military commander bears certain responsibility.

excessiveness in attack, which presumes in the first instance that military commanders are indeed trained to be reasonable and can be objectively restrained in such assessments.<sup>385</sup>

The assessment must be made on the basis of all of the information available from all sources at the given time.<sup>386</sup> All relevant and reasonably available information must be proactively sought out in this process.<sup>387</sup> Where expert technical advice is available, particularly in relation to assessing reverberating harm, this can and should supplement the assessment of the military commander.<sup>388</sup>

If such an assessment leads to the conclusion that the attack would violate the rule of proportionality, the attack is unlawful and may not be undertaken even if the intended target is a legitimate military objective. In other words, even if there was some military advantage to be gained from striking a certain target, if the attack is foreseen to cause so much harm as to be excessive in comparison, the plan for attack must be either adapted to sufficiently mitigate the harm or, in the alternative, be aborted altogether.<sup>389</sup> The consequence of this assessment is even more salient for situations where the stakes are high, and the proportionality assessment is tested to the extreme.<sup>390</sup> It must be emphasised that the principle of proportionality should be read in the context of its object and purpose, which is to protect the civilian population. While it is difficult to determine what is ‘excessive’, a more protective interpretation and greater restraint are preferable, and the principle of proportionality should not be misused to justify extensive harm. The high level of destruction including up to 45% of residential units, flattening of entire neighbourhoods, claiming of

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<sup>385</sup> ICRC and Université Laval Proportionality Report (n 280) 52-53; Sassòli (n 251) para 8.324.

<sup>386</sup> Commentary to CIHL r 14.

<sup>387</sup> ICRC and Université Laval Proportionality Report (n 280) 48.

<sup>388</sup> Ibid 48-49.

<sup>389</sup> According to a Reuters report, ‘Israel has attacked around 5,000 Hamas targets in the Gaza Strip since Oct 7 and has cancelled a “large number” of other strikes in an effort to avoid Palestinian civilian casualties, a senior Israeli official said on Tuesday’. Dan Williams, ‘Israeli Official: 5,000 Hamas Targets Attacked in Gaza So Far’ *Reuters* (Jerusalem, 17 October 2023) <<https://www.reuters.com/world/middle-east/israeli-official-5000-hamas-targets-attacked-gaza-so-far-2023-10-17/>> accessed 30 November 2023.

<sup>390</sup> It has even been posited that extensive civilian harm must never be tolerated. Commentary to AP I art 51, para 1980 states: ‘The idea has also been put forward that even if they are very high, civilian losses and damages may be justified if the military advantage at stake is of great importance. This idea is contrary to the fundamental rules of the Protocol [...] The Protocol does not provide any justification for attacks which cause extensive civilian losses and damages. Incidental losses and damages should never be extensive’. See also the concurring opinion of Judge Rivlin in Targeted Killings Case (n 1) para 5: ‘[I]t seems that there can be collateral damage to the civilian population so severe that even a military objective with very substantial benefit cannot justify it’. This may be a preferred approach if one insists on humanitarian protection as the chief imperative of the principle of proportionality, though it comes under pressure where the military advantage at stake is very weighty, especially when bearing in mind that failure to achieve such advantage may ultimately also result in (very) extensive civilian harm – in this case, to civilians affiliated with the attacking party. Treating the assessment of proportionality as a relative measure only up to a point, beyond which the protection of civilians would override military advantage, would attribute an absolute character to the otherwise relative notion of excessiveness in the definition of the principle of proportionality, and such an approach has been criticised. See eg The Program on Humanitarian Policy and Conflict Research at Harvard University, ‘HPCR Manual on International Law Applicable to Air and Missile Warfare’ (CUP 2013) 98; Dinstein (n 326) 181.

thousands of lives, and injuring of tens of thousands more, leaving virtually no safe place in Gaza, have raised serious concerns in this regard.<sup>391</sup>

Turning to a specific case, the attack on Jabalia refugee camp on 31 October was particularly contentious.<sup>392</sup> The Israeli military had stated that it was specifically targeting ‘a very senior Hamas commander’<sup>393</sup> ‘hiding in an underground bunker’.<sup>394</sup> This was allegedly part of a ‘wide-scale strike on terrorists and terror infrastructure belonging to the Central Jabaliya Battalion, which had taken control over civilian buildings in Gaza City’.<sup>395</sup> The strike was defended as one ‘on a military target of significant military importance to the battlefield and for [them] to be able to obtain [their] military objectives’,<sup>396</sup> and the Israeli military claimed that they ‘considered all factors when making the strike’.<sup>397</sup> The Israeli military reported that the strike killed the specific targeted commander and ‘a large number of terrorists’<sup>398</sup> who were present, and noted that ‘as a result of the subterranean infrastructure, the building that was targeted collapsed, as did other buildings in the area’.<sup>399</sup>

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<sup>391</sup> OCHA oPt Reported Impact Day 33 (n 88); Wafaa Shurafa and Samya Kullab, ‘No Place Is Safe in Gaza After Israel Targets Areas Where Civilians Seek Refuge, Palestinians Say’ *The Associated Press* (Gaza Strip, 17 October 2023) <<https://apnews.com/article/israel-gaza-palestinian-civilians-safety-airstrikes-f38f27da1dd995acc14e6db1524761e7>> accessed 30 November 2023; Situation Room, ‘Drone Footage of War-Torn Gaza Show Immense Destruction’ *CNN* (Southern Lebanon, 12 October 2023) <<https://edition.cnn.com/videos/world/2023/10/12/ben-wedeman-gaza-man-speaks-out-tsr-vpx.cnn>> accessed 30 November 2023. For detailed mapping of the destruction documented, see Mariano Zafra, Prasanta Kumar Dutta, and Aditi Bhandari, ‘The Destruction of Gaza’ *Reuters* (London, 20 October 2023) <<https://www.reuters.com/graphics/ISRAEL-PALESTINIANS/MAPS/zjvqedgdjvx/>> accessed 30 November 2023; Júlia Ledur, Janice Kai Chen, and Emily M. Eng, ‘Damage Maps of Gaza’s Hard-Hit Areas Since the Start of the War’ *The Washington Post* (Washington, D.C. and Seattle, 18 October 2023) <<https://www.washingtonpost.com/world/2023/10/18/gaza-war-damage-images-maps/>> accessed 30 November 2023.

<sup>392</sup> Eg Mark Lattimer, ‘Assessing Israel’s Approach to Proportionality in the Conduct of Hostilities in Gaza’ (*Lawfare*, 16 November 2023) <<https://www.lawfaremedia.org/article/assessing-israel-s-approach-to-proportionality-in-the-conduct-of-hostilities-in-gaza>> accessed 30 November 2023; Kareem Khadder, Abeer Salman, and Tara John, ‘Catastrophic Damage After Second Israeli Airstrike hits Gaza Refugee Camp’ *CNN* (Jerusalem, 1 November 2023) <<https://edition.cnn.com/2023/10/31/middleeast/jabalya-blast-gaza-intl/index.html>> accessed 30 November 2023.

<sup>393</sup> Kyle Blaine and others, ‘Israeli Military Claims It Killed Hamas Commander in Strike on Jabalya Camp in Gaza; Hamas Denies Claim’ *CNN* (Atlanta, 31 October 2023) <[https://edition.cnn.com/middleeast/live-news/israel-hamas-war-gaza-news-10-31-23/h\\_f5bb08977dffffafaeaba47f832de861](https://edition.cnn.com/middleeast/live-news/israel-hamas-war-gaza-news-10-31-23/h_f5bb08977dffffafaeaba47f832de861)> accessed 30 November 2023.

<sup>394</sup> Kevin Flower, ‘Al Jazeera Employee Lost 19 Relatives in Israeli Airstrike on Jabalya Refugee Camp Tuesday, Network Says’ *CNN* (Los Angeles, 31 October) <[https://edition.cnn.com/middleeast/live-news/israel-hamas-war-gaza-news-10-31-23/h\\_a91e18337f6580e16339f1ef568e96a4](https://edition.cnn.com/middleeast/live-news/israel-hamas-war-gaza-news-10-31-23/h_a91e18337f6580e16339f1ef568e96a4)> accessed 30 November 2023.

<sup>395</sup> IDF, ‘IDF and ISA Kill Commander of Hamas’ Central Jabaliya Battalion, One of the Leaders October 7<sup>th</sup> Massacre’ (*Israel Defense Forces*, 31 October 2023) <<https://www.idf.il/144297/>> accessed 30 November 2023.

<sup>396</sup> Mariya Knight and Mitchell McCluskey, ‘Israel Defense Forces Defends Deadly Strike on Refugee Camp in Northern Gaza’ *CNN* (Atlanta, 31 October 2023) <[https://edition.cnn.com/middleeast/live-news/israel-hamas-war-gaza-news-10-31-23/h\\_1a3e4ffb13094ea4034e9539ee95ad7c](https://edition.cnn.com/middleeast/live-news/israel-hamas-war-gaza-news-10-31-23/h_1a3e4ffb13094ea4034e9539ee95ad7c)> accessed 30 November 2023.

<sup>397</sup> *Ibid.*

<sup>398</sup> IDF (n 395).

<sup>399</sup> Mission Brief from LTC Richard Hecht, ‘Mission Brief: Dispatch #4’ (*Official IDF Substack*, 1 November 2023) <<https://idfspokesperson.substack.com/p/mission-brief-dispatch-4>> accessed 30 November 2023.

The Israeli military declined to comment on the type and number of weapons it used in the attack on Jabalia; however, it has been reported that 2000-pound bombs were likely deployed, and that these left impact craters approximately 12 metres or 40 feet wide.<sup>400</sup> As noted, according to reports at least 50,<sup>401</sup> and perhaps more than 100,<sup>402</sup> people were killed, many more were injured,<sup>403</sup> and an entire quarter with 30 residential buildings was destroyed in Jabalia on 31 October.<sup>404</sup> The high civilian impact could and should have been reasonably foreseen,<sup>405</sup> given publicly available population statistics of Jabalia refugee camp, the locations of civilian infrastructure, such as schools, above ground,<sup>406</sup> and the damage that such an attack would likely cause in this environment, including, notably, by causing the collapse of buildings located on top of underground tunnels being attacked.<sup>407</sup> The tolerance for civilian harm appears to have been very high compared to the military advantage (seemingly derived from the elimination primarily of one specific individual, even if high-ranking),<sup>408</sup> and this attack was arguably disproportionate.

### **The principle of precautions**

All parties to an armed conflict must take constant care in their military operations to spare civilian life or injury, and damage to civilian objects, and take feasible precautions to minimise incidental civilian harm.<sup>409</sup>

Parties must take precautions in attacks as well as precautions against the effects of attacks. These are independent obligations. Hamas' obligations to take precautionary measures against the effects of attacks were discussed earlier,<sup>410</sup> but even if one side has failed to discharge its obligations to take precautions against the effects of attacks, it does not relieve the other party from its obligations to respect the principles of distinction, proportionality, and precautions, which apply regardless. In a statement, the Israeli military indicated that ' Hamas are hiding among Gazan civilians, inside Gazan homes and schools, hospitals and mosques'.<sup>411</sup> Even if this is in fact the case, attacks against Hamas fighters still have to adhere to precautions and other rules regulating the conduct of hostilities.

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<sup>400</sup> Graham-Harrison, Ganguly, and Morresi (n 310); Christoph Koettl and others, 'Israel Used 2000-Pound Bomb in Strike on Jabaliya, Analysis Shows' *New York Times* (New York, 3 November 2023) <<https://www.nytimes.com/2023/11/03/world/middleeast/israel-bomb-jabaliya.html>> accessed 30 November 2023.

<sup>401</sup> OCHA oPt Flash Update #25 (n 344).

<sup>402</sup> Gritten (n 345); OCHA oPt Flash Update #27 (n 345).

<sup>403</sup> OCHA oPt Flash Update #27 (n 345).

<sup>404</sup> OCHA oPt Flash Update #25 (n 344).

<sup>405</sup> This includes civilians who choose to remain even if effective advance warnings had been given. See the section below for further discussion on warnings.

<sup>406</sup> UNRWA (n 310).

<sup>407</sup> Lattimer (n 392). The Israeli military statements appeared to suggest that they did not anticipate the collapse of buildings from the collapse of tunnels underground. Eg Paul Adams, 'Israel's Jabalia Explanation Bears Similarity to Previous Attack on Hamas Tunnel' *BBC* (Jerusalem, 1 November 2023) <<https://www.bbc.com/news/live/world-middle-east-67281166/page/8>> accessed 30 November 2023.

<sup>408</sup> This is based on a comparison to the practices of other militaries. Lattimer (n 392).

<sup>409</sup> AP I art 57; CIHL r 15.

<sup>410</sup> See text to n 222.

<sup>411</sup> Israel Defense Forces (n 363).



Required precautions are limited to what is ‘feasible’, which is understood widely as ‘practicable or practically possible, taking into account all circumstances ruling at the time’,<sup>412</sup> ‘including humanitarian and military considerations’.<sup>413</sup> This involves making an effort to obtain the ‘best possible intelligence’ and assessing all available information from all sources in the decision-making process for planning and executing attacks.<sup>414</sup> The information that should be sought out and considered includes ‘information on concentrations of civilian persons, important civilian objects, specifically protected objects, [...] and the civilian environment of military objectives’, that is, information crucial to assess and to minimise potential harm to civilians.<sup>415</sup>

**Precautionary measures in attack** include the following:

- Target verification: do everything feasible to verify that the target is indeed a military objective;<sup>416</sup>
- Selection of the means and methods of warfare: take all feasible precautions to choose means and methods of warfare that minimise (or even avoid) civilian harm;<sup>417</sup>
- Assessment of the effects of attacks: do everything feasible to assess whether the expected incidental civilian harm from an attack would be excessive;<sup>418</sup>
- Control during the execution of attacks: do everything feasible to cancel or suspend an attack if it becomes apparent that the target is not a military objective, or if the attack will cause excessive harm;<sup>419</sup>
- Giving effective advance warning: give effective advance warning of attacks which may affect the civilian population, unless circumstances do not permit;<sup>420</sup>
- Target selection: select the target that causes the least civilian harm, where a choice is possible between several military objectives to achieve a similar military advantage.<sup>421</sup>

Some of these precautionary measures are inextricably linked with the implementation of the principles of distinction and proportionality. The remainder of this section will assess Israel’s compliance with its duty to undertake these precautionary measures, with a focus on the obligation to give effective advance warning. This will be analysed in conjunction with the other precautionary measures, and more generally with the other rules regulating the conduct of hostilities.

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<sup>412</sup> Commentary to AP I art 57, para 2198.

<sup>413</sup> Commentary to CIHL r 15.

<sup>414</sup> Commentary to CIHL r 15.

<sup>415</sup> Commentary to CIHL r 15.

<sup>416</sup> AP I art 57(2)(a)(i) and its Commentary, paras 2192-2199; CIHL r 16.

<sup>417</sup> AP I art 57(2)(a)(ii) and its Commentary, paras 2200-2203; CIHL r 17.

<sup>418</sup> AP I art 57(2)(a)(iii) and its Commentary, paras 2204-2219; CIHL r 18.

<sup>419</sup> AP I art 57(2)(b) and its Commentary, paras 2220-2221; CIHL r 19.

<sup>420</sup> AP I art 57(2)(c), and its Commentary, paras 2222-2225; CIHL r 20.

<sup>421</sup> AP I art 57(3) and its Commentary, paras 2226-2228; CIHL r 21.

### *Giving effective advance warning*

It is important to note that the proper function of warnings is to give the civilian population who may potentially be affected by the attack a chance to protect themselves.<sup>422</sup> To qualify as an ‘effective advance warning’ as stipulated in the set of precautionary measures in attack, the measure taken must fulfil this protective function. Effective advance warnings have to be given for every attack. There is no specific prescription for how the warning should be given, provided it reaches those likely to be in danger in advance of the attack, and clearly indicates the steps they must take to avoid harm.<sup>423</sup> As such, the warning should have sufficient specificity and prescription as to enable the civilian population to take the right protective steps.<sup>424</sup>

The only exception to the requirement to implement this measure is if circumstances do not permit, for example where the element of surprise is a necessary condition for a successful attack.<sup>425</sup> If warnings have been issued and civilians nevertheless remain, it does not absolve the attacking party from its obligations under the rules regulating the conduct of hostilities.<sup>426</sup>

In the present context, Israeli forces have taken various measures that have been described as ‘warnings’ to the civilian population. This includes (1) general notifications to leave entire neighbourhoods,<sup>427</sup> and (2) a (repeated) directive to move from north to south Gaza, demarcated by Wadi Gaza.<sup>428</sup>

As a preliminary point, there is little to no opportunity for Gazans to leave. This is in large part due to Israel’s own enforcement of the closure on Gaza that severely restricts residents’ movement out of Gaza, Israel having retained control over the air space, territorial waters, and all but one land crossing. These restrictions were tightened even further since 7 October, and their impact exacerbated by the fact that the remaining land crossing with Egypt – Rafah Border Crossing – was mostly non-operational due to Israeli airstrikes, and severely restricted otherwise. Furthermore, neighbouring countries – Egypt and Jordan – have also rejected the

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<sup>422</sup> Commentary to AP I art 57, para 2225.

<sup>423</sup> Sassòli (n 251) para 8.330.

<sup>424</sup> The UK standard of “sufficiently specific and comprehensible” has been referenced by others. United Kingdom, The Joint Service Manual of the Law of Armed Conflict, JSP 383 (2004), para 5.32.8 <<https://assets.publishing.service.gov.uk/media/5a7952bfe5274a2acd18bda5/JSP3832004Edition.pdf>> accessed 30 November 2023; Sara Benabbass and Marten Zwanenburg ‘The Interaction Between the Obligation to Warn and Other Rules of IHL’ (2023) 14(2) J Intl Humanitarian L Studies 1, 5-6, 8 <<https://brill.com/view/journals/ihts/aop/article-10.1163-18781527-bja10084/article-10.1163-18781527-bja10084.xml>> accessed 30 November 2023.

<sup>425</sup> AP I art 57(2)(c) and its Commentary, para 2223; CIHL r 20 and its Commentary. Whether the civilians remain of their own volition, they are unable to leave, or even forced to stay, is irrelevant for the attacking party’s obligations.

<sup>426</sup> Commentary to CIHL r 20; text to nn 441-442.

<sup>427</sup> Eg Israel Defense Forces (n 322).

<sup>428</sup> ‘IDF Announcement Sent to the Civilians of Gaza City’, (*Israel Defense Forces*, 13 October 2023) <<https://www.idf.il/en/mini-sites/idf-press-releases-regarding-the-hamas-israel-war/idf-announcement-sent-to-the-civilians-of-gaza-city/>> accessed 30 November 2023; Israel Defense Forces (X, 28 October 2023) <<https://twitter.com/IDF/status/1718240244129059167?s=20>> accessed 30 November 2023. There were also some initial calls for Gazans to leave the Gaza Strip altogether, but these were later retracted with clarifications. Israel Prime Minister’s Office (n 347); Israel Defense Forces (X, 10 October 2023) <<https://twitter.com/IDF/status/1711698008708964472>> accessed 30 November 2023.

idea of receiving Gazans.<sup>429</sup> The rest of the analysis will thus proceed on the basis of these constraints limiting the opportunities of civilians to seek safety outside Gaza, even if they wanted to leave.

First, not every measure that resembles or is labelled as a ‘warning’ qualifies as an ‘effective advance warning’ within the legal meaning of the term. While in principle ‘warnings may also have a general character’,<sup>430</sup> a blanket notification or alert to the civilian population for entire operations, with little specificity, would give the civilians who do receive the notification little opportunity to protect themselves.<sup>431</sup> It goes without saying that only warnings that the civilian population can actually follow may be considered effective. Where the party issuing a warning makes it impossible for civilians to actually heed the warning, for instance by attacking the alternative locations of safety or the routes to them, the protective function of warnings is nullified.

*Moving more than one million people across a densely populated warzone to a place with no food, water, or accommodation, when the entire territory is under siege, is extremely dangerous – and in some cases, simply not possible.*<sup>432</sup>

The general notifications by Israel to the civilian population of Gaza do not appear to qualify as ‘effective advance warnings’ per the legal meaning, since they did not seem to give the civilian population much opportunity, if at all, to protect themselves under the circumstances at the time.<sup>433</sup> The directives, which were general and open-ended,<sup>434</sup> effectively required over a million Gazans (almost half of whom are children) to move en masse along road

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<sup>429</sup> It is worth noting that both Egypt and Jordan have received patients evacuated from Gaza hospitals for urgent medical treatment. Eg ‘Children with Cancer Evacuated from Gaza for Treatment to Egypt and Jordan’ (WHO, 10 November 2023) <<https://www.who.int/news/item/10-11-2023-children-with-cancer-evacuated-from-gaza-for-treatment-to-egypt-and-jordan>> accessed 30 November 2023; Nidal Al-Mughrabi and Dan Williams, ‘Premature Gaza Babies Evacuated to Egypt as Israeli Tanks Encircle Second Hospital’ *Reuters* (Gaza/Jerusalem, 20 November 2023) <<https://www.reuters.com/world/middle-east/israeli-tanks-reported-near-hospital-embattled-north-gaza-2023-11-20/>> accessed 30 November 2023; ‘At Least 320 Foreign Nationals and Some Wounded Leave Gaza for Egypt’ *Reuters* (Rafah Crossing, 1 November 2023) <<https://www.reuters.com/world/middle-east/egypt-prepares-evacuees-gaza-arrive-through-rafah-crossing-2023-11-01/>> accessed 30 November 2023.

<sup>430</sup> Commentary to AP I art 57, para 2225.

<sup>431</sup> Some more specific warnings were also given prior to some attacks, but even if they were individually sufficient for certain attacks, these do not sufficiently alleviate the other general concerns elaborated here.

<sup>432</sup> António Guterres, ‘Secretary-General’s Remarks to the Press on the Situation in the Middle East’ (UN, 13 October 2023) <<https://www.un.org/sg/en/content/sg/speeches/2023-10-13/secretary-generals-remarks-the-press-the-situation-the-middle-east>> accessed 30 November 2023.

<sup>433</sup> It has also been argued elsewhere that ‘the “order” by Israel to one million inhabitants of the Northern Gaza Strip to move away from their homes cannot possibly constitute a warning required (unless circumstances do not permit) by IHL, because such warning must concern an attack directed at a determined military objective and the entire northern Gaza Strip cannot possibly constitute a military objective’. Sassòli (n 228).

<sup>434</sup> The interpretation to this rule tolerates warnings of a ‘general character’, but the examples qualifying this flexibility illustrate ‘general’ in the sense of warnings issued for ‘certain types of installations’, and ‘a list of the objectives that will be attacked’. A permissible ‘general warning’ therefore can only be general insofar as it is applied to attacks that still identify specific military objectives in attacks, and not so expansive as to be for the operation broadly.

infrastructure that had suffered critical damage, under threats of attacks overhead (by Israel) even on pre-identified safe routes,<sup>435</sup> to seek safety in an area that was not immune from attack<sup>436</sup> at a time when there was generally ‘no safe place for civilians in Gaza’.<sup>437</sup>

Second, effective advance warnings must be understood and applied as part of a set of precautionary measures and other obligations applicable in the conduct of hostilities. As a general remark, even effective advance warnings cannot serve to render an otherwise unlawful attack lawful.<sup>438</sup> For example, if an attack is directed against an unlawful target such as a civilian object, it is simply unlawful, and giving advance warning to civilians who might be harmed by the attack would not render it lawful. While the Israeli military has subsequently disputed that this was its intention,<sup>439</sup> the plain meaning of the Arabic in the warning leaflets it dropped, stating that ‘anyone who chooses not to evacuate from the north to the south of Wadi Gaza could be marked as an accomplice of a terrorist group’,<sup>440</sup> does in fact imply that civilians who remain in the north will not be regarded as being protected from attacks, in contravention of IHL. As explained above, civilians lose protection against attacks only when and for such time as they take a direct part in hostilities. Failure to act upon the ‘warnings’ issued by a party<sup>441</sup> – in this case, to move away from an area which will presumably become an arena of heavy battle – unequivocally fails to meet the definition of direct participation in

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<sup>435</sup> Paul Brown and Jemimah Herd, ‘Strike on Civilian Convoy Fleeing Gaza: What We Know from Verified Video’ (*BBC*, 16 October 2023) <<https://www.bbc.co.uk/news/world-middle-east-67114281>> accessed 30 November 2023.

<sup>436</sup> Eg Israel Defense Forces (*X*, 27 October 2023) <<https://twitter.com/idfonline/status/1717872157726822542>> accessed 30 November 2023 [translated from Hebrew]; Yahya Abou-Ghazala, ‘They Followed Evacuation Orders. An Israeli Airstrike Killed Them the Next Day’ *CNN* (Atlanta, 17 October 2023) <<https://edition.cnn.com/2023/10/16/middleeast/israel-palestinian-evacuation-orders-invs/index.html>> accessed 30 November 2023.

<sup>437</sup> António Guterres, ‘Why Israel Must Reconsider Its Gaza Evacuation Order’ *New York Times* (New York, 13 October 2023) <<https://www.nytimes.com/2023/10/13/opinion/israel-gaza-united-nations.html>> accessed 30 November 2023. According to the UN Humanitarian Coordinator, ‘Nowhere is safe in Gaza’. ‘Statement by the UN Humanitarian Coordinator for the Occupied Palestinian Territory, Lynn Hastings, on the Protection of All Civilians in Gaza’ (*OCHA oPt*, 26 October 2023) <<https://www.ochaopt.org/content/statement-un-humanitarian-coordinator-occupied-palestinian-territory-lynn-hastings-protection-all-civilians>> accessed 30 November 2023; Nidal Al-Mughrabi, ‘Palestinians Fleeing to the South Find No Escape from Danger’ *Reuters* (Gaza, 15 October 2023) <<https://www.reuters.com/world/middle-east/palestinians-fleeing-fighting-south-find-no-escape-danger-2023-10-15/>> accessed 30 November 2023.

<sup>438</sup> Marco Sassòli and Anne Quintin, ‘Active and Passive Precautions in Air and Missile Warfare’ (2014) 44 *Israel YB Human Rights* 69, 110 <<https://brill.com/display/book/edcoll/9789004423954/BP000003.xml>> accessed 30 November 2023.

<sup>439</sup> The Israeli military has claimed that this translation from the Arabic text it distributed is imprecise and that they have ‘no intention of considering those who have yet to evacuate as a member of a terrorist group’ (Israel Defense Forces, (*X*, 21 October 2023) <<https://x.com/IDF/status/1715819239221641617?s=20>> accessed 30 November 2023).

<sup>440</sup> This is a direct translation by the IHL Centre of the wording of the leaflet which reads كل من اختار ان لا يخلي من شمال القطاع الى الجنوب من وادي غزة، من الممكن ان يتم تحديده على انه شريك بتنظيم إرهابي.

<sup>441</sup> See above for the explanation concluding that the order, in fact, fails to qualify as an effective advance warning under IHL.

hostilities. Accordingly, those who stay in northern Gaza remain protected against the effects of attacks.<sup>442</sup>

If an attack is directed against a legitimate target,<sup>443</sup> where sufficient precautionary measures are taken such that the expected civilian harm is reduced so as not to be excessive, an attack may no longer be considered disproportionate.<sup>444</sup> However, if a ‘warning’ does not actually constitute an ‘effective advance warning’ in the legal sense of the term, and is incapable of mitigating expected excessive civilian harm, such an attack will remain disproportionate.

The decisions facing those planning or deciding upon an attack are not just a choice between a poor attempt at a ‘warning’ (that does not qualify as an effective advance warning) and proceeding with an unlawful attack anyway without a warning. The obligation to give an effective warning applies together with other precautionary measures and should not be treated in isolation as a standalone requirement; the general aim of the entire set of interrelated precautionary measures is to minimise (and even avoid) civilian harm.<sup>445</sup> Where target verification and assessment of the effects of the attack indicate illegality, which no effective advance warning is capable of mitigating, the attacking party should take other precautionary measures – to cancel, suspend, or change the operational plan so as not to violate IHL.<sup>446</sup>

Third, given that effective advance warnings have an inherently protective function, warnings that have the foreseeable consequence of placing civilians who adhere to them at risk of great harm in any case need to be assessed carefully, and may require a re-evaluation of the attack altogether. Each rule in the framework of rules that gives effect to the general obligation in the conduct of military operations to take constant care to spare civilians and civilian objects – including precautions in attack – ‘feeds into the process for the application of the rule of proportionality in practice’.<sup>447</sup>

Applying this to the present context, it could and should have been reasonably foreseen that directing the entire civilian population of over a million people in north Gaza to move to south Gaza would expose them to significant risk.

In the south of Gaza, shelters were already overwhelmed, hospitals were already at capacity and collapsing, and access to water and sanitation was also severely reduced. The directive therefore required the mass displacement of the civilian population in such a manner as to compel them to search for shelter and safety in south Gaza while that area continued to be

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<sup>442</sup> Even if an effective advance warning is given, and civilians nevertheless remain behind (either because they could not or would not otherwise leave), they do not lose protection from attacks and from the effects of attacks, and the attacking party must still abide by the rules regulating the conduct of hostilities. It was particularly unfeasible for some parts of the population, such as patients who are receiving lifesaving care, to leave. ‘Evacuation Orders by Israel to Hospitals in Northern Gaza are a Death Sentence for the Sick and Injured’ (WHO, 14 October 2023) <<https://www.who.int/news/item/14-10-2023-evacuation-orders-by-israel-to-hospitals-in-northern-gaza-are-a-death-sentence-for-the-sick-and-injured>> accessed 30 November 2023.

<sup>443</sup> This is a theoretical assumption, which sets aside the concern that the attacks for which general warnings have been given to civilians in wide areas of Gaza may not be attacks on legitimate targets.

<sup>444</sup> ICRC and Université Laval Proportionality Report (n 280) 64-65; Gillard (n 382) paras 22-23.

<sup>445</sup> AP I arts 57(1) and 57(2)(a)(ii); CIHL rr 15 and 17.

<sup>446</sup> AP I art 57(2)(b); CIHL r 19.

<sup>447</sup> Gillard (n 382) para 22.

attacked,<sup>448</sup> and subject them to severe deprivation of basic needs and essential services as well.

Even if this was not foreseen by the military commander responsible for the decision, which in itself seems neither plausible nor reasonable, the effects were otherwise made abundantly clear by the alarms sounded by the international community, which emphasised that such large-scale movement would inevitably cause devastating humanitarian consequences.<sup>449</sup> Such effects must be included in the assessment of civilian harm expected when assessing the proportionality of the attack(s).

A directive that triggers such harmful consequences may not be justified simply by presenting it as an effort to discharge the obligation to give warnings, which would be a perverse application of a protective measure. If the harm that civilians are likely to incur when adhering to this directive can reasonably be foreseen to be equal or greater than the harm they would face if they remained in place, the directive to move would not only fail to alleviate suffering, but would in fact be contrary to the underlying protection imperative of precautions. It would create significant deleterious consequences for the civilian population in contravention of the obligation to take constant care to minimise civilian harm. This would be unlawful.

One may contend that such harm (from the mass displacement and other associated consequences), significant as it is, would still be less severe than the harm that civilians would be expected to incur if they remained in north Gaza (as their lives would be at greater risk if they were to remain); be that as it may, it still does not make the former acceptable by default. The fact, if indeed it is a fact, that mass displacement south (and resulting injury and loss of life) would be less harmful than remaining during the attack(s) is insufficient. IHL mandates an objective assessment of attacks,<sup>450</sup> which must be lawful in themselves, and not just relatively preferable 'as the lesser of two evils'.<sup>451</sup>

In this regard, it is instructive to consider the view that in addition to the proportionality calculus that has to be conducted with respect to every individual attack, belligerent parties are also subject to 'a broader notion of proportionality as a general principle of the law of armed conflict'.<sup>452</sup> Also instructive is the developing concept of 'strategic proportionality', which would require the balancing of the overall harm caused by a military operation against

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<sup>448</sup> Eg Israel Defense Forces (n 436); OCHA oPt (n 437); 'Israel/OPT Update' (OHCHR, 27 October 2023) <<https://www.ohchr.org/en/press-briefing-notes/2023/10/israel-opt-update>> accessed 30 November 2023.

<sup>449</sup> References cited in n 111.

<sup>450</sup> In this case, the logic of harm assessment is applied to the entire operation, for the sake of comparing the two alternatives; the 'warning' itself is not considered an 'attack'.

<sup>451</sup> Eg Michael N Schmitt, 'The Evacuation of Northern Gaza: Practical and Legal Aspects' (*Articles of War*, 15 October 2023) <<https://lieber.westpoint.edu/evacuation-northern-gaza-practical-legal-aspects/>> accessed 30 November 2023. For a critique of such 'lesser evil' reasoning noting, among other things, that it is often based on an artificial dilemma that ignores alternative courses of action (including the possibility of not acting) see eg Eitan Diamond, 'Before the Abyss: Reshaping International Humanitarian Law to Suit the Ends of Power' (2010) 43(2) *Israel L Rev* 414, 443-446 <<https://www.cambridge.org/core/journals/israel-law-review/article/abs/before-the-abyss-reshaping-international-humanitarian-law-to-suit-the-ends-of-power/9806A089AB5A7464A45BF10DD702C658>> accessed 30 November 2023.

<sup>452</sup> Eg, Jann K Kleffner, 'Military Collaterals and Ius in Bello Proportionality' (2018) 48 *Israel YB Human Rts* 43, 57.

its strategic objectives.<sup>453</sup> On this view, if the less harmful alternative will inflict a degree of harm that is excessive under such a general principle of proportionality, the point that it is *relatively* less excessive is moot since IHL prohibits excessive harm. It again bears upon the responsible party to cancel or suspend the attack(s).

If the expected civilian harm is indeed excessive, a military operation involving devastating attacks on the entire north of Gaza would fail to meet such a test of proportionality, whether performed without an evacuation directive or with one. In the former case, it would foreseeably result in the mass killing of many of the million civilians residing in the area, and in the latter case it would entail the mass displacement of those million or so civilians under conditions that would almost certainly result in a great many casualties and tremendous human suffering.

The practices through which Israel has professed to be discharging its duty to take precautions in attack therefore appear to be ineffective, and even harmful to the civilian population. Some exception is accommodated by the law where circumstances do not permit giving a warning, but that does not seem to be the problem here since notifications have been given. In fact, the conduct of the Israeli military suggests that certain measures have been taken under the guise of precautions that are not genuinely protective of the civilian population. These indicate not only a failure to take the necessary precautions, but also a misuse of humanitarian protections to engender even greater foreseeable harm.

### **Concerns that IHL is being disregarded with calamitous consequences**

Israel's 'unprecedented'<sup>454</sup> bombardment of the Gaza Strip during the period under review here killed over 10,000 people, injured over 26,000 others, and reduced to rubble refugee camps,<sup>455</sup> mosques,<sup>456</sup> churches,<sup>457</sup> schools,<sup>458</sup> and residential neighbourhoods,<sup>459</sup> destroying or damaging thousands of buildings, including homes and schools used as temporary shelters.<sup>460</sup> It also crippled essential services<sup>461</sup> and other critical infrastructure including water and sanitation facilities,<sup>462</sup> and displaced around 1.5 million people.<sup>463</sup>

There are grave grounds for concern that the scale of human suffering and devastation inflicted on Gaza stems from the approach taken by the Israeli authorities towards the rules of IHL that impose constraints on the methods and means of warfare that can be deployed in

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<sup>453</sup> Noam Lubell and Amichai Cohen, 'Strategic Proportionality: Limitations on the Use of Force in Modern Armed Conflicts' (2020) 96 Intl L Stud 159.

<sup>454</sup> Adwan (n 338).

<sup>455</sup> OCHA oPt Flash Update #3 (n 105).

<sup>456</sup> BBC News (n 107).

<sup>457</sup> Al-Mughrabi (n 108).

<sup>458</sup> UNRWA (n 104).

<sup>459</sup> Adwan (n 338).

<sup>460</sup> See above 'Events since 7 October 2023'.

<sup>461</sup> 'Hospitals in the Gaza Strip at a Breaking Point, Warns WHO', (WHO, 12 October 2023), <<https://www.emro.who.int/opt/news/hospitals-in-the-gaza-strip-at-a-breaking-point-warns-who.html>> accessed 30 November 2023.

<sup>462</sup> 'Urgent Public Statement from the WASH Cluster' (WASH Cluster State of Palestine, 15 October 2023) <<https://www.washcluster.net/node/31496>> accessed 30 November 2023.

<sup>463</sup> OCHA oPt Flash Update #33 (n 68).

hostilities. As the analysis in this section has elaborated, there are troubling indications of deliberate disregard for these rules. Where deference has been given to IHL, it appears to have been selective. Accordingly, and notwithstanding the Israeli military's professed adherence to the law, there are serious concerns that Israel has in fact been acting in breach of the IHL rules on the conduct of hostilities, including the foundational principles of distinction and proportionality, and the duty to take precautions in attack.



## 5. Assessment of violations of IHL concerning access to indispensable resources and humanitarian relief

The harm inflicted on the civilian population of Gaza as a result of the use of force by Israel, discussed in the previous section, was compounded and significantly exacerbated by the Israeli decision to cut off the Strip's supply of crucial resources. Already crippled from years of movement restrictions imposed as part of Israel's closure, the Gaza Strip was hermetically sealed off from the rest of the world on 9 October, when Israeli Defence Minister Yoav Gallant announced a 'complete siege'<sup>464</sup> on Gaza, meaning 'no electricity, no food, no water, no fuel'.<sup>465</sup> Gallant indicated that the siege would only be lifted once the hostages are released;<sup>466</sup> Israel had already stopped the supply of fuel and electricity on 7 October.<sup>467</sup> There has been a complete electricity blackout in Gaza since 11 October.<sup>468</sup> The Erez and Kerem Shalom crossings between Gaza and Israel have been closed since 7 October,<sup>469</sup> and from 9 until 21 October, the Rafah crossing with Egypt was closed uninterrupted as well.<sup>470</sup> Israel had reportedly informed Egypt that any truck carrying humanitarian relief to Gaza would be bombed.<sup>471</sup> This was later followed by at least four instances of bombing of the Rafah crossing,<sup>472</sup> currently the only entry and exit point for the civilian population in Gaza not directly controlled by Israel.

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<sup>464</sup> Holmes and Michaelson (n 240).

<sup>465</sup> Ibid.

<sup>466</sup> OCHA oPt Flash Update #14 (n 125).

<sup>467</sup> OCHA oPt Flash Update #9 (n 75).

<sup>468</sup> Eg 'Hostilities in the Gaza Strip and Israel | Flash Update #18' (OCHA oPt, 24 October 2023) <<https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-18>> accessed 30 November 2023.

<sup>469</sup> Ibid.

<sup>470</sup> 'Hostilities in the Gaza Strip and Israel | Flash Update #15' (OCHA oPt, 21 October 2023) <<https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-15>> accessed 30 November 2023.

<sup>471</sup> 'The Fourth Day of the War: At Least 1,000 Murdered and Fallen; Biden to Hezbollah: "Don't Dare to Interfere"' *Israel Channel 2* (Tel Aviv, 10 October 2023) (Hebrew) <<https://www.mako.co.il/news-military/6361323ddea5a810/Article-9a0c1fd27561b81026.htm?sCh=31750a2610f26110&pid=173113802>> accessed 30 November 2023; 'Israel Threatens to Bomb Egypt Aid Trucks Heading to Gaza' *Middle East Monitor* (London, 10 October 2023) <<https://www.middleeastmonitor.com/20231010-israel-threatens-to-bomb-egypt-aid-trucks-heading-to-gaza/>> accessed 30 November 2023.

<sup>472</sup> Christiane Amanpour, "'Why Should Egypt Be Presumed to Allow the Influx of 1 or 2 Million People?' Asks Egyptian FM' (CNN, 17 October 2023) <<https://edition.cnn.com/videos/tv/2023/10/17/amanpour-shoukry.cnn>> accessed 30 November 2023; Kiara Alfonseca and Ayat Al-Tawy, 'Rafah Crossing: What is Happening at the Egypt-Gaza Border?' *abc News* (New York, 1 November 2023) <<https://abcnews.go.com/International/rafah-crossing-people-aid-stuck-egypt-border-gaza/story?id=104016070>> accessed 8 November 2023; Laure Stephan, 'Rafah Border Crossing: A Barrage of Israeli Fire Endangers Gaza's Only Gateway to Egypt' *Le Monde* (Beirut, 11 October) <[https://www.lemonde.fr/en/international/article/2023/10/11/rafah-border-crossing-a-barrage-of-israeli-fire-endangers-gaza-s-only-gateway-to-egypt\\_6165190\\_4.html](https://www.lemonde.fr/en/international/article/2023/10/11/rafah-border-crossing-a-barrage-of-israeli-fire-endangers-gaza-s-only-gateway-to-egypt_6165190_4.html)> accessed 30 November 2023.

Since 21 October, a small trickle of aid convoys has been allowed to cross into Gaza,<sup>473</sup> which a spokesperson for OHCHR described as ‘a mere drop in the ocean’.<sup>474</sup> This was mainly for the south of the Gaza Strip, while the north remained ‘largely cut off’.<sup>475</sup> With the densely populated Strip already mired in a state of economic and humanitarian crisis prior to the hostilities following 16 years of closure,<sup>476</sup> the residents of besieged Gaza now face an unprecedented humanitarian catastrophe with more than a million IDPs, a lack of basic necessities (such as clean water and food), large-scale destruction of civilian infrastructure, and a health care system on the brink of collapse.<sup>477</sup> During the period under review, there were no fuel supplies entering Gaza at all,<sup>478</sup> which affected water supply, vehicles and equipment needed for rescue and aid operations, and hospitals. There was also little to no connection to mobile networks, which made it even more difficult to coordinate rescue services and the delivery of humanitarian aid.<sup>479</sup> Hospitals have been reportedly on the verge of collapse as they reached 150 percent of their operational capacity during this period,<sup>480</sup> and more than a third of the hospitals and almost two-thirds of primary health care facilities were shut down.<sup>481</sup> These factors, compounded by severe shortages of essential medical supplies and the rationing of dwindling fuel supplies to operate only critical facilities, have resulted in a situation that constitutes an acute threat to the lives of thousands of patients.

The fact that Defence Minister Gallant conditioned the resumption of the flow of goods and services essential for human survival on the release of the hostages, taken together with other statements by Israeli officials examined further below, substantiates that the 2.3 million inhabitants of Gaza are being punished collectively for the attacks by Hamas forces. Collective punishment is absolutely prohibited by international law,<sup>482</sup> as is attacking, destroying, removing, or rendering useless objects indispensable to the survival of the civilian population (for example, by means of cutting off electricity, water, and fuel).<sup>483</sup> There are also grounds

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<sup>473</sup> ‘Hostilities in the Gaza Strip and Israel | Flash Update #24’ (*OCHA oPt*, 30 October 2023) <<https://ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-24>> accessed 30 November 2023; ‘Hostilities in the Gaza Strip and Israel | Flash Update #16’ (*OCHA oPt*, 22 October 2023) <<https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-16>> accessed 30 November 2023; ‘Hostilities in the Gaza Strip and Israel | Flash Update #17’ (*OCHA oPt*, 23 October 2023) <<https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-17>> accessed 30 November 2023.

<sup>474</sup> Gabrielle Tétrault-Farber, ‘UN Organisations Plead for Unimpeded Gaza Aid “On Our Knees”’ *Reuters* (Geneva, 24 October 2023) <<https://www.reuters.com/world/middle-east/un-palestinian-refugee-agency-calls-unimpeded-flow-aid-gaza-2023-10-24/>> accessed 30 November 2023.

<sup>475</sup> ‘Israel-Palestine Crisis: Gaza’s North Cut Off from Aid; Death Toll Rising’ (*UN News*, 2 November 2023) <<https://news.un.org/en/story/2023/11/1143107>> accessed 30 November 2023.

<sup>476</sup> Eg Gisha (n 46).

<sup>477</sup> OCHA oPt Flash Update #18 (n 468).

<sup>478</sup> Yusri Mohamed and Michelle Nichols, ‘Third Aid Convoy Enters Gaza, UN Warns Fuel About to Run Out’ *Reuters* (Ismalia, 24 October 2023) <<https://www.reuters.com/world/middle-east/third-gaza-bound-aid-convoy-enters-rafah-crossing-egypt-sources-2023-10-23/>> accessed 30 November 2023.

<sup>479</sup> OCHA oPt Flash Update #18 (n 468).

<sup>480</sup> OCHA oPt Flash Update #13 (n 78); ‘Gaza Hospitals Hanging on by a Thread: UN Humanitarians’ (*UN News*, 30 October 2023) <<https://news.un.org/en/story/2023/10/1142967>> accessed 30 November 2023.

<sup>481</sup> OCHA oPt Flash Update #33 (n 68).

<sup>482</sup> AP I art 75(2)(d); AP II art 4(2)(b); CIHL r 103.

<sup>483</sup> AP I art 54(2); AP II art 14, CIHL r 54.

for concern that Israel has been using starvation of civilians as a method of warfare, and that it has violated its obligations with respect to the provision of humanitarian aid.

The section that follows will provide analysis to substantiate these contentions.

### **Cutting off the supply of indispensable resources**

The capacity to control access to and from the Gaza Strip and to cut off the supply of resources indispensable for the survival of its population give Israel a considerable degree of power to dictate conditions of life in Gaza. As noted, it is because of such enduring control, and where and to the extent that it is in fact retained, that Israel remains bound in our view by the law of occupation with respect to Gaza.<sup>484</sup> Pursuant to its obligations under the law of occupation, Israel is generally obligated to take all the measures in its power to ensure, as far as possible, civil life in the Gaza Strip.<sup>485</sup> Accordingly, it must act with due diligence to exert the control that it has with a view to ensuring the welfare of the population.<sup>486</sup> The law of occupation further imposes a number of positive obligations on the occupying power. These include, among others, a duty to act, to the fullest extent of the means available to it, to ensure the food and medical supplies of the population;<sup>487</sup> and to ensure and maintain, with the cooperation of local authorities, the medical establishments and services, as well as public health and hygiene in the occupied territory.<sup>488</sup> All these obligations are obligations of means (as opposed to results), requiring the occupant to act with due diligence using the means reasonably available to it to discharge the obligation.<sup>489</sup> Alongside these obligations, the occupying power is entitled to impose ‘measures of control and security’ on the population of the occupied territory that it deems ‘necessary as a result of the war’.<sup>490</sup>

When hostilities break out in occupied territory, the law of occupation continues to apply alongside the IHL rules regulating the conduct of hostilities;<sup>491</sup> however, the extent to which the occupying power can reasonably be expected to secure the local population’s welfare and other needs may be limited by the prevailing circumstances. As a result of the hostilities, the occupant may additionally deem it necessary to impose (additional) measures of control and security on the local population. In the present case, Israel would have to demonstrate a security or military need so compelling as to somehow justify the imposition of what it has called ‘a complete siege’ on Gaza, depriving its population of food, water, electricity, fuel, and other items indispensable to their survival. It is most doubtful that the law of occupation

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<sup>484</sup> Text to n 6.

<sup>485</sup> Hague Regulations art 43.

<sup>486</sup> Eg Marco Sassòli, ‘Legislation and Maintenance of Public Order and Civil Life by Occupying Powers’ (2005) 16(4) *Eur J Intl L* 661, 663-665; Eliav Lieblich and Eyal Benvenisti, *Occupation in International Law* (OUP 2022) 82-83.

<sup>487</sup> GC IV art 55(1).

<sup>488</sup> GC IV art 56(1).

<sup>489</sup> Marco Longobardo, ‘The Relevance of the Concept of Due Diligence for International Humanitarian Law’ (2019) 37 *Wisconsin Intl L J* 44, 73-77.

<sup>490</sup> GC IV art 27(4). See also Jean S Pictet, *The Geneva Conventions of 12 August 1949 Commentary - IV Geneva Convention relative to the Protection of Civilian Persons in Time of War* (ICRC 1958) (Commentary to GC IV) 207.

<sup>491</sup> Yoram Dinstein, *The International Law of Belligerent Occupation* (2nd ed, CUP 2019) para 311.

permits the imposition of such severe restrictions.<sup>492</sup> What is certainly clear is that if the measures that Israel has imposed exceeded the restrictions that can lawfully be imposed even by a belligerent that is not bound by additional obligations arising from the law of occupation, they could not possibly constitute ‘measures of control and security’ permissible under the law of occupation. Indeed, in assessing the legality of the ‘complete siege’ that Israel has imposed on Gaza, it is instructive to consider it in the light of the IHL rules on the conduct of hostilities regulating siege warfare. If Israel’s actions were in breach of those provisions, they would be prohibited even in cases where the law of occupation is not applicable, and would thus be prohibited *a fortiori* with respect to a party that is bound by the law of occupation.

Sieges do not per se constitute a prohibited method of warfare under IHL.<sup>493</sup> They can be lawfully imposed, provided they are directed exclusively against combatants.<sup>494</sup> Accordingly, a siege may be enforced to pursue the military objectives of weakening the enemy, preventing reinforcements from reaching it, cutting off its supply of weapons, and generally exhausting its capacities with a view to inducing it to surrender.<sup>495</sup> At the same time, because sieges involve the imposition of multiple restrictions over the besieged locality with potentially adverse effects on the civilian population, the belligerent party resorting to siege warfare has to abide by various constraints imposed by IHL. These include, among others,<sup>496</sup> the prohibition against using the starvation of civilians as a method of warfare;<sup>497</sup> the related prohibition on attacking, destroying, removing, or rendering useless objects indispensable to the survival of the civilian population;<sup>498</sup> the rules on the evacuation of civilians from besieged areas;<sup>499</sup> and the rules concerning humanitarian relief operations.<sup>500</sup>

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<sup>492</sup> See the Commentary to GC IV 207 observing (based on the provision of GC IV art 41) that the most severe measures of control and security that the occupying power may inflict on protected persons are those of assigned residence and internment, and that any such measures adopted pursuant to GC IV art 27(4) ‘should not affect the fundamental rights of the persons concerned’.

<sup>493</sup> IHL indirectly allows sieges as a method of warfare by setting specific rules as to how civilians and civilian objects in besieged areas should be protected from the effects of violence. See Hague Regulations art 27; GC IV art 17. It has been argued however that following the adoption of AP I art 54 and its acceptance as a rule of customary IHL, a siege ‘in the old meaning and function of the term’, which involved depriving civilians of nourishment, is prohibited. See Dinstein (n 326) paras 889-894 and references cited therein.

<sup>494</sup> Commentary to AP II art 14, para 4796.

<sup>495</sup> Dinstein (n 326) para 897.

<sup>496</sup> In addition to the constraints listed and discussed here, siege warfare is constrained by the prohibition of acts or threats of violence the primary purpose of which is to spread terror among the civilian population (AP I art 51(2); AP II art 13(2); CIHL r 2). Siege warfare is, of course, also constrained by the IHL rules regulating the conduct of hostilities, notably those discussed in the previous section. Eg, Maxime Nijs, ‘Humanizing siege warfare: Applying the principle of proportionality to sieges’ (2020) 102 (914) *Intl Rev Red Cross* 683 <<https://international-review.icrc.org/sites/default/files/reviews-pdf/2021-12/applying-principle-of-proportionality-to-sieges-914.pdf>> accessed 30 November 2023.

<sup>497</sup> AP I art 54(1); AP II art 14; CIHL r 53.

<sup>498</sup> AP I art 54(2); AP II art 14; CIHL r 54.

<sup>499</sup> GC IV art 17.

<sup>500</sup> Eg Dapo Akande and Emanuela-Chiara Gillard, ‘Conflict-Induced Food Insecurity and the War Crime of Starvation of Civilians as a Method of Warfare: The Underlying Rules of International Humanitarian Law’ (2019) 17(4) *J Intl Crim J* 753.

*Using starvation of civilians as a method of warfare*

The first constraint imposed on the besieging party is the prohibition of starving the civilian population as a method of warfare.<sup>501</sup> This rule prohibits a belligerent party from deliberately depriving civilians of food and causing famine.<sup>502</sup> If committed during international armed conflict, the intentional starvation of civilians as a method of warfare is a war crime.<sup>503</sup>

The prohibition of starvation does not render siege warfare unlawful per se.<sup>504</sup> Starvation can be lawfully used against combatants to induce their surrender.<sup>505</sup> However, when a belligerent besieges a locality – preventing the entry of supplies of any kind (weapons, as well as food and other items indispensable to survival) – with the main purpose of weakening the enemy and inducing surrender, there comes a point when the food reserves have been exhausted; the humanitarian situation will have inevitably deteriorated and, eventually, civilians will face the risk of starvation.<sup>506</sup> In such a situation, the prohibition of starvation mandates that the besieging party *at least* allow the civilian inhabitants (especially the most vulnerable) to leave the area in question,<sup>507</sup> or permit the free passage of humanitarian relief supplies. Failure to implement either or both of these measures may be indicative of an intention to starve civilians.<sup>508</sup>

At the time of writing, Gaza has been under siege for about a month.<sup>509</sup> Throughout this time, Israel has been reluctant to grant unhindered humanitarian access – so far, only a very small number of aid convoys has been allowed to cross into Gaza, which is just a fraction of what would be needed to prevent a further deterioration of the already dire humanitarian situation.<sup>510</sup> At the time of writing, the north of Gaza – locus of the Israeli military's main

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<sup>501</sup> Starvation is understood per its ordinary meaning as the 'action of starving or subjecting to famine' (Commentary to AP I art 54, para 2089 and its fn).

<sup>502</sup> AP I art 54(1); Commentary to AP I art 54, para 2089 and its fn; AP II art 14; Commentary to AP II art 14, para 4791; CIHL r 53.

<sup>503</sup> ICC Statute art 8(2)(b)(xxv). As per an amendment to article 8 of the ICC Statute (6 December 2019), starvation of a civilian population is a war crime if committed during non-international armed conflict too, however Palestine has not acceded to the amendment to the ICC Statute granting the ICC jurisdiction over such crimes.

<sup>504</sup> Commentary to CIHL r 53.

<sup>505</sup> Sassòli (n 251) para 10.199.

<sup>506</sup> Gloria Gaggioli, 'Joint Blog Series on International Law and Armed Conflict: Are Sieges Prohibited under Contemporary IHL?' (*EJIL: Talk!*, January 30, 2019) <<https://www.ejiltalk.org/joint-blog-series-on-international-law-and-armed-conflict-are-sieges-prohibited-under-contemporary-ihl/>> accessed 30 November 2023.

<sup>507</sup> *Ibid.*

<sup>508</sup> *Ibid.*; Melzer (n 260) 96. An IHL manual produced by the Israeli army for internal training purposes reportedly provides that pursuant to the prohibition of starvation, the residents of a besieged city must be allowed to leave. See Commentary to CIHL r 53. Notably, deliberate impediment of free passage of humanitarian aid, even without intention to starve civilians, is a violation of IHL. See the section 'Ensuring essential supplies through humanitarian aid' below.

<sup>509</sup> Gold and others (n 79).

<sup>510</sup> OCHA oPt Flash Update #24 (n 473); OCHA oPt Flash Update #16 (n 473); OCHA oPt Flash Update #17 (n 473).

ground operations – has been ‘largely cut off’<sup>511</sup> from the delivery of aid.<sup>512</sup> As a result, more than two million civilians have been placed at risk of starvation as foodstuffs and clean water are running out.<sup>513</sup> Furthermore, as noted, the land crossings between Gaza and Israel have remained closed, thus preventing civilians from – *voluntarily* and *temporarily* – leaving besieged Gaza (with the exception of a small number of foreign passport holders and injured and sick, who have been allowed to pass through the *Egyptian*-controlled Rafah crossing).<sup>514</sup>

There are consequently strong grounds to conclude that Israel’s declared ‘siege’ of Gaza, even if primarily motivated by military objectives, violates the prohibition on intentionally starving the civilian population.

In addition to prohibiting the intentional starvation of civilians, IHL also establishes that belligerents must not:<sup>515</sup>

*[A]ttack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.*

Besides the objects specifically mentioned in this provision, the provision also extends protection to ‘land, infrastructure and other objects essential to ensuring food and water production, distribution and supply, such as markets or power stations’.<sup>516</sup> This protection does not extend to objects used as sustenance solely for the members of the party’s forces, or in direct support of its military objects, as long as actions against such objects will not otherwise starve the civilian population or force it to move.<sup>517</sup> The cutting off of Gaza’s water, electricity, and fuel supply (and threats to attack the Gaza power plant should it be refuelled)

<sup>511</sup> ‘Israel-Palestine Crisis: Gaza’s North; Death Toll Rising’ (*UN News*, 2 November 2023) <<https://news.un.org/en/story/2023/11/1143107>> accessed 30 November 2023.

<sup>512</sup> Eg ‘Fuel Shortage Means Aid Lorries Can’t Reach Gaza City – Charity’ *BBC News* (London, 8 November 2023) <<https://www.bbc.com/news/live/world-middle-east-67339462/page/3>> accessed 30 November 2023; ‘UPDATED: Gazans Struggle for Survival; Aid Reaches Stricken Hospital’ (*UN News*, 8 November 2023) <<https://news.un.org/en/story/2023/11/1143347>> accessed 30 November 2023.

<sup>513</sup> Eg ‘A Matter of Life and Death: Water Runs Out for Two Million People in Gaza’ (*UNRWA*, 14 October 2023) <<https://www.unrwa.org/newsroom/official-statements/matter-life-and-death-water-runs-out-2-million-people-gaza>> accessed 30 November 2023; Mohamed Soulimane, ‘Gaza: “How Do We Escape the Slow Death of Starvation?”’ (*The New Humanitarian*, 7 November 2023) <<https://www.thenewhumanitarian.org/news-feature/2023/11/07/gaza-how-do-we-escape-slow-death-starvation>> accessed 30 November 2023; Edith M. Lederer, ‘The Average Palestinian in Gaza Is Living on 2 Pieces of Bread a Day, UN Official Says’ *The Associated Press* (United Nations, 4 November 2023) <<https://apnews.com/article/gaza-humanitarian-un-bread-water-unrwa-fuel-90fcfc40d63f8604d0effa861e793c89>> accessed 30 November 2023; OCHA oPt Reported Impact Day 33 (n 88).

<sup>514</sup> See eg Reuters (n 429).

<sup>515</sup> AP I art 54(2).

<sup>516</sup> Abby Zeith, ‘Food security in times of armed conflict: What you need to know’ (*ICRC*, 31 July 2023) <<https://www.icrc.org/en/document/food-security-in-armed-conflict-what-you-need-know>> accessed 30 November 2023.

<sup>517</sup> AP I art 54(3)(b).

clearly falls in the former category of protected objects rather than the latter exceptions to the prohibition, and thus constitutes a violation.

Additionally, even if the siege were not accompanied by attacks from land, air, or the sea, any starvation of civilians that may be expected to occur as a result of military operations other than an attack would have to be taken into account under the view that a general principle of proportionality applies to all military operations.<sup>518</sup> In this context, it has been suggested that an analogy can be drawn to the rules regulating naval blockades:<sup>519</sup> belligerents are prohibited from imposing a blockade in circumstances where ‘the damage to the civilian population is, or may be expected to be, excessive in relation to the concrete and direct military advantage anticipated from the blockade’<sup>520</sup> – in other words, where doing so would be disproportionate. It has further been suggested that amongst the factors to consider in the assessment of proportionality would be the duration of the siege<sup>521</sup> as well as the impact on the civilian population, ‘including [the] number of civilians expected to starve, suffer from malnutrition and other nutritional deficiencies, [and] forced to move’.<sup>522</sup> In the case of Gaza, as noted, the measures that Israel refers to as a ‘siege’ had been in place for around a month during the period under review, having been first announced on 9 October;<sup>523</sup> it can only be reiterated that the humanitarian consequences these have produced are catastrophic. The severity of these consequences was exacerbated by the fact that Gaza was already facing a pre-existing state of humanitarian crisis following 16 years of closure imposed by Israel.

There are thus strong grounds to conclude that the measures that Israel has imposed on Gaza as part of the ‘siege’ it has declared are unlawful also because they violate wider considerations of proportionality deemed applicable in the conduct of military operations.

#### *Evacuating civilians from besieged areas*

During a siege, belligerent parties are strongly encouraged to evacuate the most vulnerable groups, namely the wounded, sick, infirm, and aged persons, as well as children and maternity cases.<sup>524</sup> This is the case when belligerents conclude an agreement to remove certain groups of civilians from the besieged or encircled areas for reasons of safety, and differs from the obligation of the besieging party to allow civilians to leave the besieged locality if there is not enough humanitarian relief supply. Evacuations of civilians from besieged areas are a way of giving effect to the general obligation in the conduct of military operations to take constant care to spare the civilian population.<sup>525</sup> Furthermore,

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<sup>518</sup> Kleffner (n 452). See also, Akande and Gillard (n 500) 768; Nijs (n 496) 694.

<sup>519</sup> Gaggioli (n 506)

<sup>520</sup> San Remo Manual on International Law Applicable to Armed Conflicts at Sea (adopted in June 1994) art 102(b).

<sup>521</sup> Gaggioli (n 506).

<sup>522</sup> Ibid.

<sup>523</sup> Gold and others (n 79).

<sup>524</sup> GC IV art 17, and Commentary to GC IV 139.

<sup>525</sup> Emanuela-Chiara Gillard ‘Sieges, the Law and Protecting Civilians’ (*Chatham House*, June 2019) 12 <<https://www.chathamhouse.org/2019/06/sieges-law-and-protecting-civilians>> accessed 30 November 2023.

*From the point of view of civilians, the departure from the besieged areas must be voluntary, informed, and conducted in safety, during both the actual evacuation and the subsequent arrangements for shelter. Civilians who do not participate in evacuations and who remain in besieged areas do not lose their status and protections. Hostilities cannot be conducted on the presumption that anyone who chose not to be evacuated is a fighter, and the rules regulating humanitarian relief operations continue to apply for the benefit of civilians who have remained.*<sup>526</sup>

As for the directive that the Israeli authorities issued instructing civilians in north Gaza to move to the southern part of the Strip, for one thing, such movement does not entail departure from the entire area over which Israel has declared a siege, but a movement within it. As such, it does not constitute a measure aimed at sparing the civilian population from the effects of siege warfare. Moreover, the directive does not change Israel's legal obligations to respect the principles of distinction, proportionality, and precautions during attacks. Even while posed as 'warnings',<sup>527</sup> such directives cannot be misused as a justification to target civilians who choose to stay in the area for any reason.<sup>528</sup>

Nor can the directive serve to override IHL rules regulating ordered and forcible displacement. Indeed, IHL prohibits forcible transfer or deportation of protected persons from occupied territories,<sup>529</sup> as well as the forced movement of civilians for reasons related to the conflict in the course of non-international armed conflict.<sup>530</sup> At the same time, IHL does allow an exception in both international and non-international armed conflicts, in cases where the security of the civilians involved, or imperative military reasons require evacuation.<sup>531</sup> The possibility of lawfully evacuating the civilian population during armed conflict suggests that IHL recognises that the exigencies of war may sometimes require moving civilians to a safer area for their own good.<sup>532</sup>

The previous section raised concerns that Israel's directive to move from the north to the south of Gaza may have served to facilitate unlawful attacks. Leaving those concerns aside, and even if one accepts that the directive was not an inherently prohibited act of displacement, in order to constitute a lawful form of evacuation it would have to be

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<sup>526</sup> Ibid.

<sup>527</sup> For more details on the effectiveness of this 'warning' by the Israeli authorities and its compliance with IHL, see the subsection 'Giving effective advance warning' above.

<sup>528</sup> See text to nn 441-442.

<sup>529</sup> GC IV art 49(1).

<sup>530</sup> AP II art 17(1).

<sup>531</sup> CIHL r 129.

<sup>532</sup> Notably, this does not justify the use of specific inhumane methods of waging war against civilians with the aim to forcibly displace them under the pretext of their safety. See David James Cantor, 'Does IHL Prohibit the Forced Displacement of Civilians during War?' (2012) 24 Intl J Refugee L, 841-42. As held by the ICTY, 'displacement for humanitarian reasons is justifiable in certain situations, but it is not justifiable where the humanitarian crisis that caused the displacement is itself the result of the accused's own unlawful activity' (*Prosecutor v. Stakić* (Appeals Chamber Judgment) IT-97-24-A (22 March 2006) [287]).



implemented in such manner as to actually protect the persons compelled to evacuate. This is borne out, for instance, by the IHL rules concerning evacuation from occupied territories.

Under those rules, when undertaking an evacuation, an occupying power has a duty to 'ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated'.<sup>533</sup> At the time that Israel issued the directive in question, it did not have forces on the ground in Gaza, and consequently lacked the type of control needed in order fully to discharge this duty. That notwithstanding, pursuant to the functional approach to the law of occupation, Israel is nevertheless obliged to exert the control that it does have over the Gaza Strip, notably its control over access, with a view to mitigating the adverse effects of displacement. This mandates that Israel itself provide,<sup>534</sup> or at least facilitate, the free passage of humanitarian relief<sup>535</sup> through the borders it controls to ensure that the civilians forced to relocate to the south of Gaza will have adequate supplies for maintaining hygiene, health, and nutrition. It also requires that Israel act to ensure that the areas to which it directed civilians to move would be safe from attack. By contrast, Israel has instead severely restricted the entry of vital supplies to any part of Gaza, and has persistently bombarded areas in the south, where it had directed civilians to move.

Moreover, the directive cannot serve as a justification for long-term displacement. Indeed, it should be underlined that all persons displaced as a result of an armed conflict, whether voluntarily or involuntarily, have a right to return to their homes.<sup>536</sup> Should Israel subsequently prevent Palestinian residents of Gaza from returning to the part of Gaza in which they reside, it would be committing a violation of IHL, which may amount, depending on the circumstances, to a war crime of either deportation, forcible transfer, or forced displacement.<sup>537</sup> In this regard, it is important to note that for many in Gaza and elsewhere, any mass displacement of the residents of Gaza calls to mind painful memories of the mass displacement in the events of 1948 known to Palestinians as the Nakba, or catastrophe. Indeed, some 70 percent<sup>538</sup> of the population of Gaza are refugees who were themselves displaced, or are descendants of persons who were displaced, during the Nakba, and who were subsequently prevented by Israel from returning to their homes. The prospect of

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<sup>533</sup> GC IV art 49(3).

<sup>534</sup> GC IV arts 55(1), 56(1).

<sup>535</sup> GC IV art 59(1).

<sup>536</sup> CIHL r 132 and its commentary.

<sup>537</sup> CIHL rr 132 and 156; ICC Statute arts 8(b)(viii). Pursuant to GC IV art 49(1), should Israel continue to retain effective control over Gaza, it would be committing an act of forcible transfer if it prevents Gazans from returning to the part of Gaza in which they reside. Preventing them from returning to the oPt altogether (eg in the event they are displaced to Egypt) would constitute an act of deportation. If the situation at the time were for some reason deemed not to be one of occupation, the category of forced displacement would apply.

<sup>538</sup> 'Refugees in the Gaza Strip' (OCHA, October 2018)

<[https://www.ochaopt.org/sites/default/files/gaza\\_thematic\\_6\\_0.pdf](https://www.ochaopt.org/sites/default/files/gaza_thematic_6_0.pdf)> accessed 30 November 2023.

another such permanent displacement, which many regard as a case of ethnic cleansing,<sup>539</sup> engenders resistance among the people of Gaza to the idea of evacuating their homes. Stating similar concerns (though these were doubtlessly not the only concerns at play),<sup>540</sup> Egypt has said that it will not allow the passage of refugees from Gaza into Sinai.<sup>541</sup> The King of Jordan, Abdullah II, likewise stated that there will be ‘no refugees in Jordan, no refugees in Egypt’.<sup>542</sup>

### *Collective punishment*

IHL prohibits collective punishment,<sup>543</sup> which ‘covers not only legal sentences but sanctions and harassment of any sort, administrative, by police action or otherwise’.<sup>544</sup> The prohibition of collective punishment extends to penalties on ‘persons or entire groups of persons in defiance of the most elementary principles of humanity, for acts that these persons have not committed’.<sup>545</sup> For a measure to constitute collective punishment, it has to be taken with punitive intent, that is, with the intent to inflict a punishment or sanction on persons in retaliation for acts committed by others, for which those being punished bear no personal responsibility.<sup>546</sup> This includes, in particular, the intentional infliction of punishment on uninvolved persons for purposes of deterrence or retribution.

Numerous statements by senior Israeli officials, already quoted above, indicate that punitive measures were indeed inflicted on the entire population of Gaza, including millions of civilians, as retribution for the attacks by Hamas forces. Such intention could be gleaned, for example, from military officials’ declaration that ‘the emphasis is on damage, not precision’ in the bombardment, and that ‘Gaza will never look the same’.<sup>547</sup> In an even more transparent expression of retributive intent, while ordering a ‘complete siege’ of Gaza and specifying ‘no electricity, no food, no water, no fuel, everything is closed’, Israeli Defence Minister Yoav Gallant claimed that Israel is ‘fighting human animals and [is] acting accordingly’.<sup>548</sup> While the

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<sup>539</sup> See n 17. Ethnic cleansing is not recognised as an independent crime under international law, it is a term that was coined in the 1990s in the context of the conflict in the former Yugoslavia. Experts mandated by the UN to look into violations of IHL in the former Yugoslavia described ethnic cleansing in their final report as ‘... a purposeful policy designed by one ethnic or religious group to remove by violent and terror-inspiring means the civilian population of another ethnic or religious group from certain geographic areas’. However, individual crimes constituting the policy of ethnic cleansing, such as murder, torture, forced displacement, deportation, and others, constitute crimes against humanity and war crimes, and may even fall within the meaning of the crime of genocide. UN Office on Genocide Prevention and the Responsibility to Protect, ‘Ethnic Cleansing’ <<https://www.un.org/en/genocideprevention/ethnic-cleansing.shtml>> accessed 30 November 2023.

<sup>540</sup> Jack Jeffery and Samy Magdy, ‘Why Egypt and Other Arab Countries Are Unwilling to Take in Palestinian Refugees from Gaza’ *The Associated Press* (Cairo, 19 October 2023) <<https://apnews.com/article/palestinian-jordan-egypt-israel-refugee-502c06d004767d4b64848d878b66bd3d>> accessed 30 November 2023 .

<sup>541</sup> Ahmed Mohamed Hassan, ‘Egypt Discusses Gaza Aid, Rejects Corridors for Civilians, Say Sources’ *Reuters* (11 October 2023) <<https://www.reuters.com/world/egypt-discussing-plans-provide-aid-gaza-under-limited-ceasefire-security-sources-2023-10-11/>> accessed 30 November 2023.

<sup>542</sup> Jeffery and Magdy (n 540).

<sup>543</sup> AP I art 75(2)(d); AP II art 4(2)(b); CIHL r 103.

<sup>544</sup> Commentary to AP I art 75, para 3055.

<sup>545</sup> Commentary to AP II art 4, para 4535.

<sup>546</sup> See Shane Darcy, ‘Prosecuting the War Crime of Collective Punishment: Is It Time to Amend the Rome Statute?’ (2010) 8 *J Intl Crim Justice* 29, 42; 2020 Commentary to GC III, paras 3688-3693.

<sup>547</sup> See Diakonia IHL Centre (n 151).

<sup>548</sup> Holmes and Michaelson (n 240).

Minister's reference to 'human animals' may have been intended for Hamas fighters, the 'complete siege' he described as a fitting response to them ('acting accordingly') was imposed on the entire population of the Strip (2.3 million people living in a densely populated area, the majority of them refugees or descendants of refugees, who were facing a dire humanitarian situation already *before* Israel declared a siege). Further indication that retributive measures were being directed at the entire population was provided by Israeli President Isaac Herzog in his aforementioned statement that '[i]t's an entire nation out there that is responsible. It's not true, this rhetoric about civilians ... not aware, not involved, it's absolutely not true'.<sup>549</sup> The President went on to declare that 'we will fight until we'll break their backbones',<sup>550</sup> which – given that the earlier part of his remark related to 'an entire nation out there that is responsible' – appeared to refer to the entire population of Gaza.

All this strongly supports the conclusion that Israel's retaliatory measures against the entire population of Gaza for acts committed by Hamas forces do indeed amount to collective punishment, which is absolutely prohibited under international law.<sup>551</sup>

### **Ensuring essential supplies through humanitarian aid**

Given the unprecedented humanitarian catastrophe unfolding in Gaza, which only stands to deteriorate further as hostilities continue, (adequate) access to humanitarian relief for the civilian population must be secured as a matter of urgency.

As noted, pursuant to the functional approach to the law of occupation to which the IHL Centre and others subscribe, certain obligations under the law of occupation remain incumbent upon Israel with respect to Gaza.<sup>552</sup> The scope of these obligations is commensurate to the type and degree of control that Israel continues to exercise over the Strip. Notable in this regard is Israel's continued control over access to and from the Strip and, consequently, over its supply of crucial goods and resources. One of the obligations that Israel consequently continues to be bound by is the duty to ensure that the civilian population is adequately supplied. In this regard, first and foremost, it must not interfere with the functioning of the existing supply system and services providing for the needs of the local population. If the existing services prove insufficient, the occupying power must itself act, to the fullest extent of the means available to it, to provide for the basic needs of the population.<sup>553</sup> If, even then, the whole or part of the population remains inadequately supplied, the occupying power is obliged to allow for and facilitate humanitarian assistance.<sup>554</sup>

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<sup>549</sup> Chantal Da Silva and Mo Abbas 'Israeli President Says Gazans "Could Have Risen Up" Against Hamas' (*NBC News*, 13 October 2023) <<https://www.nbcnews.com/news/world/live-blog/israel-hamas-war-live-updates-rcna120252>> accessed 30 November 2023.

<sup>550</sup> Omaar (n 239).

<sup>551</sup> 'Israel/occupied Palestinian territory: UN Experts Deplore Attacks on Civilians, Call for Truce and Urge International Community to Address Root Causes of Violence' (*UN*, 12 October 2023) <<https://www.ohchr.org/en/press-releases/2023/10/israeloccupied-palestinian-territory-un-experts-deplore-attacks-civilians>> accessed 30 November 2023.

<sup>552</sup> Text to nn 6, 484-491.

<sup>553</sup> GC IV art 55(1); AP I art 69(1).

<sup>554</sup> GC IV Art 59(1).

While Israel and some others do not accept that the law of occupation is binding in the present case, other provisions of IHL, which unquestionably are applicable, also impose obligations with regards to ensuring essential supplies. Indeed, pursuant to customary rules of IHL, applicable to both international and non-international armed conflicts, all parties to the conflict must immediately ‘allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control’.<sup>555</sup> While it is recognised that the consent of the concerned parties is required for the delivery of aid, consent cannot be arbitrarily withheld,<sup>556</sup> or withheld based on otherwise unlawful grounds.<sup>557</sup> The necessity of obtaining consent does not confer unlimited discretion upon the involved parties. In circumstances where the population’s survival is jeopardised, and a humanitarian organisation, adhering strictly to impartiality and non-discrimination, is capable of alleviating this crisis, relief efforts must take place. The authorities are not at liberty to reject such assistance without substantiated justification. A refusal under such conditions would constitute a violation of IHL.<sup>558</sup>

Parties are allowed to take measures to control the contents and delivery of humanitarian aid, and accordingly to search aid convoys or to impose conditions of delivery such as a demand that they be subjected to the supervision of impartial parties like the ICRC.<sup>559</sup> Yet, these measures should not ‘unduly delay humanitarian operations, impede their rapid deployment, or make their implementation impossible’.<sup>560</sup> Considerations of military necessity certainly cannot be invoked to justify complete refusal to allow access of humanitarian relief into Gaza. Such justification can only be invoked for the purpose of regulating entry of the humanitarian relief operation, not for the complete or near-complete denial of all such relief.<sup>561</sup> The wilful impeding of aid, as part of the use of starvation as a method of warfare, is a serious violation of IHL constituting a war crime.<sup>562</sup>

The parties must provide safe passage to both humanitarian personnel and relief.<sup>563</sup> The obligation to respect and protect humanitarian relief personnel and objects means that parties may not intentionally obstruct the delivery of humanitarian aid, or direct attacks at any person who is part of the mission to deliver humanitarian relief, or intentionally direct attacks towards installations, material, units, or vehicles carrying necessary humanitarian relief material to civilians in dire need.<sup>564</sup> It further requires the parties to ensure that their

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<sup>555</sup> CIHL r 55. See also GC IV art 59; AP I art 70; AP II art 18(2).

<sup>556</sup> Ibid.

<sup>557</sup> Lisandra Novo, ‘Humanitarian Aid Cannot Be Weaponized. Gazans are Depending on it’ (*Atlantic Council*, 18 October 2023) <<https://www.atlanticcouncil.org/blogs/menasource/gaza-israel-hamas-humanitarian-aid/>> accessed 30 November 2023.

<sup>558</sup> Commentary to AP II art 18, para 4885.

<sup>559</sup> CIHL r 55.

<sup>560</sup> ‘ICRC Q&A and Lexicon on Humanitarian Access’ (2014) 96(893) *Intl Rev Red Cross* 363, 364. <<https://international-review.icrc.org/sites/default/files/irrc-893-q-a.pdf>> accessed 30 November 2023.

<sup>561</sup> Knut Dörmann and Tristan Ferraro, ‘Humanitarian Assistance’ in Dieter Fleck (ed) *The Handbook of International Humanitarian Law* (4<sup>th</sup> ed, OUP 2021) 356.

<sup>562</sup> ICC Statute art 8(2)(b)(xxv); CIHL r 156.

<sup>563</sup> Commentary to CIHL r 55.

<sup>564</sup> CIHL rr 31-32 and commentaries thereto.

military operations do not place humanitarian aid objects or personnel at risk, or undermine their capacity to function. It should also be emphasised that intentionally targeting humanitarian personnel or humanitarian relief objects is a war crime.<sup>565</sup>

These obligations appear to have been disregarded when, on 7 November, a humanitarian convoy of five aid trucks organised and coordinated by the ICRC, including two ICRC vehicles carrying lifesaving medical supplies to health facilities in Gaza, came under fire. As a result, two of the aid trucks were reportedly damaged, and a driver was injured. In a statement decrying the shooting at its humanitarian convoy, the ICRC stressed that '[e]nsuring that vital assistance can reach medical facilities is a legal obligation under international humanitarian law'.<sup>566</sup>

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<sup>565</sup> ICC Statute art 8(2)(b)(iii) and 8(2)(e)(iii).

<sup>566</sup> 'Israel and the Occupied Territories: ICRC Decries the Shooting of its Humanitarian Convoy in Gaza' (*ICRC*, 7 November 2023) <<https://www.icrc.org/en/document/israel-and-occupied-territories-icrc-decries-shooting-its-humanitarian-convoy-gaza>> accessed 30 November 2023.

## 6. Conclusions and recommendations

This legal brief has examined the actions of the parties to the hostilities that broke out in Israel and Gaza on 7 October 2023 with an attack mounted by Hamas forces and a counteroffensive launched by Israel in the period lasting until 8 November 2023. Drawing on a factual account of events derived from a range of publicly available sources of information, which the authors have endeavoured to verify primarily by cross-referencing from a large and diverse set of credible sources, the brief has sought to assess the opposing belligerents' actions on the basis of fundamental provisions of IHL that all parties to any armed conflict must respect.

The brief found, first, that there is incontrovertible evidence that Hamas-led armed groups have violated IHL, in many cases perpetrating serious violations that implicate the individuals responsible in the commission of war crimes. These violations include indiscriminate as well as intentional attacks on civilians, acts of violence aimed at spreading terror among the civilian population, murder or wilful killing of civilians and persons *hors de combat*, arbitrary deprivation of liberty, and hostage taking. The victims of these violations included children. There is also compelling evidence that Hamas forces subjected civilians, again including children, and persons *hors de combat* to torture, cruel, inhuman, or degrading treatment and to acts of rape and mutilation, and that they mistreated the dead. Eyewitness testimonies, testimonies from first respondents, and forensic evidence reported by the Israeli authorities and by a nongovernmental commission further indicate that acts of rape were perpetrated. These acts all constitute serious violations of IHL and are defined as war crimes. Additionally, Hamas forces launched indiscriminate attacks on civilian objects, intentionally destroyed such objects, and engaged in pillage. These too are serious violations of IHL that constitute war crimes. Finally, Hamas has failed to take precautions against the effects of attacks as mandated by IHL, and there are indications that it has used civilians and civilian objects as human shields, a serious violation of IHL and a war crime.

Examining the conduct of the Israeli forces in the hostilities, the brief found next that the Israeli military has acted with apparent disregard for the limitations on the use of force imposed by the IHL rules on the conduct of hostilities. This disregard is evidenced not only by the dire humanitarian consequences of the Israeli attacks – claiming many thousands of lives, including the lives of thousands of children, injuring an even greater number of persons, and causing massive destruction of civilian homes and infrastructure – but also in statements made by Israeli political decisionmakers and military leaders. More specifically, the analysis pointed to indications that Israeli forces are engaging in indiscriminate attacks and may otherwise be violating the principle of distinction; and that they are conducting attacks which foreseeably inflict excessive harm on civilians in breach of the principle of proportionality, both of which are potential war crimes. Furthermore, Israel has failed to respect the duty to take precautions in attack, not least by issuing a directive that was posed as a 'warning', but which in fact exposes civilians to extensive harm.

The brief went on to analyse the 'complete siege' that Israel has declared on Gaza, cutting off its supply of water, food, fuel, electricity, and other goods and resources crucial for the survival of the civilian population of the Strip. It found that the 'siege', as implemented,

imposed a measure of collective punishment on the entire population of Gaza, numbering over 2 million people, only a small fraction of whom are members of the armed groups engaged in hostilities with Israel. As such, this action constitutes a serious violation of IHL which may implicate those responsible for it in the perpetration of a war crime. The brief raised further concerns that Israel has been using starvation of civilians as a method of warfare; and that Israel's actions violated the absolute prohibition that IHL imposes on rendering useless objects indispensable for the survival of the civilian population. Finally, it concluded that Israel is violating its duty with respect to the provision and safe passage of humanitarian relief.

The analysis undertaken here was focused on key provisions of IHL. For the most part, the violations and concerns identified in the brief are pertinent whether the present hostilities are governed by the rules applicable to international armed conflicts or by those applicable to non-international armed conflicts (a matter about which there are diverging opinions). Moreover, the provisions on which this legal analysis is based are generally applicable irrespective of whether and to what extent additional provisions derived from the law of occupation are currently binding upon Israel with respect to Gaza (another matter on which opinions differ). Where a specific provision cited here applies only under certain classifications (e.g., only in international armed conflict, or only under the law of occupation), this has been noted. Correspondingly, the recommendations specified here below are also focused on the requirements of IHL and are not exhaustive. Among other things, they do not specify measures that may be merited by other areas of international law, or by wider extra-legal humanitarian considerations, such as those motivating calls for a ceasefire.<sup>567</sup>

Since the hostilities are still underway at the time of writing, with many new developments unfolding every day, the analysis as well as the recommendations presented here do not address all matters relevant to the current fighting between Israel and Hamas, not to mention wider developments that have been unfolding in the Israeli-Palestinian context since the outbreak of hostilities on 7 October 2023. Still less does this brief endeavour to provide an account of wider concerns about IHL violations that predate the present hostilities, or to suggest remedies for them. Matters such as Israel's indefinitely prolonged occupation of Palestinian territory and associated violations of IHL and IHRL, including, notably, those linked to the longstanding closure imposed on Gaza, the settlement enterprise, annexation of

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<sup>567</sup> Calls for a ceasefire have been made in a resolution adopted by the UN General Assembly, by UN agencies, committees, and experts, by many humanitarian and human rights organisations, and by other civil society actors. A partial sample of these includes eg 'Gaza Is "Running Out of Time" UN Experts Warn, Demanding a Ceasefire to Prevent Genocide' (*OHCHR*, 2 November 2023) <<https://www.ohchr.org/en/press-releases/2023/11/gaza-running-out-time-un-experts-warn-demanding-ceasefire-prevent-genocide-0>> accessed 30 November 2023; 'Open Call for an Immediate Ceasefire in the Gaza Strip and Israel to Prevent a Humanitarian Catastrophe and Further Loss of Innocent Lives' (*ReliefWeb*, 18 October 2023) <<https://reliefweb.int/report/occupied-palestinian-territory/open-call-immediate-ceasefire-gaza-strip-and-israel-prevent-humanitarian-catastrophe-and-further-loss-innocent-lives>> accessed 30 November 2023; "'We Need an Immediate Humanitarian Ceasefire'", Statement by Principals of the Inter-Agency Standing Committee, on the Situation in Israel and the Occupied Palestinian Territory' (*Inter-Agency Standing Committee*, 5 November 2023) <<https://interagencystandingcommittee.org/inter-agency-standing-committee/we-need-immediate-humanitarian-ceasefire-statement-principals-inter-agency-standing-committee>> accessed 30 November 2023.

occupied territory, discriminatory policies, excessive use of force, and other forms of violence and abuse will need to be addressed elsewhere. So too will issues of concern regarding the previous conduct of the Hamas-led de facto authorities in Gaza and of the PA.

With these limitations in mind, and in view of the findings of this brief, the Diakonia IHL Centre recommends the following:

**Hamas and other armed groups party to the armed conflict:**

- Must:
  - Release all hostages immediately and unconditionally, unharmed;
  - Fully and unconditionally abide by all applicable rules of international law, notably the IHL rules on the conduct of hostilities, as well as the rules regarding the treatment of persons in the power of a party to the conflict, and in particular:
    - Refrain from launching indiscriminate attacks and direct attacks only at military objectives;
    - Refrain from acts or threats of violence aimed at spreading terror among the civilian population;
    - Refrain from using human shields;
  - Treat the dead with dignity and facilitate the return of the remains of the dead to their families;
  - Allow for and facilitate the rapid and unimpeded passage of humanitarian relief for all civilians in need;<sup>568</sup>
  - Ensure respect for IHL by all persons or groups acting in fact on their instructions, or under their direction or control.<sup>569</sup>
- Should:
  - Cooperate with national and international investigations aimed at bringing those responsible for violations of international law to justice.

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<sup>568</sup> Eg Commentary to CIHL r 55 and the references cited therein. It has also been suggested that non-State armed groups have a *positive* obligation to ensure that the population under their control has their basic needs met, as part of the obligation of humane treatment enshrined in Common Article 3 to the GCs, AP II, and customary IHL. See eg ‘Protection of the Civilian Population: Humanitarian Assistance and Access in Armed Conflict’ (Diakonia IHL Centre, June 2023) 14-17 and the references cited therein <<https://www.diakonia.se/ihl/news/humanitarian-assistance-and-access-in-armed-conflict/>> accessed 30 November 2023.

<sup>569</sup> CIHL rr 139, 142; Michelle Mack and Jelena Pejic, ‘Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts’ (ICRC, February 2008) 10, 15 and the references cited therein <[https://www.icrc.org/sites/default/files/topic/file\\_plus\\_list/0923-increasing\\_respect\\_for\\_international\\_humanitarian\\_law\\_in\\_non-international\\_armed\\_conflicts.pdf](https://www.icrc.org/sites/default/files/topic/file_plus_list/0923-increasing_respect_for_international_humanitarian_law_in_non-international_armed_conflicts.pdf)> accessed 30 November 2023: ‘As a matter of customary law binding on both States and armed groups, the obligation to “respect” and “ensure respect” for international humanitarian law extends to ensuring respect by other persons or groups acting in fact on their instructions, or under their direction or control (footnote omitted)’.



- Hamas, as the de facto authorities in Gaza, must:
  - Address serious violations of IHL, including by means of investigations and reparations for those directly affected.<sup>570</sup>

**Israel, as a party to the armed conflict:**

- Must:
  - Fully and unconditionally abide by all applicable rules of international law, notably the IHL rules on the conduct of hostilities, as well as the rules regarding the treatment of persons in the power of a party to the conflict, and in particular:
    - Refrain from launching indiscriminate attacks and direct attacks only at military objectives;
    - Comply with the principle of proportionality;
    - Take genuine precautions that can indeed protect civilians;
  - Ensure respect for IHL, including by means of adopting orders and manuals and other instruments that instruct its forces to comply with IHL;<sup>571</sup>
  - Refrain from inflicting collective penalties on the civilian population in Gaza for acts they are not personally responsible for and revoke any measures of collective punishment that are currently in place;
  - Allow for and facilitate the rapid and unimpeded passage of humanitarian relief for all civilians in need;
  - Refrain from interfering with or obstructing access to infrastructure and services for basic needs, such as water, food, and electricity;
  - Treat the dead with dignity and facilitate the return of the remains of the dead to their families;
  - Investigate allegations of war crimes committed by its nationals or armed forces or on its territory and, where appropriate, prosecute and punish those responsible,<sup>572</sup> in accordance with international fair trial and due process guarantees;
  - Investigate all other alleged violations of international law;
  - Provide reparations for those directly affected by violations of the law;

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<sup>570</sup> This emanates, by analogy, from the provisions concerning disciplinary measures for the adverse party enshrined in Common Article 3 to the GCs and AP II. If it is accepted that a non-State armed group has human rights obligations to the extent that it exercises quasi-governmental (de facto) authority in a given territory, such obligations would also emanate from IHRL. See eg Tilman Rodenhäuser, 'The legal protection of persons living under the control of non-State armed groups' (2020) 102(915) Intl Rev Red Cross <<https://international-review.icrc.org/sites/default/files/reviews-pdf/2022-01/legal-protection-persons-under-control-of-nsags-915.pdf>> accessed 30 November 2023.

<sup>571</sup> Commentary to CIHL r 139.

<sup>572</sup> CIHL r 158.

- Comply with the resolutions of the UN Security Council, in accordance with Article 25 of the UN Charter;
- Should:
  - Cooperate with the ICC in its investigation into the Situation in Palestine;
  - Refrain from imposing unwarranted adverse measures on civil society and humanitarian actors, such as designations as ‘terrorist organisations’, travel and access restrictions, and freezing of bank accounts.

**States that are not party to the armed conflict, and the international community at large:**

- Must:
  - Call upon Israel and Hamas forces to cease ongoing violations of international law, and to make full reparation for injury;
  - Ensure respect for IHL,<sup>573</sup> including:
    - Refrain from aiding or assisting violations of international law by the parties to the conflict;
    - Take steps to ‘influence the Parties to the conflict and bring them to an attitude of respect for IHL’;<sup>574</sup>
  - Investigate alleged war crimes over which they have jurisdiction and, where appropriate, prosecute the alleged perpetrators;<sup>575</sup>
  - To the extent that these violations amount to serious breaches of peremptory norms:<sup>576</sup>
    - Refrain from recognising as lawful or otherwise giving legitimacy to the consequences of violations of international law by the parties to the conflict;<sup>577</sup>
    - Refrain from rendering any aid or assistance in maintaining the unlawful situation;<sup>578</sup>
    - Take lawful measures to bring the situation to an end;<sup>579</sup>
  - Consider invoking the international responsibility of Israel, e.g., before the ICJ.

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<sup>573</sup> GCs common art 1; CIHL r 139.

<sup>574</sup> Cordula Droegge and David Tuck, ‘Fighting together and international humanitarian law: Ensuring respect for the law and assessing responsibility for violations (2/2)’ (*ICRC Humanitarian Law & Policy*, 17 October 2017) <<https://blogs.icrc.org/law-and-policy/2017/10/17/fighting-together-international-humanitarian-law-ensuring-respect-law-assessing-responsibility-violations-2-2/>> accessed 30 November 2023.

<sup>575</sup> CIHL r 158.

<sup>576</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) art 40.

<sup>577</sup> ARSIWA art 41(2).

<sup>578</sup> ARSIWA art 41(2).

<sup>579</sup> ARSIWA art 41(1).

- Should:
  - Use their leverage and positions of influence to affect the conduct of the parties to the conflict with a view to enhancing humanitarian protections and reducing human suffering;
  - Cooperate with the ICC in its investigation into the Situation in Palestine;
  - Refrain from withdrawing development aid for Palestinians as a reactive measure;
  - Express their support for civil society actors working in or on the context, and push back against any measures taken by Israel, the PA, and the de facto authorities in Gaza, to hinder their operations.

**The Office of the Prosecutor of the ICC:**

- Should investigate all alleged crimes within the Court's jurisdiction and prosecute those responsible, expeditiously.

**Other monitoring and accountability bodies, such as the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel:**

- Should document, verify, and investigate all potential violations of international law.