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## EXAMINATION OF THE PRINCIPLES GOVERNING BELLIGERENT OCCUPATION UNDER INTERNATIONAL LAW: A STUDY OF ISRAEL'S OCCUPATION OF GAZA STRIP, 2023

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### Abstract

International humanitarian law imposes specific obligations on occupying powers, among them Israel in its continuing occupation of the Gaza Strip. Noting with great concern the events in Israel and Palestine since October 7, 2023, this paper provides an initial legal analysis of certain conduct undertaken by the armed forces of Israel and Hamas during the on-going conflict and the provision of IHL in that respect. The scope of the paper will discuss Israel's occupation of Gaza from the legal view point under international humanitarian law. The aim is to highlight on the negative effect of violating the rule of international humanitarian law in respect to Israel's occupation of Gaza. It is found that, though civilians in Israel's occupation of Gaza often faced with several consequences ranging from the use of explosive weapons, hunger and

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ethnic cleansing no detailed assessment of the risk of harm are taken by state actors. In order to effectively prevent harm caused by the use of weapons in populated areas (particularly hospitals and schools), of explosive weapons with wide area effects. As such, the heightened risk of indiscriminate harm and the appalling civilian suffering they inflict when used in such areas should be reason enough for us to consider this issue more in depth, including the possibility of developing stronger international standards.

**KEY WORDS:** Occupation, Gaza, Israel, War and International Humanitarian Law

### 1.1 Introduction

International Humanitarian Law (IHL), also referred to as the rules of armed conflict are the rules regulating the conduct of war. It is a subset of international law that aims to reduce the consequences of armed conflict by protecting people who are not engaged in wars and by limiting and regulating the means and methods of war available to combatants<sup>364</sup>. It includes a set of rules, established by treaty or custom, which seeks to protect persons and property/objects.<sup>365</sup> International human rights law and international human rights law are complementary.<sup>366</sup>

The need for mechanism to monitor which weapons had developed such law is unlikely to have the desired impact. The proposal that led to Article 363 offered a solution a State would monitor the development of weapons by reference to its obligations under public international humanitarian law. However, there was a feeling that the Additional Protocol had not gone far enough in responding to some concerns about particular weapons. A resolution of the CDDH paved the way for negotiations that eventually led to the adoption of the 1980 United Nations Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May be Deemed to be Excessively Injurious or to have Indiscriminate effects (CCW).<sup>367</sup> By 1981 there existed both a mechanism for monitoring the legality of weapons and a framework convention to address weapons of particular concern to the international community. Among the problem is that majority of civilian population were indiscriminately affected during armed conflict

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<sup>364</sup> [https://en.wikipedia.org/wiki/south/Africa\\_v.\\_Israel-\(Genocide\\_Convention\)](https://en.wikipedia.org/wiki/south/Africa_v._Israel-(Genocide_Convention)). <https://www.icj-cij.org>.

<sup>365</sup> Keith K, (1996), "Constraining Conventional Arms Proliferation: A Model for Canada," *Multilateral Approaches to Non-Proliferation*, Andrew Latham, ed., Toronto: York University, 1996, p. 57.

<sup>366</sup> Ibid, p. 71

<sup>367</sup> The discussions leading to the adoption of the Additional Protocols had resulted in Resolution 22 of 9 June 1977 (Fourth Session of the CDDH), which recommended that a Conference of Governments be convened to reach agreements on prohibitions or restrictions on the use of specific conventional weapons (para. 3).

by harmful weapons and who are not even participating in the conflict. This leads to loss of lives and properties and relatives. What are the humanitarian, legal, technical, and military policy issues raised by the use of explosive weapons against legitimate targets located in populated areas. In addition to the above, United Nation General assembly(UNGA) also adopted the convention on prevention and punishment of the crime of genocide in 1948. with the view to preventing the act of destruction.<sup>368</sup>

To what extent do the humanitarian concerns arising from the use of explosive weapons in populated areas include the immediate and long-term effects on civilian lives and health, and the effects on civilian? This paper will highlight on the humanitarian, legal, technical, and military policy issues raised by the use of explosive weapons against legitimate targets located in populated areas particularly Israel's occupation of Gaza, 2023.

## **1.2 Clarification Of Relevant Key Terms On Principles Of The Law Of Armed Conflict**

This part of the paper will lay background by clarifying some terms relating to the principles of law of armed conflict. This is because criticism levelled at Israel in its response to the October 7, 2023, attacks is that in its use of white phosphorus<sup>369</sup> and broader bombing campaign in the Gaza Strip,<sup>370</sup> Israel has violated the law of war principles of distinction, humanity, and proportionality. Each issue will be considered separately.

### **1.2.1 White Phosphorus**

Law of War Manual describes “white phosphorus” as a “munition that contains fragments of white phosphorus” intended primarily for marking or illuminating a target or masking friendly force movement by creating smoke.<sup>371</sup> Although white phosphorus is not included in the definition of an “incendiary weapon” (it is instead considered a weapon with “incidental incendiary effects)<sup>372</sup>. it may be used as an antipersonnel weapon. Moreover, given it is not considered an incendiary weapon, white phosphorus is not subject to the Law of War Manual's restrictions on the use of incendiary weapons, such as the general prohibition on using incendiary weapons within a concentration of civilians. Indeed, there is no categorical prohibition under

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<sup>368</sup> [https://en.wikipedia.org/wiki/south/Africa\\_v.\\_Israel-\(Genocide\\_Convention\)](https://en.wikipedia.org/wiki/south/Africa_v._Israel-(Genocide_Convention)). <https://www.icj-cij.org>.

<sup>369</sup> 41

<sup>370</sup> Helen Regan, et al., Second Israeli Airstrike in Two Days Pummels Gaza Refugee Camp, Deepening a Growing Outcry, CNN (Nov. 2, 2023),

<sup>371</sup> John A.A, (1954) *Military Trials and International Crimes*, star publishers UK pp. 190-91.

<sup>372</sup> Ibid.

international law on the use of white phosphorus in war.<sup>373</sup> However, any use of white phosphorus, like any action taken in war, must comply with the principles of the law of armed conflict, such as military necessity, humanity, distinction, and proportionality.

a. Military Necessity " is defined as "the principle that justifies the use of all measures needed to defeat the enemy as quickly and efficiently as possible that are not prohibited by the law of war."<sup>374</sup> Military necessity justifies wartime violence and destruction, but also justifies certain incidental harms that inevitably stem from such violence and destruction.<sup>375</sup>

b. Humanity" is defined as "the principle that forbids the infliction of suffering, injury, or destruction unnecessary to accomplish a legitimate military purpose."<sup>376</sup> It is the "logical inverse" of military necessity, acting as a limitation on the violence and destruction broadly justified by military necessity.<sup>377</sup>

c. Proportionality" is defined as "the principle that even where one is justified in acting, one must not act in a way that is unreasonable or excessive." This principle reflects the *jus in bello* prohibition on excessive incidental harm and creates a duty in belligerents to "take feasible precautions for the protection of civilians and other protected persons and objects."<sup>378</sup>

d. Distinction" is the principle that "obliges parties to a conflict to distinguish principally between the armed forces and the civilian population, and between unprotected and protected objects."<sup>379</sup>

### **1.3 Meaning and Concept of International Armed Conflict from the perspective of Geneva Convention**

It is trite that for the law of war to apply, there must be an Armed Conflict or an occupation. Put differently, international humanitarian law is a body of laws and rules applicable when armed violence reaches the level of Armed Conflict, and is confined only to Armed Conflicts. This concept of Armed Conflict is broader than 'war' to include all kinds of hostilities among States and other contenders, such

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<sup>373</sup> Ibid.

<sup>374</sup> Pictet J.S. (1960), Geneva Convention Relative to the Treatment of Prisoners of War, Vol. III of The Geneva Conventions of 12 August 1949: Commentary, ICRC, Geneva, p. 76

<sup>375</sup> Ibid

<sup>376</sup> Ibid

<sup>377</sup> Geneva Convention additional protocol I and ii 1949 and 1977. Convention against Torture and other Cruel, Inhuman or degrading Treatment or Punishment (CAT) 1984.

<sup>378</sup> Article 3 .Geneva convention 1949. Additional protocol I to Geneva convention 1977.

<sup>379</sup> Suleiman A.J, (2020). *International humanitarian law: Notes and Materials*, Ahmadu University Printing Press, Zaria Kaduna State Nigeria. P.14

belligerent groups, insurgent rebels. Thus in the absence of a statutory definition of this concept, States practices must be consulted and relied upon in defining this concept. This is so even though some treaties contain some indications that do not amount to Armed Conflict. For example, riots and sporadic acts of violence or the use of armed forces by criminals, or even well-organized terrorist activity are conventionally not considered Armed Conflict to which international law applies.<sup>380</sup>

It helps to distinguish between criminal or terrorist activity on the one hand and Armed Conflicts on the other hand. If armed opposition groups control territory and are structured on military lines and conduct operations wearing distinct military uniforms then there is a strong case for saying that there is an Armed Conflict. Beside the element of organization of the forces, there must also be a certain level of intensity of the conflicts to distinguish between Armed Conflicts and internal security operations. On what constitutes an Armed Conflict, Rogers is of the view that once heavy armour, artillery, and ground attack aircraft have been deployed in action, it was clear that the intensity threshold had been crossed. Where on the other hand the weapons used and deployed are assault rifles and rocket-propelled grenades, the conclusion will be inevitably that the conflict in question is not Armed Conflict except and unless, as in Somalia or Iraq, where these weapons are the only ones available to the insurgents or fighters.<sup>381</sup>

Appeal Chambers of the International Criminal Tribunal for the former Yugoslavia in the notorious Tadic's case held that: Armed Conflict exists wherever there is a resort to armed forces between States or protracted armed violence between governmental authorities and organized armed groups within a State. International humanitarian law applies.<sup>382</sup>

#### **1.4 International Humanitarian Law and the Principles of Protecting Civilians**

Persons hors de combat and those who do not take a direct part in hostilities are entitled to respect for their lives and their moral and physical integrity. They shall in all circumstances be protected and treated humanely without any adverse distinction<sup>383</sup>. It is forbidden to kill or injure an enemy who surrenders or who is hors de combat. Protection also covers medical personnel, establishments, transports and

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<sup>380</sup> Fidelis K., (2000) *Armed Conflict and International Rules*, Sweet and Maxwell Publishers, vol. 2, Ibadan, P. 79

<sup>381</sup> Ibid

<sup>382</sup> Dambazau B. (2006) *Armed Conflicts and the Rules of International Criminal Justice*, Star Publishers, Kano. P. 68

<sup>383</sup> Phuong C. (2004) *The International protection of Internally Displaced Persons*, Cambridge, Cambridge University Press. P. 37

equipment. The emblem of the Red Cross or the Red Crescent is the sign of such protection and must be respected. Captured combatants and civilians under the authority of an adverse party are entitled to respect for their lives, dignity, personal rights and convictions.<sup>384</sup>

Parties to a conflict and members of their armed forces do not have an unlimited choice of methods and means of warfare. It is prohibited to employ weapons or methods of warfare of a nature to cause unnecessary losses or excessive suffering.<sup>385</sup>. The rules that form the basis of international humanitarian law are laid down in international treaties that can be grouped into four namely treaties on the protection of victims of war, treaties on the limitation and/or prohibition of different types of arms; treaties on the protection of certain objects; and treaties governing international jurisdiction (repression of crimes).

IHL forms today a universal body of law initiated in the form of the first Geneva Convention of 1864, to meet the ever-growing need for humanitarian aid resulting from developments in weaponry and new types of conflict.

### **1.5 Principle of Distinction**

The principle of distinction underpinning many rules of IHL is that only fighters may be directly targeted. This is a necessary compromise that IHL provides for in order to protect civilians in armed conflict. The specific rules where the principle of distinction is set out concerns Article 48 and 52 of Additional Protocol 1 to the Geneva Conventions. This defines who is a combatant and a military object that can be lawfully attacked. Any direct attack against a civilian or civilian object is not only a violation of IHL but also a grave breach. Direct attacks against civilians and/or civilians objects are categorised as war crimes.<sup>386</sup>

. This principle binds all the states.<sup>387</sup> The prohibition to attack any person hors de combat (those who are sick and wounded, prisoners of war) is a fundamental rule under IHL.<sup>388</sup>

### **1.6 Necessity and Proportionality**

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<sup>384</sup> Ibid.

<sup>385</sup> Umozurike, U. O. (2001) Introduction to International Law, Spectrum Law Publishing Ibadan Nigeria. P. 72

<sup>386</sup> Deng, F.M. (2001), "The Global Challenge of Internal Displacement", *Journal of Law and Policy*, Vol. 5. P. 87

<sup>387</sup> Ibid

<sup>388</sup> Hathaway J. C. (2005), *The Rights of Refugees under International Law*, Cambridge University Press, Cambridge, p. 201

The principle of proportionality limits and protects potential harm to civilians by demanding that the least amount of harm is caused to civilians, and when harm to civilians must occur it needs be proportional to the military advantage. The article where proportionality is most prevalent is in Article 51(5) (b) of API concerning the conduct of hostilities which prohibits attacks when the civilian harm would be excessive in relation to the military advantage sought. This is an area of hostilities where we often hear the term ‘collateral damage.’<sup>389</sup>

The principle of proportionality itself is to be found within the rules of IHL themselves. For example, direct attacks against civilians are prohibited and hence a proportionality assessment is not a relevant legal assessment as any direct attack against even a single civilian who is not taking part in hostilities is a clear violation of IHL. Proportionality is only applied when a strike is made against a lawful military target. Military necessity permits armed forces to engage in conduct that will result in destruction and harm being inflicted.<sup>390</sup> This concept of military necessity acknowledges that under the laws of war, winning the war or battle is a legitimate consideration. However the concept of military necessity does not give the armed forces the freedom to ignore humanitarian considerations. Article 52 of Addition Protocol I lists those objects that can be lawful attacks..<sup>391</sup>

### **1.7 Principle of Humane Treatment**

The principle of humanity, and its absence during the battle of Solferino of 1859, was the central notion that inspired the founder of the International Committee of the Red Cross (ICRC), Henry Dunant. The principle stipulates that all humans have the capacity and ability to show respect and care for all, even their sworn enemies. The notion of humanity is central to the human condition and separates humans from animals. armed conflict there is some common sense of and respect for humanity.<sup>392</sup> The principle sets out protections for the wounded and sick.<sup>393</sup>

### **1.8 Principle of Non-Discrimination**

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<sup>389</sup> Ibid

<sup>390</sup> Koskenniemi, M. (2002). “Fragmentation of International Law? Postmodern Anxiety”. *Leiden Journal of International Law*. 15 (3): 553-579.

<sup>391</sup> Petrusek, D. (1998) Moving Forward on the Development of Minimum Humanitarian Standards, *American Journal of International Law*, 92

<sup>392</sup> Ankumah E. A, (1996) *The African Commission on Human and Peoples’ Rights, the OAU Charter did not proclaimed Decision on Human Rights*, in; A. U. Kalu & Y. Osinbayo (eds.) *Perspective on Human Rights*. vol. 12, 1992, p.197

<sup>393</sup> Ibid . P.198.

Non-discrimination emerged as a key element and principle in the United Nations regime governing the protection of human rights which took root following the Second World War. The importance of the non-discrimination principle under the United Nations is reflected in Article 1 of the 1945 UN Charter, which describes one of the four purposes of the organization as: “promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.”<sup>394</sup> The technique of listing human attributes which represent forbidden grounds for differentiation arguably has its origins in the protection of freedom of religion and religious practice in an array of early bilateral or multilateral treaties. Some Minorities Treaties such as Article 2 of the Polish Minorities Treaty also elucidated general non-discrimination clauses, or the right of everyone to equality without discrimination are applicable in the broad context of minority rights, to the four UN “Charter grounds” of race, sex, language, or religion applied to in principle in of international law.<sup>395</sup>

The general non-discrimination clauses of each Covenant are complemented by provisions prohibiting discrimination on specific grounds. For example, Article 7(a)(i) ICESCR guarantees equal conditions of work between men and women and requires equal remuneration for work of equal value.<sup>396</sup>

### **1.9 The Status Of Gaza And The Question Of Applicable Law**

The international legal status of the Gaza Strip is currently contested. There is no dispute that the Gaza Strip is not a sovereign state; rather, the main controversy is whether or not, after Israel's 2005 "disengagement" from the Gaza Strip, the territory remains subject to belligerent occupation within the meaning of international law. Israel maintains that its evacuation from the Gaza Strip ended its occupation, while other observers and commentators have maintained that the occupation persists.<sup>397</sup>

Whether Gaza is occupied or not is of considerable legal consequence. First, international humanitarian law imposes affirmative duties on an occupier in its treatment of the occupied civilian population. Israel, both before and during Operation Cast Lead itself, failed its legal duties as an occupying authority. Second,

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<sup>394</sup> Pictet, Jean (1975). *Humanitarian Law and the protection of war victims*. Leyden Sijthoff. P. 71

<sup>395</sup> Singh, N.(1985) *Armed conflicts and Humanitarian laws of Ancient India*, in C. Swinarski. *Studies and Essays on International Humanitarian Law and Red Cross Principles*. The Hague: Kluwer Law International. Star Publishers, p. 21

<sup>396</sup> Ibid

<sup>397</sup> Henry D., and Rob P., (2010) *Monitoring Explosive Violence: The EVMP Dataset 2011, Action on Armed Violence*, March 2012; p. 75

the law of occupation also restricts an occupier's right to use force in maintaining public order in the territory it occupies. Israel, in unleashing its powerful military against the Gaza Strip, vastly exceeded the limits of acceptable legal force for an occupying authority.

Third, if Israel continues to occupy the Gaza Strip, it may not be able to plead self-defence as justification for Operation Cast Lead. Arguably, a state cannot claim self-defence vis-à-vis a territory it has already occupied. Finally, whether Israel's attack on the Gaza Strip constitutes the crime of aggression may turn, in part, on the Strip's status, as that crime, classically, involves an attack by one state against another state, rather than an attack by a state on a non-state entity. For all these reasons, we must, as a preliminary matter, clarify Gaza's current status in international law. The better argument, in our view, is that the Gaza Strip continues to be occupied territory.<sup>398</sup>

### **1.10 Historical Perspective Of Conflict In Gaza**

The conduct by armed groups from Gaza may amount to the commission of war crimes under Article 8 of the Rome Statute of the International Criminal Court (the Rome Statute), including wilful killings, taking of hostages, outrages upon personal dignity, and intentionally directing attacks against civilians and civilian objects, may amount to crimes against humanity under the Rome Statute.

In response to the attacks by armed groups from Gaza, Israeli Defense Forces (IDF) launched 'Operation Iron Swords,' a military operation. This has involved a severe bombardment of Gaza on an unprecedented scale— IDF reported to media on Thursday 12 October 2023 that it had dropped 6000 bombs weighing 4000 tons on Gaza since 7 October 2023.<sup>399</sup> The airstrikes appear to have targeted civilians and densely populated areas including markets, schools, hospitals, mosques, and civilian convoys which are protected areas. They have caused significant damage to humanitarian services and infrastructure essential to the preservation of life in Gaza, including at least 18 facilities of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNWRA).<sup>400</sup> IDF has repeatedly launched airstrikes on the Palestinian side of Rafah gate, Gaza's sole border crossing with Egypt.<sup>401</sup> These airstrikes have significantly disrupted the delivery of essential humanitarian aid to the Gaza Strip and hindered civilians from securing protection.

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<sup>398</sup> Ibid

<sup>399</sup> <https://www.wsj.com/livecoverage/israel-hamas-war-gaza-strip/card/israeli-air-force-says-it-has-dropped-6-000-bombs-on-gaza-QK1aSnupiGqytMVO86PU> Accessed on 22/3/2024 at 3:30pm

<sup>400</sup> 8

<sup>401</sup> Eck, K. (2019). From Armed Conflict to War: Ethnic Mobilization and Conflict Intensification. *International Studies Quarterly*, 53(2), 369-388.

Israel's Finance Minister Bezalel Smotrich stated "In war you have to be brutal... We need to deal a blow that hasn't been seen in 50 years and take down Gaza."<sup>402</sup> Israeli Prime Minister Benjamin Netanyahu said in a nationally televised address that they will do to their enemies in the coming days will reverberate with them for generations."<sup>403</sup> Netanyahu warned people living in Gaza to leave as he vowed to turn parts of the territory "into rubble" in revenge for a "black day."<sup>404</sup>

The Israeli Defence Ministry ordered a "total blockade" of the Gaza strip, preventing the entry of food, water, medicine, fuel or electricity, and has to date, indicated it will not reverse this decision without the release of hostages in violation of rules of IHL.

Both the bombardment and the siege of Gaza have had a major impact on the civilian population of Gaza. At time of writing, media reports indicate there have been at least 4,385 people have been killed, including 1,756 children and 967 women; a further 13,561 persons were injured. Humanitarian actors have also been affected – as of 23 October 2023, UNWRA reported that 29 of its staff had been killed, while a further have been injured since 7 October 2023. On 12 October 2023, rights groups and media reported that Israel had used white phosphorus bombs in its attacks on Gaza City, as well as in its attacks across the Israeli-Lebanon border, impacting hundreds of civilians.<sup>405</sup>

On Friday 13 October 2023, the UN reported Israel has given a 24-hour deadline for everyone in the northern part of the Gaza Strip home to about 1.1 million people - to evacuate to the south. Multiple actors, including the United Nations Secretary General<sup>406</sup> and the Special Rapporteur on the human rights of internally displaced persons, is likely to cause further devastating humanitarian consequences. Many, including patients in medical facilities, will not be able to leave. Israeli army's order to people in northern Gaza and Gaza city to evacuate to the south of the Gaza Strip does not negate the obligation to distinguish between civilian and those directly participating in hostilities incumbent on Israel as a party to the conflict.

## 1.11 Principles governing belligerent occupation under International Law

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<sup>402</sup><https://apnews.com/article/palestinians-israel-military-prisoners-hostage-amas-soldierse75729364f8c0b453da272365c16d136#:~:text=Israel's%20powerful%20finance%20minister%2C%20settler,he%20was%20quoted%20as%20saying>. Accessed on 22/3/2024 at 3:30pm

<sup>403</sup> Ibid

<sup>404</sup> Ibid

<sup>405</sup> Richard A.S. (2023), *The Developing Law of Weapons: Human-ity, Distinction, and Precautions in Attack*, in *The Oxford Handbook Of International Law In Armed Conflict* 273, Andrew Clapham & Paola Gaeta eds., p. 19;

<sup>406</sup> Ibid

This section of the paper provides a brief introduction to the *jus in bello* nature of belligerent occupation and examines the principles underpinning a belligerent occupation with reference to the Hague Regulations (1907), the Fourth Geneva Convention (1949), Additional Protocol 1 (1977), and customary and general principles of international law. The laws governing belligerent occupation establish a number of important principles, including the temporary or de facto nature of the occupation and the proviso that the occupying Power as temporary administrator does not have sovereignty: i.e., that the territory is administered in the best interests of the occupied population and follows the conservationist principle as much as possible while ensuring the legitimate security interests of the occupying Power.<sup>407</sup> It is important to examine each of these principles more extensively, as many distinguished authors argue that Israel's breach of the core principles constitutes an illegal occupation *jus in bello*. This research suggests that some of the breaches of the *jus in bello* principles reflect violations of peremptory norms of international law, and therefore offer particularly compelling evidence of violations of the principles of necessity and proportionality when considering occupation as a continuing use of force *jus ad bellum*. It must be noted that both the breach of general principles underlying the occupation and the violations of international humanitarian law, including grave breaches of the Geneva Conventions, may similarly be indicative of a breach of the principles of necessity and proportionality for self-defence.<sup>408</sup>

This principle is more articulately reflected in Article 1 of the Lieber code of 1863, which provides, "Martial Law is the immediate and direct effect and consequence of occupation or conquest. The presence of a hostile army proclaims its Martial Law".<sup>409</sup> The de facto nature of belligerent occupation is mirrored in the Hague Regulations, which provides that "territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation applies only to the territory where such authority is established, and in a position to assert itself."<sup>410</sup>

Article 2 of the Fourth Geneva Convention (1949) states the general rule that "the Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance".<sup>411</sup> Notably, the International Committee of the Red Cross (ICRC) Commentary to the Fourth Geneva Convention explains that the word "occupation"

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<sup>407</sup> Ardi Imseis, "Critical Reflections on the International Humanitarian Law Aspects of the International Court of Justice Wall Advisory Opinion" *AJIL* vol. 99 (2005) pp. 102, 109–110, 112.

<sup>408</sup> *Ibid*

<sup>409</sup> Instructions for the Government of Armies of the United States in the Field (Lieber Code) (24 April 1863), art. 1.

<sup>410</sup> Hague Regulations (1907), article. 42.

<sup>411</sup> Convention Relative to the Protection of Civilian Persons in Time of War (12 August 1949) 75 UNTS 287, art. 2.

has a wider meaning than it has in Article 42 of the Hague Regulations, and for individuals concerned, the application of the Fourth Geneva Convention does not necessarily “depend upon the existence of a state of occupation.”<sup>412</sup>

### 1.12 Israel’s Siege Of The Gaza Strip

One of the foremost criticisms of Israel’s response to the attacks of October 7, 2023, concerns Israel’s siege of the Gaza Strip, with some referring to the siege as an unlawful form of “collective punishment.”<sup>413</sup> Although the effects of a siege on non-combatants and civilians can be devastating, siege is not prohibited under the law of war.<sup>414</sup> Inherent to the authority to lay siege is the authority to “exercise control (e.g., stopping, searching, and diverting traffic) over civilians” and forbid “all communications and access between the besieged place and the outside.”<sup>415</sup>

Commanders are likewise encouraged to allow the passage of relief consignments (e.g., food, medicine, clothing), but no such requirement exists if the commander laying siege believes such consignments either “may be diverted from their destination” or may not be effectively controlled or “a definite advantage may accrue to the military efforts or economy of the enemy.”<sup>416</sup> While forces laying siege may not refuse to allow civilians to flee a besieged area, there is no requirement on the part of the besieging force to guarantee civilians’ ability to flee, to permit civilians to flee civilians behind the besieging forces lines, or to provide for refugees or displaced persons.<sup>417</sup> Reducing the risk of incidental harm to civilians falls primarily on the besieged force, who should “mark protected buildings to indicate their protected status to enemy forces” and “concentrate the wounded and sick and civilians in areas remote from military objectives.”<sup>418</sup> Starvation directed at civilians by the besieging force is prohibited, but starvation directed at enemy forces even

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<sup>412</sup> Article 1 of the Fourth Geneva Convention which requires that “the High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances”.

<sup>413</sup> David H., (2008) “Framing Prolonged Occupation” (Opinio Juris, 18 June 2021); Ronen, “Illegal Occupation and Its Consequences” *Israel Law Review* vol. 41 (ILR) p. 201

<sup>414</sup> Orna B.N, et al, (2005) “Illegal Occupation: Framing the Occupied Palestinian Territory” 23 *Berkeley J. Int’l L.* pp. 551, 600;

<sup>415</sup> Enzo C., (2006) “Contextualizing Proportionality: Jus ad Bellum and Jus in Bello in the Lebanese War” 88 *Int’l Rev. Red Cross* p. 779;

<sup>416</sup> *Ibid*

<sup>417</sup> Yutaka Arai-Takahashi, “Unearthing the Problematic Terrain of Prolonged Occupation” *Israel Law Review* vol. 52(2) (2019) pp. 125, 142.

<sup>418</sup> Hague Regulations (1907) art. 43; Eyal Benvenisti, *The International Law of Occupation* (OUP 2012) p. 69.

where the incidental starvation of civilians results is lawful if conducted in accordance with the principles of distinction and proportionality.<sup>419</sup>

Additional Protocol I generally prohibits the destruction of “objects indispensable to the survival of the enemy civilian population,” to include “foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations, and supplies for irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse party.”<sup>420</sup>

### **1.13 Unlawful and Forcible Transfer Of Civilians in Gaza**

Following Israel’s order for civilians to evacuate northern Gaza October 13, 2023, some commentators, including those at the United Nations, claimed that Israel’s complete siege of Gaza, combined with the evacuation order, could amount to a forcible transfer of civilians, breaching international law.<sup>421</sup> The prohibition against forcible transfers in international law comes from Article 49 of the Fourth Geneva Convention of 1949, which states, “Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.”<sup>422</sup>

However, total or partial evacuations of an area are permissible if performed for the “security of the population” or for “imperative military reasons. An Occupying Power that conducts such a transfer or evacuation “shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that evacuations or transfers are effected with satisfactory conditions of hygiene, health, safety, and nutrition, and members of the same family are not separated.

Applying these rules to Israel’s case, a threshold question is whether Israel is an “Occupying Power” within the meaning of Article 49. To be sure, some in the international community regard Israel as an occupier of the Gaza Strip as a result of

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<sup>419</sup> Robert Jennings, Arthur Watts, *Oppenheim’s International Law*, volume I, Peace (9th edition, Longman, London and New York) p. 204.

<sup>420</sup> *Ibid*

<sup>421</sup> Israel Could be in Breach of Global Law with Gaza Relocation Order: UN, AL JAZEERA (Oct. 17, 2023), <https://www.aljazeera.com/news/2023/10/17/israel-could-be-in-breach-of-global-law-with-gaza-relocation-order-un> Accessed on 22/3/2024 at 3:30pm

<sup>422</sup> Art. 49, Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949). Rule 129 of Additional Protocol I

Israel's continued control of Gaza's territorial waters and airspace.<sup>423</sup> Following Israel's unilateral disengagement from the Gaza Strip in 2005, many in the international community including international law scholars, military professionals, and foreign policy experts concluded Israel's occupation of the Gaza Strip had ended.<sup>424</sup> For its part, the United States does not recognize Israel as an occupier of the Gaza Strip.<sup>425</sup>

Article 49 imposes an obligation on the Occupying Power only insofar as it is "practicable." It is difficult indeed to say such accommodations are practicable in Israel's case; even the mere presence of Israeli troops in the Gaza Strip is liable to "result in numerous casualties among Palestinian civilians as well as Israeli soldiers, potentially triggering a dramatic escalation of hostilities in the region."<sup>426</sup>

Women, children, old people and sick are forced to work to death in forced labour camps, Israel's actions are far more appropriately characterized as a warning to civilians of an imminent attack, as is required by the long-standing rule of customary international law.<sup>427</sup>

Fourth Geneva Convention of 1949 provides an explicit carve out for the temporary evacuation of civilians for the "security of the population" or for "imperative military reasons," and an exception to the requirement of providing for the accommodation and basic human needs of evacuees if doing so is impracticable for the Occupying Power. Thus, whether viewed as an Occupying Power or not, Israel has acted lawfully.

### **1.14 Legal Analysis Of Israel's/Gaza Occupation**

The above conduct taken by IDF members during Operation Iron Swords may amount to the commission of war crimes under Article 8 of the Rome Statute of the

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<sup>423</sup> Celeste Kmiotek, Israel Claims it is No Longer Occupying the Gaza Strip. What Does International Law Say?, ATL. COUNCIL (Oct. 31, 2023), <https://www.atlanticcouncil.org/blogs/menasource/gaza-israel-occupied-international-law/>.

<sup>424</sup> Celeste Kmiotek, Israel Claims it is No Longer Occupying the Gaza Strip. What Does International Law Say?, ATL. COUNCIL (Oct. 31, 2023), <https://www.atlanticcouncil.org/blogs/menasource/gaza-israel-occupied-international-law/>.

<sup>425</sup> Peter Baker, Biden Warns Israel Not to Occupy Gaza, N.Y. TIMES (Oct. 15, 2023), <https://www.nytimes.com/2023/10/15/us/politics/biden-israel-gaza.html>. Accessed on 22/3/2024 at 5:31pm

<sup>426</sup> Yasmeeen A., et al., 2023 U.S. Urges Israel Against Gaza Ground Invasion, Pushes Surgical Campaign, WASH. POST p, 27,)

<sup>427</sup> Ibid

International Criminal Court (the Rome Statute), including: willful killing, indiscriminate and intentionally directing attacks against civilians and civilian objects or attacks that cause disproportionate civilian harm, intentionally directing attacks against humanitarian workers, extensive destruction of property, not justified by military necessity and carried out unlawfully and wantonly. Such conduct may also violate the prohibition of collective punishment, which must be respected at all times under International Humanitarian Law.<sup>428</sup>

According to customary international law, all parties to a conflict, be it international or non-international in nature, have the obligation to allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need and must refrain from deliberately impeding its delivery.<sup>429</sup> The Office of the Prosecutor of the International Criminal Court currently has an investigation into the situation of the State of Palestine. Per the decision of the Pre-Trial Chamber of the International Criminal Court on 21 February 2021, the territorial scope of this jurisdiction extends to Gaza and the West Bank, including East Jerusalem. Crimes within the jurisdiction of the International Criminal Court include crimes against humanity, war crimes and genocide.<sup>430</sup>

Article 1 of the Geneva Conventions states “The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.”<sup>431</sup> ICRC Commentary on this article confirms this entails the obligation to abstain from conduct violating international humanitarian law and to exert their influence, to the degree possible, to stop violations of the Conventions and bring them to an end. This obligation is not limited to stopping ongoing violations but includes an obligation to prevent violations when there is a foreseeable risk that they will be committed and to prevent further violations in case they have already occurred. Under Article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide, Contracting Parties undertake to prevent genocide from occurring. The physical acts of genocide include killing members of the group, causing serious bodily , mental harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part. Under the Convention, Contracting Parties must also criminalize direct and public incitement to commit genocide. States should not render aid nor assistance to States that are engaged in violations, or they will also be legally responsible.<sup>432</sup> Pursuant to

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<sup>428</sup> ICRC, Rule n. 103 <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule103>

<sup>429</sup> ICRC, Rule number. 55, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule55>

<sup>430</sup> Ibid

<sup>431</sup> ICRC, Rule number. 144.

<sup>432</sup> United Nations, International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, Article 16

the above convention South Africa instituted an action at ICJ against Israel on 29th December, 2023 alleging genocide by Israel and request for immediate suspension of military operation at the Gaza strip and the court ordered that Israel should take all measures to prevent act that could amount to genocide.

The Resolution adopted by the General Assembly on 16 September 2005 (A/RES/60/1) (2005 World Summit Outcome), and incorporated into many UN Security Council resolutions and Human Rights Council resolutions, Responsibility to Protect (R2P), affirms that each state has the responsibility to protect its own populations from war crimes, crimes against humanity, ethnic cleansing, and genocide, including the prevention of such crimes. The international community has the responsibility to encourage and assist individual states in meeting that responsibility. Under the Responsibility to Protect (R2P), all States, including those in the region and Israel, have a responsibility to prevent the commission of the listed international crimes and protect the civilian population. On the above negative implication of violation of human right by Israel United Nation security council (UNSC) passed a resolution for cease fire but Israel is yet to comply notwithstanding the war crime that is committed against the innocent children and civilians which resulted to at list 32600 death among which children and women according to enclave's health ministry<sup>433</sup>

### **1.15 Conclusion**

From the analysis and background study in this paper, It is found that, though civilians in Israel's occupation of Gaza often faced with several consequences from the use of explosive weapons, no detailed assessment of the risk or harm are taken by state actors. This tends to violets the existing rules of the protection given by IHL..<sup>434</sup> likewise, it is also found out that, in relation to Gaza occupation/ conflict explosive are often used directly against civilians not mindful of the level of causalities. Under existing IHL, the standards on the protection of civilians are generally not weapon-specific and focus on the direct impacts of individual attacks. The use of explosive weapons in populated areas does not attract a uniform applicable set of consequences.

It is recommended that explosive weapons in general shall not be used in populated areas like Gaza. It is recommended that, there should be uniform protection of civilians by the applicable international law. The standard of protection should also be weapon-specific, any state actor that violates its uniforms application should be brought to face the law.

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<sup>433</sup> <https://newrab.com/news/unsc-gaza-ceasefire-resolution>.

<sup>434</sup> Ibid