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ORIGINAL ARTICLE

INTERNATIONAL LAW AND PRACTICE

The armed conflict in Gaza, and its complexity under international law: *Jus ad bellum*, *jus in bello*, and international justice

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Abstract

The armed conflict in Gaza raises a series of questions under international law. The most significant questions concern the Israel's use of force under *jus ad bellum*, the military operations conducted by the belligerents in relation to the law of armed conflict, and the proceedings brought before certain international courts, such as the International Criminal Court. This article examines each of these three issues in two stages. Firstly, it shows that the answers to these questions give rise to uncertain solutions insofar as they depend on the point of view adopted in relation to fundamental controversies concerning Palestine, such as the latter's statehood. Secondly, it sets out the solutions that emerge independently of these controversies, whether these solutions express certainties or likelihoods.

Keywords: Statehood of Palestine; OPT; Gaza; self-defence; *jus in bello*; international justice

1. Introduction

Since Hamas came to power in the Gaza Strip (Gaza) in 2007, Israel has carried out a series of military operations against the Palestinian organization. The most important include 'Cast Lead' in 2008, 'Pillar of Defence' in 2012, and 'Protective Edge' in 2014, with Israel's objective most often being to put an end to the firing of missiles and rockets from Gaza.[1] The military operation that began on 7 October 2023, dubbed 'Iron Sword', has nothing in common with these military operations, in terms of the resources deployed, its duration, and the material and human damage caused. The operation has resulted in tens of thousands of Gazan victims, the destruction of most of their homes, massive population displacements, and a growing famine.[2] This operation was triggered following military actions by Hamas, which were also unprecedented in relation to the organization's past attacks. Hamas no longer confined itself to firing a series of rockets, but

*Certain aspects developed in this article have already been addressed in a Belgian French speaking local journal; see R. van Steenberghe, 'Le conflit armé entre le Hamas et Israël au regard du droit international', (2024) *Journal des Tribunaux* 161. The author would like to thank Prof. Marina Sharpe for her valuable comments on a previous version of the paper. The author, however, bears full responsability for that paper.

[1]See, e.g., C. Henderson, 'Israeli Military Operations against Gaza: Operation Cast Lead (2008-09), Operation Pillar of Defence (2012), and Operation Protective Edge (2014)', in T. Ruys, O. Corten and A. Hofer (eds.), *The Use of Force in International Law: A Case-Based Approach* (2018), 729.

[2]See, e.g., on the number of victims since the 7 October attack, the OCHA website (www.ochaopt.org/). See also Sections 4.2.1 and 4.2.2, *infra* concerning the other consequences of the Israeli military response.

launched a large-scale operation, planned for a long time[3] and accompanied by acts of unprecedented savagery. On 7 October 2023, in parallel with the continuous firing of rockets against Israel,[4] thousands of Palestinian fighters entered Israeli territory by sea, land, and air,[5] causing the death of around 1,140 persons in Israel, mainly civilians who were deliberately targeted. [6] Many victims were also raped before being executed by the attackers, while others were decapitated or burnt.[7] During their retreat, the armed groups took around 250 people as hostages.[8] The aim of Israel's 'Iron Sword' response is to eliminate Hamas and free those who continue to be held hostage. More than 100 remain in captivity, while the others have been released in an exchange with Palestinian prisoners held by Israel or have been killed in clashes between Hamas and Israel.[9] At the time of completing the publication process of this article,[10] the hostilities between Israel and Hamas are ongoing,[11] despite a UNSC proposal for a comprehensive cease-fire plan.[12] The Israeli Prime minister merely stated that intensive fighting into Gaza was close to ending,[13] while he opposed tactical pauses as announced by the Israeli army to facilitate the delivery of humanitarian aid.[14]

The armed conflict in Gaza raises many questions under international law. These questions are particularly complex, and they must be examined with caution insofar as answers are likely to vary according to the point of view adopted in relation to certain fundamental controversies concerning Palestine. It is therefore appropriate, as a preliminary matter, to examine these controversies (i), before addressing the main questions discussed in legal scholarship in relation to the armed conflict in Gaza, namely Israel's use of force in Gaza under *jus ad bellum* (ii), the concrete military operations carried out by the belligerents under the law of armed conflict (LOAC) (iii), and the proceedings initiated before certain international jurisdictions, mainly the International Criminal Court (ICC) and the International Court of Justice (ICJ) (iv). Each of these three issues are examined in two stages. In a first subsection, the article shows the uncertain solutions arising from the controversies surrounding Palestine, before considering, in a second subsection, the solutions that might be asserted independently of these controversies, whether these solutions express certainties or likelihoods.

2. Preliminary controversies on Palestine

Three main long-standing controversies condition the legal analysis of the armed conflict in Gaza under international law. The most important one is the issue of statehood of Palestine (Section 2.1). The two others include the status of Gaza as an occupied territory (Section 2.2) and the legal

[3]See, e.g., A. Ragad et al., 'How Hamas Built a Force to Attack Israel on 7 October', *BBC News*, 27 November 2023.

[4]See, e.g., OCHA, 'Escalation in the Gaza Strip and Israel | Flash Update #1 as of 18:00, 7 October 2023', at 1.

[5]Those fighters mostly came from the armed wing of Hamas; see, e.g., Ragad et al., *supra* note 3.

[6]See, e.g., OCHA, 'Hostilities in the Gaza Strip and Israel | Flash Update #72, 18 December 2023', at 4.

[7]See, e.g., Human Rights Council, Detailed Finding on Attacks Carried Out on and after 7 October 2023 in Israel, Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel, UN Doc. A/HRC/56/CRP.3 (10 June 2024), paras. 119–127, 141–167.

[8]See, e.g., ibid., para. 21.

[9]See, e.g., ibid.

[10]This article has been submitted to the *Journal* for publication at the beginning of March 2024. As a result, most research on which this article is based has been concluded on 30 January 2024. However, the author has endeavoured to update some aspects of this research, by considering the most important recent events, including new judiciary and political developments. Moreover, given space constraints, the article only deals with the main issues raised by the armed conflict under international law.

[11]See e.g., OCHA, 'Hostilities in the Gaza Strip and Israel | Flash Update #182, 24 June 2024'.

[12]UNSC Res. 2735 (10 June 2024).

[13]See, e.g., D. Lieber and S. Raice, 'Netanyahu Says Intensive Fighting in Gaza Is Close to Ending', *Wall Street Journal*, 23 June 2024.

[14]See, e.g., 'Netanyahu Opposed to Israeli Military "Tactical Pauses" for Gaza Aid', *Aljazeera*, 16 June 2024.

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status of the Israeli occupation of Palestine (Section 2.3). As detailed below, these two last controversies have been subject to new developments following the Advisory Opinion issued by the ICJ on 19 July 2024 on the *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*.[15] The Opinion, however, expressly excludes the current armed conflict in Gaza from its scope.[16]

2.1 Statehood of Palestine

From 1923 until just after the Second World War, Palestine was administered by the British authorities in accordance with a mandate carried out under the control of the Council of the League of Nations.[17] According to the Covenant of the League of Nations, the Mandatory Power was charged of a 'sacred trust of civilisation', meaning that it had to lead the people living in the mandatory territories to autonomy.[18] One of the special features of the Mandate on Palestine was that it required the Mandatory Power to 'ensure the establishment of a national home for the Jewish people'.[19] This clause was in line with the declaration made by the British Foreign Secretary, Lord Balfour, during the First World War[20] and met the expectations of the Zionist movement which had emerged at the end of the nineteenth century under the leadership of Theodor Herzl.

Under pressure from this movement, which sought the creation of a Jewish state in Palestine, the UN General Assembly voted for a partition plan of Palestine on 29 November 1947. That plan provided for the creation of an Arab state and a Jewish state, with Jerusalem placed under international administration.[21] On 14 May 1948, the day after the official end of the British Mandate, Israel proclaimed its independence.[22] This proclamation was immediately followed by military interventions conducted against Israel by the neighbouring Arab states. This first war, in which Israel emerged victorious, officially ended with the conclusion of armistice agreements between February and July 1949.[23] On 11 May 1949, Israel was admitted as a member state of the United Nations,[24] with its territory later recognized as delimited by the lines laid down in the armistice agreements, also known as the 'Green Line'.[25] In the meantime, the Arab state envisaged in the partition plan had not been able to emerge. Its territories were occupied by Jordan (today's West Bank, which Jordan annexed in 1950) and Egypt (today's Gaza), while Jerusalem was divided in two parts: the western part under Israeli control and the eastern part annexed by Jordan.

It was not until 15 November 1988 that the Palestine Liberation Organization (PLO), recognized as the legitimate representative of the Palestinian people, proclaimed the independence of the 'State of Palestine'.[26] By that time, the political situation had changed because of Israel's victory in a new war against the Arab states, the Six-Day War, which had begun on 5 June 1967: the territories formerly annexed by Jordan (West Bank and East Jerusalem) or occupied by Egypt

[15] *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion of 19 July 2024, [2024] ICJ.

[16] Ibid., para. 81.

[17] See the 1920 Treaty of Sevres, available at treaties.fcdo.gov.uk/awweb/pdfopener?md = 1&did = 63986, Arts. 94, 95, and the Decision of the Council of the League of Nations, 24 July 1922, available at digitallibrary.un.org/record/829707?ln = en.

[18] See the 1919 Covenant of the League of Nations, available at www.refworld.org/legal/constinstr/lon/1919/en/17145, Art. 22.

[19] See the Decision of the Council of the League of Nations, *supra* note 17, Art. 2.

[20] The text of the declaration is available at avalon.law.yale.edu/20th_century/balfour.asp.

[21] See UNGA Res. 181 (II) (29 November 1947).

[22] The text of the declaration is available at main.knesset.gov.il/en/about/pages/declaration.aspx.

[23] See the armistice treaties concluded between Israel and Egypt on 24 February 1949 (UN Doc. S/1264/corr.1 (8 March 1949)), Lebanon on 23 March 1949 (UN Doc. S/1296 (23 March 1949)), Jordan on 3 April 1949 (UN Doc. S/1302/Rev.1 (20 June 1949)), and Syria on 20 July 1949 (UN Doc. S/1353 (20 July 1949)).

[24] UNGA Res. 273 (11 May 1949).

[25] See, e.g., *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, [2004] ICJ Rep. 136, para. 101; UNSC Res. 2334 (23 December 2016), point 3.

[26] The text of the declaration is available at www.un.org/unispal/document/auto-insert-178680/.

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(Gaza) were now under Israeli occupation. The PLO's declaration of independence in 1988 led many states to recognize Palestine as a state. Attempts were also made to achieve peace with Israel, the most important one being the conclusion of the Oslo Accords signed between 1993 and 1996,[27] under which Israel agreed to withdraw from certain parts of the occupied territories while the PLO recognized the existence of Israel.

Nevertheless, faced with the lack of sufficient support from the international community and with the failure of these peace attempts, the Palestinian Authority, which succeeded the PLO following the Oslo Accords, went on the diplomatic offensive in the 2010s. On 23 September 2011, it applied for the State of Palestine to join the United Nations as a full member state.[28] Although this application was unsuccessful,[29] it was nevertheless granted a non-member observer status by the UN General Assembly on 29 November 2012.[30] The State of Palestine has also become a member of several international organizations, including UNESCO, the International Seabed Authority, and the ICC.[31] It has also acceded to a number of international conventions, including the 1949 Geneva Conventions and their two 1977 Additional Protocols,[32] which constitute the bulk of LOAC, as well as the 1998 Rome Statute,[33] which established the ICC.[34]

Does this mean that Palestine is a state? There are several reasons why this question remains controversial. Firstly, a state is classically identified by three elements under international law: a territory, a population, and an independent and effective government, which allows it to enter into international relations with other states.[35] Regarding Palestine, it is this last element which proves controversial. Some scholars consider that the PLO was not independent and had no effective control over the Palestinian territory at the time of the declaration of independence, as this is still the case today with the Palestinian Authority, mainly because its territory is occupied by Israel.[36] Others, however, consider that this occupation cannot lead to the denial of statehood to Palestine insofar as it is illegal.[37] Secondly, although the State of Palestine has been recognized by a large number of states, particularly since the 1988 declaration of independence by the PLO, around 50 states still oppose recognizing Palestine as a state.[38] Thirdly, although the State of Palestine was granted the status of non-member state of the United Nations in 2012, thus suggesting that Palestine is a state in the United Nations' view, a significant proportion of the UN members did

[27]See the Oslo Accord (Oslo I), 13 September 1993, available at www.refworld.org/legal/resolution/par/1993/en/13889; Gaza-Jericho Accord, 4 May 1994, available at peacemaker.un.org/israelopt-cairoagreement94; Interim Agreement on the West Bank and the Gaza Strip (Oslo II), 28 September 1995, available at www.refworld.org/legal/agreements/par/1995/en/20547.

[28]See UN Doc. S/2011/592 (23 September 2011).

[29]The Committee on the Admission of New Members, mandated by the UN Security Council, did not reach any consensus on that application in its report (UN Doc. S/2011/705 (11 November 2011), para. 21). As a result, '[t]he application for full United Nations membership remain[ed] pending before the Security Council' (UN Doc. A/67/738 (8 March 2013), para. 19). This application was again considered on 3 April 2024 (see note 41, *infra*).

[30]See UNGA Res. 67/19 (29 November 2012).

[31]The State of Palestine became a member of those international organizations on 23 November 2011, 2 January 2015, and 1 April 2015, respectively.

[32]The State of Palestine acceded to the Geneva Conventions and the First Additional Protocol on 2 April 2014, and to the Second Additional Protocol on 4 January 2015.

[33]The State of Palestine acceded to the Rome Statute on 2 January 2015.

[34]See, e.g., about such participation to international organizations and such accession to various treaties, J.-Ch. Martin, 'Le statut de la Palestine dans les organisations internationales', (2016) 62 *Annuaire français de droit international* 213, 219–20.

[35]See the 1933 Convention on Rights and Duties of States (Montevideo Convention), Art. 1.

[36]See, e.g., T. Becher, 'International Recognition of a Unilaterally Declared Palestinian State: Legal and Policy Dilemmas', *Jerusalem Center for Public Affairs*, available at https://www.europarl.europa.eu/meetdocs/2009_2014/documents/dplc/dv/8_internationalrecognitionpalesti/8_internationalrecognitionpalestine.pdf; R. Sabel, *International Law and the Arab-Israeli Conflict* (2022), 395–6.

[37]See, e.g., J. Salmon, 'La qualité d'Etat de la Palestine', (2012) *Revue belge de droit international* 13, 17.

[38]See, e.g., 'MAP: These Countries Recognize a Palestinian State', *U.S.News*, 22 May 2024. Eight states recognized the State of Palestine after the 7 October attacks and the Israeli military response.

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not vote in favour of the resolution granting such a status.[39] Moreover, certain states that supported the resolution were careful to indicate that their vote in favour did 'not yet constitute a recognition of a State in the full sense'.[40] This is also the case with respect to the recent new attempts made by the State of Palestine to be admitted as a full member of the United Nations. On 3 April 2024, the State of Palestine submitted a request to the UN Security Council for reconsidering its application for membership in the United Nations.[41] Admittedly, only the United States[42] voted against a draft resolution granting such membership,[43] while the UN General Assembly later adopted a resolution in which it '[d]etermine[d] that State of Palestine [was] qualified for membership in the United Nations [and] [a]ccordingly recommend[ed] that the Security Council reconsiders the matter favourably'.[44] However, there was still a significant part of the international community that did not vote in favour of the UNGA resolution,[45] and statements made by states before both the UN Security Council and the UN General Assembly clearly show that the positive votes of those states did not necessarily mean that they recognized the State of Palestine as a state under international law.[46] Fourthly, it is true, as indicated above, that the State of Palestine is a member of several international organizations, which are normally composed only of states under international law. Nevertheless, the participation of the State of Palestine in international organizations does not necessarily mean that the other member states recognize or consider it to be a state. Several member states have expressly raised reservations in that regard.[47] Fifthly, although the State of Palestine is a party to various treaties to which only states may accede, this does not necessarily mean that it is considered as a state within the meaning of international law. An enlightening example can be drawn from the ICC decision on its territorial jurisdiction over the situation in Palestine, a situation that has been referred to the Court by the State of Palestine as will be seen in detail below. Under the Rome Statute, to which that state has acceded, the Court has jurisdiction to prosecute international crimes committed on the territory of a state party.[48] In its decision of 5 February 2021, the ICC Pre-Trial Chamber decided that the State of Palestine was a state party within the meaning of the relevant provision of the Rome Statute, while taking care to emphasize that, in doing so, it was not ruling on the statehood of the State of Palestine within the meaning of general international law.[49] It thus adopted a functional approach to the notion of state provided for in the Statute. In its view, the State of Palestine was only a state for the purpose of determining its jurisdiction, without prejudice to its status under general international law. Finally, it is worth observing that the ICJ has always avoided to pronounce itself on the issue of statehood of Palestine, including in its 2024 Advisory Opinion on the Occupied Palestinian Territory (OPT).[50]

[39]See UN Doc. A/67/PV/44 (29 November 2012), at 12: 138 votes in favour to 9 against, with 41 abstentions.

[40]Statement of Belgium, UN Doc. A/67/PV.44 (29 November 2012), at 16; see also statements of Switzerland, ibid.; Denmark, ibid., at 18; Finland, ibid., at 20; Norway, ibid., at 21.

[41]Letter dated 3 April 2024 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2024/286 (3 April 2024).

[42]UN Doc. S/PV.9609 (18 April 2024), at 3.

[43]Algeria: Draft Resolution, UN Doc. S/2024/312 (18 April 2024).

[44]UNGA Resolution A/ES-10/L.30/Rev.1 (9 May 2024), at 2.

[45]143 votes in favour to 9 against, with 25 abstentions.

[46]Regarding the UN Security Council, see, e.g., statement of Japan, UN Doc. S/PV.9609 (18 April 2024), at 7; regarding the UN General Assembly, see, e.g., statements of states during the tenth Emergency Special Session between 10 and 13 May 2024, in particular of New Zeeland (New Zealand Explanation of Vote delivered by Permanent Representative, H.E. Ms. Carolyn Schwalger, 10 May 2024), and Norway (Stemmeforklaring, avstemning I Generalforsamlingen, 10 May 2024).

[47]See, e.g., the reservations mentioned in Martin, *supra* note 34, at 220–1.

[48]1998 Rome Statute of the International Criminal Court, Art. 12(2)(a).

[49]Decision on the 'Prosecution Request to Article 19(3) for a Ruling on the Court's Territorial Jurisdiction in Palestine', ICC-01/18, 5 February 2021, paras. 102–103, 106.

[50]For one judge deploring this see *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, *supra* note 15 (Judge Gómez Robledo, Separate Opinion), para. 4.

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If the State of Palestine does not constitute a state within the meaning of international law, the people living on its territory must at least be considered as a people entitled to the right to self-determination, meaning 'the right freely to determine, without external interference, [its] political status and to pursue [its] economic, social and cultural development', including the right to become a state.[51] This right, which is unquestionably recognized by the international community in favour of the Palestinian people, implies the obligation of other states, in particular Israel, not to hamper its exercise.

2.2 The status of Gaza as an occupied territory

A second controversy concerns the status of Gaza as an occupied territory before the 7 October attacks and the Israeli military response. In 2005, the Israeli military forces, indeed, withdrew from Gaza, in accordance with the disengagement plan decided a year earlier by the Israeli government. Accordingly, some scholars[52] and states, including Israel,[53] consider that the occupation ended with the disengagement, since the existence of a situation of occupation presupposes the physical presence of state's military forces on the foreign territory.[54] As a result, in their view, Israel was no longer bound by any provision of the law of occupation.

Nevertheless, after the disengagement, Israel retained control over Gaza's land and sea 'borders' as well as over its airspace. Moreover, following the takeover by Hamas, which won the Palestinian elections in 2006 and took control of Gaza in 2007, Israel imposed an unprecedented blockade on that territory. Because of such continuous remote control by Israel over Gaza, other scholars[55] as well as UN institutions[56] and the International Committee of the Red Cross (ICRC)[57] consider that Israel remained bound by the law of occupation or at least by some of its provisions, namely those that are commensurate with the degree to which Israel exercised control over the Gazan territory. While such application of the law of occupation could be upheld irrespective of whether the occupation of Gaza had ended, some expressly considered that Gaza remained an occupied territory.[58] It was further argued that Israel was able to re-enter the Gazan territory at any time and exercise its authority, in line with the definition of occupation under Article 42 of the 1907 Hague Regulations.[59]

In its 2024 Advisory Opinion on OPT, the ICJ embraced the view that, notwithstanding its disengagement of Gaza, Israel continued to exercise a remote control over Gaza and, therefore, remained bound by its obligations under the law of occupation, that are 'commensurate with the degree of its effective control over the Gaza Strip'.[60] However, it is unclear whether the Court

[51]See, e.g., for a first recognition of that right by the UN General Assembly, UNGA Res. 2535 (XXIV) (10 December 1969). See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* note 25, para. 118.

[52]See, e.g., Y. Shany, 'Faraway, So Close: The Legal Status of Gaza After Israel's Disengagement', (2005) 8 *Yearbook of International Humanitarian Law* 369, 378.

[53]See, e.g., Supreme Court of Israel, *Jaber Al-Bassiouni Ahmed and others v. Prime Minister and Minister of Defence*, HCJ 9132/07, 30 January 2008, para. 12.

[54]See, e.g., about this condition for a situation of occupation, T. Ferraro, 'Determining the Beginning and End of an Occupation under International Humanitarian Law', (2012) 94 *International Review of the Red Cross* 133, 143–7.

[55]See, e.g., S. Solomon, 'Occupied or Not: The Question of Gaza's Legal Status after the Israeli Disengagement', (2011) 19 *Cardozo Journal of International Law* 59, 72–3.

[56]See, e.g., UN Doc. A/HRC/7/17 (21 January 2008), paras. 9–11.

[57]See, e.g., ICRC, Frequently Asked Questions on ICRC's Work in Israel and the Occupied Territories, 20 December 2023; ICRC, *Commentary on the First Geneva Convention* (2016), paras. 307–313.

[58]See, e.g., UN Doc. A/HRC/7/17, *supra* note 56, para. 11.

[59]See, e.g., J. Grignon, 'The Geneva Conventions and the End of Occupation', in A. Clapham, P. Gaeta and M. Sassòli (eds.), *The 1949 Geneva Conventions. A Commentary* (2015), 1575, at 1594.

[60]See *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, *supra* note 15, para. 94.

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considered that Gaza was still occupied or that the occupation had ended, but Israel had still to comply with residual obligations of the law of occupation.[61] In addition, three judges dissented from the majority of the Court on that matter. They argued that the Court should not have pronounced itself on the legal status of Gaza given the specific circumstances concerning that territory, including that Israel withdrew from it in 2005.[62]

2.3 The legality of the Israeli occupation

Even assuming that Gaza was no longer occupied by Israel since 2005, it is not disputed that the other Palestinian territories, the West Bank and East Jerusalem, were and remain under Israeli occupation. The legality of this occupation is a matter of debate. There are several reasons why this issue is complicated. These reasons include the validity of the legal argument put forward by Israel to justify the Six-Day War and the ensuing occupation of the Palestinian territories. The justification officially invoked by Israel before the UN Security Council was based on the argument of self-defence in response to an armed attack by Arab states, in particular Egypt.[63] It is not disputed that a state acting in self-defence may occupy a foreign territory – without ever being authorized to annex it – as long as this occupation ensures its protection against the aggressor.[64] While the neighbouring Arab states can no longer be such an aggressor, since Egypt and Jordan recognized the existence of Israel and no longer threaten this state, it is moreover argued that the threat would now come from attacks carried out by Palestinian armed groups from a foreign territory. It is also claimed, in response to those who assert that the occupation is illegal because certain Israeli conduct contravenes the right of the Palestinian people to self-determination,[65] that this cannot be the case if the Israeli military presence is justified by the right of self-defence.[66]

This reasoning is, however, contested. Some argue that, in light of statements made by Israeli leaders after the Six-Day War,[67] Israel acted on the basis of an unaccepted or at least controversial form of self-defence, namely preventive self-defence,[68] aimed at preventing an imminent threat of armed attack from the neighbouring Arab states.[69] It is also argued, with respect to the alleged right of Israel to maintain its occupation to protect itself against armed attacks by Palestinian armed groups originating from the OPT, that the right of self-defence is not available in such case, since, as will be explained below, the armed attacks would come from a territory that Israel occupies and would not be attributable to any foreign state.[70] In addition, without any justification based on self-defence, the Israeli occupation could be considered as illegal since it would infringe the right of the Palestinian people to self-determination. Finally, it is also claimed that the

[61]Ibid., paras 90–91. See, e.g., M. Milanovic, 'The Occupation of Gaza in the ICJ Palestine Advisory Opinion', *EJIL: Talk!*, 23 July 2024.

[62]See *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, *supra* note 15 (Judges Tomka, Abraham and Aurescu, Joint Opinion), paras. 15–17.

[63]UN Doc. S/PV.1347 (5 June 1967), para. 30.

[64]See, e.g., E. Benvenisti, *The International Law of Occupation* (2012), 17.

[65]See, e.g., A. Imseis, *The United Nations and the Question of Palestine* (2023), 196, 200–3.

[66]See, e.g., *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, *supra* note 15, (Judges Nolte and Cleveland, Joint Declaration), para. 8.

[67]See, e.g., statements of the Prime Minister L. Eshkol, 'Admission on Attack', *Time* (London), 8 July 1967 and of the Minister Menahem Begin, 'Excerpts from Begin Speech at National Defense College', *N.Y. Times*, 21 August 1982, A6.

[68]See, e.g., about the controversial nature of this type of self-defence, R. van Steenberghe, *La légitime défense en droit international public* (2012), 406–12.

[69]See, e.g., R. Wilde, 'Israel's War in Gaza is Not a Valid Act of Self-Defence in International Law', *Opinio Juris*, 9 November 2023; Committee on the Exercise of the Inalienable Rights of the Palestinian People, The Legality of the Israeli Occupation of the Occupied Palestinian Territory, including East Jerusalem, United Nations (2023), 51–2.

[70]See Section 3.1, *infra*.

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prolonged nature of the occupation has rendered it illegal and that such occupation then amounts to an unlawful de facto annexation of the OPT.[71]

Another significant element fuelling the debate is the interpretation of UNSC Resolution 242, unanimously adopted on 22 November 1967 following the Six-Day War. This resolution, which pursued the ambitious aim of establishing 'a just and lasting peace in the Middle East',[72] is based on two fundamental principles and mentions, firstly, '[w]ithdrawal of Israel armed forces from territories occupied in the recent conflict'[73] and, secondly, the recognition of the right of the states in the region, including Israel, 'to live in peace within secure and recognized boundaries free from threats or acts of force'. The chronology in the application of these two principles is subject to divergent interpretations. Some states believe that Israel must first withdraw before its security is guaranteed,[74] while others interpret these two principles as having to be applied concurrently:[75] Israel must only withdraw from the occupied territories as far as its security is guaranteed, or, in other words, territory will be returned in exchange for peace. As emphasized by several states,[76] various peace plans, including the Oslo Accords[77] and the roadmap adopted in 2003 by a diplomatic quartet[78] are based on this 'land for peace' rationale. According to that view, the current occupation by Israel would be justified by the need to ensure its security in accordance with UNSC Resolution 242. Furthermore, although the UN General Assembly has condemned the Israeli occupation on several occasions, not all states have voted in favour of these condemnations.[79]

A third element that is being discussed is the impact of Israel's unlawful practices and policies as an occupying power on the legality of the Israeli occupation as such. It is undisputed that some of these practices and policies in the administration of the OPT are contrary to international law. This is notably the case of the annexation of East Jerusalem by Israel in 1980[80] and its continuing colonization of the West Bank.[81] These two practices have been unanimously condemned by the international community. Does this mean that such practices make the Israeli occupation as such illegal? The ICJ answered in the affirmative in its 2024 Advisory Opinion on OPT. The issue was at

[71]See, e.g., *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, *supra* note 15, Written Statement of Brazil, paras. 41–46; Written Statement of the Organization of Islamic Cooperation, paras. 276–279; Written Statement of Guyana, para. 10. See also Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel, UN Doc. A/77/328 (14 September 2022), paras. 75, 79.

[72]See UNSC Res. 242 (22 November 1967), point 1.

[73]Unlike the French version, the English version, which is the original one, uses the terms 'from occupied territories' rather than 'from *the* occupied territories', which let some experts to argue that Israel had to withdraw from some and not all the occupied territories; see, e.g., Sabel, *supra* note 36, at 200–4.

[74]See, e.g., statements of Nigeria (UN Doc. S/PV.1373 (9 November 1967), para. 108), Bulgaria (UN Doc. S/PV.1375 (13 November 1967), para. 123), USSR (UN Doc. S/PV.1381 (20 November 1967), para. 9), Indonesia (UN Doc. S/PV.1747 (21/22 October 1973), para. 119), Romania (UN Doc. S/PV1875 (16 January 1976), paras. 31–33), Iraq (UN Doc. S/PV.1876 (19 January 1976), paras. 60–61) and Tanzania (UN Doc. S/PV.1878 (22 January 1976), para.59).

[75]See, e.g., statements of Canada (UN Doc. S/PV.1373 (9 November 1967), para. 215), Denmark (ibid., para. 230), United Kingdom (UN Doc. S/PV.1377 (15 November 1967), paras. 37–39 and S/PV.1934 (25 June 1976), para. 16), France (UN Doc. S/PV.1934 (25 June 1976), para. 48), Japan (UN Doc. S/PV.1938 (29 June 1976), para. 116) and the United States (UN Doc. S/PV.2242 (30 June 1980), para. 18). See also ICJ, *Legal Consequences arising from the Policies and Practices of Israel* . . . , *supra* note 15, Written Statement of the United States of America, para. 11.

[76]See, e.g., *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, *supra* note 15; Written Statement of the United States of America, paras. 1.4, 2.4; Written Statement of the United Kingdom of Great Britan and Irland, para. 10.

[77]See note 27, *supra*.

[78]UN Doc. S/2003/529 (7 May 2003).

[79]See, e.g., UNGA Res. 32/20 (25 November 1977). The resolution has been adopted with 102 in favour, the others opposing it or abstaining.

[80]See, e.g., UNSC Res. 478 (20 August 1980); the United States did not oppose that condemnation by the UN Security Council.

[81]See, e.g., UNSC Res. 2334, *supra* note 25; the United States did not oppose that condemnation by the UN Security Council.

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the heart of the advisory proceedings. The Court found that many practices and policies pursued by Israel in the OPT, mainly those associated with Israel's settlement policy, were unlawful,[82] and it concluded that they rendered the Israeli occupation as such illegal, with the consequence that Israel must withdraw from the OPT 'as rapidly as possible'.[83] According to the Court's reasoning, Israel's practices and policies actually reveal the intention of Israel to annex OPT,[84] which is contrary to the prohibition of acquisition of territory by force,[85] and they permanently obstruct the right of the Palestinian people to self-determination.[86] In the Court's view, this 'has a direct impact on the lawfulness of Israel's continued presence'.[87] According to the Court, Israel's annexation of the OPT and its continued frustration of the right of the Palestinian people to self-determination are the result of a '*sustained abuse* by Israel of its position as an occupying power', which 'violates fundamental principles of international law and renders Israel's presence in the OPT unlawful'.[88]

However, several judges dissented from the majority of the Court on that point.[89] Most of them argued, in line with scholars,[90] that the lawfulness of practices as well as policies pursued by an occupying Power and the legality of its occupation are two distinct issues that must be settled separately on the basis of two different sets of rules.[91] Accordingly, while it is true that many Israel's practices and policies in the administration of the OPT are unlawful and notably amount to an unlawful annexation, this does not necessarily entail the illegality of the Israeli occupation as such. As emphasized by the judges, the wrongful act committed by Israel, which must cease, is its annexation policy, including the practices and policies associated with it, rather than its occupation of the OPT.[92] The judges, therefore, criticized the Court for failing to provide any rigorous legal explanation for drawing the illegality of the Israeli occupation as such from the unlawful Israeli practices and policies and, in particular, from its annexation policy.[93] The same criticism has been raised by scholars[94] who emphasized that the relevant terms used by the Court in that regard, namely 'the sustained abuse by Israel of its position as an occupying power', remain quite obscure.[95]

3. The use of force between states

The legality of the Israeli military intervention in Gaza is widely discussed in relation to *jus ad bellum*, in particular in light of the law of self-defence. In a letter sent to the UN Security Council

[82]See *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, *supra* note 15, paras. 115–154, 163–172, 192–222, 237–242.

[83]Ibid., para. 267.

[84]Ibid., paras. 163–172.

[85]Ibid., para. 179.

[86]Ibid., paras. 237–242.

[87]Ibid., paras. 254–257.

[88]Ibid., para. 261 (emphasis added).

[89]See in particular ibid., (Judges Tomka, Abraham, and Aurescu, Joint Opinion). See also ibid., (Vice-President Sebutinde, Dissenting Opinion), paras. 86–87.

[90]See, e.g., A. Zemach, 'Can Occupation Resulting from a War of Self-Defense Become Illegal?', (2015) 24 *Minnesota Journal of International Law* 313.

[91]See *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, *supra* note 15, (Judges Tomka, Abraham, and Aurescu, Joint Opinion), para. 23.

[92]Ibid., para. 30.

[93]Ibid., paras. 21–22.

[94]M. Milanovic, 'ICJ Delivers Advisory Opinion on the Legality of Israel's Occupation of Palestinian Territories', *EJIL:Talk!*, 20 July 2024.

[95]See, however, certain judges of the majority who attempted to provide legal explanations in their declaration (see *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, *supra* note 15, (Judge Charlesworth, Declaration), paras. 11–28; ibid., (Judges Nolte and Cleveland, Joint Declaration), paras. 3–8). These explanations are mainly based on the law of self-defence and its restrictions. However, as explained above, such legal basis raises numerous issues.

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on 7 October 2023, Israel, indeed, justified its military intervention by the need to 'act in any way necessary to protect its citizens and sovereignty from the ongoing terrorist attacks originating from Gaza and carried out by Hamas and other terrorist organizations',[96] an argument that it repeated at various UNSC meetings on the situation in the Middle East.[97] Many states, mainly Western states, and international organizations have expressly recognized Israel's right to act in self-defence in response to the 7 October attacks, with some states explicitly referring to Article 51 of the UN Charter.[98] Others, however, such as Russia and many Arab states and international organizations, have expressly denied Israel's right to act in self-defence, essentially because of its occupation of the Palestinian territories.[99] It is uncertain whether this argument of self-defence is useful given the preliminary controversies surrounding Palestine (Section 3.1). However, were the argument useful, its validity must be questioned (Section 3.2).

3.1 Usefulness of self-defence in light of the preliminary controversies

Was it necessary for Israel to invoke the right of self-defence to benefit from a legal title allowing it to use force on Gaza? The answer to this question largely depends on the point of view adopted in relation to the controversies examined above. The invocation of self-defence would be useless in three situations. The first is if the State of Palestine is not considered as a state. In such a case, the Israeli use of force would not be carried out on the territory of another state. It would not therefore violate the principle of the prohibition on the use of force, since that prohibition is only applicable between states,[100] which would make it unnecessary to invoke any exception to that principle, including self-defence.[101]

Secondly, self-defence would also be superfluous if Gaza were to be considered as a territory occupied by Israel at the time of its intervention. In that case, the armed attack would come from a territory controlled by the state that claims to respond to it in self-defence. Yet, in its 2004 Advisory Opinion on the wall built by Israel in the occupied Palestinian territory, the ICJ stated that 'Article 51 of the Charter [had] no relevance [in justifying the construction of the wall]' since the threat against which Israel intended to protect itself with the wall 'originate[d] within, and not outside, [the] territory [that it occupied]'.[102] According to the Court, the armed response of an occupying Power to an attack originating from the territory that this Power is occupying is not governed by *jus ad bellum*, but (mainly) by LOAC.[103] Such a reasoning was expressly invoked by states, like Russia, to justify their refusal to recognize Israel's right to respond in self-defence to the 7 October attacks.[104]

Thirdly, it can be argued that the argument of self-defence would also not be necessary if the Israeli occupation of (the rest of) Palestine were lawful under *jus ad bellum* and based on security grounds. In such a case, in accordance with the opinion upheld by scholars,[105] the Israeli response

[96]UN Doc. S/2023/742 (9 October 2023), at 2. Israel does not, however, expressly refer to Art. 51 of the UN Charter in its letter.

[97]See, e.g., UN Doc. S/PV.9439 (16 October 2023), at 11: '. . . the Council must support Israel's right to defend itself'.

[98]See the numerous references in R. van Steenberghe, 'A Plea for a Right of Israel to Self-Defence in Order to Restrict Its Military Operations in Gaza: When *Jus Ad Bellum* Comes to the Aid of *Jus In Bello*', *EJIL:Talk!*, 16 November 2023.

[99]Ibid.

[100]See, e.g., *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion of 22 July 2010, [2010] ICJ Rep. 403, para. 80.

[101]See, e.g., M. Milanovic, 'Does Israel Have the Right to Defend Itself?', *EJIL:Talk!*, 14 November 2023.

[102]See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* note 25, para. 138.

[103]See, e.g., C. Tams, 'Light Treatment of a Complex Problem: The Law of Self-Defence in the Israeli Wall Case', (2005) 16 *European Journal of International Law* 963, 970.

[104]See, e.g., statements of Jordan (UN Doc. S/PV.9439 (16 October 2023), at 12); Russia (UN Doc. S/PV.9453 (25 October 2023), at 3–4). See also OHCHR, 'Grave Violence in Israel and Gaza Has Outraged the Conscience of Humanity, UN Commission of Inquiry Says', 27 October 2023.

[105]See, e.g., M. Longobardo, *The Use of Armed Force in Occupied Territory* (2018), 126–33.

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would already be justifiable based on such reasons and the invocation of an additional justification of the same nature would be superfluous.

It is, therefore, paradoxical from a legal perspective that Israel and other states, including the United States, sought to justify the Israel's response on the basis of self-defence, although they share certain points of view which make the invocation of such legal argument superfluous, in particular the absence of Palestinian statehood. This is even more paradoxical in that, by referring to self-defence, which presupposes the use of force on the territory of a foreign state, these states implicitly admit that Palestine is a state even though, according to their official position, they do not recognize this entity as a state.

3.2 The validity of the argument of self-defence

If one adopts another point of view, namely that the State of Palestine is a state, that Gaza was not an occupied territory at the time of the Israeli intervention, and that the Israeli occupation of the rest of Palestine is illegal, the argument of self-defence becomes useful to justify the Israeli response under *jus ad bellum*. Does it mean that this argument is legally sound? While this is manifestly the case regarding the conditions for triggering the right to self-defence (Section 3.2.1), it is more doubtful with respect to the conditions for its exercise (Section 3.2.2).

3.2.1 Conditions for triggering the right of self-defence

Three main obstacles need to be examined in relation to the conditions for triggering Israel's right to self-defence. The first stems from the well-established customary condition that self-defence can only be triggered if it is necessary for the victim state to protect itself against an armed attack. This is one aspect of the condition of necessity under the law of self-defence, which requires that 'no lawful alternative in practice' to the use of force in self-defence is available.[106] Authors argue that Israel's response was no longer necessary, given that the 7 October armed attack had ended by the time Israel intended to respond to it by force and that its protection against the continued firing of rockets could be ensured by the use of the 'Iron Dome'.[107] Practice shows, however, that self-defence, especially when exercised in response to attacks by non-state actors, such as Hamas, can be triggered not only to repel the armed attack but also to prevent further attacks,[108] which Israel is claiming in this case.[109] It should also be noted that the 'Iron Dome' does not protect Israel from all rocket attacks, since these rockets have reached and continue to reach Israeli territory.[110] Finally, the taking of hundreds of Israelis as hostages, including soldiers, could be qualified as a continuous armed attack by Hamas against Israel, justifying a response in self-defence.[111] In any case, no state that opposed the right of Israel to self-defence has invoked non-compliance with this condition of necessity as a reason for its opposition.

The second obstacle concerns the non-state nature of the author of the armed attack. Hamas is not the government of the State of Palestine, which is represented at the international level by the Palestinian Authority. Moreover, the acts committed by Hamas cannot be attributed to the State of Palestine under the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA).[112] According to certain scholars,[113] self-defence can only be invoked in response to an

[106]International Law Institute, Resolution 'Present Problems of the Use of Armed Force in International Law A. Self-Defence', 27 October 2007, available at www.idi-iil.org/app/uploads/2017/06/2007_san_02_en.pdf.

[107]See, e.g., O. Corten, in the video entitled 'La guerre de Gaza et le droit international (2023)', at 1:17:10.

[108]See, e.g., van Steenberghe, *supra* note 68, at 415–29.

[109]See, e.g., UN Doc. S/PV.9439 (16 October 2023), at 11.

[110]See, e.g., 'Hamas Rockets still Breaking through Israeli Defences despite Airstrikes', *CBC News*, 27 October 2023.

[111]See van Steenberghe, *supra* note 68, at 211–14.

[112]See, e.g., Corten, *supra* note 107, at 1:02:12.

[113]See, e.g., O. Corten, *Le droit contre la guerre. L'interdiction du recours à la force en droit international contemporain* (2014), 246–305.

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armed attack committed by states. However, the issue is now debated and there is a growing body of practice, to which certain states contributed notably by way of their armed intervention in Syria,[114] which tends to recognize the right of states to respond in self-defence to armed attacks by non-state actors – at least when the state on whose territory the action of self-defence is conducted proves to be unable or unwilling to put an end to the armed attack launched from its territory.[115] Moreover, the states that challenged the right of Israel to self-defence have not invoked the non-state nature of Hamas to justify their view before UN bodies.[116] In fact, the absence of any such challenge, combined with the recognition by many states of the right of Israel to respond in self-defence to the 7 October attacks, arguably reinforces the contemporary practice in favour of a right to self-defence in response to armed attacks by non-state actors.

The third obstacle, mentioned by states[117] and supported by some scholars,[118] is the illegal occupation of the occupied Palestinian territories. If the Israeli occupation is considered illegal under *jus ad bellum*, Israel is the aggressor state and Palestine the victim state. It is therefore the State of Palestine that would be entitled to resort to self-defence against Israel to put an end to Israel's illegal occupation.[119] By contrast, Israel could no longer invoke self-defence to respond to such a use of force since this use of force would be legal and would not therefore constitute an armed attack – as long as it remains within the limits of the law of self-defence. Other authors,[120] however, rightly point out that this scenario does not correspond to the situation in the present case. It was not the State of Palestine that carried out the 7 October attacks, to which Israel responded in self-defence. It was an armed group which, as already seen, does not represent that state and whose actions are not attributable to it. This armed group cannot therefore exercise the right of self-defence of the State of Palestine, which would have precluded Israel from invoking the same right in response. On this view, the argument of self-defence invoked by Israel remains valid, irrespective of the issue of the legality of the Israeli occupation under *jus ad bellum*.

3.2.2 Conditions for the exercise of the right to self-defence

While the conditions for triggering the right of self-defence have apparently been respected by Israel, this is not the case for the conditions for the exercise of such right. This right must notably respect the conditions of proportionality and necessity – with the latter also including an aspect relating to the exercise of the right of self-defence. Many scholars defend a teleological approach to proportionality, according to which the state acting in self-defence can only take measures that are strictly necessary or appropriate to protect itself from the armed attack.[121] According to this approach, the condition of proportionality merges with that of necessity. Such an approach does not, however, correspond to the general practice of states,[122] which rather consider the condition

[114]See, e.g., the letter sent by the Netherlands to the UN Security Council, UN Doc. S/2016/132 (10 February 2016).

[115]See, e.g, R. van Steenberghe, 'Les interventions militaires étrangères récentes contre le terrorisme international. Première partie : fondements juridiques (*jus ad bellum*)', (2015) 61 *Annuaire français de droit international* 145, 173–98.

[116]See, e.g., *contra*: OHCHR, *supra* note 104.

[117]See, e.g., statement of Pakistan (UN Doc. S/PV.9443 (18 October 2023), at 27).

[118]See, e.g., Corten, *supra* note 107, at 1:20:17.

[119]See, e.g., about the right of states to use force in self-defence to regain their own territory occupied by a foreign state, D. Akande and A. Tzanakopoulos, 'Use of Force in Self-Defence to Recover Occupied Territory: When Is It Permissible', *EJIL: Talk!*, 18 November 2020.

[120]See Milanovic, *supra* note 101.

[121]See, e.g., R. Ago, Addendum to the Eighth Report on State Responsibility, UN Doc. A/CN.4/318/Add.5-7 (1980), para. 121; D. Kretzmer, 'The Inherent Right to Self-Defence and Proportionality in "Jus Ad Bellum"', (2013) 24 *European Journal of International Law* 235, 240.

[122]See, e.g., debate on the blogs on the scope of the condition of proportionality, notably A. Haque, 'Enough: Self-Defense and Proportionality in the Israel-Hamas Conflict', *Just Security*, 6 November 2023; C. Kels, 'The Problem of Proportionality: A Response to Adil Haque', *Just Security*, 14 November 2023; A. Haque, 'Proportionality in Self-Defense: A Brief Reply', *Just Security*, 14 November 2023; Milanovic, *supra* note 101; Y. Shany and A. Cohen, 'International Law "Made in Israel" v. International Law "Made for Israel"', *Articles of War*, 22 November 2023.

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of proportionality as involving a quantitative test. More specifically, this practice shows that states tend to qualify an action in self-defence as disproportionate when the scale and damage of that action are manifestly greater than the scale and damage of the armed attack.[123] The ICJ also appears to adopt such a quantitative approach to proportionality.[124] Moreover, this quantitative test seems to be used by states to assess more easily compliance with the condition of necessity. By emphasizing the existence of a manifest disproportion, they intend to show that the measures taken by the state acting in self-defence exceed what is strictly necessary or are inappropriate to achieve the authorized protective goal.[125] In other words, in case of manifest disproportion, it is assumed that the objective pursued by the state invoking self-defence is no longer the objective authorized by the law of self-defence but consists, for example, in punishing or taking revenge against the author of the armed attack. This approach seems logical, as it is difficult to determine in the abstract the protective objective that can be concretely pursued by a state acting in self-defence, as well as the specific measures that are necessary or appropriate to achieve that objective. Being based on tangible and observable elements, the quantitative 'manifest disproportionate' test makes it easier to assess non-compliance with the condition of necessity, thereby reducing the margin of discretion.

In this sense, the greater the number of Palestinian victims and the destruction caused by the Israeli intervention,[126] the more difficult it becomes for Israel to argue that its intervention is proportionate and respects the law of self-defence. Given the number of victims and the extent of destruction, weighed against the number of victims and destruction caused by the attacks by Hamas, it seems that the measures taken by Israel manifestly exceed what is necessary or are inadequate to protect itself against the armed attack of which it has been the victim, and that the objective pursued by its measures no longer corresponds to the objective that can be pursued in self-defence. Some states quite quickly emphasized the disproportionate nature of the Israeli intervention, even though they had recognized Israel's right to self-defence.[127]

These conditions for the exercise of the right to self-defence prove crucial for limiting Israel's intervention in Gaza, especially in light of the potential weaknesses, as will be shown below, of LOAC in this respect. Hence, by recognizing Israel's right to self-defence, even though that right was not necessary to provide Israel with a legal title to use force in Gaza under *jus ad bellum*, certain states, such as the United States,[128] paradoxically made this use of force subject to strict conditions relating to the exercise of that right. Conversely, by not recognizing Israel's right to self-defence because the armed attack originated from an occupied territory, in accordance with the 2004 ICJ Advisory Opinion, certain states, such as Russia,[129] paradoxically deprived themselves of legal means to limit Israel's use of force.

[123]See, e.g., van Steenberghe, *supra* note 68, at 448–58; T. Ruys, *'Armed Attack' and Article 51 of the UN Charter. Evolutions in Customary Law and Practice* (2011), 110–11.

[124]See, e.g., *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, [1986] ICJ Rep. 14, para. 237; *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Merits, Judgment of 6 November 2003, [2003] ICJ Rep. 161, paras. 76–77; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Merits, Judgment of 19 December 2005, [2005] ICJ Rep. 168, para. 147.

[125]See, e.g., van Steenberghe, *supra* note 68, at 455–8.

[126]See, e.g., OCHA, 'Hostilities in the Gaza Strip and Israel | Flash Update #138', 13 March 2024.

[127]See, e.g., statement By H.E. Inga Rhonda King Ambassador/Permanent Representative, Permanent Mission of Saint Vincent and the Grenadines to the United Nations, 10th Emergency Special Session of the General Assembly The Situation in the Middle East, Thursday, 2 November 2023, at 3–4. See also the resolution of the *Chambre des représentants de Belgique*, 31 January 2024, available at www.lachambre.be/FLWB/PDF/55/3805/55K3805002.pdf, point 4.

[128]See, e.g., for the recognition of that right by the United States, UN Doc. S/PV.9439 (16 October 2023), at 3.

[129]See, e.g., for the denial of that right by Russia, UN Doc. S/PV.9453 (25 October 2023), at 3–4.

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4. Military operations by the belligerents

Legal debates about the armed conflict in Gaza also concern the legality of the specific military operations carried out by the belligerents under LOAC. Again, the preliminary controversies examined above on Palestine make this debate quite complex and findings become uncertain. Those uncertainties mainly concern the legal qualification of the armed conflict under LOAC and, accordingly, the applicable LOAC rules (Section 4.1). They do not, however, prevent one from assessing the legality of certain military operations, for which this legal qualification has little or no impact (Section 4.2).

4.1 Qualification of the armed conflict and applicable law in light of the preliminary controversies

The applicable conventional LOAC rules vary according to the nature of the conflict. While the whole body of LOAC applies to international armed conflicts, which usually oppose two or more states,[130] only a limited number of conventional LOAC rules apply to non-international armed conflicts, to which at least one non-state armed group is party. In addition, certain LOAC rules of the law of international armed conflict regulate situations that amount to belligerent occupation. The classification of the armed conflict in Gaza is particularly complex. Once again, it mostly depends upon the point of view adopted in relation to certain of the controversies outlined above. Those controversies prove crucial in determining whether the armed conflict is of an international or non-international nature (Section 4.1.1) and to what extent the law of occupation applies in Gaza (Section 4.1.2)

4.1.1 Non-international armed conflicts v. international armed conflicts other than occupations

Is the armed conflict in Gaza a non-international or an international armed conflict? Three main scenarios influence the answer to this question. The first is the scenario according to which Palestine is not considered as a state under international law. Two different positions can be upheld in this scenario. The first is in line with the majority position, supported by most authors and confirmed by abundant practice, according to which the qualification of the conflict depends upon the state or armed group's nature of the belligerent parties,[131] even if the conflict takes place abroad.[132] In this case, the conflict is between a state, Israel, and a non-state armed group, Hamas. This conflict must, therefore, normally be qualified as a non-international armed conflict, even if it takes place outside the territory of Israel. The second position, which represents the minority view, is the position supported and repeated by the Israeli Supreme Court in well-established case law. The Court already had the occasion to rule several times on the classification of armed clashes between Israel and Palestinian armed groups, including Hamas. Breaking with the majority approach, the Court has classified such clashes as an international armed conflict on the ground that Israel was acting outside its territory, in Gaza. It maintained such a view even after 2005, although it no longer considered Gaza to be occupied territory.[133] The discrepancy between these two positions has placed the Israeli government in a delicate situation with respect to the classification of the current armed conflict with Hamas. This is illustrated by the document published on 2 November 2023, in which the Israeli Ministry of Defence presents the main legal

[130]See, e.g., Art. 2 common to the four 1949 Geneva Conventions. Such a conflict may also oppose other subjects of international law, like international organizations.

[131]See, e.g., J. de Hemptinne, *Les conflits armés en mutation* (2019), 36–46, 61–75.

[132]See, e.g., J. Pejic, 'Extraterritorial targeting by means of armed drones: Some legal implications', (2014) 96 *International Review of the Red Cross* 67, 78.

[133]See, e.g., *Public Committee against Torture in Israel and LAW – Palestinian Society for the Protection of Human Rights and the Environment v. Government of Israel and others*, HCJ 769/02, 14 December 2006, para. 18; *Physician for Human Rights and others v. The IDF Chief of Staff and the Military Advocate General*, HCJ 3003/18 et HCJ/18, 24 May 2018, para. 38.

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aspects of the conflict and concludes, after recalling the two positions, that the question of qualification is open to debate.[134]

A second scenario is the situation in which the State of Palestine is considered a state under international law. In this scenario, the armed conflict in Gaza could be qualified as both an international armed conflict and a non-international armed conflict according to the 'double classification theory'.[135] Under this theory, which has been developed by the ICRC,[136] when a state uses force against an armed group on the territory of another state without that state's consent, this use of force triggers an international armed conflict between the two states, which overlaps with a non-international armed conflict between the intervening state and the armed group. According to this theory, this second scenario would imply the existence of two simultaneous armed conflicts: an international armed conflict between Israel and the State of Palestine, since Israel intervenes on the territory of the State of Palestine without the latter's consent, and a non-international armed conflict between Hamas and Israel, since the military operations are directed against a non-state armed group. Even if this 'double classification theory' is supported in legal scholarship,[137] there remain grey areas as to the determination of the acts that would fall into one or the other type of armed conflict. Some scholars argue that all the acts of the intervening state, namely Israel, would be regulated by both the law of international armed conflict and the law of non-international armed conflict.[138] Others limit the application of the law of non-international armed conflict to certain acts only, such as attacks exclusively impacting members of the armed group,[139] or, on the contrary, extend the application of this law to most acts of the intervening state and envisage the application of the law of international armed conflict only to some of them, such as the detention by the intervening state of enemy nationals on its territory.[140] Each of these positions raises problems with respect to the applicable law. This has led some authors to reject the double classification theory and to retain only the qualification of non-international armed conflict.[141]

A third scenario is based on the assumption that Gaza was an occupied territory at the time of the Israeli response to the 7 October attacks. It is true that, according to a majority view,[142] the qualification of the hostilities between an occupying power and an armed group in an occupied territory is not impacted by the situation of occupation and normally depends upon the state or armed group's nature of the parties to the conflict. However, a minority view contends that hostilities such as those currently opposing Israel to Hamas in Gaza must necessarily be qualified as an international armed conflict.[143] The argument is that those hostilities are an extension of the situation of occupation and this situation constitutes a particular type of international armed conflict.[144]

[134]State of Israel, Ministry of Foreign Affairs, Hamas-Israel Conflict 2023: Key Legal Aspects, 2 November 2023, at 8, footnote 2.

[135]See, e.g., ICRC, *Commentary on the First Geneva Convention, supra* note 57, paras. 260–262.

[136]Ibid.

[137]See, e.g., N. Lubell, 'Fragmented Wars: Multi-Territorial Military Operations against Armed Groups', (2017) 93 *International Law Studies* 215, 233.

[138]See, e.g., D. Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts', in E. Wilmshurst (ed.), *International Law and the Classification of Conflicts* (2012), 32, at 74. See also A. Haque, 'Armed Intervention and Overlapping Conflict', SSRN, 2 October 2017, available at papers.ssrn.com/sol3/papers.cfm?abstract_id = 3046791.

[139]See, e.g., C. Heyns et al., 'The International Law Framework Regulating the Use of Armed Drones', (2016) 65 *International & Comparative Law Quarterly* 791, 815; V. Koutroulis, 'The Fight Against the Islamic State and Jus in Bello', (2016) 29 *Leiden Journal of International Law* 827, 842.

[140]See, e.g., about such approach, R. van Steenberghe, 'Les interventions militaires étrangères récentes contre le terrorisme international. Deuxième partie: le droit applicable (*jus in bello*)', (2017) 63 *Annuaire français de droit international* 37, 69–71.

[141]See, e.g., P. Lesaffre, 'Double Classification of Non-Consensual State Interventions: Magic Protection or Pandora's Box ?', (2022) 99 *International Law Studies* 408, 434–52.

[142]See, e.g., J. de Hemptinne, 'Classifying the Gaza Conflict Under International Humanitarian Law, a Complicated Matter', *EJIL:Talk!*, 13 November 2023.

[143]See, e.g., Longobardo, *supra* note 105, at 218–29.

[144]See, e.g., C. McCarthy, 'The Paradox of the International Law of Military Occupation: Sovereignty and the Reformation of Iraq', (2005) 10 *Journal of Conflict & Security Law* 43, 44.

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4.1.2 Occupation

There is a strong argument that the more specific rules of the law of international armed conflict regulating belligerent occupations also apply in Gaza. However, their scope of application is dependent upon the position adopted in relation to the controversy on the status of Gaza as an occupied territory before the 7 October attacks. Two main scenarios can be identified. In the first scenario, it is assumed that Gaza remained occupied after the 2005 Israeli Disengagement Plan – or, at least, that Israel was still required to fulfil certain obligations as an occupying power in Gaza – since Israel retained control over Gaza's land and sea 'borders' as well as its airspace. Two positions can be upheld in that regard. According to certain scholars, the occupation has ceased since intensive hostilities broke out in the former occupied territory, even if Israel retained remote control.[145] However, others argue that this remote control did not cease after the 7 October attacks, and that the occupation of Gaza – or the application of the law of occupation to that territory – has, therefore, never ended.[146] This is allegedly evidenced by Israel's continued control over the delivery of essential supplies to the Gazan population, such as water, fuel, and electricity.

In the second scenario, it is assumed that the law of occupation was no longer applicable in Gaza after 2005, since the Israeli military forces withdrew from the territory. That law may then apply again after the 7 October attacks, either as soon as the Israeli forces have reinterred Gaza, according to a broad approach to the beginning of occupation,[147] or only when and where these forces exercised effective territorial control, according to the traditional approach to the beginning of occupation.[148] This seems to have been the case at least in certain parts of Gaza, in particular the north where the Israeli forces claimed to have completely dismantled Hamas and gained control over the region,[149] and from January to May 2024, when hostilities resumed in northern Gaza.[150]

In any scenario, it is irrelevant whether Palestine is considered a state under international law. The scenario in which occupation is claimed to have never ended does not require that Gaza must be part of a foreign state, namely the State of Palestine, since, as stated by the ICJ,[151] the Israeli occupation that began in 1967 resulted from an international armed conflict between Israel on one hand and Jordan and Egypt on the other. The issue of statehood of Palestine is not relevant either with respect to the other scenarios, even if the claimed renewed occupation of Gaza by Israel can no longer be considered the result of an international armed conflict with Jordan and Egypt. Indeed, it is widely acknowledged that the unsettled sovereign status of a territory is irrelevant for the application of the law of occupation. As supported in legal scholarship[152] and by the ICRC,[153] 'it is sufficient that the State whose armed forces have established effective control over the territory was not itself the rightful sovereign of [that territory]'.[154]

[145]See, e.g., M. Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (2019), 345.

[146]See, e.g., RULAC, Geneva Academy, Military Occupation of Palestine by Israel, available at www.rulac.org/browse/conflicts/military-occupation-of-palestine-by-israel#collapse2accord; Detailed Findings on the Military Operations and Attacks carried Out in the Occupied Palestinian Territory from 7 October to 31 December 2023, Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel, UN Doc. A/HRC/56/CRP.4 (10 June 2024), at 417.

[147]According to such approach, the law of occupation – or at least some of its rules – would apply as soon as the protected persons fall into the hands of the Israeli forces; see, e.g., *Commentary on the Geneva Conventions of 12 August 1949, Vol. IV* (1958), 60.

[148]See, e.g., ICRC Commentary to Art. 2 of 1949 Geneva Convention III (2021), paras. 335–338.

[149]See, e.g., O. Ben-Naftali et al., 'Legal Opinion on the Status of Israel in the North of Gaza', 1 April 2024, available at static.gisha.org/uploads/2024/04/Legal-Opinion-on-the-status-of-Israel-in-the-north-of-Gaza-EN.pdf.

[150]See, e.g, 'What's Behind Resurgent Fighting in North Gaza', *Dawn*, 20 May 2024.

[151]See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* note 25, para. 101.

[152]See, e.g., A. Orakhelashvili, 'Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: Opinion and Reaction', (2006) 11 *Journal of Conflict & Security Law* 119, 123.

[153]See ICRC Commentary to Art. 2 of the 1949 Geneva Convention III, *supra* note 148, para. 358.

[154]Ibid.

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4.2 Certain conduct

The uncertainty about the LOAC applicable to the armed conflict in Gaza makes it difficult to assess the legality of certain conduct. This is, for example, the case for detention of persons by the belligerents, since LOAC significantly varies on this issue according to conflict classification. This is not, however, the case for the main conduct of the belligerents in the armed conflict in Gaza, in particular the miliary operations launched by Israel in that territory (Section 4.2.1), its conduct in relation to relief supplies (Section 4.2.2), and the military actions by Hamas (Section 4.2.3). Customary international law has, indeed, partly bridged the gap between the law of international armed conflict and the law of non-international armed conflict with respect to such military conduct. The role of customary international law is even more important in this case as it makes it possible to bind states that are not parties to the relevant treaties, which is the situation of Israel with respect to the two 1977 Additional Protocols. As a result, the rules of these two protocols, which are also part of customary law, are applicable to Israel insofar as Israel has not persistently objected to them. This is the case for many of these rules, including those relating to attacks and humanitarian aid.[155]

4.2.1 Military operations by Israel

Israel has been carrying out massive aerial bombardments in Gaza since the 7 October attacks. It also launched a large-scale ground operation on 27 October 2023 and started a military offensive in Rafah on 7 May 2024. The legality of these ongoing air and ground military operations[156] must mainly be assessed in light of the three major LOAC principles governing the conduct of hostilities.[157] The first principle is that of distinction, which requires the attacker to distinguish between civilians and members of the enemy armed forces as well as between civilian objects and military objectives, and to target only members of the armed forces and military objectives.[158] In this sense, indiscriminate attacks, which do not make such a distinction,[159] as well as attacks that intentionally target civilians or civilian objects, are prohibited. It is difficult to assert with certainty, especially in light of the currently available information, that Israel carries out such attacks, although cases of indiscriminate attacks have been reported.[160] Israel usually argues that it is targeting military objectives, including when it destroys houses, hospitals, or ambulances.[161] Such destruction is authorized by LOAC when the civilian object has become a military objective, notably when it is used by the enemy armed forces.[162] This is the argument put forward by Israel, which criticizes Hamas for using civilian objects to protect itself or for a military purpose,[163] which seems to be, at least partly, confirmed by the facts on the ground.[164]

[155]See, e.g., regarding the rules of those Protocols that Israel does not recognize as having a customary nature, 'Status of Protocols Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of Armed Conflicts', by Ms. Sarah Weiss Ma'udi, Legal Advisor Permanent Mission of Israel to the United Nations, New York, 20 October 2020.

[156]See, e.g., OCHA, 'Hostilities in the Gaza Strip and Israel | Flash Update #166', 15 May 2024.

[157]It is well admitted that these three principles apply in both international and non-international armed conflicts. Regarding customary law applicable to both conflicts see the ICRC study on customary LOAC (J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law. Volume 1: Rules* (2005), notably Rules 1, 7, 11, 14, 15).

[158]Ibid., Rules 1, 7.

[159]Ibid., Rule 14.

[160]See, e.g., Amnesty International, 'Damning Evidence of War Crimes as Israeli Attacks Wipe Out Entire Families in Gaza', 20 October 2023.

[161]See, e.g., State of Israel, Ministry of Foreign Affairs, *supra* note 134, at 9.

[162]See the definition of the notion of military objective provided by Art. 52 of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I).

[163]See, e.g., State of Israel, Ministry of Foreign Affairs, *supra* note 134, at 9.

[164]See, e.g., 'L'Union européenne condamne l'utilisation de civils comme "boucliers humains" à Gaza', *RTS*, 12 November 2023.

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Even if Israel were to target only members of Hamas and civilian objects that have become military objectives, it would have to respect a second principle, that of proportionality.[165] According to this principle, the damage which can reasonably be expected from an attack to civilians or civilian objects, including damage that aggravates the humanitarian situation for the Gazan population, must not be excessive in relation to the concrete and direct military advantage expected from that attack. This condition of proportionality is limited in several respects. Firstly, it is unable to restrict the military campaign of the belligerent as a whole, since it regulates only each specific military attack. Secondly, it only takes into account a few types of damage, mainly those caused to civilians and civilian objects. Thirdly, its assessment is complex for two main reasons. The first is that it involves comparing two elements of a different nature: a quantitative element, civilian casualties and damage to civilian objects, on the one hand; and a qualitative element, a military advantage, on the other hand.[166] The second reason is that the proportionality calculation must be carried out before the military operation by the military commander,[167] on the basis of the information reasonably available to that commander.[168] If this calculation has been carried out correctly, the proportionality test is respected, even if excessive collateral damage is caused at the time of the attack due to facts that the military commander could not have reasonably foreseen. Yet, it is impossible at this stage to know exactly Israel's plans for military action, [169] even though the anticipated damage must be extensive given the densely populated nature of Gaza.[170] This is notably borne out by the diverging scholarly views on the proportionality of certain Israeli military operations.[171] This explains why the condition of proportionality under the law of self-defence may appear to be a more efficient constraint on Israel's military intervention. Unlike the LOAC principle of proportionality,[172] *jus ad bellum* proportionality takes into account the whole action in self-defence and assesses that action in light of various factors, including its scale and all the damage it causes. In addition, as explained above, it involves balancing quantitative elements of the same nature.

Finally, even assuming that Israel is conforming to the LOAC principles of distinction and proportionality, Israel would also have to comply with the principle of precaution in attack, which requires, as a general obligation, that belligerents must do everything feasible to minimize the damage caused to civilians or civilian objects.[173] This general obligation of means, the implementation of which depends upon what is practically or materially possible for the attacker according to both humanitarian and military considerations, implies a series of other obligations of the same nature, such as using the most appropriate methods of combat and weapons to minimize civilian casualties. Israel has been criticized in this respect for using certain weapons, such as bombs that weight more than 900 kilograms, which cannot spare civilians and civilian

[165]See, e.g., Henckaerts and Doswald-Beck, *supra* note 157, Rule 14.

[166]See also R. J. Barber, 'The proportionality equation: balancing military objectives with civilian lives in the armed conflict in Afghanistan', (2010) 15 *Journal of Conflict and Security Law* 467, 476.

[167]See, e.g., Sassòli, *supra* note 145, at 362.

[168]See, about the reasonable commander test, *Prosecutor v. Stanislav Galić*, Judgment of 30 November 2003, IT-98-29, para. 58; I. Henderson and K. Reece, 'Proportionality under International Humanitarian Law: The Reasonable Military Commander Standard and Reverberating Effects', (2018) 51 *Vanderbilt Journal of Transnational Law* 835, 839–46.

[169]See also M. Sassòli, 'Assessing the Conduct of Hostilities in Gaza – Difficulties and Possible Solutions', *Articles of War*, 30 October 2023.

[170]See, e.g., I. Robinson and E. Nohle, 'Proportionality and precautions in attack: The reverberating effects of using explosive weapons in populated areas', (2016) 98 *International Review of the Red Cross* 107, 131–4.

[171]See, e.g., about the attack on the *Jabalia* refugee camp on 31 October 2023, A. Manea, 'Too Early To Tell? The (Un) lawfulness of Israeli Attacks: The Case of the Jabalia Refugee Camp', *EJIL:Talk!*, 4 November 2023; M. Schack, 'In Defence of Preliminary Assessments: Proportionality and the 31 October Attack on the Jabalia Refugee Camp', *EJIL:Talk!*, 8 November 2023.

[172]See, e.g., about the distinction between the two types of proportionality, R. van Steenberghe, 'Proportionality under *Jus ad Bellum* and *Jus in Bello*: Clarifying their Relationship', (2012) 45 *Israel Law Review* 107.

[173]See, e.g., Henckaerts and Doswald-Beck, *supra* note 157, Rule 15.

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objects, especially given that the operations are being carried out in a densely populated theatre of war.[174] The general obligation of precaution also implies obligations of result, such as the obligation to warn the population of an attack 'when circumstances permit', meaning when the belligerent's military strategy does not depend on an element of surprise. In this respect, media have reported cases in which Israel has contacted Gazans, warned them of an imminent attack and asked them to evacuate the building where they were staying.[175]

It is difficult at this stage to definitively assess the violations of these three principles by Israel. However, several factors suggest that they have not (always) been respected. These factors include the particularly high number of civilian casualties and destruction of civilian objects, the scale and recurrence of attacks against such objects,[176] and the ensuing disastrous humanitarian consequences for the Gazan population. Violations of these principles have been claimed in a recent report by the UN Commission of Inquiry on the Occupied Palestinian Territory and Israel.[177]

There are also reasonable grounds to believe that Israel has breached LOAC norms that protect specific objects against the effects of attacks, such as objects indispensable to the survival of the civilian population, which include not only those enabling the population to get food and water but also essential items and services, such as clothing, medical supplies, and medical care.[178] LOAC, indeed, prohibits belligerents, as a corollary of the prohibition of starvation of civilians, to 'attack, destroy, remove or render useless' such objects. This prohibition applies irrespective of the nature of the armed conflict[179] and even if the purpose is not to starve civilians as a method of warfare but to merely deny these objects for their substance value to the enemy.[180] It is, indeed, reported that Israel destroyed or rendered useless not only hospitals and medical units in Gaza[181] but also many water facilities, agricultural lands, crops, orchards, and greenhouses.[182] Admittedly, in international armed conflicts and potentially in non-international armed conflicts,[183] such operations are no longer prohibited when the objects become military objectives if they serve as direct supports to military actions. However, they remain prohibited when they are '*expected* to

[174]See, about the application of this principle in urban warfare, Robinson and Nohle, *supra* note 170, at 134–44.

[175]See, e.g., A. Cuddy, 'I'm Calling from Israeli Intelligence. We Have the Order to Bomb. You HaveTwo Hours', *BBC News*, 8 November 2023.

[176]See, for a similar conclusion on the attacks by Russia in Ukraine, based on a pattern of attacks against protected objects, W. Benedek, V. Bilková and M. Sassòli, 'Report on Violations of International Humanitarian and Human Rights Law, War Crimes and Crimes Against Humanity Committed in Ukraine Since 24 February 2022', Report ODIHR.GAL/26/22/Rev.1 (2022) at 25.

[177]See UN Doc. A/HRC/56/CRP.4, *supra* note 146, at 37–61.

[178]D. Akande and E.-C. 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 *Journal of International Criminal Justice* 753, 758–60.

[179]See Rule 54 of the ICRC study on customary LOAC, applicable in both international and non-international armed conflicts, Henckaerts and Doswald-Beck, *supra* note 157, at 189.

[180]See Protocol I, *supra* note 162, Art. 54(2)) and the terms 'for the specific purpose of denying them for their sustenance value to the civilian population *or* to the adverse Party, *whatever the motive*' (emphasis added). Although Art. 14 of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) seems to use the terms 'for its purpose' as referring only to the starvation of civilians as a method of war, scholars (see, e.g., T. Dannenbaum, 'Criminalizing Starvation in an Age of Mass Deprivation in War: Intent, Method, Form, and Consequence', (2022) 55 *Vanderbilt Journal of Transnational Law* 681, 738–740) and the ICRC (Y. Sandoz et al. (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987), para. 4807) interpret it more broadly, as encompassing starvation caused in military operations pursuing a military aim.

[181]See, e.g., 'Strikes, Raids and Incursions: Seven Months of Relentless Attacks on Healthcare in Palestine', *MSF*, 29 May 2024.

[182]See, e.g., N. Tabrizy, I. Piper and M. Berger, 'Israel's Offensive Is Destroying Gaza's Ability to Grow Its Own Food', *Washington Post*, 3 May 2024.

[183]See Henckaerts and Doswald-Beck, *supra* note 157, at 192. Art. 14 of the Protocol II, *supra* note 180, does not contain such an exception. See, however, the 1987 ICRC Commentary to that Article, *supra* note 180, paras. 4806, 4807.

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leave the civilian population with such inadequate food or water as to cause its starvation or force its movement'.[184] The scope of that residual prohibition is broad in two respects. Firstly, as argued in legal scholarship,[185] the operations are prohibited merely when starvation or forced movement is expected. It is not required that such consequences be sought by the belligerents, in this case by Israel. It is enough if they were expected. Secondly, the operations are prohibited even if the principle of proportionality is respected, which means whatever the concrete and direct military advantage anticipated by Israel from its operations. It is arguable that Israel could have expected that its operations destroying, removing or rendering useless objects indispensable to the Gazan population, including those ensuring the functioning of the health care system, would threaten the survival of the Gazan population – especially when coupled, as will be seen, with its conduct in relation to relief supplies – or cause its forced displacement. It is clear from international reports that the survival of the Gazan population was already threatened shortly after the Israeli military response to the 7 October attacks and that this remains the case today.[186]

4.2.2 Israel's conduct in relation to relief supplies

The day after 7 October, Israel decided to impose a complete siege on Gaza and to stop all supplies of water, electricity, and fuel to the territory.[187] The Israeli government opposed any delivery of humanitarian aid and all the crossing points between Israel and Gaza were closed. This immediately led to a critical situation, as the only crossing point between Gaza and Egypt, at Rafah, which had the potential to be a lifeline, was also closed.

This stranglehold on Gaza was subsequently eased somewhat. The water supply was restored by Israel, at least in part.[188] Trucks carrying humanitarian aid were allowed to enter Gaza via Rafah as of 21 October 2023,[189] and Israel reopened the Kerem Shalom crossing between Gaza and Israel on 17 December 2023.[190] Fuel imports were once again authorized from 21 November 2023.[191] Yet, relief supplies remain limited and pale in comparison to the basic needs of the Gazan population. Ongoing clashes between Hamas and Israel prevent humanitarian convoys from delivering aid safely and effectively, and alternative means of providing humanitarian relief, by air[192] or sea,[193]

[184]See Protocol I, *supra* note 162, Art. 54(3)(b) (emphasis added).

[185]See, e.g., G. Gaggioli, 'Joint Blog Series on International Law and Armed Conflict: Are Sieges Prohibited under Contemporary IHL?', *EJIL:Talk!*, 30 January, 2019; Akande and Gillard, *supra* note 178, at 762–5.

[186]See, e.g., OCHA, 'Hostilities in the Gaza Strip and Israel | Flash Update #10', 16 October 2023. See also, e.g., UN Web TV, Press Conference by Carl Skau (WFP), 14 December 2023, available at webtv.un.org/en/asset/k13/k139z8z7t5; Integrated Food Security Phase Classification, Gaza Strip: Acute Food Insecurity Situation for 24 November – 7 December 2023 and Projection for 8 December 2023–7 February 2024, 21 December 2023; World Health Organization,'Lethal Combination of Hunger and Disease to Lead to More Deaths in Gaza', 21 December 2023.

[187]See the declaration of the Israeli Minister of Defence, Yoav Gallant, 9 October 2023, available at www.youtube.com/watch?v=1nxvS9VY-t0.

[188]See, e.g., OCHA, 'Hostilities in the Gaza Strip and Israel | Flash Update #9', 15 October 2023, at 1. However, the supply of water has not been completely restored in the north of Gaza: see OCHA, 'Hostilities in the Gaza Strip and Israel | Flash Update #82', 27 December 2023.

[189]See, e.g., 'Guerre Israël-Hamas: plus de 30 camions d'aide humanitaire sont entrés à Gaza en passant par Rafah', *Le Soir*, 30 October 2023.

[190]See, e.g., 'Gaza: l'ONU salue l'annonce concernant le poste frontière de Kerem Shalome', Nations Unies, 16 December 2023; see, e.g., about the passage of humanitarian relief through that post, OCHA, 'Hostilities in the Gaza Strip and Israel | Flash Update #95', 17 January 2024, 1.

[191]See, e.g., OCHA, 'More Aid Delivered into Gaza on First Day of Humanitarian Pause', 24 November 2023. However, this authorization appears to be limited: see, e.g., 'Israel Not Doing Enough to Allow Fuel, Aid into Gaza -US', *Reuters*, 5 December 2023.

[192]See, e.g., S. Dadouch and C. Parker, 'Dropping Aid from Planes Is Expensive and Inefficient. Why Do It?', *Washington Post*, 2 March 2024.

[193]See e.g., Amnesty International, 'Israel-OPT: Maritime Aid Corridor and Seaport Scheme is "Woefully Slow" Response to Gaza Aid Crisis', 8 March 2024.

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have proven insufficient. Israel also failed to restore the electricity supply[194] and both the Rafah and Kerem Shalom crossings were closed again in May 2024.[195] While the latter was soon reopened, the delivery of humanitarian aid remains hampered due to the security and logistical conditions.[196] In addition, it was only on 12 March 2024 that a new military road was opened for humanitarian convoys to the north of Gaza, where relief supplies were the most needed,[197] and only on 1 May 2024 that Israel decided to reopen the Erez crossing point in northern Gaza, under pressure from humanitarian agencies and the United States.[198] It is also widely reported that Israel exercises very tight control over humanitarian relief, which significantly delays the delivery of that aid, and often leads to the cancellation of humanitarian operations altogether.[199] In general, Israel is claimed to have repeatedly impeded the entry and passage of relief supplies to the whole of Gaza.[200]

The legality of such conduct can be assessed in light of three main types of LOAC regulations, which lead to broadly similar results irrespective of the qualification of the armed conflict. These regulations mainly include the norms governing humanitarian relief to civilian populations insufficiently supplied (Section 4.2.2.1). This regulation must be supplemented by those dealing with the evacuation of the civilian population (Section 4.2.2.2) and siege tactics (Section 4.2.2.3). UNSC resolutions adopted on the matter are also worth examining to assess their potential impact on these regulations (Section 4.2.2.4).

4.2.2.1 Humanitarian relief to civilian populations insufficiently supplied. Under customary LOAC, when a civilian population is insufficiently supplied in the territory controlled by one of the parties to the conflict, the belligerents must allow and facilitate the rapid and unimpeded passage of humanitarian aid to that population.[201] Two kinds of consent may be distinguished in relation to humanitarian relief operations. The first, often termed 'strategic consent' in legal scholarship,[202] relates to the consent of belligerents to an offer of services made by an impartial humanitarian organization to provide humanitarian aid into the territory where the population is in need. In both non-international armed conflicts and international armed conflicts other than occupations,[203] such consent can be withheld, but such withholding cannot be arbitrary. While this will be further developed below, this notably means that consent can only be withheld for valid reasons. Unlike the ICRC,[204] scholars[205] argue that such reasons can be based on military necessity, which could include, according to certain states,[206] the risk that the aid will be diverted or that controls will prove ineffective. By contrast, in situations of occupation, strategic consent must necessarily be given.[207] However, regarding the post 7 October armed conflict in Gaza,

[194]See, e.g., OCHA, 'Hostilities in the Gaza Strip and Israel | Flash Update #92', 14 January 2024, at 4.

[195]See, e.g., OCHA, 'Hostilities in the Gaza Strip and Israel | Flash Update #163', 8 May 2024.

[196]See, e.g., OCHA, 'Hostilities in the Gaza Strip and Israel | Flash Update #166', 15 May 2024.

[197]See, e.g., 'UN and Morocco Deliver Humanitarian Aid to Gaza via Land Routes through Israel', *Times of Israel*, 13 March 2024.

[198]See, e.g., OCHA, 'Hostilities in the Gaza Strip and Israel | Flash Update #165', 13 May 2024.

[199]See, e.g., L. Keath, 'Cumbersome Process and "Arbitrary" Israeli Inspections Slow Aid Delivery into Gaza, US Senators Say', *AP*, 6 January 2024.

[200]See, e.g., OCHA, *supra* note 194, at 4.

[201]See, e.g., Rule 55 of the ICRC study on customary LOAC, applicable in both international and non-international armed conflicts, Henckaerts and Doswald-Beck, *supra* note 157, at 258–67.

[202]See, e.g., M. Sharpe, 'Humanitarian Access to Gaza', *EJIL:Talk!*, 20 November 2023.

[203]Rule 55 of the ICRC study on customary LOAC, Henckaerts and Doswald-Beck, *supra* note 157, at 258–67.

[204]ICRC, 'ICRC Q&A and lexicon on humanitarian access', (2014) 96 *International Review of the Red Cross* 359, 369.

[205]See, e.g., D. Akande and E.-C. Gillard, 'Arbitrary Withholding of Consent to Humanitarian Relief Operations in Armed Conflict', (2016) 92 *International Legal Studies* 483, 499, and scholars quoted in note 61.

[206]See, e.g., the military manual of the United Kingdom (*The Joint Service Manual of the Law of Armed Conflict*, 2004, §9.12.1.).

[207]1949 Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Art. 59.

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it might be submitted that concerns over such consent only arose at the beginning of that conflict.[208] At the time, Israel could not arguably be bound by such unconditional obligation, even if it was already considered as an occupying power under broad approaches to the notion of occupation. Indeed, it is argued that this unconditional obligation does not apply when the occupying power does not exercise any territorial control over the territory where the aid is to be delivered, especially when it is fighting against the enemy in that territory. This territorial control seems required, notably in order to be in a position to deal with the risk of diversion of humanitarian relief.[209] Yet, Israel exercised such territorial control only over the north of Gaza since January 2024. Accordingly, concerns over the strategic consent from Israel must be addressed only in light of the LOAC regulation applicable to non-international armed conflicts and international armed conflicts other than occupations. The second type of consent, often termed 'operational consent', refers to the obligation of belligerents, once their strategic consent has been given, to allow and facilitate the rapid and unimpeded passage of humanitarian aid to the civilian population. This obligation, which is the same irrespective of the qualification of the armed conflict, including in situations of occupation,[210] may be subject to the belligerent's right to control the humanitarian aid. As with the withholding of strategic consent, the exercise of control rights cannot, however, be arbitrary, which notably means, as usually admitted, even by the ICRC,[211] that reasons for such control may be based on military necessity.

If one agrees with the view that the withholding of 'strategic consent' may be justified by reasons of military necessity, Israel arguably invoked valid reasons to withhold its strategic consent at the beginning of the armed conflict, since, as it claimed it,[212] there was a serious risk that the humanitarian aid will be diverted to benefit Hamas. Similarly, Israel arguably invoked valid reasons to limit its 'operational consent' for the remainder of the armed conflict, by controlling the humanitarian aid, namely in order to check whether it does not contain military supplies that could be useful for Hamas. However, it is increasingly admitted that those reasons are not sufficient to make such restrictions lawful.[213] These restrictions can still be arbitrary and, therefore, unlawful in certain circumstances.

This is undoubtedly the case when the restrictions involve the violation of other obligations of international law. In the armed conflict in Gaza, this is arguably the case with respect to the prohibition of starvation as a method of warfare. Normally, the protective impact of this prohibition is limited. It is true that, as already seen, the prohibition arguably does not require that belligerents seek the starvation of civilians as a method of warfare and that such starvation may merely be expected when belligerents engaged in depriving a civilian population of objects indispensable to their survival by attacking, destroying, removing or rendering useless those

[208]However, another position could be argued if strategic consent is considered to be related to each border crossing of a besieged territory, especially when the border crossing is the only one to be able to provide the population of a specific region with adequate humanitarian assistance. Under such an approach, the continuous closure of the Erez crossing point in northern Gaza would amount to a denial of strategic consent from Israel as an occupying power, even though humanitarian assistance was allowed to enter Gaza before through the border crossing points in the south (Rafah and Kerem Shalom).

[209]See, e.g., Sassòli, *supra* note 145, at 643. See *contra*: *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, *supra* note 15, (Judge Cleveland, Separate Opinion), para. 24.

[210]See Geneva Convention IV, *supra* note 207, Art. 59 regarding occupation; Protocol I, *supra* note 162, Art. 70 and Rule 55 of the ICRC study on customary LOAC regarding international armed conflicts, Henckaerts and Doswald-Beck, *supra* note 157, at 258–67; Protocol II, *supra* note 180, Art. 18(2)) and Rule 55 of the ICRC study on customary LOAC regarding non-international armed conflicts, ibid.

[211]See ICRC, *supra* note 204, at 369.

[212]See, e.g., State of Israel, Ministry of Foreign Affairs, *supra* note 134, at 12–13.

[213]See, e.g., OCHA, *Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict* (2016), 25, 29; Panel of Experts in International Law. Convened by the Prosecutor of the International Criminal Court, Report of the Panel of Experts in International Law, 20 May 2024, para. 26. See nonetheless *contra*: S. Watt, 'Humanitarian Logic and the Law of Siege: A Study of the *Oxford Guidance* on Relief Actions', (2019) 95 *International Legal Studies* 1, 27 et seq.

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objects. However, this broad approach to the prohibition of starvation is more disputed in relation to other conduct, including in relation to relief supplies. Under the classical view,[214] which is nonetheless contested,[215] starvation is then prohibited only if the belligerent has the 'purpose' of starving the civilian population. It is particularly difficult to demonstrate such intent in most situations, including in relation to the Israeli restrictions to relief supplies to the Gazan population, even if statements of certain Israeli leaders could be interpreted in that way.[216] That being said, Israel seemed to have adopted a less restrictive interpretation of the prohibition of starvation when considering it in connection with restrictions to humanitarian relief. In a 2008 case before the Israeli Supreme Court, about restrictions placed by the Israeli government on the delivery of electricity and fuel to the Gazan population,[217] that government admitted that the prohibition of starvation limited such restrictions, although its purpose was not to starve the Gazan population but to avoid giving a military advantage to Hamas.[218] It acknowledged that, given the prohibition of starvation, such restrictions could not go as far as depriving the Gazan population of at least essential humanitarian goods. It emphasized in that respect that the relevant LOAC regulation on humanitarian relief and the prohibition on starvation had to be read together.[219] Accordingly, there is a strong argument that, in the current armed conflict in Gaza, Israel's denials or obstacles to the supply of humanitarian aid to the Gazan population, including the total cut-off of electricity supply and the limitations on fuel imports, are arbitrary as they have the effects of depriving that population of essential humanitarian goods, which is contrary to the prohibition of starvation as construed by Israel itself.[220] Independent reports on Gaza have continually stressed the urgent need for humanitarian aid to meet the basic needs of the Gazan civilian population, since shortly after the start of the Israeli military offensive until today. [221]

As increasingly argued in legal scholarship,[222] restrictions to humanitarian relief may alternatively be considered as arbitrary when the ensuing humanitarian consequences are disproportionate to the military advantage sought by such restrictions. This appears to be the case in Gaza. Israel's withholding of consent and obstacles to the rapid delivery of humanitarian aid[223] have catastrophic humanitarian consequences for the Gazan population, which are manifestly disproportionate in relation to the military advantage sought by Israel through its conduct. Israel must therefore lift or ease its restrictions to humanitarian relief, even if such restrictions are based on imperative military reasons, so that the essential needs of the Gazan population are met.

4.2.2.2 Evacuation of the civilian population. Another relevant regulation for the armed conflict in Gaza, which relates to humanitarian supplies, is the regulation dealing with the evacuation of civilian populations. Israel has, indeed, repeatedly called on the population of Gaza to evacuate certain regions and to move to supposedly protected areas. The first and most significant call was

[214]See, e.g., Akande and Gillard, *supra* note 178, at 761.

[215]See Dannenbaum, *supra* note 180, at 726–40.

[216]See, e.g., statements reported by Human Rights Watch, 'Israel: Starvation Used as Weapon of War in Gaza: Evidence Indicates Civilians Deliberately Denied Access to Food, Water', 18 December 2023.

[217]See *Jaber Al-Bassiouni Ahmed and others v. Prime Minister and Minister of Defence*, *supra* note 53.

[218]Ibid., paras. 14, 15.

[219]The Israeli government referred to Arts. 70 and 54 of Protocol I, *supra* note 162, which it considered as part of customary law (ibid., para. 14).

[220]See also the ongoing proceedings before the Israeli Supreme Court on the obligation for Israel to meet the essential needs of the Gazan population. The Court already took interim measures (*HCJ, Gisha – Legal Center for Freedom of Movement et al. v. The Government of Israel et al.*, HCJ 2280/24, interim measure, 6 May 2024, available at static.gisha.org/uploads/2024/05/24022800.M18-1.pdf; summary in English available at gisha.org/en/aid-access-now/).

[221]See note 186, *supra*.

[222]See, e.g., Akande and Gillard, *supra* note 205, at 498.

[223]See, e.g., Keath, *supra* note 199.

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made on 13 October 2023,[224] when Israel called on more than a million civilians to evacuate their homes from the north of Gaza, including Gaza City, and to move to the area south of Wadi Gaza for their own safety. This call took place at the time Gaza was subject to a total siege. Other calls to move, either general[225] or specific,[226] followed. Certain scholars interpreted these calls as a lawful application of the obligation of precaution in the attack, in particular the obligation to warn the population of an imminent attack.[227] Yet, such a warning should have been realistic and should have given the population time to leave the area before the attack, [228] which was not the case with the first call on 13 October, at least when it was communicated to the one million Gazans who, according to this call, had only 24 hours to leave the north of Gaza.

In any case, it does not seem that these appeals constitute an application of the obligation of precaution since, as some authors have rightly pointed it out,[229] such an obligation applies to specific military attacks against a particular military objective and not to a military campaign carried out over an entire region. These calls should rather be seen as 'orders' given to a civilian population to evacuate a region, even if no formal order has been expressed,[230] since this population has been forced to move at the risk of becoming victim of the clashes between Hamas and Israel. Accordingly, such calls are regulated by the LOAC rules relating to the displacement of populations. Those rules apply both in non-international[231] and international armed conflicts.[232] Admittedly, they apply in international armed conflicts only when the situation amounts to belligerent occupation.[233] However, as evidenced by the ICC case law on the matter,[234] they are applicable to belligerents even if they do not exercise any territorial control over the area where the displaced population is located. Accordingly, they would be applicable from the beginning of the armed conflict in Gaza even though that conflict would not be qualified as a non-international armed conflict and Israel would be considered as an occupying power – or as bound by the law of occupation – without any territorial control over Gaza according to broad approaches to the notion – or law – of occupation. Moreover, although the Israel Supreme Court objected that those rules did not prevent a state from displacing persons, it confined this view to the displacement of selected individuals and not to mass displacement as it occurred in Gaza.[235]

According to the rules on forced displacement, a belligerent is allowed to proceed to the evacuation of a population for the protection of that population or for imperative military reasons.[236] The belligerent nevertheless has an obligation to take '*all possible measures* . . . in order that the civilians concerned are received under satisfactory conditions of shelter, hygiene, health, safety and nutrition . . .'.[237] If the belligerent is unwilling or unable to provide the displaced

[224]See the Israeli Defence Forces, @IDF, Tweet (6:50am, October 13, 2023), available at twitter.com/IDF/status/1712707301369434398.

[225]See, e.g., OCHA, 'Hostilities in the Gaza Strip and Israel — Flash Update #61', 6 December 2023, at 3.

[226]See, e.g., OHCHR, 'Israel Working to Expel Civilian Population of Gaza, UN Expert Warns', 22 December 2023.

[227]See, e.g., N. M. Schmitt, 'The Evacuation of Northern Gaza: Practical and Legal Aspects', *Articles of War*, 15 October 2023.

[228]See, e.g., J. de Hemptinne and J. d'Aspremont, *Droit international humanitaire. Thèmes choisis* (2012), 276.

[229]See, e.g., Sassòli, *supra* note 169.

[230]See, e.g., Y. S. Khan, 'The Directive to Evacuate Northern Gaza: Advance Warning or Forced Displacement?', *Just Security*, 19 October 2023; see also J. Willms, 'Without Order, Anything Goes? The Prohibition of Forced Displacement in Non-International Armed Conflict', (2009) 91 *International Review of the Red Cross* 547.

[231]See Protocol II, *supra* note 180, Art. 17.

[232]See Rule 129 of the ICRC study on customary LOAC, applicable in international armed conflicts (129 A) and non-international armed conflicts (129 B), Henckaerts and Doswald-Beck, *supra* note 157, at 457.

[233]See Geneva Convention IV, *supra* note 207, Art. 49.

[234]See *Prosecutor v. Bosco Ntaganda*, Appeals Chamber, Judgment of 30 March 2021, para. 550

[235]See, e.g., HCJ, *Abd al Affo et al. v. Commander of IDF Forces in the West Bank et al.*, Case H.C. 785/87, 945/87 and 27/88, Judgment of 10 April 1988, available at www.hamoked.org/files/2011/280_eng.pdf, at 19 et seq.

[236]See Rule 129 of the ICRC study on customary LOAC, Henckaerts and Doswald-Beck, *supra* note 157, at 457.

[237]See Rule 131 of the ICRC study on customary LOAC, applicable in both international and non-international armed conflicts, ibid., at 463 (emphasis added).

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persons with such treatment, this implies, as argued by the ICRC, that it has 'an obligation to permit the free passage of humanitarian assistance to [those] persons'.[238] It is arguable that such obligation must be considered in light of the above-described general regulation on humanitarian relief to civilian populations insufficiently supplied and might accordingly be subject to lawful restrictions. In any case, the belligerents' conduct must primarily be assessed against the test of 'all possible measures'. It may hardly be argued that Israel always took all the possible measures to allow the displaced persons to be received under the required conditions after each of its call to evacuate. The ICJ expressly stated that Israel failed to take such measures when it told the Gazan population in Rafah to evacuate to the Al-Mawasi area.[239]

4.2.2.3 Siege tactic. At the beginning of the armed conflict, Israel imposed a total siege on Gaza. It may be argued that such conduct was lawful since siege is an ancient, well-established practice and is not prohibited as such by modern LOAC. However, it is limited today by the prohibition on another method of warfare, namely starvation of the civilian population, which is applicable irrespective of the nature of the armed conflict.[240] Admittedly, as explained above, it is debated whether this prohibition requires a purposive intent from the belligerents, namely to seek the starvation of civilians, when starvation does not result from the deprivation of objects indispensable to the civilian population through attacks against those objects, their destruction or removal or by rendering them useless. Yet, again, Israel seems to adopt a less restrictive interpretation of the prohibition on starvation when considering it in connection with the siege tactic. According to its own 2006 military manual,[241] proof of purposive intent to starve a civilian population does not appear to be required in order to conclude that the prohibition on starvation has been breached when the passage of humanitarian aid to a besieged area has been refused. Indeed, in its manual, Israel begins by stating that '[u]ntil recently, there were no rules attached to [the siege as a] method of warfare, and it was permitted to exploit the suffering of the local population in order to overcome the enemy.' However, the manual goes on to state that '[t]he [1977] Additional Protocols to the Geneva Conventions contain a provision banning starvation of the civilian population in battle.' According to the manual:

> [t]he meaning to be extracted from this provision is that the residents of a city need to be allowed to leave it if it is besieged [or that, in] cases where civilians do not have the opportunity to leave the besieged city, *a duty arises to supply them with food, water and humanitarian aid.*[242]

Israel is bound by such a duty since the Gazan population has not been allowed to leave Gaza. In order to respect this duty, Israel was therefore obliged to allow humanitarian aid to enter into Gaza as it did not itself provide it. By refusing such passage during the siege period, Israel was, therefore, in breach of the prohibition on starvation, without it being necessary to demonstrate its intention to starve the Gazan population, in accordance with its own interpretation of this prohibition.

4.2.2.4 Impact of UNSC resolutions. Should one consider that the aforementioned regulations have been supplemented or even reinforced by the relevant UNSC resolutions adopted on the matter? This is probably not the case. It is true that, in its Resolution 2720 adopted on 22 December 2023, the Security Council '*demand[ed]* that [all parties to the armed conflict] allow, facilitate and enable

[238] Ibid., at 467.

[239] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip* (*South Africa v. Israel*), Order of 24 May 2024, para. 46.

[240] See Rule 53 of the ICRC study on customary LOAC, applicable in both international and non-international armed conflicts, Henckaerts and Doswald-Beck, *supra* note 157, at 186 and, in relation to the siege, at 188.

[241] Israel, *Rules of Warfare on the Battlefield* (2006), Military Advocate-General's Corps Command, IDF School of Military Law, at 37.

[242] Emphasis added.

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the immediate, safe and unhindered delivery of humanitarian assistance at scale directly to the Palestinian civilian population throughout the Gaza Strip'.[243] Resolution 2728, adopted on 25 March 2024, went even further. After '[e]xpressing deep concern about the catastrophic humanitarian situation in the Gaza Strip',[244] the Security Council '*demand[ed]* an immediate ceasefire for the months of Ramadan respected by all parties leading to a lasting sustainable ceasefire'.[245] However, it is controversial whether those UNSC 'demands' were binding, since the Security Council did not formally express itself in the more straightforward term of 'decisions'.[246] It has been argued that UNSC 'demands' may be construed as amounting to decisions at least when an implicit or express reference is made to Chapter VII or Article 25 of the UN Charter in the resolution.[247] Yet, no such reference is made in UNSC resolutions 2720 and 2728. Concerning Resolution 2728, while several UNSC member states considered the resolution as binding when explaining their vote,[248] two states, including the United States[249] and the Republic of Korea,[250] expressly denied this binding nature. Such clarification by the United States was arguably a key element in deciding not to veto the resolution and to merely abstain. Moreover, the demand contained in Resolution 2720, which concerns the unhindered delivery of humanitarian assistance, is directly preceded by a 'reaffirmation' by the Security Council of 'the obligations of the parties to the conflict under [LOAC] regarding the provision of humanitarian assistance'.[251] In other words, the resolution appears to have been adopted without prejudice to the LOAC rights and obligations on the matter, as confirmed by statements of UNSC members.[252]

That being said, it is undoubtful that a cessation of hostilities, at least of temporary nature, is crucial to render operational the immediate, safe and unimpeded delivery of humanitarian aid;[253] and even if such cessation is not (or no longer) required by Resolution 2728, it must be accepted by Israel under international law. As already demonstrated, Israel does not seem to comply with the various regulations discussed above concerning relief supplies. Insofar as these violations have a continuing character, Israel must cease them given its obligation of cessation under ARSIWA.[254] As such, Israel should cease refusing or impeding the passage of humanitarian relief in order to allow the Gazan population to receive the essential humanitarian goods and to put an end to the disproportionate humanitarian disaster underway in Gaza. This necessarily presupposes at least a temporary cessation of hostilities.

4.2.3 Hamas' military operations

The assessment of the legality of most military operations carried out by Hamas under LOAC is less complex. There is, indeed, no doubt that the 7 October attacks amount to violations of this law, whatever the qualification of the armed conflict in Gaza. These violations result from the

[243]UNSC Res. 2720 (22 December 2023), point 2.

[244]UNSC Res. 2728 (25 March 2024), preamble.

[245]Ibid., point 1.

[246]See, e.g., E. Suy and N. Angelet, 'Article 25', in J.-P. Cot, A. Pellet and M. Forteau (eds.), *La Charte des Nations Unies. Commentaire article par article* (2005), 915. For a debate on this issue see E. Bjorge, 'Resolution 2728 (2024) is a Binding Council Resolution', *EJIL:Talk!*, 26 April 2024.

[247]See, e.g., M. Wood and E. Sthoeger, *The UN Security Council and International* Law (2022), 35–44.

[248]See, e.g., statements of Slovenia, UN Doc S/PV.9586, at 5 and Sierra Leone, ibid., at 10.

[249]Ibid., at 5.

[250]Ibid., at 6.

[251]See UNSC Res. 2720, *supra* note 243, point 2.

[252]See, e.g., statement of the United Kingdom, UN Doc. S/PV. 9520 (22 December 2023), at 7.

[253]See, e.g., statements of the UN Secretary General in OCHA, 'Remarks to the Media by the Secretary-General', 22 December 2023. The 2720 resolution nonetheless provides for the appointment of 'a Senior Humanitarian and Reconstruction Coordinator . . .' (point 4).

[254]See ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001 YILC, Vol. II (Part Two), Art. 30.

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failure to comply with numerous prohibitions set out in this law, such as the prohibition on targeting civilians,[255] the prohibition on inhuman and degrading treatment,[256] the prohibition on rape or sexual violence,[257] and the prohibition on hostage-taking.[258]

Moreover, Hamas fired indiscriminate rockets against Israel, making no distinction between civilians and Israeli soldiers or between civilian objects and military objectives. This practice is clearly contrary to LOAC.[259] The same applies to its method of using civilians or civilian objects, including specifically protected objects such as ambulances or hospitals, as 'human shields'.[260]

5. International justice

The LOAC breaches committed by the belligerents could potentially be prosecuted by the ICC as war crimes. Yet, once again, the above-examined controversies over Palestine make the determination of those war crimes uncertain (Section 5.1). Such uncertainty does not, however, concern the other international crimes falling under the ICC's jurisdiction, including genocide, which is also at the heart of proceedings initiated by Southy Africa before the ICJ in order to establish the international responsibility of Israel (Section 5.2).

5.1 Determination of the war crimes in light of the preliminary controversies

Proceedings before the ICC concerning the situation in the State of Palestine are already well advanced. [261] They are currently at the investigation stage and the Prosecutor requested that the Pre-Trial Chamber issues arrest warrants against both Hamas and Israeli leaders on 20 May 2024.[262] This is the result of a long process that began on 1 January 2015. Having deposited a declaration of acceptance of the exercise of jurisdiction by the Court on that date,[263] as a non-state party to the Rome Statute, the State of Palestine, which later acceded to the Statute, was able to refer the situation to the Prosecutor on 22 May 2018.[264] This allowed the Prosecutor, once the preliminary examination was concluded, to dispense herself from obtaining the authorization by the Pre-Trial Chamber to open investigations.

That said, the Prosecutor still requested that the Chamber rule on the territorial scope of the Court's jurisdiction, given the difficulties surrounding that issue. In its decision of 5 February 2021, the Chamber concluded that the Court's jurisdiction encompassed all crimes committed in the territory of the State of Palestine, including all the territories occupied by Israel since 1967. A few weeks later, on 3 March 2021, the Prosecutor announced the opening of an investigation into the situation in the State of Palestine for international crimes committed since 13 June 2014 in that

[255]See note 158, *supra*.

[256]See Rule 87 of the ICRC study on customary LOAC, applicable in both international and non-international armed conflicts, Henckaerts and Doswald-Beck, *supra* note 157, at 306.

[257]See Rule 93 of the ICRC study on customary LOAC, applicable in both international and non-international armed conflicts, ibid., at 343.

[258]See Rule 96 of the ICRC study on customary LOAC, applicable in both international and non-international armed conflicts, ibid., at 334.

[259]See note 159, *supra*.

[260]See Rule 97 of the ICRC study on customary LOAC, applicable in both international and non-international armed conflicts, Henckaerts and Doswald-Beck, *supra* note 157, at 337.

[261]See, for more information about that situation, ICC, State of Palestine, *Situation in the State of Palestine*, ICC-01/18, available at www.icc-cpi.int/palestine.

[262]ICC, 'Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for Arrest Warrants in the Situation in the State of Palestine', 20 May 2024.

[263]'Declaration Accepting the Jurisdiction of the International Criminal Court', 31 December 2014, available at www.icc-cpi.int/sites/default/files/iccdocs/PIDS/press/Palestine_A_12-3.pdf.

[264]'Referral by the State of Palestine Pursuant to Articles 13(a) and 14 of the Rome Statute', 15 May 2018, available at www.icc-cpi.int/sites/default/files/itemsDocuments/2018-05-22_ref-palestine.pdf.

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territory,[265] which, therefore, includes crimes potentially committed in the context of the current armed conflict in Gaza.[266] According to its Statute, the ICC has jurisdiction not only over the crimes committed on the Palestinian territory, whether by Palestinians or Israelis,[267] but also over the crimes committed by Palestinian nationals abroad, which includes the crimes committed by members of Hamas in Israel.[268] It is nonetheless clear that Israel's refusal to join the ICC does, however, complicate relations between the Court and Israel, since Israel can refuse to co-operate with the Court.

The war crimes for which Palestinians or Israelis may be prosecuted by the ICC can only be identified once the armed conflict in Gaza has been classified under LOAC. The Rome Statute distinguishes between war crimes applicable in international armed conflicts[269] and those applicable in non-international armed conflicts.[270] The former are much more numerous than the latter. Yet, as already explained, it is difficult to qualify the armed conflict in Gaza, mainly because of the above-outlined controversies regarding Palestine. It is impossible for the Court to overcome that difficulty by relying on customary international law, as abundantly done by the International Criminal Tribunal for the Former-Yugoslavia (ICTY).[271] In order to limit the judicial activism of that Tribunal, the drafters of the Rome Statute, indeed, took care to provide an exhaustive list of crimes.

Admittedly, certain war crimes, such as those charged in the recent applications of the ICC Prosecutor,[272] are listed in the Rome Statute in relation to both categories of armed conflict. They include the war crimes of murder (or wilful killing)[273] and torture,[274] charged against both the Hamas and Israeli leaders in the Prosecutor's applications; war crimes of intentionally directing attacks against a civilian population[275] and cruel treatment (or wilfully causing great suffering, or serious injury to body or health),[276] only charged against the Israeli leaders; and war crimes of sexual violence,[277] taking hostages,[278] and outrages upon personal

[265]'Statement of ICC Prosecutor, Fatou Bensouda, respecting an investigation of the Situation in Palestine', 3 March 2021, available at www.icc-cpi.int/news/statement-icc-prosecutor-fatou-bensouda-respecting-investigation-situation-palestine.

[266]Since the outbreak of this conflict, several states party to the Statute have also referred the situation in the State of Palestine to the Prosecutor, with a request to investigate crimes committed during the conflict (see, e.g., regarding referral by South Africa, the letter from 17 November 2023, available at www.icc-cpi.int/sites/default/files/2023-11/ICC-Referral-Palestine-Final-17-November-2023.pdf, and, regarding referrals by Chili and Mexico, the letter available at www.icc-cpi.int/sites/default/files/2024-01/2024-01-18-Referral_Chile__Mexico.pdf). However, these additional referrals have no impact on the jurisdiction of the Court, which has already been triggered by the referral made by the State of Palestine. The objective seems to be primarily political, namely, to put pressure on the Prosecutor, who enjoys discretionary powers in conducting the investigations, to concentrate his efforts on the Middle East conflict, even though he is involved in investigations in other parts of the world, such as in Ukraine.

[267]See Rome Statute, *supra* note 48, Art. 12(2)(a).

[268]Ibid., Art. 12(2)(b).

[269]Ibid., Arts. 8(2)(a), 8(2)(b).

[270]Ibid., Arts. 8(2)(c), 8(2)(e).

[271]See, e.g., J. de Hemptinne, 'Réflexion sur l'évolution des rôles normatif et judiciaire des juges pénaux internationaux', (2011) 22 *Revue trimestrielle des droits de l'homme* 525, 528.

[272]See ICC, Statement of ICC Prosecutor Karim A. A. Khan KC, *supra* note 262.

[273]See Rome Statute, *supra* note 48, Art. 8(2)(a)(i) ('wilful killing') regarding international armed conflicts, and Art. 8(2)(c)(i) ('murder') regarding non-international armed conflicts.

[274]Ibid., Art. 8(2)(a)(iii) regarding international armed conflicts, and Art. 8(2)(c)(i) regarding non-international armed conflicts.

[275]Ibid., Art. 8(2)(b)(i) regarding international armed conflicts, and Art. 8(2)(e)(i) regarding non-international armed conflicts.

[276]Ibid., Art. 8(2)(a)(iii) ('wilfully causing great suffering, or serious injury to body or health') regarding international armed conflicts, and Art. 8(2)(c)(i) ('cruel treatment') regarding non-international armed conflicts.

[277]Ibid., Art. 8(2)(b)(xxii) regarding international armed conflicts, and Art. 8(2)(e)(vi) regarding non-international armed conflicts.

[278]Ibid., Art. 8(2)(a)(viii) regarding international armed conflicts, and Art. 8(2)(c)(iii) regarding non-international armed conflicts.

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dignity,[279] only charged against the Hamas leaders. Yet, this is not the case for other war crimes that could have been committed by Israeli leaders given the potential LOAC breaches by Israel, especially those concerning both its attacks and its conduct in relation to relief supplies. One instance is the war crime resulting from disproportionate attacks, which might have been committed, notably given the numerous civilian victims and material damage caused by the Israeli attacks. This war crime is only provided for with respect to international armed conflicts.[280] If the hostilities in Gaza were to be classified only as a non-international armed conflict, the Court could not prosecute any individual, including Israeli soldiers, for that war crime, even if the disproportionate nature of the Israeli attacks were to be established. Another instance is the war crime of starvation as a method of warfare, which might have been committed by Israel, notably because of the likely unlawful Israeli operations having destroyed or rendered useless objects indispensable to the survival of the civilian Gazan population or because of Israel's unlawful restrictions to relief supplies.[281] Although this war crime has recently been added to the list of war crimes falling under the ICC jurisdiction with respect to non-international armed conflict,[282] it is not applicable to the situation in the State of Palestine, since it has not (yet) ratified the relevant amendment. Other instances include war crimes allegedly committed by Hamas, such as the war crime of using protected persons as shields, which is only applicable in international armed conflicts.

In his recent applications, the ICC Prosecutor retained one war crime which is only applicable in international armed conflicts, namely the war crime of starvation, charged against the Israeli leaders. This might explain why the Prosecutor decided to rely on the 'double classification theory'.[283] He, indeed, asserted that 'the war crimes alleged in these applications were committed in the context of an international armed conflict between Israel and Palestine, and a non-international armed conflict between Israel and Hamas running in parallel'. The assertion of an international armed conflict between Israel and Palestine allowed him to retain the charge of war crime of starvation allegedly committed by Israelis. This, however, raises several issues.[284] Firstly, the Prosecutor will have to demonstrate that the Israeli conduct underlying the war crime of starvation is not related to the non-international armed conflict against Hamas, although all the military operations carried out by Israel appear to be directed against that armed group. Secondly, the ICC will have to engage in the issue of whether Palestine is a state under international law, except if the Court elaborates a functional approach to that notion under LOAC, as it did in 2021

[279]Ibid., Art. 8(2)(b)(xxi) regarding international armed conflicts, and Art. 8(2)(c)(ii) regarding non-international armed conflicts.

[280]Ibid., Art. 8(2)(b)(iv).

[281]Ibid., Art. 8(2)(b)(xxv). According to that Article, the war crime of '[i]ntentionally using starvation of civilians as a method of warfare' is indeed committed 'by depriving them of objects indispensable to their survival', which includes 'wilfully impeding relief supplies as provided for under the Geneva Conventions'. Debate exists on the intent element of that war crime, as requiring that starvation of the civilian population must be sought by the suspect (*dolus specialis*) or the suspect must have merely intended (including foreseen) such starvation (*dolus directus* of the first or second degree); see, e.g., G. Corn and E.-C. Gillard, 'The War Crime of Starvation – The Irony of Grasping at Law Hanging Fruit', *Articles of War*, 15 May 2024. The lower standard, namely the *dolus directus* of the second degree, may be admitted, unless it is construed that the underlying LOAC norms provide for a more restrictive intent, namely a purpose intent. Yet, as demonstrated above, such intent does not seem either provided by the norm in relation to certain conduct (depriving a civilian population of objects indispensable to its survival through attacking, destroying, removing or rendering those objects useless) or espoused by Israel in relation to other conduct (humanitarian relief and siege tactics).

[282]Resolution on Amendments to Article 8 of the Rome Statute of the International Criminal Court, ICC-ASP/18/Res.5 (6 December 2019).

[283]See ICC, Statement of ICC Prosecutor Karim A. A. Khan KC, *supra* note 262.

[284]For those issues and ways to deal with them see, e.g., R. van Steenberghe and J. de Hemptinne, 'ICC Prosecutor's Application for Arrest Warrant against Israeli Leaders: The War Crime of Starvation and Its Contextual Element', *EJIL: Talk!*, 4 June 2024.

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with respect to the determination of its territorial jurisdiction in light of its Statute. One possible way to overcome those difficulties is to argue that the criminal conduct occurred in the context of an occupation, to which the law of international armed conflict applies; and this would be arguable for the war crime of starvation, whose underlying LOAC norms, such as unlawful restrictions to relief supplies, are applicable in situations of occupation. Indeed, as detailed above, such occupation does not require considering Palestine as a state under international law. Moreover, this occupation uncontroversially occurred in Gaza, at least on some parts of the Gazan territory (the north) during a limited period of time (between January and May 2024), where and when the relevant Israeli criminal conduct was allegedly committed.

5.2 The other international crimes

Whatever the uncertainty on the war crimes subject to prosecution by the ICC in relation to the armed conflict in Gaza, such uncertainty does not concern the other crimes falling under the ICC jurisdiction and whose constitutive elements do not require the existence of an armed conflict. This is firstly the case for crimes against humanity. The specific feature of such crimes is that the underlying material act, such as murder, torture or forcible transfer of population,[285] must have taken place in a particular context, namely 'a widespread or systematic attack directed against any civilian population, with knowledge of the attack',[286] 'pursuant to or in furtherance of a State or organizational policy to commit such attack in pursuance of, or in furtherance of, a policy of a State or an organisation to commit such an attack'.[287] It seems that the Hamas' military actions could easily be qualified as amounting to crimes against humanity, notably because the 7 October attack was mainly directed against Israeli civilians and planned over a long period of time by Hamas leaders. This is less straightforward for Israel's military operations since it should then be proved that civilians were intentionally victims of an 'attack' conducted by the Israeli forces. Yet, in his applications for arrest warrants, the ICC Prosecutor charged both the Hamas and Israeli leaders with crimes against humanity, including extermination and murder.[288]

By contrast, it is clear that concerning the crime of aggression, which also falls under the ICC jurisdiction, the Court would not be able to prosecute any persons, be they Israeli military or political leaders,[289] even though the use of force by Israel could likely be qualified as an act of aggression[290] if the self-defence argument was considered useful but not valid. The crime of aggression can only be prosecuted by the ICC if it is committed on the territory of a state party *and* by the national of a state party.[291] As already emphasized, Israel has not acceded to the Rome Statute. It is, therefore, logical that the ICC Prosecutor's applications for arrest warrants do not contain any reference to the crime of aggression.

Yet, these applications do not contain any reference to the crime of genocide either, although the Court is competent to prosecute such a crime in the situation of the State of Palestine, and many experts[292] and states[293] contend that Israel is committing a genocide in Gaza. The main

[285]See Rome Statute, *supra* note 48, Art. 8(7)(1).

[286]Ibid.

[287]Ibid., Art. 8(7)(2)(a).

[288]See ICC, Statement of ICC Prosecutor Karim A.A. Khan KC, *supra* note 262.

[289]About the persons who can be prosecuted for a crime of aggression, see Rome Statute, *supra* note 48, Art. 8bis-1: '[those] in a position effectively to exercise control over or to direct the political or military action of a State.'

[290]Ibid., Art. 8*bis*(1) and (2).

[291]Ibid., Art. 15*bis*.

[292]See, e.g., UNHCR, 'Gaza: UN Experts Decry Bombing of Hospitals and Schools as Crimes against Humanity, Call for Prevention of Genocide', 19 October 2023.

[293]See, e.g., Organization of Islamic States (OIS), 'OIC Strongly Condemns the Successive Massacres Committed by the Israeli Occupation against the Palestinian People', Press Release, 18 November 2023, available at www.oic-oci.org/news/?page=5&arc=2023&lan=en. See also South Africa's proceedings before the ICJ and all the intervening states (notes 298, 330, 331, *infra*).

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difficulty with respect to such a crime stems from its specific feature, which lies in the intent that must animate its perpetrator, namely the genocidal intent (or *dolus specialis*). This is the intention to destroy, in whole or in part, an ethnic, national, racial or religious group, through the commission of certain material acts, such as '[k]illing members of the group, [c]ausing serious bodily or mental harm to members of the group [and] [d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part'.[294] The intent to destroy must at least concern a 'substantial' part of the group.[295] This is arguably the only obstacle to qualifying the 7 October attacks as involving a crime of genocide. It is clear that the acts perpetrated as part of that attack were directed against Jews because they belong to the Jewish group, as can be seen from some of the slogans shouted by the attackers.[296] Moreover, the destruction of the Jews as a religious and national group is one of the foundations of Hamas policy, at least in accordance with their original Charter.[297] Having said that, it still has to be proved that the intention of the attackers or their leaders was not to carry out a large-scale attack to spread terror among the civilian population, but rather to destroy a 'substantial' part of the Jewish people, if not to destroy them in their entirety. It is not certain that they could have had such an intention. They may well have anticipated that their operations could not extend beyond a limited geographical area, given the capability of Israel to quickly respond by military means.

The issue is much more complex with respect to Israel's conduct. It is also subject to proceedings before the ICJ, initiated by South Africa against Israel on 29 December 2023,[298] and in which several states decided to intervene, including the State of Palestine.[299] While the ICC is competent to rule on the criminal responsibility of individuals, including Israelis, the ICJ has to rule on the international responsibility of Israel for alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide (the Convention). Both cases raise the issue of the commission of acts prohibited by the Convention, either a genocide as such, whose definition is similar in the ICC Statute and the Convention, or other connected acts, such as the direct and public incitation to commit a genocide. In addition, findings from both the ICJ and the international criminal jurisdictions, especially the ICTY, converge about the determination of a genocide and genocidal intent. Both types of jurisdictions, indeed, agree that such intention may be inferred from concrete circumstances provided that '[such] inference ... must be the only reasonable inference available on the evidence'.[300] The ICJ highlighted this concordance in its case law[301] and generally relied on ICTY's findings to confirm its conclusions as to the existence of

[294]See Rome Statute, *supra* note 48, Art. 6.

[295]See, e.g., ICTY, *Prosecutor v. Krstić*, Judgement of 2 August 2001, Case No. IT-98-33, paras. 585–590; ICTR, *Prosecutor v. Ignace Bagilishema*, Judgement of 7 June 2001, Case No. ICTR-95-01A, para. 64.

[296]N. Coadou, 'Attaques du Hamas: l'armée israélienne dévoile des images insoutenables. Le récit de notre reporter', *BFMTV*, 23 October 2023.

[297]The Covenant of the Islamic Resistance Movement, 18 August 1988, Art. 7, available at avalon.law.yale.edu/20th_century/hamas.asp. See nonetheless the 2017 revised Charter of the Hamas, available at www.middleeasteye.net/news/hamas-2017-document-full.

[298]See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip*, *supra* note 239, Application Instituting Proceedings, 29 December 2023.

[299]Concerning Palestine, see ibid., Application for Permission to Intervene and Declaration of Intervention Submitted by Palestine, 3 June 2024; regarding the other states, see notes 330 and 331, *infra*.

[300]See, e.g., concerning the ICTY, *Prosecutor v. Tolimir*, Judgement of 12 December 2012, Case No. IT-05-88/2, para. 745; *Prosecutor v. Brđanin*, Judgement of 1 September 2004, Case No. IT-99-36, para. 970; concerning ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, [2007] ICJ Rep. 43, para. 373; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment of 3 February 2015, [2015] ICJ Rep. 3, paras. 148, 417.

[301]See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, *supra* note 300, para. 148.

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genocidal intent.[302] One of the most recent judgments handed down by an international criminal court – in this case a hybrid one – on the crime of genocide, namely that of Khmer Rouge leaders, issued on 16 November 2018 by the Extraordinary Chambers in the Courts of Cambodia, takes up various circumstances that the ICTY or the ICJ have examined in order to infer genocidal intent. In particular, it mentions the following elements: 'the general context, the perpetration of other culpable acts systematically directed at the same group, the scale of atrocities committed ... speeches made in public or in meetings [or the] existence of a plan or policy'.[303]

It is clear that certain material acts underlying genocide, such as murder or serious bodily harm have been committed by the Israeli armed forces in Gaza. The issue of establishing the required genocidal intent is nonetheless complicated, notably, because these acts seem to be committed in the context of the application of the law of armed conflict, which might suggest at first sight that there is another explanation than the genocidal intent for their commission. Nevertheless, statements made by certain Israeli political and military leaders are troubling. In particular, they express the wish that everything in Gaza must be eliminated or that Gaza must become unliveable, in order to achieve a new 'Nakba', meaning the mass and violent expulsion of the Palestinians, which would eclipse that of 1948.[304] They stress that there are no civilians who were not involved in the 7 October attacks and that everyone is responsible.[305] While such public statements do not necessarily imply a genocidal intent, they are at least likely to reveal direct incitement to commit genocide. This is plausible since this genocidal rhetoric has been taken up by Israeli soldiers on the ground, as can be seen from certain videos in which such rhetoric is sung and chanted by a large group of soldiers.[306]

That being said, the proceedings before the ICJ in the case brought by South Africa should also lead the Court to rule on the violation by Israel of other obligations set out in the Convention, which are only binding on states, such as the obligation to prevent or punish acts prohibited by the Convention.[307] In addition, on 26 January 2024, the Court indicated provisional measures in that case,[308] which were requested by South Africa, and decided to modify those measures in subsequent Orders.[309] Most of the measures indicated by the Court consist of requiring Israel to implement its obligations under the Convention and to ensure that evidence on the matter is preserved[310] and can be collected in the field by international mechanisms.[311] The Court never ordered the unconditional cessation of the whole hostilities in Gaza, as requested several times by the applicant.[312] Although in its Order of 24 May 2024, the Court requested that Israel '[i]mmediately halt its military offensive, and any other action in the Rafah Governorate ...',[313]

[302]See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *supra* note 300, paras. 296, 344, 354.

[303]See Extraordinary Chambers in the Courts of Cambodia, *Co-Prosecutors v. Nuon Chea and Khieu Samphan*, Case 002/02 Judgment, 16 November 2018, para. 803.

[304]See all the declarations systematically reported by South Africa in its application before the ICJ (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip*, *supra* note 239, Application Instituting Proceedings, paras. 101–105.

[305]Ibid.

[306]See, e.g., the video available at /twitter.com/MiddleEastEye/status/1733116719668113618.

[307]Art. I of the Convention.

[308]See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip*, *supra* note 239, Order of 26 January 2024.

[309]See ibid., Order of 28 March 2024, and Order of 24 May 2024.

[310]Ibid., Order of 26 January 2024, para. 86.

[311]Ibid., Order of 24 May 2024, para. 57.

[312]Ibid., Order of 26 January 2024, para. 5; Order of 28 March 2024, para. 11.

[313]Ibid., Order of 24 May 2024, para. 57.

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this only concerned the military offensive as conducted at the time by Israel in Rafah[314] as well as any other actions that 'may inflict on the Palestinian group in Gaza conditions of life that could bring about its physical destruction in whole or in part'.[315] Other more limited military measures, therefore, remained allowed. Moreover, the measures requesting the unhindered and unimpeded delivery of humanitarian assistance[316] do not seem to go beyond what is required under LOAC, except the specific order to '[m]aintain open the Rafah crossing'.[317] However, by indicating provisional measures, the Court considered that all the relevant legal conditions had been met.[318] This includes the plausibility of the rights subject to the dispute. Those rights consist of both the right of the Palestinians to be protected against genocide and other acts prohibited by the Convention, and the right of South Africa to have the Convention respected, since the obligations enshrined in the Convention are obligations '*erga omnes partes*'.[319] Moreover, in order to find such plausibility, the ICJ endorsed the facts set out by South Africa in its application[320] and reported by numerous experts[321] concerning the ongoing humanitarian disaster in Gaza. The Court also referred to certain controversial statements of Israeli leaders[322] and the warning issued by numerous UN special rapporteurs[323] about the 'visibly genocidal and dehumanising' rhetoric of such statements.

6. Conclusion: Obligations for all the states?

The armed conflict in Gaza raises complex questions under international law, particularly with respect to the legality of the Israeli actions – most of the Hamas' operations being, by contrast, indisputably illegal. This complexity is mainly due to controversies over certain preliminary issues, such as statehood of Palestine. Yet, it cannot be ruled out that fundamental rules of international law are being violated by Israel or Israelis, whether these violations concern the regulation on the use of force between states, LOAC rules or other rules such as the prohibition on direct and public incitement to commit genocide. In any case, it cannot be contested that there is at least a serious, substantial or foreseeable risk that some of these violations may be committed. This is certainly true of the LOAC violations, in particular with regard to the attacks launched by Israel and its impeding, or even refusal, of the delivery of humanitarian relief. It is more debatable with respect to genocide. However, by indicating the provisional measures requested by South Africa, the ICJ reinforced the likeliness of the risk of a genocide in Gaza, since it has recognized the plausibility of the alleged rights and the existence of serious and irreparable prejudice to those rights.[324] Any serious risk of LOAC violations or genocide triggers obligations for all the states.

[314]The interpretation of the measure is made difficult due to the awkward use of comas (ibid.). However, the measure must be interpreted in light of the ICJ findings at para. 47. For a similar interpretation see A. Haque, 'Halt: The International Court of Justice and the Rafah Offensive', *Just Security*, 24 May 2024.

[315]See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip*, *supra* note 239, Order of 24 May 2024 (Judge Nolte, Declaration), para. 25.

[316]Ibid., Order of 26 January 2024, para. 86; Order of 28 March 2024, para. 51.

[317]Ibid., Order of 24 May 2024, para. 57.

[318]Ibid., Order of 26 January 2024, para. 54.

[319]See, e.g., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar),* Preliminary Objections, Judgment of 22 July 2022, [2022] ICJ Rep. 477, paras. 107–108, 112.

[320]See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip*, *supra* note 239, Order of 26 January 2024, para. 46.

[321]Ibid., paras. 47–50.

[322]Ibid., paras. 51–52.

[323]Ibid., para. 53.

[324]See, e.g., in support of such a view, statement of the Minister President of the Wallon Parliament in Belgium, 5 February 2024, available at nautilus.parlement-wallon.be/Archives/2023_2024/CRAC/crac92.pdf; 'Japan's Itochu to End Cooperation with Israel's Elbit amid Gaza War', *Times of Israel*, 5 February 2024.

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Those obligations may require states to take positive measures, namely, to use all lawful means at their disposal to prevent Israel from committing those violations or a genocide. As far as the prevention of LOAC violations is concerned, such obligation may arguably be found in the obligation 'to ensure respect' for LOAC, notably contained in Article 1 common to the four Geneva Conventions.[325] Positive preventive measures could include[326] an official and public request to Switzerland to convene a meeting of states party to the Geneva Conventions to examine the situation in Gaza,[327] to step up the supply of humanitarian aid to the Gazan population, and to mobilize states to take action for peace in Israel and Gaza. As far as the prevention of genocide is concerned, the obligation is expressly set out in Article I of the Convention and its content has been interpreted by the ICJ.[328] South Africa has argued that this obligation notably involved referring the matter to the ICJ and requesting provisional measures to prevent the commission of genocide.[329] This view is shared by Nicaragua, which also referred to this obligation of prevention to justify its request for intervention against Israel in the proceedings initiated by South Africa on the basis of Article 62 of the ICJ Statute.[330] Although this cannot apply to requests made by other states for intervention based on Article 63 of the ICJ Statute,[331] since the purpose of such a request is not to prevent the genocide at stake but, for the intervening state, to provide its own interpretation of the disputed provisions,[332] those requests nonetheless prove to be essential in order to clarify the elements of the Convention discussed in the case. Those elements arguably include the contours of the concept of public and direct incitement to commit genocide and the factors to be taken into account for inferring genocidal intent. Such a clarification is essential not only because it concerns the determination of the content of a Convention whose observance is of interest to all the states, given its subject matter, but also because it will make it easier in the future to identify cases of violations of the Convention or risks of such violations and, consequently, to prevent or punish them on time.

The obligation to prevent LOAC violations or genocide, stemming from Article 1 common to the four Geneva Conventions and Article 1 of the Genocide Convention, respectively, may be construed as also requiring states to abstain from taking certain measures, such as providing military equipment to a state when there is a serious, clear or substantial risk that such equipment might be used to commit LOAC violations[333] or a genocide.[334] Similar prohibitions may also be

[325]See also Protocol I, *supra* note 162, Art. 1 and customary LOAC (Rule 144 of the ICRC study on customary LOAC, applicable in both international and non-international armed conflicts, Henckaerts and Doswald-Beck, *supra* note 157, at 509).

[326]See 'Open Letter to Mr. Alexander De Croo, Prime Minister of Belgium, Holding the Presidency of the Council of the European Union Brussels', 14 January 2024 (unpublished).

[327]Three meetings of such a nature have already been convened by Switzerland as the depositary of the Geneva Conventions, in particular on the respect for the obligations provided in the Fourt Geneva Convention in relation to conflicts in Gaza: on 15 July 1999, 5 December 2001 and 17 December 2014.

[328]See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Serbia and Montenegro*), *supra* note 300, para. 431.

[329]See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip*, *supra* note 239, Application Instituting Proceedings, para. 3.

[330]Ibid., Application for Permission to Intervene by the Government of the Republic of Nicaragua, 23 January 2024, para. 17. Unlike Art. 63 of the ICJ Statute, that Article requires the requesting state to show that 'it has an interest of a legal nature which may be affected by the decision in the case'.

[331]See, e.g., the interventions of Colombia (see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip*, *supra* note 239, 5 April 2024), Libya (ibid., 10 May 2024), Mexico (24 May 2024), and Spain (28 June 2024).

[332]See, e.g., *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide* (*Ukraine v. Russian Federation*), Order of 5 June 2023, para. 84.

[333]See, e.g., ICRC, *Understanding the Arms Trade Treaty from a Humanitarian Perspective* (2020), 13.

[334]See, e.g., *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v. Germany)*, Application Instituting Proceedings, in particular para. 67.

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found in other regulations, both at the world level, with the Arms Trade Treaty, [335] and at the regional level, especially with the 2008 EU Common Position defining common rules governing control of exports of military technology and equipment.[336] Those regulations, as well as common Article 1 to the four Geneva Conventions and Article 1 of the Genocide Convention, have recently been referred to by states,[337] national courts[338] or even corporations[339] to suspend – or require the suspension of – the transfer of military equipment to Israel. On 1 March 2024, Nicaragua even instituted proceedings before the ICJ against Germany, alleging that Germany breached its obligation of prevention embodied in both Article 1 common to the four Geneva Conventions and Article I of the Genocide Convention, by still providing military equipment to Israel for its military operations in Gaza.[340]

That being said, even if it was proved that Israel was committing LOAC violations and a genocide, it is uncertain that such supplying states would be accomplice to those violations, as alleged by Nicaragua in its application against Germany,[341] on the ground that they would breach the obligation not to aid or assist Israel in their commission.[342] Such a breach requires establishing that the supplying state shares the intent of Israel to commit the violations[343] or, at least, according to the ICRC's view with respect to LOAC violations,[344] that it knows that its assistance is being used to commit such violations and has actually facilitated their commission. Nevertheless, the more Israel's LOAC violations are established, in particular through investigation reports, the greater the risk that the states supporting Israel militarily will be held responsible as accomplices.

[335]See in particular Art. 6.

[336]See in particular Art. 2, para. 2 and 6.

[337]See, e.g., Nicaragua, Application Instituting Proceedings, *supra* note 334, in particular para. 67; Decision of the Minister President of the Wallon Parliament in Belgium, *supra* note 324. The United States paused 'the delivery of 3,500 bombs to Israel ... out of fear that widespread civilian casualties could be caused by American bombs' (P. Baker, 'Turning Point or Breaking Point? Biden's Pause on Weapons Tests Ties to Israel', *New York Times*, 8 May 2024). However, the United States decided to continue providing Israel with military equipment although a US official report concluded that 'it is reasonable to assess that [US military equipment] have been used by Israeli security forces since October 7 in instances inconsistent with its [LOAC] obligations or with established best practices for mitigating civilian harm'. See Report to Congress under Section 2 of the National Security Memorandum on Safeguards and Accountability with Respect to Transferred Defense Articles and Defense Services (NSM-20), 10 May 2024, at 22.

[338]See, e.g., Gerechtshof Den Haag, 'Civiel recht, Arrest van 12 februari 2024', available at uitspraken.rechtspraak.nl/details?id = ECLI:NL:GHDHA:2024:191 (in Dutch). See, for comments, M. Zwanenburg and J. Voetelink, 'Appeals Judgment in Case Concerning the Shipment from the Netherlands of Parts for F-35 Fighter Aircraft to Israel', *EJIL:Talk!*, 16 February 2024.

[339]See, e.g., 'Japan's Itochu to End Cooperation with Israel's Elbit amid Gaza War', *supra* note 324.

[340]See Nicaragua, Application Instituting Proceedings, *supra* note 334. The ICJ nonetheless refused to indicate provisional measures since the circumstances did not require to indicate them, Order of 30 April 2024, para. 26, at 9.

[341]Ibid., para. 3.

[342]Under general international law, this obligation may be found in ARSIWA, *supra* note 254, Arts. 16, 41(2)). However, Art. 41 implies a 'serious' violation of peremptory norms (ibid., Art. 40(1)). While Israel might have committed violations of such norms, it is uncertain that those violations amount to 'a gross or systematic failure' by Israel to fulfil the obligations arising from those norms (ibid., Art. 40(2)). In the ICRC's view, LOAC provides for a specific obligation not to aid or assist a belligerent in the commission of LOAC violations, as stemming from the general obligation to ensure respect for LOAC (see, e.g., ICRC Commentary to Art. 1 of the 1949 Geneva Convention III, *supra* note 148, paras. 192–193).

[343]UN Doc. A/56/10 (2001), at 65, paras. 3, 5.

[344]See ICRC Commentary to Art. 1 of the 1949 Geneva Convention III, *supra* note 148.

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