

International Humanitarian Law: The Siege on the Gaza Strip

Updated 24 July, 2017

Since the declaration of Gaza as a “hostile entity” in September 2007, Israel has employed a strategy which aims to politically cripple Hamas into submission at the expense of the 2 million innocent Palestinians who populate the Gaza Strip. Israel justifies its actions by asserting that Hamas is an Islamic group which refuses to recognize Israel and is intent on destroying it by launching homemade Qassam rockets into southern Israel.

Although Israel claims that it no longer bears the responsibilities of an occupier since its withdrawal from Gaza in September 2005, Israel still controls the borders, the airspace and the sea of the 365km² area, exploiting this fact to impose a blockade on Gaza. Israel periodically releases resources on a drip and fails to provide adequate amounts of fuel, food and medical supplies. This isolation has plunged the area into a dire humanitarian crisis, with commentators describing Gaza as “the largest open air prison in the world.”

By collectively punishing the Palestinians to ensure political gain, Israel is in complete violation of international humanitarian law, a fuller discussion of which will now follow.

What is International Humanitarian Law?

International Humanitarian Law (IHL) is a branch of International Law which seeks to mitigate the impact of wars and armed conflicts on the lives of human beings and to minimize their suffering. Generally, IHL can be defined as a set of rules that are applicable in armed conflicts; supposedly a device by which a balance can be struck between humanitarian concerns and military requirements.

International Humanitarian Law consists of two branches, first of which is the law of armed conflict. The aim of this law is to regulate the parameters under which combat may be engaged, with an emphasis on preventing the deliberate targeting of civilians and also on the **principle of proportionality**, which seeks to prevent disproportionate injury to civilians. Secondly, **the law of occupation**, which applies to a foreign power that is effectively in control of an area whilst at the same time, owing obligations towards the civilian population under its control.

Generally speaking, a major part of IHL is contained in the Geneva Conventions of 1949 and their Additional Protocols, which are international treaties containing the most important rules limiting the barbarity of war. This factsheet will also examine the Hague Regulations annexed to the 1907 Fourth Geneva Convention Respecting the Laws and Customs of War on Land.

The legal status of these conventions is a contentious issue, although it has been deemed that the Hague Convention is part of international customary law. This ultimately means that it is binding on all states, even if they have not voluntarily agreed to accept its principles. The Geneva Conventions are generally accepted as having customary status, although there is some debate surrounding the status of some additional sections.

The Fourth Geneva Convention is of particular importance when analysing the situation in the Occupied Palestinian Territories. Particular attention should be paid to the following obligations:

<p>"Protected persons are entitled, in all circumstances, to respect for their persons, their honor, their family rights, their religious convictions and practices, and their manners and customs."</p>	<p>Geneva Convention (GC) IV Art. 27 (also see Hague Regulations (Hague) Art. 46)</p>
<p>To the fullest extent of the means available to it, the Occupying Power has the responsibility of ensuring food and medical supplies for the population, as well as maintaining medical services.</p>	<p>GC IV, Art. 55, 56</p>
<p>"If the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief schemes on behalf of the said population, and shall facilitate them by all means at its disposal." Such relief schemes can be undertaken either by States or by impartial international organizations like the ICRC. The Occupying Power must also guarantee the protection of relief consignments.</p>	<p>GC IV Art. 59</p>
<p>Such relief consignments do not relieve the Occupying Power of its ultimate responsibility to ensure (to the fullest extent that it can) that protected persons have access to food and medical supplies and medical services</p>	<p>GC IV Art. 60</p>
<p>Protected persons shall have every facility for making application to the ICRC, Protecting Powers, or any organization that might assist them.</p>	<p>GC IV Art. 30</p>
<p>Occupying Power shall facilitate the functioning of institutions devoted to the care and education of children</p>	<p>GC IV Art. 50</p>
<p>Representatives from the Protecting Power (or the ICRC) have permission to visit protected persons wherever they are detained or interned, and can interview them without witnesses. Such visits may not be prohibited except for reasons of imperative military necessity, and then only as an exceptional and temporary measure.</p>	<p>GC IV Art. 76, 143</p>
<p>The Occupying Power should facilitate the operation of local courts to enforce existing laws, although in certain instances non-political military tribunals can be used.</p>	<p>GC IV Art. 64, 66</p>
<p>The Occupying Power must respect certain due process rights (mainly in the context of criminal</p>	<p>GC IV Art. 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75</p>

proceedings).	
Representatives of the Protecting Power (or a substitute, such as the ICRC) shall have the right to attend the trial of any protected person, unless the trial must be held in camera - as an exceptional measure - due to the security interests of the Occupying Power (which then must so notify the Protecting Power.)	GC IV Art. 74
The Occupying Power is forbidden from pillaging and imposing collective punishment.	Hague Art. 47, 50 (and GC IV Art. 33)
"Individual or mass forcible transfers, as well as deportations of protected persons from the occupied territory...are prohibited." Nevertheless, the Occupying Power may undertake a total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Also, the Occupying Power shall not "deport or transfer parts of its own population into the territory it occupies."	GC IV Art. 49
"Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory."	GC IV, Art. 47

International Humanitarian Law applies only to armed conflict and then, only once the conflict has begun. It applies equally to all sides, regardless of who started the fighting.

It should be noted that IHL is often referred to as “the Laws of War.”

Distinction and Proportionality

Under conventional and customary international humanitarian law, civilians are persons who are not members of the armed forces and as such they are protected against attack, unless and during such time they directly participate in the hostilities.

As will become apparent from the discussion hereon, the Israeli occupying forces have clearly failed to respect the basic principles of distinction and proportionality enshrined in international humanitarian law. Parties in a conflict should at all time “distinguish between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.” This principle of distinction should also be read alongside the principle of proportionality. This principle states, according to The International Committee of the Red Cross, “that launching an attack which may be expected to cause

incidental loss of civilian life, injury of civilians and damage of civilian objects, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.”

Israel’s use of tanks and F-16 fighter jets against civilian populated centres in the Gaza Strip, one of the most densely populated areas on earth, results in flagrant breaches of the principles of distinction and proportionality. These civilians, who are entitled to the protection provided under international humanitarian law as a population under belligerent occupation, are being subjected to some of the most horrific attacks, without the comfort of having a legal shield to protect them from harm. In 2014, over 2000 Palestinians died, 1,462 of whom were civilians, and 495 of whom were children.

In disregarding the principles of distinction and proportionality, the Israeli occupying forces carrying out and the political leaders sanctioning attacks such as those described above, have committed grave breaches of the Fourth Geneva Convention, which constitute war crimes entailing individual criminal responsibility for the perpetrators. The High Contracting Parties to the Geneva Conventions hold the responsibility to bring before their courts those responsible for such breaches, as established under Article 146 of the Fourth Geneva Convention. However, this shall be discussed in detail under the “Right to a Remedy” section.

International Law of Occupation

In order to fully understand the legal status of Gaza, a broader examination is required of Israel’s contention that their 2005 withdrawal from the area marks the end of its obligations to residents of the Gaza Strip. The notion is founded upon an overtly narrow understanding and interpretation of “occupation” as defined exclusively by the continuous presence of ground troops in a given territory.

The law of occupation is one the oldest and most developed branches of IHL. It is aimed at regulating the relationship between the occupying power and the population of the occupied territory. It also regulates the relationship between the Occupying Power and the state whose territory has been occupied.

Occupation has long been understood in terms of the ability to exercise effective control over a territory, a concept that is intimately linked with military ground presence in the territory. However, occupation for the purposes of IHL is determined by effective control and does not require the continuous presence of ground troops. Article 42 of the 1907 Hague Convention, states that “territory is occupied when it has actually been placed under the authority of the hostile army. The occupation only extends to the territory where such authority has been established and can be exercised.” This sets the basic legal standard and has been expounded upon by the Fourth Geneva Convention, in UN resolutions and judgments of the International Court of Justice.

The law of occupation should also be interpreted in the light of changes in technology. For example, in the Gaza Strip, Israel exercises “police functions” through the use of image technology and drone planes, allowing it to identify a suspected militant from the air and to kill that person using missiles fired from the air. At no point is there the need to send in ground troops. Although there is not a tangible presence on the ground, there is no doubt that this is still a form of occupation and control.

When does occupation end?

Occupation ends when:

The occupying forces no longer exert control over enemy territory, or the occupying forces no longer exercise the functions of government in the occupied territory and the public authority has returned to the sovereign State.

International Humanitarian Law: Israel's Position

Unlike the Hague Regulations, which Israel accepted due to its customary nature, Israel contests the applicability of the Fourth Geneva Convention to the Occupied Palestinian Territories. Israel claims that it is merely an “administrator” in the region and therefore does not subscribe to the Fourth Geneva Convention. Instead, it has declared that it would abide by the humanitarian provisions of the Convention. The Israeli Supreme Court has held that Israel is a belligerent occupant in both Gaza and the West Bank, yet it continues to endorse the position of the government against the de jure (meaning rightful, by law) application of the Fourth Geneva Convention.

Israel's stance remains firmly rooted in claims that it owes no obligation to the residents of the Gaza Strip. On September 12th 2005, Israel completed its disengagement of the Gaza Strip, with the two primary components of the plan being the dismantling of the Gaza settlements (transferring the settlers to Israeli territory) and removal of all Israeli Defense Forces from the area. After completion of the plan, Israel issued an order declaring the end of the military government in the Gaza Strip, thereby relinquishing its responsibility for ensuring the proper functioning of life there. This was an historic event, given that Israel had maintained a permanent military presence since capturing Gaza in the 1967 War. Three days after completion, the Prime Minister at the time, Ariel Sharon, declared before the UN General Assembly that it was “the end of Israeli control over Gaza and responsibility for the Gaza Strip.” But was it?

Indeed, officially, Israel claimed that its goal in disengaging from the Gaza Strip was to end the friction and fatalities arising from conflicts between the Israeli troops and settlers and the residents of Gaza. In the Revised Disengagement Plan Main Principles, Israel described the plan as a means of improving economic and social welfare of Gaza residents by giving them an opportunity to run their own affairs.

However, the disengagement plan has not absolved Israel of its obligations to permit and facilitate the proper functioning of civilian life in the Gaza Strip, nor has Israel relinquished control over the Gaza Strip, but rather removed some elements of control whilst enhancing control in other areas.

Even in the unlikely event that Israel's control in Gaza did not amount to an “effective control”, thereby rendering the territory unoccupied, Israel would still carry a degree of responsibility for the area. Certainly, upon closer examination of the provisions of the Fourth Geneva Convention, it is evident that IHL is not limited to affording protection to civilians living under occupation. For example, the humanitarian provisions state that Israel must protect the wounded as well as enabling the free passage of medicines and food. Similarly, there is the further question of whether an end of an occupation would immediately extinguish all responsibilities to population in the formerly occupied territories. According to Gisha's recent paper “Disengaged Occupiers: The Legal Status of Gaza”, it may be right to impose residual responsibilities on a former occupying power. So, even if Israel had wholly relinquished all ties to the Gaza Strip upon its withdrawal in 2005, then theoretically if Gaza had been left inadequately supplied, Israel would have continued to owe duties to the population of Gaza in order to allow them to

restore their society to the desired condition. However, this paper works on the basis that Israel's occupation did not, in fact, end and that it remains in this instance, a factual occupation.

How does Israel continue to exercise effective control over the Gaza Strip?

Israel's proposed disengagement plan from the Gaza Strip stated that "once fully enacted there will be no basis to the claim that the strip is occupied land", even though it was envisaged that there would be indefinite Israeli military and economic control over Gaza strip. If one were to read between the lines, the eagerness to make such a declaration revealed the strategy behind the thinking; Israel sought to proclaim an end to the occupation of Gaza, ostensibly in order to absolve Israel of all legal responsibilities as an occupying power, whilst retaining military control. Upon closer inspection, the disengagement by Israel merely changed the way in which the control of the area is effectuated. Israel continues to control Gaza in the following ways:

- Control of border crossings
- Control of crossing of goods
- Complete control of Gaza's airspace and territorial waters.
- Control of the Palestinian Population Registry.
- Control of Gaza's taxation system

Since the September 2005 withdrawal, Israel has sharply limited the movement of goods and people into and out of Gaza. However, no better example of Israel's continued control can be given than that which is being displayed by the current situation in the Gaza Strip.

The Siege on the Gaza Strip

The above documented disengagement from the Gaza Strip cannot be interpreted in isolation and should be considered alongside the very significant event that occurred soon after the disengagement plan was implemented, namely the ascent of Hamas to the Palestinian Authority in January 2006.

In June 2007, Hamas took over power in the Gaza Strip. On January 25, 2006, Hamas became the leading party in the Palestinian Authority, after a sweeping victory in the Palestinian Legislative Council elections. This marked the first time a party other than Fateh had been elected into the Palestinian Authority. Israel, the United States and the European Union all view Hamas as a terrorist organization and refuse to deal with a party that does not recognize Israel's right to exist.

It was inevitable that tension between Hamas and Fateh would eventually erupt. Low level conflict ensued throughout 2006 between the two parties until February 2007 when Khaled Mashal, Hamas politburo leader and President Abbas of Fateh agreed to form a National Unity Government in Mecca under the sponsorship of King Abdullah of Saudi Arabia.

However, fighting continued and at the end of May, independent Interior Minister Taleb al- Qawasmi, resigned due to lack of authority in controlling the two factions. In the middle of June 2007, Hamas claimed to have complete control over Gaza. Meanwhile in the West Bank, President Abbas announced the dissolution of the current unity government and declared a state of emergency. Since then and until now, Fateh and Hamas have tried to have many reconciliation talks. In 2014, a new unity government was formed.

Since 2006, the area has been under siege; the objective being, according to the Israeli Defense Minister Ehud Barak, “to weaken Hamas”. The sanctions imposed following Hamas’s 2006 victory have been tightened further. One example of the siege is that Israel has curtailed cross- border traffic, pointing to the absurdity of supplying goods to an entity whose rulers fire rockets into Israeli towns.

The logic behind the siege is supposedly to demonstrate to Palestinians in the Gaza Strip that Hamas cannot deliver and therefore ought to be cast aside. However, this idea has fallen short. Hamas continues to control the area and has filled the void left by the PA. So, the closure of the crossings and the economic punishment which was designed to hurt the rulers has in turn only hurt the ruled. It is the civilians who are now suffering. Hamas finds ways to finance its government and can invoke the siege to justify its more unconscionable practices.

The charities operating on the ground in Gaza have been able to paint a truthful picture of the humanitarian crisis that is occurring. Eight leading charities (including Oxfam and Save the Children) compiled a report entitled “The Gaza Strip: A Humanitarian Implosion” which states that “Israel retains effective control over the Gaza Strip, by virtue of the full control it exercises over the Gaza Strip’s land border, its air space and territorial waters and the movement of people and goods...The blockade, in response to indiscriminate rocket attacks into Israel, constitutes a reprisal against a civilian population and is forbidden by international humanitarian law.” This could not be put in more simple and digestible wording. These charities have first- hand experience of the crisis in the Gaza Strip and they exercise a shrewd judgment. Their report goes on to call on the leaders of Britain and the EU. “We ask the UK government and the EU to actively promote plans for the reopening of the Gaza crossings in line with the Agreement on Movement and Access (AMA,) brokered by the EU and the US in 2005, and to renew their efforts to ensure the full implementation of the AMA.” The AMA is an agreement entered into by the Israeli government and the Palestinian Authority designed to promote peaceful economic development and improve the humanitarian situation in Gaza.

The foreign trade of Gaza is conducted almost solely with Israel or via Israeli ports. Under the AMA, Israel undertook to ensure an orderly and continuous movement of goods through the Karni crossing. Since the siege began, Israel has severely prohibited movement through this crossing to the point where exports have been stopped completely. As each day passes, more and more businesses have had to shut down, completely destroying the livelihoods of thousands of workers.

The current situation is a threat to the health and well-being of the Gaza Strip, almost half of whom are children.

Israeli air strikes have repeatedly ripped through the Gaza Strip, indiscriminately killing civilians, many of whom have been Palestinian children. The use of unrestrained force against a civilian population in response to the unlawful rocket attacks carried out by the Palestinian militant wings is a flagrant violation of the laws of war. This regular infliction of “collective punishment” on the Palestinians has been excused by the Israeli Internal Security Minister Avi Dichter who stated that the firing of rockets by Palestinian groups must be “stopped completely irrespective of the cost to the Palestinians”. Even if the siege contributes to the safety of Israeli soldiers and Israeli civilians (as the government claims) – which some senior defense officials themselves question – the appalling human consequences make the siege a classic example of collective punishment, which is prohibited by both Israeli and international law

Sporadic fuel and electricity cuts have crippled the functioning of hospitals, prevented Gaza residents from lighting and warming their homes and caused disruption to other sanitation services, such as sewage treatment. In 2017, residents of Gaza receive around 4 hours of electricity daily. The Gaza Strip needs 450 megawatts daily, but currently receives only 150. The lack of fuel also prevents doctors and medical crews from arriving to work at the hospitals.

Another issue is the severe lack of wastewater treatment. In 2014, Israel damaged the treatment facilities, leading to untreated sewage. This makes 90-95% of Gaza's water unfit for consumption, and even difficult to use in agriculture. Moreover, the water infrastructure in Gaza is depreciating at a level of 44%, compared with 10-12% in Israeli cities.

Rafah International Crossing Point on the Egyptian border remained closed and restrictions remained tight on the general movement of Palestinians until May 2011 when it announced it would permanently reopen. However, it closed again after Morsi was overthrown in 2013. Also, the Israeli army allows only a handful of Palestinians through the Erez crossing to the West Bank or into Israel for work purposes. In 2010, Israel started permitting most imports, but most of the limitations on exports have not been eased.

Such is the level of catastrophe in Gaza that routine acts such as purchasing goods, visiting relatives and continuing with an education have become impossible.

The Right to a Remedy when International Humanitarian Law is Breached

As outlined above, International Humanitarian Law ensures the protection and provision of assistance to the victims of armed conflicts. However, once individuals become the victim of violations of international humanitarian law (as seen in the Gaza Strip), the protection afforded by this law effectively terminates. The law offers victims of serious violations of this law little or no means of redress. Humanitarian law does not expressly guarantee victims any right to a remedy. As the humanitarian law treaties do not envisage causes of action for victims in national or international law, they are not able to exercise their rights.

Speaking in general terms, the vast majority of nations have ratified the Geneva Conventions, thereby recognizing a legal obligation to uphold them in the midst of the war. However, in the event of violations of these laws, there are few legal sanctions that the world community can apply against the offending nation.

Whilst the laws of war do allow that some civilian life may be lost as an incidental result of military action, this is only the case where such military action distinguishes between military and civilian targets, is proportionate and causes the least foreseeable harm. The situation in Gaza clearly fails to fulfill these prerequisites.

Article 146 of the Fourth Geneva Convention, all state parties to the convention have a legal obligation to "enact effective penal sanctions for persons committing, or ordering to be committed" grave breaches, and to investigate and prosecute those persons. Al-Haq recently issued a press release urging the High Contracting Parties to the Convention "to fulfill their obligations...including searching for and prosecuting those responsible for grave breaches of the Geneva Conventions, and to ensure that Israel as the Occupying Power respects its legal obligations under international humanitarian law". However, MIFTAH'S article "Striving for Justice in Gaza", identifies that expecting the case to go before another

country's court may be distant and unrealistic. "Due to the political implication related to the effective application of such a principle...the recourse to foreign jurisdictions is far from being a concrete response".

The International Criminal Court cannot exercise its jurisdiction because Israel refused to sign its Statute. Israel has indicated that they do not intend to ratify the treaty, which they have termed "unsigned" the treaty.

According to the law of treaties, a state that has signed but not ratified a treaty is obligated to refrain from "acts which would defeat the object and purpose" of the treaty; however, these obligations do not continue if the state makes clear that it does not intend to become a party to the treaty.

The Red Cross believes that the "the most effective means of securing compliance with these humanitarian rules is through widespread public education in peacetime. In ratifying the Geneva Conventions, nations agree to educate their military and the public. The more knowledgeable members of the armed forces and the general public are about the law, the more likely it is to be obeyed". The operative word here is "ratifying"; in not ratifying the Fourth Convention, Israel effectively bypassed the responsibilities that would naturally follow.

In 2005, the UN General Assembly adopted a resolution on the fundamental principles of the right to reparation under human rights law and international humanitarian law. This resolution is not legally binding as such. However, it is useful in examining Israel's obligations, given that the resolution does not profess to create new norms, but collects and restates accepted norms in international law.

The right to an effective remedy implies the right to seek and obtain full reparation, including restitution, compensation, satisfaction, rehabilitation and guarantees of non-repetition. "In accordance with its domestic law and international legal obligations, a State shall provide reparation to victims for acts or omission which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law". There is yet to be seen any signs of reparation or compensation from Israel.

As Caelum Moffatt, writing for MIFTAH rightly observes, Israel continues to prove that it is the "overriding authority when it comes to matters of Israel" and its leaders will not "succumb to objections to their policies". Indeed, the blockade on Gaza has been met with much international criticism but to no avail.

Attempts by the UN Security Council to criticize the Israeli siege of the Gaza Strip have been blocked by the United States. The International Middle East Media Center reported on 23rd January 2008 that the US representative to the UN, Zalmay Khalilzad, said that the UN Security Council statement was "not fair and [failed] to consider the fact that the Palestinian homemade shells are the cause of the crisis in Gaza". The Palestinian Ambassador still held out however, proclaiming that "Israel should take note; 14 members of the Security Council say that humanitarian situation cannot be tolerated."

As to whether international humanitarian law is complied with, sadly there are countless international examples of violations of IHL. Increasingly, the victims of war are civilians. Implementing this law will always be difficult as this law only applies during times of violence. However, striving for effective compliance remains as urgent as ever.

In the meantime, the international community will continue to be called upon to:

1) End the humanitarian sanctions imposed on the Palestinian people in the Occupied Palestinian Territories. These measures affect the very essential sources of survival and are being used against a population that has suffered enough already.

2) Use all means at its disposal to respect and ensure respect in Occupied Palestinian Territories to the Fourth Geneva Convention.

In conclusion, it is seemingly not international law that determines policy in the Middle East. Debate over whether Israel's siege of the Gaza Strip constitutes an illegal occupation is remote to those living there. The siege on the area continues, leaving Gaza isolated and desperate. Action is required; and sooner rather than later.

Resources:

The ICRC Advisory Service on International Humanitarian Law

<http://icrc.org/web/eng/siteeng0.nsf/html/57JNRP>

Program on Humanitarian Policy and Conflict Research <http://opt.ihlresearch.org>

Human Rights Watch <http://www.hrw.org/english/docs/2007/09/20/isrlpa16920.htm>

B'Tselem http://www.btselem.org/topic/gaza_strip

Gisha: Legal Center for Freedom of Movement <http://www.gisha.org/>

Al-Haq <http://www.alhaq.org>

The Electronic Intifada <http://electronicintifada.net>

International Middle East Media Center <http://www.imemc.org>

Negotiations Affairs Department <http://www.nad-plo.org>

Palestinian Centre for Human Rights as quoted at <http://www.reliefweb.int/rw/rwb.nsf>

Amnesty International

<http://asiapacific.amnesty.org/library/Index/ENGMDE150352005?open&of=ENG-ISR>

BBC <http://www.bbc.com/news/world-middle-east-28439404>