

# The Israel-Palestine conflict from the perspective of international humanitarian law

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## I Introduction

On 7 October 2023, Hamas and other Palestinian armed groups launched an attack on Israel, during which over 1,200 people were killed (of whom at least 809 were civilians) and at least 252 others taken hostage. Shortly after, Israel began a campaign of air strikes against Gaza, followed by a ground invasion. As of 10 July 2024, Israel's assault on the territory had killed more than 38,000 Palestinians and injured more than 88,000 others (the majority civilians), displaced more than 90% of the population, and left much of Gaza in ruins.<sup>1</sup>

The shocking toll of death, injury and destruction has prompted many ordinary people around the world to try to understand the background to the conflict, which has its roots in the denial of the Palestinian people's right to self-determination over many decades, and to consider how international law relates to the situation. One area of international law that is of direct relevance is international humanitarian law (IHL). Since October 7, repeated references have been made to IHL in connection with the conflict by states, the United Nations, and other organizations. For example, on December 5, Japanese Foreign Minister Yoko Kamikawa stated that "Japan recognizes that Israel has a right to defend itself and its people following the attacks by Hamas, in accordance with international law. However, at the same time, on various occasions, ... Japan has directly urged Israel to act in accordance with international law, including international humanitarian law, while unequivocally condemning the terror attacks by Hamas and others."<sup>2</sup>

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<sup>1</sup> OCHA, "Reported Impact Snapshot," 10 July 2024, at <https://www.ochaopt.org/content/reported-impact-snapshot-gaza-strip-10-july-2024>; U.N. Doc. A/HRC/56/26, 27 May 2024, p. 3, para. 9; Adam Gaffney, "Don't Believe the Conspiracies About the Gaza Death Toll," *The Nation*, 30 May 2024, at <https://www.thenation.com/article/world/gaza-death-toll-evidence>; World Bank, European Union & United Nations, "Gaza Strip Interim Damage Assessment: Summary Note," 29 March 2024, at <https://thedocs.worldbank.org/en/doc/14e309cd34e04e40b90eb19afa7b5d15-0280012024/original/Gaza-Interim-Damage-Assessment-032924-Final.pdf>.

<sup>2</sup> Ministry of Foreign Affairs of Japan, "Press Conference by Foreign Minister KAMIKAWA Yoko," 5 December 2023, at [https://www.mofa.go.jp/press/kaiken/kaikenwe\\_000001\\_00007.html](https://www.mofa.go.jp/press/kaiken/kaikenwe_000001_00007.html).

This expert comment aims to assist those interested in understanding how IHL applies to the current conflict, first by providing a basic outline of IHL and then explaining how Israel's occupation of Gaza affects the application of this body of law.

## II What is international humanitarian law?

Also known as *jus in bello*, IHL is the body of treaty and customary international law rules that govern the conduct of armed conflicts (and occupations by states of the territory of other states following armed conflict). The core IHL treaties today are the 1907 Hague Convention (IV) and its annexed Regulations,<sup>3</sup> the four 1949 Geneva Conventions, and the two 1977 Additional Protocols to these Conventions.<sup>4</sup>

In its regulation of armed conflict, IHL aims to balance two competing objectives: reducing the suffering caused by armed conflict while still enabling the parties to the conflict to carry out legitimate military operations aimed at subduing the enemy. This has given rise to the basic principles of IHL, which include the following:

- The principle of distinction: Parties to the conflict must at all times distinguish between civilians/civilian objects and combatants/military objects, and may not directly target civilians/civilian objects or carry out indiscriminate attacks.
- The principle of proportionality: Attacks which may be expected to cause incidental harm to civilians/civilian objects that would be excessive in relation to the concrete and direct military advantage anticipated for that particular attack are prohibited.
- The principle of humanity: Civilians and combatants who are no longer taking part in hostilities because they are sick or injured, have surrendered, or have been taken prisoner must be treated humanely.

In its regulation of occupations, IHL aims to preserve the rights of the ousted sovereign (the state whose territory has been occupied) by prohibiting the occupying power from making fundamental changes to the territory it is temporarily controlling. It also places an obligation on the occupying power to assume the duty of the ousted sovereign to restore and maintain public order and safety.

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<sup>3</sup> <https://ihl-databases.icrc.org/en/ihl-treaties/hague-conv-iv-1907>.

<sup>4</sup> <https://ihl-databases.icrc.org/en/ihl-treaties/geneva-conventions-1949additional-protocols-and-their-commentaries>.

An important means of enforcing IHL is prosecuting serious violations as war crimes, in either domestic or international courts. The International Criminal Court (ICC) is empowered to prosecute war crimes under Article 8 of the Rome Statute of the International Criminal Court.<sup>5</sup>

IHL does not deal with the legality under international law of the resort to armed force (in other words, whether it was legal to start a particular armed conflict). That is regulated by a different area of international law: the *jus ad bellum*. Since the adoption of the UN Charter in 1945, states have been prohibited from using force against other states, with two exceptions: if force is 1) authorized by the Security Council or 2) used in self-defense under Article 51 of the Charter, which allows states to exercise their “inherent right of individual or collective self-defense” if they are subjected to an armed attack.<sup>6</sup> Any use of force in self-defense must be both necessary and proportionate.<sup>7</sup>

In considering the application of IHL to the current situation in Gaza, two important issues must be clarified: 1) is Gaza still “occupied” and 2) is the conflict “international” or “non-international,” as defined in IHL? These are discussed in turn below.

### III Is Gaza still occupied?

Israel occupied Gaza and the West Bank (including East Jerusalem) during the 1967 war, displacing Egyptian control over the former and Jordanian control over the latter. Subsequently, both Egypt and Jordan renounced any claims to these territories in recognition of the Palestinian people’s right to self-determination, to be realized in subsequent negotiations between Israel and the Palestinians.<sup>8</sup> Under a series of agreements beginning with the 1993 Oslo Accord, the Palestinian Authority (PA) was created as an interim Palestinian government, the West Bank was divided into three zones with differing degrees of Palestinian and Israeli administrative and/or security control (with the status of East Jerusalem, annexed by Israel in 1967, to be resolved in

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<sup>5</sup> <https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf>.

<sup>6</sup> <https://www.un.org/en/about-us/un-charter>.

<sup>7</sup> It is beyond the scope of this expert comment to examine this issue in detail, but it should be noted that Israel cannot rely on an Article 51 right of self-defense as legal grounds for its current use of armed force against Gaza, for reasons including the fact that (as discussed in Section III) it continues to exercise effective control over the territory as the occupying power (International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I. C. J. Reports 2004*, p. 136, p. 194, para. 139). Even if it had such a right, the degree of force it has used has grossly exceeded the limits of necessity and proportionality.

<sup>8</sup> Yoram Dinstein, *The International Law of Belligerent Occupation*, Kindle edition (Cambridge University Press, 2019), p. 61.

future negotiations), and most of Gaza came under the administrative and security control of the PA, with the exception of Israeli military installations and settlements. Later, in September 2005, Israel unilaterally withdrew all its troops and removed all its military installations and settlements from Gaza.

Although Israel refers to the West Bank as “disputed territory” in its political statements, at the legal level it has implicitly acknowledged since 1967 that the West Bank is occupied, by basing its arguments on occupation law (the subset of IHL rules that apply specifically during occupations) in cases relating to the territory before the Israeli Supreme Court.<sup>9</sup> However, it no longer considers Gaza to be under occupation, as it argues that since its 2005 withdrawal it no longer exercises “effective control” there.

The test of “effective control” derives from Article 42 of the Hague Regulations, which states that “[t]erritory is considered to be occupied when it is actually placed under the authority of the hostile army.” This definition is interpreted as having two aspects: 1) the establishment by the enemy force of its authority, or “effective control,” over the territory, and 2) the dissolution of the authority of the displaced sovereign over the territory.<sup>10</sup>

Israel’s position on the status of Gaza is not accepted by UN bodies,<sup>11</sup> the ICC Prosecutor,<sup>12</sup> the International Committee of the Red Cross (ICRC),<sup>13</sup> the majority of scholarly opinion,<sup>14</sup> or respected non-governmental human rights organizations,<sup>15</sup> which

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<sup>9</sup> United Nations General Assembly 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,” 2023, pp. 31-32; David Kretzmer & Yaël Ronen, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories*, Kindle edition (Oxford University Press, 2021), p. 1.

<sup>10</sup> Dinstein, *supra* note 8, p. 48.

<sup>11</sup> U.N. Doc. A/HRC/50/21, 9 May 2022, p. 4, para. 16.

<sup>12</sup> ICC, Office of the Prosecutor, “Report on Preliminary Examination Activities 2016,” 14 November 2016, p. 25, para. 112.

<sup>13</sup> ICRC, “What Does the Law Say About the Responsibilities of the Occupying Power in the Occupied Palestinian Territory?,” 28 March 2023, at <https://www.icrc.org/en/document/ihl-occupying-power-responsibilities-occupied-palestinian-territories>; ICRC, “Frequently Asked Questions on ICRC’s Work in Israel and the Occupied Territories,” 20 December 2023, at <https://www.icrc.org/en/document/frequently-asked-questions-icrcs-work-israel-and-occupied-territories>.

<sup>14</sup> Dinstein, *supra* note 8, pp. 297-303; Iain Scobbie, “Gaza,” in Elizabeth Wilmschurst, *International Law and the Classification of Conflicts*, Kindle edition (Oxford University Press, 2012), p. 280, p. 300; Julia Grignon, “The Geneva Conventions and the End of Occupation,” in Andrew Clapham, Paola Gaeta & Marco Sassòli (eds.), *The 1949 Geneva Conventions: A Commentary* (Oxford University Press, 2015), p. 1575, pp. 1593-1596; Safaa Sadi Jaber & Ilias Bantekas, “The Status of Gaza as Occupied Territory under International Law,” *International and Comparative Law Quarterly*, Vol. 72 (October 2023), p. 1069, pp. 1069-1088.

<sup>15</sup> B’Tselem, “The Gaza Strip,” 26 February 2023, at [https://www.btselem.org/gaza\\_strip](https://www.btselem.org/gaza_strip); Clive Baldwin, “How Does International Humanitarian Law Apply in Israel and Gaza?,” Human Rights Watch,

hold that it remains the occupying power in the territory. The main reasons for this can be summarized as follows:

- Troops must be present on the ground in order to *establish* effective control over a territory, but are not necessary to *continue* an occupation if the occupying power retains effective control of the territory through other means.
- Israel retains effective control over Gaza’s airspace, maritime areas and land borders, and for many years has imposed a blockade on the territory severely restricting the flow of people and goods (that it has tightened even further since October 7).
- Effective control can “lie in the *capacity* to assert control”<sup>16</sup>; even if Israel had withdrawn its troops, it had the capacity to send them back into Gaza at any time (and has exerted this capacity a number of times, with an ever increasing toll on the civilian population, culminating in its current military operations after October 7).
- Even after withdrawal, Israel has continued to exercise certain key administrative functions, such as control over the Palestinian population registry.
- The international community has insisted that Israel is obliged to provide humanitarian aid, electricity and fuel to Gaza, even during times of active conflict, which indicates that it believes that Israel still exercises effective control over the territory.

Gaza’s status as occupied territory has not changed since October 7. In other words, the current armed conflict is taking place within the context of an ongoing occupation.<sup>17</sup>

#### IV Is the conflict “international” or “non-international”?

The rules of IHL can be divided into two main groups: those that apply to international armed conflicts (and subsequent occupations), and those that apply to non-international armed conflicts. International armed conflicts (IACs) consist of a) those that occur between states and b) wars of national liberation (in other words, armed conflicts “in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination.”<sup>18</sup> Non-international armed conflicts (NIACs) consist of conflicts between a) a state and one or more non-state armed groups, and b) between non-state armed groups.

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27 October 2023, at <https://www.hrw.org/news/2023/10/27/how-does-international-humanitarian-law-apply-israel-and-gaza>.

<sup>16</sup> Scobbie, *supra* note 14, p. 299.

<sup>17</sup> 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, p. 7, para. 27.

<sup>18</sup> 1977 Additional Protocol I to the Geneva Conventions, Article 1(4).

Many acts are prohibited as violations of IHL in both categories of conflict. For example, the taking of hostages, which involves “the seizure or detention of a person (the hostage), combined with threatening to kill, to injure or to continue to detain the hostage, in order to compel a third party to do or to abstain from doing any act as an explicit or implicit condition for the release of the hostage,”<sup>19</sup> is prohibited in both international<sup>20</sup> and non-international<sup>21</sup> conflicts as a matter of treaty law, and also as a matter of international customary law.<sup>22</sup> The classification of the conflict in Gaza as international or non-international would therefore have no impact on whether the taking of hostages by Hamas and other Palestinian armed groups on October 7 was deemed to be illegal under IHL. However, the rules governing the two categories of conflicts are not identical, and the classification of the conflict can sometimes make a difference (for example, in determining which acts can be prosecuted as war crimes under the Rome Statute of the International Criminal Court, which criminalizes a broader range of serious violations of IHL in IACs than in NIACs). The first step in applying IHL to a conflict is thus identifying which type of conflict it is.

Some scholars argue that any armed conflict involving an occupying power in the territory it occupies should be treated as international, regardless of whether the occupying power is fighting another state or a non-state armed group.<sup>23</sup> The ICC Prosecutor has taken a different approach. In his May 2024 application for arrest warrants against three Hamas leaders and Israeli Prime Minister Benjamin Netanyahu and Minister of Defence Yoav Gallant for war crimes and crimes against humanity,<sup>24</sup> he asserts that there are parallel armed conflicts occurring in Gaza: a non-international

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<sup>19</sup> ICRC Database, Customary IHL, Hostage-Taking, at [https://ihl-databases.icrc.org/en/customary-ihl/v1/rule96#refFn\\_E597D6C\\_00017](https://ihl-databases.icrc.org/en/customary-ihl/v1/rule96#refFn_E597D6C_00017).

<sup>20</sup> Fourth Geneva Convention, Article 34 (4); 1977 Additional Protocol I to the Geneva Conventions, Article 75 (2)(c).

<sup>21</sup> Common Article 3 of the 1949 Geneva Conventions; 1977 Additional Protocol II to the Geneva Conventions, Article 4 (2)(c).

<sup>22</sup> ICRC Database, *supra* note 19.

<sup>23</sup> Antonio Cassese, *International Law*, 2nd edition (Oxford University Press, 2005), p. 420; Marco Longobardo, *The Use of Armed Force in Occupied Territory*, Kindle edition (Cambridge University Press, 2018), pp. 204-229. Note that the conflict in Gaza cannot be treated as a war of national liberation under Article 1(4) of 1977 Additional Protocol I to the Geneva Conventions because Israel has not ratified this Protocol. Israel states that it is conducting its military operations in Gaza in accordance with IHL, without making a clear determination as to whether the conflict is an IAC or a NIAC (Israeli Ministry of Foreign Affairs, “ Hamas-Israel Conflict 2023: Key Legal Aspects, Annex 2, Legal Aspects of the Hamas-Israel Conflict 2023,” updated to 2 November 2023, at [https://www.gov.il/Blob-Folder/news/hamas-israel-conflict2023-key-legal-aspects/en/English\\_Documents\\_Hamas-Israel%20Conflict%202023%20-%20Some%20Factual%20and%20Legal%20Aspects%20-%20Israel%20Ministry%20of%20Foreign%20Affairs%20\(2%20NOV%202023\).pdf](https://www.gov.il/Blob-Folder/news/hamas-israel-conflict2023-key-legal-aspects/en/English_Documents_Hamas-Israel%20Conflict%202023%20-%20Some%20Factual%20and%20Legal%20Aspects%20-%20Israel%20Ministry%20of%20Foreign%20Affairs%20(2%20NOV%202023).pdf), pp. 7-8.)

<sup>24</sup> 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, at <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state>.

armed conflict between Israel and Hamas (together with other Palestinian armed groups) and an international armed conflict between Israel and Palestine.

While his application to the Court remains under seal, grounds for this categorization are outlined in a report by a panel of experts whom the Prosecutor had convened to independently assess the application before it was submitted to the Court. According to the report, the conflict between Israel and Hamas can be categorized as a NIAC because Hamas is a non-state armed group,<sup>25</sup> while the conflict between Israel and Palestine can be categorized as an IAC<sup>26</sup> on the basis of any one of three different theories, namely:

- a) Palestine is a State in accordance with criteria set out in international law, for which there is a sufficiently strong argument for the purpose of an application to the Court for an arrest warrant, and an international armed conflict arises if a State uses force against a non-state actor on the territory of another State without the latter's consent; or
- b) Palestine and Israel are both High Contracting Parties to the 1949 Geneva Conventions, and that pursuant to the text of Common Article 2 of the Conventions, an armed conflict between two High Contracting Parties is international in character; or
- c) There is a belligerent occupation by Israel of at least some Palestinian territory.<sup>27</sup>

Theory a)<sup>28</sup> assumes that Palestine fulfills the requirements for statehood under international law. Traditionally, these were held to be a) a permanent population; b) a defined territory; c) effective government; and d) capacity to enter into relations with other states.<sup>29</sup> In the case of Palestine, a lack of effective government control has most frequently been raised as the basis for denying the existence of a Palestinian state.<sup>30</sup>

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<sup>25</sup> Non-state armed groups involved in a NIAC must have a certain degree of internal structure and organization. The fact that a group is designated as a terrorist organization does not in itself affect whether it can be treated as a non-state armed group under IHL.

<sup>26</sup> One of the charges asserted by the Prosecutor against Netanyahu and Gallant, starvation of civilians as a method of warfare as a war crime contrary to article 8(2)(b)(xxv) of the Statute, can only be prosecuted if the conflict between Israel and Palestine is categorized as an IAC. The Rome Statute was amended in 2019 to add the war crime of starvation of civilians as a method of warfare in NIACs, but Palestine has not yet ratified this amendment, so it cannot be applied in the current situation.

<sup>27</sup> Panel of Experts in International Law, *supra* note 17, p. 4, para. 13.

<sup>28</sup> This theory has been accepted by the Court in previous jurisprudence: *Prosecutor v. Bosco Ntaganda*, Judgment, Trial Chamber, 8 July 2019, ICC-01/04-02/06, pp. 349-350, para. 728.

<sup>29</sup> James R. Crawford, *The Creation of States in International Law*, 2nd edition, Kindle edition (Oxford University Press, 2006), pp. 45, 55.

<sup>30</sup> John Quigley, *The Statehood of Palestine: International Law in the Middle East Conflict*, Kindle edition (Cambridge University Press, 2010), p. 213.

However, the primary reason for any insufficiency of Palestinian government control is the fact of Israeli occupation, and the requirement of effective government “cannot be considered in the usual way when a territory is under belligerent occupation.”<sup>31</sup> Further, new states may come into being even if one or more of the above requirements, most commonly effective government, is “present to a lesser extent than usual.” In such circumstances, “widespread recognition can act as a legal counterweight, ‘pulling’ towards the conclusion that a new State has emerged.”<sup>32</sup> Palestine is now recognized as a state by more than 140 nations, most recently Spain, Norway, Ireland and Armenia, and would have been accepted into the United Nations earlier this year as a full member state but for the opposition of a single permanent member of the UN Security Council.<sup>33</sup> Further, since 2014 it has acceded to numerous multilateral treaties, including the core IHL treaties listed in Section II and the Rome Statute. Taken as a whole, the above developments constitute persuasive evidence supporting the assumption in theory a) that Palestine qualifies as a state under international law.

Although theory b) does not specifically refer to Palestinian statehood, focusing instead only on the terms of the Geneva Conventions as grounds for determining that there is an IAC between Israel and Palestine, the term “High Contracting Party” in Common Article 2 of the Conventions is typically understood to refer only to states. However, it has been argued that even if Palestine does not yet fully qualify as a state, it could be treated as “functionally equivalent to a State for the purposes of applying the laws of IAC to the Gaza conflict,”<sup>34</sup> based on the fact that it has sufficient capacity to effectively implement these laws.<sup>35</sup> It seems unnecessary to resort to this argument, though, given the persuasive evidence supporting Palestinian statehood outlined in the previous paragraph.

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<sup>31</sup> *Ibid.*, p. 219.

<sup>32</sup> Alex Green, “States,” in Sué González Hauck, Raffaella Kunz & Max Milas (eds.), *Public International Law: A Multi-Perspective Approach* (Routledge, 2024), p. 224, pp. 229, 230.

<sup>33</sup> Palestine has enjoyed non-member observer state status in the UN since 2012, and a draft resolution recommending it be given full membership failed to pass the Security Council in April 2024 only because of a veto by the United States. The following month, 143 states in the General Assembly voted in favor of a resolution upgrading Palestine’s rights as an observer State, determining that it is qualified for membership in the UN and should therefore be admitted, and recommending that the Security Council reconsider the matter favourably.

<sup>34</sup> Raphael Van Steenberghe & Jérôme 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, at <https://www.ejiltalk.org/icc-prosecutors-application-for-arrest-warrant-against-israeli-leaders-the-war-crime-of-starvation-and-its-contextual-element/>.

<sup>35</sup> Some of the differences in the rules applying to IACs and NIACs arise from the fact that non-state armed groups generally have fewer resources than states, and therefore do not necessarily have the capacity to implement very detailed and demanding norms.



In theory b), “armed conflict” refers simply to Israel’s use of force against the population and infrastructure of Palestine. Common Article 2 of the 1949 Geneva Conventions states that the Conventions “apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties,” and the rules of IHL do not require that a state respond militarily to the use of force against it by another state for an international armed conflict to arise “between” them.<sup>36</sup>

Theory c) does not depend on any finding of Palestinian statehood, but rather relies on the fact of occupation.<sup>37</sup>

The Prosecutor’s decision to classify the hostilities in Gaza as a NIAC and an IAC occurring in parallel may cause difficulties in practice. For example, it may not be easy to determine whether IAC rules or NIAC rules should be applied in certain cases (for example, “attacks directed at Hamas forces which, at the same time, cause significant damage to Palestinian infrastructures and the natural environment”).<sup>38</sup> Adopting the alternate approach advocated by some scholars and applying IAC rules to all hostilities in the territory involving Israel as the occupying power would make it possible to avoid issues of this kind, but at the same time would give rise to other difficulties (for example, determining the status of Hamas fighters).<sup>39</sup> If the Pre-Trial Chamber approves the arrest warrants and any of the suspects are ever arrested, the complex issue of conflict classification will receive further examination during Court proceedings.

## V Conclusion

Given the widespread violations of IHL in the present conflict, it is essential that efforts to enforce IHL by judicial bodies, particularly the ICC, are fully supported. The Israeli government has attempted to interfere with the work of the Court<sup>40</sup> and certain US

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<sup>36</sup> As the ICRC notes, “[a]n IAC can ... be triggered on the basis of a unilateral attack, including attacks directed towards the territory, population or infrastructure of a state.” ICRC, “How Is the Term ‘Armed Conflict’ Defined in International Humanitarian Law? International Committee of the Red Cross Opinion Paper 2024,” p. 9.

<sup>37</sup> Panel of Experts in International Law, *supra* note 17, p. 7, para. 27.

<sup>38</sup> Jérôme de Hemptinne, “Classifying the Gaza Conflict Under International Humanitarian Law, a Complicated Matter,” EJIL: Talk!, 13 November 2023, at <https://www.ejiltalk.org/classifying-the-gaza-conflict-under-international-humanitarian-law-a-complicated-matter>.

<sup>39</sup> *Ibid.* Unless it can be demonstrated that Hamas fighters “belong” to the State of Palestine, and thus qualify as “combatants” (who can be targeted and killed at any time), they must be treated as civilians, who cannot be targeted and killed unless and for such time as they take direct part in hostilities.

<sup>40</sup> The Guardian, “Spying, Hacking and Intimidation: Israel’s Nine-Year ‘War’ on the ICC Exposed,” 28

politicians have threatened to sanction ICC officials in relation to the Palestine investigation.<sup>41</sup> It is thus a welcome development that 93 states, including the Japanese government, recently issued a joint statement stressing a determination to defend the “principles and values enshrined in the Rome Statute” and to protect the Court from political interference.<sup>42</sup> The government must maintain this stance and continue to make it clear that it stands firmly by the Court and rejects any attempts to compromise its impartiality and independence.

Urgent action must also be taken to stop ongoing violations. Common Article 1 of the 1949 Geneva Conventions requires state parties to “ensure respect” for the Conventions, which encompasses a duty for states to do what can reasonably be expected of them in the given circumstances to end ongoing violations of the Conventions by other states and non-state organized armed groups. What a particular state is required to do to fulfill this obligation is not fixed, but varies depending on the gravity and extent of the violations, whether further violations are imminent, and the ability of the state to exert influence over the transgressor.<sup>43</sup>

In the current situation in Gaza, violations of IHL are occurring on a widespread scale and many of these violations are grave enough to qualify as war crimes. Additionally, many of the acts underlying these IHL violations have also been legally categorized by independent experts as crimes against humanity and genocide, indicating a pattern of serious and organized criminality.<sup>44</sup> Further, violations have continued for nine months and show no sign of ending. Combined with the fact that in recent years Japan has strengthened its ties with Israel and has the capacity to exert at least some degree of influence over it, it can be argued that at this point the Japanese government is obliged to take stronger measures than it has to date to ensure respect for the Conventions by Israel. For example, when credible evidence of violations of IHL is made public by reliable sources, the government could reasonably be expected at the very least to

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May 2024, at <https://www.theguardian.com/world/article/2024/may/28/spying-hacking-intimidation-israel-war-icc-exposed>.

<sup>41</sup> Zeteo, “‘You Have Been Warned’: Republican Senators Threaten the ICC Prosecutor over Possible Israel Arrest Warrants,” 6 May 2024, at <https://zeteo.com/p/exclusive-you-have-been-warned-republican>.

<sup>42</sup> Post on X by the Permanent Mission of Belgium to the UN, 15 June 2024, at <https://x.com/BelgiumUN/status/1801740915658428920>; The Guardian, “ICC Must Be Allowed to Carry Out Work ‘Without Intimidation’, Say 93 Member States,” 15 June 2024, at <https://www.theguardian.com/law/article/2024/jun/15/icc-must-be-allowed-to-carry-out-work-without-intimidation-say-93-member-states>.

<sup>43</sup> Robin Geiß, “The Obligation to Respect and to Ensure Respect for the Conventions,” in Clapham, Gaeta & Sassòli (eds.), *supra* note 14, p. 111, pp. 126-127 (marginal notes 27, 29).

<sup>44</sup> U.N. Doc. A/HRC/56/26, *supra* note 1; U.N. Doc. A/HRC/55/73, 25 March 2024.

specifically and publicly condemn such violations,<sup>45</sup> in the same way that it has condemned Hamas's October 7 attack, instead of simply expressing serious concern or calling on Israel to abide by IHL in general terms.

The Japanese government's legal obligations may also extend to more stringent measures, such as imposing sanctions against Israel, which it has already imposed on Hamas. For example, it may be obliged to cancel its reported plan to procure attack drones from Israeli companies,<sup>46</sup> given the fact that purchasing such weapons may indirectly contribute to ongoing violations of IHL against the Palestinian people.<sup>47</sup> Even if it is not legally required to take these kind of measures, it could certainly choose to do so, in a similar manner to certain actors in the private sector such as Itochu Corporation.<sup>48</sup> This would not only contribute to ending ongoing violations of IHL in Gaza, but would also serve as a powerful message of support for international law, the international justice system, and the universality of human rights.

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<sup>45</sup> Condemning violations is categorized by Geiß as a minimal response that could reasonably be expected of a state that is geographically remote from the location where violations are occurring and with extremely limited influence on the state responsible for the violations. Geiß, *supra* note 43, p. 127, marginal note 29.

<sup>46</sup> 213th Ordinary Session of the Diet, House of Councillors, Committee on Foreign Affairs and Defense, 12 March 2024, at <https://kokkai.ndl.go.jp/#/detail?minId=121313950X00320240312&current=6> (in Japanese).

<sup>47</sup> "Obligations of Third States and Corporations to Prevent and Punish Genocide in Gaza," expert opinion by Irene Pietropaoli, Senior Fellow in Business and Human Rights, British Institute of International and Comparative Law, 5 June 2024, p. 30.

<sup>48</sup> Reuters, "Japan's Itochu to End Cooperation with Israel's Elbit Amid Gaza War," 5 February 2024, at <https://www.reuters.com/business/japans-itochu-end-cooperation-with-israels-elbit-over-gaza-war-2024-02-05/>.