

# Legal Issues Regarding a Siege on the Gaza Strip During War

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Following Hamas' and other Palestinian terrorist organizations' invasion of Israel on October 7, 2023, during which the terrorist organizations committed unspeakable atrocities, including more than 1000 murders, as well as rape, hostage-taking and sadistic brutality, the Israeli government declared it was at war with Hamas, the terrorist organization that controls Gaza and holds primary responsibility for the October 7 massacre and crimes.

For many years, despite Palestinian terrorist organizations' control of the Gaza Strip, the State of Israel provided residents of the Gaza Strip access to medical care and even job markets in Israel, while also providing the enemy territory more generally with food, water, electricity and other supplies. On October 7, 2023, Israel terminated its supply of electricity.<sup>1</sup>

As well, for many years, Israel permitted and often assisted third parties in providing money and materials to the Gaza Strip through several land border crossings.<sup>2</sup> These third parties included a wide range of nations from enemy states like Qatar to friendlier states in Europe, a range of international organizations, most unfriendly to Israel, and various NGO's, most self-described as pro-human rights, and all hostile to Israel.

Israel declared a naval blockade on the Gaza shortly after Hamas' violent takeover of the Gaza Strip in 2007,<sup>3</sup> and it has enforced the blockade since.

On October 9, 2023, Israel's Minister of Defense ordered a complete embargo on Israeli supplies to the Gaza Strip, which includes preventing the supply from Israel of electricity, food, fuel and water, describing his action in Hebrew as a "complete siege" or "complete blockade."<sup>4</sup>

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1 "Israel Cuts Electricity Supply to Gaza." *The Times of Israel*, 7 Oct. 2023, [www.timesofisrael.com/liveblog\\_entry/israel-cuts-electricity-supply-to-gaza/](http://www.timesofisrael.com/liveblog_entry/israel-cuts-electricity-supply-to-gaza/).

2 "Qatar Raises Annual Aid to Gaza to \$360 Million." *The Times of Israel*, 31 January 2021, <https://www.timesofisrael.com/qatar-raises-annual-aid-to-gaza-to-360-million/>

3 Britannica, The Editors of Encyclopaedia. "Gaza Strip." *Encyclopedia Britannica*, 17 Oct. 2023, <https://www.britannica.com/place/Gaza-Strip>. Accessed 17 October 2023.

4 "Israeli Defense Minister Orders 'Complete Siege' of Gaza, as Hamas Threatens Hostages," CNN, 9 October 2021, <https://edition.cnn.com/2023/10/09/middleeast/israel-gaza-hamas-fighting-monday-intl-hnk/index.html>

On October 15, 2023, Israel restored the supply of Israeli water to the southern portion of Gaza.<sup>5</sup> According to media news reports, Egypt wants to send hundreds or thousands of truckloads of goods to the Gaza Strip, generally described as humanitarian aid. According to contradictory news reports, Israel has either agreed to or opposed the Egyptian decision, and the U.S. either has or has not imposed pressure on Israel to surrender to the Egyptian policy position.

As a result of this confused set of developments, it is not clear whether Israel has imposed a siege in actuality. Israel has a right under international law to impose a complete siege, which would be a land encirclement of the combat area of the Gaza Strip. Since Gaza has land borders with two countries—Israel and Egypt—a complete siege would require that Israel interdict land transfers from Egypt to the Gaza Strip. As of this writing, reports are conflicted on whether Israel has declared any such intent, and, indeed, on whether Egypt has any intent to open its side of the border with Gaza. It is thus unclear if Israel has imposed a siege.

Israel's action thus raises three distinct legal questions:

- a. Does Israel have a duty to supply goods of any kind to the Gaza Strip during the war?
- b. Does Israel have a duty to facilitate the entry of goods supplied by third parties of any kind, or of humanitarian items in particular, and if yes, what kinds of goods, subject to what conditions?
- c. Do the answers to the first two questions change if Israel has imposed a siege on the Gaza Strip, and is there currently a siege?

This memorandum addresses each of these issues in turn.

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5 "Israel Resumes Water Supply to Southern Gaza after Heavy Pressure," *The J*, 15 October 2023, <https://www.jpost.com/breaking-news/article-768469>

## ► Duty to supply:

In general, states are not required to supply anything to enemy territories, absent a special legal duty. Thus, since Israel has no special legal duty to supply Gaza (the case of humanitarian goods is described separately below), Israel is entitled to stop provision of any Israeli good—from toys to water.

Some have argued that Israel has a special duty to supply Gaza because it belligerently occupies the Gaza Strip. This argument—which shockingly has been adopted in the past by several Israeli jurists<sup>6</sup>—is legally unsupportable. It is evident that even if the other legal preconditions for belligerent occupation were met (and they are not), since 2005, Israel has not exercised effective control over the Gaza Strip, and effective control is a *sine qua non* for the status of belligerent occupant. Israel can acquire effective control of the Gaza Strip only by means of a military conquest and reoccupation of the territory that eliminates Hamas' control over the territory, and even then, the laws of belligerent occupation would not apply *de jure* because other preconditions would not have been met.<sup>7</sup> Israel obviously does not consider itself to belligerently occupy Gaza, and Israel's Supreme Court has agreed.<sup>8</sup>

Others have argued that Israel has a special duty to supply Gaza due to Israel's administration of Gaza 1967–1994, and joint administration together with the Palestinian Authority 1994–2005. According to this argument, Israel is a former belligerent occupier, and Israel retained post-occupation duties toward the territory, or developed duties under other bodies of international law that persist despite the termination of Israeli administration. This argument too—which has also shockingly has been adopted in the past by several Israeli jurists<sup>9</sup>—is without legal foundation, legal support, or legal precedent. It has been raised exclusively in the context of Gaza Strip and exclusively as a demand against Israel, and thus must be rejected as an attempt to fabricate and impose extra-legal duties on Israel.

6 See Dinstein, Y. (2019). Human Rights and Belligerent Occupation. In *The International Law of Belligerent Occupation* (pp. 77-98). Cambridge: Cambridge University Press. doi:10.1017/9781108671477.004.

See Benvenisti, E. (2012). The Israeli Occupation of the West Bank and Gaza. In *The International Law of Occupation* (pp 259-304). Oxford University Press, Incorporated, Oxford. Available from: ProQuest Ebook Central. [15 October 2023].

7 Bell, A., & Shefi, D. (2010). The mythical post-2005 Israeli occupation of the Gaza Strip. *Israel Affairs*, 16(2), 268–296.

8 HCJ 9132/02 Elbassiouni v. Prime Minister

9 See Gross, A. (2017). The Indeterminacy of Occupation: From Conceptualism to the Functional Approach. In *The Writing on the Wall: Rethinking the International Law of Occupation* (pp. 52–135). Cambridge: Cambridge University Press. doi:10.1017/9781316536308.003.

Gross attempts to adapt his argument originally made before the disengagement from Gaza in an earlier article: Ben-Naftali, O., Gross, A. M., & Michaeli, K. (2005). Illegal occupation: Framing the occupied Palestinian territory. *Berkeley Journal of International Law*, 23(3), 551.

See Also Shany, Y. (2009). The Law Applicable to Non-Occupied Gaza: A Comment on *Bassiouni v. Prime Minister of Israel*. Hebrew University International Law Research Paper No. 13-09, Available at SSRN: <https://ssrn.com/abstract=1350307>.

## ► Duty Not to Supply

In the case of the Gaza Strip, Israel is actually under a legal duty not to supply the territory due to Hamas' control. According to Security Council Resolution 1373,<sup>10</sup> adopted under Chapter VII of the UN Charter, and therefore binding rather than merely recommendatory, all states must:

- a. "Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons;"
- b. "Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts;"
- c. "Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens;" and
- d. "Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens."

Given Hamas' control over the Gaza Strip and its history of benefiting from money, goods and services supplied to the territory, including humanitarian aid, it is evident that any supply of goods will provide at least indirect support to terrorists, which is illegal.

Some have argued that the legal duties of Resolution 1373 not to supply Hamas in the Gaza Strip should be seen as inapplicable because Israel has consented in the past both to supply Hamas with goods and services and to allow others to supply money, goods and services. However, the duties in the resolution are *erga omnes* and not waivable at Israel's discretion. Israel's and other states' past violations of Resolution 1373 do not render current support of Hamas licit.

Others have argued that Resolution 1373 does not cover supplies to Gaza's civilian population that are predictably diverted by Hamas. However, the plain language of the Resolution forbids even indirect support.

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10 United Nations Security Council (UNSC) Res 1373 (28 September 2001) UN Doc S/RES/1373

## ► Duty to facilitate supply of humanitarian goods

During times of armed conflict, parties to the conflict have the duty to facilitate supply of various kinds of humanitarian goods, and to facilitate the provision of essential medical relief (such as the removal of the wounded to medical facilities), all subject to a number of conditions. These duties can be found in various treaties, including the Fourth Hague Convention<sup>11</sup> and several of the Geneva Conventions,<sup>12</sup> but under the circumstances of this war, the most important source of the duty is in customary international law. It should be noted that these duties do not require that the warring parties themselves provide the goods, and, historically, the goods have generally been provided by third parties, especially NGOs.<sup>13</sup>

There are longstanding disputes among jurists about the identity of the goods that are considered humanitarian goods whose supply must be facilitated.<sup>14</sup> Essential medicines and food are certainly in the list. Some have argued for broader lists that include, for example, clothing for children and certain especially protected civilians, and such expanded lists appear in some treaties.<sup>15</sup> It is doubtful that electricity is an essential humanitarian goods, although some have made the argument that Israel must consider electricity a humanitarian good. Surprisingly, several Israeli jurists have argued in the past for this position.<sup>16</sup>

In the case of the current war, the disputes are irrelevant because the duty to facilitate the provision of humanitarian goods is subject to the right of belligerents to prevent supply where there is ground for fearing that the supplies will be diverted to enemy use.<sup>17</sup> In the current war, given Hamas' control of the territory, its history of diverting humanitarian supplies to its own use and its open contempt for the laws of war and requirements of humanity, it is near-certain that any goods and services that enter the Gaza Strip will improve the enemy's economy or military efforts and, in many cases, directly serve the military needs of Hamas. Absent a reliable mechanism for ensuring non-diversion of supplies—and no such mechanism is possible so long as Hamas controls the territory—Israel is under no obligation to facilitate supply.

Indeed, given the fact that the duty not to supply terrorist organizations applies to all states and is *erga omnes*, Israel is forbidden under international law to facilitate the supply of even humanitarian goods to the Gaza Strip until the termination of Hamas control.

Likewise, it should be noted that duties of humanitarian relief fall on all parties to the conflict. Hamas' attempts to prevent Gazan civilians from escaping, like its attempts to use Gaza civilians as human shields, and its unannounced but ubiquitous attempts to capture humanitarian supplies and divert them to Hamas' combat needs, all violate international law.

11 See Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. Sec. 2, Chap. 1, Art. 27. The Hague, 18 October 1907.

12 See Fourth Geneva Convention of 1949, Articles 20, 23, 55, 59 and 81, First Additional Protocol articles 15, 70 and 71, Second Additional Protocol, Articles 9 and 18

13 Fourth Geneva Convention Article 23 and 39. See Stoffels, R. A. (2004). Legal regulation of humanitarian assistance in armed conflict: achievements and gaps. *International Review of the Red Cross*, 86(855), 515–546.

14 See Dinstein, Yoram. "The Right To Humanitarian Assistance," *Naval War College Review*, vol. 53, no. 4, 2000, pp. 77–91. *JSTOR*, <http://www.jstor.org/stable/44638892>. Accessed 17 Oct. 2023. See also Schwendimann, Felix. "The legal framework of humanitarian access in armed conflict." *International Review of the Red Cross* 93.884 (2011): (p.1003)

15 Article 23 of the Fourth Geneva Convention imposes such a duty, Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Art. 23, Aug. 12 1949, 75 U.N.T.S. 287, entered into force Oct. 21, 1950, but it is clear that the Fourth Geneva Convention does not apply to the conflict with the Hamas organization and it is unclear whether this section enlarges the traditionally limited list of humanitarian goods in customary law.

16 See Dinstein, Y. (2019). Human Rights and Belligerent Occupation. In *The International Law of Belligerent Occupation* (p. 278). See also Shany, Y. (2009). The Law Applicable to Non-Occupied Gaza: A Comment on *Bassiouni v. Prime Minister of Israel*.

17 Fourth Geneva Convention Article 23. See "Military Necessity," International Committee of the Red Cross Case Book. "Military necessity generally runs counter to humanitarian exigencies. Consequently the purpose of humanitarian law is to strike a balance between military necessity and humanitarian exigencies." [https://casebook.icrc.org/a\\_to\\_z/glossary/military-necessity](https://casebook.icrc.org/a_to_z/glossary/military-necessity)

## ► Siege

Imposing a siege during war is a legal measure recognized by international law.<sup>18</sup> A siege is an encirclement of the enemy that includes complete denial of supplies.<sup>19</sup>

The Gaza Strip borders Egypt and Israel; Israel can only carry out a siege of the territory if it blocks supply along Egypt's border as well. It is thus unclear if Israel's actions to date implicate the laws of siege at all.

Sieges are lawful unless intended to starve the civilian population.<sup>20</sup> Israel's actions are clearly intended to deny supply to Hamas and other terrorist forces in the Gaza Strip, in order to speed up the campaign defeat and destroy Hamas and win release of the hostages taken by Hamas, and in order to ensure the safety and effectiveness of Israeli military forces in achieving those aims.

Some have argued that Israel should be presumed to have the motive to starve the population because Israel's defense minister cited food among the goods Israel will not supply.<sup>21</sup> Arguments attributing ill motives to Israeli military planners based on collateral results, the presumed evil of Israeli decision makers and inferences from political quotes, often out of context, are commonplace in anti-Israel propaganda but have no place in serious legal analysis.

Some have argued that sieges that are not intended to starve the population, but nevertheless might lead to civilian food deprivation, are also forbidden.<sup>22</sup> This argument is not well founded in international law, as it is contrary to military practice and crystalized customary law.<sup>23</sup> Even if the argument were well-founded, there is no reason to believe that a siege in the Gaza Strip will result in starvation, and there is no plausible argument that Israeli actions (which are not clearly a siege) have already caused starvation. Substantial foodstuffs and water are on hand in the Gaza Strip. More than 90% of Gaza's water supply is internal, from

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18 For recognition of the siege as a legitimate measure during war, see: J. L. Brierly, *THE LAW OF NATION* 287–286 (1953). Also see: Sean Watts “Siege Law,” Lieber Institute: West Point (4.3.22).

19 *Siege*. Oxford Reference. Retrieved 15 Oct. 2023, from <https://www.oxfordreference.com/view/10.1093/oi/authority.20110803100504971>.

20 The prohibition on starvation is a matter of customary law, mentioned in treaty provisions such as Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Article 54. 8 June 1977.  
In this context, it should be remembered as stated that the Fourth Geneva Convention does not apply to the conflict with the Hamas organization, but it is presumed that the prohibition of starvation is part of customary law even in a non-international conflict.

21 “Israel/occupied Palestinian territory: UN experts deplore attacks on civilians, call for truce and urge international community to address roots causes of violence.” Office of High Commissioner for Human Rights, 12 October 2023, <https://www.ohchr.org/en/press-releases/2023/10/israeloccupied-palestinian-territory-un-experts-deplore-attacks-civilians>

22 See “It takes Two: The protection of civilians during sieges under the IHL prohibition against starvation and the right to food. Opinion Juris. (2022, January 12). <https://opiniojuris.org/2021/12/20/it-takes-two-the-ihl-protection-of-civilians-during-sieges-under-the-prohibition-against-starvation-and-the-right-to-food/>. See also Akande, D., & Gillard, E. C. (2019). Conflict-induced food insecurity and the war crime of starvation of civilians as a method of warfare: The underlying rules of international humanitarian law. *Journal of international criminal justice*, 17(4), 753-779.

23 Corn, G. and Watts, S. (2023). “Israel-Hamas 2023 Symposium– Siege Law and Military Necessity.” *Articles of War*. Lieber Institute, West Point. <https://lieber.westpoint.edu/siege-law-military-necessity/#:~:text=Geoffrey%20S.%20Corn%20is%20the,Gemunder%20Center%20for%20Defense%20%26%20Strategy>.

“To interpret the law to categorically outlaw even incidental civilian starvation would be to create an exception that swallows the rule, which “could well render siege impossible as it has historically been known.” Thomas Wheatley, “Why Israel's siege of Gaza is legal under international law,” *USA Today*, 14 October 2023.

the coastal aquifer and from local desalination (Gaza borders the Mediterranean Sea). Accurate figures on local food supplies are less easily obtained, but do not seem to point to incipient starvation. In any event, it is evident that given Hamas control of Gaza, the only reliable means for ensuring the safety of civilians in the Gaza Strip is their immediate evacuation.

Because sieges are military actions, they implicate the usual rules of war including military necessity, distinction and proportionality. It must be reiterated that it is not yet clear if Israel is actually imposing a siege.

Imposing a siege on the Gaza Strip certainly meets the criterion of military necessity<sup>24</sup> because it will accelerate and facilitate Israel's war aims: the subjugation of the genocidal terrorist group Hamas that rules the Gaza Strip.

Because a siege is a legitimate military operation, Israel can use force to enforce it. This means that Israel can forcibly repel efforts by Egypt or any other actor to breach the siege and supply the Gaza Strip, even if that actor claims that the supplies are humanitarian or benign. It has been reported that a former commander of Israel's international law department has insinuated that Israel would not have the right to use force against Egyptian trucks trying to enter the Gaza Strip—if the commander so said, he erred.<sup>25</sup>

If there is a siege in the legal sense of a military operation, Israel must adjust its terms if or when the collateral damage to protected persons or objects becomes clearly excessive in relation to military necessity. Given the high military necessity given the mission to destroy the sadistic antisemitic terrorist organization governing the Gaza Strip and to deny it territory from which to operate, it is difficult to foresee likely circumstances that will require Israel to curb a siege. As noted, the best means for alleviating humanitarian needs in the Gaza Strip, so long as Hamas controls the territory, is the release of hostages and complete evacuation of citizens from the territory.

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24 Watts, S. (2019). Humanitarian logic and the law of siege: A study of the Oxford Guidance on relief actions. *International Law Studies*, 95, 1-48.

25 "Water, electricity and temporary evacuation from Gaza? Legal Aspects", YNet, Dr. Liron Libman, 13 October 23.