

How does the classification of armed conflict impact the protection of freshwater in Gaza?

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On October 7, 2023, Hamas launched “Operation Al-Aqsa Flood” – an unprecedented attack on Israel from Gaza. Israel responded with “Operation Swords of Iron”, aiming to remove hostile forces. Over the weeks, the Israel-Hamas conflict has escalated, leading to severe implications for access to freshwater in Gaza. Israel’s control over essential supplies, including those vital for water treatment, exacerbates the already dire freshwater situation in Gaza. Israeli’s Defense minister announces “complete siege” of Gaza, cutting off food, electricity, fuel, or water. Because of the lack of water supply, hospitals in Gaza face critical water shortages, resulting in deteriorating sanitary conditions and a heightened risk of infections. Even before the conflict, 90% of the population lacked direct access to clean water (A/HRC/48/43, para. 47), with 96% of Gaza’s water considered unsafe. The scarcity of clean water has far-reaching and devastating consequences and elevates the risk of waterborne diseases, exacerbates poor hygiene conditions in overcrowded makeshift shelters and creates a fertile ground for rapid disease transmission. The situation has reached a critical juncture, with the UNICEF-led WASH Cluster warning of an imminent risk of death and infectious disease outbreaks if water and fuel are not immediately allowed into the area. The United Nations has described the lack of water as a “matter of life and death” for over 2 million people in Gaza.



Controversies surrounding the status of Gaza

The conflict between Israel and Hamas raises several questions related to international humanitarian law (IHL) and determining the applicable rules (see [here](#), [here](#) and [here](#)). Though the definition of occupation under the Hague Regulation of 1907 (Art. 42) is general, there are three generally accepted cumulative criteria for determining occupation: the presence of foreign forces, the exercise of authority, and the non-consensual nature of belligerent occupation (see ICRC Report on Occupation (2012), p.10). In addition, factual elements, such as the continuation of hostilities and/or the continued exercise of some degree of authority by local authorities may render the legal classification a difficult exercise (see ICRC, IHL Challenges Report, p.27).

After Israel withdrew its troops from Gaza in 2005, there have been debates on whether Israel still qualifies as an occupying power under IHL. Such a determination significantly affects the applicable law to the situation in Gaza, including freshwater resources. Legal scholars, court decisions, and international bodies provide different perspectives. For some,

effective control persists due to Israel's authority over airspace, territorial waters, and border crossings, even without a continuous military presence on the ground; hence, it is still an occupying power (see [UNGA, A/ES-10/L.25](#), para. 5, [ICRC](#), [Geneva Academy](#), [RULAC](#)). A further argument is that on account of geographical closeness and other factors, Israel could re-establish control over the territory of Gaza within a reasonable time (Jaber & Bantekas [here](#)) and that the end to an occupation "should not be seen as an all or nothing switch" (Ferraro [here](#), and Dinstein p. 301-302, [here](#)). Others conclude that Israel is no longer an occupying power, emphasizing that military presence is a prerequisite for establishing an occupation (see [Jaber al-Basyuni Ahmad et al. v. The Prime Minister and the Minister of Defence \(2008\)](#), para. 12, [Sargsyan V. Azerbaijan \(2015\)](#), para. 94, and Milanovic [here](#); see also Shany [here](#), and Schmitt [here](#)). For a detailed discussion on the classification of this conflict (see [here](#)).

This post explores the obligations regarding access to freshwater within the context of this complex armed conflict. It examines both scenarios in which Israel is considered an occupying power and those where it is not seen as such.

Obligations related to freshwater in the case of occupation

Under IHL, an occupying power must take all measures in its power to restore and ensure, as far as possible, public order and civil life in the occupied area ([Hague Regulations 1907](#), Art. 43), to ensure, by all the means at its disposal, the necessities of life of the population in occupied territory ([Geneva Convention IV Art. 55](#)), and maintain public health and hygiene in the occupied territory ([Geneva Convention IV Art. 56](#)). And if it cannot do so, a mandatory relief scheme (to allow humanitarian assistance) is introduced ([Geneva Convention IV, Art. 59](#)). Thus, occupying power must grant rapid and unimpeded passage and access to water-related personnel and consignments used for humanitarian relief operations, including the operation, repairs or rehabilitation of water systems and related facilities.

Besides, IHL prohibits the starvation of civilians as a method of warfare ([CIHL, Rule 53](#) and see also [Resolution 2573 \(2021\)](#), para. 4). This IHL prohibition significantly restricts siege warfare (e.g., Lattimer [here](#)). According to the [ICRC](#), "irrespective of any military siege, the authorities must ensure that civilians have access to basic necessities, including safe water". There are divergent views on whether the prohibition of starvation as a method of warfare not only includes those measures specifically intended to cause starvation (deliberate starvation of civilians) (see e.g., Watts [here](#)) but also incidental starvation (merely indirect effect) (Akande and Gillard [here](#), and Gaggioli [here](#)). If the latter approach is accepted, cutting off the water supply and other essentials and restricting humanitarian access could still implicate Israel's international responsibility, even if the measures were not taken for the specific purpose of starving the civilians in Gaza. It is crucial to note that not all violations of IHL amount to war crimes. War crimes are serious violations of IHL that are committed wilfully, i.e., either intentionally or recklessly (*dolus eventualis*). According to the ICC Statute, "intentionally using starvation of civilians as a method of warfare by depriving them of objects

indispensable to their survival, including wilfully impeding relief supplies” constitutes a war crime (Art. 8(2)(b)(xxv) and (e)(xix)). Hence, establishing individual criminal responsibility for the war crime of starvation necessitates proving the required mental element (*mens rea*) of those responsible for implementing the measures.

Deprivation of freshwater may also qualify as a crime against humanity as implying the commission of inhumane acts (see Dannenbaum here). In addition, there is a debate on whether depriving civilians of access to freshwater could be deemed a “deliberate imposition of conditions aimed at the physical destruction of the group” as defined under ICC Statute, Art. 6(c) (see ICRC Commentary AP I, para. 2097). In this regard, the ICC Pre-Trial Chamber, in the Omar Al Bashir case, explored the connection between depriving civilians of means of survival, including access to freshwater and the crime of genocide. The Prosecution contended that Sudanese government forces systematically destroyed essential means of survival, such as food, shelter, crops, and freshwater sources, constituting the deliberate imposition of conditions aimed at the physical destruction of a group. Nevertheless, the Pre-Trial Chamber ultimately concluded that there were insufficient grounds to establish that Omar Al Bashir had the *specific intent* to destroy a particular group in Darfur (paras 202-206).

Furthermore, as the International Court of Justice (ICJ) has affirmed in the Wall Advisory Opinion, the occupying power must protect civilian populations, respect their human rights and meet their humanitarian needs in compliance with IHL and the Fourth Geneva Convention (ICJ’s Advisory Opinion on Wall (2004), paras.104-113, 130 and HRC, A/HRC/40/CRP.2, paras.80-83). Access to water is a fundamental human right and a prerequisite for realizing other human rights. The UN Committee on Economic, Social and Cultural Rights has long established that the State party’s obligations under the Covenant apply to all territories and populations under its effective control (E/C.12/1/Add.90, para.31). Thus, if Israel is considered an occupying power, it must respect, protect, and fulfil the human rights of persons living in the occupied territory to the degree it exercises control over their enjoyment of their human rights, including the human rights to safe drinking water and sanitation. It must refrain from limiting or destroying water services and infrastructure as a punitive measure during armed conflicts (General Comment No. 15, paras. 21 and 31). Failing to provide water and preventing supplies needed for safe water from entering Gaza violates IHL and human rights law (see UN Special Rapporteur on Safe Drinking Water and Sanitation, Mr. Pedro Arrojo-Agudo, here).

Obligations related to freshwater if Gaza is not considered an occupied territory

If Gaza is not considered an occupied territory, the obligations owed to an occupied territory under the IHL would not *normally* apply. The exception is if one accepts the ‘Pictet theory’, which introduces the notion of ‘functional occupation’ for the application of Geneva Convention IV, i.e., the gradual implementation of occupation law starting from the invasion phase based on the degree of control it exercises (see here, and for the debates on the

theory, see [here](#)). If this theory is accepted, then as soon as the invasion of Gaza started, Israel should begin applying the relevant rules from which protected persons benefit, including at least its negative obligations and the duty not to hinder humanitarian assistance.

Outside the context of occupation, IHL also has relevant rules that regulate access to freshwater by imposing certain obligations on the parties to the conflict. Based on different factors and interpretations, the conflict could be classified as a non-international armed conflict (NIAC) because the military operation is specifically targeted towards Hamas ([Sassòli](#), p. 172) or as an international armed conflict (IAC) because it is pragmatic and “has also the merit of reinforcing legal protection for individuals and objects” (de Hemptinne [here](#)), or both IAC and NIAC (parallel conflict) ([2016 ICRC Commentary GC I](#), paras 257–64, Dinstein, p. 41 [here](#), and Akande [here](#)). Previously, the Israeli Ministry of Foreign Affairs of Israel, as a matter of policy, applied to its military operations in Gaza the rules of armed conflict governing both international and non-international armed conflicts (see [here](#)).

From the outset, it should be mentioned that only in a situation of occupation that the positive obligation to ensure essential services to the population explicitly stipulated. In all situations other than occupied territories, a party to a conflict “has *negative obligations* not to interfere” with relief actions, subject to consent, right of control and any military necessity exception (see Milanovic [here](#) emphasis in the original). In both IAC and NIAC, the parties to the conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need’ ([CIHL, Rule 55](#)). The treaty rules regulating humanitarian assistance in NIACs are far less developed and appear more restrictive than the provisions concerning providers of humanitarian assistance in IAC, at least in terms of who could deliver such assistance and consent requirements. Also, under Geneva Convention IV, the duty to allow such access is restricted “to consignments of medical and hospital stores and objects necessary for religious worship” and the obligation to allow “free passage for essential foodstuffs, clothing and tonics needed only for children under fifteen, expectant mothers and maternity cases” ([Art. 23](#)), such restriction is not retained neither in Additional Protocol I ([Art. 70](#) but only in favour of the civilian population “not adequately provided with supplies essential to its survival” and in other contexts it remains optional) and customary IHL ([CIHL, Rule 55](#)).

In addition to objects/supplies, in both IAC and NIAC, parties to the conflict “must ensure the freedom of movement of authorized humanitarian relief personnel essential to the exercise of their functions” except only restriction is justified by imperative military necessity ([CIHL, Rule 56](#)).

In the case [Nicaragua v. United States](#), the ICJ also emphasized the need to ensure humanitarian assistance “to prevent and alleviate human suffering” and “to protect life and health and to ensure respect for the human being” (para. 243). Moreover, the UN Security Council unanimously adopted [Resolution 2573 \(2021\)](#), which underscores the importance of meeting the basic needs of the civilian population and reiterates that “all parties to armed

conflict engage immediately in a durable humanitarian pause to facilitate safe, unhindered and sustained delivery of humanitarian assistance” (para. 7). The Geneva Principles includes a recommendation for parties to the conflict “to negotiate water ceasefire agreements” (Geneva Principle 17 (4)).

Similarly, the Israeli High Court of Justice, stating that Israel is not an occupying power in Gaza, nonetheless underscored that under IHL Israel has an obligation to allow Gaza to receive “what is needed in order to provide the essential humanitarian needs of the civilian population” (Jaber al-Basyuni Ahmad et al. v. The Prime Minister and the Minister of Defence (2008), para. 11). The Court was criticized for not elaborating the exact basis in international law for its conclusion (see here). In another case, the Supreme Court sitting as the High Court of Justice, decided that “as long as Israel has control of the transfer of necessities and the supply of humanitarian needs to the Gaza Strip, it is bound by the obligations enshrined in international humanitarian law, which require it to allow the civilian population to have access, *inter alia*, to medical facilities, food and water, as well as additional humanitarian products that are needed to maintain civilian life” (Physicians for Human Rights and others v. Minister of Defence, HCJ 201/09, para.27).

Another important IHL rule relevant to ensuring access to freshwater is the prohibition of starvation as a method of warfare, which is applicable both in IAC and NIAC (CIHL, Rule 53). This applies to occupied territories and territories that are not occupied (Commentary API, para. 2091). As indicated above, intentionally using starvation of civilians as a method of warfare is a war crime in both IAC and NIAC (see the ICC Statute Art. 8 (2)(b)(xxv) and (e)(xix), respectively). If the conflict is classified as NIAC, the criminalization under the ICC statute might not be possible because Palestine has yet to ratify the 2019 Statute amendment that criminalizes the conduct in NIAC. The discussions regarding crimes against humanity and genocide outlined earlier remain equally pertinent in this context, as they are applicable regardless of how the armed conflict is classified.

It is indicated above that the occupying power has human rights obligations, including the human rights to safe drinking water and sanitation. When it comes to a non-occupying power’s extraterritorial human rights obligation, there are divergent views mainly because of jurisdiction (see e.g., Pertile and Faccio here). It becomes even more delicate during the active phase of hostilities (see e.g., Milanovic here). Generally, the negative obligation under human rights – the obligation to respect – is accepted to have an extraterritorial dimension. For instance, the Committee on Economic, Social and Cultural Rights indicated that states shall refrain from interfering with the enjoyment of the right to water and from limiting or destroying water services and infrastructure as a punitive measure during armed conflicts (General Comment No. 15, paras 21, 22 and 31). According to the Maastricht Principles, respecting human rights requires states to refrain from interfering directly or indirectly with the enjoyment of rights by persons outside their territories (see here).

Conclusion

Israel often denies its status as an occupying power in Gaza, seeking to avoid the negative connotations and obligations associated with the occupation. However, if considered an occupying power, actions such as cutting water supplies and restricting vital resources for water purification, supply system operation, and repairs violate international humanitarian law and human rights. Even when considered as not an occupying power, such acts interfere with relief efforts and humanitarian needs regulated under IHL and also trigger its human rights obligations. Besides, in both scenarios, arguing to restrict access to freshwater based on its potential use by Hamas might not hold up, considering that the military advantage gained by such restriction is minimal or absent compared to its catastrophic consequences for the population.

Given the extensive damage to vital infrastructure in Gaza and the restrictions on access to freshwater supplies, it is crucial to evaluate the rules governing the conduct of hostilities, particularly those protecting water, water-related infrastructure and essential services for the population. However, the challenge persists in assessing compliance with these rules amid the ongoing armed conflict and the lack of information from an impartial fact-finding mechanism.

Image: 'Damage in Gaza Strip during the October 2023' by Al Araby (Creative Commons [Attribution-ShareAlike 3.0 Unported](https://creativecommons.org/licenses/by-sa/3.0/)).