

Legal Questions and Answers Related to Israeli Policy in the Gaza Strip

1. Is the Gaza Strip still occupied?

YES.

- The definition of “occupation” under international humanitarian law can be found in Article 42 of the 1907 Hague Regulations, which is reflective of customary international law:

Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.

- The test for determining whether a country or territory is occupied is that of “effective control,” which exists if the military forces of an adversary could, “at any time they desired assume physical control of any part of the country.”
- The unilateral withdrawal of Israeli settlements and stationed troops was completed with the stated purpose of removing the “basis for claiming that the Gaza Strip is occupied territory” (Disengagement Plan – 18 April 2004) and therefore ending Israel’s obligations towards the Gaza Strip as an Occupying Power. However, Israel’s policies and practices in the Gaza Strip in no way result in an end to the occupation thereof.

Israel remains the Occupying power in the Gaza Strip because of:

- *its stated policy*: “Israel will guard the perimeter of the Gaza Strip, continue to control Gaza air space, and continue to patrol the sea off the Gaza coast” (Revised Disengagement Plan – 6 June 2004).
- *its practices*: regular military incursions, control of Gaza’s borders including sea and airspace, control of movements of goods and people, control of the civil population registry and tax system.

As a consequence, the civilian population of the Gaza Strip remains entitled to the status of protected persons under Article 4 of the Fourth Geneva Convention.

2. What are the legal obligations of Israel, the Occupying Power, vis-à-vis the civilian population of the Gaza Strip?

Obligations when carrying out military operations:

- Israel must respect the customary principles of *military necessity*, *distinction* and *proportionality* when carrying out military operations in the Gaza Strip.

Military necessity: military operations have to be aimed at obtaining an actual military advantage and at progressing towards the end of the hostilities.

Distinction: the Parties to the conflict must distinguish at all times between civilian and military objectives, and direct attacks exclusively against the latter. The prohibition on attacking civilians and civilian objects, a principle of customary international law, is derived from the principle of distinction (Rules 1 and 7, International Committee of the Red Cross (ICRC) Study on Customary International Humanitarian Law).

Proportionality: 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 (Rule 14, ICRC Study on Customary International Humanitarian Law).

- Israel is under the legal obligation to take all feasible precautions before launching an attack in order to avoid harming civilians, such as the obligation to give advanced warning to the population before attacking populated areas (Rule 20, ICRC Study on Customary International Humanitarian Law).

Obligations at anytime of the occupation (*non exhaustive*):

Israel must:

- Treat protected persons humanely (Article 27, Fourth Geneva Convention).
- Refrain from destroying private property “except where such destruction is rendered absolutely necessary by military operations” (Article 53, Fourth Geneva Convention).
- Provide for the basic needs of the civilian population, including food and medical supplies when the resources of the occupied territory are inadequate (Article 55(1) Fourth Geneva Convention) and the proper functioning of medical, public health and hygiene services (Article 56(1) Fourth Geneva Convention).
- Israel has to respect international human rights law (Article 2, Fourth Geneva Convention). The applicability of the instruments of human rights law to the Occupied Palestinian Territories was confirmed by the International Court of Justice in its 2004 Advisory Opinion on the Wall (paragraphs 106, 149...)

3. Are Israel’s obligations limited to maintaining the minimum humanitarian needs of the civilian population?

NO.

The Israeli government has consistently maintained that it would not “harm the humanitarian minimum to which Israel is committed.” In addition to the Occupying Power’s legal obligation to provide food, medical supplies and medical, public health and sanitation services, Israel also has a concurrent obligation to treat the occupied population humanely (Article 27, Fourth Geneva Convention). The obligation to treat

protected persons humanely, a principle of customary international law, applies “in all circumstances” and “at all times” (ICRC, Commentary on the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War). The “humanitarian minimum” benchmark that Israel is relying upon in order to attempt to legalise its policies is an artificial legal construct with no basis in international humanitarian law.

4. Does the labelling of the Gaza Strip as a “hostile territory” alter Israel’s legal obligations as an occupying power?

NO.

On 19 September 2007, the Israeli Security Cabinet declared the Gaza Strip a “hostile territory.” The term “enemy entity” has also been used in this regard by government officials. Neither of these terms have any basis in international humanitarian law.

5. Are Israel’s sanctions against the civilian population in the Gaza Strip legal?

NO.

Israel’s decision to label the Gaza Strip a “hostile territory” had the underlying purpose of attempting to legitimise Israel’s acts of collective punishment and unlawful reprisals. While overtly admitting to the punitive character of these measures imposed on the Gaza Strip, the Israeli authorities have laboured to attach some legal meaning to these measures.

Collective punishment and reprisals against protected persons are prohibited under Article 33 of the Fourth Geneva Convention:

[n]o protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.

(...)

Reprisals against protected persons and their property are prohibited.

Because the result is the collective punishment of the entire population, the restrictions and blockades of fuel and electricity supplies to the Gaza Strip, as well as the prolonged closures of border crossings for people and goods (including humanitarian aid) to the Gaza Strip, are in clear violation of the rules of international humanitarian law.

6. Does “self-defence” justify the Israeli siege of the Gaza Strip or attacks on its civilian population?

NO.

Reliance on Article 51 of the UN Charter as the basis for a claim to self-defence fails to acknowledge Israel's ongoing occupation of the Gaza Strip and status as an Occupying Power under the Fourth Geneva Convention. In declaring the Gaza Strip a "hostile territory" and subsequently availing itself of an overly broad right to self-defence, it is its status as the Occupying Power that Israel is attempting to obscure, thereby diminishing its obligations under international law towards the civilian population of the Gaza Strip.

It cannot be contested that attacks directed by Palestinian armed groups against civilian population centres within Israel are in violation of international humanitarian law, and that Israel has the right and duty to protect its civilian population from such attacks. However, it must do so within the framework of international humanitarian law by respecting the principles of military necessity, distinction and proportionality, including its obligations vis-à-vis the civilian population of the occupied territory.

The continuous military attacks against the civilian population of the Gaza Strip, the sanctions imposed on the supply of essential utilities and the prolonged closure of the border crossings amount to collective punishment and unlawful reprisals under international humanitarian law and do not constitute a legitimate means of self-defence.

7. What are the obligations of third parties regarding the situation in the Gaza Strip?

- As per Article 2 of the EU/Israel Association Agreement, the EU must suspend the agreement should Israel persist in violating the rights of the civilian population of the Gaza Strip.
- On the basis that Israel's continuing siege of the Gaza Strip amounts to a threat to international peace and security which is not being adequately addressed by the UN Security Council, the members of the UN General Assembly must invoke GA Resolution 377, *Uniting For Peace*, with a view to making recommendations on the adoption of collective measures, including economic and diplomatic sanctions against Israel.
- The High Contracting Parties to the Fourth Geneva Convention are obliged under Article 1 to ensure respect for the Convention by taking immediate and decisive action to compel Israel to cease its collective punishment of the civilian population of the Gaza Strip.
- The High Contracting Parties to the Fourth Geneva Convention have a further legal duty under Article 146 to search for and prosecute those Israeli actors responsible for the commission of the grave breaches such as "wilful killing" and "wilfully causing great suffering or serious injury to body or health" in the Gaza Strip.