

## Protection of Civilians in Armed Conflict Under Customary International Law: The Gaza Situation

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Policy Brief Series No. 185 (2025)

### 1. Introduction

One significant difference between the two world wars in the twentieth century was the number of killed civilians. In World War I, violence was, at least in Europe, by and large concentrated at the frontline between opposing armies. World War II brought massive bombing of cities (London, Hamburg, Berlin, Dresden, Tokyo), fighting in urban areas (Manila, Stalingrad, Berlin), prolonged siege of cities (Leningrad), and occupation of foreign soil affecting millions of people.

The issue of protection of civilians during occupation was addressed by the 1949 Geneva Convention IV, while the protection of civilians who are exposed to combat operations was dealt with in the 1977 Additional Protocols to the Geneva Conventions.<sup>1</sup> Some provisions of the Additional Protocols remain contested, but the fundamental rules for protection of the civilian population are not and are considered to reflect customary law.<sup>2</sup> As customary law, they apply both in international and non-international armed conflicts. When a rule has attained the status of customary law, it is binding on all, irrespective of whether a state or other party to an armed conflict has consented to being bound by the rule (by ratification of a treaty or by other means).

The background for the present policy brief is the situation in Gaza at the time of publication. When reference is made to acts or omissions by parties to the conflict, the purpose is not to deliver a final verdict, but to elucidate the applicable law based on what appears to be happening, as reported by mass media. Since attention has mostly focused on the conduct of the Israeli Defence Forces ('IDF'), the main thrust of the brief is on the rules applicable to the party that expects an attack with respect to taking measures to protect its own civilian population.

It will only consider directly combat-related activities, and not issues of blockade, siege or starvation.

<sup>1</sup> Protocols Additional to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of International Armed Conflicts ('Additional Protocol I') (<https://www.legal-tools.org/doc/jyy11c28/>) and Relating to the Protection of Victims of Non-International Armed Conflicts ('Additional Protocol II') (<https://www.legal-tools.org/doc/4dmhf9xz/>), in Dietrich Schindler and Jiri Toman (eds.), *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents*, 4th ed., Brill Nijhoff, Leiden, 2004, p. 711. Also accessible in the ICC Legal Tools Database as per the indicated persistent URLs.

<sup>2</sup> See Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law, Volume I: Rules*, ICRC, Cambridge University Press, 2005 (<https://www.legal-tools.org/doc/78a250/>).

### 2. Active and Passive Precautions

To protect civilians, the parties to the conflict are obliged to take precautions. When an attack<sup>3</sup> is planned or launched, the attacker must distinguish between enemy combatants and military objectives<sup>4</sup> that may be attacked, on the one hand, and civilian persons and objects that must be spared, on the other.<sup>5</sup> Warnings may have to be issued, targets, weapons and tactics chosen in order to minimize the risk to the civilians.<sup>6</sup>

In the choice of targets, we should select the one that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.<sup>7</sup> This could be to break a line of communications by bombing a bridge in the countryside instead of a bridge on the same road when it goes through a city. In the choice of weapons, one should preferably use precision-guided munitions if civilian persons or objects are in the vicinity of the target. In land warfare, this could mean to employ directed rounds from tanks rather than mortar fire. In the choice of tactics in air operations, one should attack the target from a direction that poses the least danger to civilians in case of weapon malfunction. Such measures are called *active precautions*.

When the necessary precautions to minimize civilian losses have been taken, the attacker must consider what the result is likely to be. Depending on the circumstances, the expected civilian losses could still be considerable. According to 1977 Additional Protocol I, Article 51(5)(b), it is forbidden to launch an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military

<sup>3</sup> The definition of 'attack' follows the Additional Protocol I definition, which, in Article 49(1), says: "By 'attack' is meant any act of violence against the adversary, whether in offence or in defense". In other words, in this context it does not matter which party is the aggressor in the broader picture.

<sup>4</sup> According to Additional Protocol I, Article 52(2), an object can be a military objective by nature, purpose, use or location. This means that, for instance, a residential building can become a military objective if it is used for military purposes. The test is whether its total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage. This definition is generally accepted, also among non-parties to the Protocol.

<sup>5</sup> Civilian persons are protected unless and for such time as they take a direct part in hostilities.

<sup>6</sup> Additional Protocol I, Article 57(2)(c), see *supra* note 1.

<sup>7</sup> Additional Protocol I, Article 57(3), see *supra* note 1.

advantage anticipated.<sup>8</sup> We are, in other words, talking about civilian losses that are foreseeable, but not intended. This weighing of expected civilian losses against the anticipated military advantage is called the principle of proportionality.

Such ‘incidental effects’ may be a result of proximity of civilians to the intended target. This could be because the blast of a bomb has effects beyond the target, or it could be because the weapon employed is not sufficiently precise or, in the case of precision-guided munitions, it malfunctions. Mistakes do also happen – a convoy with refugees can be mixed up with a military convoy that has been reported in the same area. ‘Collateral damage’ is a term for such incidental effects.

But the party which expects attacks must also take steps to protect the civilian population. If the civilian population and civilian objects are mixed with military objectives, it may be difficult or even impossible for the attacker to distinguish between lawful targets and civilian persons and objects that should be protected, as he is obliged to.

Such steps are called *passive precautions*, and are reflected in the 2005 ICRC Customary Law Study, Rules 22–24:

**Rule 22.** The parties to the conflict must take all feasible precautions to protect the civilian population and civilian objects under their control against the effects of attacks.

**Rule 23.** Each party to the conflict must, to the extent feasible, avoid locating military objectives within or near densely populated areas.

**Rule 24.** Each party to the conflict must, to the extent feasible, remove civilian persons and objects under its control from the vicinity of military objectives.

The negation of the duty to take passive precautions is the use of human shields. Human shields are civilians who are deliberately put in harm’s way to induce the potential attacker to desist from attack out of respect for the civilians, or to put blame on the attacker if the attack is carried out, resulting in heavy civilian casualties. Such tactics are forbidden, as reflected in Rule 97 of the 2005 Customary Law Study:

**Rule 97.** The use of human shields is prohibited.

### 3. Protection of Civilians in Gaza

#### 3.1. Feasible Precautions – Civil Defence

The general duty to take precautions to protect the civilian population under one’s control against the effects of attacks includes civil defence measures, such as shelters, fire-fighting teams, *et cetera*. Information to the adversary on the movement of convoys with civil defence personnel, medical evacuation, refugees, relief consignments, *et cetera*, will also significantly reduce the risk of attacks by mistake. Such movements, as well as stationary facilities should, of course, be kept clearly separate from any military installations or units.<sup>9</sup>

It is well known that there is a network of tunnels, mostly under Gaza City in the more northern part and Khan Yunis in the southern part of the Gaza Strip. Some of the tunnels cross under

the borders to Israel and Egypt and have been used for launching attacks (on Israel) or smuggling weapons (from Egypt). It appears that these tunnels are reserved for military use by Hamas.<sup>10</sup> Most likely, many civilian lives could have been saved if the tunnels, or some substantial fraction of them, had been made available for the civilian population as air raid shelters.

Precautions to protect the civilian population can also include measures such as digging of trenches and distribution of information and warnings. On the contrary, it appears that Hamas has told the civilians to ignore Israeli warnings.<sup>11</sup>

In contrast, elaborate preparations for protecting the civilian populations have been carried out in several countries that have expected or experienced war. For instance, in many countries, gas masks were distributed before World War II in anticipation of air raids involving poisonous gas, shelters were built or improvised in subway stations and children sent to the countryside when the threat of bombing appeared to be serious. During the ‘Cold War’, fire-fighting brigades could be pre-positioned in camps outside of urban centres and elaborate plans laid for evacuation of non-essential persons from cities or other locations that were exposed to bombing or other combat activities.<sup>12</sup>

No action remotely resembling those mentioned above have been reported from Gaza.

#### 3.2. Location of Military Objectives

Each party to the conflict must, to the extent feasible, avoid locating military objectives within or near densely populated areas. Typical military objectives in Gaza are launch sites for rockets, command posts, and storage facilities for weapons. Defensive positions are also military objectives. When fighting takes place from house to house, each contested building becomes a military objective (by use) that can lawfully be attacked.<sup>13</sup> Buildings in the vicinity may also become military objectives by location if it is deemed necessary to take control over them or deny the enemy the use of them. In this way, fighting from block to block, building by building, can reduce a city to rubble.

The extreme case of avoiding locating military objectives within or near densely populated areas is to declare an ‘open city’ or ‘non-defended locality’.<sup>14</sup> This means that a certain place is left open for occupation by the enemy, to spare it from the destruction and sufferings that urban fighting entails. This was done by the French during World War II with respect to Paris.<sup>15</sup>

The general picture in Gaza seems to be that launch sites for rockets, with command centres, have been concentrated in Gaza City, closer to cities in Israel.<sup>16</sup> This has attracted attacks by IDF air and land forces, with disastrous effects on people, buildings and

<sup>10</sup> Hamas is an Islamist organization with a political and a military branch. In this brief, the term refers to the military branch, which by many is considered a terrorist organization.

<sup>11</sup> News broadcast in Norway, 13 October 2023.

<sup>12</sup> In Norway, all lanes on highways would be reserved for outbound traffic in case of evacuation of the capital.

<sup>13</sup> Yoram Dinstein, “The Special Dimensions of Urban Warfare”, in *Israel Yearbook on Human Rights*, 2020, vol. 50, p. 2.

<sup>14</sup> Non-defended localities are regulated in Additional Protocol I, Article 59, see *supra* note 1.

<sup>15</sup> This was a disappointment for the British Prime Minister Winston Churchill, who told the French that the defence of a city from house to house had an enormous capacity to absorb a hostile army.

<sup>16</sup> The repeated rocket campaigns by Hamas have in themselves been war crimes, as the rockets have not been aimed at any military objectives, but have been launched in the general direction of population centres. Seen from the Israeli perspective, the launch sites are, however, lawful targets independent of the criminal nature of the rocket campaigns.

<sup>8</sup> According to the ICRC commentary to Additional Protocol I, a military advantage can only consist in ground gained and in annihilating or weakening the enemy armed forces (Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC/Martinus Nijhoff Publishers, 1987, para. 2218). This is obviously too narrow. The security of one’s own forces must, for instance, be taken into account, as pointed out in Australia’s and New Zealand’s declarations of understanding on ratification of the Additional Protocol (Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 3rd ed., Cambridge University Press, 2016, p. 106).

<sup>9</sup> See, for instance, Additional Protocol I, Article 66 (on identification of civil defence personnel, buildings and materiel), *supra* note 1.

infrastructure in general.

However, before concluding, it is necessary to consider the alternatives. Would it have been feasible to locate rocket launch sites in orchards or other less populated locations, in order to reduce the risks for the civilian population in Gaza? Possibly – yes. But armed resistance against an invading army would hardly have been possible without establishing defensive positions in built-up areas. Gaza has no forests or mountains from where Hamas might have fought with a reasonable chance of success.

The Gaza Strip is not large, but 360 square kilometres does give some possibility of choice. Gaza City has a population of about one million in an area of 45 square kilometres. Hamas has obviously prepared for war. Taking into consideration the massive efforts to build tunnels all over the place, one may wonder whether it would have been feasible to divert some of this activity to establish suitable fortifications on the surface at select locations in the city, allowing the rest of the built-up area to retain its civilian character. Similar measures could have been taken in other cities such as Khan Yunis and Rafah, if the plan was to take up combat at these locations in case of an Israeli invasion.

### 3.3. Removal of Civilians from the Vicinity of Military Objectives

Many military objectives are stationary and cannot be moved. In such cases, the civilians ought to be removed to the extent feasible. When it is a matter of point targets, it may be sufficient to evacuate adjacent buildings, or blocks in an urban environment. If, in contravention of Rule 23 of the 2005 Customary Law Study, Hamas decides to locate a launch site for rockets in a residential area, the situation can to some degree be ameliorated by evacuating the immediate neighbourhood.

In other situations, evacuation of substantial areas ought to take place. In 1945, when the Soviet army was approaching Berlin, evacuation of the about two million civilians was on the table. How this was to be done in practice if it had been decided was, however, an open question.

The attacking party has a duty to issue warnings when circumstances permit, and this has been done repeatedly by the IDF. Such warnings have obviously been heeded by a major part of the civilian population. When the focus of operations shifted over the months from the northern end of Gaza to the southern, and back again, it has resulted in a strain on the population, in particular on persons with limited means of transportation. Difficulties regarding finding suitable shelter in a new location is also a factor.

This has been characterized by some as ‘expulsion’ of the population. Such relocations are, however, necessary to save civilian lives. And, in contrast to the above-mentioned situation in Berlin, the distances involved are limited to some kilometres, 20 to 30 at most, which can be managed without extensive use of mass transportation.

The law places a duty on the party that expects an attack to take active steps to evacuate civilians, for instance, by providing transport or directing traffic. However, the policy of Hamas seems to have been to keep civilians in combat areas by discouraging them from moving out. If the purpose has been to make them victims, or ‘martyrs’, in order to gain sympathy in international media, this conduct looks like utilizing them as human shields.

### 3.4. Human Shields

The use of human shields is prohibited. The concept of human shields is defined in Additional Protocol I, Article 51(7): “The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military opera-

tions”.

The use of human shields is a war crime under the 1998 Statute of the International Criminal Court (‘ICC Statute’), where Article 8(2)(b)(xxiii) defines it as “[u]tilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations”. The language covers also the use of medical units as shields; see Additional Protocol I, Article 12(4): “Under no circumstances shall medical units be used in an attempt to shield military objectives from attack”.

If, however, one of the parties to the conflict is using human shields, it raises the question whether or not the adverse party may attack the military objective that is shielded. Additional Protocol I seems to answer the question in Article 51(8): “Any violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians, including the obligation to take the precautionary measures provided for in Article 57”. The ICRC Commentary adds: “It is clear that in such cases a warning to the population is particularly appropriate as civilians are themselves rarely capable of assessing the danger in which they are placed”.<sup>17</sup>

This provision is obviously apt when speaking of *involuntary* human shields, including persons who are unaware of the risk or lack the capacity to understand the situation, like children. But what about *voluntary* human shields – persons who knowingly position themselves close to a military objective, obviously with the intention to shield it? Three solutions have been aired.

One is to consider them direct participants in hostilities since they try to influence the outcome of the fight, and, for this reason, lawful targets in themselves. If so, major exceptions from the general rules regarding direct participation would have to be applied. The most important is that civilians participating directly in hostilities may be attacked ‘upstream’ when they are on their way to the location where the intended action is going to take place, and ‘downstream’ until they have clearly dissociated themselves from combat-related activities, for instance, when they have reached their home. This would, of course, be non-sensical with respect to persons acting as human shields.

Another is to award them full protection as civilians, meaning that they will achieve their purpose if an attack on the military objective that they are shielding would lead to disproportionate civilian casualties, and the enemy for this reason desists from attack.

A third solution might be that they are still awarded protection as civilians, but that their lives do not count as much in the proportionality assessment as normally since they have knowingly placed themselves in harm’s way to exploit the law in a manner not intended by the humanitarian rules. In practice, this solution might mean that the tolerance for civilian casualties increases, but that mass murder, for instance, of a thousand protesters standing on a bridge that could be a military objective, would not be acceptable.

The present author is not aware of any case law elucidating the issue of how the attacker should relate to voluntary human shields.

In the absence of positive indications, such as waving banners showing defiance towards the potential attacker, the prudent solution will, however, be to consider any apparent human shields as involuntary or ignorant of the danger they are exposed to.

## 4. Attacks on Hospitals

In several cases, hospitals have suffered attacks by ground troops or from the air. The IDF has alleged that the hospitals have been used as command posts or depots of weapons and, for this reason, are lawful targets.

Medical units – civilian as well as military – enjoy specific protection. According to Article 13 of Additional Protocol I, the pro-

<sup>17</sup> Sandoz *et al.* (eds.), 1987, para. 1990, see *supra* note 8.

tection to which civilian medical units are entitled shall not cease unless they are used to commit, outside their humanitarian function, acts harmful to the enemy. Protection may cease only after a warning has been given, setting, whenever appropriate, a reasonable time limit, and after such warning has remained unheeded.

This rule is a development of Article 21 in 1949 Geneva Convention I. Some examples of harmful acts are given in the commentary on that article. These examples also elucidate the interpretation to be given to the expression “harmful acts”:

the use of a hospital as a shelter for able-bodied combatants or fugitives, as an arms or ammunition dump, or as a military observation post; [...] Thus the definition of *harmful* is very broad. It refers not only to direct harm inflicted on the enemy, for example, by firing at him, but also to any attempts at deliberately hindering his military operations in any way whatsoever.<sup>18</sup>

Although the 1949 Geneva Conventions are universally accepted, the 1977 Additional Protocols are not. In particular, the Protocols are not ratified by Israel. The general principles regarding protection of medical units and the limitation of it, are, however identified as customary law in the 2005 Customary Law Study, which provides:

**Rule 28.** Medical units exclusively assigned to medical purposes must be respected and protected in all circumstances. They lose their protection if they are being used, outside their humanitarian function, to commit acts harmful to the enemy.

Whether the requirement of issuing a warning before attacking a medical unit is considered to be binding by Israel is not known to the present author, but he has not seen any indications to the contrary.

If a hospital or other medical unit is attacked because it is used to commit acts harmful to the enemy, the general duty to avoid or at least limit harm to medical personnel, patients and civilians still applies. This means that any attack should be limited to the relevant parts of the buildings and by use of means that produce as little ‘collateral damage’ as possible. This could, for instance, mean that intrusion by ground troops is preferable to dropping bombs on the facility.

## 5. Conclusions

The fighting in Gaza has reportedly cost more than 60,000 Palestinian lives, some 20,000 or more of whom are children below the age of 18. No information has been given by Palestinian sources as to the numbers of fighters versus genuine civilians, but it has been reported that the IDF considers some 20,000 to have been fighters. Since children comprise about 50 per cent of the population, the numbers seem to add up to roughly two civilian victims per fighter who has been killed.

Average numbers can hide individual instances of breach of the law or war crimes in the more serious cases. Deliberate targeting of civilians is a war crime, as well as causing excessive incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof. In the absence of a more concrete yardstick on

<sup>18</sup> *Ibid.*, para. 551, see *supra* note 8.

what ‘excessive’ means, the ICC Statute has limited its definition of the corresponding crime to encompass collateral damage that is “clearly excessive in relation to the concrete and direct overall military advantage anticipated”.<sup>19</sup>

In an overall apportioning of blame and guilt for loss of civilian lives we must, however, take into consideration not only the conduct of the attacker, but also which measures have been taken by the party expecting attack to protect its civilian population. So far, such measures by Hamas seem to have been totally absent.

On the contrary, one may suspect that the strategy of Hamas has been to cause a humanitarian ‘Armageddon’ appealing to the compassion of civilized nations so that pressure is brought to bear on Israel to end the campaign against Hamas on terms favourable to it and the Palestinian cause.

Lawrence of Arabia observed that war upon rebellion can be messy and slow, like eating soup with a knife.<sup>20</sup> Although it can be disputed whether it is apt to characterize the war in Gaza as war upon rebellion, it is much more so than the classic wars of the past, when armies met each other in the field and civilians could be spectators rather than participants or victims. The ‘mess’ in this case is loss of civilian life and limbs, as well as destruction of homes and other civilian property. It would be substantially easier for the attacker to distinguish between enemy combatants and military objectives that may be attacked, on the one hand, and civilian persons and objects that must be spared, on the other, if the opponent takes corresponding steps to keep the two categories separated from each other.

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ISBN: 978-82-8348-277-5.

TOAEP-PURL: <https://www.toaep.org/pbs-pdf/185-dahl/>.

LTD-PURL: <https://www.legal-tools.org/doc/9a50i2nd/>.

Date of publication: 10 September 2025.

<sup>19</sup> Statute of the International Criminal Court, 17 July 1998, Article 8(2) (b)(iv) (italics added) (<https://www.legal-tools.org/doc/7b9af9/>).

<sup>20</sup> T.E. Lawrence, *Seven Pillars of Wisdom*, Wordsworth Editions Ltd., Ware, 1997, p. 182.



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