

THE LEGALITY OF ISRAEL'S MILITARY OFFENSIVE IN RAFAH AND ATTACK AT TAL AL-SULTAN

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Military Offensive in Rafah and Attack at Tal Al-Sultan

This publication analyses the legality of Israel's ongoing military offensive in Rafah and of Israel's reported airstrike on the Tal al-Sultan area on 26 May 2024.

The IHL Centre maintains dedicated research pages on the South Africa v. Israel case and the 2023-2024 hostilities in Israel and Gaza.¹

Introduction

On 26 May 2024, the Israeli military carried out an airstrike in the Tal al-Sultan area in Rafah, Gaza's southernmost city.² According to the Ministry of Health in Gaza, 45 persons were killed in the attack, amongst them 23 elderly persons, children, and women, whilst 249 others were injured.³ Images of fires ripping through tents and reports of distraught civilians scrambling for safety in the darkness of night, lit only by the smouldering flames, drew swift international condemnation.⁴ The United Nations (UN) Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator, Martin Griffiths, spoke of an 'utterly unacceptable attack' and 'the latest – and possibly most cruel – abomination'.⁵ Medical aid organisation Médecins Sans Frontières (MSF, also known as Doctors Without Borders) said in a statement that the 'attack on a populated camp in a so-called "safe zone" in Rafah shows the complete disregard for the lives of civilians in Gaza'.⁶

The Israeli military claimed on the evening of the attack that it had conducted a strike 'against legitimate targets under international law, through the use of precise munitions and on the basis

¹ 'Contentious Case Before the ICJ: *South Africa v. Israel*' (*Diakonia IHL Centre*)

<<https://www.diakonia.se/ihl/jerusalem/proceedings-before-international-courts-relating-to-israel-and-the-opt/contentious-case-before-the-icj-south-africa-v-israel/>> accessed 3 June 2024; '2023-2024 Hostilities and Escalating Violence in the oPt' (*Diakonia IHL Centre*) <<https://www.diakonia.se/ihl/jerusalem/2023-2024-hostilities-escalating-violence-opt/>> accessed 3 June 2024.

² Hadeel Al-Shalchi and Anas Baba, 'An Israeli Airstrike Killed 45 Palestinians in an Encampment for Displaced People' *NPR* (Rafah, Gaza, 27 May 2024) <<https://www.npr.org/2024/05/27/nx-s1-4982690/rafah-encampment-israeli-airstrike-hamas>> accessed 3 June 2024; 'Israel's Attack at Tal al-Sultan' (*Diakonia IHL Centre*, 27 May 2024) <<https://www.diakonia.se/ihl/news/israel-attack-tal-al-sultan/>> accessed 3 June 2024.

³ 'Hostilities in the Gaza Strip and Israel | Flash Update #171' (*United Nations Office for the Coordination of Humanitarian Affairs (OCHA) occupied Palestinian territory (oPt)*, 27 May 2024) <<https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-171>> accessed 3 June 2024.

⁴ Nidal Al-Mughrabi and Dan Williams, 'Israeli Attack on Rafah Tent Camp Kills 45, Prompts International Outcry' *Reuters* (Cairo and Jerusalem, 27 May 2024) <<https://www.reuters.com/world/middle-east/israeli-attack-rafah-tent-camp-draws-global-condemnation-2024-05-27/>> accessed 3 June 2024; Mohammad Al Sawalhi and others, 'Israeli Strike That Killed 45 at Camp for Displaced Palestinians in Rafah a "Tragic Error," Netanyahu Says' *CNN* (Rafah, Gaza and Jerusalem, 28 May 2024) <<https://edition.cnn.com/2024/05/27/middleeast/gaza-rafah-displaced-people-camp-israel-strike-mime-intl/index.html>> accessed 3 June 2024.

⁵ 'Statement on Gaza by Martin Griffiths, Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator' (*OCHA oPt*, 27 May 2024) <<https://www.ochaopt.org/content/statement-gaza-martin-griffiths-under-secretary-general-humanitarian-affairs-and-emergency-relief-coordinator>> accessed 3 June 2024.

⁶ 'MSF Denounces Israeli Attack on Camp Sheltering Displaced People in Rafah' (*MSF*, 28 May 2024) <<https://www.msf.org/msf-denounces-israeli-attack-camp-sheltering-displaced-people-rafah>> accessed 3 June 2024.

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of precise intelligence that indicated Hamas' use of the area'.⁷ They also said that the ' Hamas Chief of Staff in [the West Bank] and an additional senior Hamas official' were killed in what they described as a 'precise airstrike in northwest Rafah'.⁸ As reports of a high number of civilian casualties trickled in, Israeli Prime Minister Benjamin Netanyahu spoke of a 'tragic mishap' that was being investigated,⁹ but pledged to press on with Israel's military offensive in Rafah.¹⁰ Israeli military spokesperson Daniel Hagari said that 'following the strike, due to unforeseen circumstances, a fire ignited tragically taking the lives of Gazan civilians nearby', which was 'unexpected and unintended'.¹¹ On Tuesday 28 May, in a demonstration of Israel's intent to press on with its offensive, Israeli tanks were sighted in the centre of Rafah, and shelling reportedly hit the Al-Mawasi area where civilians had been told to relocate, killing at least 21.¹²

Israel launched its offensive in Rafah in early May despite weeks of international pressure to refrain from doing so over concerns for the lives and wellbeing of the around 1.3 million Palestinians who had been sheltering in the city,¹³ described by some as the 'last refuge' for Palestinians in Gaza.¹⁴ All the while, the humanitarian situation in Gaza has been deteriorating steadily, including in Rafah, not least after Israel captured the border crossing with Egypt, one of the main thoroughfares for the passage of desperately needed humanitarian assistance.¹⁵

The strike on Tal al-Sultan on 26 May came two days after the International Court of Justice (ICJ) delivered its third order on provisional measures in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South*

⁷ Israel Defense Forces (X, 26 May 2024) <<https://x.com/IDF/status/1794838430473421042>> accessed 3 June 2024.

⁸ Israel Defense Forces (X, 27 May 2024) <<https://x.com/IDF/status/1794854903489118405>> accessed 3 June 2024.

⁹ Tia Goldenberg, Melanie Lidman, and Samy Magdy, 'Netanyahu Says Deadly Israeli Strike in Rafah was the Result of a "Tragic Mishap"' *The Associated Press* (Tel Aviv, 28 May 2024) <<https://apnews.com/article/israel-palestinians-hamas-war-news-05-27-2024-7b743a848ef8bfbe69a9659a4a5dd047>> accessed 3 June 2024.

¹⁰ Paul Adams and Matt Murphy, 'Netanyahu Vows to Continue War Amid Air Strike Condemnation' *BBC News* (London, 28 May 2024) <<https://www.bbc.com/news/articles/c7228x974lxo>> accessed 3 June 2024.

¹¹ Israel Defense Forces (X, 28 May 2024) <<https://x.com/IDF/status/1795507041135456626>> accessed 3 June 2024.

¹² Nidal Al-Mughrabi, 'Israel Denies Strike on Camp Near Rafah that Gaza Officials Say Killed 21 People' *Reuters* (Cairo, 29 May 2024) <<https://www.reuters.com/world/middle-east/israeli-forces-press-rafah-offensive-despite-global-outcry-2024-05-28/>> accessed 3 June 2024; 'Hostilities in the Gaza Strip and Israel | Flash Update #172' (*OCHA oPt*, 29 May 2024) <<https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-172>> accessed 3 June 2024.

¹³ Aya Batrawy, Kat Lonsdorf, and James Hider, 'Israel Pushes Deeper into Rafah After Deadly Strike at Camp for Displaced Gazans' *NPR* (Washington DC, 28 May 2024) <<https://www.npr.org/2024/05/28/g-s1-1361/rafah-gaza-israel>> accessed 3 June 2024.

¹⁴ Ghazal Golshiri, Clothilde Mraffko, and Madjid Zerrouky, 'Israeli Army Now Pounds Rafah, Gaza's Last Refuge' *Le Monde* (Paris, 12 May 2024) <https://www.lemonde.fr/en/international/article/2024/02/12/israeli-army-now-pounds-rafah-gaza-s-last-refuge_6517370_4.html> accessed 3 June 2024.

¹⁵ Samy Magdy, Melanie Lidman, and Lee Keath, 'Israel Seizes Gaza's Vital Rafah Crossing, But the US Says It Isn't the Full Invasion Many Fear' *The Associated Press* (Cairo, 8 May 2024) <<https://apnews.com/article/israel-palestinians-gaza-hamas-war-05-07-2024-113bf4ee5dad87dc5c003d76ed2785bf>> accessed 3 June 2024.

Africa v. Israel).¹⁶ South Africa had instituted the proceedings against Israel at the end of December 2023 alleging that Israel has been violating its obligations under the Genocide Convention by means of its conduct of the war in Gaza and requested provisional measures on several occasions, including most recently with respect to Israel's offensive in Rafah. The following sections provide an analysis of the lawfulness of Israel's military offensive in Rafah in general and its attack on the Tal al-Sultan area specifically in light of the ICJ's order on provisional measures and international humanitarian law (IHL).

Israel's military offensive in Rafah

The ICJ's third order on provisional measures

The ICJ's third order on provisional measures, rendered on 24 May 2024, explicitly addressed Rafah in its operative paragraph. The Court ordered Israel to:

*Immediately halt its military offensive, and any other action in the Rafah Governorate, which may inflict on the Palestinian group in Gaza conditions of life that could bring about its physical destruction in whole or in part.*¹⁷

Conditional or unconditional halt to the military offensive

There are conflicting interpretations, including amongst the Court's judges, as to what this paragraph requires from Israel:¹⁸ Does it mandate a halt of the military offensive in Rafah *full stop*, or *only* of a military offensive that is carried out in such a manner as to inflict on the Palestinian group in Gaza conditions of life that could bring about its physical destruction?

In grammatical terms, the question is whether the sentence is read as a defining or nondefining relative clause – does the second part of the sentence ('which may inflict on the Palestinian group in Gaza conditions of life that could bring about its physical destruction in whole or in part') provide essential information without which the meaning of the full sentence cannot be understood, or can the part that comes before it stand alone? The Court's order has an additional layer of complexity because it mentions not just the military offensive but also 'any other action in the Rafah Governorate', which is separated by two commas as an apposition of sorts. It is not immediately discernible whether the 'which may inflict' clause relates to the military offensive, to any other action, to both, or to neither (in the defining sense).

The sections below provide an overview of different options for reading the sentence, alongside a commentary on their plausibility.

¹⁶ 'Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)' (ICJ) <<https://icj-cij.org/case/192>> accessed 3 June 2024.

¹⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)* (Request for the Modification of the Order of 28 March 2024: Order) General List No. 192 [2024] ICJ 1 [57(2)(a)].

¹⁸ Eg Juliette McIntyre, 'Consensus, at what Cost?' (*Verfassungsblog*, 25 May 2024) <<https://verfassungsblog.de/consensus-at-what-cost/>> accessed 3 June 2024.

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1. 'Which may inflict' defines both the military offensive and 'any other action'

Defining relative clause. Israel must only halt its military offensive and any other action in Rafah insofar as they could inflict adverse conditions of life on the Palestinian group in Gaza that could bring about its physical destruction.

This reading does not entirely fit with how the sentence is drafted. For one, it is unclear why there are *two* commas when, grammatically, there should probably be *none*.

To indicate such a conditioning, the sentence could have been drafted to read instead 'halt (both) its military offensive and any other action in the Rafah Governorate *insofar as or to the extent that* they may inflict conditions of life...'

There is also the use of the possessive pronoun 'its' in relation to the military offensive. It is clear which military offensive is being talked about ('its', i.e., Israel's); as will be further explained below, the part of the sentence whose meaning is not immediately clear (and which potentially needs further definition by means of the clause starting with 'which may inflict') is 'any other action'. Again, had this meaning been intended, the sentence could have been drafted to read instead '*any* military offensive and any other action in the Rafah Governorate which may inflict...'

This is nonetheless how several judges understood the sentence.¹⁹ Judge Aurescu explicitly acknowledged in his declaration that its meaning 'is somehow unclear',²⁰ and proceeded to explain that in his view the clause starting with 'which may inflict' relates to the military offensive as well.²¹ Judge Barak similarly said that the order does not contain 'an unconditional obligation to halt the military operation'.²²

Judge Sebutinde wrote:

*[T]his measure does not entirely prohibit the Israeli military from operating in Rafah. Instead, it only operates to partially restrict Israel's offensive in Rafah to the extent it implicates rights under the Genocide Convention.*²³

Even if it were accepted that the Court conditioned the halt of the military offensive to its potentially inflicting adverse conditions of life on the Palestinian people in Gaza – which, as noted, is not the most intuitive reading of the sentence as drafted – Israel's military offensive in Rafah

¹⁹ 13 judges voted in favour of the measure, and two voted against. Three of those who voted in favour – Judges Nolte, Tladi, and Aurescu – appended a separate declaration explaining their reading of the sentence, and the two who voted against – Judge Sebutinde and Judge ad hoc Barak – appended dissenting opinions. See Adil Ahmad Haque, 'Halt: The International Court of Justice and the Rafah Offensive' (*Just Security*, 24 May 2024) <<https://www.justsecurity.org/96123/icj-gaza-israeli-operations/>> accessed 3 June 2024.

²⁰ 'Declaration of Judge Aurescu' (*ICJ*) [3] <<https://icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-03-en.pdf>> accessed 3 June 2024.

²¹ *ibid.*

²² 'Dissenting Opinion of Judge Ad Hoc Barak' (*ICJ*) [28] <<https://icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-05-en.pdf>> accessed 3 June 2024.

²³ 'Dissenting Opinion of Vice-President Sebutinde' (*ICJ*) [21] <<https://icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-01-en.pdf>> accessed 3 June 2024.

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has arguably already reached that threshold.²⁴ This emerges both from the terms of the order itself and from developments that have unfolded since the order was rendered.

The Court explicitly spells out in its order of 24 May that 'Israel has not provided sufficient information concerning the safety of the population during the evacuation process, or the availability in the Al-Mawasi area of the necessary amount of water, sanitation, food, medicine[,] and shelter for the 800,000 Palestinians that have evacuated thus far'.²⁵ It further took the position that 'Israel has not sufficiently addressed and dispelled the concerns raised by its military offensive in Rafah',²⁶ concluding 'that the current situation arising from [this] offensive ... entails a further risk of irreparable prejudice to the plausible rights claimed by South Africa[,] and that there is urgency'.²⁷

It is difficult to discern, given these statements, how Israel could argue that it is lawful to continue its offensive in Rafah under these circumstances, at least in the manner in which it has been carried out to date. Since the Court's order, the situation has only deteriorated further; even more people have been displaced, currently estimated at around 1 million,²⁸ and the attacks on the Tal al-Sultan area on 26 May and in Al-Mawasi on 28 May further underscore the grave risks that civilians in Rafah face.

2. 'Which may inflict' defines neither

Nondefining relative clause. Israel must halt its military offensive and any other action in the Rafah Governorate full stop.

Legally, this reading does not make much sense since Israel has obligations pursuant to the law of occupation and other branches of international law that may require it to take different forms of action in the Gaza Strip, including Rafah, such as the provision of humanitarian assistance. Halting any action in the Rafah Governorate *full stop* would not be consistent with these obligations.

On this reading, it is also not clear why the Court included the 'which may inflict' clause at all. It could have simply said 'halt the military offensive and any other action in the Rafah Governorate' in the operative paragraph for clarity and brevity, and could have related to the (non-defining, additional) information in another part of the order.

²⁴ McIntyre (n 18) cites three authors who have made this argument: Kevin Jon Heller, Mike Becker, and Heidi Matthews. See Kevin Jon Heller (X, 24 May 2024) <<https://x.com/kevinjonheller/status/1794087611264356473>> accessed 3 June 2024; Mike Becker (X, 24 May 2024) <<https://x.com/mabecker17/status/1794091117668946334>> accessed 3 June 2024; and Heidi Matthews (X, 24 May 2024) <https://x.com/Heidi__Matthews/status/1794059869164597366> accessed 3 June 2024. See also Haque (n 19).

²⁵ Order (n 17) [46].

²⁶ *ibid.*

²⁷ *ibid* [47]. See Heller (n 24).

²⁸ OCHA oPt Flash Update #172 (n 12).

3. 'Which may inflict' defines only the military offensive

Defining relative clause. Israel must only stop the military offensive insofar as it may inflict on the Palestinian people in Gaza conditions of life that may bring about its physical destruction, and it must halt any other action in the Rafah Governorate full stop.

This reading is not semantically sound. The 'which may inflict' clause can either relate to the first part of the sentence as a whole ('military offensive and any other action') or to the part that directly precedes it ('any other action'), but it cannot relate to the first part only ('military offensive'). The relative pronoun should come directly after the word or clause that it relates to, not after an apposition; this would be a reference error.

Furthermore, it would not make sense for the sentence to mean that the military offensive must be stopped only insofar as it may inflict adverse conditions of life while at the same time saying that 'any other action in the Rafah Governorate' (ostensibly including the provision of humanitarian assistance and other actions mandated by international law) must be ceased *full stop*.

4. 'Which may inflict' defines only 'any other action'

Defining relative clause. Israel must halt its military offensive full stop, but must only stop any other action insofar as it may inflict on the Palestinian people in Gaza conditions of life that may bring about its physical destruction.

This reading is plausible.²⁹ As noted, the Court explained in other parts of the order that there are risks to the plausible rights of Palestinians associated with Israel's ongoing military offensive in Rafah, so it might not be necessary to specify the 'which may inflict' part for the offensive.

By contrast, it makes sense for the 'other actions' – the meaning of which is not self-evident – to be defined as those which may inflict such adverse conditions of life. Such a reading would also be consistent with Israel's ongoing obligations under international law, which as noted might require it to take certain action in Rafah, such as facilitating the provision of humanitarian assistance.

As an aside, the President's oral presentation of the order appeared to follow this interpretation as he made a longer pause after 'military offensive' and a shorter pause after 'any other action', thereby seemingly conveying to the listener that the clause starting with 'which may inflict' defines only the latter and not the former.³⁰

In light of the foregoing, the IHL Centre takes the view that the two most plausible readings of the sentence under consideration are as follows:

²⁹ See Haque (n 19).

³⁰ 'Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel) – Delivery of the Order of the Court' (ICJ, 24 May 2024) <<https://icj-cij.org/multimedia/204101>> accessed 3 June 2024.

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- The sentence is a defining relative clause ordering Israel to halt both its military offensive in Rafah and any other action in the Rafah Governorate insofar as these may inflict on the Palestinian population in Gaza conditions of life that may bring about its physical destruction (and the military offensive in Rafah must be halted immediately because under the prevailing circumstances, this condition has been met); or
- The sentence is a defining relative clause ordering Israel to halt its military offensive in Rafah *full stop* and any other action in the Rafah Governorate insofar as it may inflict on the Palestinian people in Gaza such conditions of life.

Both readings yield the same result: **Israel must halt its ongoing military offensive in Rafah.**

The meaning of ‘military offensive’

A second ambiguity in the Court’s order arises from the fact that the precise meaning of the term ‘military offensive’ is not clear. It is not found directly in IHL.

Terms that have specific meaning in IHL are ‘attack’, ‘military operation’, and ‘hostilities’. **Attacks** are ‘acts of violence against the adversary, whether in offence or in defence’.³¹ A **military operation** is generally understood to be ‘a larger concept than “attacks” that equally covers, for example, a foray through a village’.³² The term **hostilities** denotes the employment of ‘means and methods of warfare ... by belligerents in armed conflicts’³³ and triggers the application of the IHL rules on conduct of hostilities.

It is accordingly not entirely clear what a halt to the military offensive requires for the purposes of interpreting the Court’s order. Does Israel have to halt *all* military operations in Rafah? Should it withdraw its ground forces? Can it still carry out specific attacks – for example, to rescue hostages, to target Hamas commanders, or to respond to rocket attacks launched from there?

The order itself does not specify this. In the part providing an overview of developments since the rendering of its last order, the Court observes:

*The military ground offensive in Rafah, which Israel started on 7 May 2024, is still ongoing and has led to new evacuation orders. As a result, according to United Nations reports, nearly 800,000 people have been displaced from Rafah as at 18 May 2024 [emphasis added].*³⁴

³¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, came into force 7 December 1978) 1125 UNTS 3 (AP I) art 49(1).

³² Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (Elgar, 2019) para 8.295 and the references cited therein. Article 48 of AP I refers to ‘operations’, and Article 51(1) and 57(1) of AP I refer to ‘military operations’.

³³ ‘Conduct of Hostilities’ (*International Committee of the Red Cross (ICRC) Glossary*) <https://casebook.icrc.org/a_to_z/glossary/conduct-hostilities> accessed 3 June 2024.

³⁴ Order (n 17) [28].

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In other instances, including in the operative paragraph, the order refers just to Israel's 'military offensive'.³⁵ When analysing whether the military offensive in Rafah poses a risk of irreparable harm and prejudice, the Court takes note of a World Food Programme (WFP) statement that refers to Israel's 'incursion into Rafah';³⁶ when summarising South Africa's application, the Court uses the terms 'ground incursion'³⁷ and 'military incursion into Rafah',³⁸ respectively.

Jude Tladi came closest to spelling out what the Court's order requires from Israel in his declaration:

*The reference to "offensive" operations illustrates that legitimate defensive actions, within the strict confines of international law, to repel specific attacks, would be consistent with the Order of the Court. What would not be consistent is the continuation of the offensive military operation in Rafah, and elsewhere, whose consequences for the rights protected under the Convention on the Prevention and Punishment of Genocide has been devastating [emphasis in original].*³⁹

Judge ad hoc Barak took a somewhat similar approach:

*The Court's first measure is ... limited to offensive (and not defensive) military action in Rafah ... This qualified measure shows that the Court is cognizant of Israel's need to undertake those military operations that are necessary to prevent and repel threats and attacks by Hamas, and to take action to defend itself and its citizens and free the hostages held in Gaza.*⁴⁰

Jude Nolte, meanwhile, seemed to equate 'military offensive' with 'military operations', stating that Israel has to '[limit] its current military offensive in Rafah'⁴¹ pursuant to the Court's order, while adding that this 'does not address military operations outside Rafah'.⁴²

Again, as with the question of whether the order to halt the military offensive in Rafah is conditional or not, a certain level of ambiguity remains regarding the precise meaning of the term 'military offensive'. On the basis of the foregoing, and considering that the Court ordered not just a halt to the military offensive but also to 'any other action in the Rafah Governorate' that may

³⁵ *ibid* [29], [40], [43], [44], [46], [47], [50], and [57(2)(a)].

³⁶ *ibid* [45].

³⁷ *ibid* [23].

³⁸ *ibid* [24].

³⁹ 'Declaration of Judge Tladi' (*ICJ*) [17] <<https://icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-04-en.pdf>> accessed 3 June 2024.

⁴⁰ Dissenting Opinion of Judge *Ad Hoc* Barak (n 22) [28].

⁴¹ 'Declaration of Judge Nolte' (*ICJ*) [18] <<https://icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-02-en.pdf>> accessed 3 June 2024.

⁴² *ibid* [25].

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inflict on Palestinians in Gaza conditions of life that may bring about their physical destruction, it is nonetheless plausible to infer that this measure requires Israel:

- To halt offensive military operations in Rafah, including those aimed at gaining or maintaining control of territory (including the border crossing);
- To withdraw its ground forces except those that may be strictly necessary to defend from individual attacks or to rescue hostages, provided that any such acts are carried out in full compliance with IHL; and
- To cease issuing broad instructions to civilians to relocate and other measures that cause mass displacement and could violate the prohibition of forcible transfer (further elaborated below).⁴³

Dangerous ambiguity

The level of ambiguity on the part of the Court is perhaps deliberate, which is lamentable; it would have been desirable to have as much clarity as possible given the humanitarian stakes at issue. The Court itself took note of the grave risks that the civilian population in Rafah faces as a result of Israel's military offensive; any ambiguity in the Court's order is liable to be interpreted by Israel at the expense and to the detriment of the civilian population. Put more bluntly: the Court had the opportunity to set clear limitations to Israel's actions and to thereby significantly enhance the protection of civilians in Rafah, and by introducing layers of ambiguity in its order, the Court has failed to do so.

While it might not be possible to conclusively resolve the meaning of the Court's order on the basis of grammatical construction and the publicly known views of judges alone, the IHL Centre holds the view that ambiguities should be resolved by favouring a more protective interpretation over a permissive one that would grant Israel significant leeway to continue its military offensive in Rafah. This follows from the gravity of the humanitarian concerns raised and the protective purpose of the Genocide Convention, which is under consideration in the proceedings.

Other measures

The Court also indicated a series of other measures. For one, the Court ordered Israel to '[m]aintain open the Rafah crossing for unhindered provision at scale of urgently needed basic services and humanitarian assistance'.⁴⁴ As of the time of writing, the Rafah crossing remains closed, constituting a breach of the order.⁴⁵ Furthermore, Israel was instructed to '[t]ake effective measures to ensure the unimpeded access to the Gaza Strip of any commission of inquiry, fact-

⁴³ Haque (n 19) reaches a similar conclusion: 'The current military offensive must immediately halt, and so must any other action that carries similar risks ... At the same time, Israel may carry out limited military operations to respond to specific attacks or to rescue hostages'.

⁴⁴ Order (n 17) [57(2)(b)].

⁴⁵ 'Gaza Strip: Humanitarian Access Constraints | 29 May 2024' (OCHA oPt, 30 May 2024)

<<https://www.ochaopt.org/content/gaza-strip-humanitarian-access-constraints-29-may-2024>> accessed 3 June 2024.

finding mission or other investigative body mandated by competent organs of the United Nations to investigate allegations of genocide'.⁴⁶ It is not publicly known whether or to what extent steps have been taken in this direction, but the order clarifies that doing so is a binding obligation on Israel, violation of which engages its responsibility under international law.

Displacement and inversion of humanitarian logic

In addition to being contrary to the ICJ's order on provisional measures of 24 May, Israel's ongoing offensive in Rafah likely entails violations of IHL. Specific attacks have raised serious concerns about a failure to comply with the IHL rules on the conduct of hostilities; this is examined in more detail below with respect to the attack on Tal al-Sultan. More generally, Israel's use of relocation directives – a consistent feature of its operations in Gaza – to remove civilians from areas where it is pursuing its offensive is problematic from a humanitarian and IHL perspective.

Hundreds of thousands of Palestinians who had sought refuge in Rafah have subsequently been ordered to relocate yet again, exacerbating the humanitarian crisis and contributing to the mass displacement of Palestinians in Gaza. Israel's use of such directives, which are ostensibly posited as 'warnings', appears to be an inversion of humanitarian logic: rather than being issued to protect civilians, these 'warnings' effect mass displacement in catastrophic conditions and are seemingly used to pave the way for large-scale military operations that disregard the protection of the civilians who remain in place. Moreover, the reported strike on a site for displaced persons in Al-Mawasi on 28 May demonstrates the dangers that Palestinians face even when they follow instructions to relocate.⁴⁷

Israel claims that it 'continues to take extraordinary measures in order to minimize harm to Palestinian civilians in Gaza', including by means of informing civilians of planned operations.⁴⁸ While issuing warnings to civilians about specific attacks is a measure of precaution that parties to a conflict may take to minimise civilian harm, it is not a panacea that renders an otherwise unlawful military operation lawful. In no way does a warning detract from the protection owed to civilians who remain, including those who may not have been able to relocate due to injury, age, disability, or lack of safe routes or alternative shelter.

While the Israeli military is presenting Palestinian civilians with a binary choice between relocating to uncertain and likely unsafe locations or staying in Rafah and suffer the consequences, Israel has further options and must adopt the course of action that respects IHL. This includes suspending or cancelling an attack if it becomes apparent that civilian harm or damage to civilian objects would be excessive in relation to the military advantage sought.⁴⁹ Israel

⁴⁶ Order (n 17) [57(2)(c)].

⁴⁷ OCHA oPt Flash Update #172 (n 12).

⁴⁸ Order (n 17) [26].

⁴⁹ 'Customary IHL Database' (ICRC, first published in 2005) <<https://ihl-databases.icrc.org/en/customary-ihl>> (CIHL) accessed 3 June 2024, r 19.

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also has a more general duty to take constant care to spare the civilian population in its military operations.⁵⁰

Israel has additional obligations pursuant to the law of occupation in Gaza by virtue of its effective control over the territory.⁵¹ Its use of ‘warnings’ and relocation directives to remove Palestinians from certain areas may also constitute a violation of the prohibition of forcible transfer and deportation of protected persons enshrined in the Fourth Geneva Convention.⁵² While evacuations necessitated by the security of the population or imperative military reasons are permissible, they must be temporary.⁵³ At present, and given the extent of destruction of civilian homes and infrastructure in Gaza, it is unclear whether or when Palestinians will be able to return to their homes. This concern is amplified by the fact that Israeli policymakers have threatened a ‘second Nakba’, implying a permanent displacement of Palestinians beyond the borders of the Gaza Strip.⁵⁴ Moreover, evacuated persons must be provided with proper accommodation, and their basic needs regarding hygiene, health, safety, and nutrition must be met.⁵⁵ These conditions do not appear to have been met in Rafah, where the UN warns that humanitarian facilities ‘are forced to close one after another’ as the flow of humanitarian aid supplies into Gaza continues to drop.⁵⁶

The attack at Tal al-Sultan

In addition to the restrictions arising from the ICJ’s order on provisional measures, all military operations and attacks conducted by Israel are subject to the limitations set out in the rules on conduct of hostilities. This section examines the implications of these rules with respect to the attack at Tal al-Sultan.

The IHL rules on conduct of hostilities require that the belligerents distinguish at all times between combatants (fighters) and civilians on the one hand, and between military objectives

⁵⁰ *ibid* r 15.

⁵¹ ‘Israel’s Expanding Obligations in Gaza Pursuant to the Law of Occupation’ (*Diakonia IHL Centre*, 15 February 2024) <<https://www.diakonia.se/ihl/news/israels-expanding-obligations-in-gaza-pursuant-to-the-law-of-occupation/>> accessed 3 June 2024.

⁵² Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 28 (GC IV) art 49(1). Deportation is generally understood to refer to the displacement of protected persons outside of the occupied territory – whether to the territory of the occupying power or to the territory of a third State – while forcible transfer refers to the displacement of protected persons within the occupied territory.

⁵³ GC IV art 49(2).

⁵⁴ Eg Michael Hauser Tov, “‘We’re Rolling Out Nakba 2023,’ Israeli Minister Says on Northern Gaza Strip Evacuation’ *Haaretz* (Tel Aviv, 12 November 2023) <<https://www.haaretz.com/israel-news/2023-11-12/ty-article/israeli-security-cabinet-member-calls-north-gaza-evacuation-nakba-2023/0000018b-c2be-dea2-a9bf-d2be7b670000>> accessed 3 June 2024.

⁵⁵ GC IV art 49(3).

⁵⁶ ‘Amid Ongoing Israeli Incursions into Gaza, Aid Facilities Shut “One After Another”’ (*UN News*, 30 May 2024) <<https://news.un.org/en/story/2024/05/1150411>> accessed 3 June 2024.

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and civilian objects on the other (**principle of distinction**);⁵⁷ that they do not carry out attacks that '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 advantage anticipated' (**principle of proportionality**);⁵⁸ and that they take all feasible precautions to avoid, or in any case to minimise, incidental harm to civilians and damage to civilian objects (**principle of precautions**).⁵⁹

It can be difficult to determine conclusively whether a party to an armed conflict has violated the rules on conduct of hostilities because of gaps in the factual picture, and because parties to the conflict do not have the benefit of hindsight. There are nonetheless serious grounds for concern that the Israeli military failed to respect IHL rules when carrying out its strike on the Tal al-Sultan area on 26 May 2024.

Israel claims to have targeted two senior Hamas officials: Yassin Rabia, who they allege 'managed the entirety of Hamas' terrorist activity in [the West Bank], transferred funds to terrorist targets[,] ... planned Hamas terrorist attacks throughout [the West Bank]', and 'carried out numerous attacks ... in which IDF soldiers were killed'; as well as Khaled Nagar [sic], who is alleged to have 'directed shooting attacks and other terrorist activities in [the West Bank,] ... transferred funds intended for Hamas' terrorist activities in Gaza', and 'carried out several deadly terrorist attacks in which IDF soldiers were killed'.⁶⁰

Even if one were to accept these claims, and that the attack was directed at lawful targets, there are serious concerns regarding the proportionality of the attack and compliance with the principle of precautions in attack.⁶¹

⁵⁷ CIHL r 1. Pursuant to the principle of distinction, it is generally accepted that combatants in State armed forces and fighters in armed groups with a continuous combat function are targetable, in addition to civilians if and for as long as they directly participate in hostilities. According to the ICRC, 'continuous combat function' refers to 'individuals whose continuous function it is to take a direct part in hostilities' and 'requires lasting integration into an organized armed group acting as the armed forces of a non-State party to an armed conflict'. Nils Melzer, 'Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law' (ICRC, 2009) 27; 34 <<https://www.icrc.org/en/doc/assets/files/other/icrc-002-0990.pdf>> accessed 3 June 2024.

⁵⁸ CIHL r 14.

⁵⁹ CIHL r 15. Such measures may include target verification (CIHL r 16); choosing appropriate means and methods of warfare (CIHL r 17); assessing the effects of attacks (CIHL r 18); halting an attack as soon as it becomes clear that it may result in a disproportionate number of civilian casualties (CIHL r 19); and giving effective advance warning to the civilian population unless circumstances do not permit (CIHL r 20).

⁶⁰ Israel Defense Forces (n 8).

⁶¹ It should be noted that financial activity, such as the handling of funds, and membership in Hamas' political as opposed to military wing does not by itself fulfil the criterion of 'continuous combat function'. In case of doubt, the presumption must be that a person is a civilian and thus cannot be intentionally targeted. For a detailed development of this argument see 'Legal Brief on the 2023 Hostilities in Israel and Gaza' (*Diakonia IHL Centre*, 5 December 2023) 46-47 <<https://www.diakonia.se/ihl/news/legal-brief-on-the-2023-hostilities-in-israel-and-gaza/>> accessed 3 June 2024.

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Officials in Gaza reportedly indicated that the Tal al-Sultan area had been designated as a ‘humanitarian area’,⁶² although the Israeli authorities have disputed this.⁶³ In any case, regardless of whether the area had been explicitly declared a ‘humanitarian’ or ‘safe zone’,⁶⁴ it was publicly known that a large number of displaced persons were sheltering in Tal al-Sultan, many of whom had set up tents and makeshift structures. UN facilities are reportedly also located in the area.⁶⁵ In light of this information, it should have been reasonably foreseeable to the Israeli military that a strike on such an area – even if, as they claimed, it was carried out with ‘precise munitions’⁶⁶ – would likely lead to a large number of civilian deaths and injuries and damage to civilian structures. Only a very considerable anticipated military advantage could render such an attack proportionate. The information available after the attack – that 45 civilians were reportedly killed and over 200 injured, while two Hamas fighters were allegedly killed – raises concerns that any process of information gathering, analysis, and evaluation that the Israeli military might have conducted prior to the attack to assess the anticipated military advantage and the expected civilian harm, and to weigh these against each other, was thoroughly inadequate and failed to meet the proportionality requirement.⁶⁷

Israel has claimed that many deaths and injuries may have been caused by a secondary explosion,⁶⁸ and not directly by the attack. However, if the risk of such an explosion was foreseeable, based on the means reasonably available to Israel, including a (technical) survey of the area and military intelligence, its consequences must likewise be included when assessing the

⁶² Bethan McKernan, ‘Israeli Airstrike Kills 35 in Rafah After Hamas Launches Rockets at Tel Aviv’ *The Guardian* (Jerusalem, 27 May 2024) <<https://www.theguardian.com/world/article/2024/may/26/hamas-rocket-attack-tel-aviv-israel-gaza>> accessed 3 June 2024.

⁶³ Israel Defense Forces (X, 27 May 2024) <<https://x.com/IDF/status/1795089873772142873>> accessed 3 June 2024.

⁶⁴ In any case, whether or not persons find themselves in areas designated as ‘safe zones’ or ‘humanitarian areas’ does not have any bearing on their status-based protection as civilians under IHL. The same holds true for instructions by the Israeli military to relocate – the status of persons as civilians remains unaffected by any decision to stay in or leave a particular area.

⁶⁵ Thomas Mackintosh and David Gritten, ‘Dozens Reported Killed in Israeli Strike on Rafah’ *BBC News* (London, 27 May 2024) <<https://www.bbc.com/news/articles/c0kkqkngnedo>> accessed 3 June 2024; OCHA oPt Flash Update #171 (n 3); Jem Bartholomew, ‘First Thing: Deadly Israeli Airstrike on Refugee Tents in Rafah Leaves Aid Groups “Horrorified”’ *The Guardian* (London, 27 May 2024) <<https://amp.theguardian.com/us-news/article/2024/may/27/first-thing-deadly-israeli-airstrike-on-refugee-tents-in-rafa-leaves-aid-groups-horrified>> accessed 3 June 2024.

⁶⁶ Israel Defense Forces (n 7).

⁶⁷ Such concerns are supported by information that has become publicly available in the aftermath of the attack. Yaniv Kubovich and Avi Scharf, ‘Bad Planning, Poor Intel: How Israel Struck Crowded Rafah Refugee Camp, Killing Dozens’ *Haaretz* (Tel Aviv, 3 June 2024) <<https://www.haaretz.com/israel-news/security-aviation/2024-06-03/ty-article-magazine/.premium/bad-planning-and-intel-how-israel-struck-crowded-rafah-refugee-camp-killing-dozens/0000018f-d90e-d673-ab8f-ffcef88d0000>> accessed 3 June 2024.

⁶⁸ Samy Magdy and Wafaa Shurafa, ‘Israeli Strikes Kill At Least 37 Palestinians, Most in Tents, Near Gaza’s Rafah as Offensive Expands’ *The Associated Press* (Deir al-Balah, Gaza Strip, 29 May 2024) <<https://apnews.com/article/israel-palestinians-hamas-war-news-05-28-2024-21ea44e3b514d3f3f2bd26a33f157e48>> accessed 3 June 2024.

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proportionality of the planned attack. Given the significant degradation of the medical infrastructure in Gaza over the course of the hostilities and the scarcity of medical supplies due to the closure of border crossings, it should also have been foreseeable to the Israeli military that injured persons with severe burns would have difficulty obtaining adequate medical care.⁶⁹ These consequences, and the foreseeable displacement caused by the destruction of shelters, likewise point to a violation of the principle of proportionality.

The attack also raises issues with respect to the obligation to take precautions in attack. Israel claims that it was using ‘precise munitions’,⁷⁰ but any use of explosive weapons in a densely populated area comes with great risks in terms of striking a lawful target indiscriminately.⁷¹ Israel also refers to its reliance on ‘precise intelligence’,⁷² which can contribute to the identification of lawful targets. However, that same resource should also have revealed the extensive risks posed by the planned attack for civilians and civilian objects. It is not known whether any other feasible measures were taken to spare the civilian population before, during, or after the attack, such as choosing to attack when the targets were in a different, less populated area, attacking other targets not presenting the same risks, or suspending the attack when it became apparent that it would result in excessive civilian harm and damage to civilian objects.

Finally, while Israel indicated that it has launched an investigation into the strike at Tal al-Sultan, to ensure the independence of such an investigation and that any potential finding of IHL violations results in perpetrators being held to account, Israel should give access to external and independent investigators at the international level. This would also be in line with the ICJ’s order on provisional measures to ensure access to UN investigative bodies, although this was limited to the context of the Genocide Convention and investigations into alleged violations thereof.

Legal consequences for Israel and for third States

The IHL Centre calls upon Israel to fully comply with its obligations under international law, including the ICJ’s orders on provisional measures, the IHL rules on conduct of hostilities, and the prohibition of forcible transfer or deportation. Pursuant to these obligations, Israel must inter alia halt its military offensive in Rafah; open the Rafah crossing and facilitate the passage of

⁶⁹ ‘Violations of the IHL Rules on the Protection of Healthcare Applicable in Gaza’ (*Diakonia IHL Centre*, 21 March 2024) <<https://www.diakonia.se/ihl/news/violations-of-the-ihl-rules-on-the-protection-of-healthcare-applicable-in-gaza/>> accessed 3 June 2024; ‘Gaza Medics Struggling in Face of “Overwhelming Disaster” as Vital Supplies Run Low: WHO’ (*UN News*, 29 May 2024) <<https://news.un.org/en/story/2024/05/1150346>> accessed 3 June 2024; Hatem Khaled, ‘Rafah Hospital Braces for Casualty Influx as Israel Readies Gaza Push’ *Reuters* (Rafah, Gaza, 17 May 2024) <<https://www.reuters.com/world/middle-east/rafah-hospital-braces-casualty-influx-israel-readies-gaza-push-2024-05-17/>> accessed 3 June 2024.

⁷⁰ Israel Defence Forces (n 7).

⁷¹ It has since been suggested that the Israeli military likely used a GBU-39 small diameter bomb – manufactured in the United States – for the strike. Allegra Goodwin, Avery Schmitz, and Kathleen Magramo, ‘US-Made Munitions Used in Deadly Strike on Rafah Tent Camp, CNN Analysis Shows’ *CNN* (Atlanta, 29 May 2024) <<https://edition.cnn.com/2024/05/28/middleeast/gaza-us-munitions-rafah-strike-analysis-intl-hnk/index.html>> accessed 3 June 2024. See also Kubovich and Scharf (n 67).

⁷² Israel Defence Forces (n 7).

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humanitarian assistance at scale; and allow for the entry of independent investigators to document and collect evidence of potential violations of international law, including in relation to the strike on the Tal al-Sultan area on 26 May.

Third States have an obligation to ensure respect for IHL and to prevent genocide and crimes against humanity.⁷³ They should also take steps to ensure Israel's compliance with the ICJ's orders on provisional measures. Those States that are party to the Rome Statute of the International Criminal Court (ICC) should cooperate with the Court's ongoing investigation into the Situation in Palestine and must hand over individuals against whom arrest warrants have been issued.⁷⁴

⁷³ 'ICJ Order on Provisional Measures in *South Africa v. Israel*: Legal Consequences for Third States' (*Diakonia IHL Centre*, 2 February 2024) <<https://www.diakonia.se/ihl/news/icj-order-provisional-measures-consequences-for-third-states/>> accessed 3 June 2024; 'ICJ Contentious Case *South Africa v. Israel*' (*Diakonia IHL Centre*, 23 February 2024) <<https://www.diakonia.se/ihl/news/icj-questions-answers-contentious-proceedings-southafrica-israel-genocide-convention/>> accessed 3 June 2024.

⁷⁴ 'The ICC Prosecutor's Application for Arrest Warrants Against Israeli and Hamas Officials' (*Diakonia IHL Centre*, 21 May 2024) <<https://www.diakonia.se/ihl/news/icc-prosecutor-application-for-arrest-warrants/>> accessed 3 June 2024; 'Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for Arrest Warrants in the Situation in the State of Palestine' (*ICC*, 20 May 2024) <<https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state>> accessed 3 June 2024.