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## **PHROC Position Paper**

### **Israel's Military Offensive on the Gaza Strip Breaches Law on the Use of Force on Self-Defence *Ad Bellum* and is a Continuing Act of Aggression**

Date: 6 December 2023

#### *Summary*

Israel's most recent onslaught on the Gaza Strip is not an act of self-defence as it claims. The Palestinian Human Rights Organizations Council (PHROC) notes that Israel carried out preemptive strikes in 1967, in breach of international law,<sup>1</sup> establishing on the foot of this unlawful aggression, an illegal belligerent occupation still in force in the Gaza Strip, the West Bank, including East Jerusalem, 56-years later. The acts of Palestinian armed groups have been carried out in the context of this continuing international armed conflict, which Israel has been mandated to end since 1967 under numerous UN Security Council and General Assembly resolutions.

Since 1967, under its continuing aggression on the occupied Palestinian territory, Israel has purportedly *de facto* and *de jure* annexed the occupied Palestinian territory, pillaging its natural resources. In the West Bank, including East Jerusalem, Israel has established a far-reaching settlement enterprise, which dispossesses Palestinians of their homes and lands, with the effect of fragmenting the Palestinian people and colonising the territory. Israel's segregationist acts of apartheid prevent the Palestinian people from exercising their right to self-determination, violating peremptory norms of international law. Notably the use of force to deny the exercise of the right to self-determination is expressly prohibited under international law.

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<sup>1</sup> United Nations Study on the Legality of the Israeli Occupation of the Occupied Palestinian Territory, including East Jerusalem <<https://www.un.org/unispal/document/ceirpp-legal-study2023/#:~:text=The%20study%20establishes%20that%20there,occupation%20is%20illegal%20ab%20initio>>.

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## 1. State Responses to the October 7 Operations

In the immediate aftermath of the October 7 military operation by non-State armed groups the Izz ad-Din al-Qassam Brigades (hereafter, Al-Qassam Brigades), the military wing of Hamas, and the Palestinian Islamic Jihad, numerous States announced their solidarity with Israel, condemned the actions of Hamas, and called for a cessation of hostilities and the protection of civilians. For example, Greece strongly condemned the “launch of heavy rocket attacks,” and the “unacceptable escalation of violence.”<sup>2</sup> Sweden stated that there are “no excuses for the violent attacks by terrorist group Hamas on Israel. They must stop immediately.”<sup>3</sup>

However, the president of the EU Commission and spokespeople from 10 countries, including Australia, the United Kingdom, the United States, Germany, Ukraine, Slovakia, The Netherlands, Hungary, Cyprus, and France all issued statements endorsing Israel’s right to defend itself. For example, British Prime Minister Rishi Sunak stated that “Israel has an absolute right to defend itself,” and Hungary and Cyprus stood in support of Israel’s “right to self-defence.”<sup>4</sup> The EU chief diplomat Josep Borrell stated that “Israel has the right to defend [itself], but it has to be done accordingly with international law, humanitarian law, and some [of Israel’s] decisions are contrary to international law”.<sup>5</sup> Once again, on 2 December as Israel resumed full hostilities after a seven day “pause”, Josep Borrell deferred to Israel’s “right to self-defence”, stating that, “The way Israel exercises its right to self-defence matters. It’s imperative that Israel respects International Humanitarian Law and the laws of war”.<sup>6</sup>

However rather than having a “right of self-defence”, Israel is currently illegally occupying the Palestinian territory, in breach of Article 51 of the UN Charter, and is obliged to bring its illegal

<sup>2</sup> @GreeceMFA, X (7 Oct. 2023, 11:13 AM), <<https://twitter.com/greecemfa/status/1710569112043151448?s=46&t=PaFh63vLIq0PICuZW7Psrw>>.

<sup>3</sup> @TobiasBillstrom, X (7 Oct. 2023, 10:40 AM), <<https://twitter.com/tobiasbillstrom/status/1710560609157239277?s=46&t=PaFh63vLIq0PICuZW7Psrw>>.

<sup>4</sup> @Christodulides, X (7 Oct. 2023, 2:11 PM), <<https://x.com/christodulides/status/1710613720198467610?s=46&t=PaFh63vLIq0PICuZW7Psrw>>; @PM\_ViktorOrban, X (7 Oct. 2023, 12:05 PM), <[https://x.com/pm\\_viktororban/status/1710581990540390740?s=46&t=PaFh63vLIq0PICuZW7Psrw](https://x.com/pm_viktororban/status/1710581990540390740?s=46&t=PaFh63vLIq0PICuZW7Psrw)>.

<sup>5</sup> Alexandra Brzozowski, EU’s Borrell: Israel has right to self-defence, but some actions ‘counter international law,’ Euractiv (11 Oct. 2023), <<https://www.euractiv.com/section/global-europe/news/eus-borrell-israel-has-right-to-self-defence-but-some-actions-counter-international-law/>>.

<sup>6</sup> @JosepBorrellF, X (2 December 2023, 2:01 PM), <<https://twitter.com/JosepBorrellF/status/1730950227912282572>>

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conduct to an end. The operations of the Al-Qassam Brigades and the Palestinian Islamic Jihad can only be understood in the context of this continuing decades long illegal act of aggression.

## 2. *The Right to 'Self-Defense' Explained*

The use of force is prohibited in international law. Article 2(4) of the UN Charter prohibits all Member States from the threat or the use of force against the territorial integrity or political independence of any other State in their international relations with one another.<sup>7</sup> The only exception to this rule is Article 51 of the UN Charter, which provides the right to use self-defence in exceptional circumstances. The right of 'self-defence' as guaranteed in Article 51 states:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.<sup>8</sup>

Self-defence refers to the inherent right of a State to use force in response to an armed attack by another State. A State must be able to demonstrate that it has been the victim of an armed attack in order to lawfully exercise the right to self-defence, and a State seeking to justify the use of self-defence has the burden of proof. The UN Charter requires that any measures taken in self-defence must be reported to the Security Council.<sup>9</sup>

Under customary international law, the principles of immediacy, necessity, and proportionality must be satisfied in order to legally exercise the right to self-defence in accordance with the UN Charter. This was confirmed by the ICJ in *Nicaragua v. USA*, which established that Article 51 does not subsume or supervene principles of customary international law, and that the right to self-defence may only be utilised in response to the most grave forms of the use of force.<sup>10</sup> In order for an act of self-defence in response to an armed attack to be justified, the necessity of self-defence must be "instant, overwhelming, and leaving no choice of means and no moment for deliberation."<sup>11</sup> In other words, the threat or attack must be immediate. Pre-emptive self-defence

<sup>7</sup> Charter of the United Nations (1945), Art. 2(4).

<sup>8</sup> Charter of the United Nation (1945), Art. 51.

<sup>9</sup> Charter of the United Nation (1945), Art. 51.

<sup>10</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, International Court of Justice (26 Nov. 1984), para. 176, 191.

<sup>11</sup> *The Caroline affair*, 1837.

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is not a recognized right under international law – customary international law only allows a State to only act in anticipatory self-defence if an armed attack is imminent and inevitable.<sup>12</sup> If such immediacy and necessity do exist at the moment of acting in self-defence, the act must be taken within a reasonable period, taking into account the relevant factual circumstances, and limited by that necessity. The principle of necessity requires an act of self-defence to avoid excessive or unnecessary measures in response to an armed attack, and there must be a lack of feasible alternatives to resorting to force in self-defence, including measures taken by the Security Council which have the effect of restoring peace and security.<sup>13</sup> The principle of proportionality requires an act of self-defence to be commensurate with the scale, nature, and gravity of the armed attack to which it is responding, and directed towards ending the attack and neutralising the danger of further attack.

### *3. Israel's Belligerent Occupation of Palestinian Territory is Illegal, and the Use of Force Continues an Already Illegal Occupation*

There are two grounds under international law establishing when a belligerent occupation is categorised as illegal: first, a belligerent occupation is illegal *ab initio* when it begins following a prohibited use of force amounting to an act of aggression; second, a belligerent occupation which begins legally following a permitted use of force in self-defence in line with Article 51 of the UN Charter, may become illegal when it is carried out *ultra vires* the principles and norms of international humanitarian law, amounting to an unnecessary and disproportionate use of force in self-defence.<sup>14</sup>

Israel's belligerent occupation of the Palestinian territories is illegal *ab initio* since 1967 following an illegal use of force against Egypt, when the Israeli military launched a surprise attack against Egypt's air bases and destroyed the entirety of Egypt's air force while it was still on the ground on the morning of June 5. Subsequently, Israel seized the remaining territory of historic Palestine, as

<sup>12</sup> Use of Force Under International Law, Justia (June 2023), <<https://www.justia.com/international-law/use-of-force-under-international-law/>>.

<sup>13</sup> Gill, T.D., *Legal Basis of the Right of Self-Defence under the UN Charter and under Customary International Law*, in T. D. Gill, & D. Fleck (Eds.), *The handbook of the international law of military operations*. - 2nd edition (p. 213-224) (Oxford Univ. Press) <[https://pure.uva.nl/ws/files/2589385/179157\\_512917.pdf](https://pure.uva.nl/ws/files/2589385/179157_512917.pdf)>.

<sup>14</sup> United Nations Study on the Legality of the Israeli Occupation of the Occupied Palestinian Territory, including East Jerusalem <<https://www.un.org/unispal/document/ceirpp-legal-study2023/#:~:text=The%20study%20establishes%20that%20there,occupation%20is%20illegal%20ab%20initio>>.

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well as the Syrian Golan Heights and the Egyptian Sinai Peninsula, in a matter of six days. Israel's claim that it was acting in pre-emptive self-defence – using force to stop a threat from its neighbouring countries from emerging – is not a recognized principle justifying the use of force according to international law, and as explained above, using preemptive force in self-defence is beyond the scope of legally accepted norms and Article 51 of the UN Charter.<sup>15</sup> Thus, the continued military occupation of the West Bank and Gaza Strip since this illegal use of force in 1967 is an ongoing act of aggression, and illegal *ab initio*.

Even if Israel could argue that it was exercising a legitimate use of self-defence when it attacked Egypt in 1967, and thus its subsequent belligerent occupation of the West Bank and Gaza Strip began legally, such justification for the use of force ended as soon as it defeated Egypt, Jordan, and Syria. Furthermore, even if Israel could argue that its belligerent occupation began legally, its continuance is being carried out with an unnecessary and disproportionate use of force *ultra vires* the principles and norms of international humanitarian law and as such, has become illegal. Rather, the occupation functions to pre-empt any threat from emerging at all, and to prevent the emergence of an autonomous Palestinian State, “out of a generalised defensive concern in relation to this State,” which is not a valid basis for using force in self-defence under international law. Thus, the occupation as “pre-emptive self-defence” is illegitimate and is being carried out in violation of the right to Palestinian self-determination.

Therefore, Israel is obligated to withdraw from all territories it occupied in 1967, and dismantle the occupying administration.<sup>16</sup> The latest round of aggression on the Gaza Strip is an extension of the illegal use of force that has been occurring against the occupied Palestinian territory since 1967, thus prolonging an illegal belligerent occupation which Israel is required to terminate.

<sup>15</sup> Dr. Ralph Wilde, Is the Israeli occupation of the Palestinian West Bank (including East Jerusalem) and Gaza ‘legal’ or ‘illegal’ under international law? University College London (29 Nov. 2022), <[https://www.ucl.ac.uk/laws/sites/laws/files/ralph\\_wilde\\_opt\\_legal\\_opinion.pdf](https://www.ucl.ac.uk/laws/sites/laws/files/ralph_wilde_opt_legal_opinion.pdf)>.

<sup>16</sup> UNGA Resolution 242 (1967); United Nations General Assembly resolution A/RES/36/147E (16 December 1981); United Nations General Assembly resolution A/RES/36/226A (17 December 1981); United Nations General Assembly resolution A/RES/37/123F (20 December 1982); United Nations General Assembly resolution A/RES/38/180D (19 December 1983); United Nations General Assembly resolution A/RES/39/146A (14 December 1984); United Nations General Assembly resolution A/RES/40/168A (16 December 1985); United Nations General Assembly resolution A/RES/41/162A (4 December 1986); United Nations General Assembly resolution A/RES/42/209B (11 December 1987); United Nations General Assembly A/RES/43/54A (6 December 1988); United Nations General Assembly resolution A/RES/44/40A (4 December 1989); United Nations General Assembly resolution A/RES/45/83A (13 December 1990); United Nations General Assembly resolution A/RES/46/82A (16 December 1991).



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#### 4. *The Use of Force to Prevent the Exercise of the Right of Self-determination is Illegal*

The right of the Palestinian people to full self-determination was recognized as early as 1922. Following victory over and the breakup of the Ottoman Empire, the League of Nations placed Palestine under British government administration as a ‘Class-A’ mandate, which provisionally recognized Palestine’s independence as a unitary state within the designated self-determination unit.<sup>17</sup> This was a recognition of the Palestinian people to the right to full external self-determination.<sup>18</sup> The right to self-determination of Mandate territories is held internationally as a “sacred trust” until full independence.<sup>19</sup> Therefore, the colonial process can only be considered to reach a complete end once the right to self-determination has been exercised.<sup>20</sup> The three other Class-A Mandate territories under the League of Nations System (Syria, Lebanon, and Iraq) all came to full independence post-mandate.

The British Mandate of Palestine denied the rights of the Palestinian people to full self-determination by failing to administer the territory in the interest of the indigenous Palestinian population, instead imposing the Balfour Declaration’s promise to “facilitate Jewish immigration” to Palestine and facilitating colonisation on a land that Great Britain did not have full sovereignty over.<sup>21</sup> As the League of Nations’ successor, in November 1947 the United Nations recommended the partitioning of Palestine in violation of *uti possidetis juris*, a principle of customary international law which preserves the boundaries of colonies emerging as States and thus partitioning a self-determination unit in which Palestinian independence had already been

<sup>17</sup> Al-Haq, *Zionist Settler Colonialism and Apartheid as the Root Causes of Israel’s Ongoing Violations of the Inalienable Rights of the Palestinian People: Joint Submission to the United Nations Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel* (31 May 2022), <[https://www.alhaq.org/cached\\_uploads/download/2022/06/28/coi-submission-root-causes-of-israel-s-violations-1656395537.pdf](https://www.alhaq.org/cached_uploads/download/2022/06/28/coi-submission-root-causes-of-israel-s-violations-1656395537.pdf)>.

<sup>18</sup> Covenant of the League of Nations (1919), Art. 22.

<sup>19</sup> United Nations Study on the Legality of the Israeli Occupation of the Occupied Palestinian Territory, including East Jerusalem <<https://www.un.org/unispal/document/ceirpp-legal-study2023/#:~:text=The%20study%20establishes%20that%20there,occupation%20is%20illegal%20ab%20initio>>.

<sup>20</sup> United Nations Study on the Legality of the Israeli Occupation of the Occupied Palestinian Territory, including East Jerusalem, citing UNHCR, *Implementation of United Nations Resolutions Relating to the Right of Peoples Under Colonial and Alien Domination to Self-Determination*, Study Prepared by Mr. Hector Gros Espiell, Special Rapporteur, (20 June 1978) E/CN.4/Sub.2/405 (vol.I) para. 78.

<sup>21</sup> The Palestine Mandate, Art. 6 <[https://avalon.law.yale.edu/20th\\_century/palmanda.asp#art6](https://avalon.law.yale.edu/20th_century/palmanda.asp#art6)>.

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recognised.<sup>22</sup> Following the partition plan's failure, the Nakba in 1948 saw the expulsion of 80 percent of the indigenous Palestinian people, between 750,000 to 900,000 Palestinians, from their homes, lands, and properties and the destruction of at least 531 villages and 11 urban neighbourhoods in Palestinian cities by Zionist militias.<sup>23</sup> It further saw the killing of at least 15,000 Palestinians and over 70 massacres by Zionist militias.

The continuing inalienable right of the Palestinian people to full self-determination has been reaffirmed by the ICJ and the UN in numerous resolutions.<sup>24</sup> Article 1(2) of the UN Charter guarantees the right of self-determination of all peoples as a *jus cogens* norm of international law, which imposes obligations on States *erga omnes*.<sup>25</sup> The *erga omnes* status of the right to self-determination places a responsibility on all third-party States to ensure that the right is realised. The obstruction or the violation of the right to self-determination, particularly through the use of force, is regarded as a serious violation of international law.<sup>26</sup> The *erga omnes* obligations of third-party States to ensure the right to self-determination of the Palestinian people was reaffirmed by the ICJ in its 2004 Advisory Opinion on *the Wall*.<sup>27</sup> The UN has consistently and repeatedly reasserted the right of self-determination of the Palestinian people in at least 267 resolutions and UN documents since 1970, declaring that “the people of Palestine are entitled to equal rights and

<sup>22</sup> Al-Haq, *Zionist Settler Colonialism and Apartheid as the Root Causes of Israel's Ongoing Violations of the Inalienable Rights of the Palestinian People: Joint Submission to the United Nations Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel* (31 May 2022).

<sup>23</sup> Badil, “Decolonisation, The Case of Palestine: Introduction” *Badil Working Paper No. 30* (May 2023) p. 6, <<file:///Users/susanpower/Downloads/wp30-decolonization-intro-eng-1686312277.pdf>>; Al-Haq et al., “Israeli Apartheid Tool of Zionist Settler Colonialism” (December 2022) p. 46, <[https://www.alhaq.org/cached\\_uploads/download/2022/12/22/israeli-apartheid-web-final-1-page-view-1671712165.pdf](https://www.alhaq.org/cached_uploads/download/2022/12/22/israeli-apartheid-web-final-1-page-view-1671712165.pdf)>

<sup>24</sup> Al-Haq, *Zionist Settler Colonialism and Apartheid as the Root Causes of Israel's Ongoing Violations of the Inalienable Rights of the Palestinian People: Joint Submission to the United Nations Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel* (31 May 2022).

<sup>25</sup> United Nations Study on the Legality of the Israeli Occupation of the Occupied Palestinian Territory, including East Jerusalem <<https://www.un.org/unispal/document/ceirpp-legal-study2023/#:~:text=The%20study%20establishes%20that%20there,occupation%20is%20illegal%20ab%20initio>>.

<sup>26</sup> Definition of Aggression, United Nations General Assembly Resolution 3314 (XXIX), <<http://hrlibrary.umn.edu/instree/GAres3314.html#:~:text=No%20consideration%20of%20whatever%20nature,give%20rise%20to%20international%20responsibility>>; International Law and Self Determination, Diakonia <<https://www.diakonia.se/ihl/resources/international-law/self-determination-international-law/>>.

<sup>27</sup> International Court of Justice Advisory Opinion *Legal Consequences of the Construction of a Wall by Israel in the Occupied Palestinian Territory*, para. 115, 122.

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self-determination, in accordance with the Charter of the United Nations.”<sup>28</sup> UNGA Resolution 3314 in 1974 affirmed the right to self-determination, freedom, and independence for all “peoples under colonial and racist regimes or other forms of alien domination,” and the “right of these peoples to struggle to that end and to seek and receive support.”<sup>29</sup> UNGA Resolution 37/43 in 1982 also reaffirmed the “inalienable right of the Palestinian people to self-determination” and reaffirmed the legitimacy of the struggle of all peoples “for independence, territorial integrity, national unity and liberation from colonial and foreign domination and foreign occupation by all available means, including armed struggle.”<sup>30</sup> The most recent UN General Assembly resolution in October 2023, “[r]eaffirms the right of the Palestinian people to self-determination, including the right to their independent State of Palestine” and “[u]rges all States and the specialized agencies and organizations of the United Nations system to continue to support and assist the Palestinian people in the early realization of their right to self-determination”.<sup>31</sup>

Israel’s belligerent occupation is an act of aggression which breaches the right of the Palestinian people to self-determination. Since its establishment, Israeli military rule has been a tool of domination against the Palestinian people, preventing the return of Palestinian refugees, expropriating and annexing Palestinian land, properties, and resources, and subjugating Palestinians to military courts, administrative detention, and extrajudicial killings in violation of international humanitarian and human rights law.<sup>32</sup> Israel’s administration of a prolonged, 56-year-and-counting belligerent occupation over the Palestinian territories characterised by the construction of residential, agricultural, industrial, and tourist settlements, nature and archaeological reserves, military firing zones, and a network of checkpoints, segregated roads, and separation barriers, has appropriated over 100,000 hectares of private and public Palestinian land

<sup>28</sup> Right of Self-Determination of the Palestinian People - CEIRPP, DPR study (1979)

<<https://www.un.org/unispal/document/auto-insert-196558/>>; UN, The Question of Palestine <[https://www.un.org/unispal/document-category/resolution/page/2/?wpv-wpcf-document-date\\_min-format=d-m-y&wpv-wpcf-document-date\\_max-format=d-m-y&wpv\\_view\\_count=4164&wpv\\_post\\_search=self-determination&wpv-document-source%5B0%5D=general-assembly&wpv-document-category%5B0%5D=resolution](https://www.un.org/unispal/document-category/resolution/page/2/?wpv-wpcf-document-date_min-format=d-m-y&wpv-wpcf-document-date_max-format=d-m-y&wpv_view_count=4164&wpv_post_search=self-determination&wpv-document-source%5B0%5D=general-assembly&wpv-document-category%5B0%5D=resolution)>

<sup>29</sup> UNGA Resolution 3314 (1974).

<sup>30</sup> UNGA Resolution 37/43 (1982).

<sup>31</sup> A/C.3/78/L.24, The right of the Palestinian people to self-determination (24 October 2023).

<sup>32</sup> Al-Haq, Zionist Settler Colonialism and Apartheid as the Root Causes of Israel’s Ongoing Violations of the Inalienable Rights of the Palestinian People: Joint Submission to the United Nations Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel (31 May 2022).



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and demolished over 50,000 Palestinian homes since 1967.<sup>33</sup> Israel's belligerent occupation has functioned to erase Palestinian presence, alter facts on the ground, interfere in the democratic process, and annex the City of Jerusalem in its entirety in order to compromise the viability of an independent Palestinian state and therefore deny the collective right of the Palestinian people to self-determination.<sup>34</sup> Israel is thus preventing the Palestinian right to self-determination through the use of force in contravention of the UN Charter and basic principles of customary international law.

##### 5. *The Applicable Law to the 7 October Operation*

Israel has the right to protect its citizens from harm under international human rights law. Under Article 43 of the Hague Regulations of 1907, Israel is forbidden from waging a military attack against people under its occupation, and in fact has an affirmative obligation to protect the Palestinian population under its occupation and control, to maintain public order and civil life, and to protect human rights.<sup>35</sup> This obligation applies *de facto* under *jus in bello*, despite the illegality of the occupation to begin with under the *jus ad bellum*. In instances that require defending populations under its control, Israel may, under Article 43 of the Hague Convention of 1907, at most resort to police powers to maintain order, or under exceptional circumstances, militarised force in line with the principles of international humanitarian law, such as discrimination, proportionality, and necessity. The Report of the United Nations Mission on the Gaza Conflict in September 2009 affirmed that the only permissible use of force Israel, as the Occupying Power, may enact within the Gaza Strip is limited to police powers “only when strictly necessary and to

<sup>33</sup> United Nations Study on the Legality of the Israeli Occupation of the Occupied Palestinian Territory, including East Jerusalem, citing UNHCR, Implementation of United Nations Resolutions Relating to the Right of Peoples Under Colonial and Alien Domination to Self-Determination, Study Prepared by Mr. Hector Gros Espiell, Special Rapporteur, (20 June 1978) E/CN.4/Sub.2/405 (vol.I) para. 78.

<sup>34</sup> United Nations Study on the Legality of the Israeli Occupation of the Occupied Palestinian Territory, including East Jerusalem, citing UNHCR, Implementation of United Nations Resolutions Relating to the Right of Peoples Under Colonial and Alien Domination to Self-Determination, Study Prepared by Mr. Hector Gros Espiell, Special Rapporteur, (20 June 1978) E/CN.4/Sub.2/405 (vol.I) para. 78; Dr. Ralph Wilde, Is the Israeli occupation of the Palestinian West Bank (including East Jerusalem) and Gaza ‘legal’ or ‘illegal’ under international law? University College London (29 Nov. 2022), <[https://www.ucl.ac.uk/laws/sites/laws/files/ralph\\_wilde\\_opt\\_legal\\_opinion.pdf](https://www.ucl.ac.uk/laws/sites/laws/files/ralph_wilde_opt_legal_opinion.pdf)>.

<sup>35</sup> Hague Regulations of 1907, Art. 43; Noura Erakat, “No, Israel Does Not Have the Right to Self-Defense in International Law Against Occupied Palestinian Territory,” *Jadaliyya*, (11 July 2014), available at: <<https://www.jadaliyya.com/Details/27551>>.

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the extent required for the performance of their duty,” and may not use firearms “against persons except in self-defence or defence of others against imminent threat of death or serious injury....”<sup>36</sup> Accordingly, Israel may exercise domestic law enforcement and use force where absolutely necessary to protect the lives of citizens – that is, defending its citizens and people under its effective control from harm. Defensive actions must be necessary and proportionate to the aims to be achieved by a State in apprehending suspects and defending citizens from unlawful violence.<sup>37</sup>

Since October 7, the Israeli military has displaced over 1.8 million out of 2.3 million Palestinians total in Gaza, air-dropped leaflets ordering Palestinians to evacuate their homes and move south, and as of November 16, also ordered Palestinians to evacuate parts of south Gaza.<sup>38</sup> Israeli airstrikes have completely destroyed 40,000 homes and partially destroyed 234,000 homes in the Gaza Strip, amounting to more than 60 percent of total housing units in the territory destroyed or damaged.<sup>39</sup> Israel is no longer protecting populations under its control– but rather, is aggressively targeting the Gaza Strip with the intention to collectively punish and forcibly remove the Palestinian population from the territory and render it unliveable. This is the latest escalation in a continuing act of aggression started in 1967, carried out with the objective of colonising the Palestinian territory.

As Ralph Wilde cogently asserts, “The two areas of international law violated by Israel’s use of force through the occupation since 1967—the prohibition of aggression in the *jus ad bellum* and the law of self-determination—have non-derogable, *jus cogens* status. This means they trump any

<sup>36</sup> The Goldstone Report, para. 1,426.

<sup>37</sup> See *McCann and others v. United Kingdom* (European Court of Human Rights Application no. 18984/91), where the ECtHR ruled that the killing of unarmed suspects was a violation of Article 2 of the European Convention of Human Rights as it was unnecessary and disproportionate for the UK to utilise SAS soldiers to intercept the alleged IRA members suspected of planning an attack on the citizens of Gibraltar, resulting in their killing.

<sup>38</sup> Wafaa Shurafa, Jack Jeffery, & Leah Keath, Under a communication blackout, Gaza’s 2.3 million people are cut off from each other and the world, Associated Press (16 Nov. 2023), <<https://apnews.com/article/israel-hamas-war-news-11-16-2023-6c7daa3b8c3a6b8d8dddf186ce631dfaad>>; UN OCHA, “Hostilities in the Gaza Strip and Israel | Flash Update #58” (3 December 2023) <[https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-58?\\_gl=1\\*mxjh55\\*\\_ga\\*MTYzNDA1MjA3Ni4xNjk2NzAyNDQy\\*\\_ga\\_E60ZNX2F68\\*MTcwMTcyMTc3OC40MS4wLjE3MDE3MjE3NzguNjAuMC4w](https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-58?_gl=1*mxjh55*_ga*MTYzNDA1MjA3Ni4xNjk2NzAyNDQy*_ga_E60ZNX2F68*MTcwMTcyMTc3OC40MS4wLjE3MDE3MjE3NzguNjAuMC4w)>

<sup>39</sup> UN OCHA, Hostilities in the Gaza Strip and Israel | Flash Update #54 [EN/AR/HE] (29 November 2023) <<https://www.unocha.org/publications/report/occupied-palestinian-territory/hostilities-gaza-strip-and-israel-flash-update-54>>

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inconsistent rules in other areas of international law”. This means that Israel’s obligation to immediately end the use of force in the form of its belligerent occupation over Palestinian territory trumps any other obligation it has to preserve order as the Occupying Power, including using force under Article 43 of the Hague Regulations “to reestablish and ensure public order and safety” in its response to the October 7 operation.<sup>40</sup>

#### 6. *Israel’s Continuing Use of Force and Occupation Since 1967 Breaches Principles of Immediacy, Necessity and Proportionality*

We note that a military operation by combatants against Israel does not absolve Israel (or any party) from respecting basic international humanitarian law principles between civilians and combatants, which, if violated, may constitute war crimes. Israel, as the Occupying Power, is responsible for the civil life of the occupied territory, including the medical condition of Palestinians in Gaza under its effective control. Notwithstanding, breaches of international humanitarian law, may also be taken into consideration as indicative of breaches of the principles of necessity and proportionality for a legitimate act of self-defence. In this case, even if Israel was to argue that it legitimately attacked Egypt in self-defence in 1967, the subsequent conduct of the occupation including the present hostilities on the Gaza Strip, breach the principles of necessity and proportionality.

The principles of necessity, proportionality, and distinction must be considered when engaging in military force. Israel is breaching *jus in bello*, or international humanitarian law, with its latest onslaught on the Gaza Strip, as it has flagrantly targeted densely populated civilian areas, hospitals, schools, and refugee camps, without sufficient justification of military necessity. Under no circumstances may a civilian hospital be justified as a target of attack under international law.<sup>41</sup> The widespread and systematic attacks carried out against the civilian population, constitute crimes against humanity of extermination, persecution, apartheid, forcible transfer, amongst others. As of December 4, Israel has killed over 15,523 Palestinians in the Gaza Strip in under two months since the escalation in hostilities. This does not include the number of those who have yet to be pulled out from under the rubble. At the time of writing 41,316 Palestinians have been injured in Gaza,

<sup>40</sup> Ralph Wilde, Israel’s War in Gaza is Not a Valid Act of Self-Defence in International Law, *Opinio Juris* (9 Nov. 2023), <<https://opiniojuris.org/2023/11/09/israels-war-in-gaza-is-not-a-valid-act-of-self-defence-in-international-law/>>.

<sup>41</sup> Geneva Convention relative to the Protection of Civilian Persons in Time of War (12 Aug. 1949), Art. 18.

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253 Palestinians have been killed in the West Bank including East Jerusalem.<sup>42</sup> Such breaches of the *jus in bello*, may also be taken into consideration in a necessity and proportionality assessment for the purpose of applying Article 51 of the UN Charter,

In applying Article 51 of the UN Charter, the principle of necessity requires that an act of self-defence avoid excessive or unnecessary measures in response to an armed attack, and that there is a lack of feasible alternatives to resorting to the use of force. Israel's 56-year presence in the occupied Palestinian territory, maintained by periodic waves of hostilities on the Gaza Strip to suppress resistance to its military rule, continues to breach the principle of necessity. We note that Israel escalated its military offensive on Gaza executing a ground operation the same day that UN General Assembly resolution ES-10/21 (27 October 2023) called for an "immediate, durable and sustained humanitarian truce leading to a cessation of hostilities".<sup>43</sup> Significantly, Israel has previously been required to cease hostilities in the Occupied Palestinian Territory, including Gaza under a UN Security Council Resolution 242 mandate obligating Israel to withdraw from territory seized in the 1967 hostilities, nearly six decades ago.<sup>44</sup>

Since October 7, Israel has targeted hospitals, ambulances, UN schools, and residential areas. Entire residential apartment blocks have been wiped out, 46 ambulances have been directly damaged and rendered unusable,<sup>45</sup> and at least 21 out of 35 hospitals in the Gaza Strip, where thousands of residents are sheltering, have been rendered "out of service" due to targeted airstrikes and a lack of fuel, electricity, and water.<sup>46</sup> Airstrikes have directly targeted densely populated refugee camps and Gaza's hospitals, including the airstrike which struck Al-Ahli hospital, killing 500 people, and a R9X hellfire missile which was dropped on the courtyard of Al-Shifa Hospital, the largest medical facility in the Gaza Strip where at least 7,000 civilians are seeking shelter.<sup>47</sup>

<sup>42</sup> Gaza Ministry of Health, Facebook (4 December 2023)  
<<https://www.facebook.com/MOHGaza1994?mibextid=LQJ4d>>

<sup>43</sup> A/RES/ES-10/21 (27 October 2023), para. 1 <<https://www.un.org/unispal/wp-content/uploads/2023/11/N2332702.pdf>>

<sup>44</sup> UNGA Resolution 242 (1967).

<sup>45</sup> EuroMed Human Rights Monitor, Day 49, The Israeli Genocide in Gaza Strip (7 October - 24 November 2023)  
<<https://euromedmonitor.org/uploads/BC58332C-5394-4E1E-BDEB-A0A0B3BEA2B7.png>>

<sup>46</sup> 'Patients are dying': What we know about Gaza hospitals under Israeli siege, Al Jazeera (13 Nov. 2023),  
<<https://www.aljazeera.com/news/2023/11/13/patients-are-dying-what-we-know-about-gaza-hospitals-under-israeli-siege>>.

<sup>47</sup> Eimine Sinmaz, "Gaza's largest hospital being bombarded, WHO says" The Guardian (10 November 2023)  
<<https://www.theguardian.com/world/2023/nov/10/netanyahu-says-israel-is-not-seeking-to-occupy-gaza>>

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Israeli soldiers have raided Al-Shifa Hospital, with tanks and snipers surrounding the hospital and shooting within the hospital complex, and detaining, stripping, and blindfolding men within the hospital.<sup>48</sup> The use of force directly targeting densely populated civilian areas and the healthcare system in the Gaza Strip, claiming that Hamas is the target while killing and injuring scores of civilians, is both excessive and unnecessary, surpassing the bounds of military necessity.

The principle of proportionality requires an act of self-defence to be commensurate with the scale, nature, and gravity of the armed attack to which it is responding, directed toward ending the attack, and neutralising the danger of further attack. Israel's occupation of the Palestinian territory continues to breach the principle of proportionality in the face of alleged threats emanating from Egypt and neighbouring countries in 1967. The occupation, characterised by the construction of settlements, *de facto* and *de jure* annexation of territory, including the purported annexation of Jerusalem, the entrenchment of an apartheid regime, and successive military offensives on the Gaza Strip, including the current escalation, manifestly breaches the principle of proportionality.

Since October 7 alone, Israel has killed more than one in every 200 people in the Gaza Strip within 60 days, amounting to 0.5 percent of the total population of 2.3 million people.<sup>49</sup> As of 4 December, 15,523 Palestinians have been killed by Israeli airstrikes according to the Palestinian Government Media Office, with many more still trapped beneath the rubble and displacing more than 70 percent of Gaza's population.<sup>50</sup> More than 36,000 Palestinians are reported injured.<sup>51</sup> Civilians are facing the brunt of both direct and indirect violence through the use of military force and the Israeli imposed total blockade of all water, food, and fuel from entering the Gaza Strip. As a result, hospitals are unable to properly treat the wounded, performing surgeries and amputations on

<sup>48</sup> 'Patients are dying': What we know about Gaza hospitals under Israeli siege, Al Jazeera (13 Nov. 2023), <<https://www.aljazeera.com/news/2023/11/13/patients-are-dying-what-we-know-about-gaza-hospitals-under-israeli-siege>>; 'Terror' amid Israel's raid on Gaza's al-Shifa hospital, Al Jazeera (15 Nov. 2023), <<https://www.aljazeera.com/news/2023/11/15/terror-witnesses-recount-israels-raid-inside-gazas-al-shifa-hospital>>.

<sup>49</sup> As of November 13, one in every 200 people in Gaza had been killed, see Ruby Mellen, Artur Galocha, & Julia Ledur, Gaza reports more than 11,100 killed. That's one out of every 200 people, The Washington Post (13 Nov. 2023), <<https://www.washingtonpost.com/world/interactive/2023/gaza-rising-death-toll-civilians/>>.

<sup>50</sup> "Health Ministry in Hamas-Run Gaza Says Fatalities Surpassed 15,200, 70% of Them, Women and Children" The Economic Times (2 December 2023) <<https://economictimes.indiatimes.com/news/international/world-news/health-ministry-in-hamas-run-gaza-says-fatalities-surpassed-15200-70-of-them-women-and-children/articleshow/105682438.cms>>

<sup>51</sup> Palestine Red Crescent Society: Response Report As of Saturday, October 7th 2023, 6:00 PM Until Wednesday, November 29th 2023, 00:00 PM <<https://www.palestinercs.org/public/files/image/2023/News/latestresponse23012023/PRCS%20OR%20185.pdf>>



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injured civilians without anaesthetics or access to clean water, electricity, medicines, or antibiotics to disinfect wounds. Almost all ICU patients, numbering more than 20, have died following fuel cuts amid an ongoing Israeli military raid on Al-Shifa Hospital.<sup>52</sup> Eight premature babies died due to Israeli-imposed fuel cuts on the Gaza Strip and a lack of electricity to keep incubators in the NICU running.<sup>53</sup>

At the time of writing, Israel has been subjecting the Gaza Strip to a continuous use of force for 60 days, including a seven day pause and a renewed second phase of hostilities. The UN stated that Israel's military operation against Gaza amounts to collective punishment and acts of genocide against the civilian population, with few options for seeking safe haven, and the humanitarian conditions in the Gaza Strip have grown increasingly dire.<sup>54</sup>

## 7. Conclusion

Against this backdrop, we warn that Israel's argument that it is engaging in self-defence following the Al-Qassam Brigades and Palestinian Islamic Jihad operation on October 7 is a fallacy, as the October 7 operation did not signify a new onset of hostilities. Rather, Israel's pre-emptive armed attack and consequent military occupation of the Palestinian territory in 1967, continues to be an illegal act of aggression.<sup>55</sup> Notably, the mere existence of the illegal 56-year-long military occupation is an act of aggression in itself "cannot be retroactively justified by reference to the right of self-defence."<sup>56</sup> As such, the right of self-defence under international law has not been

<sup>52</sup> CNN, November 17, 2023 Israel-Hamas War, <[https://edition.cnn.com/middleeast/live-news/israel-hamas-war-gaza-news-11-17-23/h\\_97fe902b6b49d81f27362059314b87e9#:~:text=Most%20of%20the%20intensive%20care,inside%20the%20facility%20on%20Friday](https://edition.cnn.com/middleeast/live-news/israel-hamas-war-gaza-news-11-17-23/h_97fe902b6b49d81f27362059314b87e9#:~:text=Most%20of%20the%20intensive%20care,inside%20the%20facility%20on%20Friday)>.

<sup>53</sup> Chantal Da Silva, Premature babies evacuated from Gaza's main hospital and taken to Egypt, NBC News (19 Nov. 2023), <<https://www.nbcnews.com/news/world/31-babies-evacuated-gazas-biggest-hospital-250-patients-remain-al-shif-rcna125916>>.

<sup>54</sup> UN Chief Guterres condemns 'collective punishment' of Palestinians, Al Jazeera (18 Oct. 2023), <<https://www.aljazeera.com/news/2023/10/18/un-chief-guterres-condemns-collective-punishment-of-palestinians>>; UN OHCHR, "Gaza: UN experts call on international community to prevent genocide against the Palestinian people" (16 November 2023) <<https://www.ohchr.org/en/press-releases/2023/11/gaza-un-experts-call-international-community-prevent-genocide-against>>

<sup>55</sup> UN CEIRPP, "The Legality of the Israeli Occupation of the Occupied Palestinian Territory, including East Jerusalem" (2023) pp. 51-57.

<sup>56</sup> A/ES-10/867, Identical letters dated 21 May 2021 from the Permanent Observer of the State of Palestine to the United Nations addressed to the Secretary-General, the President of the General Assembly and the President of the Security Council, (24 May 2021), <<https://www.un.org/unispal/wp->

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available to Israel with respect to its dealings with the West Bank and Gaza Strip populations since 1967. States which argue that Israel holds the right to self-defence against Gaza are greenlighting Israel's continuing acts of aggression in breach of the UN Charter.

Third States and the international community are therefore obliged to:  
Intervene to bring Israel's acts of aggression to an immediate end;

1. States that authorise the continued transfer of arms, and other forms of military support to Israel to:
  - Immediately bring an end to such transfers in accordance with their international law obligations, and
  - Immediately halt the provision of any material equipment or other commodity that may foreseeably be used in the commission of serious international law violations including international crimes;
2. Address Israel's illegal occupation and apartheid as the root cause of the current continuing hostilities, and intervene to ensure Israel's total, immediate and unconditional withdrawal from the entire Occupied Palestinian Territory as provided for in numerous UN General Assembly and UN Security Council resolutions and the dismantling of the occupying administration;
3. Ensure the realisation of the right to external self-determination of the Palestinian people as a whole, including refugees and exiles, and the right of the Palestinian people to return.

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content/uploads/2021/06/AES10867S2021493\_240521.pdf>; A/RES/3314, UNGA Resolution (14 Dec. 1974), Art. 3(a), (stating that an act of aggression includes the "invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof"). *See also* an analysis of the illegality of the occupation: A/78/378, *Letter dated 20 September 2023 from the Chair of the Committee on the Exercise of the Inalienable Rights of the Palestinian People addressed to the Secretary-General*, (20 Sept. 2023), ("Even assuming *arguendo* that Israel's use of force was a legitimate act of self-defence in response to an armed attack, Israel's continued belligerent occupation of the Palestinian territory for almost 56 years – decades after it concluded peace agreements with Egypt and Jordan, key parties to the conflict, and after multiple Security Council calls for it to end – makes it clear that the belligerent occupation has exceeded the parameters of military necessity and proportionality for a legitimate act of self-defence").

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