

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: **ICC-01/18**
Date: **05 August 2024**

PRE-TRIAL CHAMBER I

Before: Judge Iulia Motoc, Presiding Judge
Judge Reine Adélaïde Sophie Alapini-Gansou
Judge Nicolas Guillou

SITUATION IN THE STATE OF PALESTINE

Public

***Amicus Curiae* observation of High Level Military Group pursuant of Rule 103**

Source: High Level Military Group

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor
Mr. Karim A.A. Khan KC

Counsel for the Defence

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation / Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
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**Amicus Curiae
High Level Military Group**

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Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

**Public Information and Outreach
Section**

I. INTRODUCTION

1. The High Level Military Group (HLMG) is an independent body of former chiefs of staff, senior military officers and cabinet ministers from NATO countries with many decades of expertise at the highest level of land, air and sea conflict and the legality thereof¹. The HLMG conducted an in-country assessment of the Gaza conflict in July 2024, visiting IDF military HQs from the top level; humanitarian aid installations and operations; units down to battalion level of command; and a visit inside Gaza.
2. Should the Court approve the requested arrest warrants, it is our professional military opinion that this would set standards that are unbearable and unrealistic with regards to military operations and the facilitation of humanitarian activities during active hostilities, and standards which would be unacceptable for other democracies and their armed forces (including our own) that engage in urban warfare.

II. ALLEGATIONS OF STARVATION

3. The complexities of coordinating movement of humanitarian aid in a highly dangerous, complex, urban battlespace cannot be overstated. We visited crossing points built by the IDF since the war began on 7 October specifically to facilitate increased volumes of aid entering the Gaza Strip. We visited two crossing points on the border between Israel and Gaza that were attacked by Hamas on 7 October and since. One of them – the Erez Crossing – was completely destroyed by Hamas on 7 October and since then two vehicle crossing points in Erez were established by the IDF. We observed roads inside the Gaza Strip that were built by the IDF specifically to enable delivery of aid laterally and south to north. That includes a new route constructed by the IDF to allow aid that has already entered Gaza to be transported from the south to the north on Israeli territory. We are aware of the IDF's considerable efforts to

¹ See Appendix 1.

enable air dropped aid by other countries as well as the US improvised harbour (JLOTS) for aid delivery. The IDF operates according to a clear chain of command. The directives and commands we reviewed did not include any order to starve civilians, or to use issues related to humanitarian assistance as a method of warfare, and in fact, included clear statements regarding the IDF's legal obligations towards the civilian population.

4. When the HLMG questioned IDF commanders there were also clear statements that the IDF had no policy - not from the start of the war and not today - to stymie the facilitation of aid into Gaza or interfere with aid distribution inside Gaza. IDF procedures and capabilities, witnessed by us and used by the IDF to communicate with international humanitarian organisations and assist with their work, suggests this is correct.
5. We were also briefed on the efforts to assist private sector aid activities, which are considerable yet often omitted from UN reports, creating a false picture of less aid than there actually is. In addition, our study indicates there have been approx. 16,000 individual coordinations of aid convoys with the UN and NGOs inside Gaza since the start of the war and only very few incidents of the IDF, presumably mistakenly, opening fire on humanitarian convoys. This does not suggest a pattern of deliberately targeting aid entering Gaza but the opposite. The logistical efforts of the IDF, the infrastructure they have built and maintained, the resources dedicated by the IDF to these efforts, the directives and commands we saw, and the commanders we met all suggest that there is a genuine, ongoing and concerted effort to alleviate the humanitarian situation in Gaza, in direct contradiction to the claims of the Prosecutor.
6. Our assessment shows that the IDF is operationalising the Israeli government's stated policy to 'flood Gaza with aid'² and this has substantially contributed to averting what may have been a situation of famine caused by ongoing violent

² <https://www.timesofisrael.com/gallant-says-israel-plans-to-flood-gaza-with-aid-with-new-crossing-into-strips-north/third>

belligerence by Hamas. Again, we believe this is counter indicative of and inconsistent with any plan or intent to employ starvation as a method of warfare at any stage in this conflict.

7. It is our assessment that whatever food insecurity exists today among the population of Gaza is not due to Israel impeding entry or distribution of aid into the territory - either deliberately or arbitrarily - but to the unavoidable effects of large-scale urban warfare, compounded by Hamas hijacking aid for their own military purposes, allowing criminal elements to seize aid, and in some cases confiscating aid and selling it to the civilian population. We have seen extensive documentary evidence of this firsthand. We were also briefed on how Hamas hoarded supplies from the start of the war and diverted items such as fuel for its military purposes, which would have likely contributed to any shortages in the first few weeks of the conflict.
8. We should note that the situation we observed in July has not been the situation since the start of the conflict. We were briefed that at the initiation of operations there was a short period (a matter of days) when entry and egress to and from Gaza, including aid delivery, could not be feasibly facilitated by the IDF, compounded by the incapacitated Erez crossing and Egyptian control of the Rafah crossing.³ This was in the context of an acute military emergency, when thousands of Hamas terrorists had invaded Israel. For several days fighting continued inside the country, with the extent of Hamas infiltration unknown. Constraints on ingress and egress into Gaza were also substantially complicated by the IDF need to prioritise manoeuvre operations and logistics support for its forces.
9. Any military force would find immense difficulty in delivering aid to population in a territory controlled by its enemy whilst simultaneously fighting in their own territory against thousands of combatants, for several days,

³ <https://www.barrons.com/news/israeli-defence-ministry-footage-of-damaged-erez-border-crossing-c30f10b4>

clearing community after community and outpost after outpost, while simultaneously trying to determine how many civilians were killed and kidnapped and their identities. This difficulty in diverting forces to provide and inspect aid is compounded when under attack simultaneously on different fronts – note the attacks from Syria and Lebanon which began on 8 October as well as increased violence in the West Bank. We understand that that Hamas rocket fire caused significant and direct damage to electricity and water lines running from Israel into Gaza, which could not have quickly or easily been repaired in the circumstances, with the requirement to locate and fix the damage while fighting Hamas in that exact area. We are certain that our own armed forces would prioritise such necessary defensive measures in these circumstances. This was short-lived before a reasonable extent of border control was restored, enabling the IDF to inspect and monitor humanitarian supplies under international law obligations. In any case, our research and briefings show that it is highly likely that there were sufficient stocks of food and other essential supplies inside Gaza to weather this immediate situation for at least a few weeks – by which time Israel had already started to facilitate the entry of aid.

10. It would be unreasonable to expect any country to go from that start point to an optimum situation overnight, especially given the intense demands of large-scale conflict involving the movement of up to 100,000 manoeuvring forces into a confined area relying on very limited points of access and supply routes. In that context, it would be expected that the IDF prioritize its own operational needs and that humanitarian access increased as those operational demands decreased.
11. We note also that the ICC Prosecutor, in his statement announcing the arrest warrant application, asserts that Israel imposed “a total siege over Gaza that involved completely closing the three border crossing points, Rafah, Kerem Shalom and Erez, from 8 October 2023”. Erez crossing was severely damaged

in the 7 October attack by Hamas. Kerem Shalom crossing is still, even to this day, a target for Hamas mortar and rocket attacks. Nonetheless, we observed a constant IDF commitment to maintain that crossing as an access point for aid. Importantly, Israel had no control over the Rafah crossing between Egypt and Gaza until their operation in Rafah in May this year, and therefore did not have the capability to impose a “total siege” as the Prosecutor alleges. Since 21 October, following needs that arose in Gaza, humanitarian aid constantly entered the Gaza Strip, after going through necessary and legally permissible security checks.

12. We were briefed by multiple high ranking IDF commanders and policy makers that at no stage was there a siege, and Israel monitored the humanitarian situation on the ground and the use of previously existing supplies of humanitarian aid in Gaza. We are aware of politicians’ statements that have been cited as evidence of intent to conduct a siege. In practice there was no such siege, but as military experts, we understand there is high value in bellicose and threatening statements towards an adversary during wartime. In no way can these statements be conclusive evidence of actual policy. Armed forces work on clear and defined orders and do not take direction from statements by politicians to the media.
13. Despite the above, it should be noted that siege is a legitimate and lawful military tactic if it is not directed against civilians. If Israel had enacted a siege against Hamas military forces, and not against civilians, that would be entirely lawful and reflect tactics that could legitimately be used by our countries. Nevertheless, Israel did not impose such a siege: from the end of October there was already aid entering Gaza freely.
14. We also note the Prosecutor alleges that Israel cut off water pipelines from Israel into Gaza, “their principal source of water”, for a prolonged period. We understand that 90% of the water in Gaza does not come from Israel. We were briefed that on 7 October, Hamas fire damaged 2 out of the 3 pipelines from

Israel into Gaza. We saw evidence that Israel has facilitated the repairs of water infrastructure. The Prosecutor further alleges that Israel cut off and hindered electricity supply. We were briefed that on 7 October Hamas fire hit nine of out the ten electricity lines from Israel into Gaza; these lines provided only 50% of Gaza's electricity. Such statements by the Prosecutor are factually inaccurate.

15. Moreover, the Prosecutor's allegations completely absolve Hamas – who instigated the war – of the responsibility for supplying its own population. As military experts, we can attest that if states engaged in war are forced to adopt full responsibility for the enemy's civilian population, especially in a context where the opposing party deliberately hinders aid efforts, it sets a standard that will be unacceptable for most states.

16. It is our considered military opinion that the State of Israel and the IDF are and have been since the inception of this operation complying in good faith with all international legal obligations to facilitate the provision of humanitarian aid into Gaza. Based on our experience and knowledge, Israel is facilitating aid to a level we have not seen in our own militaries and we are not aware of our forces' efforts or even capabilities to conduct similar operations. We do not believe any other armed forces have ever made such efforts, or achieved such success, in facilitating aid delivery to civilians in enemy territory while still engaged in active hostilities in that same operational environment.⁴ It is our professional view that accusations of an intent to starve civilians by the Israeli Prime Minister and Minister of Defence are unsupported by all available evidence, most importantly by the actual conduct of IDF operations in and around Gaza.

III. ALLEGATIONS OF UNLAWFUL KILLING ETC

⁴ Price, D. H. (2014). Counterinsurgency by other names: Complicating humanitarian applied anthropology in current, former, and future war zones. *Human Organization*, 73(2), 95-105. 2

17. The ICC Chief Prosecutor also alleges wilful killing, murder, intentionally directing attacks against civilians and extermination. There may well have been instances of unlawful killing by IDF forces during this war, as the result of negligence, by accident or perhaps deliberately. In addition some civilians will have died as a result of non-negligent military accidents or errors. There has never been a war where such incidents have not occurred, and not in our collective experience. But our investigations have confirmed that this does not reflect any Israeli official policy nor are such incidents a manifestation of an intent to attack civilians transmitted to the force from the alleged defendants in this matter. In fact, quite the reverse.
18. We know from experience that civilian casualties are a tragic but inevitable consequence of war; a consequence that is exacerbated by enemy tactics that seek to exploit both the presence of civilians and such casualties. This is critical context in relation to this armed conflict. It is common knowledge that Hamas consistently and pervasively embeds itself into the civilian population and complicates the distinction process, endangering civilians by not wearing uniforms or distinctive emblems. It uses civilians as human shields as a deliberate strategy. Add to that the holding of hostages, the length and complexity of the Hamas tunnel system, the number of rockets still being fired towards Israel (almost 10,000 since the start of the war), and this becomes the most complex and challenging battlefield of modern times.
19. Ignoring these circumstances when assessing Israeli action means that one side of the conflict is completely absolved of all responsibility. Civilian harm in and of itself is not evidence of misconduct, especially when one party to the conflict deliberately seeks to maximise such harm for tactical and strategic advantage. Absolving a party to a conflict from its responsibility to protect its own population would be untenable for states committed to fighting according to the law.

20. Based on our observations, we do not believe the evidence of actual operational practice in any way corroborates the accusation of policies directed from the alleged defendants to intentionally attack civilians. In our view, the IDF has developed and implemented innovative procedures to mitigate the risk to civilians arising from attacks on valid military objectives. These procedures often result in suspension or cancellation of attacks due to civilian risk estimates. IDF policy is that every service person adheres to specified Rules of Engagement, which conform with the Laws of Armed Conflict. We have conducted limited questioning of IDF commanders and front-line soldiers on the Rules of Engagement and are convinced that their understanding is fully coherent with the legally approved policies.
21. One of the most pertinent examples of innovative civilian risk mitigation is the Civilian Harm Mitigation Cell (CHMC), established prior to the conflict and in operation during every phase. The CHMC integrates digital map technology, updated hourly, and intelligence to show population density in each area of Gaza. Every IDF operations centre has access to this map which is cross-checked with real-time air surveillance to verify civilian presence.
22. IDF targeting of air strikes is made in conjunction with the CHMC and influenced by civilian population density in a particular area. Selection of munition size is based on the nature of the military target, intelligence regarding enemy presence and the proximity of civilians.
23. It is our professional opinion that such a unit is extremely unusual and we are not aware of any other military with a comparable risk mitigation methodology. We assess this is an unprecedented measure, along with millions of leaflet drops, phone calls, text and voice messages, to help commanders prevent or minimise risk to civilian life. How such innovative efforts align with an allegation of the defendants in this matter directing the IDF to intentionally attack civilians is perplexing.

IV. COMPLEMENTARITY

24. We believe that pursuing arrest warrants for Israeli national leaders is not only as a minimum premature, but factually unjustified. IDF legal mechanisms require time to check the facts and credibility of allegations, and to investigate and prosecute war crimes allegations against IDF soldiers, sailors and airmen. It is unrealistic to expect such action during the midst of a military campaign of this magnitude. It is apparent to us that an essential aspect of proving these national leaders ordered the offences alleged would be corroboration in the form of IDF operations that align with these alleged criminal objectives. This is another reason why the Prosecutor's request is patently premature.
25. We gained insight into the IDF military justice and accountability mechanism through meetings and briefings and found them consistent with the highest standards of our own armed forces.
26. During our assessment we visited the IDF Fact Finding and Assessment Mechanism which examines any incident that could raise a charge of possible illegal conduct or military procedural misconduct (except for incidents that *immediately* raise suspicion of criminal misconduct, which are sent directly for criminal investigation). There are currently approximately 300 incidents being actively investigated by the FFAM, with many more which they have received initial information about. To our knowledge no other armed forces have established such a permanent system but would benefit from doing so. In respect to the speed of the FFAM's processes, Australia's Special Advisor, Air Chief Marshal Binskin, reporting on the World Central Kitchen strike, stated: '...the ADF [Australian Defence Force] could not have imposed equivalent reprimands as quickly as the IDF CGS [Chief of General Staff] was able to.'⁵
27. By way of comparison, we draw your attention to war crimes investigations by comparable armed forces in Australia and the UK. The Brereton report was

⁵ <https://www.dfat.gov.au/sites/default/files/special-advisers-public-report-israels-response-wck-strikes-august-2024.pdf>

commissioned by the Inspector-General of the ADF to investigate war crimes by Australian forces committed between 2005 and 2016⁶. The investigation began in 2016 and reported in 2020. Charges were not brought until 2023. The Haddon-Cave Independent Inquiry was commissioned by the UK Ministry of Defence to investigate alleged special forces war crimes in Afghanistan committed between 2010 and 2013⁷. It was established in 2022 and is ongoing. These two inquiries give a clear parallel to Israeli investigations of war crimes and demonstrate the length of time required to give an equitable, legal outcome in such investigations. We recall the OTP's complementarity assessment of the UK's actions to investigate misconduct via IHAT, SPLI and the SPA and the timelines involved.

28. We do not believe there is a credible basis to conclude Israel lacks the ability or will to implement national investigatory and judicial processes that are comparable to other countries and their militaries. There is no individual, to include the PM and MOD, immune from this process. The proposed ICC arrest warrants would deny the investigatory leeway to the State of Israel which was exercised in the cases we mention above.

Respectfully submitted:

Dr Rafael Bardaji

Dated this 5th day of August 2024.

At Madrid, Spain

⁶ <https://www.defence.gov.au/about/reviews-inquiries/afghanistan-inquiry>

⁷ <https://www.iiaindependentinquiry.uk>

Appendix 1 – Members of the High Level Military Group⁸

Dr Rafael Bardaji, Spain.

General (Retired) Vincenzo Camporini, Italy.

Lieutenant Colonel (Retired) Geoffrey S. Corn, USA.

Lieutenant General (Retired) David A. Deptula, USA.

Major (Retired) Andrew Fox KJ, UK (Rapporteur).

Colonel (Retired) Richard Kemp CBE, UK.

Brigadier General (Retired) Alain Lamballe, France.

Brigadier (Retired) Ian Liles OBE, UK.

The Honourable Uri Rosenthal, The Netherlands.

The Honourable Timo Soini, Finland.

Admiral (Retired) Jose Maria Teran, Spain.

⁸ <http://www.high-level-military-group.org/biographies.html>