

On civilians' return to north Gaza

What int'l humanitarian law requires



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ANALYSIS

the International Court of Justice's recent ruling on provisional measures in South Africa's case against Israel.

In recent weeks, Israel has reportedly "scaled back" its operations in some areas in Gaza, while it prepares to ramp up in others. At present, the humanitarian situation among displaced Palestinians in South Gaza remains extremely dire, with the UN warning of impending famine. The humanitarian situation in the area was central to

The majority of those sheltering in the Rafah area in South Gaza have fled from North Gaza, when in the weeks following the October 7 attacks by Hamas, Israel called on all residents of the area to evacuate south of Wadi Gaza. With the worsening humanitarian situation, the United States, as well as other actors, stressed that residents should be allowed to return to North Gaza as soon as possible. While the area is itself devastated after months of war, this might, at the very least, alleviate the overcrowding in the camps in the South. Should Israel expand its operation into Rafah, the need for people to move back north, it seems, would be even more accentuated.

In its initial calls to leave North Gaza, the Israeli military declared that the evacuation was temporary and that its sole purpose was to protect civilians from the intensive bombardments in the area. Nonetheless, the policy was criticized by some international organizations as a potential act of forcible displacement, and the United Nations General Assembly has called upon Israel to rescind the policy (operative paragraph 5). Furthermore, some worry that

the Netanyahu cabinet's "true" intention behind the evacuation — following statements by far-right ministers that Palestinians should be "encouraged" to leave Gaza, and that Israel should rebuild its settlements there — is to permanently ban evacuees from returning, or at least to elongate the evacuation for political reasons, such as to pressure Hamas to release Israeli captives. For his part, the IDF Chief of Staff reemphasized, on January 13, that in his view, the

evacuation is temporary and that "[w]hen we know there is no danger to the population [in North Gaza], we will be able to consider bringing them back."

To the extent that the initial evacuation from North Gaza was unlawful, on whatever grounds, then it obviously cannot serve as a justification for the prevention of return to the area. Furthermore, any suggestion that people should be "encouraged" to leave Gaza is so blatantly unlawful, that it does

not require serious legal engagement at all. However, this essay is not about the consequences of unlawful evacuation. Rather, it discusses the rules that should determine return assuming that an initial evacuation could be grounded in law as a temporary measure, as claimed by the IDF. Furthermore, this essay does not deal with obligations to ensure humanitarian access to civilians in Gaza, which remain in place in any case.



Palestinians leave their homes and migrate to safe areas with their belongings as Israeli attacks continue on the Zeitoun neighborhood in Gaza City on February 20, 2024.

● DAWOUD ABO ALKAS/
ANADOLU AGENCY



An Israeli tank and other military vehicles guard a position as Palestinians flee Khan Yunis in the southern Gaza Strip on January 26, 2024, amid ongoing battles between Israel and the Palestinian resistance group Hamas.

● AFP

Assessing two possible legal grounds

Before proceeding, it should be emphasized that there are extremely narrow grounds that could allow, under international humanitarian law (IHL), for the temporary evacuation of civilians during armed conflict. An evacuation that runs counter to these — as well as prevention of return when the relevant grounds have expired — may amount to an international crime of forcible transfer (when the evacuation is within the territory) or deportation (when the evacuation is to an area outside the territory).

The first potential legal ground for temporary evacuation is when a warning of impending attacks is given as a precautionary measure. Sometimes, such an evacuation can be a consequence of the duty to give an advance warning before an attack that may endanger the civilian population. Usually, such a warning is

given before a specific attack. However, in certain circumstances, an advance warning could relate to a wider area, where attacks on a large scale are expected. If not an advance warning in the strict sense, such a call could also follow the more general duty to take constant care to spare the civilian population. To emphasize, as with all precautions, under no circumstances does a warning alone transform any protected object or person into a lawful target. Furthermore, issuing such a warning does not release the party to the conflict from its obligations to ensure humanitarian access to those remaining in the area.

More crucial for our purposes is that such a measure — if viewed as a type of advance warning or precaution — is extremely limited in its ability, if at all, to justify prolonged evacuation. Crucially,

an advance warning does not create a legal obligation for civilians to evacuate — as the attacker has no legal authority over them — nor does it in itself justify preventing persons from returning. Indeed, if the purpose of the call to leave an area is to advise civilians to evacuate for their own safety, and does not create an obligation to do so, it obviously cannot provide a legal basis for preventing return. This reveals a broader conundrum: if the earlier evacuation call is phrased as a warning (which people are free to accept or reject), there needs to be another source to actively bar their return. Even setting this conceptual problem aside, a threshold issue concerns the scale of hostilities. When the intensity of the fighting in the relevant area decreases below the level that putatively justified the initial broad warning, it is no longer

possible to rely on the previous level of danger to civilians to prevent them from returning to the area now.

Therefore, the IDF Chief of Staff's statement that once the danger subsides people would be permitted to return to North Gaza is in the right direction; however, it is wrong on the law by requiring that this will be the case only when there is "no danger" in the area. Unfortunately, there is always a danger to civilians during hostilities, particularly in urban areas. The question is not whether there is any danger, but rather whether the danger remains on a level that justified the initial evacuation, or perhaps whether the situation is imminently expected to return to such a level. It would be hard to argue this is the case any longer in North Gaza, especially as IDF operations have been reportedly "scaled

back" in the area and considering the extent of the aerial bombing that already took place.

The second ground for evacuation stems from the law of occupation, and as opposed to the previous ground, may also provide legal authority for evacuations. Under Article 49(2) of the Fourth Geneva Convention, the occupying power may evacuate a population from a certain area if the safety of the population or imperative military reasons require it. However, it is impossible to invoke powers under the law of occupation without the corresponding duties. Crucially, this power is preconditioned on an obligation to ensure as much as possible that proper living conditions exist in the area to which civilians are evacuated, and furthermore, the evacuees must be allowed to return to their