



homes as soon as hostilities in the area in question cease. In any case, since there is a significant risk of abuse of the powers recognized in Article 49(2) — and in particular concerning military reasons for evacuation — it should be interpreted narrowly.

Now, many of those who criticize Israel's initial evacuation, proceed from the assumption that Israel was an occupying power in Gaza at the time the order was issued and has failed to ensure proper living conditions in South Gaza. The question of whether Gaza was fully, "functionally," or not occupied at the time is beyond the scope of this essay. What is important is that in recent weeks, the Israeli military has claimed to possess "operational control" in North Gaza, which supports the view that at least now it is an occupant in North Gaza (although, this control might be in flux in some areas). This remains the case even if there are some clashes in the area, as the mere existence of such clashes does not necessarily negate the existence of occupation. Article 49(2) itself concedes this possibility by recognizing that some hostilities can take place within occupied territory, as grounds for evacuation. Arguably, then, even if it is accepted that the initial evacuation was predicated on an advance warning during active hostilities, after which Israel proceeded to occupy the area, any prevention of return post-occupation becomes a de facto evacuation order also under the law of occupation and subject to its regulation.

This de facto transformation of the warning into an order under the law of occupation has two key implications. First, the occupant is under a strong affirmative obligation to restore public order and to act for the benefit of the local population. This obligation requires that the military commander act positively to facilitate the residents' return. Second, the occupying forces must work to ensure that proper living conditions exist in the area to which people were evacuated. That, indeed, goes beyond the occupant's general obligation to ensure the welfare of civilians in the area it controls.

In terms of the safety of the population as grounds for evacuation from occu-

piated territory, here the analysis seems to merge with that above concerning advance warning. The occupant cannot rely on reasons for evacuation that were predicated on intense and sustained aerial bombardment of the area, to justify prevention of return after the area is occupied. Namely, it is clear that evacuation under Article 49(2) cannot stand until the end of the armed conflict as a whole, and it is likewise clear that this provision cannot allow prevention of return as long as there is fighting of any intensity in the area.

Notably, Article 49(2) does not refer only to the security of civilians as grounds for evacuation, but also to imperative military considerations. Furthermore, some claim — as the US Department of Defense Manual states in Section 5.19 — that in sieges, belligerents may prevent civilian access to certain areas. Israel might argue, in this context, that if the return to North Gaza is permitted, there is fear that Hamas fighters will impersonate civilians and return to the area. However, this risk cannot justify a blanket denial of the return of all civilians. Just as the presence of some enemy fighters in a civilian area cannot alone justify the complete removal of civilians from the area to begin with, so is the fear that some enemy fighters may return cannot justify total prevention of the return of civilians. Even if one accepts that the law of siege might recognize such restrictions — an issue not dealt with here — it is difficult to view the situation in the whole of North Gaza as one of siege, considering that Israel claims to exercise operational control within the area. A siege is about exercising external control. One cannot have it both ways. Furthermore, should an argument be made that imperative military considerations can include the creation of a security buffer zone by evacuating civilians from an area, this would not hold on any reasonable reading of Article 49(2). Not only is the article to be read narrowly so as not to weaken the prohibition on forcible transfer or deportation, but it is also explicit that evacuees should be allowed to return as soon hostilities in the evacuated area cease. This quite clearly excludes any preventive rationale as an imperative military consideration.

Proportionality

Whatever rationale a force invokes for evacuations, the principle of proportionality has special significance. Although this principle usually applies to "attacks," Israel's own Supreme Court has ruled that proportionality also applies to other measures undertaken in armed conflict and occupation, such as the route of the West Bank Wall. Other sources also apply proportionality beyond attacks. The San Remo Manual, as part of a broader trend, applies proportionality to blockades, and the updated version of the DoD Manual also adopts proportionality in the context of measures intended to starve enemy forces (Section 5.20.2). It is also possible to argue that residual "laws of humanity and dictates of public conscience," which are part of IHL, require that military considerations cannot justify unlimited harm to civilians, even when the law does not explicitly speak the language of proportionality. This also makes sense in terms of the law's coherence. It would be unsustainable to argue that a single attack that might risk, say, a few people, would be subject to a proportionality assessment while military measures that might affect millions would not.

Thus, it seems that even in cases where civilian safety or imperative military considerations could justify evacuation, if a humanitarian crisis occurs in an area to which civilians have been evacuated, proportion-

ality may under certain conditions create an obligation to allow the civilians to return. Concerning North Gaza, any security advantage potentially sought by preventing disguised Hamas fighters from returning to North Gaza must be balanced against the acute humanitarian crisis that exists in Southern Gaza due, among other things, to the overcrowding there. Likewise, any risk for civilians in North Gaza today does not seem to outweigh the risk in South Gaza, due to the humanitarian conditions there — not to mention the risk to evacuees if significant military operations take place in Rafah itself.

The war in Gaza raises complex dilemmas, owing to the extent of embeddedness of armed groups in the urban infrastructure both above and underground, the offensive capabilities and motivation they displayed on October 7 and since, as well as the presence of captives. These factors implicate both the safety of the local population and give rise to operational challenges across the board. When military considerations arise, however, they must remain military and not political; and even when they remain as such, some rational balance must exist between benefit and harm. Proportionality as a general principle under IHL best captures this balance and closes the normative void that otherwise exists. The conditions in South Gaza are a quintessential example of harm that one

would be incredibly hard-pressed to justify, even in relation to civilian safety or military considerations in North Gaza.

In sum, there are two potentially lawful grounds for evacuations: the safety of civilians and, in cases of occupation, imperative military considerations. Any evacuation of civilians on these grounds must be temporary and closely related to the underlying lawful cause. The initial grounds for the evacuation of North Gaza in October — which were officially predicated on the safety of the civilian population — cannot be said to persist at the level of intensity that putatively justified the evacuation almost four months later, and accordingly, cannot alone justify maintaining the situation. If the cause of evacuation is related to imperative military considerations, these should be concrete, defined, and limited. Perhaps most importantly, proportionality requires Israel to take into account the humanitarian calamity in South Gaza. Owing to the scale of this crisis, that humanitarian cost almost certainly outweighs any putative safety or military consideration in letting civilians return to relative safety in North Gaza; indeed, especially when those competing safety and military interests could be afforded through other measures.

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Palestinians carry bags of flour they grabbed from an aid truck near an Israeli checkpoint, as Gaza residents face crisis levels of hunger amid the ongoing conflict between Israel and Hamas, in Gaza City on January 27, 2024.

● REUTERS

