

**COVID-19 in occupied Gaza:
What are the health-related and
other obligations of the responsible
authorities?**

Legal Brief

December 2020



**Diakonia
International
Humanitarian
Law Centre
Jerusalem**

Table of Contents

Executive summary	1
Introduction	3
1. Applicability of international law in Gaza	4
2. Health	9
3. Livelihoods	20
4. Education	23
5. Obligations of third States	24
Conclusion	26

EXECUTIVE SUMMARY

The COVID-19 pandemic has given rise to unparalleled challenges across the globe. In the occupied Palestinian territory (oPt), these challenges are compounded by the pre-existing situation of prolonged occupation. In Gaza, the pandemic also takes place in the context of a 13-year-old blockade imposed by Israel, which has led to a chronic lack of access to essential goods, to the erosion of essential services including health care, water and sanitation, as well as to widespread impoverishment. This land, sea and air blockade exacerbates the vulnerability of Gazans to COVID-19: not only does it undermine the capacity of local authorities to fight against the virus, it also hampers patients' access to adequate health care and dramatically exacerbates the social, economic and other effects of the crisis on the population.

This legal brief clarifies the international obligations of the responsible authorities in relation to the COVID-19 pandemic in Gaza, with a particular focus on the obligations of Israel, as the occupying power, and Hamas as the *de facto* local authority in Gaza. The analysis mostly focuses on health-related obligations, with a shorter treatment of rules pertaining to the protection of livelihoods and education. The brief underlines the importance of not only complying with obligations related to the immediate public health, economic and social crisis created by the COVID-19 pandemic, but also of ending pre-existing violations.

The scope of the obligations of the responsible authorities under IHL and IHRL is a function of the control they exercise over different aspects of civil life in Gaza. The following is a non-exhaustive summary of some important obligations of the main actors that have an influence over the effectiveness of the COVID-19 response in Gaza:

Israel must notably

- lift the blockade on Gaza;
- refrain from arbitrarily blocking or interfering with, and instead immediately facilitate, the passage of all items necessary to fight the COVID-19 pandemic, including items necessary to treat and contain the spread of the virus, to ensure the proper functioning of the local health care system, and to maintain and develop WASH systems in Gaza;
- refrain from arbitrarily blocking or interfering with, and instead facilitate, the supply of fuel, electricity and internet into the Gaza Strip, as these are necessary for the proper functioning of essential services such as health and WASH services, as well as for continued access to education during the pandemic;
- lift unwarranted, excessive or otherwise arbitrary restrictions on the movement of patients requiring medical referrals outside of Gaza, and of health care personnel in and out of Gaza;

- lift additional unwarranted, excessive or otherwise arbitrary restrictions of access imposed in the ARA;
- take all other necessary measures in its power to treat and control the COVID-19 and more generally to ensure and maintain health care in Gaza;
- refrain from hindering efforts by others, including States and humanitarian actors, to support and develop Gaza's health care system.

The Palestinian Authority must notably

- distribute to the Gaza Strip available medical goods, including medicines, necessary to treat and control the virus;
- create the conditions to ensure that everyone in the Palestinian territory, including Gaza, has equal access to health care.

Hamas must notably

- take all the steps necessary for the treatment and control of the COVID-19 pandemic in Gaza, to the fullest extent that the resources at its disposal allow;
- when adopting restrictions, such as movement restrictions, such restrictions must be compliant with IHRL standards;
- take the necessary steps to ensure the continuity of essential health services during the pandemic, including mental health care;
- take the necessary steps to protect those in vulnerable positions from violence including domestic violence;
- take the necessary steps to comply with its core obligations related to livelihoods and education in Gaza, with particular attention to the situation of individuals and groups in vulnerable positions.

Third States must notably

- facilitate access to essential health goods and services for Gazans to the maximum of their capacities, including preventive medicines aimed at containing the spread of COVID-19, such as vaccines;
- refrain from rendering aid or assistance to Israel in the commission of violations of international law including the maintenance of unlawful access and movement restrictions;
- use their influence over Israel, if any, to prevent further human rights violations and to ensure respect for IHL.

INTRODUCTION

The COVID-19 pandemic has given rise to unparalleled challenges across the globe. In the occupied Palestinian territory (oPt), these challenges are compounded by the pre-existing situation of prolonged occupation. In Gaza, the pandemic also takes place in the context of a 13-year-old blockade imposed by Israel, which has led to a chronic lack of access to essential goods; the erosion of essential services including health care, water, and sanitation; as well as widespread impoverishment.

This land, sea and air blockade exacerbates the vulnerability of Gazans to COVID-19: not only does it undermine the capacity of local authorities to fight against the virus, it also hampers patients' access to adequate health care and dramatically exacerbates the social, economic and other effects of the crisis on the population. The virus and public health measures necessary to contain it put new strains on a local health system and an economic and social fabric already profoundly affected by years of movement restrictions and episodes of hostilities. In this sense, the COVID-19 crisis also underlines the profound, structural consequences of past and ongoing violations of international law.

In this light, clarifying the law applicable to the fight against COVID-19 in Gaza requires taking into account rules specifically relevant to contain the virus as well as other rules protecting civilian life in an occupied territory more generally. The relevant authorities must address not only the immediate public health, economic and social crisis created by the COVID-19 pandemic but also underlying protection issues. It is necessary to both end ongoing violations, and to comply with the positive obligations associated with the exercise of control over a civilian population.

International law imposes a number of obligations upon authorities that have control over the public health, economic or social situation in the Gaza Strip. Gazans are protected by two main bodies of international law: international humanitarian law (IHL), which applies to armed conflicts including occupation, as well as international human rights law (IHRL), which applies at all times. Both regimes continue to apply during pandemics, and both contain rules relevant to mitigate the direct and indirect effects of the COVID-19 crisis. As detailed below, in situations of occupation, IHL notably requires occupying powers – like Israel in Gaza – to ensure and maintain public health in such territory, including by adopting the necessary measures to combat the spread of epidemics, and more generally to ensure public order and civil life. Under IHRL, Gazans have a number of relevant rights including the right to enjoy the highest attainable standard of physical and mental health.

This legal brief clarifies the international obligations of the responsible authorities in relation to the COVID-19 pandemic in Gaza, with a particular focus on the obligations of Israel, as the occupying power, and Hamas as the *de facto* local authority in Gaza. The analysis mostly focuses on health-related obligations, with a shorter treatment of rules pertaining to the protection of livelihoods and education. It aims at encouraging relevant stakeholders to promote compliance with IHL and IHRL by Israel and local authorities in Gaza, with a renewed sense of urgency in the context of the COVID-19 crisis.

This brief complements a more general “IHL Fact Sheet” published by the Diakonia IHL Centre in April 2020 on the “Health-Related Duties and Obligations of an Occupying Power During a Pandemic”.¹ The Diakonia IHL Centre will continue to monitor developments linked to the COVID-19 crisis and will strive to deliver up-to-date legal analysis relevant to the ongoing crisis.

1. APPLICABILITY OF INTERNATIONAL LAW IN GAZA

1.1 IHL, including the law of occupation

IHL is the body of international law that applies specifically to situations of armed conflict. The source and scope of protection offered by IHL depends on the nature of the conflict – international armed conflict (IAC) or non-international armed conflict (NIAC) – and, in cases of IACs, on whether a territory is “occupied” or not. The population of an occupied territory faces particular risks owing to the fact that important aspects of their lives are in the hands of a foreign, hostile State. IHL seeks to mitigate these risks by imposing a number of additional obligations on belligerent States that occupy the territory of their enemy. These occupation rules are set forth in the 1907 Hague Regulations as well as in the Fourth Geneva Convention from 1949 (hereafter “GCIV”). They are also reflected in customary IHL.² In Gaza, Israel is bound by IHL as a belligerent and more specifically as an occupying power.

¹ See Diakonia International Humanitarian Law Centre, Jerusalem, “Health-Related Duties and Obligations of an Occupying Power During a Pandemic- The Occupied Palestinian Territory and the COVID-19 Outbreak”, April 2020, <https://www.diakonia.se/Ajax/GetFile?path=%2fglobalassets%2fblocks-ihl-site%2fihl-file-list%2ffact-sheets%2fthe-occupied-palestinian-territory-and-the-covid-19-outbreak.pdf>. For other IHL Reports, Briefs and Fact Sheets published by the Centre see Diakonia, “IHL Centre Publications”, <https://www.diakonia.se/en/IHL/resources/>.

² The International Committee of the Red Cross (ICRC) identified 161 rules of customary IHL, see ICRC, “IHL Database – Customary IHL”, <https://ihl-databases.icrc.org/customary-ihl/eng/docs/home> (hereafter “ICRC’s CIL Study”).

Israel took control of the Gaza Strip as a result of the 1967 Arab-Israeli war. The territory was then under Israeli military administration which amounts to a regime of occupation under IHL. In the 1990s, authority over the Gaza Strip was formally transferred to the newly established Palestinian Authority. However, this formal development had no effect on the classification of the situation under IHL: Israel remained present and retained effective control over Gaza and hence maintained its status as occupying power.³ When Israel withdrew its troops and settlers from the Gaza Strip in 2005, the question arose as to whether this change in fact on the ground put an end to the situation of occupation.

According to the widely accepted “effective control” test, a situation of occupation exists when three conditions are fulfilled: 1) foreign forces are present without the consent of the local government; 2) these foreign forces are capable of exercising authority over the territory; and 3) the local government is incapable of exercising authority.⁴ Under one interpretation of the law, the presence of foreign forces on the ground is a condition not only for the beginning of an occupation but also for its continuation. Accordingly, under this interpretation, when Israeli forces withdrew from Gaza, the occupation ended. Pursuant to another interpretation, supported by case law, the withdrawal of occupying forces from an occupied territory does not automatically terminate the occupation.⁵ A State can remain an occupying power even if it no longer has a permanent military presence, as long as it has “the capacity to send troops within a reasonable time to make [its] authority [...] felt”.⁶ Israel retains this capacity in Gaza, having carried out several military incursions in Gaza since 2005. This interpretation of the law precludes the possibility for a belligerent to evade its obligations under the law of occupation by withdrawing its troops while retaining remote control over enemy territory.⁷

Even if permanent military presence is not a condition for the continuation of occupation, the foreign State must be able, even if remotely, to substitute its authority for that of the local

³ In addition to keeping governmental authority over Israeli settlements in Gaza, Israel retained control over Gaza’s main roads, its land borders, territorial waters and airspace as well as security authority over the entire Gaza territory.

⁴ This test is a rearticulation of Art. 42 of the 1907 Hague Regulations according to which “[t]erritory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised”. The three elements of the “effective control” test were first put forward in the 1948 *List* case and subsequently upheld in case law and literature. See for instance Yuval Shany, “Faraway, So Close: The Legal Status of Gaza after Israel’s Disengagement”, *Yearbook of International Humanitarian Law*, August 2006, p. 370; Tristan Ferraro, “Determining the beginning and end of an occupation under international humanitarian law”, *International Review of the Red Cross*, Vol. 94, n°885, Spring 2012, pp. 155-158.

⁵ See U.S. Military Tribunal at Nuremberg, *USA v. Wilhelm List* [The Hostages Case], reprinted in *Law Reports of Trials Of War Criminals*, Vol. VIII, 1949, p. 56; ICTY, *Prosecutor v Naletilić & Martinović*, Trial Judgment, IT-98-34, 31 March 2003, para. 217. See also ICRC, *Commentary on the First Geneva Convention*, Cambridge University Press, 2016, paras 307–309.

⁶ ICTY, *Prosecutor v Naletilić & Martinović*, Trial Judgment, IT-98-34, 31 March 2003, para. 217.

⁷ See ICRC, above note 5, paras. 307-313.

government (corresponding to the second and third conditions of the “effective control” test). The degree of requisite authority or control is also the object of controversy. According to one of the competing positions – the “classical” approach to occupation – the foreign State must be capable of exercising wide-ranging, government-like authority over the territory. Under this approach, the existence of an occupation triggers the applicability of the whole corpus of occupation rules: the occupier must have a level of control that allows it to comply with all these rules including, for instance, the obligation to ensure the proper working of educational institutions or to publish newly adopted penal provisions.⁸ By contrast, proponents of the rival “functional” approach to occupation maintain that the extent to which the foreign State is bound by the law of occupation is a function of the type and degree of control it exercises. On this view, it is not necessary to exercise control over all issues regulated by the law of occupation; rather, a State is bound by the law of occupation in relation to those issues, or areas of life, over which it has control, and only in relation to such issues. Diakonia considers this more nuanced and pragmatic approach, which has been endorsed by the ICRC and others,⁹ to be the better view.

Under this approach, Israel continues to occupy Gaza despite not being physically present there on a permanent basis. By maintaining exclusive control over Gaza’s airspace and territorial waters, as well as control over all land crossings (with the exception of the Rafah crossing), Israel retains authority over the movement of persons and goods in and out of the Gaza Strip. Israel notably controls Gazans’ access to fuel, electricity, telecommunications services as well as to materials necessary for the maintenance and development of essential infrastructure and services such as water, sanitation and hygiene (WASH) systems. This means that Israel exercises effective control over multiple aspects of civilian life in Gaza. In fact, Israel has been using this control to enforce a blockade since 2007: the blocking or restrictions of access to these goods and services have profoundly undermined economic and social life in Gaza.¹⁰ The Israeli authorities also *de facto* prohibit Gazans from accessing large swathes of their land and of Gaza’s territorial waters by enforcing, through military force, a “buffer zone” or “access-restricted areas” (ARA). Israel also maintains Gaza’s population registry, therefore keeping control over residency and citizenship issues. This factual situation has led multiple

⁸ See Art. 43 Hague Regulations from 1907 ; Arts. 50, 65 GCIV.

⁹ ICRC, above note 5, para. 310; UN Human Rights Council, ‘Report of the Detailed Findings of the Independent International Commission of Inquiry on the Protests in the Occupied Palestinian Territory’, A/HRC/40/CRP.2, 2019, para. 67. See also for instance Marco Sassòli, “The Concept and the Beginning of Occupation” in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, 2015, paras. 47–51; Aeyal Gross, *The Writing on the Wall*, Cambridge University Press, 2017, pp. 133–135.

¹⁰ On the wide-ranging and profound effects of the blockade on Gaza, see for instance UN Country Team in the Occupied Palestinian Territory, “Gaza Ten Years Later”, July 2017; Gisha, “Gaza up close”, <https://features.gisha.org/gaza-up-close/>.

stakeholders – including the International Court of Justice, UN, EU and ICRC – to conclude that Israel continues to occupy Gaza.¹¹

In conformity with the functional approach to occupation, Israel is bound by the law of occupation within the functional limits of the control it exercises over the Gaza Strip. Beyond the law of occupation, Israel is bound by other rules of IHL by virtue of its status as a party to an armed conflict.¹²

1.2 IHRL

Another body of international law applicable in the Gaza Strip is IHRL. Both Israel and Palestine are parties to most of the core IHRL instruments, notably the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) from 1966.

Israel and Palestine are bound to respect, protect and fulfill the rights enshrined in these instruments for individuals within their jurisdiction. This includes all individuals present in their respective territory. Accordingly, the Israeli authorities are bound by these instruments on the territory of Israel; and the Palestinian Authority is bound on the entire territory of Palestine, including Gaza.

Beyond their own territory, there is debate as to when a State exercises jurisdiction for the purpose of bearing IHRL obligations. However, authoritative sources have established that a State also exercises jurisdiction when it exercises control over persons or their enjoyment of their human rights. The latter criterion means that if the actions of a State have a direct and reasonably foreseeable impact on the human rights of a population, this State bears IHRL obligations towards this population.¹³ On this basis, the UN treaty bodies monitoring the

¹¹ See for instance International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Rep 136, para. 114; UN Security Council, Resolution S/RES/1860 (2009), 8 January 2009; Peter Maurer (President of the ICRC), “Challenges to International Humanitarian Law: Israel’s Occupation Policy”, *International Review of the Red Cross*, Vol. 94, n°888, Winter 2012, p. 1503; UN General Assembly, Resolution A/C.4/73/L.16 (2018), 14 November 2018 ; UN Human Rights Council, Report of the independent international Commission of inquiry on the protests in the Occupied Palestinian Territory, above note 9, para. 67. The European Union uses the phrase “occupied Palestinian territory” or “territories” to designate both the West Bank and Gaza, see for instance European Commission, “European Civil Protection and Humanitarian Aid Operations – Palestine”, last updated 17 November 2020, https://ec.europa.eu/echo/where/middle-east/palestine_en.

¹² For instance, Israel is bound by Art. 33 GCIV on the prohibition of collective penalties, which is not restricted to situations of occupation.

¹³ UN Human Rights Committee, “Concluding Observations: Israel”, CCPR/CO/78/ISRUN, 21 August 2003, para. 11; UN Human Rights Committee, “General comment no. 36 – Article 6 (Right to Life)”, CCPR/C/GC/35, 3 September 2019, para. 63.

implementation of the two 1966 international covenants as well as numerous other UN organs have considered that, even if Israeli forces have withdrawn from Gaza, Israel continues to be bound by IHRL towards Gazans, to the extent of the control it exercises over the enjoyment of their human rights.¹⁴

The question of whether non-State actors are bound by IHRL, and to what extent, is also a matter of controversy. However, there is a growing body of practice and doctrine supporting the conclusion that at least non-State actors who exercise government-like functions are bound by IHRL.¹⁵ Accordingly, Hamas, as the *de facto* authority in Gaza, bears obligations under IHRL (either via the treaties ratified by Palestine or via customary law), though within the limits of its capacity to influence the enjoyment of the rights of Gazans.¹⁶ Hamas cannot be held responsible for failing to abide by IHRL in relation to issues over which Israel exercises *de facto* control.

Only some human rights may be subject to derogation (suspension) – this is the case for instance of the right to the liberty of movement (Art. 12 ICCPR). However, derogations are lawful only in case of “public emergency which threatens the life of the nation”, and they must be proportionate and limited to those strictly required by the exigencies of the situation. Human rights may also be subject to limitations (restrictions): such limitations must be provided by law, necessary (including for the protection of public health), proportionate to the interest at stake and non-discriminatory.¹⁷

¹⁴ UN Human Rights Committee, “Concluding observations: Israel”, CCPR/C/ISR/CO/4, 21 November 2014, para. 5; UN Committee on Economic, Social and Cultural Rights, “Concluding observations on the fourth periodic report of Israel”, E/C.12/ISR/CO/4, 12 November 2019, paras. 10, 11. The fact that Israel has obligations under IHRL in the oPt including Gaza is consistently expressed in General Assembly Resolutions, Secretary-General reports, by the UN High Commissioner for Human Rights, the UN Human Rights Council and by Commissions of Inquiry and Fact-Finding missions on the OPT (see for instance UN Human Rights Council, Report of the independent international Commission of inquiry on the protests in the Occupied Palestinian Territory, above note 9, para. 45).

¹⁵ UN Secretary-General, “Report of the Secretary-General’s Panel of Experts on Accountability in Sri Lanka”, 2011, para 188; UN Human Rights Council, “Report of the International Commission of Inquiry to Investigate All Alleged Violations of International Law in the Libyan Arab Jamahiriya”, 2011, A/HRC/17/44, para 72; UN Human Rights Council, “Report of the Independent International Commission of Inquiry on the Syrian Arab Republic”, 2012, A/HRC/19/69 para 106. In doctrine see notably Andrew Clapham, *Human Rights Obligations of Non-State Actors*, Oxford University Press, 2006; Katharine Fortin, *The Accountability of Armed Groups under Human Rights Law*, Oxford University Press, 2017;; Tilman Rodenhäuser, *Organizing Rebellion: Non-State Armed Groups under International Humanitarian Law, Human Rights Law, and International Criminal Law* (First edition, Oxford University Press 2018) part 2.

¹⁶ See for instance UN Human Rights Council, Report of the independent international Commission of inquiry on the protests in the Occupied Palestinian Territory, above note 9, para. 50.

¹⁷ On derogations and limitations in the context of the fight against COVID-19, see OHCHR, “Emergency measures and Covid-19: Guidance”, 27 April 2020, https://www.ohchr.org/Documents/Events/EmergencyMeasures_COVID19.pdf.

2. HEALTH

The current COVID-19 crisis has had dramatic direct and indirect effects on the health of Gazans. The number of COVID-19 cases recorded in the Gaza Strip continues to increase at the time of writing. As the virus exerts additional pressure on an already overstretched health system, many Gazans suffering from other health conditions have been unable to access the medical diagnostics or treatments they need. The threat posed by COVID-19 and associated challenges for the health system is compounded by the pre-existing fragility of the system and chronic shortages of medicines, medical materials and equipment, including laboratory supplies for COVID-19 testing.¹⁸ This situation results from the blockade imposed by Israel on Gaza and the associated regime of restrictions on the movements of goods and persons, including the policy prohibiting the entry of items susceptible to being used for both civilian and military purposes (“dual-use” items). Two objectives must be urgently pursued: first, to contain the spread of the virus in the densely populated Gaza Strip and; second, to ensure continued access to adequate health care for Gazans suffering from COVID-19 or other health conditions.

To this end, which specific obligations does IHL and IHRL impose on Israel, as the occupying power, and on the local authority, respectively?

2.1 Relevant rules

Under IHL, an occupying power is responsible for safeguarding the health of the population living in the occupied territory: according to GCIV, the occupying power has the duty of “ensuring and maintaining, with the co-operation of national and local authorities, the medical and hospital establishments and services, public health and hygiene”, to the fullest extent of the means available to it. Importantly, this includes the “adoption and application of the prophylactic and preventive measures necessary to combat the spread of contagious diseases and epidemics”, such as COVID-19.¹⁹ Relatedly, the occupying power has the primary responsibility to ensure the provision of medical supplies to the population.²⁰ In relation to

¹⁸ WHO, “Coronavirus disease 2019 (COVID-19) Situation Report 52: Occupied Palestinian territory, Information for period: 5 March - 12 November 2020”, <https://reliefweb.int/report/occupied-palestinian-territory/coronavirus-disease-2019-covid-19-situation-report-52-occupied>; WHO, “Right to Health in the occupied Palestinian territory: 2018”, 2019, p. 37; Gisha, “With Gisha’s assistance, critical goods brought in to the Strip and medical equipment exits Gaza for repair”, undated (2020), <https://gisha.org/updates/11455>.

¹⁹ Art. 56(1) GCIV. A similar obligation is restated in Art. 14(1) API which provides that the occupying power has “the duty to ensure that the medical needs of the civilian population in occupied territory continue to be satisfied”.

²⁰ Art. 55(1) GCIV.

medical and other relief supplies sent by other States or by humanitarian organizations, the occupying power has the duty to allow and facilitate their passage into the occupied territory.²¹ Also relevant is the absolute prohibition of collective punishment: States party to the GCs agreed that no one should be subject to penalties – of any kind – for acts that they have not committed.²²

These protections are complemented by IHRL. Under the ICESCR, all Gazans have the “right to the enjoyment of the highest attainable standard of physical and mental health”.²³ This means that health facilities, goods and services must be available in sufficient quantity in Gaza and accessible – physically, economically and in terms of information, as well as without discrimination – to every Gazan. Such facilities, goods and services must be acceptable to Gazans and of good quality. The last condition notably requires skilled medical personnel, scientifically approved and unexpired drugs and hospital equipment, safe and potable water, and adequate sanitation.²⁴ Gazans indeed have a right to water and sanitation,²⁵ which is essential to the realization of all their other human rights and particularly critical in times of a pandemic.

These IHRL standards are also important to clarify the content of IHL obligations. Hence an occupying power must respect these IHRL standards in order to comply with its obligations both under IHRL and under IHL.

2.2 Obligations of Israel

How does this legal framework apply to Israel, as the occupying power, with regards to Gaza?

According to the functional approach to the law of occupation and the meaning of jurisdiction under IHRL described above, **the health-related obligations of Israel under IHL and IHRL are a function of the control that Israel exercises over the health of Gazans.** At the outset, it should be noted that the fact that the Palestinian Authority has formal jurisdiction and Hamas has *de facto* control over the administration of the local health care system in Gaza has no bearing on Israel’s own control over critical aspects of this system and

²¹ Art. 59 GCIV, Rule 55 of the ICRC’s CIL Study.

²² Art. 33(1) GCIV.

²³ Art. 12 ICESCR.

²⁴ CESCR, “General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)”, E/C.12/2000/4, 11 August 2000, para. 12.

²⁵ As noted by the UN CESCR, the right to water is implicit in the right to health (Art. 12 ICESCR) and the right to an adequate standard of living (Art. 11 ICESCR), see UN CESCR, “General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)”, E/C.12/2002/11, 20 January 2003. The UN General Assembly explicitly recognized the right to water and sanitation in 2010, see UN General Assembly, Resolution A/RES/64/292 (2010), 3 August 2010.

over the health of Gazans more broadly. Through its control of Gaza's land borders, airspace and territorial waters, Israel indeed exercises *de facto* control over the availability and quality of health care in Gaza, as well as over Gazans' access to health care outside Gaza.

Indeed, the restrictions on the movements of persons and goods imposed by Israel as part of the blockade have had a well-documented and profoundly damaging impact on Gaza's local health system. Israeli restrictions on the entry of medical goods as well as other goods and consumables essential for the proper functioning of health care facilities and services (such as fuel and electricity²⁶) have also undermined the availability and quality of health care.²⁷ These restrictions also impact the availability and quality of services that are underlying determinants of health, such as safe drinking water and sanitation facilities: multiple actors have documented how the blockade and prohibition on entry of "dual-use" items have affected the WASH situation in Gaza, with most water in Gaza being unfit for consumption.²⁸ Restrictions on the entry of building materials have also dramatically slowed the process of reconstructing those health care and other essential infrastructures damaged or destroyed by Israel during past phases of hostilities, thereby further limiting the availability of associated services.²⁹

Restrictions on the movement of persons also have a significant impact on the availability and quality of health care in Gaza (health care professionals are prevented from receiving proper training and specialization outside the Gaza Strip) as well as on the accessibility of Gazans to health care outside Gaza.³⁰

These elements demonstrate that, through its control of Gaza's borders, Israel exercises *de facto* control over critical aspects of Gaza's public health situation. Consequently, Israel is bound by the IHL obligations of an occupying power to ensure and maintain public health, and to allow the passage of medical and related supplies. As it has the capacity to impede on Gazans'

²⁶ On Israel's control over the energy and water infrastructures in Gaza, see Gisha, "Hands on the Switch: Who's responsible for Gaza's infrastructure crisis?", January 2017, pp. 3-16.

²⁷ WHO, 2019, above note 18, p. 46; Gisha, "With Gisha's assistance, critical goods brought in to the Strip and medical equipment exits Gaza for repair", 2020, <https://gisha.org/updates/11455>.

²⁸ See for instance WHO, 2019, above note 18, p. 57; OCHA – Occupied Palestinian Territory, "Water, Sanitation and Hygiene", <https://www.ochaopt.org/theme/water%2C-sanitation-and-hygiene>; Gisha, above note 10. On the water crisis in Gaza and its concrete impact during the COVID-19 crisis, see for instance B'tselem, "Water in Gaza: Scarce, polluted and mostly unfit for use", 17 August 2020, https://www.btselem.org/gaza_strip/20200818_gaza_water_scarce_polluted_mostly_unfit_for_use; Al Mezan Center for Human Rights, "Water Shortage in the Gaza Strip Amid COVID-19 Outbreak", September 2020, <http://www.mezan.org/en/post/23795>.

²⁹ See for instance Sultan Barakat and Firas Masri, "Still in ruins: Reviving the stalled reconstruction of Gaza", Brookings Doha Center, August 2017, <https://www.brookings.edu/research/reviving-the-stalled-reconstruction-of-gaza/>.

³⁰ WHO, 2019, above note 18, pp. 19, 35-43, 47.

enjoyment of their human right to health, it is also bound by the obligations deriving from this human right.

What measures must Israel take in order to comply with these obligations?

Israel has chosen to exercise control by enforcing a blockade on Gaza, under the pretext of security concerns since Hamas came to power in 2007. As just highlighted, the blockade severely restricts the availability and quality of health care in Gaza and Gazans' ability to access health care elsewhere.

Under IHL, the obligation of an occupying power to ensure and maintain public health³¹ encompasses a negative obligation not to interfere arbitrarily with efforts from the local authorities (including by unreasonably hampering the movement of goods or persons) and a positive obligation to take the appropriate steps to ensure public health “to the fullest extent of the means available” to the occupying power. This positive obligation is subject to available resources.³² According to certain interpretations, this obligation of means may also be subject to security considerations.³³ Be that as it may, “to the fullest extent of the means available” to the occupying power must be interpreted in good faith, taking into consideration that public health services are essential for the welfare of a population.

As far as the IHL obligation to allow and facilitate the passage of medical and other supplies is concerned, an occupying power has the obligation to consent to such passage as long as the population is inadequately supplied (and denying consent is not an option).³⁴ It has a right to control that these supplies do not consist of weapons, munitions, military equipment or other articles used for military purposes, and to prescribe other technical arrangements.³⁵ However, this right of control does not entitle an occupying power to enforce an automatic ban on broad categories of items on the basis of a theoretical risk that they may be used for military purposes. In order to be lawful, the imposition of technical arrangements must not be arbitrary. This

³¹ Art. 56 GCIV.

³² Gilles Giacca, “Economic, Social, and Cultural Rights in Occupied Territories”, in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, 2015, para. 35.

³³ According to such interpretations, security considerations may be taken into account to assess whether a certain course of action is required, despite the wording of Art. 56 GCIV (“to the fullest extent of the means available to it”) pointing to material ability rather than security considerations.

³⁴ This is specific to situations of occupation. See Jean Pictet (ed), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War: Commentary*, vol IV (International Committee of the Red Cross 1958), pp. 321–322. See also Dapo Akande, Emanuela-Chiara Gillard, “Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict”, October 2016, para. 33.

³⁵ Arts. 59 GCIV, Rule 55 of the ICRC's CIL Study. See Jean Pictet, *ibidem*.

means that they must be necessary and proportionate, and must not be imposed in a manner that is unreasonable, that may lead to injustice or lack of predictability, or that is otherwise inappropriate.³⁶

In this regard, Israel has the burden of demonstrating that access and movement restrictions, including the “dual-use” policy, are not only necessary to prevent potential attacks on Israel by Hamas, but also reasonable and proportionate. In light of the well-documented and severe consequences that these restrictions had on the local health system and the health of Gazans generally, the existing regime of restrictions appears incompatible with the law. Such measures seems particularly unreasonable and disproportionate in times of a pandemic, when the proper functioning of the health care system is so critical to prevent the loss of lives. The fact that the restrictions adopted by Israel cannot be arbitrary also means that they must not violate Israel’s obligations under international law.³⁷ These obligations include its IHL duty, as an occupying power, to ensure public health and its core obligations under the human right to health.³⁸ Ongoing restrictions are incompatible with these important obligations and therefore cannot be justified on the basis of Israel’s security concerns.

As a result, the restrictions currently imposed by Israel as part of the blockade constitute an ongoing violation of Israel’s IHL obligations to ensure and maintain public health, to combat the COVID-19 pandemic in Gaza, and to allow the passage of medical and other essential supplies. The blockade also constitutes an ongoing violation of Israel’s IHRL obligation to respect the right to health, since it interferes with Gazans’ enjoyment of their right to health. To the extent that Israel has been imposing the blockade in reaction to Hamas taking power in Gaza in 2007 – thereby punishing a population for acts committed or ideas expressed by their leaders – the blockade may also constitute collective punishment.³⁹ Overall, in order to comply with international law Israel must, first and foremost, **lift the blockade on Gaza**.

In particular, during the COVID-19 pandemic, it is vital that Israel refrains from unwarranted, excessive or otherwise arbitrary blocking or interference with, and instead allows and facilitates, the entry into Gaza of **all items necessary to treat and contain the spread of the virus**, notably personal protective equipment (PPE), sanitizers, testing kits and laboratory supplies for testing, appropriate medications, ventilators, etc. – especially as there

³⁶ Dapo Akande, Emanuela-Chiara Gillard, above note 35, para. 71.

³⁷ *Ibidem*.

³⁸ Core obligations include ensuring the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups, see CESCR, *General Comment No. 14*, above note 24, para. 43.

³⁹ See Section 2.1.

is an acute shortage of some of these items in Gaza.⁴⁰ This obligation also applies to COVID-19 vaccines.

It is equally important that all Gazans continue to have access to regular health care. During the pandemic as well as at all times, Israel must allow and facilitate the entry of **medical goods and other goods necessary for the proper functioning of the local health care system**: this includes medicines, medical devices, equipment and consumables, and items necessary for the maintenance or repair of medical equipment. This implies that Israel removes from the dual-use list all items necessary for the provision and maintenance of health equipment in Gaza and refrains from imposing unwarranted, excessive or otherwise arbitrary security restrictions.⁴¹ As highlighted by the UN Committee on Economic, Social and Cultural Rights (UN CESCR), States parties to the ICESCR, like Israel, “should refrain at all times from imposing embargoes or similar measures restricting the supply of another State with adequate medicines and medical equipment. Restrictions on such goods should never be used as an instrument of political and economic pressure”.⁴²

Equally important for maintaining public health in Gaza as well as for containing COVID-19 are WASH systems. Given that ensuring access to WASH is a core obligation deriving from the right to health,⁴³ Israel must also allow the unimpeded and swift passage into Gaza of **all items necessary for the maintenance and development of WASH systems**, some of which are currently on Israel’s dual-use list (such as certain pipes or drilling equipment). Security concerns cannot be used in an unwarranted, excessive or otherwise arbitrary manner to elude this obligation.

Given that **fuel and electricity** are necessary for the proper functioning of health and WASH infrastructures, Israel is obligated to refrain from unwarranted, excessive or otherwise arbitrary interference with the supply of fuel and electricity into the Gaza Strip, as part of its obligations under the human right to health and part of its IHL duty to ensure and maintain public health. During the COVID-19 pandemic, ensuring the supply of fuel necessary for the proper functioning of WASH systems is absolutely essential to contain the spread of the virus. Again, blocking fuel supplies with a view to punish the population for acts committed by their leaders or others would amount to collective punishment.

⁴⁰ See for instance Palestinian Centre for Human Rights, “Acute Shortage in Coronavirus Testing Kits: PCHR Warns of Repercussions of Medicines and Medical Supplies Shortage on Patients’ Health”, 23 September 2020, <https://www.pchrgaza.org/en/acute-shortage-in-coronavirus-testing-kits-pchr-warns-of-repercussions-of-medicines-and-medical-supplies-shortage-on-patients-health/>.

⁴¹ See WHO, 2019, above note 18, p. 48.

⁴² CESCR, General Comment No. 14, above note 24, para. 41.

⁴³ *Idem.*, para. 43.

In addition to lifting arbitrary restrictions on the movement of goods necessary to contain the spread of COVID-19 and to ensure the proper functioning of the health care system, Israel must **lift** unwarranted, excessive or otherwise arbitrary **restrictions on the movement of patients** requiring medical referrals outside of Gaza. As part of their right to health, all Gazans have the right to access health care, and given the very limited availability of quality health care – especially certain specialist health care – in Gaza owing to the blockade, thousands of patients every year have to rely on health care outside the Strip, including for life-saving treatment.⁴⁴ Israel however imposes on all such patients and their companions the requirement to obtain a permit, even when they are referred to health care facilities in other parts of the oPt, namely the West Bank or East Jerusalem (which represent the majority of the referrals⁴⁵). This permit system results in Gazans either being denied access when their request is rejected, or having to go through a cumbersome and costly process and thus receiving delayed diagnosis or treatment.⁴⁶ Rejections of companion permit applications lead to young patients having to undergo a stressful travel and medical procedure without their parents or carers. In order to comply with its obligations under the human right to health, it is urgent that Israel lifts unwarranted, excessive or otherwise arbitrary restrictions of access for medical referrals outside the Gaza Strip, as the COVID-19 pandemic puts further pressure on an already fragile local health system. Patients whose treatment have been suspended or delayed owing to the COVID-19 crisis – including cancer treatment, complicated surgeries or long-term rehabilitation treatment – and have been referred by the Palestinian health authorities to external medical facilities must be allowed unhindered access, with due consideration to the urgency of their condition.⁴⁷

More generally, Israel must also allow qualified health personnel to enter the Gaza Strip and **Gazan health care personnel to travel outside Gaza** in order to acquire the necessary training and experience, notably in specialist health care currently missing in Gaza. As noted above, skilled medical personnel is an important element of quality health care. Therefore, refraining from raising unwarranted, excessive or otherwise arbitrary obstacles for health care personnel to acquire such skills is also part of Israel's obligation to respect the human right to health, as well as of its IHL duty to ensure and maintain health care in Gaza.⁴⁸

⁴⁴ WHO, 2019, above note 18, p. 27.

⁴⁵ *Idem.*, pp. 31-32.

⁴⁶ *Idem.*, pp. 35-46; Al Haq, "Civil Society Submit Appeal to UN Special Procedures Urging Access for Gaza Patients", 27 June 2020, <https://www.alhaq.org/advocacy/17031.html>.

⁴⁷ See also Gisha, "Full Lockdown: The tightening of the closure on Gaza under the guise of the pandemic", November 2020, https://gisha.org/UserFiles/File/publications/Full_lockdown_EN.pdf.

⁴⁸ See Section 2.1.

Apart from enabling the entry of items into Gaza and the travel of patients health care and personnel outside the Strip, Israel must **take all other necessary measures in its power to ensure and maintain health care in Gaza, including with regard to the prevention, treatment and control of epidemics like COVID-19.** Notably, Israel must endeavour, individually and jointly with others, to make available relevant technologies, improving epidemiological surveillance and implementing strategies of infectious disease control.⁴⁹ This obligation logically implies endeavouring to make COVID-19 vaccines available to Gazans. In this respect, it is worth recalling that the “accessibility” element of the right to health entails a prohibition of discrimination:⁵⁰ this means that Israel must ensure that health care (including preventive medicine such as vaccines) is accessible to everyone under its control, without discrimination.

In the same vein, Israel must **refrain from hindering efforts by others, including States and humanitarian actors, to support and develop Gaza’s health care system.** Indeed, as far as third States are concerned, the UN CESCR considers that they have an obligation, under IHRL, to take steps “through international assistance and cooperation, especially economic and technical, towards the full realization of” the right to health in Gaza.⁵¹ Correspondingly, attempts by Israel to interfere with the fulfillment of their obligations by third States would arguably amount to a violation of the right to health by Israel.⁵² Humanitarian actors also have a role to play in the realization of the right to health of Gazans, and therefore States including Israel should provide an environment which facilitates the discharge of their responsibilities.⁵³ In this light, if certain Israeli laws or measures adopted under the guise of “counter-terrorism” efforts – such as the criminalization of contacts with Hamas, deemed a “terrorist organization” under Israeli law⁵⁴ – are in fact aimed at discouraging external support to local authorities and ultimately at hindering the availability of health care in Gaza, they could run counter to Israel’s international obligations.⁵⁵

⁴⁹ CESCR, General Comment No. 14, above note 24, para. 16.

⁵⁰ CESCR, General Comment No. 14, above note 24, paras. 12, 18.

⁵¹ *Idem.*, para. 38.

⁵² It would amount to a violation of the obligation to respect the right to health.

⁵³ CESCR, General Comment No. 14, above note 24, para. 42.

⁵⁴ Israel’s Counter-Terrorism Law from 2016 criminalizes notably the provision of “a service or resources to a terrorist organization, where doing so may assist or promote the organization’s activity”, see Israel, *The Counter-Terrorism Law – 5776-2016*, Internal number: 568876 2346, Appendix No. M-949; M-967; M-782/A, para. 23.

⁵⁵ The UN CESCR cites “the adoption of laws or policies that interfere with the enjoyment of any of the components of the right to health” as a violation of the obligation to respect the right to health, see CESCR, General Comment No. 14, above note 24, para. 50.

2.3 Obligations of local Palestinian authorities

What are the health-related obligations of the local authorities during the COVID-19 crisis? Hamas, as the *de facto* local authority in Gaza, bears a number of obligations under the human right to health.⁵⁶ Its positive obligations are commensurate to the resources at its disposal to administer Gaza,⁵⁷ and these resources are severely constrained by the occupation and blockade.

Hamas' obligations are also commensurate to the control it has on the public health situation in Gaza. Hamas cannot be held responsible for failing to protect or fulfill aspects of the right to health over which Israel has effective control – as explained above, through its control of Gaza's borders, Israel has a significant degree of control over the availability and quality of health care services in Gaza. (In addition, when impeding the local authorities' capacity to fulfill their obligations under IHRL, Israel is violating its own obligation to respect these human rights⁵⁸).

Even the administration of the local public health system in Gaza does not exclusively lie within Hamas' hands. Although Hamas *de facto* runs health services through a local Health Ministry, the Palestinian Authority has partial control over the availability of health goods and services in Gaza. It is responsible for funding a significant part of Gaza's public health care and for ensuring the availability of medicines (including preventive ones such as vaccines) and other medical items in the Strip, to the maximum of its available resources. The Palestinian Authority notably has the obligation, under IHRL, to create the conditions to ensure that everyone on the Palestinian territory – which comprises the West Bank and Gaza – has **equal access to health care**.⁵⁹

Overall, it can be said that Hamas has partial control over the availability and accessibility of health services located inside Gaza, to all Gazans. As such, Hamas is bound by important obligations deriving from the human right to health.⁶⁰

In the context of the COVID-19 crisis, Hamas must **take all the steps necessary for the “prevention, treatment and control” of the pandemic**, to the maximum of its available

⁵⁶ See Section 1.2. on the applicability of IHRL to non-State actors.

⁵⁷ Each State party to the ICESCR must undertake to take steps toward the full realization of the right to health, “to the maximum of their available resources” (ICESCR, Art. 2(1)), and there is no reason why the same standard would not apply to Hamas. On this see CESCR, “General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)”, E/1991/23, 14 December 1990, para. 10.

⁵⁸ The International Court of Justice opined that Israel must “not raise any obstacle to the exercise of [economic, social and cultural] rights in those fields where competence has been transferred to Palestinian authorities”, see International Court of Justice, above note 11, para. 112.

⁵⁹ Art. 12(2)(d) ICESCR. See also UN CESCR, General Comment No. 14, above note 24, paras. 17, 19.

⁶⁰ Either via the ICESCR, which was ratified by Palestine, or via customary law, see Section 1.2.

resources.⁶¹ These steps include notably putting in place a system of urgent medical care for COVID-19 patients, ensuring timely access to COVID testing or the establishment of quarantine facilities complying with human rights standards. All Gazans must have access to these health services, including those living with a disability⁶² or internally displaced persons. Another essential aspect of this obligation is the implementation of prevention and education programmes concerning rules of hygiene and other behaviours that help contain the spread of the virus. At the same time, communication around the virus and ways to prevent its spread must avoid fuelling social stigma for people affected by COVID-19 and their relatives.⁶³ In this respect as well, the right to health imposes a duty on the authorities to ensure that public health information related to the virus is accessible to everyone in Gaza.⁶⁴ Hence this information must also be made accessible to persons who have specific communication needs including those with hearing and visual impairments.⁶⁵ It is also incumbent upon the local authorities to take specific steps to prevent the spread of the virus in places of detention, to provide alternatives for detainees to have contacts with their family and lawyer when in-person visits are suspended owing to the virus, and to address the specific needs of detainees in the context of this crisis.

When **restrictions on movements** such as stay-at-home orders or curfews are imposed with a view to prevent the spread of the virus, they **must be compliant with IHRL**. Gazans have a right to liberty of movement⁶⁶ and, in order to be lawful, limitations upon this right must satisfy a number of conditions set out above.⁶⁷ In particular, restrictions that go beyond what is necessary and proportionate to contain the virus would contravene IHRL. When adopting measures restricting the movement of people, the authorities must take into consideration the needs of people with specific vulnerabilities – such as the elderly or people with disabilities who depend on health care personnel making home visits. Mitigating

⁶¹ Per Art. 12(2)(c) ICESCR.

⁶² For the actions and protective measures that can be taken in this respect, see WHO, “Disability considerations during the COVID-19 outbreak”, 26 March 2020, <https://www.who.int/publications/i/item/WHO-2019-nCoV-Disability-2020-1>.

⁶³ For how to communicate effectively about the virus while reducing the risk of social stigma see WHO, “A guide to preventing and addressing social stigma associated with COVID-19”, February 2020, <https://www.who.int/publications/m/item/a-guide-to-preventing-and-addressing-social-stigma-associated-with-covid-19>; UNAIDS, “Addressing stigma and discrimination in the COVID-19 response - Applying the evidence of what works from HIV-related stigma and discrimination in six settings to the COVID-19 response”, October 2020, <https://www.unaids.org/en/resources/documents/2020/covid19-stigma-brief>.

⁶⁴ CESCR, General Comment No. 14, above note 24, para. 12.

⁶⁵ Humanitarian organizations have reported that access to COVID-19 related information is a barrier for persons with disabilities in Gaza who have specific communication needs including those with hearing and visual disabilities. See for instance Humanity & Inclusion, *Needs Assessment for People with Disabilities in the Gaza Strip to Access Shelter / NFIs Services*, September 2020, p. 10.

⁶⁶ Art. 12(1) ICCPR.

⁶⁷ See above Section 1.2. See also UN OHCHR, above note 17.

measures must be adopted to ensure that all Gazans continue to have access to essential health care despite movement restrictions.

Hamas has the obligation to take the necessary steps to **ensure the continuity of essential health services during the pandemic**, to the extent of its resources and control over the availability of health care in Gaza. This requires Hamas to adopt not only emergency response plans but also strategies to mitigate the pressure created by the virus on the local health system and ensure that non-COVID patients continue to receive the diagnosis, curative or paliative care their condition requires. This includes persons with disabilities who need long-term rehabilitation treatment.

Ensuring access to health care includes access to **mental health and psychosocial support**. The COVID-19 virus has had significant mental health consequences for patients, their relatives, frontline workers and the population in general, whose daily lives have been hard hit by measures adopted to fight the virus.⁶⁸ In Gaza, the COVID-19 crisis exacerbates the mental toll that years of conflict, occupation and blockade have had on the population. Yet Gazans have the right to enjoy the highest attainable standard of both physical and mental health. As part of its obligations under the right to health, Hamas must notably integrate mental health and psychosocial support in public health strategies, including those adopted in the context of the fight against COVID-19 and, to the maximum of its available resources, ensure that such support is accessible to all Gazans.

Several actors have reported a rise in domestic violence in Gaza – in particular against girls, women and persons with disabilities – corresponding in time to the imposition of stay-at-home orders.⁶⁹ Violence being a clear determinant of health, Hamas’ duty to “protect” the right to health implies a **duty to protect from violence those in vulnerable positions**, while its duty to “fulfill” the right to heath implies notably the adoption of information campaigns to prevent domestic violence,⁷⁰ and ensuring the availability of and accessibility to reporting and assistance mechanisms for those who experience violence during and beyond the COVID-19 crisis.

⁶⁸ See International Federation of Red Cross and Red Crescent Societies and ICRC, “The greatest need was to be listened to’: The importance of mental health and psychosocial support during COVID-19”, Geneva, 2020, <https://www.icrc.org/en/document/crisis-mental-health-COVID-19>; Islamic Relief, “New study shows shocking economic and psychological toll of Covid-19 in Gaza”, November 2020, <https://www.islamic-relief.org/new-study-shows-shocking-economic-and-psychological-toll-of-covid-19-in-gaza/>.

⁶⁹ See notably needs assessment carried out by Humanity & Inclusion, March – September 2020 (on file with Humanity & Inclusion).

⁷⁰ CESCR, General Comment No. 14, above note 24, paras. 35, 36.

3. LIVELIHOODS

The COVID-19 outbreak has led not only to a public health crisis but also to an economic and social crisis. In Gaza, measures adopted to contain the spread of COVID-19 have put enormous pressure on a local economic fabric already severely strained by 13 years of blockade. Several actors have already reported how restrictive measures related to COVID-19 have exacerbated the economic and social challenges faced by Gazans, in particular by vulnerable households, such as single mothers or persons living with a disability. Since the start of the outbreak, many households have either lost their only source of income or seen their income falling drastically.⁷¹ The agricultural sector was hit particularly hard by movement restrictions, further contributing to food insecurity which was already rampant in Gaza before the COVID-19 outbreak.⁷² Socio-economic distress during the pandemic is particularly severe for farmers and fishermen working in the ARA, as they were already suffering from additional layers of restrictions imposed by Israel: restrictions to access their lands and the sea, to import items essential for their economic activities (such as materials to repair damaged boats which are deemed “dual-use” items), and to export their agricultural products.⁷³

3.1 Relevant rules

How do IHL and IHRL address this situation? Under IHL, the primary responsibility to provide supplies essential to the survival of the civilian population of the occupied territory lies with the occupying power.⁷⁴ More generally, the occupying power has the duty to take all the measures in his power to restore and ensure, as far as possible, public order and civil life.⁷⁵ As

⁷¹ According to a study by Première Urgence Internationale (PUI) on the impact of COVID-19 on the livelihood of vulnerable households in Gaza, these households are facing increased expenses – leading to some of them being unable to meet their basic needs, including food – coupled with dramatic loss of income. 97% of the farmers surveyed by PUI report a decrease in their agricultural income by about 50%; all fishermen reported being affected by the pandemic, stating that their monthly income decreased by 54%. See Première Urgence Internationale, “COVID-19 Rapid Assessment: Impact of COVID-19 Pandemic on Vulnerable Households in Gaza”, April 2020. In the same vein, an Islamic Relief study estimates for instance that, due to the COVID-19 crisis, tens of thousands of Gazans have lost their jobs, that the monthly income of Gazan workers has fallen on average by almost 90 per cent, with almost 60 percent of people in Gaza no longer able to afford basic food, medicine and other essential supplies, see Islamic Relief, above note 69.

⁷² FAO, “Palestine – Humanitarian Response Plan 2019”, www.fao.org/3/CA3263EN/ca3263en.pdf.

⁷³ Première Urgence Internationale, “Gaza: Living Near the Fence”, https://pui.maps.arcgis.com/apps/Cascade/index.html?appid=9e0c129785264c35a15a0d2aff631661&utm_source=site_PUI&utm_content=01042019.

⁷⁴ Art. 69(1) API.

⁷⁵ Art. 43 Hague Regulations from 1907. The French version, the only authentic version of the Hague Regulations, mentions “l’ordre et la vie publics” which is broader than suggested by the phrase adopted in the English translation of the regulations (“public order and safety”).

noted by the Supreme Court of Israel, the notion of civil life is broad enough to include many aspects of civil life including the economy, society, education, welfare, hygiene, health or transportation.⁷⁶ In addition, this duty must be read in light of IHRL which includes the right of everyone “to an adequate standard of living for [themselves] and [their] family, including adequate food, clothing and housing, and to the continuous improvement of living conditions”.⁷⁷ States party to the ICESCR have endeavoured to take appropriate steps to ensure the realization of this right to the maximum of their available resources. A failure to do so would constitute a violation of their IHRL obligations, and also, for an occupying power, a violation of the IHL obligation to ensure civil life in the occupied territory.

In addition, it is important to stress that the right to health encompasses “a wide range of socio-economic factors that promote conditions in which people can lead a healthy life”.⁷⁸ In particular, access to essential needs such as water, nutritional food and housing are underlying determinants of health, and therefore compliance with the right to health is closely linked to compliance with the right to an adequate standard of living.

3.2 Obligations of Israel

In light of this legal framework, what are the obligations of Israel, as the occupying power in Gaza?

As explained above in relation to health-related obligations, the extent of Israel’s IHL and IHRL obligations is a function of the control it has over Gaza. Through its control of Gaza’s land borders, airspace and territorial sea, Israel *de facto* exercises a substantial degree of control over Gaza’s economy and the livelihoods of Gazans. As a result, it has an obligation under IHL to take feasible steps to ensure civil life, including economic life, in occupied Gaza and, in the first place, to refrain from doing anything that would run counter to this objective. Similarly, because Israel has the capacity to influence the enjoyment by Gazans of their right to an adequate standard of living, it is bound by the obligations deriving from this human right.

Concretely, this means that Israel **must lift the access and movement restrictions** imposed on Gaza in an unwarranted, excessive or otherwise arbitrary manner, as well as the **additional restrictions of access imposed in the ARA**. Both types of measures have had a well-documented, profoundly destructive impact on Gaza’s economy, and therefore

⁷⁶ Israel’s High Court of Justice, *Jam’iat Iscan Al-Ma’almoun v. IDF Commander in the Judea and Samaria Area*, Judgment, HCJ 393/82, 28 December 1983, para. 18.

⁷⁷ Art. 11, ICESCR.

⁷⁸ CESCR General Comment No. 14, above note 24, para. 4.

contravene Israel’s above-mentioned obligations when they are arbitrary.⁷⁹ As recalled by the UN CESCR, the right to adequate food for instance imposes on States parties to “refrain at all times from food embargoes or similar measures which endanger conditions for food production and access to food in other countries”.⁸⁰ Measures endangering food production could include for instance restricting farmers and fishermen’s access to their lands, the sea or storage facilities, measures hindering access to water (necessary notably for crop production) or to electricity (needed, for instance, for cold-storage facilities).

Refraining from such measures is particularly vital in the context of COVID-19 which is already severely hampering Gazans’ capacity to meet their basic needs, as just noted. It must also be recalled that the imposition of collective penalties in the form of restrictions in the passage of objects and consumables necessary to meet these needs would violate the IHL prohibition of collective punishments.⁸¹

3.3 Obligations of local Palestinian authorities

The Palestinian Authority and Hamas also continue to bear obligations under IHRL during the pandemic. As noted above, measures adopted to fight the spread of the virus such as stay-at-home orders and other restrictions of movements must satisfy a number of conditions to be lawful. Notably, such measures must be necessary and proportionate to the interest at stake – that is appropriate to achieve the legitimate aim of containing the spread of the virus – and must be the least intrusive option among those that might achieve the desired result.⁸² In addition, the Palestinian Authority and Hamas retain some **core obligations related to livelihoods** in Gaza such as “to take the necessary action to mitigate and alleviate hunger” to the maximum of their available resources.⁸³

Particular efforts must be undertaken to respect, protect and fulfill the rights of individuals and groups in vulnerable positions,⁸⁴ such as persons with disabilities. During the COVID-19 crisis, it has been reported that persons with disabilities are not only at greater risk of

⁷⁹ See Section 2.2.

⁸⁰ CESCR, *General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)*, E/C.12/1999/5, 12 May 1999, para. 37.

⁸¹ Art. 33(1) GCIV.

⁸² See above Section 1.2, and OHCHR, above note 17.

⁸³ Art. 11(2) ICESCR. CESCR, *General Comment No. 12*, above note 81, para. 6.

⁸⁴ The General Comment on Art. 11 ICESCR notes that “[e]ven where a State faces severe resource constraints, whether caused by a process of economic adjustment, economic recession, climatic conditions or other factors, measures should be undertaken to ensure that the right to adequate food is especially fulfilled for vulnerable population groups and individuals”, CESCR, *idem.*, para. 28.

contracting the virus, but also of socio-economic exclusion, leading notably to limited access to hygiene materials and food stocks.⁸⁵

4. EDUCATION

The measures adopted to fight the virus, including restrictions on movements and limited availability of public transportation, have also had detrimental impact on access to education. Distance learning also poses access challenges to many students, notably due to power cuts, limited internet access and difficult socio-economic conditions at home making learning difficult.

4.1 Relevant rules

International law imposes a number of obligations on the relevant authorities in this regard as well. Under IHL, the occupying power has a duty to “facilitate the proper working of all institutions devoted to the care and education of children”.⁸⁶ Under IHRL, the ICESCR provides that everyone has the right to education.⁸⁷ This right implies that educational institutions and programmes have to be available, accessible, acceptable to students and adapted to their needs.⁸⁸

4.2 Obligations of Israel

Israel is bound by IHL and IHRL obligations related to education within the limits of the control it exercises on education in Gaza. Israel controls the supply of electricity to Gazans, and therefore also their access to internet. In times of COVID-19 and distance learning, electricity and internet are essential utilities for continued access to education. In this context, providing these utilities is part of Israel’s IHL duty – as the occupying power – to ensure the proper functioning of educational institutions, and part of its IHRL duties to ensure that education remains accessible to Gazan students.

According to the same IHL and IHRL rules, Israel has an obligation to refrain from arbitrarily hindering the passage, into Gaza, of all goods necessary for the proper functioning and

⁸⁵ See notably needs assessment carried out by Humanity & Inclusion, March – September 2020 (on file with Humanity & Inclusion).

⁸⁶ Art. 50(1) GCIV.

⁸⁷ Art. 13 ICESCR.

⁸⁸ CESR, *General Comment No. 13: The Right to education (Art. 13 of the Covenant)*, E/C.12/1999/10, 8 December 1999, para. 6.

maintenance of educational facilities. It is also noteworthy that, as health and socioeconomic factors are determinants of learning, Israel's compliance with the above-mentioned obligations relating to health and livelihoods also impacts on its compliance with education-related obligations.

4.3 Obligations of local Palestinian authorities

During the COVID-19 crisis, the Palestinian Authority and Hamas retain the obligation to respect, protect and fulfil the right to education of Gazans. This implies taking all feasible steps, through coordination, to ensure continued access to education, notably the adoption and continued adaptation of a contingency plan by education authorities. Such a plan must take into consideration the special educational needs and disabilities of students. Resources should be allocated to assist educational institutions with the development of learning resources adapted to their students' additional support needs. Authorities should also avoid using schools as quarantine centers.

5. OBLIGATIONS OF THIRD STATES

Third States also have obligations under IHL and IHRL in relation to the fight against COVID-19 in Gaza. As the present brief focuses on the obligations of Israel as the occupying power and of the local authorities, this section offers only a brief treatment of this question.

The ICESCR recognizes the role of all States, as members of the international community, in achieving the realization of the rights enshrined in the Covenant for all human beings. Each State party to the ICESCR indeed agreed "to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights" recognized in the Covenant.⁸⁹ This means, for instance and in relation to the right to health, that States parties to the ICESCR, depending on their available resources, should facilitate access to essential health facilities, goods and services in Gaza.⁹⁰ In times of emergency such as the COVID-19 pandemic, third States have a particular obligation to provide humanitarian assistance to the maximum of their capacities. The UN CESCR specifically noted that the international community "has a collective responsibility" to address diseases that are

⁸⁹ Art. 2(1) ICESCR.

⁹⁰ According to the UN CESCR, "[d]epending on the availability of resources, States should facilitate access to essential health facilities, goods and services in other countries, wherever possible, and provide the necessary aid when required", CESCR, General Comment No. 14, above note 24, paras. 39, 45.

transmissible beyond the frontiers of a State; with economically developed States bearing a special responsibility in this regard.⁹¹ This could include notably the provision of goods and services necessary to fight the spread of COVID-19 in Gaza – including vaccines – and the sharing of expertise with local medical personnel on appropriate preventive measures.

Third States also have a number of obligations in relation to Israel’s violations of international law. First and foremost, they must not render aid or assistance to Israel in the commission of such violations including in maintaining the blockade.⁹² Furthermore, according to UN treaty bodies, States that have diplomatic or other influence over Israel have an obligation to use this influence with a view to prevent Israel from violating its IHRL obligations.⁹³ Similarly, all States parties to the four Geneva Conventions have an obligation to “ensure respect” for IHL rules.⁹⁴ According to several authorities, including the International Court of Justice and the ICRC,⁹⁵ this implies using one’s influence and taking proactive steps to bring Israel’s violations of the Conventions to an end.

⁹¹ CESCR, *idem.*, para. 40.

⁹² International Law Commission, “Responsibility of States for Internationally Wrongful Acts”, *Yearbook of the International Law Commission - Report of the Commission to the General Assembly on the work of its fifty-third session*, Vol. II, 2001, Art. 16.

⁹³ The UN CESCR highlighted this obligation in relation to the right to health, see CESCR, General Comment No. 14, above note 24, para. 39.

⁹⁴ Common Art. 1 to the four 1949 GCs.

⁹⁵ International Court of Justice, above note 11, para. 163; ICRC, above note 5, paras. 164-173.

CONCLUSION

In Gaza, the COVID-19 outbreak poses unprecedented challenges to a community that has already suffered decades of conflict and occupation. In particular, the blockade imposed by Israel since 2007 considerably amplifies the vulnerability of Gazans to the pandemic: it creates major obstacles for local authorities to effectively contain the spread of COVID-19, for patients to access adequate health care and for the population to overcome the economic, social and other effects of the crisis.

As an occupying power, Israel bears a number of obligations including the obligation to ensure, to the fullest extent of the means available to it, public health and to allow and facilitate the passage of supplies, including all supplies necessary for the proper functioning of health care services. Israel is also bound to respect, protect and fulfill Gazans' human rights, including their rights to health, to an adequate standard of living, and to education, within the limits of the control it exercises over Gazans' enjoyment of these rights. The current regime of access and movement restrictions imposed by Israel, including on Gazan patients in need of medical care, is incompatible with these obligations.

The Palestinian Authority as well as Hamas, as the *de facto* local authority, also bear obligations under IHRL, commensurate to their resources and to the degree of control they exercise over those rights. For instance, under the right to health, Hamas must take all the steps necessary for the treatment and control of the pandemic within Gaza. When imposing restrictive measures to that effect (such as movement restrictions), such measures must be compliant with IHRL.

Ensuring an effective COVID-19 response in Gaza is also a responsibility shared by the international community. In this respect, third States have a role to play in using their influence to put an end to Israel's violations of international law, with a renewed sense of urgency during the COVID-19 pandemic.