

**CRIMES**

**AGAINST HUMANITY**

**GAZA**

**2023**

**Complaint lodged with NAST**

**'We are witnessing a killing of civilians that is unparalleled and unprecedented in any conflict since I have been Secretary-General'**

**United Nations Secretary-General António Guterres,  
20 November 2023**



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## Complaint:

# Aiding and abetting crimes against humanity

## 1. Introduction

### 1.1 Which crimes the present complaint concerns, etc.

The present complaint concerns the aiding and abetting\* of the following crimes committed against the civilian population in Gaza in the period after 9 October 2023, when the stepped-up blockade was put into place alongside extensive bombing of Gaza as from 7 October 2023:

- A. Crime against humanity in the form of inhumane acts,
- B. Crime against humanity in the form of murder,
- C. Crime against humanity in the form of extermination,
- D. Crime against humanity in the form of forcible transfer of population,
- E. Crime against humanity in the form of persecution.

The crimes have been committed against approximately 270 Norwegian citizens as part of the civilian population in Gaza. The Norwegian citizens make up only a small number of all the civilians that have been impacted by these crimes. The civilian victims of Hamas's attack on 7 October 2023 do not include Norwegian citizens and those acts therefore fall outside Norwegian jurisdiction.

A number of the crimes which are the subject of the present complaint have impacted the entire (inhumane acts, persecution) or large segments (forcible transfer) of the civilian population in Gaza of around 2.2 million people, whilst almost 15 000 people, including 6000 children and 4000 women, have been killed in deliberate attacks, according to the UN health authorities in

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\* It is explained in part 3.7 why aiding and abetting (complicity) is the appropriate mode of liability under Norwegian criminal law. Note also that this is a translation of the complaint filed with Norwegian prosecutors (NAST) on 28 November 2023. The English version has thus not been updated with subsequent developments.

Gaza. <sup>1</sup> Almost 40 000 civilians have been injured. Gaza has acted as a slaughterhouse and has been described as a graveyard for children. On 20 November 2023, UN Secretary-General António Guterres stated that the number of civilian deaths in Gaza has been ‘unparalleled and unprecedented’ in his time as Secretary-General since 2017, with ‘thousands of children killed’ in the course of a few weeks. <sup>2</sup>

The present case is the most serious criminal case ever to be registered in Norway.

The legal basis for the present complaint is set out in greater detail in part 3, including why the actions of the accused satisfy the requirements to constitute aiding and abetting. Part 4 contains an explanation of why the actions cannot be justified as self-defence. Why the public interest warrants prosecution is discussed in part 5: see the last paragraph of section 5 of the Norwegian Criminal Code (*straffeloven*).

## **1.2 The persons against whom the present complaint is directed and why**

The present complaint is lodged against Israel’s Minister of Defense **Yoav Gallant**, member of Israel’s war cabinet, **Benjamin Gantz** and Chief of the General Staff, and **Herzl Halevi** (see below in part 2 about the accused). These persons are considered to be the main people responsible for the acts which are the subject of the present complaint.

The present complaint is not directed at Israel’s current President, Prime Minister or Foreign Minister. Under international law, heads of State enjoy head of State immunity for as long as they hold their positions: see *Arrest Warrant Case* (2002), delivered by the International Court of Justice (ICJ) in The Hague. <sup>3</sup> Even heads of State do not have immunity against criminal prosecution before the International Criminal Court (ICC) in The Hague: see Article 27 of the Rome Statute of the International Criminal Court (ICC) (‘the Rome Statute’) and the arrest warrant issued in respect of Russian President Vladimir Putin. <sup>4</sup>

The ICC has jurisdiction to investigate crimes in Gaza: see the more detailed description of jurisdiction and investigation in ‘Situation in the State of Palestine’. <sup>5</sup> At the current juncture, there are no known indictments with the ICC against any of the persons accused herein. It is a hypothetical question whether any of them will be indicted for crimes by the ICC. The crimes can in any event be prosecuted criminally in Norway pursuant to Norwegian criminal law: see part 1.5.

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<sup>1</sup> <https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-51>

<sup>2</sup> <https://news.un.org/en/story/2023/11/1143772>

<sup>3</sup> <https://www.refworld.org/cases,ICJ,3c6cd39b4.html>

<sup>4</sup> <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and>

<sup>5</sup> <https://www.icc-cpi.int/palestine>

### **1.3 Who is filing the present complaint**

[ICJ Norway](#) and the initiative Defend International Law ([Forsvar folkeretten](#)) are lodging the present complaint on behalf of Norwegian citizens and non-Norwegians resident in Norway – referred to as ‘Norwegian citizens’ or ‘Norwegians’ – who were present in Gaza as from 7 October 2023.

ICJ Norway is the Norwegian branch of the [International Commission of Jurists](#), whilst Defend International Law is an initiative of 44 Norwegian jurists. Both are non-partisan and autonomous and endeavour to promote respect for international law, the rule of law and human rights.

The present complaint is, in principle, lodged on behalf of all Norwegian citizens who were in Gaza as from 7 October 2023, but it can also be viewed as being lodged on behalf of the entire civilian population there. Crimes against humanity are acts which concern all people; such acts give rise to rights for and obligations owed towards everyone (*erga omnes*). At the same time, the present complaint is lodged specifically on behalf of those persons who have to date signed a documented giving ICJ Norway and Defend International Law authorisation to lodge a complaint on their behalf. If others wish to join the same complaint, the necessary information will be provided. Authorisations from the injured parties are attached in a separate annex: see Annex 1. It is requested that the personal information in Annex 1 be treated confidentially out of concern for their safety. The persons can choose themselves whether to go public with their stories.

### **1.4 With whom the present complaint is filed**

The present complaint is lodged with the National Authority for Prosecution of Organised and Other Serious Crime (*Det nasjonale statsadvokatembetet for innsats mot organisert og annen alvorlig kriminalitet (NAST)*), including efforts to combat international crimes such as genocide, crimes against humanity and war crimes.<sup>6</sup> Although the question of indictments is within the remit of the Director General of Public Prosecutions (*Riksadvokaten*) in this case due to the high sentence involved under the second paragraph of section 102 (‘imprisonment for a term not exceeding 30 years’): see section 65(1) of the Criminal Procedure Act (*straffeprosessloven*), it is assumed that the question of opening an investigation and the investigation itself lies with NAST.

### **1.5 Legal basis for the present complaint**

The basis for the present complaint is section 102 of the Criminal Code, including (a) (murder), (b) (extermination), (d) (forcible transfer), (h) (persecution) and (k) (inhumane acts),<sup>7</sup> read in

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<sup>6</sup> <https://www.riksadvokaten.no/oversikt-over-statsadvokater-og-embeter/>

<sup>7</sup> [https://lovdata.no/dokument/NL/lov/2005-05-20-28/KAPITTEL\\_2-1#KAPITTEL\\_2-1](https://lovdata.no/dokument/NL/lov/2005-05-20-28/KAPITTEL_2-1#KAPITTEL_2-1)



conjunction with section 15 of the Criminal Code (aiding and abetting),<sup>8</sup> and the fifth paragraph of section 5 of the Criminal Code (jurisdiction).<sup>9</sup>

Section 102 of the Criminal Code is contained in Chapter 16 of the Criminal Code on genocide, crimes against humanity and war crimes. War of aggression is not criminalised in Norwegian law. The punishment for a crime against humanity, which is what the present complaint is confined to, is imprisonment not exceeding 30 years, the most stringent punishment under the Code.

Under the rules in section 5 of the Criminal Code on Norwegian criminal jurisdiction, acts committed abroad by non-Norwegian citizens generally fall outside the scope of the Criminal Code. One possible exception is if an offender already ‘is present in Norway’: see the third paragraph of section 5 of the Criminal Code. That is not the case here.

Another exception, however, is ‘if the act carries a maximum penalty of imprisonment for a term of six years or more and is directed at someone who is a Norwegian national or domiciled in Norway’: see the fifth paragraph of section 5 of the Criminal Code. That provision is applicable here. The acts which are the subject of the present complaint under section 102 of the Criminal Code have, for the purposes of the provision, been directed at those Norwegian citizens who were present in Gaza as from 7 October. They have been part of the civilian population in Gaza during the material period: see the discussion in part 3.

Once Norwegian jurisdiction has been established, crimes investigated will apply in respect of the entire civilian population in Gaza. Hence it is not necessary to show how many Norwegians have specifically been impacted by each of the crimes against humanity in the form of inhumane acts, murder, mass murder (extermination), forcible transfer of population and persecution. In any event – in the alternative – Norwegian citizens have been victims of all of these crimes. All of the Norwegians has been directly subjected to inhumane acts and persecution, whilst in all likelihood many of them have been subjected to forcible transfer. As the case stands now, at least one of the Norwegians has been a direct victim of murder and thus also mass murder.

## **1.6 Summary of the factual basis for the present complaint**

It has long been common knowledge that over 200 Norwegian citizens were present in Gaza during the material period, including around 100 children.<sup>10</sup> That figure has subsequently been revised upwards to 269 Norwegians, including 125 children.<sup>11</sup> The exact figure is not yet known at the current juncture, but the government has since said that it was around 270

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<sup>8</sup> [https://lovdata.no/dokument/NL/lov/2005-05-20-28/KAPITTEL\\_1-3#KAPITTEL\\_1-3](https://lovdata.no/dokument/NL/lov/2005-05-20-28/KAPITTEL_1-3#KAPITTEL_1-3)

<sup>9</sup> [https://lovdata.no/dokument/NL/lov/2005-05-20-28/KAPITTEL\\_1-1#KAPITTEL\\_1-1](https://lovdata.no/dokument/NL/lov/2005-05-20-28/KAPITTEL_1-1#KAPITTEL_1-1)

<sup>10</sup> <https://www.regjeringen.no/no/aktuelt/utenriksministeren-pa-gaza-toppmote-i-kairo-det-haster-for-folk-i-gaza/id3003125/>

<sup>11</sup> <https://www.aftenposten.no/verden/i/wABvKA/aner-ikke-hva-som-venter-oss>

Norwegian citizens, of whom approximately half were children.<sup>12</sup> On Wednesday 15 November, 51 Norwegians were allowed to leave Gaza,<sup>13</sup> whilst a further 49 Norwegians were allowed to leave on 17 November.<sup>14</sup> Subsequently, even more Norwegians have been able to leave, although just under 60 remain in Gaza. Israel commenced its bombing of Gaza on 7 October 2023, and on 9 October imposed a total blockade of Gaza. This means that around 270 Norwegians have been impacted by the attack on Gaza as part of the civilian population.

The key and particular sets of facts for the crimes which are the subject matter of the present complaint are the combination of Israel's full-scale blockade ('the blockade') of Gaza as from 9 October 2023 and the parallel extensive bombing of Gaza, which is a small, densely-populated geographical area. Euro-Med Human Rights Monitor has unofficially estimated that, already by 2 November 2023, Israel had dropped 25 000 tonnes of explosives on the Palestinians in Gaza since 7 October, equal to explosives in the two atom bombs dropped by the US over Hiroshima and Nagasaki in 1945.<sup>15</sup> Although the latter were in concentrated form, with the result that the immediate effect is not comparable, the estimate does give some idea of the sheer magnitude of the bomb attacks.

Gaza has thus become one big crime scene for the crimes directed at the civilian population which are the subject of the present complaint. By 15 November, the number of people killed and injured in Gaza totalled around 40 000 people, out of a total population of around 2.2 million: see the discussion in part 3.1. This corresponds to almost 2% of the population. By way of comparison, this corresponds proportionately to almost 100 000 killed and injured Norwegians in Norway. Over 1.5 million people have also been driven from their homes and homesteads internally in Gaza.<sup>16</sup> The situation is critical in terms of spreading of disease and insufficient food supply, clean water, fuel, medicines and healthcare for sick and injured people. The number of civilians killed, injured and seriously ill in Gaza as a result of the crimes which are the subject of the present complaint will continue to grow if Israel's war of aggression against Palestine is not stopped.

The factual basis for the present complaint is elaborated on below in relation to the individual criminal acts: see generally parts 2–5, in particular part 3.

### **1.7 Why the present complaint is limited to crimes against humanity**

It has been an important consideration for the complainants to limit the present complaint to acts which are clearly punishable under the Criminal Code and concern facts for which the evidentiary aspects are clear and can be based on a broad selection of publicly available and

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<sup>12</sup> <https://www.dagbladet.no/nyheter/norske-borgere-far-forlate-gaza/80515565>

<sup>13</sup> <https://www.dagsavisen.no/nyheter/innenriks/2023/11/16/ingen-nordmenn-ut-av-gaza-torsdag/>

<sup>14</sup> <https://www.vg.no/nyheter/utenriks/i/WRPgak/ud-setter-opp-fly-fra-kairo-til-oslo-loerdag>

<sup>15</sup> <https://euromedmonitor.org/en/article/5908/Israel-hits-Gaza-Strip-with-the-equivalent-of-two-nuclear-bombs>

<sup>16</sup> <https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-41>

presumably reliable sources. By way of illustration, reference has been had to a number of such sources in the course hereof.

The present complaint does not concern war crimes: see the fifth paragraph of sections 103–107 of the Criminal Code. There are jurisdiction-related and evidentiary reasons for this in relation to the accused. This holds true, irrespective of whether the accused actually did aid and abet such acts. If warranted by the situation in Gaza, the legal basis may be broadened in order for the present complaint to be directed against the same persons at a later point in time. Already within a very short time after 9 October, there was a genuine risk of genocide directed at the Palestinian population.<sup>17</sup> The conditions for attempted aiding and abetting of genocide or even completed acts of genocide may be met: see section 101 of the Criminal Code: see sections 15–16. Genocidal intent is, however, very difficult to prove, even if such intent is present.

We consider that the prosecuting authority should now focus its attention on the crimes against humanity forming the subject matter of the present complaint. In the complainants' view, there is not much point in an indictment being overly broad, even though there may be a basis for further charges or more accused parties. The most important thing for the victims and trust in the Norwegian legal system, is that a targeted, precise and swift investigation be gotten under way immediately.

## **2. Further particulars on the accused – roles and statements**

### **2.1 Minister of Defense Yoav Gallant**

Yoav Gallant is a politician and has been the Minister of Defense in the Israeli Government since 2022.<sup>18</sup> He is also one of three persons in Israel's 'war cabinet', together with Prime Minister Benjamin Netanyahu and former Chief of the General Staff Benny Gantz.<sup>19</sup>

On 9 October 2023, it was Defence Minister Gallant who announced the imposition of the total blockade of Gaza. According to *The Times of Israel*, he stated:

'I have ordered a complete siege on the Gaza Strip. There will be no electricity, no food, no fuel, everything is closed.'<sup>20</sup>

According to the same source, he added:

'We are fighting human animals and we are acting accordingly.'

According to CNN, the next day, on 10 October 2023, he stated inter alia the following:

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<sup>17</sup> See, for example,.: <https://www.icj.org/gaza-occupied-palestinian-territory-immediate-ceasefire-necessary-to-prevent-further-civilian-casualties-and-crimes-under-international-law/>

<sup>18</sup> [https://en.wikipedia.org/wiki/Yoav\\_Gallant](https://en.wikipedia.org/wiki/Yoav_Gallant)

<sup>19</sup> <https://www.nytimes.com/2023/10/26/world/middleeast/israel-war-cabinet-hamas.html>

<sup>20</sup> [https://www.timesofisrael.com/liveblog\\_entry/defense-minister-announces-complete-siege-of-gaza-no-power-food-or-fuel/](https://www.timesofisrael.com/liveblog_entry/defense-minister-announces-complete-siege-of-gaza-no-power-food-or-fuel/)

‘Israel’s defense minister [Yoav Gallant] said he has “released all restraints” on the Israel Defense Forces’ troops in their fight against Hamas. [...] “Hamas wanted a change in Gaza, it will change 180 degrees from what he thought. They will regret this moment. Gaza will never return to what it was”, Gallant said, calling Hamas the ISIS of Gaza.’<sup>21</sup>

Official statements in Hebrew may be on the Defense Ministry’s webpage.<sup>22</sup>

On 28 October, Defense Minister Gallant stated the following on the radio:

“‘We moved to the next stage in the war”, Defense Minister Yoav Gallant said in remarks broadcast Saturday. “Last evening, the ground shock in Gaza. We attacked above ground and underground...The instructions to the forces are clear. The campaign will continue until further notice.”<sup>23</sup>

The same article contained a description of how the intensified bombing cut off virtually all communication between Gaza and the rest of the world.<sup>24</sup>

The aforementioned statement by Defense Minister Gallant, when read in context with similar statements made by other Israeli leaders (see part 2.5), also sheds light on the subjective conditions for guilt in relation to the crimes against humanity committed by the accused. It is emphasised that the requirement of intent here is solely awareness of the attack on the civilian population and intent as to its likely consequences for the civilian population: see part 3 for a more detailed discussion.

The main point here is to show that Defense Minister Gallant has played a key role in the decisions taken on acts that have also been directed at the civilian population in Gaza, and public communications on same. Defense Minister Gallant has been fully informed about the widely-publicised harmful effects of the blockade and the bombing on the civilian population in Gaza, which has only led to an intensification of the bombing and a sustained, almost total blockade. Israel’s overall attack on Gaza has been carried out in keeping with the plans made, approved and/or decided by the war cabinet or by Gallant himself as Minister of Defense. Whether any of the accused, or other Israeli leaders, apologise at some future point for the consequences of the attack on the civilian population in Gaza is immaterial. It is the intent at the time of the acts which is decisive.

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<sup>21</sup> [https://edition.cnn.com/middleeast/live-news/israel-hamas-war-gaza-10-10-23/h\\_72b24198b48f49dae4a02f53b6f9da81](https://edition.cnn.com/middleeast/live-news/israel-hamas-war-gaza-10-10-23/h_72b24198b48f49dae4a02f53b6f9da81)

<sup>22</sup> <https://www.mod.gov.il/Pages/default.aspx>

<sup>23</sup> <https://www.pbs.org/newshour/world/israeli-defense-minister-says-war-has-entered-new-stage-amid-expanded-ground-operation-in-gaza>

<sup>24</sup> <https://www.pbs.org/newshour/world/israeli-defense-minister-says-war-has-entered-new-stage-amid-expanded-ground-operation-in-gaza>

## **2.2 War cabinet member Benjamin Gantz**

Benjamin Gantz is a politician and former Chief of the General Staff of the Israeli Defense Forces, and a member of the war cabinet, together with Prime Minister Benjamin Netanyahu and Defense Minister Yoav Gallant.<sup>25</sup> Mr Gantz has been a key figure in the relevant decisions that have been taken or approved by the war cabinet and he was fully aware of the serious consequences for the civilian population in Gaza of the blockade and the heavy bombing.

## **2.3 Chief of the General Staff Herzl Halevi**

Herzl Halevi has been Chief of the General Staff of the Israeli Defense Forces since 16 January 2023.<sup>26</sup> This position is also known as ‘the Commander-in-Chief’, that is to say, the highest-ranking military leader.<sup>27</sup> The position is nevertheless subordinate to the Defense Minister,<sup>28</sup> currently Yoav Gallant. He has overall responsibility for executing militarily the decisions of the Government and the Defense Minister. He, too, was fully aware of the serious consequences for the civilian population in Gaza of the blockade and the bombing.

## **2.4 The aiding and abetting crimes against humanity**

The three accused have all had key roles in the attack on Gaza and have clearly aided and abetted the alleged punishable acts directed against the civilian population for the purposes of the relevant provision: see section 15 of the Criminal Code. The objective and subjective conditions for the aiding and abetting of crimes against humanity by the accused are discussed in further detail in part 3.

## **2.5 The question of whether the accused incited genocide, etc.**

A number of sources attribute similar statements to other Israeli politicians. At no time have Messrs Gallant, Gantz or Halevi distanced themselves from rhetoric that is close to or over the line of public and direct incitement (provocation) to genocide: see section 108 of the Criminal Code. That provision also covers public and direct incitement to commit crimes against humanity.<sup>29</sup> It is clear to see that they have either explicitly (Gallant), or implicitly through tacit consent by dint of their roles (Gantz and Halevi), committed or psychologically aided and abetted direct, public incitement to commit genocide and/or crimes against humanity.

Incitement to commit genocide and/or crimes against humanity constitutes an autonomous crime in Norwegian law and can therefore be applied on its own or in conjunction with aiding and abetting of a committed crime against humanity. The provision provides for punishment of 10 years’ imprisonment. The prosecuting authority should accordingly examine whether any of

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<sup>25</sup> [https://en.wikipedia.org/wiki/Benny\\_Gantz](https://en.wikipedia.org/wiki/Benny_Gantz)

<sup>26</sup> [https://en.wikipedia.org/wiki/Herzi\\_Halevi](https://en.wikipedia.org/wiki/Herzi_Halevi)

<sup>27</sup> [https://en.wikipedia.org/wiki/Chief\\_of\\_the\\_General\\_Staff\\_\(Israel\)](https://en.wikipedia.org/wiki/Chief_of_the_General_Staff_(Israel))

<sup>28</sup> [https://en.wikipedia.org/wiki/Chief\\_of\\_the\\_General\\_Staff\\_\(Israel\)](https://en.wikipedia.org/wiki/Chief_of_the_General_Staff_(Israel))

<sup>29</sup> The incitement alternative in section 108 is worded as follows: ‘Any person who directly and publicly incites any person to commit such an offence [as referred to in sections 101 (genocide) and 102 (crime against humanity)] [shall be subject to imprisonment for a term not exceeding 10 years]’.

the accused have committed an offence under that provision. Such incitement will also have encompassed the Norwegians in Gaza as potential victims.

In that context, it will be relevant to examine Defense Minister Gallant's statements in context with public statements by other Israeli politicians and military figures, since they have tended to be mutually exacerbating, which heightens the danger and seriousness of the statements.

For documentation of key Israeli political genocidal rhetoric and incitement to commit genocide, see the complaint in the case lodged before a federal court by inter alia the Rafto Prize winner (2023) [Defence for Children International – Palestine](#) with the American advocacy organisation [Center for Constitutional Rights](#) (New York). That case has been lodged against the President, Secretary of State and the Secretary of Defense of the US Government in order to have enforced the US's obligations under the UN Genocide Convention in order to prevent genocide and observed the prohibition on aiding and abetting of genocide.<sup>30</sup> The US, Israel and Palestine are all contracting parties to the Genocide Convention. Pages 24–35 of the complaint seeking a federal order document a series of public statements by Israeli leaders<sup>31</sup> which should, in principle, be caught by section 108 of the Criminal Code. Inter alia the third member of the war cabinet, who cannot be included in the present complaint due to immunity (see part 1), Prime Minister Benjamin Netanyahu, has made a number of statements in that category which taint the accused by virtue of their roles in conducting the war against the civilian population in Gaza in close cooperation with Prime Minister Netanyahu.<sup>32</sup>

### **3. The criminal acts which are the subject of the present complaint**

#### **3.1 Crimes against humanity – common conditions for a broad or systematic attack directed against a civilian population**

##### *3.1.1 The objective conditions in section 102 of the Criminal Code are applicable*

The common objective conditions [common material elements] which must be met in order for certain acts to constitute a crime against humanity are laid down in the introductory part of section 102 of the Criminal Code:

‘Any person is liable to punishment for crimes against humanity who as part of a broad or systematic attack on a civilian population [...].’

The fact that the attack must be directed against a ‘civilian population’ means that the victims must have status as civilians. The population must be largely civilian in nature.<sup>33</sup> The term

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<sup>30</sup> <https://ccrjustice.org/home/what-we-do/our-cases/defense-children-international-palestine-v-biden>

<sup>31</sup> [https://ccrjustice.org/sites/default/files/attach/2023/11/Complaint\\_DCI-Pal-v-Biden\\_ww.pdf](https://ccrjustice.org/sites/default/files/attach/2023/11/Complaint_DCI-Pal-v-Biden_ww.pdf)

<sup>32</sup> [https://ccrjustice.org/sites/default/files/attach/2023/11/Complaint\\_DCI-Pal-v-Biden\\_ww.pdf](https://ccrjustice.org/sites/default/files/attach/2023/11/Complaint_DCI-Pal-v-Biden_ww.pdf)

<sup>33</sup> Jo Martin Stigen, *Norsk lovkommentar til straffeloven* [Norwegian Commentary on the Criminal Code], Note 789, Gyldendal Rettsdata, 07.04.2023.



‘attack’ has mostly a human rights-related meaning.<sup>34</sup> The attack must be systematic or broad and directed against a civilian population: see below part 3.1.2 on the term ‘directed against’.

On the basis of the wording and content of the provision, there can hardly be any doubt that the intensified blockade that has impacted the entire civilian population in Gaza since 9 October 2023 has been systematically and methodically executed by Israel through its government and military forces. It has also been executed effectively pursuant to the objective of blocking, in practice, virtually all new access to fresh water, food, medicine, fuel and electricity. At the same time, Gaza, which is a small, densely-populated area in which half of the population are children, has been subjected to extensive, methodical bomb attacks by Israeli forces throughout the period from 7 October 2023 to the present. The bomb attacks have mostly directly impacted civilians and civilian infrastructure such as homes, schools, roads, hospitals, ambulances, etc., irrespective of what the military target behind the attacks may have been.

Israel, through its political and military leaders, has consistently refused to implement a ceasefire or pause in the attack on Gaza. On 18 October 2023, the US used its veto to prevent the international community from adopting a binding resolution in the Security Council on a ceasefire or humanitarian pause.<sup>35</sup> It was only on 15 November 2023 that the Security Council managed to adopt an in-principle binding resolution – *Resolution 2712 (2023)*<sup>36</sup> – which however only calls for a temporary humanitarian pause in hostilities.<sup>37</sup> Israel reacted immediately by stating that it would not comply with the request.<sup>38</sup>

From an international law standpoint, Israel’s attack on Gaza represents an unlawful war of aggression against Palestine and the Palestinian people, contrary to Article 2(4) of the UN Charter, and is, by all accounts, a crime of aggression for which Israeli political and military leaders bear joint criminal liability: see part 4 for a more detailed discussion of the limits on the right of self-defence and Israel’s unlawful occupation under international law of inter alia Gaza. However, war of aggression is not a criminal act under Norwegian law. Nor is there a condition under section 102 of the Criminal Code on crimes against humanity providing that the attack on a civilian population also represents an attack on a State or a people’s right of self-determination.

The decisive factor for whether the common conditions in section 102 are met are the actual conditions and consequences for the civilian population in Gaza as a result of the blockade and the bomb attacks.

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<sup>34</sup> Jo Martin Stigen, *Norsk lovkommentar til straffeloven*, Note 788, Gyldendal Rettsdata, 07.04.2023.

<sup>35</sup> <https://news.un.org/en/story/2023/10/1142507>

<sup>36</sup> <https://press.un.org/en/2023/sc15496.doc.htm>

<sup>37</sup> <https://www.theguardian.com/world/live/2023/nov/15/israel-hamas-war-live-updates-israeli-military-al-shifa-hospital-gaza-operation?filterKeyEvents=false&page=with:block-65552d1d8f08d1d922ef775e - block-65552d1d8f08d1d922ef775e>

<sup>38</sup> <https://media.un.org/en/webtv>

Although figures and statistics alone cannot describe the situation in Gaza, in this case they are illustrative of the consequences of the attack. According to the *Washington Post*, as at 13 November 2023, more than 11 100 people have been killed in Gaza since 7 October 2023, that is to say, in the course of five weeks.<sup>39</sup> Around 2/3 of those killed are women and children,<sup>40</sup> whilst many others have clearly been men without any connection to Hamas. At least 4 600 children have been identified as killed, whilst around 1 500 children are still missing after bomb attacks and are in all likelihood killed.<sup>41</sup> Thus, over 6 000 children have been killed in five weeks, and many of them could have likely been saved had it not been for the blockade. By way of comparison, 12 000 children were killed in Syria over the course of a 10-year war.<sup>42</sup> The number of people killed is updated on an ongoing basis.

Over 28 000 people have been injured in the bomb attacks in Gaza,<sup>43</sup> at least half of them probably children. For well-known medical reasons, children are generally fatally wounded more than grown-ups. Thus, the number of people killed and wounded in Gaza amounts to around 40 000 people out of a total population of about 2.2 million. This corresponds to almost 2% of the population. By way of comparison, this corresponds proportionately to almost 100 000 killed and wounded Norwegians in Norway, or almost 6.5 million killed or wounded Americans in the US, half of them children – in five weeks.

The term ‘broad’ attack in the criminal law provision refers to ‘number of victims’.<sup>44</sup> According to the *travaux préparatoires* for the Code, the term encompasses ‘massive, frequent, far-reaching acts carried out collectively with utmost seriousness’.<sup>45</sup>

‘The point is not to have isolated attacks or random acts caught by the definition. Attacks by a band of pirates against random victims do not come within the scope of the definition. An extensive attack against a civilian population, on the other hand, will come within its scope.’<sup>46</sup>

There is no doubt that Israel’s attack has been both broad and systematic for the purposes of the criminal law provision. Nor is there any doubt that the attack has entailed serious violations of a number of key universal human rights. These include the right to respect for life, freedom from inhuman or dehumanising treatment, freedom of movement, the right to respect for private and family life, freedom from hate speech, the right to freedom of assembly – rights and freedoms which have been grossly violated in Gaza by Israel through the combination of the

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<sup>39</sup> <https://www.washingtonpost.com/world/interactive/2023/gaza-rising-death-toll-civilians/>

<sup>40</sup> See [https://www.who.int/news/item/03-11-2023-women-and-newborns-bearing-the-brunt-of-the-conflict-in-gaza-un-agencies-warn?itid=lk\\_inline\\_enhanced-template](https://www.who.int/news/item/03-11-2023-women-and-newborns-bearing-the-brunt-of-the-conflict-in-gaza-un-agencies-warn?itid=lk_inline_enhanced-template)

<sup>41</sup> <https://www.washingtonpost.com/world/interactive/2023/gaza-rising-death-toll-civilians/>

<sup>42</sup> <https://www.washingtonpost.com/world/interactive/2023/gaza-rising-death-toll-civilians/>

<sup>43</sup> <https://www.washingtonpost.com/world/interactive/2023/gaza-rising-death-toll-civilians/>

<sup>44</sup> See the *travaux préparatoires* for section 102, and white paper Ot.prp. nr. 8 (2007-2008), page 281.

<sup>45</sup> Ot.prp. nr. 8 (2007-2008), page 281.

<sup>46</sup> Ot.prp. nr. 8 (2007-2008), page 281.



blockade and the extensive bombing. Health rights have been completely neglected. Children's universal rights have been violated to an even greater extent. Considerations of the best interest of the child in Gaza have been completely disregarded by Israeli political and military authorities. Over one million children have been impacted. Israel has not respected children's inherent right to life, right to survive, right to develop, or right to respect for their family life and right to treatment for serious illness and damage to health. These are rights which have literally been buried in the rubble by the bombing and the blockade. Thus, there can be no doubt that there has been an extremely far-reaching and serious attack on the human rights of the civilian population in Gaza. The attack goes to the very core of what particularly serious crimes against humanity involve.

### 3.1.2 *Specific remarks on the concept of an attack 'directed against a civilian population'*

The question could theoretically be asked whether the broad and systematic attack has been 'directed against a civilian population'. At the same time, it can be observed that the requirement for guilt under section 102 is intent, which encompasses intent as to probability: see section 22(b) of the Criminal Code, unlike section 101 on genocide, under which there must be qualified intent in the form of intention to wholly or partly destroy a national, ethnic, racial or religious group: see section 22(a) of the Criminal Code.

Bombing of Gaza which actually has been directed at military targets is, as a rule, not 'directed against' a civilian population if the individual attack complies with applicable rules governing warfare. Whether the different attacks go beyond the limits of international humanitarian law, or whether war crimes may have potentially been committed, is a separate discussion. Furthermore, it is correct, as observed in the *travaux préparatoires* for section 102, that the term civilian population 'does not [include] persons who actively take part in hostilities'.<sup>47</sup> Bomb attacks genuinely directed against Hamas military installations and combatants, including the military leadership, is not an attack directed against a civilian population. This point is sometimes presented as being that the civilian population must be the primary target of the attack, whilst attacks on legitimate military targets in accordance with international humanitarian law do not qualify as a crime against humanity.<sup>48</sup> It is important to understand, however, what is meant by primary target in that context and which interests are protected in a war situation as well.

First, it is not true that any absence of a war crime, potentially due to evidentiary challenges relating to the subjective intent in the event of bombing of (alleged) military targets which also impacts heavily on civilians, precludes a crime against humanity. The conditions for that crime stand on their own, even though there may be certain special considerations that come into play in a war situation. 'Crime against humanity' is intended to protect civilians' human rights, which certainly apply in armed conflict as well. This is given expression in the underlying acts covered by section 102(a)–j, where (k) is also a catch-all category for other serious human rights violations. Without a doubt, 'crimes against humanity' apply in and outside war:

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<sup>47</sup> Ot.prp. nr. 8 (2007-2008), page 282.

<sup>48</sup> See Douglas Guilfoyle, *International Criminal Law*, Oxford University Press, 2016, page 244.

‘If the scope of crimes against humanity was ever limited to the protection of (civilian) war victims this is no longer the case. At present, it serves the protection of civilians in general.’<sup>49</sup>

Second, in relation to what is a primary target, it is important to distinguish between a planned target and motive, and between intent and motive. As stated earlier, a crime against humanity does not require the same type of intent as to purpose as is required in relation to genocide, which can be understood more easily, although not necessarily, as a requirement of an ultimate objective of wholly or partly destroying a group of people: see section 101 of the Criminal Code. If an attack is intentionally directed against a civilian population in order to obtain a military advantage, the attack is primarily directed precisely against the civilian population, as a means of attaining another objective. The use of civilians as a means of war is contrary to human rights and international law, even though one or more given bomb attacks that kill both military personnel and civilians may, depending on the circumstances, be lawful under international humanitarian law. There may also be cases of exclusion of criminal liability for war crimes due to actual error because the target of the bombing appeared incorrectly as a military target and where there is not a sufficient degree of guilt for the incorrect bombing. There can be no question of using the latter scenario as a basis for a ground of exclusion of criminal liability in relation to the attack on Gaza as a crime against humanity. Here the attack, consisting of the blockade and the overall bombing, has been planned and executed militarily methodically according to the plan. Hence nor is there any doubt that the particular policy requirement in Article 7(2)(a) of the Rome Statute, to the effect that an attack against a civilian population must consist of the multiple commission of acts ‘against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack’, is satisfied in the present case.<sup>50</sup> The acts have been planned, set in motion and executed by key Israeli authorities at the highest level, with help from the Israeli military.

As regards the requirement itself that the civilian population must be the primary target of the attack, which has been put forward in some circles of legal theory and certain international legal decisions, it should be noted that that requirement does not follow explicitly from section 102 of the Criminal Code, the *travaux préparatoires* for section 102 or Article 7(1) of the Rome Statute, on which the Criminal Code is modelled. Nor is that requirement included in the definition in Article 7(2)(a) of an attack directed against a civilian population:

“‘Attack directed against any civilian population’ means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit the attack.’

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<sup>49</sup> See Kai Ambos, *Treatise on International Law, Vol. II: The Crimes and Sentencing*, Oxford University Press, 2014, p. 64.

<sup>50</sup> See also ICC, *Elements of Crimes*, Article 7 – Crimes against Humanity, Introduction, para. 3: ‘[...] It is understood that “policy to commit such attack” requires that the State or organization actively promote or encourage such an attack against a civilian population’.

What is emphasised here is not that the civilian population must necessarily be *the primary target*, but that the civilian population must be intentionally subjected to multiple acts which cause a civilian population to be impacted by serious human rights violations resulting from an intentional State or organisational policy or practice. Such an intentional policy or practice will be based on certain thinking about objectives and means, including potentially military strategy, so that the attainment of multiple parallel objectives might also be envisaged.

This means that the term ‘primary target’ must be applied with caution. It would, for example, be too simple to conclude that an attack is not directed against a civilian population for the purposes of the Criminal Code or the Rome Statute solely because, from the assailant’s viewpoint, the civilian population was not the ultimate target, for example, if it was to eliminate military personnel present in the same area as a civilian population.

Case-law on the use of a legal-theoretical auxiliary term such as ‘primary object of the attack’ has also made the picture much more nuanced. The purpose of the term seems to have been to exclude from the scope of crimes against humanity those cases where there has only been a *limited number* or *random civilian victims* who have been impacted by the attack.<sup>51</sup> This much was made clear in the *Katanga* judgment of the ICC (with further references in the notes for judgment):<sup>52</sup>

‘The civilian population must be the primary target and not the incidental victim of the attack. In order to determine whether the attack may be said to have been so directed, [one must] consider, *inter alia*, the means and method used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed in its course, the resistance to the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war.’<sup>53</sup>

It should be underscored that, according to the jurisprudence of the ad hoc tribunals founded on article 50 of the Additional Protocol I to the Geneva Conventions of 12 August 1949, the population so targeted must be primarily composed of civilians – the presence of non-civilians in their midst has therefore no effect on its status of civilian population. The Prosecution must therefore prove that the attack was not directed against a limited group of randomly selected persons. However, to such end, it suffices for the Prosecution to establish [...] that the civilians were targeted during the attack in sufficient number or in such a manner that the attack was effectively directed against the civilian population, without it being necessary for the Prosecution to prove that the *entire*

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<sup>51</sup> See [Case Matrix Network](#), *Crimes against Humanity, February 2017* (published with support from the EU and UD (Norway), pages 45–46 (with further references to case-law and legal theory).

<sup>52</sup> [International Criminal Court \(ICC\), Trial Chamber II, The Prosecutor v. Germain Katanga, 7 March 2014](#).

<sup>53</sup> See [Katanga](#) judgment, paragraph 1104.

population of a geographic area was targeted at the time of the attack.’ (emphasis added in the judgment)<sup>54</sup>

*3.1.3 More detailed discussion of the attack directed against the civilian population in Gaza*  
Unlike the situation discussed in the *Katanga* judgment, the blockade of Gaza has undoubtedly been ‘directed against the civilian population’ for the purposes of the Criminal Code and the Rome Statute, because it has impacted and impacts the entire population in Gaza, which consists mainly of women and children and men with no connection to Hamas’s military wing. As stated earlier, the population in Gaza is mainly a civilian population. This is sufficient to meet the legal condition of attack ‘directed against a civilian population’, since the blockade is one of the two main components of the intentional attack on the civilian population in Gaza.

In this case, however, the overall bombing of Gaza has also been directed against the civilian population for the purposes of the criminal law provision. It also seems to have been an integral part of Israel’s military strategy, that is to say, the blockade and the overall bombing were to impact the entire population of Gaza heavily and have a mutually exacerbating effect, either as a separate war objective, or as part of the displacement of the civilian population out of North Gaza or potentially ultimately out of all of Gaza, or potentially merely as a means of getting Hamas ‘exterminated’. It is again emphasised that it is not a requirement under section 102 that the consequences for the civilian population have been the purpose of the blockade and the bombing on the part of the accused.

Furthermore, according to settled international case-law, the presence of non-civilian (military) forces among a predominantly civilian population does not change its character as ‘civilian’:<sup>55</sup>

‘[T]he presence of hostile military forces among a predominantly civilian population does not change its character as “civilian”.’<sup>56</sup>

That the population must be ‘mainly’ civilian in order to have protection under section 102 of the Criminal Code and international law: see Article 7 of the Rome Statute, means that a certain quantitative assessment must be made of the proportion of military personnel in relation to civilians:

‘That the target population is predominantly civilian is enough, the presence of some military personnel will not deprive a population of its civilian character. In assessing whether a “population” is “civilian” the relative proportion of civilians and military

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<sup>54</sup> See *Katanga* judgment, paragraph 1105.

<sup>55</sup> See, for example, Kai Ambos, *Treatise on International Law, Vol. II: The Crimes and Sentencing*, Oxford University Press, 2014, p. 64.

<sup>56</sup> Kai Ambos, *Treatise on International Law, Vol. II: The Crimes and Sentencing*, Oxford University Press, 2014, p. 64. See also *Katanga* judgment, paragraph 1105, cited above in the main text.

personnel will be important; in this assessment military personnel who are hors de combat (i.e. the wounded, disabled, etc) will not count as civilians.’<sup>57</sup>

Although military personnel who are wounded or hors de combat in that context are deemed to be non-civilians, most estimates for Hamas as at 7 October 2023 have been around 40 000 military combatants in Gaza.<sup>58</sup> They make up only a very small portion of Gaza’s total population of around 2.2 million people at that same time and going forward.

In the light of the foregoing, there can be no doubt that the population in Gaza is mainly a civilian population for the purposes of the Criminal Code and the Rome Statute and that that civilian population enjoys protection under criminal law. The civilians who have been impacted by the total blockade as from 9 October 2023 are not small in number or random.

This is the crucial factor for the international law assessment under Article 7 of the Rome Statute and section 102 of the Criminal Code, which is modelled on none other than international law and the aforementioned Article 7. The blockade and the overall bombing have in fact been, to an extreme extent, directed against a civilian population for the purposes of international law and the criminal law provision. In international criminal law theory and case-law, for example, it has never been a requirement that the entire population in a geographical area must be attacked in order for it to qualify as an attack on a civilian population.<sup>59</sup> Yet that is exactly what is happening in Gaza. There is not a single civilian in Gaza who has not been seriously physically or psychologically affected by the overall attack on Gaza, or has not had his or her fundamental human rights grossly violated. This is above all true for the children in Gaza.

Israeli authorities, including the accused, have, subjectively speaking, been fully aware that the blockade has taken a heavy toll on the civilian population. The purpose of the blockade has probably also been to impact the entire population, in order to be able to eradicate Hamas more easily which, according to Israeli authorities, is the objective and the underlying motive for the blockade and the overall bombing. Thus, intentionally impacting the civilian population through the blockade is used as a means of attaining another objective. As emphasised earlier, however, the attack need not have taken place with the purpose of eliminating the Palestinian population or parts of it per se in order to qualify as a crime against humanity.<sup>60</sup> What is a

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<sup>57</sup> See, with further references to theory and case-law, Douglas Guilfoyle, *International Criminal Law*, Oxford University Press, 2016, page 244.

<sup>58</sup> See, for example, <https://www.reuters.com/world/middle-east/how-hamas-secretly-built-mini-army-fight-israel-2023-10-13/>

<sup>59</sup> See, with further reference to case-law, Kai Ambos, *Treatise on International Law, Vol. II: The Crimes and Sentencing*, Oxford University Press, 2014, p. 63.

<sup>60</sup> See generally about interpretation in Ot.prp. nr. 8 (2007-2008), page 281. See also about the corresponding interpretation of international law in Kai Ambos, *Treatise on International Law, Vol. II: The Crimes and Sentencing*, Oxford University Press, 2014, p. 63.

condition, however, one that is indisputably met here, is that the punishable act is collective in nature inasmuch as it is directed against a group of people or a population.<sup>61</sup>

In the same manner as with genocide, individuals become victims of a crime against humanity due to their kinship with the civilian population in question.<sup>62</sup> A civilian population may, for example, be attacked because the assailants consider that the civilian population in question or parts of it hold a given political view or support a State or organisation in an armed conflict. In that case, all civilians in the group will constitute an attacked civilian population for the purposes of the criminal law provision.

Precisely that latter viewpoint has been expressed by the highest political quarters in Israel, by President Isaac Herzog. He has been cited after stating the following publicly at a press conference on Friday 13 October (quotes in quotation marks as in the stated source):

‘As Israel engages in a massive campaign ahead of an anticipated full-scale ground invasion of the Gaza Strip, Israeli President Isaac Herzog said on Friday that all citizens of Gaza are responsible for the attack Hamas perpetrated in Israel last weekend that left 1,200 people dead. “It is an entire nation out there that is responsible,” Herzog said at a press conference on Friday. “It is not true this rhetoric about civilians not being aware, not involved. It’s absolutely not true. They could have fought against that evil regime which took over Gaza in a coup d’etat.”’<sup>63</sup>

Here, President Herzog identifies the entire civilian population in Gaza as guilty by association for Hamas’s (punishable) acts. Although President Herzog may have only meant that all citizens of Gaza’s population are *morally* responsible for Hamas’s acts, the entire population in Gaza gets tarred with the same brush as Hamas and Hamas’s brutal acts against civilians on 7 October and afterwards.

Thus, that association with serious criminals encompasses the vast majority of the population, which – on the basis of a rule-of-law and human rights assessment – is made up of entirely innocent men, women and children in Gaza. As far as the complainants are aware, nobody else in Israel’s political or military leadership, including the accused, has publicly distanced themselves from that statement and the description of Gaza’s civilian population. As early as in its Emergency Legal Briefing Paper of 18 October 2023, the American civil rights organisation the Center for Constitutional Rights<sup>64</sup> pointed to that statement by Israel’s President Herzog as facilitating a possible ‘genocidal moment’ in Gaza.<sup>65</sup> Moreover, in a

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<sup>61</sup> Kai Ambos, *Treatise on International Law, Vol. II: The Crimes and Sentencing*, Oxford University Press, 2014, p. 63.

<sup>62</sup> Ot.prp. nr. 8 (2007-2008), pages 281-282.

<sup>63</sup> [https://www.huffpost.com/entry/israel-gaza-isaac-herzog\\_n\\_65295ee8e4b03ea0c004e2a8](https://www.huffpost.com/entry/israel-gaza-isaac-herzog_n_65295ee8e4b03ea0c004e2a8)

<sup>64</sup> <https://ccrjustice.org>

<sup>65</sup> [https://ccrjustice.org/sites/default/files/attach/2023/10/Israels-Unfolding-Crime\\_ww.pdf](https://ccrjustice.org/sites/default/files/attach/2023/10/Israels-Unfolding-Crime_ww.pdf)

statement of 27 October 2023,<sup>66</sup> the UN Committee on the Elimination of Racial Discrimination expressed deep concern about hate and dehumanising speech directed against Palestinians as a group since 7 October 2023, which includes speech on the Internet and social media coming from Israeli senior officials, politicians, members of the Parliament and others. The Committee draws particular attention to the statement by the accused Minister of Defense Gallant, ‘in which he referred to the Palestinians as “human animals”, language which could incite genocidal actions’.<sup>67</sup>

At the same time, individuals can also be part of a civilian population under section 102 on a broader basis than nationality, ethnicity, race or religion, as in the case of genocide: see section 101 of the Criminal Code. As observed by the Ministry in the *travaux préparatoires* for the Code, ‘[the attacked population] need not distinguish themselves by having a national, ethnic, racial or religious aspect’.<sup>68</sup> This must also hold true for individuals who actually become part of the civilian population, for example, for reasons of work or visiting. This may have some implications in relation to the Norwegian citizens in Gaza as from 7 October 2023, provided they cannot also be viewed as Palestinians on the basis of family background, upbringing, ethnicity, etc. The point here is that the Norwegians need not necessarily define themselves as Palestinian or be defined by others as Palestinian in order to be protected as part of the civilian population in Gaza during the material period.

### *3.1.4 The subjective conditions [mental elements] are met in relation to the attack directed against a civilian population*

Like Article 7 of the Rome Statute, section 102 of the Criminal Code is based on a two-fold intent principle. The intent must cover both the common objective conditions in the introductory part of section 102 – which describes broad or systematic acts directed against a civilian population (see part 3.1) – and the objective conditions which describes each of the relevant underlying acts in (a)–(k). The intent must also encompass the underlying act as having been ‘part of’ the attack on the civilian population.

As stated above, in relation to a crime against humanity and attack on a civilian population for the purposes of section 102, it is not necessary to prove purpose [specific intent to destroy], as in the case of genocide. The abovementioned statements show, however, that key Israeli leaders have directed their anger and apparent need for revenge against the entire Palestinian population in Gaza. One example of a particularly wide-ranging statement from a member of the Israeli government is the suggestion in a radio interview in Israel to drop a nuclear bomb on Gaza. This led to his being immediately suspended from cabinet *meetings*, although he kept his place

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<sup>66</sup> <https://www.ohchr.org/en/press-releases/2023/10/occupied-gaza-strip-un-committee-calls-immediate-ceasefire-and-urges-end>

<sup>67</sup> See Committee on the Elimination of Racial Discrimination, *Statement 5 (2023) – Israel and the State of Palestine*, 27 October 2023: [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2FCERD%2FSWA%2F9904&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2FCERD%2FSWA%2F9904&Lang=en)

<sup>68</sup> Ot.prp. nr. 8 (2007-2008), page 281.



in the government.<sup>69</sup> Although intent to harm is not a requirement under section 102, such statements may be an aggravating circumstance if insufficient steps are taken to distance oneself from them.

The assailants' motive for the attack directed against a civilian population in relation to a crime against humanity is irrelevant for the question of guilt, as long as the attack is carried out deliberately and with intent as to purpose or intent as to probability in terms of the consequences of the attack, which in this case is directed against a civilian population. Intent as to probability is sufficient in order for the accused to meet the conditions for guilt: see section 21(b) of the Criminal Code. There can be no question of there being error as to fact or error as to law in relation to the accused, given their positions and roles in the attack.

When a high number of civilians are killed and injured in attacks that are claimed to be directed at military targets, when most of those killed and wounded are women and children, the bomb attacks as a whole have been 'directed against a civilian population'. Thus, the overall, methodical bombing of Gaza as from 7 October and afterwards, has been an 'attack directed against' the civilian population in Gaza. In any event, it is proven beyond all reasonable doubt that the bombing and the blockade together constitute both a broad and systematic attack directed against a civilian population, as Israel's military operation against Gaza has been planned, arranged and executed.

There can be no doubt that the accused have shown intent in terms of the attack on the civilian population in Gaza and its consequences. They have also '*understood that the act was part of an attack against a civilian population (or that it was highly likely that it was part of such an attack)*'.<sup>70</sup> This implies that the accused, in relation to each of the underlying acts in question – see section 102(a) (murder), (b) (extermination), (d) (forced displacement), (h) (persecution) and (k) (inhuman act) – have been aware of or believed it to be highly likely that the act was part of the Israeli authorities' plan for the attack on Gaza.<sup>71</sup> They have participated in drawing up and executing that plan themselves, by virtue of their key roles. No further documentation is then needed of what the individual accused have done or said at different stages. Objectively and subjectively speaking, all of the underlying acts have been an integral part of the attack on the civilian population.

In the following, the underlying acts will be addressed separately in turn. At the current stage of proceedings, it is logical to begin with the blockade as an 'inhuman act': see (k).

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<sup>69</sup> <https://www.timesofisrael.com/far-right-minister-says-nuking-gaza-an-option-pm-suspends-him-from-cabinet-meetings/>

<sup>70</sup> Ot.prp. nr. 8 (2007-2008), page 281.

<sup>71</sup> See Ot.prp. nr. 8 (2007-2008), page 281.



### **3.2 Both the blockade and the overall bombing of Gaza represent inhuman acts and, in any event, as a whole they constitute an inhuman act – section 102(k)**

#### *3.2.1 Legal basis (description of the offence)*

Section 102 of the Criminal Code implements Article 7 of the Rome Statute on crimes against humanity. The crime provided for in section 102(k) of the Criminal Code is worded as follows:

Any person is liable to punishment for crimes against humanity who as part of a broad or systematic attack on a civilian population [...] commits some other inhuman act of a similar type that causes great suffering or serious harm to body or health.

In order for an act to be considered an ‘inhuman’ act, it must, in a qualified manner, be contrary to human rights norms. The category of crime against humanity and the underlying acts referred to in section 102 of the Criminal Code: see Article 7(1) of the Rome Statute, is based on serious violations of human rights. The inhuman act in (k) need not be of the same nature as in (a)-(j), only of a similar nature and equal seriousness.

#### *3.2.2 The objective conditions in (k) are applicable*

As stated earlier, the stepped-up blockade put in place as from 9 October 2023 has formed a key part of the overall attack on Gaza: see above part 3.1. However, the blockade and its inhuman consequences for the civilian population in Gaza also constitute an inhuman act under section 102(k). To put it succinctly, the blockade represents a particularly serious ‘inhuman act’ for the purposes of the provision, being ‘of a similar type’ as the other acts listed in section 102 (a)–(j).

The blockade has led to ‘great suffering or serious harm to someone’s body or health’ for the Norwegians as well. The same holds true for the overall bombing of civilians in Gaza, which also represents a particularly serious inhuman act. In any event, the blockade and the overall bombing constitute an inhuman act for the purposes of the provision.

The term ‘health’ in section 102(k) is based on the wording ‘mental or physical health’ in Article 7(1)(k) of the Rome Statute, and accordingly also encompasses serious harm to psychological (mental) health. Children are generally at greater risk of suffering permanent psychological damage than adults. Young children who are physically injured in bomb attacks are also at greater risk of dying of injuries and disease caused by the bombing and the blockade, or sustaining permanent and serious injury, compared to adults. This is general medical knowledge. That knowledge is important in the appraisal of the suffering and the physical and psychological damage, given that around half of the population in Gaza are children. Around half of the Norwegians in Gaza after 7 October are children as well. Irrespective of purely physical injuries, they have endured great suffering and in all likelihood have incurred serious harm to their mental health whilst they have been in Gaza. The situation is one of a sustained period of bombing, shooting, loud bangs and other sounds associated with attacks and fear of death, fear of losing one’s loved ones, seeing dead bodies, injured people, people on the run,

etc. Add to that the lack of food, clean water, medicines, disease, sleep deprivation, etc. Adults and children have been through a living hell.

What the blockade has consisted of thus far and its consequences for civilians in Gaza is general knowledge through open and available sources. The blockade has led to a complete halt in supplies of fresh water, food, medicines, necessary equipment for treating patients and fuel/electricity. As from 27 October, the lines of communication were destroyed and/or shut down by Israel. That has inter alia made it difficult and sometimes impossible for healthcare workers and people injured following bomb attacks to find each other in time. Entry access for external humanitarian aid shipments and external medical workers has, in practice, been completely closed off. Only grossly insufficient quantities of emergency aid have been allowed to be driven in from Egypt.

There is largely no international disagreement on the great suffering the blockade has caused for the people in Gaza. The Israeli actions have impacted the entire civilian population in Gaza, so much so that virtually nobody who was in Gaza during the material period was able to avoid great suffering or serious harm to their body or health. On this basis alone, it appears that the conditions of the provision are met. Nevertheless, it can be helpful to elaborate on the facts in somewhat more detail.

After the present complaint has been lodged, more detailed documentation of the suffering and injuries will in all likelihood, be published in the media, in the UN system, by independent human rights organisations and potentially by States and through judicial processes. Even already general knowledge, however, can provide a sufficient factual basis for drawing the necessary legal inferences for the legal basis relied on and on which the present complaint is founded.

Given the nature of the situation, not all of the consequences of the total blockade imposed on 9 October made themselves felt immediately. However, due to the situation with parallel bomb attacks directed against Gaza, the consequences of the blockade swiftly became so serious that it becomes quickly apparent that that it exceeds the threshold for qualifying as an ‘inhuman act’ for the purposes of the provision. It must at any rate be deemed to have done so by 15 November 2023, when the first Norwegians got to leave. Long before then, extremely serious consequences had impacted the civilian population, including over one million children in Gaza.

In the aftermath, it is important to understand how the situation in Gaza has evolved, as it has implications for the objective and subjective conditions for criminal liability.

A BBC article of 27 October gives an instructive overview of the general situation from 7 October onwards.<sup>72</sup> For example, already by 21 October, an estimated 80% of buildings, school and healthcare institutions in Gaza were without electricity. According to the WHO, at that

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<sup>72</sup> <https://www.bbc.com/news/world-middle-east-20415675>

point more than 30 healthcare institutions throughout Gaza had been destroyed, whilst 1/3 of the hospitals and 2/3 of other healthcare facilities were closed down due to bombing or lack of energy supply. Even before 7 October and subsequently, when Israel first ordered the evacuation of North Gaza, over 75% of Gaza's population of at least 2.2 million people were registered as refugees by the UN (1.7 million people). Half a million of those people lived in overcrowded refugee camps in Gaza. After less than two weeks, by 20 October, the number of internally displaced people in Gaza since 7 October was around 1.4 million people, in one of the most densely populated areas in the world – while Gaza was being heavily bombed, and not just in the north. **Almost 60% of the population in Gaza are children or young adults under 25 years of age.** Even before 7 October, more than 80% of the people in Gaza were living in poverty, among the world's highest rate of unemployment, 45% in 2022. Before 7 October, Gaza received 400-500 trucks carrying humanitarian aid. After 9 October, Gaza received a total of 54 trucks, spread out over 20 trucks on 21 October, 14 trucks on 22 October and 20 trucks on 23 October. The absolute minimum was estimated by the UN to be 100 trucks a day for necessities of life.<sup>73</sup> By 30 October, the numbers killed in Gaza had exceeded 9000 people.<sup>74</sup> As at 29 October, between 3000 and 4000 of those killed were children, possibly even more.<sup>75</sup> As at 28 October, almost 20 000 people in Gaza had been injured in bomb attacks,<sup>76</sup> very many of them children. There is reason to believe that most of those killed and injured were women and children and men without any connection whatsoever to Hamas. **According to UNRWA, almost 70% of those killed were women and children.** On 30 October, UNRWA Commissioner-General Phillippe Lazzarina told the UN Security Council that 'this cannot be "collateral damage"', adding that Israel is carrying out 'collective punishment'.<sup>77</sup>

Since then, the numbers of people killed and injured in Gaza has only continued to climb. As at 6 November 2023, 10 305 people were estimated to have been killed, including 4 104 children killed and 1 270 children missing and assumed killed under rubble,<sup>78</sup> while at least 25 000 were injured<sup>79</sup> – including very many children. As at 15 November, the numbers of people killed and injured in Gaza were around 40 000, out of a population of around 2.2 million,

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<sup>73</sup> The information is taken from the same article: <https://www.bbc.com/news/world-middle-east-20415675>

<sup>74</sup> <https://www.vg.no/nyheter/utenriks/i/13R5vy/spiegel-tyske-shani-louk-22-som-ble-tatt-til-gissel-er-doeed>

<sup>75</sup> Figures for children killed as a result of the bomb attacks have varied somewhat. In an article of 29 October 2023 in the US publication *Huffington Post*, the figure given was 'at least 3,195 Palestinian children have been killed in Gaza'. In the same article, it is stated that the number of children killed in Gaza in the three weeks since 7 October 'has officially exceeded the number of children who died in conflict zones around the world each year since 2019, according to human rights groups'. The same article also states that the number of children killed in Gaza is probably even higher, because an additional 1000 children were reported missing and were likely buried under the rubble. See [https://www.huffpost.com/entry/gaza-children-killed-exceeds-global-annual-number\\_n\\_653ecd43e4b032a1c9b6d86](https://www.huffpost.com/entry/gaza-children-killed-exceeds-global-annual-number_n_653ecd43e4b032a1c9b6d86)

<sup>76</sup> <https://www.haaretz.com/israel-news/2023-10-28/ty-article-live/gazans-report-heaviest-night-of-attacks-since-outbreak-of-war-as-idf-expands-ground-op/0000018b-7420-d2fc-adcf-f77f6f340000>

<sup>77</sup> <https://www.theguardian.com/world/live/2023/oct/30/israel-hamas-war-live-updates-aid-trucks-enter-gaza-strikes-casualties-israel-targets-hit-syria-lebanon?filterKeyEvents=false&page=with:block-654023af8f0880c248192dd6#block-654023af8f0880c248192dd6>

<sup>78</sup> <https://edition.cnn.com/2023/11/07/middleeast/palestinian-israeli-deaths-gaza-dg/index.html>

<sup>79</sup> <https://www.aljazeera.com/news/2023/11/7/one-month-of-no-water-food-and-healthcare-for-gaza>

see above part 3.1.1. On 18 November, the *Washington Post* reported that the Gaza Health Ministry estimated that around 16 000 people had been killed; 12 000 were confirmed dead whilst 4 000 were reported missing under the rubble.<sup>80</sup>

The situation in Gaza has led inter alia to a massive need for operations and other vital healthcare in a situation where there is a lack of clean water, electricity, fuel and medicines due to the blockade. Israel has closed the entryway for all external medical assistance, which in itself constitutes an inhuman act in a war situation with so many sick and badly injured people, very many of whom are young children. The surgeon Mohammed Obeid, who works for Doctors Without Borders in Gaza, stated as early as 29 October 2023:

‘Hospitals are flooded with patients, amputations and **surgeries are being carried out without proper anaesthesia**, and morgues are flooded with dead bodies.’<sup>81</sup>

Even earlier, on 22 October 2023, 14 international health experts published an article in *The Lancet Regional Health – Europe* about the critical health situation in Gaza on 17 October 2023.<sup>82</sup> The article discusses a number of serious consequences of the bombing and the blockade that have a direct impact on life and health, in the form of risk of waterborne diseases and outbreaks of epidemics such as cholera, which is dangerous for patients with chronic illness, poor children who find themselves in critical living conditions, the development of post-traumatic stress disorder (PTSD) and complex PTSD in both children and adults. In an op-ed in the Norwegian newspaper *Aftenposten* on 25 October, five Norwegian academics who have worked in the West Bank and Gaza elaborated on the content of the article in *The Lancet*,<sup>83</sup> estimating that ‘**over 70% of the people injured in Gaza are women, children and elderly persons**’, while almost half of those killed were children. They further stated inter alia that **1000 people in Gaza are dependent on kidney dialysis** whilst **12 000 cancer patients** are dependent on medicines and radiation treatment. In addition, there are ‘**50 000 pregnant women, intubated ICU patients, newborns in incubators and patients waiting for operations**’.

It goes without saying that, with the much higher numbers of people killed and injured since then, and the ongoing blockade, the situation has only become much worse. The blockade has thus had a number of very serious consequences for civilians in Gaza in the current situation. It is precisely these consequences that make section 102(k) applicable.

When an assessment is to be made of the consequences, a sharp distinction should not be drawn between the overall bombing, on the one hand, and the blockade, viewed in isolation, on the other. Both acts have been committed with knowledge and intent by Israeli authorities, and they are mutually exacerbating. The bombing has made the blockade more inhuman, and the

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<sup>80</sup> <https://www.washingtonpost.com/world/2023/11/18/israel-hamas-war-gaza-news-palestine/>

<sup>81</sup> <https://www.vg.no/nyheter/utenriks/i/JQe2B7/angrepene-i-gaza-fortsetter-jeg-er-sjokkert>

<sup>82</sup> <https://www.sciencedirect.com/science/article/pii/S2666776223001862>

<sup>83</sup> <https://www.aftenposten.no/meninger/kronikk/i/kEgwXv/gaza-brenner-hva-gjoer-norge>

blockade has made the bombing of civilians and civilian infrastructure more inhuman. This holds true irrespective of whether or not an individual bombing act represents a war crime.

The effect of the blockade in a situation with extensive bombing has been that many civilian women and children and men with no connection to Hamas's military wing have probably lost their lives, lives which could have been saved, whilst others have undergone operations or amputations of limbs in torture-like circumstances without anaesthesia, made worse by the absence of sterilised instruments and proper post-operative care. This has happened to people badly injured by bomb attacks and others who have been sick with cancer or other life-threatening diseases. An amputation without anaesthesia equates to an extreme form of torture. It is also general knowledge that, at any given time, there are several hundred premature babies lying in incubators in Gaza who can die or be put through torture-like suffering when the electricity is cut off.

Hence, in the current actual context, the blockade is also of a similar type as murder in (a), torture in (f) and persecution in (h).

The Norwegian citizens in Gaza do not need themselves to have been directly subjected to the acts 'of a similar type' as referred to in, for example, (a) (murder) or f (torture). If the blockade on its own, the bombing, or the blockade and the bombing together, is/are held to be an inhuman act that has also impacted the Norwegians, that is sufficient in relation to the act as described in section 102(k). The complainants submit, as a matter of principle, that once Norwegian criminal law jurisdiction has been established under section 5 of the Criminal Code, section 102 will apply with full force and effect in relation to the entire attacked civilian population, not just the Norwegians as part of that population.

In any event, at least one Norwegian citizen has been killed in an Israeli bomb attack on the city Khan Younis: mother of two Ghadah Hassan Abudaqah, who had travelled to Gaza a few days before 7 October to take care of her sick father.<sup>84</sup>

### 3.2.3 *The subjective conditions are met*

Great suffering and serious harm to body and health have been inflicted on civilian men, women and children with knowledge and intent by the accused. They have fully understood that it has contributed to great suffering and serious harm. The consequences of the blockade and the bombing have been highly foreseeable.

It has clearly been an intentional objective of the blockade and the bombing that the civilian population was to be heavily impacted. The motive may have been revenge or retaliation. In any event, there is qualified intent as to probability and knowledge on the part of the accused meeting the test of the Rome Statute.

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<sup>84</sup> <https://www.nrk.no/norge/norske-ghadah-hassan-abudaqah-drept-i-gaza-1.16634980>

The decisive factor, however, is that there is no doubt that there was intent as to probability under section 22(b) of the Criminal Code in respect of all three of the accused. The aforementioned consequences have been a highly likely consequence of the military plan that has included both the blockade and the methodical bombing. The accused have taken part in all key decisions and in the execution of the plan at the highest levels throughout the period and they have been fully aware of the consequences of their actions. That the accused themselves may not have considered the blockade and the bombing to be unlawful and inhuman is irrelevant for the question of criminal liability.

#### *3.2.4 Conclusion*

All objective and subjective conditions for a crime against humanity in the form of an inhuman act are clearly met: see section 102(k) of the Criminal Code. It is an extremely serious inhuman act. The crime must be deemed to have been committed no later than 15 November 2023, when the first Norwegians were allowed to leave Gaza. Due to their key roles and participation in plans and decisions with full knowledge of the consequences for the civilian population in Gaza, the accused have aided and abetted the crime for the purposes of the provision: see section 15 of the Criminal Code.

### **3.3 Crime against humanity – section 102(a) of the Criminal Code (murder)**

#### *3.3.1 Legal basis (description of the offence)*

Section 102 of the Criminal Code implements Article 7 of the Rome Statute on crimes against humanity. The crime provided for in section 102(a) of the Criminal Code is worded as follows:

Any person is liable to punishment for crimes against humanity who as part of a broad or systematic attack on a civilian population [...] kills a person.

#### *3.3.2 The objective conditions related to murder are met*

According to the *travaux préparatoires*, the underlying act ‘homicide’ has the same meaning as ‘murder’ in the former section 233 of the Criminal Code of 1902. It now corresponds to ‘murder’ under the current section 275 of the Criminal Code. It is sufficient that a perpetrator has committed – or is criminally liable for – ‘a murder’,<sup>85</sup> provided the other conditions are met, that is to say, that the murder must be part of a broad or systematic attack on a civilian population.<sup>86</sup> A murder for the purposes of the provision means that someone commits an act with the intention of causing another person’s death. There must be a causal link between the act and the resulting death.<sup>87</sup> Manslaughter falls outside the scope of the provision.

Which acts of murder, then, are relevant in relation to the situation in Gaza from 7 October 2023 onwards when the bomb attacks started, and from 9 October onwards when the blockade was imposed?

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<sup>85</sup> Ot.prp. nr. 8 (2007-2008), page 282.

<sup>86</sup> Ot.prp. nr. 8 (2007-2008), page 282.

<sup>87</sup> See Ot.prp. nr. 22 (2008–2009) s. 183.

The complainants submit that the correct approach in relation to section 102(a) is to look at the effect of the overall bomb attacks in Gaza, together with the consequences of the blockade. Both the stepped-up blockade as from 9 October and the overall bombing have been part of the military plan for the attack on Gaza for which the accused were responsible for drawing up and executing. The acts have led to huge numbers of civilian men, women and children killed. As at 7 November 2023, there were some 10 000 people killed and around 25 000 injured in Gaza as a result of Israeli bombing,<sup>88</sup> in combination with the consequences of the blockade. The number of people killed has grown steadily and has been in keeping with the plan throughout. On 7 November, the Palestinian organisation *Defense for Children International* reported that 4 237 children were confirmed killed in the first month after 7 October, whilst 1 350 children were missing and presumed dead.<sup>89</sup> This totals over 5 500 children that have probably been killed. On 6 November, UN Secretary-General António Guterres stated that Gaza had become a graveyard for children:

“Gaza is becoming a graveyard for children. Hundreds of girls and boys are reportedly being killed or injured every day” said UN Secretary-General António Guterres yesterday. [...] “Without fuel, newborn babies in incubators and patients on life support will die.”<sup>90</sup>

The number of people killed has continued to climb steadily after 7 November as well: see above part 1.6 and part 3.1. It must also be assumed that many of the other people killed have been women who most certainly were civilians, whilst it is virtually certain that many of the others have been civilian men. In addition, a great many journalists and over 100 UN personnel have been killed in attacks.<sup>91</sup>

The fact that so many civilians and children have been killed is closely linked to the fact that much of the bombing has hit civilian homes, roads and other civilian infrastructure, including refugee camps, hospitals, ambulances, schools, etc. It is difficult to say how many of those killed could have been saved without the blockade, but since the accused are responsible for both causal factors – the bombing and the blockade – the internal breakdown of those two causes is immaterial from a legal perspective.

However, the fact that so many civilians, including so many children, have been killed, shows that the entire Israeli military operation directed at Gaza has been planned, designed and executed so that high numbers of civilians would be killed directly in a bomb attack or more indirectly as a result of injuries and the blockade. At no time has Israel stated that the civilians killed were not part of the plan or made adjustments to the military plan so as to protect civilians effectively. The two factors have also had a mutually exacerbating effect on each other.

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<sup>88</sup> <https://abcnews.go.com/International/timeline-surprise-rocket-attack-hamas-israel/story?id=103816006>

<sup>89</sup> [https://www.dci-palestine.org/4237\\_palestinian\\_children\\_killed\\_as\\_gaza\\_becomes\\_graveyard\\_for\\_children](https://www.dci-palestine.org/4237_palestinian_children_killed_as_gaza_becomes_graveyard_for_children)

<sup>90</sup> <https://news.un.org/en/story/2023/11/1143267>

<sup>91</sup> <https://news.un.org/en/story/2023/11/1143267>



Civilians have also died because life-saving treatment for life-threatening diseases and necessary hospital care for pregnant women and premature infants could not be provided as usual. Injury patients have died because they could not be operated on or given adequate treatment due to the lack of medical equipment, food supplies, clean water, fuel and electricity.

It is not a requirement for criminal liability that each individual person who has been killed must be capable of identification. It will probably be possible eventually to document in greater detail who was killed and how they died. The evidentiary burden for guilt is discharged if it is proven beyond all reasonable doubt that at least person was killed as a consequence of the overall bomb attack and/or the blockade. The complainants submit that it is proven beyond all reasonable doubt that thousands of civilians, including children, have been killed for the purposes of the criminal law provision.

In the complainants' submission, there is no requirement that any of the Norwegians must have been killed. Since the requirements of (k) are met in relation to the Norwegians, including the individual complainants, the requirement laid down in the fifth paragraph of section 5 of the Criminal Code, to the effect that 'the act [...] is directed at someone who is a Norwegian national or domiciled in Norway', is met for a crime against humanity.<sup>92</sup> The acts of the accused have been directed against Norwegian citizens as part of the civilian population in Gaza under the common conditions: see above part 3.1, and the same is true for the specific conditions under (k). It is not a requirement under (a) on murder that the act that led to the death was specifically directed against a given person in such a situation. A typical feature of crimes against humanity is that the acts are directed against a group of civilians: see above part 3.1. This is decisive in relation to the underlying act of murder as well.

The complainants submit that all relevant criminal law offences listed in (a)–(j) in the present case come within Norwegian criminal law jurisdiction and can be investigated and prosecuted in Norway. At the very least, this must be so if at least one of the offences has been committed in relation to the Norwegians: see above on (k), which undoubtedly is applicable. The criminal law jurisdiction for investigation goes even further, because investigation may be required in order to decide whether an act has been directed against a Norwegian citizen.

In any event, the matter comes within Norwegian criminal law jurisdiction if at least one of the Norwegian civilians in Gaza during the material period has been killed as part of a broad or systematic attack directed against a civilian population. That is the case here. **Mother of two Ghadah Hassan Abudaqah was killed in an Israeli bomb attack on the city Khan Younis.**<sup>93</sup> **A father, Mohamed Almokayed, was later killed in another bomb attack.**<sup>94</sup> The attacks were, for the purposes of the provision, 'part of' the broad and systematic attack directed against the civilian population in Gaza: see above part 3.1.

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<sup>92</sup> See above part 3.1–3.2.

<sup>93</sup> <https://www.nrk.no/norge/norske-ghadah-hassan-abudaqah-drept-i-gaza-1.16634980>

<sup>94</sup> <https://www.nrk.no/norge/ud-nok-en-norsk-borger-er-drept-i-gaza-1.16643748>



### 3.3.3 *The subjective conditions [mental elements] related to murder are met*

The requirement of intent follows from section 22 of the Criminal Code which, in relation to murder, encompasses murder committed deliberately [specific intent], intent as to probability or possibly intent [dolus eventualis]. The requirement of intent in the Rome Statute is somewhat more stringent inasmuch as Article 30 as a rule includes only intent as to purpose (with knowledge and intent) and a relatively stringent requirement of intent as to probability in the terms of the consequences of the act. There, the requirement is that the perpetrator is aware that the consequence – that one or more persons will die – will occur in the ordinary course of events. The requirement of probability is higher here than a preponderance of probability under the Norwegian Criminal Code. Unless otherwise provided, dolus eventualis is generally excluded under Article 30. There are no specific rules on the subjective requirements of Article 7 of the Rome Statute on crimes against humanity.

In relation to section 102 of the Criminal Code, however, it is clear that it is the Norwegian concept of intent that is to be applied. This is apparent both from the context of the Code itself and the *travaux préparatoires*.<sup>95</sup> In any event, in this case as well the requirement of intent in the Rome Statute is also met.

It is clear from the circumstances that the accused have been fully aware that large numbers of civilians would be killed as a direct consequence of the extensive bomb attacks. There has clearly been intent as to probability that the planned and executed military operation in the form of the blockade and the overall bombing would lead to many civilians being killed, which indeed happened each and every day. The only additional explanation that should be added here is perhaps that the accused at least believed it was ‘more likely than not that the act [the act of murder] was part of such an attack’.<sup>96</sup> There is no requirement that the accused intended to kill certain individuals or believed it to be highly likely that certain persons would be killed. The requirement of intent in relation to (a) is therefore clearly met, including in relation to the murder of Ghadah Hassan Abudaqah: see above part 3.3.2.

### 3.3.4 *Conclusion*

All objective and subjective conditions for a crime against humanity in the form of murder are clearly met: see section 102(a) of the Criminal Code. The crime must be deemed to have been committed no later than 15 November 2023, when the first Norwegians were allowed to leave Gaza. Due to their key roles and participation in plans and decisions with full knowledge of the consequences for the civilian population in Gaza, the accused have aided and abetted that crime for the purposes of the provision: see section 15 of the Criminal Code.

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<sup>95</sup> Ot.prp. nr. 8 (2007-2008), page 71–72.

<sup>96</sup> Ot.prp. nr. 8 (2007-2008), page 281.

### 3.4 Crime against humanity – section 102(b) of the Criminal Code (extermination)

#### 3.4.1 Legal basis (description of the offence)

Section 102 of the Criminal Code implements Article 7 of the Rome Statute on crimes against humanity. The crime provided for in section 102(b) of the Criminal Code is worded as follows:

Any person is liable to punishment for crimes against humanity who as part of a broad or systematic attack on a civilian population [...] exterminates a population wholly or in part, including by inflicting living conditions on the population or parts thereof that are intended to exterminate the population wholly or in part.

#### 3.4.2 The objective conditions related to extermination are met

Section 102(b) applies to a person who ‘exterminates a population wholly or in part, including by inflicting living conditions on the population or parts thereof that are intended to exterminate the population wholly or in part’. It is modelled on Article 7(b) of the Rome Statute on extermination. That term is defined in greater detail in Article 7(2)(b), where the definition and thus scope of the provision is broader than what the term ‘extermination’ on its own might suggest:

“‘Extermination’ includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population.’

Point (b) is thus a provision that not only concerns direct murder, but also the creation of deadly living conditions for a population.<sup>97</sup> The murders are then committed in a more indirect manner, but it is still murder. The *travaux préparatoires* emphasise that inflicting living conditions intended to bring about extermination is caught by the provision.<sup>98</sup> According to the Ministry, partial or total extermination entails that ‘mass murder – direct or indirect’ comes under (b).<sup>99</sup> This means ‘murder on a large scale’, with no ‘minimum number’.<sup>100</sup> It is nevertheless ‘sufficient that the individual perpetrator has committed or aided and abetted a single murder’.<sup>101</sup>

As regards the facts, reference is made to the explanations above in the present complaint (see part 3.1, and part 3.3.1 on murder). The combination of the blockade and the overall bombing has transformed Gaza into one huge crime scene and a mass grave for dead children and other civilians. It nevertheless bears repeating that the numbers of people killed and injured in Gaza

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<sup>97</sup> See Kai Ambos, *Treatise on International Law, Vol. II: The Crimes and Sentencing*, Oxford University Press, 2014, p. 84–85.

<sup>98</sup> Ot.prp. nr. 8 (2007-2008), page 282.

<sup>99</sup> Ot.prp. nr. 8 (2007-2008), page 282.

<sup>100</sup> Ot.prp. nr. 8 (2007-2008), page 282.

<sup>101</sup> Ot.prp. nr. 8 (2007-2008), page 282.

as at 15 November 2023 were reported to be around 40 000, out of a population of around 2.2 million (see above part 1.6, part 3.1–3.3). This corresponds to almost 2% of the population.

As explained earlier, this corresponds proportionately to almost 100 000 killed and wounded Norwegians in Norway, or almost 6.5 million killed or wounded Americans in the US. A comparison such as this is relevant because international criminal courts have sometimes used numbers killed as a proportion of the population in their deliberations.<sup>102</sup> At the same time, it is emphasised in the *travaux préparatoires* that ‘it is sufficient that part of the population is exterminated’.<sup>103</sup>

In the light of the foregoing, there can be little doubt that, irrespective of how the calculation is done, the numbers of people dead and dying in Gaza are high enough that it must be deemed that extermination has been inflicted on part of the Palestinian population for the purposes of the criminal law provision. The act is ongoing. Obviously, a factor in this situation is that so exceptionally many of those killed, injured, sick or dying in Gaza are children. The murders in Gaza have occurred both directly and indirectly. The bomb attacks have led to most people being exterminated by direct bomb attack. There is no objective additional requirement here. It has affected so many people that the objective conditions for direct extermination are met on that basis.

On the other hand, the crime of inflicting on a population ‘living conditions ... intended to exterminate the population wholly or in part’ involves particular requirements as to objective which must be met.<sup>104</sup> In the case of Gaza, that requirement as to intent is met for the indirect murders. In the military plan, the deliberate combination of total blockade and the overall bombing has had extermination as one of its objectives. Those two factors have fostered deadly living conditions in Gaza for the civilian population. There are many people injured and sick who will necessarily die as a result of the blockade and its effects, people who otherwise would not have died. It is, in any event, not a requirement that extermination must have been the sole objective. Political and military leaders will generally have a number of objectives they wish to attain simultaneously or successively through their acts. That has also been the case here. There is, for example, no doubt that Israeli leaders have stated that the objective has been and is to exterminate Hamas. That objective is not however incompatible with that of exterminating a civilian population wholly or in part. On the contrary, the two objectives can bolster each other, politically and militarily.

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<sup>102</sup> See Ot.prp. nr. 8 (2007-2008), page 282, particularly with reference to the *Krstić* case before the ICTY (paragraphs 502–503).

<sup>103</sup> Ot.prp. nr. 8 (2007-2008), page 282.

<sup>104</sup> See Ot.prp. nr. 8 (2007-2008), page 282: ‘(b) presupposes that the crime can be committed by exterminating a people wholly or in part, including by inflicting on the population living conditions the aim of which is extermination.’ The objective of extermination is thus connected solely to indirect forms of murder. Direct mass murder can, by definition, constitute extermination, in which case intent will be required only with respect to the murders themselves.

That mass murder has been an autonomous objective is substantiated by how the military operation on Gaza has been executed methodically whilst, at the same time, the murders and the deadly consequences for civilians have been sustained and on the increase throughout this time. Despite international calls to do so, Israeli leaders have refused to end or ease the total blockade introduced, refused to allow emergency aid to enter and refused to stop or pause the bombing, even after everything that has become publicly and internationally known all along about the suffering in Gaza. Extermination of civilians has thus clearly been part of the attack directed against the civilian population.

The Norwegians in Gaza have not been spared the same acts that have led to mass murder of civilians. They have been part of the civilian population, and it has been pure chance as to who has been killed or is dying in Gaza. As stated earlier, a Norwegian woman and a Norwegian man have been killed: mother of two Ghadah Hassan Abudaqah and a father, Mohamed Almokayed. Others still in Gaza can yet be killed. The complainants submit that there is clearly no requirement that the Norwegians must be exterminated wholly or in part for in order for a complaint to be lodged under (b).

All objective conditions under (b) are therefore met.

#### *3.4.3 The subjective conditions related to extermination of a population wholly or in part are met*

The accused have been key figures in the planning and execution of the military attack on Gaza's civilian population. They have had a full overview of the mass murders and supported them through their respective decisions, orders and omissions. There is no doubt that there is intent as to probability of extermination of a civilian population wholly or in part in the form of direct and indirect mass murder of civilians in Gaza for the purposes of the provision.

#### *3.4.4 Conclusion*

All objective and subjective conditions for a crime against humanity in the form of extermination (mass murder) are met: see section 102(b) of the Criminal Code. The crime must be deemed to have been committed no later than 15 November 2023, when the first Norwegians were allowed to leave Gaza. Due to their key roles and participation in plans and decisions with full knowledge of the consequences for the civilian population in Gaza, the accused have aided and abetted that crime for the purposes of the provision: see section 15 of the Criminal Code.

### **3.5 Crime against humanity – section 102(d) of the Criminal Code (forcible transfer)**

#### *3.5.1 Legal basis – description of the offence*

Section 102 of the Criminal Code implements Article 7 of the Rome Statute on crimes against humanity. The crime provided for in section 102(d) of the Criminal Code is worded as follows:

Any person is liable to punishment for crimes against humanity who as part of a broad or systematic attack on a civilian population [...] deports or forcibly [transfers] a population contrary to international law.

3.5.2 *The objective conditions related to unlawful forcible transfer of a population are met*  
Point (d) encompasses both deportation and forcible transfer contrary to international law. The wording ‘contrary to international law’ suggests that the term is wide-ranging because ‘international law’ is wide-ranging: see the corresponding wording ‘without grounds permitted under international law’ in Article 7(2)(d) of the Rome Statute (see below). The term is intended to catch acts which are illegal or unlawful under international law. It can encompass substantive prohibitions on certain conduct and procedural requirements that must be complied with in order for the act to be held to be lawful under the relevant rules.

Deportation entails that a population is forced across an international border, whilst forcible transfer entails forcible transfer internally in a country. Thus, in both cases it is a condition that the displacement not only is forcible, but also contrary to international law. A forcible transfer can become a deportation. There is no requirement that the entire population must be forcibly transferred or deported in order for the provision to be applicable. In Article 7(2)(d) of the Rome Statute, the corresponding terms ‘deportation’ and ‘forcible transfer of population’, on which the legislative provision is based,<sup>105</sup> are given the following legal definition:

“‘Deportation or forcible transfer of population’ means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.’

Expulsion or acts which constitute ‘other coercive acts’ entailing forcible displacement are also wide-ranging terms. The essential point here is that people in practice are forced to leave their lawful places of residence due to deliberate violent acts or other forms of force, including threats.<sup>106</sup>

The *travaux préparatoires* give some examples of acts ‘contrary to international law’, although the list is not exhaustive. Human rights encompass absolute protection against expulsion of one’s own citizens and absolute protection against collective expulsion of foreigners.<sup>107</sup> Nor can there be any encroachment on the right to respect for the home or family life without it being necessary in a democratic society. Forcible displacement of civilians is, as a rule, unlawful, and may constitute a crime against humanity, including in a war situation. The *travaux préparatoires* point out that, in *Krstic*, the International Criminal Tribunal for the Former Yugoslavia (ICTY) found that the forcible displacement of around 25 000 Bosnian Muslims from Srebrenica in the course of two days in 1995 to another area, under Bosnian Muslim control, constituted a crime against humanity.<sup>108</sup> In those cases, the Bosnian Muslims were forced to leave Srebrenica under threat and were transported by bus to the new area.<sup>109</sup>

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<sup>105</sup> Ot.prp. nr. 8 (2007-2008), page 282.

<sup>106</sup> Ot.prp. nr. 8 (2007-2008), page 282.

<sup>107</sup> Ot.prp. nr. 8 (2007-2008), page 282.

<sup>108</sup> Ot.prp. nr. 8 (2007-2008), page 282.

<sup>109</sup> Ot.prp. nr. 8 (2007-2008), page 282.

If the persons choose themselves to move from their homesteads so as avoid being killed or are explicitly threatened with violence if they do not comply with an order, it does not matter if the choice is in any event made on grounds of actual risk of violent attack. Such violence can also consist of bomb attacks or starvation. Nor is the wording of a military order decisive, for example, if it is phrased as an ‘offer’ or ‘recommendation’ or whether the stated reason is that it is out of concern for the civilians themselves. It is the actual element of force that is decisive. This does not mean that each and every forcible transfer of a population also meets the additional condition that it must be ‘contrary to international law’: see below for a more detailed discussion.

On one point there is a difference of nuance between the wording in the *travaux préparatoires* for the Code and the definition in Article 7(2)(d) of the Rome Statute. In the *travaux préparatoires* it is explained that deportation takes place ‘from one State to another, whilst forcible displacement takes place within the same State’.<sup>110</sup> Although this will be the usual situation, the wording of the Rome Statute is not tied to the term ‘State’. Therein the wording is ‘from the area in which they are lawfully present’. There are several good reasons for this. For example, in general international law there can also be deportation when someone is sent out to sea. A deportation will normally have been committed once a State border has been crossed. From a human rights perspective, it is the forcible transfer itself that is the key factor, hence formalistic requirements should not be read in that might limit the protection contrary to the purpose of the rules. The point in relation to Gaza is that the specific protection under (d) is not contingent on whether Palestine is considered to be a ‘State’ in which Gaza is part of Palestine. The protection against external and internal forcible displacement is intended to be mutually complementary, without lacunae. The provision must be interpreted in that light. The *travaux préparatoires* also explicitly refer to Article 7(1)(d) and 7(2)(d) of the Rome Statute, without suggesting any intention that Norwegian law is to be substantively more restrictive on this point. If part of the Palestinian population are forced out of Gaza and into Egypt, however, it is clear that it is a deportation contrary to international law, whilst forced displacement internally in Gaza can be forcible transfer contrary to international law: see below.

As at 15 November 2023, there had not actually been a deportation from Gaza to Egypt, at least not to any particular extent. Foreign citizens have been gradually able to leave Gaza through the border into Egypt, including Norwegians as from 15 November. A number of them have, by all accounts, been subjected to prior forcible transfer, including out of North Gaza. What has become known is that Israeli authorities have made plans for possible mass deportation of Palestinians into Egypt, ‘deemed to be the best option for Israel’s security’.<sup>111</sup> A number of people from the Likud party of the accused Minister of Defense Yoav Gallant have publicly supported such a plan.<sup>112</sup> Such a mass deportation will be contrary to international law under section 102(d) and constitute an autonomous crime against humanity.

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<sup>110</sup> Ot.prp. nr. 8 (2007-2008), page 282.

<sup>111</sup> <https://www.nbcnews.com/news/world/palestinians-forced-gaza-egypt-israel-proposal-outrage-rcna122934>

<sup>112</sup> See with further links: <https://www.nbcnews.com/news/world/palestinians-forced-gaza-egypt-israel-proposal-outrage-rcna122934>

On 4 November, the United Nations Office for the Coordination of Humanitarian Affairs (OCHA), <sup>113</sup> estimated that 1.5 million Palestinians (out of a population of around 2.2 million) in Gaza were internally displaced. <sup>114</sup> The numbers have increased steadily ever since the bombing of Gaza began on 7 October 2023. According to the UN, there were 1.6 million internally displaced persons as at 18 November 2023, <sup>115</sup> corresponding to around 3/4 of the population in Gaza. This would equate to almost 4 million Norwegians on the run internally in Norway, in a situation with a blockade, extensive bomb attacks, mass murder of civilians and high numbers of people sick and injured without access to normal healthcare. For us in Norway, it is almost impossible to imagine what such a situation is like for the civilian population.

The decisive legal factor for whether (d) is applicable is thus whether the forcible transfer has been ‘contrary to international law’. Has it nevertheless been lawful to force the population in Gaza from their homesteads on the basis of legitimate military considerations and/or out of concern for the displaced persons themselves?

What is contrary to international law can be multi-layered. By way of example, Russia’s unlawful and criminal war of aggression against Ukraine means that nothing done by Russian forces on Ukrainian territory is lawful. Everything is contrary to international law and unlawful. To put it succinctly, Russian forces should not be in Ukraine. Of course, this does not mean that all of the unlawful acts also constitute war crimes or crimes against humanity; the usual conditions for such acts must also be met here. The point of departure under international law in relation to Gaza is that Israel occupied Gaza long before 7 October 2023. For the purposes of international law, Gaza has been continuously occupied since 1967: see briefly below and part 4 for a more detailed discussion on this issue in the context of the right of self-defence as a possible ground of exclusion of criminal liability for crimes against humanity. The occupation was, by all accounts, unlawful prior to the watershed moment of 7 October: see part 4 for a more detailed discussion. In short, it means that, under international law, Israel’s justified reactions to Hamas’s attack on civilians on 7 October must be kept within certain parameters in order to be a lawful act. Those parameters have been completely pulverised.

The attack on Gaza after 9 October 2023 through the imposition of the total blockade and continued intensive bombing of civilians and civilian infrastructure, including acts such as actual forcible transfer and evacuation orders, have therefore been unlawful acts on the basis of international law on war of aggression (*jus ad bellum*) alone. That Stortinget [the Norwegian parliament] has not wanted to criminalise war of aggression in Norwegian law is immaterial, since section 102(d) expressly refers to an assessment of the lawfulness on the basis of all relevant international law. International law on war of aggression is part of the relevant international law. On that basis alone, it can be concluded that the condition in (d), to the effect

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<sup>113</sup> <https://www.unocha.org/>

<sup>114</sup> <https://reliefweb.int/report/occupied-palestinian-territory/hostilities-gaza-strip-and-israel-flash-update-29>

<sup>115</sup> <https://reliefweb.int/report/occupied-palestinian-territory/hostilities-gaza-strip-and-israel-flash-update-43-enar>

that the forcible transfer must be contrary to international law in order to constitute a crime, is met.

An alternative basis for considering the displacement to be contrary to international law can be found in the rules on humanitarian law (the Geneva Conventions) and in the Rome Statute on war crimes. Displacement of a civilian population by an occupying power, either outside the territory of the population (deportation) or internally in the occupied area, is a war crime under Article 8(2)(b)(viii) of the Rome Statute:

‘The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside the territory.’

The term ‘transfer’ (displacement) in that provision must, however, be interpreted narrowly in accordance with the rules of humanitarian law.<sup>116</sup> Although each and every forcible transfer of civilians will, as a rule, be an unlawful act for human rights purposes, the specific rules of humanitarian law on the evacuation of civilians may mean that the act nevertheless can be viewed as lawful under international law within that part of international law (*jus in bello*). This comes to the fore when attempts are made to justify the displacement in question on grounds of legitimate evacuation considerations such as military necessity and the population’s own safety. The possible relevant legal bases for this are Article 49(2) of the Fourth Geneva Convention (international armed conflict), or possibly Article 17 of Protocol II to the Geneva Conventions (non-international armed conflict).

The UN and most international institutions and organisations assume, correctly, that Gaza is occupied.<sup>117</sup> Norwegian courts should, for example, accord considerable weight to the fact that, in 2021, the International Criminal Court (ICC) held that Gaza has been occupied by Israel in its decision on the ICC’s territorial jurisdiction over all the occupied Palestinian territories since 1967, namely Gaza, the West Bank and East Jerusalem.<sup>118</sup> Hence it is Article 49(2) that is applicable. That provision lays down several cumulative conditions which must be met in order for a forcible evacuation to be lawful:

- it must be required on grounds of the population’s safety or imperative military reasons;
- the evacuation must not displace persons to outside the occupied territory unless it is impossible to avoid;
- evacuated persons must be moved back home as soon as hostilities have ceased;
- the occupying power must ensure decent accommodation for the evacuated persons;
- the evacuation must be effected in satisfactory conditions of hygiene, health, safety and nutrition;

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<sup>116</sup> See ICC, Elements of Crimes (official source for the interpretation of the Rome Statute), note 44.

<sup>117</sup> See, by way of information, further references and links:

<https://www.atlanticcouncil.org/blogs/menasource/gaza-israel-occupied-international-law/>

<sup>118</sup> ICC, Pre-Trial Chamber I, Decision on the Court’s jurisdiction in Palestine, 5 February 2021, see [https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021\\_01165.PDF](https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_01165.PDF)



- members of the same family must not be separated.

It is highly doubtful that the first bullet point has been observed. What have been ‘imperative military reasons’ must be construed within the framework of the right of self-defence under international law: see part 4. In other words, Israel does not get to decide itself what is required by ‘imperative military reasons’ for the purposes of the provision. The consideration of the population’s safety cannot be examined in a vacuum. Already as from 9 October, the Israeli attack on Gaza went far beyond lawful self-defence. It is that attack that has primarily threatened the population’s safety. That threat could have been eliminated by Israel halting the bomb attacks and the plans for a ground invasion, and refraining from imposing a total blockade. They make it difficult to conclude that the evacuation out of North Gaza and other places is based on a legitimate concern for the population’s safety or imperative military reasons.

In any event, none of the last four bullet points have been observed in connection with the forcible and hasty ‘evacuation’ of over a million people out of North Gaza. There have been no promises from Israeli authorities to the effect that the people evacuated will get to move back to their homes and homesteads. Very many of the homes and locations have been completely destroyed by Israeli bombing. Israel has done nothing to provide any accommodation for the people evacuated. On the contrary, people from South Gaza as well have been subjected to heavy Israeli bombing of private homes, schools, refugee camps, hospitals, ambulances, roads and other civilian infrastructure. In addition, the bombing has made the displacement itself highly chaotic and unsafe, whilst at the same time the blockade has given rise to a highly precarious situation in terms of hygiene, nutrition and health in South Gaza as well. Many family members have become separated from each other.

It can be helpful to provide somewhat more details on the facts at this point. Already in the first week after 7 October, the Israeli military ordered (‘called for’ or ‘recommended’) a mass evacuation out of North Gaza, upon which over a million people fled southwards in Gaza.<sup>119</sup> Whilst the total blockade was imposed on 9 October, an evacuation order was issued by Israeli authorities on 13 October, with a 24-hour deadline to leave North Gaza.<sup>120</sup> At that point, the population was under threat from the ongoing bombing, blockade and ground invasion. Subsequently, more Israeli evacuation orders or ‘recommendations’, directed at South Gaza as well,<sup>121</sup> have come, even though there is nowhere safe in Gaza. Hospitals with sick and wounded patients have also been ordered evacuated, inter alia in connection with the Israeli

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<sup>119</sup> See, for example, Human Rights Watch: <https://www.hrw.org/news/2023/10/16/why-israels-gaza-evacuation-order-so-alarming>

<sup>120</sup> See, for example, AP, ‘Israel orders the evacuation of 1.1 million people from northern part of Gaza, the UN says’ <https://apnews.com/article/israel-palestinians-gaza-hamas-airstrikes-cabinet-beb1fa2b9e4ede6cf4568dd6c86ff11a>

<sup>121</sup> <https://www.aljazeera.com/news/2023/11/16/israel-orders-evacuation-in-parts-of-southern-gaza-amid-fears-of-escalation>

attack on the Al-Shifa Hospital<sup>122</sup> and the Indonesian Hospital.<sup>123</sup> This last type of act sends a clear signal to the civilian population in Gaza that nor are ‘protected places’ safe. It is a well-known means of particularly brutal psychological warfare along the lines of terrorist acts directed at medical workers and the most vulnerable (patients, wounded children, etc.).

On 5 November, Israel’s military forces (IDF) declared that Gaza had been divided in two. According to the Norwegian newspaper *VG*, IDF spokesman Daniel Hagari stated that ‘Today, there is north Gaza and south Gaza’.<sup>124</sup> Many of the forcibly transferred Palestinians were already refugees under the UN mandate before 7 October, and have been driven from the refugee camps. There is nowhere to live for very many of those who have been displaced internally. The UN reported that, on 18 November, many people were sleeping rough and estimated that there was, on average, one shower for every 700 persons and one toilet for every 150 persons, which in turn contributes to the spread of disease.<sup>125</sup>

It appears obvious that the so-called evacuation does not fulfil the requirements laid down in Article 49(2) for lawful evacuation. On that basis, the conclusion must therefore be that the objective conditions under section 102(d) are met.

In the alternative, if, contrary to expectation, the warfare that began on 7 October should be held to be a non-international armed conflict, the question becomes whether the conditions in Article 17 of Protocol II to the Geneva Conventions are met. Here as well, there is a requirement that forcible displacement of a civilian population may take place only out of concern for the population’s safety or for imperative military reasons, which it is highly doubtful is met: see above. As stated earlier, Israel’s stated reasons cannot be taken at face value. Israel may also have had political reasons for moving the civilian population out of North Gaza, namely to eliminate the Palestinians from half of Gaza permanently. This will clearly be contrary to Article 17, as per the ICRC’s Commentaries to that provision:

‘Clearly, imperative military reasons cannot be justified by political motives. For example, it would be prohibited to move a population in order to exercise more effective control over a dissident ethnic group.’<sup>126</sup>

There is nothing to suggest that Israel’s political and military leaders have bothered to safeguard the safety of the Palestinian civilian population. Under Article 17, there is a requirement to the effect that ‘all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition’. This requirement is obviously not met. As stated above, in South Gaza as well there has been heavy

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<sup>122</sup> [https://edition.cnn.com/middleeast/live-news/israel-hamas-war-gaza-news-11-18-23/h\\_fb4c50d5d5e948969d8e3db285792a8c](https://edition.cnn.com/middleeast/live-news/israel-hamas-war-gaza-news-11-18-23/h_fb4c50d5d5e948969d8e3db285792a8c)

<sup>123</sup> <https://www.emro.who.int/media/news/who-appalled-by-latest-attack-on-indonesian-hospital-in-gaza.html>

<sup>124</sup> <https://www.vg.no/nyheter/utenriks/i/VP75XW/nye-bombeangrep-mot-gaza-soendag-kveld>

<sup>125</sup> <https://reliefweb.int/report/occupied-palestinian-territory/hostilities-gaza-strip-and-israel-flash-update-43-enar>

<sup>126</sup> <https://ihl-databases.icrc.org/en/ihl-treaties/apii-1977/article-17/commentary/1987>

Israeli bombing of private homes, schools, refugee camps, hospitals, ambulances, roads and other civilian infrastructure. In addition, the bombing has made the huge displacement of people highly chaotic and unsafe, whilst at the same time the blockade has given rise to a highly precarious situation in terms of hygiene, nutrition and health in South Gaza as well. It is accordingly clear that nor does the forcible transfer meet the requirements for a lawful displacement under Article 17.

The act has been part of a broad or systematic attack directed against a civilian population.<sup>127</sup> The forcible transfer has in fact been part of that attack. This is true irrespective of whether the forcible transfer has been an objective or simply a means for Israeli political and military leaders. It is not lawful under international law to use a civilian population as a means of attaining another objective if the act in itself is not lawful. The act at issue here is not lawful: see above. It is not clear at the current juncture how many of the Norwegian citizens in Gaza have been impacted by unlawful forcible transfer after 7 October 2023, although it must be assumed that many of them have.

The conclusion is therefore also in the alternative that the objective conditions under section 102(d) are met.

### *3.5.3 The subjective conditions related to unlawful displacement of a population are met*

The accused have been key figures in the planning and execution of the military attack on Gaza's civilian population. They have been fully aware of the facts surrounding the occupation of Gaza that is unlawful under international law. They have at any rate been aware of the facts suggesting that there was an occupation of Gaza prior to 7 October, irrespective of whether it is lawful or unlawful. They have also been fully aware of the facts suggesting that Israel's right of self-defence as an occupying power after 7 October was limited.

The accused have also fully accepted the stated reasons for the forcible transfer of the civilian population out of North Gaza. They have also been fully aware that the displacement of so many people in a short space of time while the bombing of all of Gaza was under way would be chaotic and highly unsafe and not in compliance with the requirements laid down in Article 49(2) of the Fourth Geneva Convention (or possibly Article 17 of Protocol II to the Geneva Conventions). They have also been fully aware that the blockade, imposed in parallel, would also give rise to a highly precarious situation in terms of hygiene, nutrition and health, etc., in South Gaza, to where the 'evacuees' were displaced. They have accordingly also been fully aware of all of the consequences of the forcible evacuation for the civilian population.

The accused have also been fully aware that the forcible transfer was part of a broad or systematic attack on a civilian population. They have also shown intent in relation to this element in the description of the offence.<sup>128</sup> In the light of the foregoing, there is intent, or at

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<sup>127</sup> Ot.prp. nr. 8 (2007-2008), page 282.

<sup>128</sup> See Ot.prp. nr. 8 (2007-2008), page 282.

least intent as to probability under section 22(b) of the Criminal Code, for all of the relevant facts that bring the act within the scope of section 102(d).

#### *3.5.4 Conclusion*

All objective and subjective conditions for a crime against humanity in the form of forcible transfer are met: see section 102(d) of the Criminal Code. The crime must be deemed to have been committed no later than 15 November 2023, when the first Norwegians were allowed to leave Gaza. Due to their key roles and participation in plans and decisions with full knowledge of the consequences for the civilian population in Gaza, the accused have aided and abetted that crime for the purposes of the provision: see section 15 of the Criminal Code.

Lastly, once there is Norwegian jurisdiction, the crimes investigated will be in respect of the entire civilian population in Gaza. It is, therefore, not necessary to prove how many Norwegians were specifically impacted by forcible transfer. This can be identified, if necessary, through questioning of the Norwegians who have returned to Norway. Legally, it must in any event – in the alternative – be sufficient that at least one of the Norwegian citizens has been subjected to unlawful forcible transfer.

### **3.6 Crime against humanity – section 102(h) of the Criminal Code (persecution)**

#### *3.6.1 Legal basis – description of the offence*

Section 102 of the Criminal Code implements Article 7 of the Rome Statute on crimes against humanity. The crime provided for in section 102(h) of the Criminal Code is worded as follows:

Any person is liable to punishment for crimes against humanity who as part of a broad or systematic attack on a civilian population [...] subjects an identifiable group to persecution by depriving one or more members of the group of fundamental human rights on political, racial, national, ethnic, cultural, religious or gender-based grounds or other grounds contrary to international law.

#### *3.6.2 The objective conditions related to persecution are met*

The term ‘persecution’ for the purposes of the Criminal Code and the Rome Statute entails that ‘a member of an identifiable group, due to kinship with the group, is seriously deprived of fundamental rights’.<sup>129</sup> Persecution is thus a serious form of discrimination, which must be of the same degree of seriousness as the other crimes in Chapter 16 of the Criminal Code.<sup>130</sup> In Article 7(2)(g) of the Rome Statute, read in conjunction with Article 7(1)(h), the term ‘persecution’ is defined as ‘the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity’. Criminal persecution thus requires a form of targeted attacks against a person or group which, under section 102(h) and Article 7(1)(h), deprives ‘one or more members of the group of fundamental

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<sup>129</sup> Ot.prp. nr. 8 (2007-2008), page 284.

<sup>130</sup> Ot.prp. nr. 8 (2007-2008), page 284.

human rights on political, racial, national, ethnic, cultural, religious or gender-based grounds or other grounds contrary to international law’.

As observed above in part 3.1.2, there is no doubt in this case that the blockade, in a situation with extensive parallel bombing of civilians and civilian infrastructure, has entailed serious violations of a number of key universal human rights. These include the right to respect for life, freedom from inhuman or dehumanising treatment, freedom of movement, the right to respect for private and family life, freedom from hate speech, the right to freedom of assembly – rights and freedoms which have been grossly violated in Gaza by Israel through the combination of the blockade and the extensive bombing. Health rights have been completely neglected. Children’s universal rights have been violated to an even greater extent. Considerations of the best interest of the child in Gaza have been completely disregarded by Israeli political and military authorities. Over one million children have been impacted. Israel has not respected children’s inherent right to life, right to survive, right to develop, or right to respect for their family life and right to treatment for serious illness and damage to health. These are rights which have literally been buried in the rubble by the bombing and the blockade. The extent and seriousness of the human rights violations have been unparalleled, to borrow the words and intention of the UN Secretary-General.<sup>131</sup>

The civilian population in Gaza has been deprived of all of these rights on political, national, ethnic, cultural and/or religious grounds. The population in Gaza is part of the Palestinian people. Israeli political and military leaders have associated the civilian population in Gaza with Hamas’s acts of 7 October 2023 and afterwards, and irrespective of whether the acts were directed at military targets, or at civilians in Israel contrary to international law. The civilian population in Gaza has been subjected to hate speech, including genocidal rhetoric, and associated not only with Hamas’s punishable acts under international law, but with Hamas as a designated terrorist organisation (see above part 2 and part 3.1: read in conjunction with part 4 below). Israeli media have supported that association through means such as untrustworthy ‘surveys’ conducted with Palestinians in Gaza while the attack on Gaza was under way.<sup>132</sup>

Such an association of an entire civilian population with Hamas or with a wish to commit criminal acts represents a form of particularly malignant racism, on an equal footing with antisemitism, which expresses ‘hostile attitudes and acts directed against Jews because they are Jews’.<sup>133</sup> The term ‘anti-Palestinianism’ has been suggested.<sup>134</sup>

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<sup>131</sup> <https://news.un.org/en/story/2023/11/1143772>

<sup>132</sup> A ‘survey’ was explained as follows: ‘the poll example includes all socioeconomic groups, ensuring equal representation of adult men and women, and is proportionately distributed across the West Bank and Gaza’: <https://www.jns.org/three-in-four-palestinians-support-hamass-massacre/>

<sup>133</sup> <https://snl.no/antisemittisme>

<sup>134</sup> [https://en.wikipedia.org/wiki/Anti-Palestinianism\\_during\\_the\\_2023\\_Israel–Hamas\\_war](https://en.wikipedia.org/wiki/Anti-Palestinianism_during_the_2023_Israel–Hamas_war)

The civilian population has been used as a means of achieving the goal of seriously weakening or eradicating Hamas.<sup>135</sup> However, no civilian population can lawfully be used as a means to further a military purpose, whether that is by using them as a ‘human shield’, as Hamas has been accused of, or by deliberately subjecting the Palestinian civilian population to inhuman treatment, thereby causing great suffering or serious harm to someone’s body or health: see section 102(k); murder: see (a); extermination: see (b); or forcible transfer unlawful under international law: see (d) (see above part 3.2–3.5).

An alternative approach to viewing the deprivation of fundamental rights for the civilian population in Gaza through the combination of total blockade and extensive bombing as a means of achieving the goal of destroying Hamas is to view the attack on the civilian population as a goal in itself. What is impossible to infer from the facts is that the suffering and attacks directed against the civilian population have been random or caused by unfortunate circumstances. It is simply not tenable to claim that all of the children and other civilians killed in Gaza are merely casualties of ordinary war operations [‘collateral damage’].

In those circumstances, all of the objective conditions in (h) met. This also holds true in relation to all of the Norwegians who were in Gaza as from 7 October 2023 and afterwards.

### *3.6.3 The subjective conditions related to persecution are met*

The accused have been key figures in the planning and execution of the military attack on Gaza’s Palestinian civilian population. They have long been involved in managing the attacks through the blockade in combination with extensive bombing of civilians and civilian infrastructure, and also subsequently through the ground invasion. They have been aware that, in so doing, they have deprived the civilian population of fundamental human rights on political, racial, national, ethnic, cultural, religious, gender-based grounds or other grounds contrary to international law. The accused have also known that the actual acts constituting persecution of the civilian population in Gaza was part of a broad or systematic attack directed against a civilian population. At the very least, they were aware that the acts constituting persecution ‘most likely [...] were part of such an attack’:<sup>136</sup> see section 22(b) of the Criminal Code.

Hence they have shown intent in relation to this element in the description of the offence as well.<sup>137</sup> In the light of the foregoing, there is at least intent as to probability under section 22(b) of the Criminal Code, for all of the relevant facts bringing the act within the scope of section 102(h).

### *3.6.4 Conclusion*

All objective and subjective conditions for a crime against humanity in the form of persecution are met: see section 102(h) of the Criminal Code. The crime must be deemed to have been

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<sup>135</sup> <https://www.washingtoninstitute.org/policy-analysis/israels-war-aims-and-principles-post-hamas-administration-gaza>

<sup>136</sup> Ot.prp. nr. 8 (2007-2008), page 281.

<sup>137</sup> See Ot.prp. nr. 8 (2007-2008), page 282.

committed no later than 15 November 2023, when the first Norwegians were allowed to leave Gaza. Due to their key roles and participation in plans and decisions with full knowledge of the consequences for the civilian population in Gaza, the accused have aided and abetted that crime for the purposes of the provision: see section 15 of the Criminal Code.

### **3.7 Further remarks on liability for aiding and abetting**

International criminal law provides for more different forms of criminal liability than Norwegian criminal law, perhaps with the exception of Chapter 18 of the Criminal Code on terrorist acts, etc. This is especially true in relation to various forms of joint criminal enterprise, in which more than one person is deemed to have committed the punishable act and not just aided and abetted it. These types of criminal liability are provided for in Article 25(3)(a) of the Rome Statute. If a person is part of a political and military leadership in a State (or organisation) that takes decisions, executes and/or supervises implementation of the decisions involving punishable acts, in the form of, for example, crimes against humanity, that person will often be deemed to have commission liability. This follows from the abovementioned Article 25(3)(a) on commission liability for a person who ‘commits such a crime [...] jointly with another or through another person’, which will then usually be applicable instead of liability for aiding and abetting (‘accomplice liability’) under Article 25(3)(c) for a person who ‘aids, abets or otherwise assists in its commission’.

In a case before the ICC, the accused, due to their positions and roles in the power hierarchy in Israel and in connection with the attack on Gaza, would be primarily tried for criminal liability under Article 25(3)(a) and, if necessary/as appropriate, possibly only in the alternative for aiding and abetting under (c).

Norwegian criminal law does not have categories of liability such as joint criminal enterprise and is generally structured somewhat differently than Article 25 of the Rome Statute. Nor are any specific rules laid down in Chapter 16 of the Criminal Code, apart from conspiracy to commit and incitement to genocide, crimes against humanity and war crimes: see section 108. These forms of criminal liability are not really relevant where a crime has already been committed, as is the case here [such acts could still be separate crimes in conjunction with committed crimes against humanity]. The rules on liability of superiors under section 109 concern liability for certain types of punishable omission, and thus are not relevant here either. However, as observed in the *travaux préparatoires*, in Norwegian law it ‘does not usually matter for the purposes of criminal liability or sentencing whether an act is deemed to be commission of the entire description of the offence or aiding and abetting’.<sup>138</sup>

Since it is clear that the accused have aided and abetted the punishable acts in question by meeting all objective and subjective conditions for the crimes which are the subject of the present complaint, as outlined above (see part 3.1–3.6), and that the form of criminal liability ‘aiding and abetting’ is also highly appropriate for bringing out the seriousness of the acts within the parameters of the Norwegian Criminal Code, the complainants do not consider it

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<sup>138</sup> Ot.prp. nr. 8 (2007-2008), page 281.

necessary to discuss in detail which is the most appropriate form of criminal liability from an international law perspective.

## **4 Whether there can be exclusion of criminal liability on grounds of self-defence**

### **4.1 Issue and legal basis**

If the aiding and abetting of crimes against humanity by the accused in Gaza can be justified as self-defence under international law: see self-defence in Norwegian criminal law, the accused will escape criminal liability for the attack they planned, executed and sustained against the civilian population in Gaza: see above part 3.

The first paragraph of section 18 of the Criminal Code is worded as follows:

An act which would otherwise be punishable, is lawful when it

- a. is committed to avert an unlawful attack,
- b. does not exceed what is necessary, and
- c. does not clearly go beyond what is justifiable, taking into account the dangerousness of the attack, the type of interest the attack violates, and the culpability of the assailant.

It is worth noting that the wording ‘culpability of the assailant’ indicates that the provision is premised on the assumption that the act of self-defence must be directed at the assailant, not an innocent or random third party: see below for a more detailed discussion.

The corresponding rule in Article 31(1)(c) of the Rome Statute is worded essentially as follows:

‘[A] person shall not be criminally responsible if, at the time of that person’s conduct [...] [t]he person acts reasonably to defend himself or herself or another person [...] against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person [...]. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph [...].’

As is apparent from the last sentence, a defensive military operation will not per se serve to exclude criminal liability.

Whether the conditions for self-defence are met must be examined *in concreto*. The abovementioned rules raise the following questions: (1) whether there was an unlawful attack (‘an imminent and illegal use of force’); (2) whether the act of self-defence directed at the assailant was aimed at averting the unlawful attack (‘acts [...] to defend himself or another person [...] against an imminent and unlawful use of force’); (3) whether the act of self-defence was necessary or reasonable; (4) whether the act of self-defence was justified under the relevant circumstances as proportionate (‘proportionate to the degree of danger to the person or the other person’). Only if all of those questions are answered in the affirmative are the conditions of



exclusion of criminal liability on grounds of self-defence met. Thus, there are four cumulative conditions which must be met.

In the *travaux préparatoires* for the Code, it is stated that the content of section 18 of the Code in relation to the punishable acts in Chapter 16 is intended to have the same substantive content as in international law, although some differences between Norwegian law and international law were identified before Chapter 16 was enacted, in response to which the following was affirmed in the *travaux préparatoires*:

‘The Ministry is nevertheless not concerned that Norwegian law in this area will lead to acquittals that will be unacceptable for the International Criminal Court. [...] Norwegian courts must, moreover, take account of the case-law of the International Criminal Court involving the application of the necessity and justification test in section 18 of the 2005 Criminal Code in cases involving genocide, crimes against humanity and war crimes.’<sup>139</sup>

On that basis, the Ministry did not find it necessary to include specific rules on self-defence in Chapter 16 of the Criminal Code.<sup>140</sup>

## **4.2 Are the four conditions for exclusion of criminal liability on grounds of self-defence met?**

### *4.2.1 An unlawful and punishable attack by Hamas took place*

At the inter-State level, the question of who has a right of self-defence against which acts has been in dispute ever since the UN’s Palestine Partition Plan, adopted by the UN General Assembly on 29 November 1947 (‘II: Palestine Partition Plan’).<sup>141</sup> More latterly, the UN has highlighted the need to end the conflict between Israel and Palestine and implement a genuine two-State solution based on the armistice lines agreed by Israel, Jordan, Egypt, Syria and Lebanon in 1949.<sup>142</sup> According to those ‘green lines’, Israel held around 78% of the former Palestinian Mandate area, whilst Palestine held only around 22%.<sup>143</sup> This is hardly a fair arrangement for the Palestinian people, given the basis of the UN’s Partition Plan and ensuing war; rather, it was a pragmatic minimum solution for Palestine aimed at ensuring peace and security for both States.<sup>144</sup> Obviously, further conditions must be put in place. At the same time, this means that the UN has considered Gaza, the West Bank and East Jerusalem to be occupied by Israel since 1967, when Israel first occupied those areas, and that assumption is

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<sup>139</sup> Ot.prp. nr. 8 (2007-2008), pages 72–73.

<sup>140</sup> Ot.prp. nr. 8 (2007-2008), page 73.

<sup>141</sup> <https://www.un.org/unispal/history/>

<sup>142</sup> See, for example, the presumption in the General Assembly’s reference to the International Court of Justice: see International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Wall Case)*, 2004, p. 9 (p. 141).

<sup>143</sup> <https://embassies.gov.il/MFA/AboutIsrael/Maps/Pages/1949-1967%20Armistice%20Lines.aspx>

<sup>144</sup> See International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Wall Case)*, 2004, p. 9 (p. 141).

inherent in wording such as ‘Occupied Palestinian Territory’ or ‘Occupied Territories’ in numerous UN documents.

It has nevertheless been disputed whether Gaza has been occupied by Israel continuously since 1967, or whether the occupation ceased when Israel withdrew its military forces out of Gaza in 2005, at the same time as it introduced a blockade [first temporarily until 2007] and retained control of Gaza’s land borders, maritime territory and air space. The examination of this question in the present case from an international law perspective has implications for whether Hamas’s actions against Israel on 7 October 2023 basically amounted to an act of self-defence, although one exceeding the limits for such an action, or whether it was *ab initio* an attack on Israel. If Israel is deemed to have continued the occupation of Gaza from 2005 up to 7 October 2023, and that occupation is deemed to be unlawful, then Israel was the attacking party under international law. As a rule, an assailant does not have a right of self-defence. This is the clear basic rule under Norwegian law<sup>145</sup> and in international law. An attacking State may not rely on a right of self-defence under Article 51 of the UN Charter when it is the attacking party under Article 2(4) of the UN Charter.<sup>146</sup>

The complainants submit, as a matter of principle, that, as a matter of international law, Gaza and Palestine as a whole, have been occupied since 1967 and that the ongoing occupation has been unlawful under international law. For the sake of completeness, this position is explained in greater detail below (part 4.2.2).

The complainants nevertheless take the view that it is correct, under international law, to make an exception from the abovementioned general rule if the act of self-defence clearly exceeds the limits of a lawful act of self-defence. The International Court of Justice (ICJ) has not ruled out such a possibility.<sup>147</sup> Even if Hamas were to be entitled to attack military targets in Israel in self-defence against the unlawful occupation of Gaza, Hamas went beyond the limits of self-defence by engaging in targeted killings and abuse of very many civilians and taking civilians as hostages. On 18 October 2023, Human Rights Watch, an independent human rights

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<sup>145</sup> See, for example, Linda Gröning, Erling Johannes Husabø and Jørn Jacobsen in their book, *Frihet, forbrytelse og straff – En systematisk fremstilling av norsk strafferett* (Freedom, crimes and punishment – a systematic presentation of Norwegian criminal law), Fagbokforlaget, 2023, p. 453: ‘If “the assailant” himself or herself acts out of urgency or in self-defence, the act is lawful, with the result that it cannot be met with self-defence. [...] Nor has someone who has been subjected to an act of self-defence acted in self-defence. [...] The law does not allow for such a “contra self-defence” (“kontranødverge”).’

<sup>146</sup> See International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Wall Case)*, 2004, p. 62 (p. 194), para. 138–139.

<sup>147</sup> Even though the International Court of Justice considered that Article 51 of the UN Charter did not confer any right of self-defence on Israel that could justify the building of the Wall, the Court stated that Article 51 was not relevant ‘in this case’, which is different from the present case inasmuch as, on 7 October 2023, Hamas committed crimes against civilians on a large scale on Israeli territory. See International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Wall Case)*, 2004, p. 62 (p. 194), para. 139.

organisation, published video evidence of a number of specific, actual war crimes,<sup>148</sup> which of course does not rule out the possibility of other crimes.

At the current juncture, not all facts have been clarified or verified by reliable and independent sources in terms of the details of the attack by Hamas that began on 7 October 2023, but the main aspects are clear enough. In parallel with the launching of rockets towards southern and central parts of Israel, armed militants from Hamas and other armed groups broke through the border fences and into Israeli territory. A good overview with further references based partly on official Israeli sources seems to have been published by Diakonia International Humanitarian Law Centre on 17 November 2023, according to which over 1 200 citizens in Israel were killed (1 162 persons have been identified by name), of whom 859 were civilians including police officers and 33 children, whilst approximately 5 400 people were injured (no breakdown is given of military personnel and civilians, but it can be assumed that the vast majority were civilians).<sup>149</sup> Inter alia 260 people attending a music festival were killed near the towns of Kfar Azza and Be'eri, which were also attacked.<sup>150</sup> Israel regained control of Israeli territory and the borders of Gaza on 9 October, but rocket attacks on Israeli cities and Ben Gurion Airport continued.<sup>151</sup> The complainants have not found information on how many people were killed or wounded in the rocket attacks alone. Rockets from Gaza do not usually cause extensive damage, but the situation could be different in this case. In any event, it appears that it was the ground attack on Israel that led to most of the deaths and presumably also most of the injuries. In addition, 237 people were taken prisoner and transported to Gaza, most of whom are presumed to be civilians, including children and elderly persons.<sup>152</sup> Military personnel taken prisoner are not generally considered hostages, as are civilians who are taken prisoner, but if the main objective was to use the military prisoners as part of a strategy for exchange with Palestinian prisoners in Israel, they may also be considered to be unlawful hostages under international law.

The acts by Hamas and potentially other groups not only constitute war crimes, but also an attack directed against the civilian population in Israel and therefore represent by all accounts crimes against humanity. Those acts fall outside Norwegian criminal law jurisdiction since, as far as the complainants are aware, they were not directed against Norwegian citizens in Israel: see part 1.5 above on Norwegian criminal law jurisdiction. As stated above, the present complaint concerns the attack directed against the civilian population in Gaza, which included around 270 Norwegian citizens. For the same reason, nor does the present complaint concern possible crimes committed in the West Bank and in East Jerusalem in the period after 7 October 2023, where, as at 16 November 2023, Israeli military forces had killed 186 Palestinians, including 51 children, and wounded 2 661 people, including 281 children (half of them in

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<sup>148</sup> <https://www.hrw.org/news/2023/10/18/israel/palestine-videos-hamas-led-attacks-verified>

<sup>149</sup> <https://www.diakonia.se/ihl/news/2023-hostilities-in-gaza-and-israel-factual-account-of-events/>

<sup>150</sup> <https://www.diakonia.se/ihl/news/2023-hostilities-in-gaza-and-israel-factual-account-of-events/>

<sup>151</sup> <https://www.diakonia.se/ihl/news/2023-hostilities-in-gaza-and-israel-factual-account-of-events/>

<sup>152</sup> <https://www.diakonia.se/ihl/news/2023-hostilities-in-gaza-and-israel-factual-account-of-events/>

demonstrations). As at the same date, Israeli settlers had killed eight Palestinians and wounded 74 others, whilst four Israelis have been killed by Palestinians. Over 2 200 Palestinians have been arrested outside Gaza after 7 October, of whom 2 070 are being held without charge or conviction. In addition, around 4 000 Palestinians from Gaza who were in Israel on 7 October have been placed in detention.<sup>153</sup>

In the complainants' submission, this in any event means that the right of self-defence Hamas could employ against military targets was clearly exceeded on 7 October and afterwards, which means that there was an *unlawful (and punishable) attack* for the purposes of international law and Norwegian criminal law, against which Israel thus had a right of self-defence within the parameters of international law.

Thus, in the complainants' submission, the *first* condition for exclusion of criminal liability is met.

Should Gaza and Palestine be deemed not to be occupied, or not unlawfully occupied, the conclusion in relation to this condition will of course be the same. In that case, Hamas will not have been entitled to attack military targets in Israel, unless the blockade from 2005 until 7 October 2023 is regarded as an unlawful act of attack. A blockade is, as a rule, an aggressive act under international law and can constitute a crime of aggression. The conclusion is in any event the same: Hamas had a right of self-defence, but misused it by attacking civilians.

*4.2.2 More detailed discussion of the international law context for the attack by Hamas*  
UN Secretary-General António Guterres came in for heavy criticism, particularly from Israel, when he stated on 24 October that the attacks by Hamas on 7 October 2023 – ‘the horrifying and unprecedented 7 October terrorist acts by Hamas in Israel’<sup>154</sup> – did not happen in a vacuum:

‘It is important to also recognize the attacks by Hamas did not happen in a vacuum. The Palestinian people have been subjected to 56 years of suffocating occupation. They have seen their land steadily devoured by settlements and plagued by violence; their economy stifled; their people displaced and their homes demolished. Their hopes for a political solution to their plight have been vanishing. But the grievances of the Palestinian people cannot justify the appalling attacks by Hamas. And those appalling attacks cannot justify the collective punishment of the Palestinian people.’<sup>155</sup>

What Secretary-General Guterres was saying here and in the rest of his remarks about the context surrounding Hamas's brutal acts is in keeping with a sober assessment under international law of the situation leading up to what occurred, in which one State is an

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<sup>153</sup> See for more detail: <https://www.diakonia.se/ihl/news/2023-hostilities-in-gaza-and-israel-factual-account-of-events/>

<sup>154</sup> <https://www.un.org/sg/en/content/sg/speeches/2023-10-24/secretary-generals-remarks-the-security-council-the-middle-east>

<sup>155</sup> <https://www.un.org/sg/en/content/sg/speeches/2023-10-24/secretary-generals-remarks-the-security-council-the-middle-east>

occupier (Israel) and another State and people are occupied (Palestine including Gaza and the Palestinian people). This view is well grounded in international law in the fundamental doctrine of effective control. At the same time as Israel withdrew from Gaza in 2005, it introduced a blockade of Gaza, which was initially temporary, but then became permanent in 2007 and lasted up until it was further tightened as from 9 October 2023. Hence, for the purposes of international law, Israel has exercised effective control over Gaza by controlling Gaza's land borders, air space and maritime territory.

Hence, as stated above in part 3.5.2, the position of international organisations such as the UN,<sup>156</sup> and non-State organisations such as Amnesty International<sup>157</sup> and Human Rights Watch<sup>158</sup> has been that Gaza has remained occupied as from 2005, as has that of the ICC.<sup>159</sup> The UN Security Council as well has, in reality, stated the same in employing the formulation 'Palestinian Territory occupied since 1967, including East Jerusalem'<sup>160</sup> in Resolution 2334 (2016), without explicitly excluding Gaza. This is wording that is often used in the UN context, where it is implicitly understood that Gaza and the West Bank are part of the Palestinian territory if Gaza and the West Bank are not specifically mentioned.

One image that has been used about Gaza to illustrate what is meant by effective control is the following: if the prison staff leave a prison, but lock the doors and keep the keys, and decide which of the inmates get to come out and when, it is still a prison. The fact that Hamas managed to break through the prison gates in a surprise attack on 7 October 2023 does not change this.

In accordance with the *travaux préparatoires* for the Code, which point out that the rule on self-defence is intended to be interpreted consistently with the case-law of the ICC, the Norwegian prosecuting authority and Norwegian courts should base themselves on the ICC's position,<sup>161</sup> which has solid anchoring in international law. The lawfulness of the occupation of the Palestinian territories will also be ruled on soon in an Advisory Opinion from the International

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<sup>156</sup> See, for example, UN General Assembly (2021): <https://www.un.org/unispal/document/assistance-to-the-palestinian-people-ga-resolution-a-res-76-126-2/> See also UN Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel, Report 5 September 2023, part 5: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N23/260/71/PDF/N2326071.pdf?OpenElement> See also former UN special rapporteur Michael Lynk, who rebutted the idea of a possible Israeli reoccupation of Gaza now, on the ground that Gaza is already occupied from an international law standpoint: <https://www.aljazeera.com/news/2023/11/8/qa-former-un-expert-stresses-israels-occupation-of-gaza-never-ended>

<sup>157</sup> <https://www.amnesty.org/en/latest/campaigns/2017/06/israel-occupation-50-years-of-dispossession/>

<sup>158</sup> <https://www.hrw.org/report/2021/04/27/threshold-crossed/israeli-authorities-and-crimes-apartheid-and-persecution>

<sup>159</sup> ICC, Pre-Trial Chamber I, Decision on the Court's jurisdiction in Palestine, 5 February 2021, see [https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021\\_01165.PDF](https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_01165.PDF)

<sup>160</sup> <https://www.un.org/unispal/document/auto-insert-178173/>

<sup>161</sup> ICC, Pre-Trial Chamber I, Decision on the Court's jurisdiction in Palestine, 5 February 2021, see [https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021\\_01165.PDF](https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_01165.PDF)

Court of Justice in The Hague (ICJ), together with the question of the legal consequences of Israel's ongoing violation of the Palestinian people's right of self-determination.<sup>162</sup> There are strong indications that the West Bank, Gaza and East Jerusalem will not only be held to be occupied, but also unlawfully occupied. The decisive question then becomes whether the prolonged occupation could be justified the whole time as an act of self-defence – an act of continuous, preventive self-defence. From an international law perspective, this seems highly unlikely. Irrespective of how the ICJ rules, however, the three other conditions for a lawful self-defence against Hamas's acts of 7 October 2023 must be met in relation to the attack on the civilian population in Gaza if the accused are to be exempted from criminal liability.

#### 4.2.3 *The condition of purpose is not met*

Israel has justified its wide-ranging attack on Gaza by stating that Hamas must be crushed or eradicated. For Israel, Hamas is a terrorist organisation. However, irrespective of whether Hamas is deemed to be a lawful Palestinian organisation having an inherent right to engage in self-defence against the unlawful Israeli occupation using military means within international humanitarian law, or as an unlawful terrorist organisation, the condition of purpose must be met. Under Norwegian law it is clear that 'only an act of self-defence that is directed at the assailant himself or herself can be justified under section 18':<sup>163</sup> see letter (a) of the first paragraph of section 18. When it was Hamas who was the assailant on 7 October, Israel and those persons who directed Israel's acts could not direct an attack against the civilian population in Gaza, as has been the case through the combination of the blockade and extensive bombing of the civilian population in a small, densely-populated area such as Gaza: see above part 3. The attack could lawfully be directed only against Hamas and potentially other armed groups. The same follows from Article 31(1)(c) of the Rome Statute, which is based on a premiss that the self-defence is to be directed against the assailant, not innocent civilian third parties contrary to human rights.

Under Norwegian law, the position is that if it is necessary to encroach upon interests other than the assailant's in order to avert the attack, that aspect of the course of action must be capable of being justified under section 17 on necessity. Necessity is hardly applicable in relation to taking a third party's life in order to save one's own life or that of others.<sup>164</sup> The numbers of civilians killed and wounded in Gaza are unquestionably far beyond what can be justified as necessity. The same holds true in contemporary international law. The Rome Statute does not contain any general rule on exclusion of criminal liability equating to 'necessity', for the simple reason that necessity is no longer recognised as a general legal basis for the exclusion of criminal liability.<sup>165</sup> 'Military necessity' may well come into play in relation to certain acts

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<sup>162</sup> <https://www.icj-cij.org/sites/default/files/case-related/186/186-20231023-pre-01-00-en.pdf>

<sup>163</sup> Linda Gröning, Erling Johannes Husabø and Jørn Jacobsen, *Frihet, forbrytelse og straff – En systematisk fremstilling av norsk strafferett*, Fagbokforlaget, 2023, p. 458.

<sup>164</sup> For more detail on the *travaux préparatoires*, case-law and theory, see Erling Johannes Husabø and Jørn Jacobsen, *Frihet, forbrytelse og straff – En systematisk fremstilling av norsk strafferett*, Fagbokforlaget, 2023, pp. 445-446.

<sup>165</sup> See, for example, Douglas Guilfoyle, *International Criminal Law*, Oxford University Press, 2016, page 389.



which would otherwise be war crimes, but the relevant facts for that are nowhere near resembling the attack that was directed against the civilian population in Gaza.

Hence the *second* condition for the exclusion of criminal liability is not met, with the result that the accused may not be exempted from criminal liability.

#### 4.2.4 *The attack directed against the civilian population was not necessary or reasonable*

Letter (b) of the first paragraph of section 18 of the Criminal Code requires that the defensive act not exceed what is necessary. This means that the party acting in self-defence must choose the least invasive option that can stop the attack and prevent a new attack. Article 31(1)(c) of the Rome Statute uses the term ‘reasonably’ to describe this course of action. Which effective courses of action were available is a relevant factor here. In this case, alternative courses of action could have been a limited, targeted military attack and legal means such as arrest warrants for Hamas leaders. An additional factor is whether or not the attack is ongoing. When an attack can be considered over, the consequence is that an act of self-defence is no longer necessary.<sup>166</sup>

In this case, the ground attack led by Hamas into Israeli territory on 7 October 2023 was over fairly quickly. Already by 9 October, Israel had retaken control of the borders with Gaza.<sup>167</sup> The rocket attacks on Israel continued, but it was unclear how much damage they did or could do when the Israeli military was prepared. Realistically, Israel’s military superiority suggested that the Israeli military would be able to protect Israeli territory and, if necessary, respond to new missiles from Hamas with targeted attacks directed at launch sites from Gaza and their command stations. According to the Israeli military, Israel has at least 360 000 soldiers,<sup>168</sup> whilst Hamas, according to the Israeli military, has 50 000 militants.<sup>169</sup> Israel has superior military force, on the ground, at sea and in the air, and in terms of weaponry and modern military technology.

Almost 240 Israeli prisoners/hostages were in Gaza, however, until an agreed exchange of some of the hostages in return for Palestinian prisoners/hostages started on 24 November 2023, at the same time as a pause in fighting. The possibility cannot be ruled out that such an exchange might have taken place earlier if Israel had so wished, instead of bombing and blockading all of Gaza. Such prisoner exchanges have taken place on previous occasions. As stated above, Israel took over 6 000 new Palestinian prisoners in the West Bank and East Jerusalem, in addition to the roughly 5 000 Palestinians who were already imprisoned in Israel, including many children. That alternative does not seem to have been attempted, because Israel opted for a different military strategy, with an attack directed against the entire population in Gaza.

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<sup>166</sup> See Erling Johannes Husabø and Jørn Jacobsen, *Frihet, forbrytelse og straff – En systematisk fremstilling av norsk strafferett*, Fagbokforlaget, 2023, p. 461.

<sup>167</sup> See <https://www.diakonia.se/ihl/news/2023-hostilities-in-gaza-and-israel-factual-account-of-events/>

<sup>168</sup> <https://abcnews.go.com/International/timeline-surprise-rocket-attack-hamas-israel/story?id=103816006>

<sup>169</sup> <https://abcnews.go.com/International/timeline-surprise-rocket-attack-hamas-israel/story?id=103816006>

Although the attacked party must have some margin of discretion in its choice of means, it seems clear that, under international law, the attack on Gaza, as carried out, was not a necessary or reasonable choice for defending the country's legitimate interests or saving the lives of the hostages.

#### 4.2.5 *The attack directed against the civilian population was disproportionate (not justified)*

Letter (c) of the first paragraph of section 18 provides that an assessment must be made of how dangerous the attack was, what kinds of interests were under attack and the culpability of the assailant. The wording of the provision suggests that concern for those interests which are under attack is to be accorded great weight and, as a rule, greater weight than concern for any interests of the assailant's.<sup>170</sup>

Nevertheless, the requirements of the provision for a justified act of self-defence entail that 'a weighing-up of conflicting interests and freedoms' must be undertaken.<sup>171</sup> The *travaux préparatoires* for the Code state that 'the attacked party shall be allowed a broad margin of discretion in its determination of what is ethically justified',<sup>172</sup> whilst the term 'ethically justified' provides a yardstick for weighing up those interests, grounded in the value prioritisations of the legal order.<sup>173</sup> One such guiding principle can be that justice must not have to yield to injustice, whilst another can be that justice must not give rise to a new injustice for innocent persons. The fact that a family member was killed by a mafia gang does not give the family the right to kill innocent relatives or acquaintances of the perpetrator. The value prioritisations must be grounded in the rule of law and human rights.

The case-law of the International Criminal Tribunal for the former Yugoslavia (ICTY), established by the UN Security Council, suggests that the rule expressed in [Rome Statute] Article 31(1)(c) constitutes customary international law.<sup>174</sup> There is also a fundamental requirement under international law that the response to the attack must be reasonable and proportionate.<sup>175</sup> The right of self-defence is limited in that it cannot, as a rule, extend to crimes under international law. One crime under international law does not legitimise another one. By way of example, even though Ukraine was attacked by Russia in 2022 through a full-scale invasion that was the continuation of attacks that have taken place since 2014, followed by Russian terrorist acts and war crimes directed against civilians, that did not give Ukraine the right to commit war crimes, terrorist acts or crimes against humanity directed against a Russian civilian population. This principle is widely agreed upon in the international law community,

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<sup>170</sup> See Erling Johannes Husabø and Jørn Jacobsen, *Frihet, forbrytelse og straff – En systematisk fremstilling av norsk strafferett*, Fagbokforlaget, 2023, p. 461.

<sup>171</sup> Erling Johannes Husabø and Jørn Jacobsen, *Frihet, forbrytelse og straff – En systematisk fremstilling av norsk strafferett*, Fagbokforlaget, 2023, p. 461.

<sup>172</sup> Ot.prp. nr. 90 (2003-2004), page 421.

<sup>173</sup> Erling Johannes Husabø and Jørn Jacobsen, *Frihet, forbrytelse og straff – En systematisk fremstilling av norsk strafferett*, Fagbokforlaget, 2023, p. 462.

<sup>174</sup> *Kordić and Čerkez*, ICTY Trial Chamber, 26 February 2001, paragraphs 449–451.

<sup>175</sup> See, for example, Douglas Guilfoyle, *International Criminal Law*, Oxford University Press, 2016, page 369.



including among Ukrainian governing powers and military forces. The same position has been expressed by the UN Independent Commission of Inquiry on Ukraine, led by former Norwegian Supreme Court Justice Erik Møse. The Commission has accordingly also investigated and found war crimes committed by Ukrainian forces against civilians, even though Russia is the attacking party.<sup>176</sup>

This agreement must be upheld, as a matter of principle, including when Israel's acts are to be judged. The same international law must apply when acts by western countries or their allies are to be judged. If some western countries view this differently in relation to Israel for political reasons, that will tend to undermine respect for international law, on which most countries depend. It goes without saying that if legal authorities in countries such as Norway begin to bow to political considerations, respect for international law will be further undermined.

At the current juncture, there are no examples in international law case-law and theory of a person who has committed or aided and abetted an act that otherwise meets all the conditions for genocide or a crime against humanity being exempted from criminal liability on grounds of self-defence, at least not persons at the top of a power hierarchy. Whether that could be envisaged for someone much lower down is a different matter; this might typically be a soldier who, with the requisite knowledge of the context, intentionally arrests a civilian who draws a weapon. Even then, however, acquittal is not a very realistic prospect if there are no particularly compelling circumstances, such as very young age or force. Otherwise, there is a requirement that the arrest itself was lawful because it complied with international humanitarian law, such as when a soldier is taken prisoner.<sup>177</sup> However, that is very unlike the situation which is the subject of the present complaint.

Article 33(2) of the Rome Statute further supports the position that self-defence is hard to imagine as a ground of exclusion of criminal liability for genocide and crimes against humanity. That provision makes some allowance for orders from a military or civilian superior, subject to certain cumulative conditions, to be able to give rise to exclusion of criminal liability, but at the same time makes it clear that orders to commit genocide or crimes against humanity must *in any event* be held to be unlawful. No exception is made for acts of self-defence.

In the light of the foregoing, solely on the basis of an interpretation of the rules, the possibility can pretty much be ruled out that a crime against humanity which, by definition, is directed against a civilian population, will be capable of being justified as proportionate or justified under the rules in Article 31(1)(c) of the Rome Statute and section 18 of the Criminal Code.

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<sup>176</sup> <https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/coiukraine/A-78-540-AEV.pdf>

<sup>177</sup> See, for example, a case from the legal proceedings following World War II involving an American airman who was lawfully caught in Germany during the war by two German policemen, whilst a crowd called for the airman to be killed. The airman made a movement towards his right pocket and was immediately shot by both policemen, who were acquitted of war crimes on the ground that they had acted in self-defence: see *Erich Weiss and Wilhelm Mundo*, Case No. 81, 1945. See <https://www.legal-tools.org/doc/36f288/pdf/>

UN Secretary-General António Guterres expressed the same position of principle in relation to Hamas's acts of 7 October 2023:

'Nothing can justify the deliberate killing, injuring and kidnapping of civilians – or the launching of rockets against civilian targets.'<sup>178</sup>

In saying this, the UN Secretary-General was emphasising that no injustice committed against the Palestinians gives the victims or anyone acting on their behalf the right to kill or abuse other civilians. This principle applies for and against everyone. It is precisely this principle that defines the difference between a state-of-law and human rights-based approach to international law and law and justice generally, and a social order based on blood revenge or retaliation. Contemporary international law is based on the principle that one serious crime directed against civilians does not make another serious crime directed against civilians justified or lawful. Retaliation against civilians in the form of murder contrary to fundamental human rights is, therefore, unlawful under contemporary international law. Israel's attack on Gaza since 7 October 2023 has resulted in 15 000 people, including approximately 6 000 children and 4 000 women, being reported killed as at 23 November 2023,<sup>179</sup> whilst 36 000 people have been reported injured.<sup>180</sup> Even if the figures were lower, the attack on Gaza looks more like retaliation and blood revenge than state of law and respect for human rights.

In the light of the foregoing, it appears to be proven beyond all reasonable doubt that Israel's overall response to the attack by Hamas on 7 October has not been justified or proportionate. Israel's acts have gone far beyond what is proportionate.<sup>181</sup> Even Norway's Prime Minister Jonas Gahr Støre, usually a cautious politician on foreign affairs matters, has been quite clear in his statements on the matter. According to the EU Observer, Prime Minister Støre stated the following on 31 October 2023 on the occasion of the Nordic Council's 75<sup>th</sup> session:

'Israel is breaking the rules of modern warfare in Gaza, Norway's prime minister has said. "I believe this is beyond proportionality", Norway's prime minister Jonas Gahr Støre told EU Observer in Oslo on Tuesday (31 October). "The humanitarian consequences for civilians are catastrophic — the number of casualties, the amount of destruction, and especially the enormous burden carried by [Palestinian] children is, as we see it, in breach of what humanitarian norms and standards require," he said.'<sup>182</sup>

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<sup>178</sup> <https://www.un.org/sg/en/content/sg/speeches/2023-10-24/secretary-generals-remarks-the-security-council-the-middle-east>

<sup>179</sup> <https://reliefweb.int/report/occupied-palestinian-territory/hostilities-gaza-strip-and-israel-flash-update-49-enarhe>

<sup>180</sup> <https://abcnews.go.com/International/live-updates/israel-gaza-war-hostages/what-we-know-about-the-conflict-104234888?id=105023987&offset=41>

<sup>181</sup> See, to similar effect, on the basis of a more general international law assessment, Adil Ahmad Haque, *Enough: Self-Defense and Proportionality in the Israel-Hamas Conflict*, Just Security, 6 November 2023: <https://www.justsecurity.org/89960/enough-self-defense-and-proportionality-in-the-israel-hamas-conflict/>

<sup>182</sup> <https://euobserver.com/nordics/157640>

A politician's assessment is, of course, not decisive for what is correct under international law, but the assessment is apt. The key point in the examination of legal justification in the present case is that Israel's attack on Gaza involving a total blockade, heavy bombing, mass murder, forcible transfer of population and persecution of civilians has impacted huge numbers of completely innocent people. The acts were committed with knowledge and intent and, at the very least, clear intent as to probability in terms of the consequences for the civilian population. All of the approximately 2.2 million civilians who were in Gaza between 7 October and 7 November 2023 have been subjected to crimes against humanity: see above part 3.

Consequently, Israel's response to Hamas's attacks clearly do not meet the conditions for self-defence. Three of four cumulative conditions for lawful self-defence are not met.

### **4.3 Conclusion**

The accused, who have been key figures in the planning, execution, and supervision of Israel's military acts in Gaza, may not escape criminal liability for their crimes against humanity on grounds of self-defence.

## **5. The public interest warrants prosecution**

The last paragraph of section 5 of the Criminal Code provides that prosecution for acts committed abroad 'shall only be instituted when in the public interest'. The provision must be read in conjunction with section 62a of the Criminal Procedure Act, under which the general rule is that criminal acts are to be prosecuted when not otherwise provided for by law. No criminal provisions in the Criminal Code are directly conditional on a complaint being filed by an injured party or being in the public interest. Nevertheless, the last paragraph of section 5 is a statutory exception in the Criminal Code, which requires that prosecution be in the public interest.

The second paragraph of section 62a of the Criminal Procedure Act further provides that the case 'may be closed when prosecution is not in the public interest', that is to say, that it may be closed without further investigation. The statutory examples of where it is not in the public interest are not exhaustive: see the wording 'including' (*herunder*) in the Act, but they nevertheless give an indication of which situations can be justified as being in the public interest. These include where 'the matter is trivial' (a) or 'prosecution would entail a length of proceedings and costs or other use of resources that is not reasonably proportionate to the importance of the case' (b). The last alternative (c) is a specific situation not relevant to the present case. Since the matter is not trivial, it will likely become a matter of weighing up the costs against the importance of the case. The importance of the case cannot be overstated for the Norwegian victims. Very serious crimes and considerations of justice are at issue. It is accordingly difficult to see how (b) could be applicable. Evidence of the acts committed are openly available in public documentation, as referred to above in the present complaint: see

parts 3–4, which also makes it difficult to see how grounds such as those referred to in (a)–(c) of the second paragraph of section 62 might apply.

Still, in the *travaux préparatoires* for the last paragraph of section 5 of the Criminal Code, it is stated that the provision is intended to express that ‘some restraint must be shown in prosecuting in Norway acts that are committed abroad’. What follows is however important:

‘The provision allows for a broad discretionary assessment. Apart from cases of genocide and crimes against humanity, the relevant factors will be how serious the act is, what connection the offender has to Norway and to what extent the act otherwise affects Norwegian interests, particularly whether the injured party or other party affected by the act is Norwegian. Another relevant factor is if other, more appropriate countries have jurisdiction and a properly-functioning legal system, and if the suspect is in that country or can be extradited there.’<sup>183</sup>

On the one hand, the provision allows for a broad discretionary assessment. That discretion is nevertheless not completely unfettered. By law, the prosecuting authority in Norway is formally made independent of political authorities. The reason for this is that the Norwegian prosecuting authority is not intended to function as a political tool, or be suspected of doing so. This means that the Norwegian prosecuting authority, including the Director General of Public Prosecutions, may not take purely political considerations into account in its work. Norway’s political relations with Israel and Palestine are accordingly extraneous considerations in relation to the present complaint. The public interest must be limited to considerations which are grounded in criminal legislation and the Criminal Procedure Act.

On the other hand, the statement in the *travaux préparatoires* also lays down some guidance points for the exercise of that discretion, which may have implications for certain cases. All of those guidance points are relevant to the present case. First, it is clear that crimes against humanity, along with genocide, are in a special position in terms of seriousness. Second, it is clear that it is significant whether the injured party or the party affected by the act is Norwegian. In the present case, around 270 Norwegians are parties injured or affected by one or more crimes against humanity. This is unprecedented. Both of these considerations must, therefore, weigh heavily in favour of the public interest warranting prosecution.

The third consideration referred to in the same place in the *travaux préparatoires* is ‘if other, more appropriate countries have jurisdiction and a properly-functioning legal system [...] if the suspect is in that country or can be extradited there’.

In the present case, it is Palestine which has, in principle, territorial jurisdiction for the acts committed in Gaza. Palestine is, however, occupied by Israel and has limited self-government and no properly-functioning legal system, either in Gaza or elsewhere. Nor is Palestine recognised as a State by either Israel or Norway. Palestine does not actually have an

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<sup>183</sup> Ot.prp. nr. 90 (2003-2004), page 404.

autonomous and politically independent legal system. It is not politically independent of Hamas in Gaza, or independent of the Palestinian Authority or of the Israeli occupation authorities in the West Bank. Consequently, a fair investigation and due procedure cannot be expected. In any event, Palestine is not in a position to bring criminal proceedings against Israeli leaders. It would not be permitted by Israeli authorities and Israel as an occupying power.

Israel has nationality jurisdiction over the acts which are the subject of the present complaint in Gaza, and probably also territorial jurisdiction, since the aiding and abetting by the accused has occurred mainly through decisions, etc. taken in Israel. It is general knowledge that Israel's legal system has come under political attack recently regarding judicial independence. Irrespective of how this aspect is viewed in isolation, it is entirely unthinkable that the accused should be investigated by the Israeli prosecuting authority and brought before the courts in Israel for crimes against humanity in Gaza. This is unthinkable for the foreseeable future and is, therefore, not an argument for why the case should not be investigated in Norway.

All three of the abovementioned considerations in the *travaux préparatoires* therefore clearly weigh in favour of the case being investigated in Norway.

One possible consideration that does not seem to have been expressly discussed in the *travaux préparatoires* for the last paragraph of section 5 of the Criminal Code is whether there are compelling reasons why the person investigated and potentially indicted will likely not be extradited to Norway. This may be due to a lack of extradition treaty or political reasons suggesting that it is not likely that a State will extradite a person for criminal prosecution in Norway. It must be assumed that that will be the case here. Israel will not extradite any of the accused, at any rate not in the foreseeable future. The question is whether this is a compelling reason in the public interest leaning in the opposite direction to the considerations discussed above. The complainants submit that, in view of the seriousness of the case, this cannot be held to be a particularly compelling reason; this will be elaborated on below.

From the perspective of the victim – and the more serious the crime, the more important this perspective is – it is misguided to believe that it does not matter whether or not the case is investigated, or whether or not a presumably guilty person is indicted, even though the person probably or in all likelihood will not be extradited for criminal prosecution in Norway. Reference can be made here to what one of the 2022 Nobel Peace Prize winners, the Ukrainian Center for Civil Liberties, stated about the importance of each and every step in criminal prosecution of the most serious crimes, inter alia, on the one-year anniversary of the Russian full-scale invasion of Ukraine on 24 February 2023, in Bergen at the conference ‘War against Ukraine – Accountability and Responses’.<sup>184</sup> Reference can also be made to the positive implications of the indictments and arrest warrants for war crimes issued by the ICC in March

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<sup>184</sup> <https://www.uib.no/en/udir/159631/international-conference-war-against-ukraine-accountability-and-responses>

2023 against President Vladimir Putin and Maria A. Lvova-Belova.<sup>185</sup> This has a positive effect, even though the chances of imminent apprehension are slim.<sup>186</sup> Also worthy of mention is the general positive significance of the criminal prosecution brought in the Netherlands against the commanders of Russian-backed forces suspected of downing Flight MH17 in 2014 which, in that case, involved criminal proceedings *in absentia* before the courts.<sup>187</sup> Those cases are not equal but bear similarities to the situation in Gaza. The essential point is that a fair criminal prosecution of serious crimes through independent prosecuting authorities and courts has an important function in terms of rule of law, international law and human rights. Each and every step in – and not just the final outcome of – those criminal proceedings is of great importance as part of the effort to hold offenders to account and obtain justice for the victims.

The victim's perspective generally plays a prominent role in particularly serious crimes in the field of human rights as well. Under the European Convention on Human Rights (ECHR) and the UN International Covenant on Civil and Political Rights (ICCPR), there is a positive duty to investigate acts of murder. Although as a general rule that duty applies only in respect of the territorial State where the act occurred, and although the rules on universal jurisdiction in relation to crimes under international law first and foremost confer a right on a State to investigate and prosecute acts committed abroad by persons other than its own citizens, it can be argued that, depending on the circumstances, there is also a duty to investigate serious crimes committed abroad. The relevant circumstances may be precisely that otherwise a situation of total exclusion of criminal liability could arise because neither the territorial State nor the State of nationality wishes or is in a position to prosecute the act. In such a situation, the fact that the victim is a citizen of the State where a complaint is lodged, or has a particular connection thereto, may weigh in favour of there being a duty. In other words, where the line is drawn between a legal obligation and a treaty-based call to investigate may be somewhat fluid.

In the UN Human Rights Committee *General Comment No. 36* (2019), paragraph 27,<sup>188</sup> the statement about the duty to investigate in the event of 'unlawful deprivations of life' is not explicitly limited to the territorial State. On the contrary, it can seem as though the Committee is taking a broader view, by linking the duty to investigate not only to Article 6(1) ICCPR (respect for life), but also to the connection with the right to an effective remedy for victims of human rights violations and their relatives: see Article 2(3) ICCPR. Norwegian citizens can thus perhaps be said to have a human rights-based right to an effective remedy in Norway in the form of Norwegian investigation in certain specific cases, even though the acts were committed abroad, typically when the victims have been subjected to extremely serious acts, such as those which are the subject of the present complaint, and there are no grounds to believe

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<sup>185</sup> <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and>

<sup>186</sup> <https://foreignpolicy.com/2023/03/21/putin-indictment-icc-international-justice-war-ukraine/>

<sup>187</sup> <https://www.justsecurity.org/84456/dutch-court-in-life-sentences-russia-had-overall-control-of-forces-in-eastern-ukraine-downing-of-flight-mh17/>

<sup>188</sup> <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/261/15/PDF/G1926115.pdf?OpenElement>

that the acts will be investigated elsewhere. In any event, a human rights obligation to investigate the acts is not a prerequisite in order for the public interest to warrant prosecution.

The Rome Statute does not lay down a clear treaty-based duty for the States Parties to investigate crimes against humanity, but it is based on a requisite of it being the States Parties which are, as a rule, to prosecute such crimes. A strong appeal to that effect is laid down in the preamble in the following terms:

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation [...].<sup>189</sup>

The justification lies in the objective of combatting impunity for the most serious crimes, which the States Parties have promised each other with a view to preventing new crimes ('the prevention of such crimes').<sup>190</sup> Although the preamble itself does not lay down legally-binding rules, it is nevertheless stated in the preamble that it is 'the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'.<sup>191</sup> No mention is made here of which basis for jurisdiction the State should use. If the State has jurisdiction, it must be used. That is precisely the case here. Norway has jurisdiction and must use it when such serious crimes have been committed, as in the present case. At least that would be in keeping with the spirit and principles of the Rome Statute.

Should an investigation against the accused be initiated by the ICC, then the complainants believe that the matter may evolve differently in terms of the public interest and potential coordination with the ICC, in keeping with the States Parties' duty of cooperation with the ICC. That, however, is a hypothetical question which need not be a reason preventing an investigation in Norway from being initiated now.

Clarification of whether the accused have committed crimes against humanity can also help to prepare the parameters for potential subsequent criminal proceedings against Norwegians who may have aided and abetted such crimes in Gaza at a lower level. Reference is made to the fact that, according to the Norwegian broadcaster NRK, several persons holding Norwegian citizenship have taken part in the Israeli military's acts against Gaza.<sup>192</sup>

In the light of the foregoing, the complainants submit that reasons of public interest clearly warrant that an investigation and prosecution be undertaken in Norway.

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<sup>189</sup> Fourth recital in the preamble to the Rome Statute.

<sup>190</sup> Fifth recital in the preamble to the Rome Statute.

<sup>191</sup> Sixth recital in the preamble to the Rome Statute.

<sup>192</sup> <https://www.nrk.no/urix/frykter-at-nordmenn-i-gaza-kan-bli-drept-av-nordmenn-i-israelsk-tjeneste-1.16617269>

Oslo, 28 November 2023

**Forsvar Folkeretten  
(Defend International Law)**

*Sign.*

Kjell Brygfjeld  
Advokat (Lawyer)

*Sign.*

Josef A. Younes  
Advokat (Lawyer)

**ICJ Norway**

*Sign.*

Dr. jur Terje Einarsen  
Chair of the Board

*Sign.*

Christina Eckhoff Skeie  
General Manager