

Arms Transfers to Israel in the Gaza Conflict

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Remarks of the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Saul

I recently led the call by over 40 United Nations independent experts for all countries to stop transferring weapons or ammunition, or parts for them, to Israel for use in Gaza, since doing so would violate international law where there is a clear risk that they would be used by Israel to violate international humanitarian law. We also emphasized that arms transfers to Palestinian armed groups are prohibited, given their obvious grave violations of international law on and after October 7 last year. We welcomed that many countries have suspended arms transfers, including Canada, Belgium, Italy, Spain, the Netherlands and a Japanese company, and the European Union has discouraged them. A few countries continue to permit exports or provide military aid, overwhelmingly the United States and Germany, but also the United Kingdom and France. I make no comment on Australian arms exports specifically other than to urge greater transparency in disclosing the nature of arms transfers to any other country.

There are five reasons why arms transfers may be unlawful. First, all countries have a legal duty to “ensure respect” for international humanitarian law by the parties to an armed conflict, including in conflicts overseas in which we are not ourselves involved. The duty arises under the Geneva Conventions of 1949 and customary international law. The duty requires all countries to refrain from transferring any weapon or ammunition – or parts or components – if it is expected, given the facts or past behaviour, that they would be used to violate humanitarian law. Transfers are prohibited even if the exporting State does not intend the arms to be used to violate the law, or does not know with certainty that they would be so used, as long as there is a clear risk.

In the present conflict, the risk is clear given Israel’s many violations in Gaza over the past six months. A Dutch Court of Appeal recently ordered The Netherlands to halt exports of F-35 fighter jet parts to Israel. It found that “there are many indications that Israel has violated the humanitarian law of war in a not insignificant number of cases”. As a result, it found there was a “clear risk” that the parts would be used to seriously violate international humanitarian law. The Court highlighted the extensive civilian casualties; the destruction of 60% of homes and extensive damage to hospitals, water and food supplies, schools and religious buildings; widespread severe hunger; and the displacement of 80% of residents. It also pointed to Israel’s prolific use of imprecise “dumb bombs”; deliberate, disproportionate and indiscriminate attacks; failures to warn civilians; and incriminating statements by Israeli soldiers.

This assessment is consistent with the documentation of violations by the United Nations and its independent experts – that Israel has not taken sufficient care to spare the civilian population. Over 110,000 Palestinians in Gaza have been killed or injured and the overwhelming majority are non-combatant women and children. Over 12,000 children have been killed, and 1,000 children have had limbs amputated, some without anaesthesia. Some reports suggest Israel has authorised the killing of up to 20 civilians to kill one suspected Hamas fighter, and levelled whole building for minor military gains.

Around 1.1 million people measurably face catastrophic hunger, and over a million more are chronically hungry. People have been boiling weeds and eating animal food. Already 30 children have suffered the horror of starving to death. Deliberately starving civilians as a tactic of war is a war crime. Israel has persistently obstructed humanitarian relief efforts, not only at the borders but also in attacking aid workers and humanitarian infrastructure, smearing UNRWA without substantiating evidence, and excluding UNRWA from parts of Gaza despite it being the largest and most capable humanitarian actor. Israel did not appreciably change tactics after the International Court of Justice ordered it to avert a plausible risk of genocide, or a binding Security Council resolution demanded a ceasefire. It has also been largely unresponsive to demands from even its closest ally, the United States, to respect international law, though a little more aid has entered in the last couple of weeks. The UN estimates only a quarter of the level of humanitarian relief entering prior to 7 October last year has entered in the six months since then. A devastating offensive still looms against the last civilian refuge in Rafah. The clear risk of future Israeli violations is manifest based on convincing evidence as to how it has behaved over the past six months.

Common article 1 arguably prevents both direct arms transfers to a state where there is a clear risk of humanitarian law violations, as well as transfer to a third country where there is a known risk of secondary transfer to an end user where there is a risk of violations. For example, State A exports artillery shells or fighter aircraft components to State B, where State A knows that State B would likely transfer them onward to State C at a later stage, for example after undertaking a further production process in State B. In such circumstances, it is within the power of State A to impose export conditions on its transfer to State B to prevent secondary transfers to State C. In contrast, the Arms Trade Treaty does not expressly address this problem of lawfully authorized onward transfers from State B to State C.

Whether the transfer of particular weapons or munitions is lawful or unlawful may depend on their specific characteristics and the nature of their use by Israel. For example, provision of a some purely defensive weapons which could not be used to violate humanitarian law in Gaza would not be prohibited, such as Patriot missile systems deployed solely within Israel whose only purpose is to intercept incoming rockets.

I emphasize that the duty to “ensure respect” for international humanitarian law raises similar considerations with respect to the sharing of military intelligence with Israel, if there is a clear risk that it would be used by Israel for military attacks in violations of international humanitarian law. This will depend on the nature of the intelligence shared and the effectiveness of any limitations or safeguards imposed by sharing state on its use by Israel.

Secondly, countries like Australia that have accepted the Arms Trade Treaty of 2012 are firstly required to refuse arms exports if they “know” that the arms “would” be used to commit international crimes (article 6(3)), which requires a high level of certainty as to their use. Even where this standard is not met, article 7 still requires exports to be refused if there is an “overriding risk” that the arms transferred “could” be used to commit or facilitate serious violations of international humanitarian law (article 7). This lower and more protective standard, which applies not only to the commission but facilitation of violations, broadly aligns with the duty to ensure respect for humanitarian law under common article 1 of the Geneva Conventions mentioned earlier, namely where there is a certain level of risk of violations.

These provisions apply not only to conventional arms under the Convention but also, under Article 4, to their “parts and components where the export is in a form that provides the capability to assemble the conventional arms”. The Convention does not define what it means by “a form that provides the capability to assemble the conventional arms”. The provision was designed to stop the Convention’s limitations on arms transfers being circumvented by exporting un-assembled parts which could then be readily assembled into whole weapons.

From the drafting it is clear that parts and components are still covered even if they are not exclusively or specifically designed for weapons but could be used in them, and they thus can include dual use items. At the same time, the provision was not seemingly intended to cover every possible generic item that could also be used in a weapon, such as ordinary nuts and bolts. The provision implies that there has been some level of production or processing of items to enable their ready integration into a weapon, as opposed to pure raw materials. It is not limited to export consignments of whole weapons systems in disassembled form, but applies to the individual parts and components when shipped separately from other parts. Parts and components also need not be themselves capable of causing military harm, such as military paint or vehicle tires, as long as they are an element of the weapon system.

To give some concrete examples, in my view the Convention covers items such as military aircraft or drone engines or other items, armoured steel for vehicles, missile launcher and control components, weapons-grade explosives, and military software.

Thirdly, where a country has learned of a serious risk of genocide, the Genocide Convention of 1948 requires countries to employ all means reasonably available to them to prevent genocide in another state as far as possible, particularly where they have influence with the other state – such as through the provision of military, financial or political support. This necessitates halting arms exports in light of the International Court’s finding that there is a plausible risk of genocide in Gaza and its order requiring Israel to prevent it.

Fourthly, under the general international law of state responsibility, a state is responsible for unlawfully aiding or abetting a violation of international law by another state where it has knowledge that the assistance it provides would be used to violate international law. This is a higher standard than the duty to ensure respect for humanitarian law under common article 1 of the Geneva Convention or the due diligence standard under article 7 of the Arms Trade Treaty, since it requires a near certainty that arms would be used to violate humanitarian law, not merely a clear risk or recklessness.

Finally, state officials involved in authorizing arms transfers or exports may be individually criminally liable for aiding and abetting international crimes (including war crimes, crimes against humanity and genocide) in Gaza where they knew that the arms would be so used. Again this is a higher standard for responsibility than the “clear risk” standard under the Geneva Conventions or the due diligence requirement under article 7 of the Arms Trade Treaty. All other states under the principle of universal jurisdiction, and the International Criminal Court, may be able to investigate and prosecute such crimes.

In addition to the above grounds on which arms transfers could be unlawful, every state also has a right under international law to impose **unilateral sanctions** on any state that is violating international law, in order to compel it to resume compliance with its obligations. This could include an arms embargo as well as financial, travel or diplomatic sanctions targeting responsible civilian and military leaders. I note that Australia’s Magnitsky sanctions legislation allows for sanctions to be imposed for “serious violations of international humanitarian law”.

Arms companies contributing to the production and transfer of arms to Israel and businesses investing in those companies bear their own responsibilities to respect international law.

International law does not enforce itself. I call on all countries to not be complicit through arms transfers where the risks of violations are so starkly evident, amidst an unrelenting humanitarian catastrophe in Gaza. While Israel has a right to protect its civilians from violence, it must do consistently with international law. When Israel demonstrates that its operations consistently comply with international law, arms transfers to Israel could lawfully resume. I note, however, that elsewhere Israeli military operations have raised real questions about compliance with international law, including its operations in the occupied Palestinian West Bank and in the targeting of civilians and embassies in neighbouring countries.