



Demolishing the Future

Continued Property Destruction in the Occupied Palestinian Territory

Diakonia International Humanitarian Law Resource Centre
June 2019

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Acronyms

Gol	Government of Israel
UN OCHA	United Nation Office for the Coordination of Humanitarian Affairs
oPt	occupied Palestinian territory
IHL	International Humanitarian Law
IHRL	International Humanitarian Law
OP	Occupying Power
ARSIWA	The Draft Articles on Responsibility of States for Internationally Wrongful Acts

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Cover photo ©ActiveStills House Demolition, Al Hadidiya, Jordan Valley, West Bank, 11.10.2018

A Palestinian woman stands next to the contents of her house, after Israeli forces demolished it earlier that day, Al Hadidiya, Jordan Valley, West Bank, October 11, 2018. The demolition was conducted on grounds of building without an Israeli-issued building permit.

Inside photo ©Diakonia A student stands next to her demolished school in South Hebron hills, 2018.

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Introduction

Over the past five decades of Israel's occupation of the Palestinian territory, a main feature of the policies implemented is the widespread appropriation and destruction of property, including land and natural resources. In recent years, the rate of demolitions, seizures, and confiscations of property by the Government of Israel (GoI) across the West Bank in particular, has been increasing.¹ In April 2019 alone, as a consequence of Israeli orders, 63 homes and structures were demolished, the highest number ever recorded in one month by the UN Office for the Coordination of Humanitarian Affairs (UN OCHA) in the occupied Palestinian territory (oPt).² In addition to the rising number of demolitions, the GoI has instituted several new military orders and passed laws that will likely have the effect of accelerating the pace of demolitions, confiscations, and seizures under new or existing demolition orders.³

These actions either directly or indirectly cause displacement and the destruction of Palestinian livelihoods,⁴ particularly in occupied East Jerusalem and "Area C" of the West Bank. Indeed, donor-funded projects aimed at addressing the humanitarian concerns of these populations are frequently targeted by Israeli authorities.⁵ Additionally, Bedouin communities in "Area C," such as the community in Khan Al-Ahmar, are particularly and increasingly vulnerable to displacement and its consequences as the GoI continues its attempts to consolidate large settlement blocs and prevent further development. This displacement and discrimination puts at risk access to water, livelihoods, education, and, among other things, basic shelter. These policies of destruction and appropriation have the clear aim of solidifying Israel's grip on Palestinian territory and resources, adding to a growing body of violations of international law.

In the oPt, Israel has obligations both under international humanitarian law (IHL) and international human rights law (IHRL). This brief will focus primarily on the framework of IHL to evaluate current Israeli policies, practices, and actions in the West Bank with respect to the destruction of private property. It will demonstrate that the actions of the GoI, specifically with respect to the demolition of private property, constitute violations of IHL, some of which amount to grave breaches and war crimes for which there is individual criminal responsibility. It will also highlight how these violations contribute to general violations of international law, including the prohibition on the acquisition of territory by force and the denial of Palestinians' right to self-determination.

The Architecture of Destruction in the oPt

Israel has occupied the Palestinian territory since 1967.⁶ As the Occupying Power (OP), Israel has obligations and duties to the Palestinian population under both IHL and IHRL.⁷

¹ United Nations Office for the Coordination of Humanitarian Affairs, "Record number of demolitions, including self-demolitions, in East Jerusalem in April 2019," 14 May 2019, available at:

<https://www.ochaopt.org/content/record-number-demolitions-including-self-demolitions-east-jerusalem-april-2019>.

² UN OCHA began tracking demolitions in the West Bank, including East Jerusalem, in 2009. *Ibid.*

³ <https://www.ochaopt.org/content/new-legislation-impedes-challenges-demolitions-and-seizures-west-bank>

⁴ United Nations Office for the Coordination of Humanitarian Affairs, "Record number of demolitions, including self-demolitions, in East Jerusalem in April 2019," 14 May 2019, available at:

<https://www.ochaopt.org/content/record-number-demolitions-including-self-demolitions-east-jerusalem-april-2019>.

⁵ United Nations Office for the Coordination of Humanitarian Affairs, *West Bank Demolitions and Displacement: An Overview*, April 2019, p. 4, available at: https://www.ochaopt.org/sites/default/files/demolition_monthly_report_april_2019.pdf.

⁶ International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *ICJ Reports 2004*, p. 140.

⁷ UNSC Res 271 (15 September 1969); UN Doc S/RES/271; UNSC Res 1544 (19 May 2004); UN Doc S/RES/1544; UNGA Res 56/60 (10 December 2001); UN Doc A/RES/56/60; International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Territories*, Advisory Opinion, *ICJ Reports 2004*, para. 78.

Under IHL and the laws regulating occupation, Israel has a duty to administer the oPt for the benefit of the Palestinian population, all of whom are considered to be “protected persons” under the Geneva Conventions.⁸ The obligation to administer the territory for the benefit of the protected population includes maintaining law and order, protecting Palestinian civilians from any form of violence, and, crucially, ensuring that their rights and needs are provided for. As part of these responsibilities, the OP is also required to respect local laws already in force prior to the commencement of the occupation unless absolutely prevented from doing so.⁹

The Israeli-imposed planning regimes in both the West Bank’s “Area C” and East Jerusalem violate these core obligations by replacing Jordanian planning laws through extensive modification without adequate justification.¹⁰ In East Jerusalem, the Israeli government completely supplanted these laws through its unlawful annexation of the Palestinian territory immediately following the conclusion of the 1967 war, making it subject to Israel’s national and municipal planning institutions.¹¹ In the parts of the West Bank which were excluded from the unlawful annexation of Jerusalem, extensive modification of the Jordanian planning laws was accomplished through the issuance military orders beginning in 1971.¹²

Both planning regimes are discriminatory, with approvals nearly impossible for Palestinians to obtain. In “Area C,” only one percent of the land is allocated to Palestinians.¹³ In East Jerusalem, approximately 13 percent of the land is zoned for construction by Palestinians.¹⁴ Additionally, virtually no so-called state or public land is allocated to Palestinian communities for their use.¹⁵ The discriminatory allocation of land is coupled with the effective impossibility of obtaining a building permit, evidenced by extraordinarily low rates of permit approvals,¹⁶ even within the minute amount of territory allocated and zoned for construction.¹⁷ Additionally, in the Israeli Civil Administration-controlled West Bank, the local and district planning committees were abolished by Military Order 418, stripping Palestinians of participation in the planning regime.¹⁸ Accordingly, it is estimated that tens of thousands of Palestinian homes and structures have been built throughout the West Bank without permits the Israelis say they must obtain. In doing

⁸ Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, adopted 12 August 1949, entry into force on 21 October 1950, 75 UNTS 287, (“GC-IV”) Art. 4; see also Henckaerts J. and Doswald-Beck L. (eds), *Customary International Humanitarian Law*, Vol. I: Rules, Cambridge University Press, 2005, (ICRC Customary Law Study), Rules 1, 6.

⁹ Hague Convention (IV) concerning the Laws and Customs of War on Land and its Annex: Regulations Respecting the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) 205 CTS 277, (HRIV) Art. 43.

¹⁰ See Diakonia, *Planning to Fail: The Planning Regime in Area C of the West Bank: An International Law Perspective*, September 2013, available at: <https://www.diakonia.se/globalassets/documents/ihl/ihl-in-opt/planning-to-fail.pdf>.

¹¹ See Al-Haq, “40 Years after the Unlawful Annexation of East Jerusalem: Consolidation of the Illegal Situation Continues Through the Construction of the Jerusalem Light Rail,” 12 October 2010, available at: <http://alhaq.org/advocacy/topics/wall-and-jerusalem/144-40-years-after-the-unlawful-annexation-of-east-jerusalem-consolidation-of-the-illegal-situation-continues-through-the-construction-of-the-jerusalem-light-rail>; see also Diakonia, *Rule of Law: A Hardening of Illegality in Israel and the oPt 2014-2017*, December 2017, available at: <https://www.diakonia.se/globalassets/blocks-ihl-site/ihl-file-list/ihl--reports/rule-of-law-a-hardening-of-illegality-in-israel-and-the-opt-2014-2017.pdf>.

¹² Diakonia, *Planning to Fail*, p. 12.

¹³ UN OCHA, “New legislation impedes challenges to demolitions and seizures in the West Bank,” 10 July 2018, available at: https://www.ochaopt.org/content/new-legislation-impedes-challenges-demolitions-and-seizures-west-bank#ftn_ref2; see also pg 13 https://www.btselem.org/sites/default/files/publications/201902_fake_justice_eng.pdf

¹⁴ UN OCHA, “UN officials call for an immediate halt to demolitions in East Jerusalem and respect for international law amidst rise,” 3 May 2019, available at: <https://www.ochaopt.org/content/un-officials-call-immediate-halt-demolitions-east-jerusalem-and-respect-international-law>.

¹⁵ Yotam Berger, “Palestinians Have Received 0.25% of State Land Israel Has Allocated in the West Bank Since 1967,” *Haaretz*, 19 July 2018, available at: <https://www.haaretz.com/israel-news/.premium-palestinians-got-0-25-of-west-bank-state-land-israel-has-allotted-1.6290748>.

¹⁶ In the Civil Administration-controlled West Bank, the Israeli NGO B’Tselem reports the rate of approvals from 2000 to mid-2016 was four percent, according to figures provided by the Israeli Civil Administration. B’Tselem, *Fake Justice: The Responsibility Israel’s High Court Justices Bear for the Demolition of Palestinian Homes and the Dispossession of Palestinians*, February 2019, p. 15, available at: https://www.btselem.org/sites/default/files/publications/201902_fake_justice_eng.pdf

¹⁷ UN OCHA, *Humanitarian Response, Humanitarian Needs Overview 2018*, (fn 58) p. 9; see also

UN OCHA, “UN officials call for an immediate halt to demolitions in East Jerusalem and respect for international law amidst rise,” 3 May 2019, available at: <https://www.ochaopt.org/content/un-officials-call-immediate-halt-demolitions-east-jerusalem-and-respect-international-law>.

¹⁸ See Diakonia, *Planning to Fail*, p. 12.

so, the occupants and owners of these structures could face heavy fines, removal by force, and destruction, confiscation, or seizure of their property by Israeli authorities.¹⁹

Indeed, in the West Bank alone, excluding East Jerusalem, authorities from the Israeli Civil Administration from 1988 to 2017 issued over 16,000 demolition orders.²⁰ By the end of April 2017, there were still over 13,000 outstanding orders either awaiting processing, held up in legal proceedings, or simply waiting to be executed. While current figures of outstanding demolition orders are difficult to find or verify, the spectre of the realisation of these demolitions and their consequences has risen in part due to the recent passage and implementation of new orders, policies and laws.²¹

Recent changes to laws and policies

Several troubling developments in Israeli policies make the acceleration of the pace of demolitions almost inevitable, and contribute to an environment that is increasingly coercive. In April of 2018, the Israeli Military Commander in the West Bank issued military order 1797,²² which allows for expedited demolition and seizure of unlicensed, so-called “new” structures within 96 hours of the issuance of a removal notice.²³ This order supplements other recently issued military orders allowing inspectors to seize “mobile structures” without notice.²⁴

Additionally, new amendments to Israel’s 1965 Planning and Building Law (which applies to Israel and occupied East Jerusalem) were passed by the Israeli Parliament (Knesset) in 2017, allowing for expedited demolitions and increased fines for violations of the permitting scheme.²⁵ Invariably, this will disproportionately affect Palestinians.²⁶ As of 2018, fines for building without a permit were increased substantially from tens of thousands of shekels to up to 400,000 shekels (approx 111,872 USD). The fines can be increased if owners do not demolish their own homes when they receive a demolition order.²⁷ Meanwhile, an amendment to the Administrative Court law has limited access to the High Court of Justice for those seeking judgement on issues relating to planning and zoning relegating these issues to the Jerusalem Administrative Affairs Court.²⁸ These recent amendments and policies apply increasing pressure on already vulnerable

¹⁹ According to OCHA, “[a]t least one third of all Palestinian homes in East Jerusalem lack an Israeli-issued building permit, potentially placing over 100,000 residents at risk of displacement.”

UN OCHA, “Record number of demolitions, including self-demolitions, in East Jerusalem in April 2019,” 14 May 2019, available at: <https://www.ochaopt.org/content/record-number-demolitions-including-self-demolitions-east-jerusalem-april-2019>.

²⁰ UN OCHA figures citing figures obtained by the Israeli NGO Bimkom who obtained data from the Israeli Civil Administration. These figures cannot be independently verified. UN OCHA, “Demolition Orders against Palestinian Structures in Area C – Israeli Civil Administration data, available at:

<https://www.ochaopt.org/page/demolition-orders-against-palestinian-structures-area-c-israeli-civil-administration-data>.

²¹ UN OCHA, “New legislation impedes challenges to demolitions and seizures in the West Bank,” 10 July 2018, available at: <https://www.ochaopt.org/content/new-legislation-impedes-challenges-demolitions-and-seizures-west-bank>.

²² *Military Order regarding Removal of New Structures (Judea and Samaria) (Temporary Order) (No. 1797) 2018.*

²³ In 2018, several NGOs filed petitions in the Israeli court system challenging the military order. The implementation of the order was subsequently suspended while the Israeli High Court of Justice reviewed the case. The High Court of Justice subsequently dismissed the petitions on April 30, 2019, lifting the freeze on the order’s implementation. The Israeli Committee Against House Demolitions, “Demolition and Displacement Report – May 2019,” 3 June 2019, available at: <https://icahd.org/2019/06/03/demolition-and-displacement-report-may-2019/>.

²⁴ IDF Regulations on the transfer of goods (Judea and Samaria), 1993. According to OCHA, “Mobile structures” are understood as those which can be disassembled or otherwise removed without destroying them.” See <https://www.ochaopt.org/content/new-legislation-impedes-challenges-demolitions-and-seizures-west-bank#ftn4>

²⁵ UN OCHA, “New legislation impedes challenges to demolitions and seizures in the West Bank,” 10 July 2018, available at: <https://www.ochaopt.org/content/new-legislation-impedes-challenges-demolitions-and-seizures-west-bank#ftn4>.

²⁶ “Between 2012 and 2014, 97 percent of the administrative demolition orders were issued against structures in [Arab] communities.” Editorial Board, “Construction, Not Destruction,” *Haaretz*, 4 April 2017, available at: <https://www.haaretz.com/opinion/editorial/construction-not-destruction-1.5456994>.

²⁷ UN OCHA, “Record number of demolitions, including self-demolitions, in East Jerusalem in April 2019,” 14 May 2019, available at: <https://www.ochaopt.org/content/record-number-demolitions-including-self-demolitions-east-jerusalem-april-2019>.

²⁸ Law of the Courts for Administrative Matters (Amendment no. 117), 5778-2018; see also The Association for Civil Rights in Israel, “Transfer of OPT petitions from the High Court to the Court for Administrative Affairs in Jerusalem,” 25 February 2018, available at: <https://law.acri.org.il/en/2018/02/25/transfer-of-opt-petitions-from-the-high-court-to-the-court-for-administrative-affairs-in-jerusalem/>.

Palestinian communities. While the broader effects of these recent changes on the existing coercive environment are not yet clear, the destruction of property is on the rise.

Rise in demolitions in the West Bank

Recent figures show destruction of property by Israeli forces in the oPt is on the rise. While, the aggregate number of demolitions carried out by Israeli authorities for reasons of failure to obtain permits under the respective unlawful planning regimes is unknown, UN OCHA figures, gathered since 2009, place the number of demolitions in the West Bank at 5,439.²⁹

East Jerusalem has also increasingly been targeted by the execution of demolition orders. According to UN OCHA, from 2009 to 2015, in East Jerusalem approximately six structures were destroyed per month, a total of 544 structures.³⁰ The number of demolitions rose precipitously in 2016. From 2016 to April 2019, an average of 14 structures were demolished per month in East Jerusalem for a total of 591 structures.³¹ This includes figures from April 2019 during which 31 structures were demolished in a single day in multiple neighbourhoods.³² In the Silwan district of East Jerusalem, dozens of structures are facing imminent demolition.³³

Beyond East Jerusalem, structures are routinely demolished and un-permitted structures face the constant threat of the issuance or execution of a demolition order. This increased pressure is felt especially by vulnerable, mostly Bedouin, communities such as Khan Al-Ahmar that are slated for “relocation” and where, following the approval of the Israeli High Court of Justice, the Civil Administration is poised to demolish the community’s structures. Khan Al-Ahmar is home to over 150 Palestinians and includes a school that services a number of local Bedouin communities.³⁴

Israel’s demolition of such structures across the West Bank, both individually and as part of a clear pattern which reflects Israeli governmental and military policies, are almost uniformly violations of its obligations as the Occupying Power, and may give rise to individual criminal liability.

Demolition of Structures under International Humanitarian Law

Under IHL, the treatment of property is subject to numerous provisions and protections. Under the law of occupation, those protections significantly constrain the OP’s ability to lawfully alter the state or status of private property. These protections are enshrined in both the 1907 Hague Regulations and the 1949 Fourth Geneva Convention. Additionally, the destruction of property, when extensive, can constitute a “grave breach” of IHL and a war crime. The destruction of property is also criminalized under the International Criminal Court’s Rome Statute.³⁵

²⁹ UN OCHA, “Breakdown of Data on Demolition and Displacement in the West Bank,” available at: <https://app.powerbi.com/view?r=eyJrIjoiMmJkZGRhYWQtODkoMSooMWJkLWI2NTktMDg1NGJlMGNiY2Y3IiwidCI6IjBmOWUzNWRLTUoNGYtNGY2MCIiZGNjLTlVlYTQxNmU2ZGM3MCIiImMiOjIh9.>

³⁰ This figure is inclusive of “self-demolitions” where, under a demolition order, Palestinians were compelled to destroy their own structures. UN OCHA, “Record number of demolitions, including self-demolitions, in East Jerusalem in April 2019,” 14 May 2019, available at: <https://www.ochaopt.org/content/record-number-demolitions-including-self-demolitions-east-jerusalem-april-2019>.

³¹ This figure also includes 106 “self-demolitions.”

³² UN OCHA, “UN officials call for an immediate halt to demolitions in East Jerusalem and respect for international law amidst rise,” 3 May 2019, available at:

<https://www.ochaopt.org/content/un-officials-call-immediate-halt-demolitions-east-jerusalem-and-respect-international-law>.

³³ Nir Hasson, “Israel Begins Demolishing Palestinian Homes in East Jerusalem Neighborhood,” *Haaretz*, 17 April 2019, available at:

<https://www.haaretz.com/israel-news/.premium-israel-police-begin-demolishing-palestinian-homes-in-east-jerusalem-neighborhood-1.7134693>.

³⁴ B’tselem, “Communities facing expulsion: The Khan al-Ahmar area,” 10 October 2017, available at:

https://www.btselem.org/communities_facing_expulsion/khan_al_ahmar.

³⁵ See Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9,

17 July 1998 (entered into force 1 July 2002), (“Rome Statute”) Arts. 8(2)(b)(xiii) and 8(2)(e)(xii).

As a general rule, IHL prohibits the OP from destroying property—both private and public—except in cases of military necessity.³⁶ This principle stems namely from two provisions of IHL, Article 53 of the Fourth Geneva Convention, which is applicable in situations of occupation, and Article 23(g) of the 1907 Hague regulation, which is applicable during all instances of international armed conflict, including situations of occupation. In addition to this general prohibition, Article 46 of the Hague Regulations requires private property to be respected by the OP.

The principle of military necessity allows parties to a conflict to take actions that are necessary to accomplish a legitimate military aim and to weaken the military capacity of the opposing party to a conflict, but which are not otherwise contrary to IHL.³⁷ When related specifically to the destruction of property, this limit has been interpreted to require a nexus or “reasonable connection between the destruction of property and the overcoming of enemy forces.”³⁸ Additionally, the requirement of “imperative” reasons of military necessity present in the language of Article 23(g) of the Hague Regulations has been interpreted to mean “no other option.”³⁹ In situations of occupation, under Article 53 of the Fourth Geneva Convention, destruction of property is permitted only when “rendered absolutely necessary by military operations.”⁴⁰ “Military operations” have been interpreted to comprise “movements, manoeuvres and actions of any sort, carried out by the armed forces with a view to combat,”⁴¹ or “fighting.”⁴² The exception would thus preclude destruction on the basis of non-combat related activities, such as military training,⁴³ and confine lawful destruction of property to exceptional circumstances during active hostilities.

Given that the vast majority of structures demolished or otherwise destroyed in the West Bank are done so without any attending justification of military necessity in the context of “fighting” or “combat,” such demolitions do not appear to fit within the exception. However, there are a small number of cases in which Israel justifies its actions on the basis of “military operations.” According to UN OCHA, from 2009 to 2018, there were 24 such events.⁴⁴ Each of these instances would need to be evaluated on a case-by-case basis to establish their legality.

In addition to the general prohibition on destruction, several types of property are afforded heightened protection. This includes food or medical supplies;⁴⁵ civilian hospitals and their medical supplies;⁴⁶ relief supplies and humanitarian assistance;⁴⁷ and those items that are otherwise “indispensable to the survival of the civilian population,”⁴⁸ which is to be broadly interpreted.⁴⁹

³⁶ ICRC Customary Law Study, Rule 50.

³⁷ See e.g., Burrus Carnahan, “Lincoln, Lieber and the laws of War: The Origins and Limits of the Principle of Necessity” (1998) 92 AJIL 213.

³⁸ *United States v. Wilhelm List et al.* (“the Hostage Case”), US Military Tribunal Nuremberg, IX TWC 757 (19 February 1948), pp. 1253-4.

³⁹ International Criminal Court, *Prosecutor v. Katanga*, Judgment Pursuant to Article 74 of the Statute, ICC-01/04-01/07-3436-tENG, 7 March 2014, para 894.

⁴⁰ GC-IV, Art. 53.

⁴¹ ICRC, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, para 152, p. 67.

⁴² Orna Ben-Naftali, Guy Harpaz, and Yuval Shany, *Expert Opinion: The Lawfulness of Israel’s House Demolition Policy under International Law and Israeli Law*, p. 10, available at: http://www.hamoked.org/files/2014/1159001_eng.pdf.

⁴³ Michael Bothe, *Expert Opinion: Limits of the right of expropriation (requisition) and of movement restrictions in occupied territory*, 2 August 2012, p. 6, available at: <https://www.diaconia.se/globalassets/blocks-ihl-site/ihl-file-list/ihl--expert-opinions/limits-of-the-right-of-expropriation-requisition-and-of-movement-restrictions-in-occupied-territory.-dr.-iur.-prof-michael-bothe.pdf>.

⁴⁴ UN OCHA, “West Bank Demolition and Displacement Trend Analysis,” <https://app.powerbi.com/view?r=eyJrIjojOGFIMmRhYjgtYmMx-MCooYTYyLTg3ZmEtZGY1ZDExODk5ZDU5IiwidCI6IjBmOWUzNWwRiLTUoNGYtNGY2MC1iZGNjLTVlYTQxNmU2ZGM3MCIsImMiOjhy9> (last accessed 31 May 2019).

⁴⁵ GC-IV Art. 55.

⁴⁶ GC-IV Arts. 18, 57.

⁴⁷ GC-IV Art. 59-62; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, adopted 8 June 1977, entry into force on 7 December 1978, 1125 UNTS 3 (“AP-I”), Art. 68. These consignments include food, medical supplies, clothing, bedding, means of shelter and “other supplies essential to the survival of the civilian population in the occupied territory.” GC-IV Art. 59; AP-I, Art. 69(1). All Contracting Parties are to allow rapid and unimpeded passage of relief consignments and equipment, and to guarantee their protection. GC-IV Art. 59; AP-I Art. 70(2). As noted by the International Committee of the Red Cross (“ICRC”), attacks on, destruction, misappropriation or pillage of relief objects “inherently amounts to the impediment of humanitarian relief” and are prohibited. See ICRC Customary Law Study, Rule 32.

⁴⁸ AP-I, Art. 54(2);

⁴⁹ Sandoz Y., Swinarski C. & Zimmermann B. (eds.), ‘Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949’, Geneva: International Committee of the Red Cross, 1987, (“APs Commentary”) p. 655.

Relief supplies and objects used for humanitarian assistance include food, medical supplies, clothing, bedding, means of shelter and “other supplies essential to the survival of the civilian population in the occupied territory.”⁵⁰ IHL requires states parties to allow rapid and unimpeded passage of relief consignments and equipment, and to guarantee their protection;⁵¹ attacks on, destruction, misappropriation or pillage of relief objects “inherently amounts to the impediment of humanitarian relief”⁵² and are prohibited.⁵³

While what is considered to be “indispensable” is highly context specific,⁵⁴ AP-I Article 54 lists non-exhaustive examples of these types of objects, including foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works.⁵⁵ It is prohibited to remove or render useless those items that are indispensable.⁵⁶

All of these restrictions and prohibitions must also be read in the context of the OP’s overriding obligation to administer the oPt for the benefit of the protected Palestinian population, which includes ensuring, as far as possible, public order and safety.⁵⁷ In particular, Articles 53 of the Fourth Geneva Convention and 46 of the Hague Regulations read together with the duty of governance under Article 43 of the Hague Regulations, assert that destruction is lawful “only if it is a necessary means to achieve a lawful end and after a full judicial review.”⁵⁸ The demolition of buildings without permit could be lawful only if the refusal of the permit was lawful,⁵⁹ however, this cannot be the case if the planning laws which restrict building contravene the OP’s obligations. Additionally, if the refusal of permits and the demolition constitute a *de facto* prevention or unlawful restraint of legitimate use of property, it violates the guarantee of private property under Article 46 of the Hague Regulations.⁶⁰

Given that the planning laws are not only maintained in violation of Israel’s obligations as the OP, and Palestinians have effectively no access to the planning system given the constraints on available territory and the rates of denial of permits, the vast majority of demolitions carried out by the Israeli government constitute violations of IHL.⁶¹ Under the Rome Statute, these actions are also criminalized, making individual perpetrators criminally liable for the demolition of property under the Court’s jurisdiction.⁶²

⁵⁰ GC-IV Art. 59; AP-I Art. 69(1).

⁵¹ GC-IV Art. 59; AP-I Art. 70(2).

⁵² ICRC Customary Law Study, Rule 32.

⁵³ *Ibid.*

⁵⁴ The definition of indispensable objects is “to be interpreted in the widest sense, in order to cover the infinite variety of needs of populations in all geographical areas.” Sandoz Y., Swinarski C. and Zimmermann B. (eds.), ‘Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949’, Geneva: International Committee of the Red Cross, 1987, (“APs Commentary”) p. 655.

⁵⁵ AP-I, Art. 54.

⁵⁶ AP-I, Art. 54(2). A similar provision can be found in AP-II as well. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, adopted 8 June 1977, entry into force on 7 December 1978, 1125 UNTS 609, (“Additional Protocol II”) Art. 14.

⁵⁷ HRIV, Art. 43.

⁵⁸ Michael Bothe, “The Administration of Occupied Territory” in Clapham A., Gaeta P., and Sassòli M., (eds.) *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, Oxford, U.K., 2015, p. 1472.

⁵⁹ *Ibid.*

⁶⁰ Michael Bothe, *Legal Expert opinion on the Right to Provide and Receive Humanitarian Assistance in Occupied Territories*, Norwegian Refugee Council, 20 Jan 2017, pp. 10-11.

⁶¹ B’Tselem calculates the rate of approval at just 4 percent since 2000. B’Tselem, “Fake Justice: The Responsibility Israel’s High Court Justices Bear for the Demolition of Palestinian Homes and the Dispossession of Palestinians,” February 2019, available at: https://www.btselem.org/publications/summaries/201902_fake_justice.

⁶² See Rome Statute, Art. 8(2)(b)(xiii).

Extensive destruction as a Grave Breach

In addition to the destruction of property being a violation of IHL, separate provisions of IHL prohibit “extensive” destruction and categorise it as a “grave breach” of the Geneva Conventions, making it a war crime and triggering additional responsibilities of third states.

Under GC-IV Article 147, “extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly”, constitutes a grave breach when committed against protected property.⁶³ The same conduct is also criminalised by the Rome Statute under Article 8(2)(a), which adopts the same language.

The Geneva Conventions do not define the protected property *per se*, but instead contain a list of objects which cannot be attacked, destroyed or appropriated.⁶⁴ For acts of destruction or appropriation to amount to a grave breach, such acts need to be “unlawful under the specific standards pertaining to the primary obligations of IHL.”⁶⁵ For this purpose, a grave breach of the Fourth Geneva Convention would require a violation of a provision which concerns the protection of property.⁶⁶

Unlawful destruction of property can take various forms. As discussed above, demolitions of properties for lack of permits without the actual possibility of getting such permits or without getting meaningful judicial review, could amount to an unlawful destruction of property. Destructions of any property in occupied territory not justified by military necessity, or destructions against specially protected properties, can be unlawful as well.

The critical element that separates this violation from the others, is the extensive nature of the destruction required to meet its threshold. To be extensive, the destruction must be extensive or on a “large scale” and only exceptionally will a single act meet the requirements of the definition.⁶⁷

The destructions of property in the oPt are, if anything, extensive. As noted by UN OCHA, from 2009 to May 2019, 5,439 structures were demolished for lack of permit alone and there were over 13,000 demolitions orders outstanding as of 2017.⁶⁸ This protracted pattern of Israeli practices is not an isolated incident, but is carried out systematically and prevalently.

⁶³ GC-IV Art. 147; see also GC-I Art. 50; Rome Statute Art. 8(2)(a)(iv); ICTY Statute, Art. 2(d).

⁶⁴ GC-I 2016 Commentary, para. 3011.

⁶⁵ GC-I 2016 Commentary, para. 3010.

⁶⁶ It is worth noting that the requirement that the destruction be “unlawful” is omitted from the elements of the crime under the Rome statute. International Criminal Court, “Elements of Crimes,” 2011, p. 15, available at: <https://www.icc-cpi.int/nr/rdonlyres/336923d8-a6ad-40ec-ad7b-45bf9de73d56/0/elementsofcrimeseng.pdf>.

⁶⁷ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 1st Ed., Oxford University Press, Oxford, U.K., 2010, (fn 193) p. 219. Certain single acts could rise to meet the threshold as was affirmed by the ICTY in the judgement: “The notion of ‘extensive’ is evaluated according to the facts of the case – a single act, such as the destruction of a hospital, may suffice to characterise an offense under this account.” *Prosecutor v. Blaškić*, Trial Judgment, IT-95-14-T, 3 March 2000, (fn 61) para. 157.

⁶⁸ See UN OCHA, “Database of Official Demolitions Order Data, including data on Israeli demolition orders from 1988 to 2017 in Area C, available at: <http://data.ochaopt.org/demolitions.aspx>.

In addition to being violations and grave breaches of IHL, under the International Criminal Court's Rome Statute, these actions are also criminalized, making individual perpetrators criminally liable for the demolition of property under the Court's jurisdiction.⁶⁹ Whether individual criminal liability attaches to any particular destruction or pattern thereof will in addition to the above-elements, depend on proving whether individuals had the appropriate mental state, or the degree to which the conduct was intentional.⁷⁰

Third State Obligations

In addition to the duties and responsibilities of the parties to an armed conflict, both international humanitarian law and general international law impose manifold legal duties and responsibilities on third states or those not otherwise party to a specific armed conflict.

Obligations under International Humanitarian Law

Obligations under IHL for those not party to a specific conflict include (1) the responsibility to respect and ensure respect for the Geneva Conventions; (2) a general duty to investigate and prosecute violations of the Conventions; and (3) a duty to investigate, search for, and prosecute individuals who have committed or ordered grave breaches under the Conventions.

The obligation to respect and ensure respect for the Geneva Conventions is broad, imposing this obligation on all States party to the Conventions "in all circumstances."⁷¹ This obligation is also generally understood to require states to both refrain from violations and to take actions to ensure that the rules of IHL are respected. Accordingly, third states should neither encourage nor aid or assist in a violation of the Conventions.⁷² Additionally, third states are required to take all reasonable measures to end violations of the Conventions.⁷³ Should States manifestly fail to do everything in their power to end violations, they may be in breach of their obligations and could incur international responsibility.⁷⁴

⁶⁹ See Rome Statute, Art. 8(2)(b)(xiii). On January 1, 2015, the Government of Palestine issued a declaration under Article 12(3) of the Rome Statute which entailed the acceptance of the jurisdiction of the International Criminal Court ("ICC") over alleged crimes committed "in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014." International Criminal Court, "Declaration Accepting the Jurisdiction of the International Criminal Court," 31 December 2014, available at https://www.icc-cpi.int/iccdocs/PIDS/press/Palestine_A_12-3.pdf.

⁷⁰ For property generally protected under the GCs and regardless of whether or not it is situated in occupied territory, the perpetrator must have acted with the intent to destroy the property or must have acted in reckless disregard of the likelihood of destroying that property. ICTY, *Prosecutor v. Kordić & Čerkez*, Trial Judgement, IT-95-14/2-T, 26 February 2001, para. 336; Knut Dörmann, *Elements of War Crimes Under the Rome Statute of the International Criminal Court*, International Committee of the Red Cross, Cambridge University Press, Cambridge, U.K., 2003, p. 84. For the destruction of property located on occupied territory (and protected by Article 53 of the GC-IV) the destruction must occur on a large scale. ICTY, *Kordić* para. 337. Dörmann p. 85.

⁷¹ The exact same wording is reproduced by Article 1(1) of Additional Protocol I (1977). International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, para. 159.

⁷² See International Committee of the Red Cross, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Cambridge University Press, Cambridge, U.K. 2016 ("GC-I 2016 Commentary"), paras. 154, 158-159. The requirement that parties not assist in violations derives from the International Law Commission ("ILC") Articles on State Responsibility, with one difference. For the ILC Articles, intent is required; however, for common Article 1 this is not required. *Ibid.*, para. 159.

⁷³ International Committee of the Red Cross, *Improving Compliance with International Humanitarian Law: Background Paper prepared for Informal High-Level Expert Meeting on Current Challenges to International Humanitarian Law*, Cambridge, June 25-27, 2004, Program on Humanitarian Policy and Conflict Research at Harvard University, Cambridge, Massachusetts, 2004, p. 2, available at: https://www.icrc.org/en/doc/assets/files/other/improving_compliance_with_international_humanitarian_law.pdf.

The "obligations of means" is also understood as the requirement that States ensure respect for the Conventions within their powers be carried out with "due diligence." GC-I 2016 Commentary, para. 165. A party's responsibilities have been interpreted to bear a relationship to the multiple factors, such as foreseeability, gravity, available means, and degree of influence a party has over another. GC-I 2016 Commentary, para. 150.

⁷⁴ Knut Dörmann and Jose Serralvo, "Common Article 1 to the Geneva Conventions and the obligation to prevent international humanitarian law violations," *International Review of the Red Cross*, Vol. 96, No. 895/896, 2014, p. 724.

Where the duties above are broad and the prescriptions minimal, the duty to investigate and prosecute violations and grave breaches of the Conventions place more specific duties on third States. Article 146 of the Fourth Geneva Convention includes a general obligation, requiring states to take “all measures necessary” to suppress violations.⁷⁵ The measures imagined include prosecutions or other judicial measures, but the Article does not require prosecution for every violation.⁷⁶ Article 147 of the Fourth Geneva Convention provides that the High Contracting Parties “undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches” of the Convention.⁷⁷ Furthermore, each party “shall be under the obligation to search for persons alleged to have committed, or have ordered to be committed, such grave breaches and shall bring such persons, regardless of their nationality before its own court.”⁷⁸ The underlying principle is that each State party, whether or not involved in an armed conflict, shall rely upon universal jurisdiction⁷⁹ to abide by its obligation to investigate and prosecute alleged perpetrators of war crimes regardless of their nationality.⁸⁰

Obligations under International Law

International law provides some general, ancillary, and secondary responsibilities with respect to the conduct of other states. The Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) lay out these key principles and are largely considered to reflect customary international law on the subject of state responsibility.⁸¹ The Draft Articles cover among other things, the responsibility of States in instances of “serious,” or gross and systematic,⁸² breaches of peremptory (*jus cogens*)⁸³ obligations under international law.

⁷⁵ “Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.” GC-IV, Art. 146. See also AP-I Art. 86.

⁷⁶ GC-I 2016 Commentary, paras. 2895-2896.

⁷⁷ According to Article 147 to the Geneva Convention IV, Grave breaches of the Convention “shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.”

⁷⁸ GC-IV, Arts. 146(1), (2).

⁷⁹ Universal jurisdiction is defined as: “criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.” *The Princeton Principles on Universal Jurisdiction*, Princeton University, Princeton, New Jersey, 2001, Principle 1, available at: <https://www.icj.org/wp-content/uploads/2001/01/Princeton-Principles-Universal-Jurisdiction-report-2001-eng.pdf>.

⁸⁰ GC-I 2016 Commentary, para. 2863.

⁸¹ The Draft Articles are a “soft law” instrument having no binding power for States. Nonetheless, they are considered by international courts and tribunals to be an accurate codification of customary international law on State responsibility and to perform a constructing role in articulating the development of international law on the subject matter. All States and entities of the international community are bound by customary international law regardless of whether they have codified these laws domestically or through treaties. The customary nature of the Draft Articles was reaffirmed, among others, by the International Court of Justice in its Bosnian Genocide case. See *International Court of Justice, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, para. 209; see also James Crawford, “Historical Development” in *State Responsibility: The General Part (Cambridge Studies in International and Comparative Law, pp. 3-44)*, Cambridge University Press, Cambridge, U.K., 2013, p. 43.

⁸² International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, Yearbook of the International Law Commission 2001, Vol. II, A/CN.4/SER.A/2001/Add.1 (Part 2), (Initially distributed as Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10, UN Doc. A/56/10, Chap. IV) (“ARSIWA” and “ARSIWA Commentary”), Art. 40(2).

⁸³ These norms “arise from those substantive rules of conduct that prohibit what has come to be seen as intolerable because of the threat it presents to the survival of States and their peoples and the most basic human values.” ARSIWA Commentary, Art. 40, Note (3). Although the boundaries of what comprises the body of peremptory norms is still contested, the existence and ultimate binding authority of these norms is undisputed. Diakonia, *Everyone’s Business: Third Party Responsibility and the Enforcement of International Law in the oPt*, October 2016, p. 12. *Jus cogens* norms create obligations *erga omnes*, or obligations that permit any state to raise a claim for its violation, not just those immediately affected. See Antonio Cassese, “The Character of the Violated Obligation” in *The Law of International Responsibility*, James Crawford, Alain Pellet, and Simon Olleson, Oxford University Press, Oxford, U.K., 2010, pp. 416-417.

Although the boundaries of what constitutes a peremptory norm are debated, there are several norms that are widely agreed upon as having attained this status, including but not limited to: the prohibition against aggression and the illegal use of force including the acquisition of territory by force, racial discrimination, apartheid,⁸⁴ torture,⁸⁵ the right to self-determination,⁸⁶ and the core principles of IHL as well as the “grave breaches” enumerated in the Conventions.⁸⁷

Serious breaches of peremptory norms engage three important aspects of third state responsibility as laid out in Article 41 of the Draft Articles: (1) a duty to cooperate to bring to an end the wrongful situation using lawful means,⁸⁸ (2) a duty to refrain from recognizing the wrongful situation,⁸⁹ and (3) a duty to refrain from rendering aid or assistance in maintaining the wrongful situation.⁹⁰

There are numerous practices of the Israeli government that qualify as serious breaches, including the aggregate and continuous impairment of Palestinian right to self-determination, acquisition of territory by force, the grave breaches of both extensive property destruction and forcible transfer, and policies that discriminate on the basis of race.⁹¹

⁸⁴ General agreement as to the peremptory character of such obligations was reached at the Vienna Conference on the law of treaties in 1969. See ARSIWA Commentary, Art. 40, p. 112.

⁸⁵ This is supported by a number of decisions by national and international tribunals. See e.g., the United States Court of Appeals, Ninth Circuit, in *Siderman de Blake and Others v. The Republic of Argentina and Others*, ILR, vol. 103, p. 455, at p. 471 (1992); the United Kingdom Court of Appeal in *Al Adsani v. Government of Kuwait and Others*, ILR, vol. 107, p. 536, at pp. 540–541 (1996); and the *United Kingdom House of Lords in Pinochet*, pp. 841 and 881. Cf. the United States Court of Appeals, Second Circuit, in *Filartiga v. Pena-Irala*, ILR, vol. 77, p. 169, at pp. 177–179 (1980).

⁸⁶ See International Court of Justice, *East Timor (Portugal v. Australia)*, Judgment, *ICJ Reports 1995*, p. 102, para. 29; see also Antonio Cassese, *International Law* (2nd ed.), Oxford University Press, Oxford, U.K., 2005, p. 65; Malcom Shaw, *International Law* (6th ed.), Cambridge University Press, Cambridge, U.K., 2008, p. 808.

⁸⁷ International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *ICJ Reports 1996*, (note 6), para. 79; see also *ICTY, Prosecutor v. Kupreskic et al.*, (Judgment, Trial Chamber) ICTY-95-16-T (14 January 2000), para. 520. Some authoritative scholars have also supported this conclusion. See Antonio Cassese, “On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law,” (1998) 9 *European Journal of International Law*, 6; Theodor Meron, “The Geneva Convention as Customary Law,” (1987) 81 *American Journal of International Law*, 350; Egon Schwelb, “Some Aspects of International Jus Cogens as Formulated by the International Law Commission,” (1967) 61 *American Journal of International Law*, 957.

⁸⁸ ARSIWA, Article 41(1).

⁸⁹ ARSIWA, Article 41(2).

⁹⁰ ARSIWA, Article 41(3). This article should be read in conjunction with Article 16 and as creating a broader duty for States, not just to refrain in complicit actions involving wrongful acts, but also to refrain from engaging in conduct after the act is complete that would maintain it. ARSIWA Commentary, Article 41, note (11), p. 115; Diakonia, *Everyone's Business*, p. 12.

⁹¹ See *Ibid.*, p. 13.



Conclusion and Recommendations

Ongoing and increasing violations of IHL by Israeli authorities in the West Bank, including occupied East Jerusalem continue to threaten the protected Palestinian population. As the rate of demolitions across the West Bank, and especially in East Jerusalem, climbs, so too does the pressure on the rest of the Palestinian population who are increasingly subjected to a coercive environment that is comprised of new laws, regulations, and orders designed to facilitate the demolition of structures and ultimately result in forcible transfer, which is both a violation of IHL and a war crime.⁹² In addition to the coercive environment that forces Palestinians from their land, the Israeli government is pursuing the expansion of settlements in the West Bank in violation of international law. These violations and the accompanying political rhetoric prevalent in Israeli politics raise anew the spectre of *de jure* annexation of significant portions, if not all of the occupied Palestinian territory.

These violations have consequences for both the perpetrators and third states. The Government of Israel continues to perpetrate well-documented violations of IHL, and in particular the destruction of property, some of which may amount to war crimes and could expose individual military commanders, government personnel, and others to international criminal liability under the International Criminal Court's Rome Statute and other regimes of universal or extraterritorial jurisdiction in third states. While the Government of Israel cannot escape liability for the violations and breaches it has already committed, it has a responsibility to cease those violations and to make reparation for them.⁹³

Third states remain bound by their obligations under the Geneva Conventions and general international law to take steps and measures to end the systematic violations perpetrated by the Government of Israel against the protected Palestinian population and the integrity of the occupied Palestinian territory. For those violations to which individual criminal liability attaches, namely "grave breaches" of the Conventions which constitute war crimes, third states have a responsibility to search for, investigate and prosecute those who are liable. This obligation should be undertaken urgently.

Third states should also urgently undertake their international legal obligations with respect to ending the numerous other violations of international law perpetrated by the Government of Israel. These include the illegal annexation of East Jerusalem, ongoing settlement activity, the maintenance of the unlawful planning regimes in East Jerusalem and the rest of the West Bank, the forcible transfer of protected Palestinians from areas in the West Bank (facilitated by the coercive environment), the transfer of settlers into the oPt, the entrenchment of the 'Separation Wall', and the undermining of the right of the Palestinian people to self-determination. Failure to take concrete measures and undertake concerted cooperation to end these violations will have long-term consequences for the future of the Palestinian people and the viability of the protections afforded under the international legal system.

⁹² GC-IV, Art. 49. See *Diakonia, Planning to Fail*, p. 24.

⁹³ The existing law on reparations is premised on the notion that every breach of an international obligation carries with it a duty to repair the harm caused. Dinah Shelton, "Righting Wrongs: Reparations in the Articles on State Responsibility," *American Journal of International Law*, Vol. 96, No. 4, 2002, p. 835.



What is Diakonia?

Diakonia is a Swedish development organisation working together with local partners for a sustainable change for the most vulnerable people in the world. We support more than 400 partners in nearly 30 countries and believe in a rights-based approach that aims to empower discriminated individuals or groups to demand what is rightfully theirs. Throughout the world we work toward five main goals: human rights, democratisation, social and economic justice, gender equality and sustainable peace.

Diakonia International Humanitarian Law Resource Centre

The goal of Diakonia International Humanitarian Law Resource Centre is to increase the respect for and further implementation of international law, specifically international humanitarian law (IHL), in the Israeli-Palestinian conflict. We believe that addressing violations of IHL and international human rights law tackle the root causes of the humanitarian and protection crisis in the oPt, in a sustainable manner. Our Centre makes IHL expertise available by providing:

- Briefings to groups and organisations on IHL and its applicability to Israel and the oPt;
- Tailored in-depth trainings on specific issues and policies relating to IHL;
- Legal analyses and ongoing research on current IHL topics; and
- Legal advice, consultation and legal review of documents for other actors in the oPt, to support policy formulation and strengthen advocacy with an IHL perspective.

Do you or your organisation want to learn more about IHL and its applicability to the oPt? Visit our website 'An Easy Guide to International Humanitarian Law in the occupied Palestinian territory' at: www.diakonia.se/en/IHL/ - or contact us to set up a general or specialised legal briefing by our legal advisors.

Contact us at: ihl@diakonia.se