

THE LEGAL FRAMEWORK SAFEGUARDING FREEDOM OF THE PRESS AND PROTECTIONS FOR MEDIA PERSONNEL

Legal Brief

May 2023

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About the Diakonia International Humanitarian Law Centre

The Diakonia International Humanitarian Law Centre promotes respect for the laws of war through independent research, advice, and advocacy. Since its establishment in 2004, the Centre's Jerusalem Desk has been a source of legal expertise supporting humanitarian and human rights action in the Israeli-Palestinian context.

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EXECUTIVE SUMMARY

1. The international legal framework protecting journalists and the media comprises both international human rights law (IHRL) and international humanitarian law (IHL).
2. Relevant substantive provisions of IHRL enshrined in the International Covenant on Civil and Political Rights (ICCPR) include the right to life; the right to liberty of person; the right to freedom of movement; and the right to freedom of expression.
3. In principle, these rights are not absolute and may therefore be lawfully restricted, provided that these restrictions have a non-discriminatory legal basis; serve a lawful purpose; are strictly necessary as a measure of last resort; are proportionate; and applied in a non-discriminatory manner.
4. In practice, reported patterns of conduct of the Israeli and Palestinian authorities towards journalists and the media unduly restrict these rights.
5. IHRL prohibits the arbitrary deprivation of life and sets stringent conditions for the use of potentially lethal force during law enforcement operations, which is only permissible in response to an imminent threat to life or bodily integrity. There are frequent reports of excessive and unwarranted use of force by the Israeli security forces against journalists covering demonstrations or military raids, resulting in injury or even death. The Israeli authorities routinely fail to investigate such incidents and to hold the perpetrators accountable.
6. IHRL also prohibits arbitrary deprivation of liberty, including arbitrary arrest and detention. Administrative detention – which is imposed on the basis of alleged anticipated security concerns without charge or trial – raises severe risks of arbitrary deprivation of liberty. It may generally only be imposed as an exceptional measure and for the minimum amount of time necessary. There are concerns about the extensive use of administrative detention by the Israeli authorities, including against journalists, and detention pursuant to criminal charge in violation of fundamental due process guarantees.
7. IHRL protects the freedom of movement within a State's territory, and the right to leave its territory. Israel's occupation of Palestinian territory has created a factual situation pursuant to which Palestinians are not free to travel between the constituent parts of the occupied Palestinian territory (oPt) and are prevented from travelling abroad. Journalists are particularly affected by this as freedom to travel is a necessary precondition for the exercise of their professional activities.
8. IHRL protects the right to freedom of expression, which includes the right of journalists to receive information and the right of the public to "receive media output". Israeli and Palestinian authorities unduly interfere with freedom of expression through various means including limiting journalistic activity and criminal prosecution of journalists on the basis of overly broad laws, in addition to the aforementioned patterns of conduct: access and movement restrictions; arbitrary arrest; physical attacks; and killings.

9. Overall, the Israeli authorities readily restrict Palestinian rights on the basis of alleged security justifications while failing to take similar measures against threats or acts of violence by Israeli nationals in the oPt.
10. Relevant provisions of IHL include the obligations of occupying powers in relation to occupied territory and the rules on conduct of hostilities.
11. Palestinian journalists in the oPt are protected persons under IHL and as such entitled to humane treatment in all circumstances, including in respect of threats or acts of violence. All persons in occupied territory regardless of protected person status are protected from torture or other ill-treatment and hostage-taking.
12. In situations of occupation, fundamental rights protected by IHRL continue to apply. At the same time, IHL allows an occupying power to take “measures of control and security ... as may be necessary as a result of the war”. The strictest security measure that an occupying power may take against protected persons is assigned residence or internment for “imperative reasons of security”. Critical reporting on the conduct of the occupying power would not constitute a valid justification for such detention.
13. During the conduct of hostilities, parties must at all times distinguish between civilians and civilian objects, and between combatants and military objectives. Only the latter may be intentionally targeted.
14. Journalists are protected from direct attack as civilians unless and for such time as they directly participate in hostilities. Reporting on ongoing hostilities, including on any suspected violations of international law by warring parties, even if biased or featuring propaganda, does not constitute direct participation in hostilities.
15. Similarly, the premises of media outlets are generally civilian objects. Such premises are considered military objectives only when their “nature, location, purpose or use” is such that they make an effective contribution to military action and their destruction or capture would offer a definitive military advantage. Broadcasting, including when biased towards one party of the conflict or constituting propaganda, does not turn the outlet into a military objective. This will be the case only if the outlet is being used as a command, control, and communications centre by the armed forces of a party to the conflict or to incite serious international crimes, for instance.
16. For an attack against a legitimate target to be lawful, parties to armed conflict must also comply with the principles of proportionality and precautions. The former prohibits attacks “which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”. The latter requires parties to take constant care to “spare the civilian population, civilians and civilian objects”. Attacking parties must take all feasible precautions to avoid or minimize “incidental loss of civilian life, injury to civilians and damage to civilian objects”, and defending parties must take such precautions to protect civilians and civilian objects against the effects of attacks.

TABLE OF CONTENTS

| | |
|---|-----------|
| I. Context | 6 |
| II. Scope and structure | 7 |
| III. Introduction to the legal framework | 8 |
| <i>Definition of “journalist”</i> | 8 |
| <i>Introduction to IHRL and IHL</i> | 8 |
| <i>Applicability of IHRL and IHL to different actors in the oPt</i> | 9 |
| IV. Substantive protections offered by IHRL and IHL | 11 |
| <i>IHRL</i> | 11 |
| i. Right to life | 13 |
| ii. Right to liberty of person | 16 |
| iii. Freedom of movement | 20 |
| iv. Freedom of expression | 21 |
| <i>IHL</i> | 27 |
| i. In the occupied territory | 27 |
| ii. Conduct of hostilities | 30 |
| V. Concluding observations | 35 |

I. Context

Journalists and media workers in Israel and the oPt, which comprises the West Bank, including East Jerusalem, and the Gaza Strip, are exposed to risks due to global as well as context-specific developments.¹ In the World Press Freedom Index developed by Reporters Without Borders (RSF), Israel ranks 97 out of 180,² while Palestine ranks 156 out of 180.³ According to RSF, 32 journalists were killed in the oPt between 2000 and 2023 and a further 28 were imprisoned, with the corresponding numbers for Israel at 5 and 35, respectively.⁴ Many other journalists have been subjected to countless acts of harassment, intimidation, and physical assault as well as travel restrictions and criminal prosecutions.

These threat patterns form part of the wider phenomenon of shrinking civic space in Israel and the oPt.⁵ Palestinian residents of the oPt have borne a disproportionate burden of this repression as they find themselves under tripartite threat: since the inception of its occupation in 1967, Israel has imposed undue restrictions on Palestinian civil society and peaceful political expression, while the Palestinian Authority (PA) in the West Bank and the Hamas-controlled de facto authorities in Gaza have for their part taken measures to quash dissent. Palestinian journalists and media workers are no exception in this regard. Their already precarious position only stands to deteriorate further under the newly elected Israeli government, deemed the most right-wing in the country's history, whose members have expressed hostility towards Palestinians and the media as an institution.⁶

¹ These global developments include the proliferation of authoritarian regimes across the globe, the rise of digital technology and concomitant possibilities for surveillance, as well as funding cuts and structural changes in the media sector resulting in increased reliance on freelance journalists who lack employee status and thus many of the formal protections afforded to staff.

² 'Israel: Index 2023' (RSF, 2023) <<https://rsf.org/en/country/israel>> last accessed 3 May 2023.

³ 'Palestine: Index 2023' (RSF, 2023) <<https://rsf.org/en/country/palestine>> last accessed 3 May 2023. Note that this ranking refers to the oPt geographically and takes into account the conduct of different actors. RSF has clarified in this regard: "In the West Bank, journalists are the victims of press freedom violations by both the Palestinian Authority and the Israeli [military]. In the Gaza Strip, Israeli military assaults and Hamas policies threaten the press."

⁴ 'Barometer' (RSF, 2023) <<https://rsf.org/en/barometer>> last accessed 10 March 2023.

⁵ See, e.g., Diakonia IHL Centre, 'Timeline: Shrinking Space in Israel-Palestine' (last updated January 2023) <<https://www.diakonia.se/ihl/jerusalem/shrinking-space/interactive-timeline-shrinking-space/>> last accessed 10 March 2023.

⁶ See, e.g., Ha'aretz Editorial, 'Silencing the Media to Destroy the Fourth Pillar of Israel's Democracy' (Ha'aretz, 16 January 2023) <<https://www.haaretz.com/opinion/editorial/2023-01-16/ty-article-opinion/silencing-the-media-is-destroy-the-fourth-pillar-of-israels-democracy/00000185-bbec-d073-af8f-fbef26160000>> last accessed 10 March 2023; "'A Thousand Palestinian Mothers Will Cry': Far-Right MK Gives Defiant Interview to British TV" (Ha'aretz, 11 December 2022) <<https://www.haaretz.com/israel-news/2022-12-11/ty-article/.highlight/israel-should-stop-being-too-merciful-to-palestinians-far-right-mk-tells-british-media/00000185-0032-d275-a3d7-b33a77be0000>> last accessed 10 March 2023; Noa Shpigel, 'Arabs "Are Here by Mistake, Because Ben-Gurion Didn't Finish the Job," Far-Right Leader Tells Lawmakers' (Ha'aretz, 13 October 2021) <<https://www.haaretz.com/israel-news/2021-10-13/ty-article/.highlight/arabs-are-here-by-mistake-ben-gurion-didnt-finish-the-job-far-right-leader-says/0000017f-dedb-d3a5-af7f-feffd1af0000>> last accessed 10 March 2023; Refaella Goichman and Nati Tucker, 'Netanyahu's Plan to Kill Israel's Media Enters Its Next Phase' (Ha'aretz, 24 January 2023) <<https://www.haaretz.com/israel-news/2023-01-24/ty-article-magazine/.premium/the-next-phase-of-netanyahus-plan-to-kill-israeli-media/00000185-e344-d093-ada5-eb57536d0000>> last accessed 10 March 2023.

II. Scope and structure

Against the backdrop of these developments, the purpose of this paper is to provide a concise overview of the international legal framework safeguarding freedom of the press and protections for media personnel, and to apply this framework to documented conduct in the Israeli-Palestinian context.

Part III provides an introduction to the international legal framework that protects journalists and press freedom, as well as its applicability. This framework comprises both IHRL and IHL.

Part IV surveys the relevant substantive provisions of IHRL and IHL. More specifically, it examines (i) the right to life; (ii) the right to liberty of person; (iii) the right to freedom of movement; (iv) the right to freedom of expression; (v) the obligations of occupying powers; and (vi) the rules on conduct of hostilities, respectively. Some of these rules protect free expression and journalistic activity specifically, while others are of general applicability but nonetheless relevant in light of the threat patterns that journalists are exposed to.

In relation to each provision surveyed, specific patterns of conduct that appear to be problematic will be analyzed. These will be drawn from a range of actors – the Israeli authorities, the PA, and the de facto authorities in Gaza – and cover, in terms of geographic scope, the West Bank, including East Jerusalem, and the Gaza Strip (i.e., the oPt).

Part V offers concluding observations about the importance of press freedom and journalistic activity for the realization of a range of rights in a free and democratic society, as well as ensuring accountability for violations of international law.

III. Introduction to the legal framework

Definition of “journalist”

There is no comprehensive or binding definition of the term “journalist” in international law. It is generally accepted, however, that “[j]ournalism is a function shared by a wide range of actors, including professional full-time reporters and analysts, as well as bloggers and others who engage in forms of self-publication in print, on the internet or elsewhere”.⁷

The functions that journalists habitually carry out include to “observe and describe events, document and analyse events, statements, policies, and any propositions that can affect society, with the purpose of systematizing such information and gathering of facts and analyses to inform sectors of society or society as a whole”.⁸

Pursuant to international law, States must not maintain general systems of registration or licensing of journalists; however, they may introduce limited accreditation and registration schemes to facilitate “privileged access to certain places and/or events”.⁹

Introduction to IHRL and IHL

Relevant protections for journalists and the media can be found in two bodies of law: IHRL and IHL.

IHRL regulates the relationship between individuals and the State. It is centred around notions of human liberty and dignity, and as such imposes obligations on States that they must adhere to in their treatment of individuals within their jurisdiction.¹⁰ Covering a wide range of topics related to almost all aspects of life,¹¹ IHRL is enshrined in international treaties – such as the ICCPR, the International Covenant on Economic, Social and Cultural Rights (ICESCR), and various other instruments – as well as customary international law.

IHL regulates the conduct of parties to armed conflict.¹² At its core, it seeks to preserve certain fundamental values while balancing considerations of military necessity and humanity. More specifically, IHL seeks to limit the adverse effects of armed conflict by restricting the permissible means and methods of warfare, and by

⁷ Human Rights Committee, ‘General comment No. 34: Article 19: Freedoms of opinion and expression’ CCPR/C/GC/34 (12 September 2011) <<https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no34-article-19-freedoms-opinion-and>> last accessed 10 March 2023 (General Comment 34) para 44. See Human Rights Council, ‘Reinforcing media freedom and the safety of journalists in the digital age: Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Irene Khan’ A/HRC/50/29 (20 April 2022) <<https://www.ohchr.org/en/documents/thematic-reports/ahrc5029-reinforcing-media-freedom-and-safety-journalists-digital-age>> last accessed 10 March 2023 para 15.

⁸ Human Rights Council, ‘Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue’ A/HRC/20/17 (4 June 2012) <https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/20/17> last accessed 10 March 2023 para 4.

⁹ General Comment 34 para 44. See SR Report April 2022 (n 7) para 15. Such schemes must be applied in a manner that is non-discriminatory, based on objective criteria and taking into account that journalism is a function shared by a wide range of actors.

¹⁰ See, e.g., UN Office of the High Commissioner for Human Rights (OHCHR), ‘International Human Rights Law’ (no date) <<https://www.ohchr.org/en/instruments-and-mechanisms/international-human-rights-law>> last accessed 10 March 2023.

¹¹ Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (Edward Elgar Publishing 2019) 424.

¹² IHL applies both to international armed conflicts, occurring between States, and non-international armed conflicts, occurring between States and non-State armed groups or between such groups.

affording protection to those “who are not or are no longer taking direct part in hostilities”,¹³ a category including civilians (among them journalists) as well as wounded, sick and shipwrecked combatants, and prisoners of war. The main sources of IHL are the Hague Conventions of 1899 and 1907, the four Geneva Conventions of 1949, the two Additional Protocols to the Geneva Conventions of 1977, and customary IHL.

Among other distinctions, these two areas of international law differ in their material scope of application. While IHRL applies at all times, in peacetime as well as during armed conflict, IHL applies only during armed conflict.

Both frameworks apply in situations of occupation where, as a consequence of an armed conflict, a State acquires effective control over foreign territory. IHL applies in such situations because they emerge from international armed conflicts and are considered a continuation thereof. IHRL applies because its geographical sphere of application extends not only to the State’s own territory but also to foreign territory that the State has effective control over or where State agents have “control over persons or their enjoyment of their human rights”.¹⁴

Applicability of IHRL and IHL to different actors in the oPt

Israel as the occupying power has obligations under both IHL and IHRL, which apply concurrently in situations of armed conflict and occupation, and accordingly govern its conduct in the oPt. Both branches of law will often provide complementary protection, so that IHL norms can be interpreted in light of IHRL and, conversely, IHRL norms in light of IHL. In case of conflict, the more specialized rule will prevail according to the *lex specialis* principle.¹⁵

- IHRL offers protections for civil and political rights in occupied territory, such as the right to freedom of opinion and expression and the right to freedom of movement. Israel became a party to the ICCPR, the core instrument in this regard, in 1991. Its claim to the contrary notwithstanding, it is widely accepted that Israel’s obligations under the Covenant extend to the oPt.¹⁶
- IHL is generally regarded as the *lex specialis* in respect of hostilities. In such situations, Israel must comply with the detailed IHL rules on conduct of hostilities.¹⁷ Israel is a party to the four Geneva Conventions and also bound by customary IHL.

¹³ ICRC, ‘What is the difference between IHL and human rights law?’ (22 January 2015) <<https://www.icrc.org/en/document/what-difference-between-ihl-and-human-rights-law>> last accessed 10 March 2023.

¹⁴ Diakonia IHL Centre, ‘Easy Guide to International Humanitarian Law: Reference for Professionals Working in the Occupied Palestinian Territory’ (2021) <<https://apidiakoniase.cdn.triggerfish.cloud/uploads/sites/2/2021/06/Easy-Guide-to-IHL.pdf>> last accessed 10 March 2023 (Easy Guide) 8-9. See Sassòli (n 11) 428-430.

¹⁵ Cordula Droege, ‘The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict’ (2007) 40(2) *Israel Law Review* 310-355 at 335-348; Sassòli (n 11) 433.

¹⁶ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) 2004 <<https://www.icj-cij.org/public/files/case-related/131/131-20040709-ADV-01-00-EN.pdf>> last accessed 10 March 2023 [102]-[111]; Human Rights Committee, ‘Concluding observations on the fifth periodic report of Israel’ CCPR/C/ISR/CO/5 (5 May 2022) <<https://www.un.org/unispal/document/human-rights-committees-concluding-observations-on-fifth-periodic-report-of-israel-ccpr-c-isr-co-5-advance-unedited-version/>> last accessed 10 March 2023 paras 6-7.

¹⁷ Droege (n 15) 344-348.

The **State of Palestine** is a party to the four Geneva Conventions and their Additional Protocols, and likewise bound by customary IHL. That said, the State of Palestine is subject to Israeli occupation and is not currently engaged in hostilities with Israel or with any other actor. Accordingly, IHL is not applicable to the actions undertaken by the State of Palestine at the present time. Palestine also has obligations under IHRL. It became a party to a number of human rights treaties, including the ICCPR, in 2014. According to the law of State responsibility, the conduct of the PA in this respect is attributable to the State of Palestine as conduct of a State organ.¹⁸

The **de facto authorities in Gaza** are bound by the IHL rules on conduct of hostilities,¹⁹ and have obligations under IHRL to the extent of their control over the rights of Palestinians in the oPt.

¹⁸ UN, 'Responsibility of States for Internationally Wrongful Acts' (2005)

<https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf> last accessed 10 March 2023 art 4.

¹⁹ Jean-Marie Henckaerts and Louise Doswald-Beck, 'Customary International Humanitarian Law Volume I: Rules' (ICRC, 2005)

<<https://www.icrc.org/en/doc/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf>> last accessed 10 March 2023 rules 1-24.

IV. Substantive protections offered by IHRL and IHL

IHRL

The policies and practices of the Israeli and Palestinian authorities towards journalists and the media affect a range of fundamental rights enshrined in the ICCPR, which include the **right to life** (Art. 6 of the ICCPR); the **right to liberty of person** (Art. 9 of the ICCPR); the **right to freedom of movement** (Art. 12 of the ICCPR); and the **right to freedom of expression** (Art. 19 of the ICCPR). This list focuses on the rights most relevant to documented patterns of conduct but lays no claim to comprehensiveness; other rights not explicitly discussed in the analysis that follows may be impacted as well. These include, in particular, the right to privacy;²⁰ the right to security of person;²¹ the right to participate in public affairs;²² and the right to equality before courts and tribunals and to a fair trial.²³

While the specific protection afforded by each particular right varies, there are certain points of commonality that are briefly summarized below.

First, it should be noted that under certain circumstances States may validly suspend or limit the application of Covenant rights.

According to Art. 4 of the ICCPR, some rights can be **derogated from** (i.e., temporarily suspended) “[i]n time of public emergency which threatens the life of the nation”, provided that such a state of emergency is officially proclaimed.²⁴ Such derogatory measures “must be of an exceptional and temporary nature”²⁵ and “limited to the extent strictly required by the exigencies of the situation”.²⁶ Additionally, measures taken for derogation must comply with the principle of proportionality,²⁷ and must not “involve discrimination solely on the ground of race, colour, sex, language, religion or social origin”.²⁸

- States may never derogate from the right to life, which is specifically listed as a non-derogable right in Art. 4(2) of the ICCPR.
- Derogations from the right to liberty of person, the right to freedom of movement, and the right to freedom of expression are in principle permitted, provided that they comply with the conditions articulated above (i.e., the measures taken on this basis are exceptional and temporary; strictly necessary; and non-discriminatory).

²⁰ ICCPR art 17. See Mona Shtaya, ‘Nowhere to hide: The impact of Israel’s digital surveillance regime on the Palestinians’ (Middle East Institute, 27 April 2022) <<https://www.mei.edu/publications/nowhere-hide-impact-israels-digital-surveillance-regime-palestinians>> last accessed 10 March 2023.

²¹ ICCPR art 9. See Haya Abushkhaideem, ‘Not just Shireen: how Israel has attacked journalists and newsrooms in Palestine’ (Reuters Institute, 6 July 2022) <<https://reutersinstitute.politics.ox.ac.uk/news/not-just-shireen-how-israel-has-attacked-journalists-and-newsrooms-palestine>> last accessed 10 March 2023.

²² ICCPR art 25.

²³ ICCPR art 14.

²⁴ ICCPR art 4(1).

²⁵ Human Rights Committee, ‘General Comment No. 29: States of Emergency (Article 4)’ CCPR/C/21/Rev.1/Add.11 (31 August 2001) <<https://digitallibrary.un.org/record/451555?ln=en>> last accessed 10 March 2023 (General Comment 29) para 2.

²⁶ General Comment 29 para 4.

²⁷ *ibid.*

²⁸ *ibid* para 8.

- The **State of Palestine** notified the UN Secretary General in March 2020 that “the measures adopted during the state of emergency [declared in the context of the COVID-19 pandemic] may derogate from the obligations of the State of Palestine under the present Covenant”²⁹ and specified in this regard in particular the right to liberty of person, the right to freedom of movement, and the right to freedom of assembly.
- **Israel** derogated only from its obligations under Art. 9 of the ICCPR on liberty and security of person in 1991, relying on a state of emergency declared in the context of the country’s establishment in 1948.³⁰ The fact that this derogation has been in place for more than three decades, together with longstanding concerns about widespread and discriminatory arrest and detention of disproportionate numbers of Palestinians, raises serious doubts as to the validity of both Israel’s derogation from Art. 9 and the measures taken on this basis. (As regards the official position of the Israeli authorities, they do not in fact rely on the derogation from Art. 9 to justify arrest and detention of Palestinians in the oPt, but rather maintain – incorrectly – that Israel’s obligations under the ICCPR do not extend to the oPt at all.)

Furthermore, most of the Covenant rights are not absolute in nature, meaning that they can also be **restricted in their ordinary application** (i.e., not in the context of a publicly declared state of emergency). The rights analyzed in this document – the right to life, the right to liberty of person, the right to freedom of movement, and the right to freedom of expression – may all be subject to lawful restrictions provided that certain cumulative conditions are met. While the precise test will depend on the specific right in question, in general terms the criteria to determine the lawfulness of a particular restriction are as follows:

- The restriction must have a **basis in law**. This is to ensure that individuals are able to discern which acts are permissible and which are prohibited, and to adjust their conduct accordingly.
- The lawfulness of a restriction especially in domestic law does not suffice; IHRL also prohibits **arbitrary** restrictions on rights, which “must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability, and due process of law, as well as elements of reasonableness, necessity, and proportionality”.³¹
- The restriction must serve a **lawful purpose**. Sometimes this purpose is specifically articulated in the Covenant (e.g., for freedom of expression and freedom of movement); sometimes it is derived from other domestic and international legal standards.
- The restriction must be **absolutely necessary** and a measure of last resort; in other words, no other means is available to secure the attainment of the lawful purpose.

²⁹ ‘State of Palestine: Notification under Article 4(3)’ (UN, 8 April 2020) <<https://treaties.un.org/doc/Publication/CN/2020/CN.127.2020-Eng.pdf>> last accessed 10 March 2023.

³⁰ ‘Israel: Derogations: Notifications under Article 4(3) of the Covenant’ (Institute for International Law and Justice, 2016) <<https://iilj.org/wp-content/uploads/2016/08/Israel-Derogations-under-ICCPR.pdf>> last accessed 10 March 2023.

³¹ Human Rights Committee, ‘General comment No. 36: Article 6: right to life’ CCPR/C/GC/36 (3 September 2019) <<https://www.ohchr.org/en/calls-for-input/general-comment-no-36-article-6-right-life>> last accessed 10 March 2023 (General Comment 36) para 12; Human Rights Committee, ‘General comment No. 35: Article 9 (Liberty and security of person)’ CCPR/C/GC/35 (16 December 2014) <<https://www.ohchr.org/en/calls-for-input/general-comment-no-35-article-9-liberty-and-security-person>> last accessed 10 March 2023 (General Comment 35) para 12.

- Both the legal basis of the restriction as well as its application in a particular instance must be **proportionate** in the sense that it constitutes the least intrusive and most right-respecting means when balanced against the legitimate objective pursued.
- Overall, the measures that a State party takes to restrict Covenant rights cannot have the effect of reversing the relationship between the right and the limitation.³²

Finally, States have undertaken to respect the rights articulated in the Covenant “**without distinction** of any kind”.³³ Similarly, any limitations to rights that can be lawfully restricted must have a non-discriminatory legal basis and must be applied in a non-discriminatory manner in practice.

Applied to the Israeli-Palestinian context, it can be observed at the outset that there are strong grounds for concern that the Israeli authorities do not comply with the non-discrimination principle when it comes to their treatment of Palestinians as opposed to Israeli citizens in the oPt. For one, Israeli nationals residing in the West Bank are not subject to the military law that Israel enforces in the West Bank, but rather to the more protective provisions of Israeli law whose application is extended to them.³⁴ Furthermore, the Israeli authorities readily restrict Palestinian rights – including free movement and expression, and liberty of person – ostensibly in pursuit of a lawful objective (the protection of public security) while at the same time failing to take similar measures against reported patterns of harassment and physical violence committed by their own nationals.³⁵

The following section examines each particular right – the right to life; the right to liberty of person; the right to freedom of movement; and the right to freedom of expression – as well as concerning patterns of conduct on the part of the Israeli and Palestinian authorities in greater detail.

“Any limitations to rights that can be lawfully restricted must have a non-discriminatory legal basis and must be applied in a non-discriminatory manner in practice.”

i. Right to life

The right to life, which protects persons from arbitrary deprivation of life,³⁶ is considered “the supreme right”.³⁷ It is of crucial importance both in itself, as a right that inheres in every human being, and as a prerequisite for the enjoyment of all other human rights.³⁸ As such, it constitutes a peremptory norm of

³² General Comment 34 para 21 and the references cited therein.

³³ ICCPR art 2(1).

³⁴ See, e.g., Yesh Din, ‘The Occupation of the West Bank and the Crime of Apartheid: Legal Opinion’ (June 2020) <<https://s3-eu-west-1.amazonaws.com/files.yesh-din.org/Apartheid+2020/Apartheid+ENG.pdf>> last accessed 10 March 2023.

³⁵ ‘Israel: UN experts condemn record year of Israeli violence in the occupied West Bank’ (OHCHR, 15 December 2022) <<https://www.ohchr.org/en/press-releases/2022/12/israel-un-experts-condemn-record-year-israeli-violence-occupied-west-bank-0>> last accessed 10 March 2023.

³⁶ ICCPR art 6(1).

³⁷ General Comment 36 para 2.

³⁸ *ibid.*

international law, from which no derogation is permitted even in situations of armed conflict and other public emergencies that threaten the life of the nation.³⁹

Respecting the right to life requires States to enforce it “through legislative and other measures, and to provide effective remedies and reparation to all victims of violations of the right to life”.⁴⁰ In other words, compliance with the right to life encompasses both substantive and procedural obligations:

- The **substantive** aspect sets out important safeguards for persons to guarantee that the State does not arbitrarily deprive life.
- The **procedural** aspect obliges the State to ensure that an independent and effective investigation is conducted in cases where arbitrary deprivation of life by State agents is suspected.
- Furthermore, a State will have violated the right to life if it allows or fails to take steps to prevent, punish, investigate or redress the harm caused by violations of the right to life by **private persons or entities**.⁴¹
- Persons whose rights have been violated also have the **right to an effective remedy** before the national authorities. This right includes, *inter alia*, an obligation by the State to compensate victims.⁴²

Substantively, the prohibition against arbitrary deprivation of life means the following:

The right to life is not absolute; it is *arbitrary* deprivation of life that is prohibited. This means that there may be exceptional circumstances where deprivation of life will be considered lawful under IHRL.⁴³

- In the first instance, deprivation of life will be arbitrary and, thus, unlawful if it does not comply with domestic or international legal standards.⁴⁴
- Legality in *domestic* law is in itself not sufficient, however: the notion of arbitrariness “must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability, and due process of law, as well as elements of reasonableness, necessity, and proportionality”.⁴⁵
- As regards the applicable *international* standards, it should be noted that international law differentiates between two frameworks regulating the use of (potentially) lethal force: the law enforcement paradigm rooted in IHRL, and the less strict conduct of hostilities paradigm rooted in IHL. The law enforcement paradigm applies in the context of law enforcement operations, while the conduct of hostilities paradigm applies in the context of hostilities.
- That is because the right to life continues to apply in situations of armed conflict including during hostilities,⁴⁶ though it can be lawfully restricted in a manner that would not be permissible under the

³⁹ ICCPR art 4(2); General Comment 36 para 2.

⁴⁰ *ibid* para 4.

⁴¹ Human Rights Committee, ‘General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’ CCPR/C/21/Rev.1/Add.13 (26 May 2004)
<<https://undocs.org/Home/Mobile?FinalSymbol=CCPR%2F21%2FRev.1%2FAdd.13&Language=E&DeviceType=Desktop&LangRequested=False>> last accessed 10 March 2023 (General Comment 31) para 8.

⁴² *ibid* para 16: “The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.”

⁴³ General Comment 36 para 10.

⁴⁴ *ibid* para 12.

⁴⁵ *ibid*.

⁴⁶ *ibid* para 64.

law enforcement paradigm. In the context of hostilities, combatants and civilians who take direct part in hostilities constitute lawful targets and can therefore be intentionally attacked, which might result in their death. Such deprivation of life will not be considered arbitrary under IHRL if the concrete military operation that led to the killing of a person was conducted in compliance with the rules of IHL.⁴⁷ A more detailed analysis of the rules governing the conduct of hostilities is provided in the next part of this document.

- In the West Bank, including East Jerusalem, no hostilities have been taking place for at least a decade, and consequently Israel's conduct is governed by the more restrictive law enforcement paradigm. This also applies to protests near the Gaza border fence, which do not amount to hostilities.⁴⁸

To preclude arbitrary deprivation of life in the law enforcement context, law enforcement operations must be conducted in full compliance with the **law enforcement paradigm**. Accordingly, any use of force by law enforcement officials should meet the following criteria:

- Force may be used only for a **lawful purpose**: in case of self-defence or defence of others against an imminent threat of death or serious injury (for potentially lethal force, including any use of firearms); or to effect a lawful arrest or prevent escape from lawful arrest (for any other force);
- Force may be used only when **absolutely necessary**, as a last resort, while giving precedence to and exhausting non-violent means;
- The force used must be **proportionate** to the level of threat, minimizing the damage and injury caused; and
- Law enforcement officials must **effectively plan** for reasonably foreseeable eventualities and prepare operations with a view to prevent, avoid and minimize the need to resort to force.⁴⁹

Since the commencement of the occupation, Israeli forces have been accused of using excessive force against thousands of Palestinians in the oPt during law enforcement operations, "including during the suppression of protests, arrest raids, when enforcing travel and movement restrictions, and conducting house and search operations".⁵⁰ Journalists, together with medics and human rights activists, have been injured and killed by Israeli forces during such operations, in some cases raising concerns that journalists had been deliberately targeted.⁵¹ Notable examples include the killing of two Palestinian journalists in 2018 while covering the Great March of Return protests near the Gaza border fence⁵² and the more recent killing of Palestinian-American

⁴⁷ *ibid.*

⁴⁸ See Diakonia IHL Centre, 'Legal Brief: The Use of Force in Law Enforcement Operations in the Occupied Palestinian Territory' (December 2022) <https://apidiakoniasse.cdn.triggerfish.cloud/uploads/sites/2/2022/12/Legal-Brief_Use-of-Force-in-Law-Enforcement-oPt.pdf> last accessed 10 March 2023 13-14.

⁴⁹ Diakonia IHL Centre, 'The Use of Force in Law Enforcement in the Occupied Palestinian Territory: Questions and Answers' (December 2021) <<https://www.diakonia.se/ihl/news/use-of-force-israel-law-enforcement/>> last accessed 10 March 2023 5. See also D.J. Harris, Michael O'Boyle et. al. (eds.), *Law of the European Convention on Human Rights* (Oxford University Press 2018) 228.

⁵⁰ Amnesty International, 'Israel's Apartheid against Palestinians: Cruel System of Domination and Crime Against Humanity' (February 2022) <<https://www.amnesty.org/en/documents/mde15/5141/2022/en/>> last accessed 10 March 2023 31.

⁵¹ *ibid* 32.

⁵² 'Palestine: New call for UN to speak out on Israeli targeting of journalists' (International Federation of Journalists, 5 July 2021) <<https://www.ifj.org/media-centre/news/detail/category/press-releases/article/palestine-new-call-for-un-to-speak-out-on-israeli-targeting-of-journalists.html>> last accessed 10 March 2023; 'Israel-Palestine: Four years of violence against Palestinian journalists covering "March of Return" protests' (RSF, 25 April 2022) <<https://rsf.org/en/israel-palestine-four-years-violence-against-palestinian-journalists-covering-march-return-protests>> last accessed 10 March 2023.

reporter Shireen Abu Akleh in Jenin.⁵³ Indeed, journalists and others who are perceived as speaking truth to power – for example, opposition leaders – are the most vulnerable to extrajudicial killings globally.⁵⁴

As per their professional activity, journalists are present at demonstrations, military raids, or similar confrontations to report from there and to inform the public. Such non-violent activity does not constitute an imminent threat to someone's life or bodily integrity justifying the use of potentially lethal force.

- It should be emphasized in this regard that the determination whether or not someone poses such an imminent threat must always be specific to the *individual*; it is not permissible for the authorities to “collectivize” the threat by claiming that a *group* of persons (e.g., demonstrators) constitutes a threat thus justifying the use of force against each of them.
- Furthermore, the threat must be *imminent* (i.e., either already present or a few seconds away from materializing); the *preventive* use of force based on an expected *future* threat is similarly unlawful.
- Finally, application of the correct legal framework is crucial. As noted, any use of force outside the context of hostilities (for instance, the policing of demonstrations – even if they turn violent – or the conduct of counter-terrorism operations) is subject to the more protective law enforcement paradigm.

There is also serious concern as to Israel's reported refusal to investigate alleged instances of excessive, and thus unlawful, use of force, which may amount to a violation of the procedural aspect of the right to life.

ii. Right to liberty of person

Art. 9 of the ICCPR protects the right to liberty and security of person, which, *inter alia*, includes protection from arbitrary or unlawful arrest or detention.⁵⁵

Persons may be deprived of their liberty for instance in police custody, remand detention, imprisonment for criminal offences, administrative detention, involuntary custody in mental health institutions or hospitals,⁵⁶ or in any other places under a State's jurisdiction and control “either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence”.⁵⁷

As noted, the right to liberty of person is not absolute in nature and, conversely, not all instances of deprivation of liberty are prohibited.⁵⁸ For instance, Art. 9(3) of the ICCPR explicitly mentions arrest and detention on the basis of criminal charges.⁵⁹ In order to be considered lawful, deprivation of liberty must have a legal basis; follow a procedure provided for by law; and be non-arbitrary, according to Art. 9(1) of the ICCPR.⁶⁰

⁵³ See, e.g., Zena Al Tahhan, ‘Shireen Abu Akleh: Al Jazeera reporter killed by Israeli forces’ (Al Jazeera, 12 May 2022) <<https://www.aljazeera.com/news/2022/5/11/shireen-abu-akleh-israeli-forces-kill-al-jazeera-journalist>> last accessed 10 March 2023.

⁵⁴ Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice* (2nd edn, Cambridge University Press 2016) 341.

⁵⁵ General Comment 35 para 3.

⁵⁶ *ibid* para 5.

⁵⁷ Optional Protocol to the Convention against Torture (OPCAT) art 4(1).

⁵⁸ General Comment 35 para 10.

⁵⁹ *ibid* para 14.

⁶⁰ *ibid* paras 10-11.

Arbitrariness in this context again has a broader meaning than illegality and denotes considerations of due process and substantive justice, amongst others.⁶¹

Some forms of detention bring with it an increased risk of arbitrariness and, therefore, unlawfulness. For example, the Human Rights Committee considers that security detention (also known as administrative detention) “presents severe risks of arbitrary deprivation of liberty”.⁶²

- Administrative detention is considered a problematic phenomenon in IHRL because it essentially constitutes detention without criminal charge or trial, on the basis of alleged anticipated security threats.⁶³ That is why this form of detention is subject to strict scrutiny: grounds for such detention must be provided by law; must be necessary to achieve the legitimate objective pursued; and must be continuously reviewed.⁶⁴
- Such detention would *per se* be considered arbitrary if it can be shown that other effective measures to mitigate the alleged threat were available and not resorted to; the burden of proof to substantiate the necessity of administrative detention and the absence of feasible alternatives lies with the State authorities.⁶⁵
- Furthermore, it needs to be demonstrated that the length of detention is kept to an absolute minimum.⁶⁶
- While in custody, the administrative detainee must also be allowed to challenge the legality of their detention before an independent court or tribunal; be granted legal representation; as well as access to the evidence and materials on the basis of which the decision to impose administrative detention was taken.⁶⁷
- If detention is imposed “as punishment for the legitimate exercise of [Covenant] rights”,⁶⁸ such as freedom of peaceful assembly or freedom of opinion and expression, or “on discriminatory grounds”,⁶⁹ it will automatically qualify as arbitrary.

In practice, administrative detention has been used by States to control and curb opposition voices on the basis of alleged “security concerns”. Israel is no exception in this regard. Thousands of Palestinians, including journalists,⁷⁰ have been held in administrative detention by the Israeli authorities over the years.⁷¹ The recent

⁶¹ *ibid* para 12.

⁶² *ibid* para 15.

⁶³ Bantekas and Oette (n 54) 373.

⁶⁴ *ibid*.

⁶⁵ General Comment 35 para 15.

⁶⁶ *ibid*.

⁶⁷ *ibid*.

⁶⁸ *ibid* para 17.

⁶⁹ *ibid*.

⁷⁰ See, e.g., ‘Israeli authorities order 4-month detention of Palestinian journalist Amer Abu Arafa, block TRT reporter Majdoleen Hassouna from leaving West Bank’ (CPJ, 5 August 2022) <<https://cpj.org/2022/08/israeli-authorities-order-4-month-detention-of-palestinian-journalist-amer-abu-arafa-block-trt-reporter-majdoleen-hassouna-from-leaving-west-bank/>> last accessed 10 March 2023.

⁷¹ See ‘Statistics on Administrative Detention’ (B’Tselem, 24 November 2021) <https://www.btselem.org/administrative_detention/statistics> last accessed 10 March 2023.

arrest, in January 2023, of a Palestinian journalist working for the outlet J-Media (who was released after four days without charge) is yet another example of the continuation of this practice.⁷²

Provisions of the military orders that Israel enforces in the West Bank authorize the military commander to order the administrative detention of individuals deemed to pose a potential security threat for up to six months.⁷³ In practice, such detention orders are frequently renewed on or just before the expiry date. That is because the law does not set a limit to the maximum total amount of time that an individual may be administratively detained, thereby allowing the Israeli authorities to keep a person in custody for an essentially indefinite period of time.⁷⁴ As of 2017, the longest reported period of administrative detention lasted eight years.⁷⁵ This stands in sharp contrast to the IHRL requirement that the duration of administrative detention be kept to an absolute minimum. Furthermore, even though the military orders enforced by Israel explicitly provide for the possibility of judicial review of an administrative detention order, in practice the evidence on the basis of which the decision was taken is often classified and not disclosed to the detainee, thus hindering their ability to successfully challenge the order.⁷⁶

Although under IHL Israel as the occupying power is allowed to administratively detain Palestinians in the oPt – who are protected persons – for imperative security reasons (see the next part of this analysis), this must not happen in disregard of human rights law. The legal framework adopted by the Israeli military governing administrative detention in the oPt and its application in practice raises concerns as to its legality under IHRL. In the absence of information as to why Israel resorts to administrative detention in each particular case, which should only be imposed in the most exceptional circumstances and for a short period of time,⁷⁷ and given arrest and detention patterns which appear to be discriminatory towards Palestinians and to be imposed as punishment for journalistic activity, such measures may amount to arbitrary deprivation of liberty.

The regime of administrative detention is distinct from arresting a person on criminal charges, and different rules apply to the latter. Persons detained on criminal charges enjoy certain rights and guarantees under IHRL, such as the right to be promptly informed about the reason for their arrest and any charges pending against them, the right to be brought before a court without delay, which must decide whether the individual should be released or remanded in custody for additional investigation or to await trial, and the right to be tried within a reasonable amount of time.⁷⁸ Art. 9(3) of the ICCPR explicitly provides that “[a]nyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to

⁷² Basil Adra, “‘I asked if he broke into my home to stop me from being a journalist’” (+972 Magazine, 5 February 2023) <<https://www.972mag.com/palestinian-journalist-home-raid-shin-bet/>> last accessed 10 March 2023.

⁷³ See *Order Regarding Security Directives* [Consolidated Version] (Judea and Samaria) (No. 1651), 5770-2009 (Military Order 1651), in particular section 285(A). In Israel itself and in East Jerusalem, administrative detention is carried out pursuant to the Israeli Emergency Powers (Detentions) Law, 5739-1979. See B’Tselem, ‘Administrative Detention’ (no date) <https://www.btselem.org/administrative_detention> last accessed 10 March 2023. For a comprehensive review of the administrative detention regimes employed by Israel see Shiri Krebs, ‘Lifting the Veil of Secrecy: Judicial Review of Administrative Detentions in the Israeli Supreme Court’ (2012) 45(3) *Vanderbilt Journal of Transnational Law* 654-666.

⁷⁴ See, e.g., Addameer, ‘Administrative Detention’ (July 2017) <https://www.addameer.org/israeli_military_judicial_system/administrative_detention> last accessed 10 March 2023.

⁷⁵ *ibid.*

⁷⁶ Human Rights Council, ‘Human rights situation in the Occupied Palestinian Territory, including East Jerusalem: Report of the High Commissioner for Human Rights’ A/HRC/37/42 (21 February 2018) <<https://undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2F37%2F42&Language=E&DeviceType=Desktop&LangRequested=False>> last accessed 10 March 2023 para 23 and the references cited therein.

⁷⁷ General Comment 35 para 15.

⁷⁸ *ibid* paras 24-38.

exercise judicial power and shall be entitled to trial within a reasonable time or to release”.⁷⁹ Failure to comply with these standards renders criminal arrest unlawful and in breach of Art. 9 of the ICCPR. Furthermore, Art. 14 of the ICCPR protects the right to equality before courts and tribunals and the right to a fair trial.⁸⁰

There are reports that Palestinian journalists have been detained by Israel on the basis of criminal charges against them, such as incitement.⁸¹ Various laws and practices by the Israeli authorities pertaining to such criminal detention may be incompatible with the due process guarantees enshrined in IHRL. A particular issue of concern in this regard is delayed access to legal assistance:

- Section 56(E) of Military Order 1651 authorizes police officers of a certain rank to disallow a detainee from meeting with legal counsel for up to 96 hours after their arrest if this is deemed necessary for security reasons. Section 57 similarly authorizes a judge to prevent a detainee from meeting with a lawyer for 96 hours for security reasons or because alleged “investigation requirements” so demand, which can be extended various times for up to 8 days in total.⁸²
- For so-called security offences as defined in the Order, the permissible time limit is even longer – 15 days following the initial arrest as ordered by the “supervisor of interrogation”, who may be from the police, the internal security service, or the military (Section 58(C)). This can be extended for additional periods – not exceeding 15 days in total – for security reasons or “the good of the interrogation” (Section 58(D)). Separately, a judge can also prohibit a detainee from meeting with a lawyer for up to 30 days (Sections 59(A) and (B)), which can be extended for another period of up to 30 days by the “president or vice president of the military court of first instance” if the military commander confirms in writing that “special reasons of security of the region necessitate this” (Section 59(C)).⁸³
- Under Israeli domestic law, and in particular the Criminal Procedure Law (Powers of Enforcement – Arrest) 1996, which Israel enforces in East Jerusalem in violation of international law, the maximum time that a detainee can be prevented access to a lawyer is 48 hours (Section 34);⁸⁴ for security offences the time period is 21 days (Section 35).⁸⁵
- The Human Rights Committee has clarified that States should “permit and facilitate”⁸⁶ criminal detainees’ access to legal representation from the moment of arrest.
- The requirement that persons arrested on criminal charges be brought promptly before a judge entails a right to legal assistance at any related hearing, “in principle ... by counsel of choice”.⁸⁷
- There is specific concern that holding persons incommunicado – that is, without access to legal representation, to family or next of kin, and without promptly being brought before a judge – raises the risk of torture and ill-treatment.⁸⁸

⁷⁹ ICCPR art 9(3).

⁸⁰ ICCPR art 14.

⁸¹ See, e.g., Yuval Abraham, ‘Israel Charges Palestinian Journalists with Incitement – for Doing their Jobs’ (The Intercept, 5 April 2022) <<https://theintercept.com/2022/04/05/israel-palestine-journalists-incitement/>> last accessed 10 March 2023.

⁸² Military Order 1651 sections 56-57; ‘Discrimination’ (Military Court Watch, no date) <https://www.militarycourtwatch.org/page.php?id=RyO5OsFMaZa27579A0cctVm0lxd#_edn1> last accessed 10 March 2023 fn 17.

⁸³ Military Order 1651 sections 58-59; ‘Discrimination’ (Military Court Watch) (n 82) fn 17.

⁸⁴ *ibid* fn 16.

⁸⁵ See Report of the High Commissioner (February 2018) (n 76) para 28 and the references cited therein; ‘Discrimination’ (Military Court Watch) (n 82) fn 16.

⁸⁶ General Comment 35 para 35.

⁸⁷ *ibid* para 34.

⁸⁸ *ibid*; Report of the High Commissioner (February 2018) (n 76) para 29.

- Additional issues of concern include, but are not limited to, prolonged pre-trial detention;⁸⁹ the withholding of confidential evidence from the defence in the course of the criminal trial that follows; and pressure to enter into plea bargains before the confidential evidence is examined.⁹⁰

If such reports are accurate, and journalists and others detained through criminal proceedings are indeed prevented from fully enjoying their due process rights, Israel is in violation of its obligations under IHRL.

Cumulatively, the policies and practices detailed in this section point towards a crackdown on the free Palestinian press by the Israeli authorities, thereby hindering media coverage of alleged violations of international law affecting Palestinians.

iii. Freedom of movement

Art. 12 of the ICCPR provides for the right to freedom of movement. This right accords everyone who is lawfully present within the territory of a State the right to liberty of movement and freedom to choose residence on “the whole territory”⁹¹ of that State, and also the freedom to leave any country, including their own.⁹²

As noted, the right to freedom of movement is not absolute, and as such may be subject to lawful restrictions which are provided by law, and are necessary to protect national security, public order, public health or morals, or the rights and freedoms of others.⁹³ The restrictions must also be proportionate in the sense that they are “appropriate to achieve their protective function; ... the least intrusive instrument amongst those which might achieve the desired result; and ... proportionate to the interest to be protected”.⁹⁴

Furthermore, the application of such restrictions in practice needs to be consistent with the fundamental principles of equality and non-discrimination. Therefore, “it would be a clear violation” of IHRL if freedom of movement “were restricted by making distinctions of any kind”.⁹⁵

Over the course of the occupation, Israel has fragmented the oPt into three units – which are again fragmented from within – and to which different legal systems apply: East Jerusalem, the West Bank (further divided into Areas A, B, and C), and the Gaza Strip. In the context of this fragmentation, the authorities have imposed different measures ostensibly on the basis of security considerations, which include various forms of access and movement restrictions including a permit regime for international and non-international travel; permanent, semi-permanent, and flying checkpoints; earth mounds; roadblocks; earth walls; barriers; trenches; and others. As a result, Israel’s occupation has created a factual situation in which Palestinians are generally not allowed to move freely *between* or *within* the constitutive parts of the oPt, as divvied up by Israel. The Palestinian residents of Gaza are furthermore prevented from leaving the Strip due to Israel’s

⁸⁹ See, e.g., ‘Israel: Release Long Detained Gaza Aid Worker’ (Human Rights Watch, 25 April 2022) <<https://www.hrw.org/news/2022/04/25/israel-release-long-detained-gaza-aid-worker>> accessed 10 March 2023.

⁹⁰ See Report of the High Commissioner (February 2018) (n 76) paras 31-32 and the references cited therein.

⁹¹ Human Rights Committee, ‘General Comment No. 27 (67): Freedom of movement (article 12)’ CCPR/C/21/Rev.1/Add.9 (1 November 1999) <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11> last accessed 10 March 2023 (General Comment 27) para 5.

⁹² ICCPR art 12(2).

⁹³ ICCPR art 12(3).

⁹⁴ General Comment 27 para 14.

⁹⁵ *ibid* para 18.

closure policy, unless they apply for – and actually receive – a special permit to travel on a specific date and time via a restricted route.

While Israel justifies restrictions to Palestinians' freedom of movement on the basis of military and security needs, it allows the free movement of its own nationals in the parts of the West Bank that are under Israeli control (especially within and between Israeli settlements in Area C, which are connected by roads and other infrastructure inaccessible to Palestinians). In addition, Israelis are allowed to freely enter and leave the parts of the West Bank that are under its control, while Palestinians are hindered or wholesale prevented from doing so. These policies and practices indeed constitute an undue restriction to the freedom of movement of Palestinians within the territory of their own State.

For one thing, the generalized security justifications that the Israeli authorities put forward for the blanket movement restrictions they impose on Palestinians do not stand up to scrutiny, as they fail to satisfy the requirements of lawful purpose, necessity, and proportionality that must be met in each particular case in which movement restrictions are imposed (i.e., a direct connection between an alleged grave security threat posed by a particular individual seeking to travel that can only be thwarted by means of restricting their movement).

Moreover, these measures have a clear discriminatory – and thus unlawful – character, as restrictions to freedom of movement are imposed more readily on Palestinians than Israeli nationals in the oPt.

Palestinian journalists living and working in the West Bank or the Gaza Strip are particularly burdened by these draconian access and movement restrictions because freedom of movement is a necessary precondition for the exercise of their professional activity. In a recent example reported by the Committee to Protect Journalists (CPJ), a Palestinian journalist was prevented by Israeli officials from leaving the West Bank for Jordan in 2022 without being given reasons for this decision,⁹⁶ despite the fact that under IHRL each restriction to free movement in a particular case “must be based on clear legal grounds and meet the test of necessity and the requirements of proportionality”.⁹⁷ There are many other examples of such reported conduct.⁹⁸

iv. Freedom of expression

Israeli and Palestinian authorities unduly interfere with the right to freedom of expression through various means including limiting journalistic activity and criminal prosecution of journalists on the basis of overly broad laws, as well as the patterns of conduct detailed in the preceding sections: access and movement restrictions; arbitrary arrest; physical attacks; and killings.

⁹⁶ ‘4-month detention’ (CPJ) (n 70).

⁹⁷ General Comment 27 para 16.

⁹⁸ For more examples see Euro-Mediterranean Human Rights Monitor, ‘Punishing Journalists: Israel’s restrictions on freedom of movement and travel against Palestinian journalists’ (November 2021) <<https://euromedmonitor.org/uploads/reports/JournalistsEN.pdf>> last accessed 10 March 2023.

Art. 19(2) of the ICCPR protects the right to freedom of expression, which includes “freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print”.⁹⁹ The Human Rights Committee has clarified that this entails specifically the right of journalists to obtain information for reporting purposes, and the right of the general public to “receive media output”.¹⁰⁰ This is in acknowledgement of the crucial role the media play in informing and fostering public debate about issues of societal relevance, thereby facilitating the enjoyment of the rights to freedom of opinion and expression by others. Accordingly, States should take steps to “encourage an independent and diverse media”.¹⁰¹ As a general proposition and starting point, then, journalistic activity is an essential component of, and protected as, free expression.

According to Art. 19(3) of the ICCPR, freedom of expression may be lawfully restricted to the extent that such limitations are provided by law; in pursuit of a legitimate objective (protecting the rights or reputations of others, national security, public order, or public health or morals); necessary; and proportionate.¹⁰²

The Human Rights Committee has specifically listed a range of measures that can never be adopted as valid restrictions to freedom of expression under Art. 19(3) of the ICCPR, which Israeli and Palestinian authorities nevertheless habitually make use of. The Committee has also recognized that journalists may be particularly vulnerable to such courses of action,¹⁰³ which include:

- **Physical attacks and killing:** Patterns of excessive use of force against journalists have been described in the section on right to life. Such attacks tend to spike in the context of large-scale demonstrations, such as the Great March of Return protests near the Gaza border fence, with two journalists reportedly killed wearing protective vests identifying them as press, and hundreds injured by Israeli forces;¹⁰⁴ the demonstrations that took place across the oPt during the May 2021 escalation of violence, especially in Jerusalem;¹⁰⁵ and the protests following the death of prominent PA critic Nizar

⁹⁹ ICCPR art 19(2).

¹⁰⁰ Human Rights Committee, ‘General comment No. 34: Article 19: Freedoms of opinion and expression’ CCPR/C/GC/34 (12 September 2011) <<https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no34-article-19-freedoms-opinion-and>> last accessed 10 March 2023. (General Comment 34) para 13.

¹⁰¹ *ibid* para 14.

¹⁰² *ibid* para 22.

¹⁰³ *ibid* para 23.

¹⁰⁴ ‘Six Months On: Gaza’s Great March of Return’ (Amnesty International, 2018) <<https://www.amnesty.org/en/latest/campaigns/2018/10/gaza-great-march-of-return/>> last accessed 10 March 2023; ‘Israel-Palestine: Four years of violence’ (RSF) (n 52).

¹⁰⁵ Oren Ziv, ‘Israeli Police Target Palestinian Journalists at Al Aqsa Mosque’ (The Intercept, 26 May 2021) <<https://theintercept.com/2021/05/26/israel-journalists-palestinian-jerusalem-al-aqsa/>> last accessed 10 March 2023; Deiaa Haj Yahia and Yanal Jbareen, ‘Arab Journalist Group Protests Israeli Police Violence After Attack on Photographer’ (Ha’aretz, 25 May 2021) <<https://www.haaretz.com/israel-news/2021-05-25/ty-article/.premium/arab-journalist-group-protests-israeli-police-violence-after-attack-on-photographer/0000017f-e285-d9aa-afff-fbdf81400000>> last accessed 10 March 2023.

Banat in June 2021, during which journalists were attacked by Palestinian security forces and their equipment confiscated.¹⁰⁶

- The Human Rights Committee has clearly stated that “an attack on a person, because of the exercise of [their] freedom of opinion or expression, including ... threats to life and killing”¹⁰⁷ can never be considered lawful under Art. 19 of the ICCPR. Furthermore, failure to “respond appropriately to patterns of violence against categories of victims”,¹⁰⁸ including journalists, amounts to a violation of the right to security of person enshrined in Art. 9 of the ICCPR.
- There are also reports of Israeli settlers and right-wing activists harassing and attacking Palestinian or Arabic-speaking journalists;¹⁰⁹ at the end of February, Palestinian journalist Muatasem Saqf Al-Hait was reportedly attacked by settlers near Nablus when trying to cover the aftermath of settler violence in Huwara.¹¹⁰
- States have an obligation to take steps to ensure that persons are protected from assault by third parties.¹¹¹
- **Arbitrary arrest and detention:** As noted, these patterns of conduct are well-documented. In August 2022, for instance, an Israeli military court ordered Palestinian journalist Amer Abu Arafa to four months’ administrative detention.¹¹² Furthermore, in the context of the May 2021 escalation of violence Israel held 13 Palestinian journalists in administrative detention, according to RSF.¹¹³ The arrest and detention of journalists has also been reported for the PA and the de facto authorities in Gaza.¹¹⁴
- The Human Rights Committee has similarly clarified that arrest cannot be justified as a valid restriction of free expression under Art. 19 of the ICCPR.¹¹⁵ If imposed as “punishment for the legitimate exercise of ... freedom of opinion and expression”,¹¹⁶ arrest and detention are considered arbitrary and therefore also contravene Art. 9 of the ICCPR.

¹⁰⁶ ‘West Bank: Palestinian Authority forces attack journalists covering Nizar Banat protests’ (Middle East Eye, 28 June 2021) <<https://www.middleeasteye.net/news/palestine-nizar-banat-death-protests-journalists-covering-attacked>> last accessed 10 March 2023; ‘Palestinian media rally for protection after assaults by police’ (Al Jazeera, 28 June 2021) <<https://www.aljazeera.com/news/2021/6/28/palestinian-media-rally-for-protection-after-assaults-by-police>> last accessed 10 March 2023; Malika Bilal, ‘A critic’s death turns eyes on the Palestinian Authority’ (The Take Podcast, Al Jazeera, July 2021) <<https://www.aljazeera.com/podcasts/the-take/>> last accessed 10 March 2023; ‘Occupied Palestinian Territory: Attacks against critics must stop, those responsible arrested – UN experts’ (OHCHR, 6 July 2021) <<https://www.ohchr.org/en/press-releases/2021/07/occupied-palestinian-territory-attacks-against-critics-must-stop-those>> last accessed 10 March 2023.

¹⁰⁷ General Comment 34 para 23.

¹⁰⁸ General Comment 35 para 9.

¹⁰⁹ Nir Hasson, ‘Arab Reporter Assaulted in Sheikh Jarrah After Right-wing March; Two Arrested’ (Ha’aretz, 30 May 2022) <<https://www.haaretz.com/israel-news/2022-05-30/ty-article/.premium/two-jewish-suspects-arrested-in-jerusalem-attack-on-arab-reporter/00000181-1474-d3ed-a7a3-367767270000>> last accessed 10 March 2023; ‘France24 correspondent is heckled by Israelis in Jerusalem for speaking Arabic’ (Middle East Eye, 24 November 2022) <<https://www.youtube.com/watch?v=BCRNNIAZtBg>> last accessed 10 March 2023.

¹¹⁰ Qassam Muaddi, “‘I thought I was going to die’: Israeli settlers attack Palestinian journalist near Nablus’ (The New Arab, 1 March 2023) <<https://www.newarab.com/news/israeli-settlers-attack-palestinian-journalist-near-nablus>> accessed 10 March 2023.

¹¹¹ General Comment 34 para 23; General Comment 31 para 8.

¹¹² ‘4-month detention’ (CPJ) (n 70).

¹¹³ ‘Israel now holding 13 Palestinian journalists’ (RSF, 28 May 2021) <<https://rsf.org/en/israel-now-holding-13-palestinian-journalists>> last accessed 10 March 2023.

¹¹⁴ See, e.g., ‘Palestine: No Letup in Arbitrary Arrests, Torture’ (Human Rights Watch, 29 May 2019) <<https://www.hrw.org/news/2019/05/29/palestine-no-letup-arbitrary-arrests-torture>> last accessed 10 March 2023.

¹¹⁵ General Comment 34 para 23.

¹¹⁶ General Comment 35 para 17.

- Arbitrary arrest, physical attacks, and killings must furthermore be subject to thorough **investigation**, and the perpetrators must be held accountable.¹¹⁷
- **Access and movement restrictions:** Israel restricted access to the Gaza Strip for international journalists during the 2008-2009 Gaza war,¹¹⁸ and partially during the May 2021 hostilities.¹¹⁹ The Israeli authorities frequently ban Palestinian journalists from travelling, such as in the case of Majdoleen Hassouna, a journalist working for a Turkish broadcaster, who according to the CPJ was prevented from exiting the West Bank for Jordan in July 2022.¹²⁰ Palestinian journalists in Gaza are wholesale denied the freedom to travel.
- The Human Rights Committee has noted in this respect that under Art. 19 of the ICCPR it is generally not permissible to bar journalists from leaving the country (or territory under a State's control); to limit their freedom of movement within the country or territory (especially in respect of areas where human rights violations are alleged to have taken place); or to allow only journalists of certain nationalities into the country or territory.¹²¹

A further significant issue of concern is the **restriction of journalistic activity and criminal prosecution of journalists on the basis of overly broad laws**.

- Israel has reportedly relied on the military orders it enforces in the West Bank – notably, Military Order 1651 – to criminally prosecute Palestinian journalists in the West Bank on charges of “incitement” or “membership in an unlawful association”.¹²²
- The PA in turn has used the so-called “cybercrime law” – passed in 2017 by presidential decree in the absence of a functioning Palestinian Legislative Council and amended in 2018 – to silence journalists and critics of the government.¹²³

¹¹⁷ General Comment 34 para 23.

¹¹⁸ Jared Malsin, ‘How the Israeli-Palestinian conflict affected journalists’ (Columbia Journalism Review, November/December 2014) <https://archives.cjr.org/feature/journalists_israel_palestine_conflict.php> last accessed 10 March 2023; ‘Israel: Allow Media and Rights Monitors Access to Gaza’ (Human Rights Watch, 5 January 2009) <<https://www.hrw.org/news/2009/01/05/israel-allow-media-and-rights-monitors-access-gaza>> last accessed 10 March 2023.

¹¹⁹ Shrouq Aila and Anna Therese Day, ‘Israel Destroyed Offices of More Than 20 Palestinian Media Outlets in Gaza’ (The Intercept, 18 May 2021) <<https://theintercept.com/2021/05/18/gaza-journalists-israel-palestine-attacks/>> last accessed 10 March 2023; ‘Israel’s arguments for denying foreign reporters access to Gaza are spurious’ (RSF, 19 May 2021) <<https://rsf.org/en/israel-s-arguments-denying-foreign-reporters-access-gaza-are-spurious>> last accessed 10 March 2023.

¹²⁰ ‘4-month detention’ (CPJ) (n 70).

¹²¹ General Comment 34 para 45.

¹²² See, e.g., Human Rights Watch, ‘Born Without Civil Rights: Israel’s Use of Draconian Military Orders to Repress Palestinians in the West Bank’ (17 December 2019) <<https://www.hrw.org/report/2019/12/17/born-without-civil-rights/israels-use-draconian-military-orders-repress>> last accessed 10 March 2023; ‘Witness: How Israel Muzzles Free Expression for Palestinians’ (Human Rights Watch, 17 December 2019) <<https://www.hrw.org/news/2019/12/17/witness-how-israel-muzzles-free-expression-palestinians>> last accessed 10 March 2023; Abraham (n 81).

¹²³ See, e.g., ‘Palestine: Reform Restrictive Cybercrime Law’ (Human Rights Watch, 20 December 2017) <<https://www.hrw.org/news/2017/12/20/palestine-reform-restrictive-cybercrime-law>> last accessed 10 March 2023; Human Rights Watch, ‘Two Authorities, One Way, Zero Dissent: Arbitrary Arrest and Torture Under the Palestinian Authority and Hamas’ (23 October 2018) <https://www.hrw.org/report/2018/10/23/two-authorities-one-way-zero-dissent/arbitrary-arrest-and-torture-under#_ftn4> last accessed 10 March 2023; ‘Palestine’ (RSF) <<https://rsf.org/en/country/palestine>> last accessed 10 March 2023; ‘Palestinian human rights activist charged under repressive new cybercrimes law’ (Amnesty International, 7 September 2017) <<https://www.amnesty.org/en/latest/press-release/2017/09/palestinian-human-rights-activist-charged-under-repressive-new-cybercrimes-law/>> last accessed 10 March 2023.

As a starting point, the Human Rights Committee has again clarified that punishing journalists and the press “solely for being critical of the government or the political social system espoused by the government”¹²⁴ or restricting the publication of such content¹²⁵ cannot be justified under Art. 19(3) of the ICCPR.

Furthermore, the Committee has specifically noted that State parties to the Covenant must ascertain that legislation relating to national security and treason¹²⁶ as well as counter-terrorism measures including related criminal offences¹²⁷ meet the stringent criteria for lawful restrictions to free expression enumerated in Art. 19(3) of the ICCPR (that is, the limitations must be provided by law; in pursuit of a legitimate objective; necessary; and proportionate).

The first requirement of Art. 19(3) – that the restriction to freedom of expression be “**provided by law**” – requires that the law be sufficiently precise so as to allow persons to adjust their behaviour in conformity therewith, and that the law does “not confer unfettered discretion”¹²⁸ on the implementing authorities. The onus is on the authorities to both substantiate the legal basis of the measures taken, and to elucidate what conduct falls within the remit of the legislation in question.¹²⁹

- It is submitted that both Military Order 1651 and the cybercrime law fall short of this requirement. Military Order 1651 contains broad and open-ended provisions, such as the offence of “incitement”, which is defined as “[a]ttempts, orally or in another way, to influence public opinion ... in a manner which may harm public peace or public order”.¹³⁰
- The cybercrime law authorizes a court, upon request by the authorities, to block websites that contain “any expressions, figures, images, films, propaganda materials or others which may threaten national security, public order or public morals”,¹³¹ and provides for a range of criminal offences that are similarly vaguely defined.
- The analysis could end at this point, since all four criteria enumerated in Art. 19(3) of the ICCPR must be complied with cumulatively. The remaining requirements are nevertheless outlined in the following for the purpose of completeness.
- Restrictions to freedom of expression must be adopted in pursuit of a **legitimate objective**. Israeli and Palestinian authorities would likely contend that the respective application of Military Order 1651 and the cybercrime law to journalistic activity can be justified on the grounds of protecting national security or public order. However, the invocation of such broad notions that are open to interpretation is not sufficient in and of itself: the authorities would have to “demonstrate in specific and individualized fashion the precise nature of the threat”¹³² posed by the person or publication in a

¹²⁴ General Comment 34 para 42.

¹²⁵ *ibid* para 43.

¹²⁶ *ibid* para 30.

¹²⁷ *ibid* para 46.

¹²⁸ *ibid* para 25 and the references cited therein.

¹²⁹ *ibid* para 27.

¹³⁰ Military Order 1651 section 251.

¹³¹ Law by Decree No. 10 of 2018 on Cybercrime art 39.

¹³² General Comment 34 para 35.

particular instance, including “a direct and immediate connection between the expression and the threat”.¹³³

- In any case, the restrictions would still have to comply with the strict requirements of necessity and proportionality.
- **Necessity** in this context means that the legitimate purpose could not have been achieved “in other ways that do not restrict freedom of expression”.¹³⁴ In other words, the limitation to free expression must be a measure of last resort. Particular care must be taken with regard to the imposition of criminal sanctions: the Human Rights Committee has stated in respect of defamation laws – but this principle is of wider applicability to non-violent expression – that “the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty”.¹³⁵
- **Proportionality** in turn requires a balancing of the legitimate objective pursued (for instance, protecting public security) against the limitation to free expression imposed by the authorities. Accordingly, the restriction should “not be overbroad”¹³⁶ and constitute the “least intrusive instrument”¹³⁷ at the disposal of the authorities. Again, both the legislation itself as well as its practical application in a specific case must conform to the principle of proportionality.¹³⁸
- Finally, in addition to the criteria set out in Art. 19(3) of the ICCPR, legislation purporting to curtail free expression and its application in practice must comply with the **principle of non-discrimination**.¹³⁹

¹³³ *ibid.*

¹³⁴ *ibid* para 33 and the references cited therein.

¹³⁵ *ibid* para 47.

¹³⁶ *ibid* para 34.

¹³⁷ General Comment 27 para 14, cited in General Comment 34 para 34.

¹³⁸ General Comment 34 para 34 and the references cited therein.

¹³⁹ *ibid* paras 26 and 32.

IHL

IHL provides protection to all persons affected by armed conflict including media personnel working in conflict zones. While it does not grant any special protection or rights to media personnel based on their profession or function,¹⁴⁰ Rule 34 of the ICRC's Customary IHL Study does provide that:

Civilian journalists engaged in professional missions in areas of armed conflict must be respected and protected as long as they are not taking a direct part in hostilities.

This rule, together with its commentary, first affirms the civilian status of journalists for the purposes of the rules on conduct of hostilities, employing the wording of the general rule applicable to civilians in clarifying under which circumstances they lose protection against attacks. Additionally, it may be read as implying further obligations for the parties to the conflict beyond the requirement to refrain from targeting journalists. Indeed, the practice referred to in the commentary includes, for example, condemnations by the international community of abductions and other acts of violence against media personnel, threats of legal prosecutions, unjustified imprisonment, intimidation, and harassment.¹⁴¹ It must be underlined that “taking a direct part in hostilities” results in the temporary loss of protection against attacks only; all other protections are applicable at all times regardless of the conduct of the journalists.

While media personnel are protected by the full array of protections that IHL grants to civilians, the following analysis focuses on the rules most pertinent for their protection and distinguishes between (i) situations in which media personnel find themselves in the hands of a party to an armed conflict of which they are not nationals, in particular as a result of being in territory occupied by that party; and (ii) the conduct of hostilities.

i. In the occupied territory

Media personnel in occupied territories are protected under the general rules relating to the protection of the civilian population, and may have further protections if they have “protected person” status.¹⁴² In the oPt, all Palestinian journalists are protected persons. As such, they must at all times be humanely treated and must be protected especially against all acts of violence or threats thereof.¹⁴³ Additionally, all persons affected by armed conflict are entitled to fundamental guarantees, for example, protection from torture or other ill-treatment, or protection from hostage-taking.¹⁴⁴

As explained above, IHL continues to apply in occupied territories. The occupying power must respect and protect the right to liberty, the right to freedom of movement, and the right to freedom of expression, including freedom of the press. However, IHL allows the occupying power to take “measures of control and

¹⁴⁰ That said, media personnel are specifically mentioned in two instances: (1) The Third Geneva Convention stipulates that a specific type of journalist, war correspondents who are authorized by State armed forces and accompany them, are entitled to prisoner of war status upon falling into the power of the enemy; (2) The First Additional Protocol affirms that journalists, including war correspondents, are civilians and must be protected as such against the effects of hostilities. See, respectively, Convention relative to the Treatment of Prisoners of War, Geneva, 12 August 1949 (GC III) art 4(4); and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 (AP I) arts 79(1)-(2) and art 50(1).

¹⁴¹ Henckaerts and Doswald-Beck (n 19) commentary to rule 34.

¹⁴² Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949 (GC IV) art 4.

¹⁴³ GC IV art 27(1).

¹⁴⁴ See Henckaerts and Doswald-Beck (n 19) rules 87-105.

security... as may be necessary as a result of the war”.¹⁴⁵ The type of measure deemed necessary is left to the discretion of the occupying power; however, the strictest measures permitted are assigned residence and internment, which may be imposed only for “imperative reasons of security”.¹⁴⁶ Less strict measures may include regular reporting to the authorities, carrying special identity cards, or restrictions of access to certain areas.¹⁴⁷ In any case, the permissibility of these measures depends on their necessity, for example to achieve a legitimate security purpose of the occupying power. The threshold of necessity, for example, would be met if the measures taken are necessary to ensure the safety of the occupying forces (e.g., restrictions of access to the army barracks) but not if they are taken in order to hinder journalistic activities reporting on the conduct of the occupying power in administering the occupied territory (e.g., in relation to the administration of justice by military courts).

As explained above, administrative detention poses certain problems under the IHRL system. However, IHL provides a legal basis for administrative detention – internment – of protected persons in the occupied territory, as an exceptional measure. Keeping in mind that both branches of law are applicable, the assessment of the lawfulness of any administrative detention then requires an analysis of their interaction on this issue. Concretely, what is prohibited under IHRL is “arbitrary” deprivations of liberty, and administrative detentions are considered as posing “severe risks” of arbitrariness, while not absolutely prohibited.¹⁴⁸ It is also submitted that administrative detention “authorized and regulated by and complying with international humanitarian law in principle is not arbitrary”.¹⁴⁹ Accordingly, it can be concluded that when assessing the lawfulness of internment in situations of occupation, IHL rules inform those of IHRL in their interpretation as to what may be considered arbitrary. At the same time, those interned also remain protected by the more detailed guarantees afforded by IHRL. In other words, the occupying power remains bound by all its obligations under IHRL, which may inform the interpretation of its obligations under IHL, even though the admissibility of the internment itself is assessed by reference to IHL.

Under IHL, the occupying power may subject protected persons to assigned residence or to internment for imperative reasons of security.¹⁵⁰ The decisions on internment must be taken according to a regular procedure duly prescribed by the occupying power, which at the minimum must include a right to appeal and a periodic review mechanism.¹⁵¹

Internment of protected persons is a preventive measure to address (future) security threats to the occupying power; it cannot be imposed as a punishment for past conduct. If a person is suspected of having committed a crime, they must go through the criminal justice system under which they should be afforded fair trial guarantees. The assessment of the alleged security threat must be made on an individual basis, and not based on collective classifications such as age or gender.¹⁵² For example, internment of persons for the sole reason

¹⁴⁵ GC IV art 27(4). It must be noted that such measures must not affect the fundamental guarantees afforded by IHL, or non-derogable rights under IHRL. See ICRC Commentary to GC IV art 27(4) (1958) <<https://ihl-databases.icrc.org/en/ihl-treaties/gciv-1949/article-27/commentary/1958?activeTab=undefined>> last accessed 10 March 2023.

¹⁴⁶ GC IV art 78(1).

¹⁴⁷ See ICRC Commentary to GC IV art 27(4) (1958) <<https://ihl-databases.icrc.org/en/ihl-treaties/gciv-1949/article-27/commentary/1958?activeTab=undefined>> last accessed 10 March 2023.

¹⁴⁸ General Comment 35 para 15.

¹⁴⁹ *ibid* para 64.

¹⁵⁰ GC IV art 78(1).

¹⁵¹ GC IV art 78(2).

¹⁵² Sassòli (n 11) 299.

of their professional activity as journalists would be unlawful. Likewise, critically reporting on the conduct of the occupying power would not constitute a valid imperative security reason for detention.

As discussed above, Israel has established a procedure for administrative detention/internment in the West Bank in the military orders it enforces. On paper, this procedure appears to correspond with the requirements of IHL, however, in practice, its implementation over the years by the Israeli authorities appears to fall short of the requirements of both IHL and IHRL.

The recent increase in the number of administrative detention orders raises concerns as to whether the “exceptional character”¹⁵³ of the measure is not or no longer respected.¹⁵⁴ There are also concerns that Israel has resorted to internment of persons for reasons going beyond what is allowed under IHL, circumventing the criminal justice system wherein it must ensure all fair trial guarantees, and effectively using internment as a form of punishment.¹⁵⁵

Where accessible publicly, the justifications for internment provided by the authorities have at times raised questions as to whether a proper *individualized* assessment has been carried out and a *concrete* security threat exists. For example, the administrative detention of a Palestinian, upon completion of a prison sentence of 14 and a half years, due their membership in the Popular Front for the Liberation of Palestine (PFLP) could be questioned in two regards.¹⁵⁶ First of all, while membership in a group which is itself deemed a threat by the authorities would be a significant factor in internment decisions, this should be supported by reasons as to why the specific person in question (as opposed to other members of the group) must be interned. Second, and in the same vein, membership in such a group may admittedly lead to the conclusion that the person may pose a (future) security threat, but this threat should be further substantiated by the authorities to meet the necessary threshold of concreteness. In this case, considering the long duration of the prison sentence served by the person, as a result of which they were most likely cut off from the “operations” of the group, it would fall upon the authorities to provide further evidence of a concrete threat posed by them.

It has also been reported that Israel relies on classified evidence in a number of cases.¹⁵⁷ This practice prevents persons from meaningfully making use of their right to appeal (and periodic review) as provided by IHL, and fails to comply with the procedural guarantees prescribed by IHRL in order to prevent arbitrary deprivations of liberty, first and foremost with the right to be informed of the reasons for detention.¹⁵⁸

Detention of protected persons, including journalists, outside of the oPt is also a common practice, despite the absolute prohibition of deportation from the occupied territories under IHL.¹⁵⁹

¹⁵³ ICRC Commentary to GC IV art 78(1) (1958) <<https://ihl-databases.icrc.org/en/ihl-treaties/gciv-1949/article-78/commentary/1958>> last accessed 10 March 2023.

¹⁵⁴ Addameer, ‘Administrative Detention as a Tool of Oppression and Domination’ (5 October 2022) <<https://www.addameer.org/sites/default/files/publications/Administrative%20Detention%20as%20a%20Tool%20of%20Oppression%20and%20Domination.pdf>> last accessed 10 March 2023; see, e.g., ‘Statistics’ (B’Tselem) (n 71).

¹⁵⁵ Report of the High Commissioner (February 2018) (n 76) para 21 and the references cited therein.

¹⁵⁶ *ibid* para 22.

¹⁵⁷ See, e.g., Concluding Observations (May 2022) (n 16) para 34; ‘Israel currently holds 456 Palestinians in administrative detention; 137 of them have been detained without charge or trial for over a year’ (HaMoked, 18 July 2019) <<https://hamoked.org/document.php?dID=Updates2091>> accessed 10 March 2023; ACRI, ‘Five Questions on Administrative Detention and Administrative Control Orders in the Occupied Territories: By what authority? For what purpose? Against whom? How many? What’s the problem with it?’ (2012) <<https://law.acri.org.il/en/wp-content/uploads/2012/04/AdministrativeDetention-1.pdf>> accessed 10 March 2023.

¹⁵⁸ Report of the High Commissioner (February 2018) (n 76) para 23.

¹⁵⁹ GC IV art 49(1); Concluding Observations (May 2022) (n 16) para 34.

The duration of detentions is in general relatively lengthy,¹⁶⁰ and the persons are left in a constant state of uncertainty as to the exact period or foreseeable end of their detention. Admittedly, the IHL regime only prescribes that the internee should be released if the imperative security reason no longer exists, or at the latest, after the close of hostilities.¹⁶¹ During the period of internment, the internee is solely entitled to having the decision reviewed periodically (“if possible every six months”).¹⁶² On the other hand, it has been submitted that long detentions with no foreseeable end for the persons concerned may amount a violation of the right to be protected from torture or other ill-treatment.¹⁶³ Considering the absence of an obligation to the contrary under IHL (lengthy internments are not required but theoretically permitted) and the non-derogable character of the prohibition, it would be appropriate to conclude that in this case, IHRL must inform the interpretation of IHL to delineate the limits of the occupying power’s authority with regard to internment.

ii. Conduct of hostilities

The rules on conduct of hostilities regulate the means and methods of warfare and provide protection for persons who do not or no longer take part in hostilities.¹⁶⁴ IHL expressly confirms the civilian status of journalists, including war correspondents.¹⁶⁵ In the conduct of hostilities, civilians are protected against the effects of hostilities.¹⁶⁶ Journalists benefit from the same protections as civilians.

Art. 79(1) of Additional Protocol I provides that:

Journalists engaged in dangerous professional missions in areas of armed conflict shall be considered as civilians within the meaning of Article 50, paragraph 1.

Rule 34 of the Customary IHL Study provides that:

Civilian journalists engaged in professional missions in areas of armed conflict must be respected and protected as long as they are not taking a direct part in hostilities.

The most fundamental protections that IHL provides to civilians during the conduct of hostilities derive from the principles of distinction, proportionality, and precautions, which the following sections address in turn.

¹⁶⁰ See ‘Statistics’ (B’Tselem) (n 71).

¹⁶¹ GC IV arts 132-133.

¹⁶² GC IV art 78(2).

¹⁶³ Report of the High Commissioner (February 2018) (n 76) para 17.

¹⁶⁴ Technically speaking, the rules on conduct of hostilities for international and non-international armed conflicts constitute two distinct frameworks. Nevertheless, the substance of these rules, for the most part, overlap; in the following overview, unless it is explicitly stated otherwise, the explanations are equally applicable to both types of armed conflict.

¹⁶⁵ AP I arts 50(1) and 79(1); Henckaerts and Doswald-Beck (n 19) rule 34. War correspondents who are authorized by a State armed force and accompany the armed force without actually being members thereof get prisoner of war status upon falling into the hands by the enemy (Updated ICRC Commentary to GC III art 4(4) (2020) <<https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949/article-4/commentary/2020>> last accessed 10 March 2023 para 1049). However, they are civilians for the purposes of the rules on conduct of hostilities.

¹⁶⁶ In the conduct of hostilities, civilians are persons who are not combatants or members of organized armed groups (“fighters”).

Principle of distinction

Parties to the conflict must distinguish between civilians and civilian objects on the one hand, and combatants/fighters and military objectives on the other hand.¹⁶⁷

Civilians are persons who are not combatants (members of State armed forces)¹⁶⁸ or fighters (members of armed groups (with a continuous combat function)).¹⁶⁹

Journalists, including war correspondents who accompany the armed forces without being members thereof, as civilians, cannot be made the object of an attack unless and for such time as they directly participate in the hostilities.¹⁷⁰ For an act to constitute direct participation in hostilities:

1. The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm); and
2. There must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation); and
3. The act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).¹⁷¹

Reporting on ongoing hostilities, including on any suspected violations of international law by warring parties, even if biased, does not constitute direct participation in hostilities. Likewise, even if the reporting is biased towards one party to the conflict, or includes propaganda, this would not amount to direct participation in hostilities.¹⁷²

In case of doubt as to their loss of protection as civilians, journalists must be presumed to be protected against attacks.¹⁷³ For example, even in the midst of hostilities where no civilians are expected, the fact that a person is wearing a vest or helmet marked as “press” is a strong indicator of the civilian status of the person.

Civilian objects are similarly defined in opposition to military objectives – “objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture, or neutralization, in the circumstances ruling at the time, offers a definite military advantage”.¹⁷⁴

Media as such, or civilian morale, are not legitimate military objectives.¹⁷⁵ Indeed, the key qualifier “military” – in that the object must make an effective contribution to *military* action and that its targeting must offer a

¹⁶⁷ AP I art 48; Henckaerts and Doswald-Beck (n 19) rules 1 and 7.

¹⁶⁸ Henckaerts and Doswald-Beck (n 19) rule 3.

¹⁶⁹ Henckaerts and Doswald-Beck (n 19) commentary to rule 3; Nils Melzer, ‘Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law’ (ICRC, May 2009) <<https://www.icrc.org/en/doc/assets/files/other/icrc-002-0990.pdf>> last accessed 10 March 2023 part II.

¹⁷⁰ AP I art 51(3); Henckaerts and Louise Doswald-Beck (n 19) rule 6.

¹⁷¹ Melzer (n 170) part V.

¹⁷² Melzer (n 170) part VIII 34 and 51.

¹⁷³ AP I art 50(1); Melzer (n 170) part VIII.

¹⁷⁴ AP I art 52; Henckaerts and Doswald-Beck (n 19) rule 8.

¹⁷⁵ ‘Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia’ (UN International Criminal Tribunal for the former Yugoslavia, 2000) <<https://www.icty.org/en/press/final-report-prosecutor-committee-established-review-nato-bombing-campaign-against-federal>> last accessed 10 March 2023 para 55.

definite *military* advantage – implies that attacks aimed solely at gaining a psychological advantage are impermissible. Buildings of media outlets, installations, vehicles, and related material are ordinarily civilian objects, and cannot be made the object of an attack except in circumstances where, by virtue of their nature, location, purpose or use, they fall within the definition of a military objective quoted above.¹⁷⁶ In case of doubt as to whether these objects which are normally dedicated to civilian purposes have turned into military objectives, they must be presumed not to have lost their protection.¹⁷⁷

Mere affiliation with a party to an armed conflict, in itself, does not render a media outlet a military objective. Likewise, broadcasting, including when biased towards one party to the conflict or constituting propaganda, does not turn the outlet into a military objective. Such activities may turn media outlets into military objectives only if they make an effective contribution to military action, for example if they are being used as a command, control, and communications (C3) centre by the armed forces of a party to the conflict, even if journalists continue to work from there.¹⁷⁸ Media outlets may also become legitimate targets if they are used to incite serious international crimes, such as genocide.¹⁷⁹

Principle of proportionality

The principle of proportionality stipulates that carrying out attacks which may be expected to cause loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, are prohibited.¹⁸⁰ This means that even when a legitimate target – a person or an object – is identified, parties must furthermore conduct a proportionality assessment wherein the attacking party must weigh the military advantage anticipated against the expected incidental civilian harm. If the latter would be excessive, the attack cannot be carried out.

In assessing whether an attack complies with the principle of proportionality, the parties to the conflict must take into account any expected incidental death or injury of journalists and damage to objects relating to media (buildings, installations, and material).

¹⁷⁶ See also UN Security Council (UNSC) Res 2222 (27 May 2015) UN Doc S/RES/2222 para 10: “Recalls also that media equipment and installations constitute civilian objects, and in this respect shall not be the object of attack or of reprisals, unless they are military objectives.”

¹⁷⁷ AP I art 52(3); Henckaerts and Doswald-Beck (n 19) commentary to rule 10.

¹⁷⁸ Final Report to the Prosecutor (n 176) para 55.

¹⁷⁹ For example, during the genocide in Rwanda a local radio station (Radio Télévision Libre des Mille Collines) was used to incite genocide. See *Nahimana et al. (Media case)* [2007] ICTR-99-52.

¹⁸⁰ AP I art 51(5)(b); Henckaerts and Doswald-Beck (n 19) rule 14.

Principle of precautions

The principle of precautions prescribes obligations for both attacking and defending parties.

The principle requires that in the conduct of military operations, parties take constant care to spare the civilian population, civilians, and civilian objects.¹⁸¹ During attacks, parties must take all feasible precautions to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians, and damage to civilian objects.¹⁸² For example, IHL expressly requires that parties give an effective advance warning to the civilian population, unless circumstances do not permit.¹⁸³ This would in practice mean that, for example, in case a media station is identified as a legitimate military objective for its use as a C3 centre while at the same time being used as a regular media office, parties must give an effective warning to the civilians, including journalists, present in the building in a language they understand, and allow for sufficient time for them to leave the building, if circumstances permit.

At the same time, (defending) parties must also take all feasible precautions to protect the civilian population and civilian objects under their control against the effects of attacks, to the maximum extent feasible.¹⁸⁴ For example, they must avoid locating military objectives within or near densely populated areas.¹⁸⁵ This would mean, as a minimum, not locating their C3 centres within media outlets. More specifically for media personnel operating in areas affected by hostilities, parties may for example provide protective gear and apparel to facilitate their identification to the best of their resources.

Case study:

The targeting of the Al-Jalaa tower in Gaza

During Israel's "Operation Guardian of the Walls" in Gaza in 2021, attacks causing damage and destruction to several media outlets raised questions as to whether Israel was deliberately targeting the media with a view to disrupting the coverage of the operation. If this was indeed the rationale behind the attack, Israel would be in blatant violation of IHL. However, the attacks against buildings housing the media outlets were, according to the Israeli authorities, justified because they contained Hamas military assets, including military offices and infrastructure for military communication.

One of the targets was the Al-Jalaa building, which housed the offices of the Associated Press and Al Jazeera, along with residences and offices. The attack was justified, according to the Israeli military, since the building was also a "base of operations for Hamas' military intel", where Hamas "gathered intel for attacks against Israel, manufactured weapons [and] positioned equipment to hamper [Israeli military] operations". The following analysis is based on the assumption that the Israeli claims are correct (though this might not actually be the case).

The Al-Jalaa building, containing residences and offices, is under normal conditions a civilian object that may not be targeted. Making this building the direct target of an attack would be lawful only if it were

¹⁸¹ AP I art 57(1); Henckaerts and Doswald-Beck (n 19) rule 15.

¹⁸² Henckaerts and Doswald-Beck (n 19) rule 15.

¹⁸³ AP I art 57(2)(c); Henckaerts and Doswald-Beck (n 19) rule 20.

¹⁸⁴ AP I art 58(c); Henckaerts and Doswald-Beck (n 19) rule 22.

¹⁸⁵ AP I art 58(b); Henckaerts and Doswald-Beck (n 19) rule 23.

demonstrated that under the circumstances pertaining at the time the building itself, by virtue of its nature, location, purpose or use, had been rendered a military objective. The alleged use by Hamas could indeed convert the building into a military objective (if it makes an effective contribution to military action whose total or partial destruction, capture, or neutralization, in the circumstances ruling at the time, offers a definite military advantage). A second alternative possibility is that the target engaged was not the whole building, but only the unit used by Hamas. This could be possible if the unit can be separated from the rest of the building, meaning that it can be engaged in isolation. In the following these two alternatives (the building as the target and the specific unit as the target) are dealt with separately where necessary.

It was reported by the Israeli military that following a warning issued prior to the attack, some of the assets were removed from the building by Hamas and Islamic Jihad. Assuming this information was available to the Israeli forces prior to launching the attack, this raises the question whether the target could still be considered as making an effective contribution to military action by its use. Alternatively, the Israeli forces may have made the assessment that, based on the information available to them at the time, Hamas would resume its use of the building and accordingly that, by its purpose, i.e., its “intended future use”, the building was a military objective.

Even if it is established that the building or a unit therein is a military objective, this would not give Israel carte blanche to target the building. Before carrying out the attack, a proportionality assessment between the military advantage anticipated and the civilian harm expected must be carried out. Firstly, it should be noted that if only a separable unit of the building is the target, the damaging or destruction of the rest of it must be taken into account in the proportionality assessment as civilian harm. In any case, the expected damage to media equipment, and death or injury of journalists must be taken into account.

Here again, the removal of (certain) assets from the building, necessarily diminishing the military advantage, raises the question of whether the proportionality assessment was still met at the time of the attack, based on the information available to the Israeli forces, or whether it rendered the civilian harm expected excessive in relation to the military advantage anticipated. On the other hand, the expected death or injury to civilians can be seen as reduced as well, due to the warning given prior to the attack.

Even if it is established that the target is a military objective, and the principle of proportionality was complied with, Israel must still have complied with the principle of precautions. Israeli forces issued a warning to the civilians prior to the attack, giving them sufficient time to leave the building. However, since it was later reported that during this time Hamas also took out items from the building, it could be the case that Israel failed to cancel (or suspend) the attack if it became apparent at the time of the attack that the building was no longer a military objective or that the attack would result in excessive civilian harm.

Lastly, it should be noted that Hamas also has obligations to protect the civilians and civilian objects under its control against the dangers resulting from military operations. For example, they have an obligation not to locate military objectives in densely populated areas, to the maximum extent feasible. Taking into account the high population density of Gaza, the feasibility of this precaution may be disputable, however, to comply with their obligations stemming from the principle of precautions, they must at least endeavour to carry out their operations from locations where there is relatively less risk posed to civilians and civilian objects, and not, for example, from high rise buildings housing a high number of civilians.

V. Concluding observations

Protecting media freedom and journalistic activity – “one of the cornerstones of a democratic society”¹⁸⁶ – is crucial for the full realization of a range of rights: the right to freedom of opinion and expression;¹⁸⁷ the right to participate in public affairs;¹⁸⁸ the right to peaceful assembly; and the right to freedom of association. Furthermore, together with human rights defenders and civil society, journalists play an essential role in holding those in power accountable for human rights violations and breaches of international law – especially in situations of armed conflict and prolonged occupation.

Therefore, when Israeli and Palestinian authorities unduly limit the operational space for the media in the oPt, they are not just violating the applicable international legal framework and attacking the rights of individuals. Such restrictions also constitute an attempt to control the narrative around rights violations, and to hinder both Palestinian and international political mobilization more broadly.

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¹⁸⁶ General Comment 34 para 13.

¹⁸⁷ *ibid.*

¹⁸⁸ *ibid* para 20.

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