

6 January 2025

## OVERKILL: A CRITICAL APPRAISAL OF THE USE OF FORCE BY ISRAEL IN THE WEST BANK

Since Israel launched its military campaign in the Gaza Strip following the Hamas-led attacks on 7 October 2023, Israeli forces have intensified their use of force against Palestinians in the occupied West Bank.<sup>1</sup> According to the United Nations (UN) Office for the Coordination of Humanitarian Affairs (OCHA), between 7 October 2023 and 26 December 2024, 786 Palestinians were killed by Israeli forces in the West Bank, marking this as the deadliest such period in the West Bank since the UN began tracking casualties in 2005.<sup>2</sup>

Israeli forces have been carrying out raids on towns and villages throughout the occupied West Bank on an almost daily basis since October 2023,<sup>3</sup> with reports indicating that the frequency of these raids has more than tripled since the onset of Israel's operations in Gaza.<sup>4</sup> For example, in August 2024, Israel conducted some of the largest raids in more than twenty years in Jenin, Tulkarem, and Tubas, 'with hundreds of ground troops advancing in bulldozers and armoured vehicles, supported by fighter jets and drones that dropped bombs'.<sup>5</sup> Tulkarem refugee camp was subject to another strike in October 2024, when Israeli F-16 warplanes bombed a building housing a crowded coffee shop, reportedly killing at least 18 people and injuring many others.<sup>6</sup> Many of

<sup>1</sup> Eg 'Shocking Spike in Use of Unlawful Lethal Force by Israeli Forces Against Palestinians in the Occupied West Bank' (*Amnesty International*, 5 February 2024) <<https://www.amnesty.org/en/latest/news/2024/02/shocking-spike-in-use-of-unlawful-lethal-force-by-israeli-forces-against-palestinians-in-the-occupied-west-bank/>> accessed 6 January 2025.

<sup>2</sup> 'Data on Casualties' (*OCHA occupied Palestinian territory (oPt)*) <<https://www.ochaopt.org/data/casualties>> accessed 6 January 2025; 'Deadly Israeli Assault in the Occupied West Bank' *Al Jazeera* (Doha, 26 September 2024) <<https://www.aljazeera.com/gallery/2024/9/26/deadly-israeli-assault-in-the-occupied-west-bank>> accessed 6 January 2025.

<sup>3</sup> Katherine Hearst, 'How Has Israeli Aggression Escalated in the Occupied West Bank Since 7 October?' *Middle East Eye* (London, 28 August 2024) <<https://www.middleeasteye.net/news/explainer-how-has-israeli-aggression-escalated-occupied-west-bank-october>> accessed 6 January 2025.

<sup>4</sup> 'Israeli Violence in West Bank Comes as World "Distracted" by Gaza Horror: Analyst' *Al Jazeera* (Doha, 28 August 2024) <<https://www.youtube.com/watch?v=ksQPMYgwc3w>> accessed 6 January 2025.

<sup>5</sup> *Al Jazeera* (n 2).

<sup>6</sup> Khalil Sayegh خليل الصايغ (X, 3 October 2024) <<https://x.com/KhalilJerries/status/1841946734471061766>> accessed 6 January 2025; 'UN Human Rights Office Condemns Unlawful Airstrike on Tulkarem Camp, Calls for Accountability and Protection of Civilians' (*OHCHR oPt*, 4 October 2024) <<https://reliefweb.int/report/occupied-palestinian-territory/un-human-rights-office-opt-un-human-rights-office-condemns-unlawful-airstrike-tulkarem-camp-calls-accountability-and-protection-civilians>> accessed 6 January 2025; Ali Sawafta, 'Deadly Israeli Strike in West Bank Shows How War is Spreading' *Reuters* (Tulkarem, 4 October 2024) <<https://www.reuters.com/world/middle-east/deadly-israeli-strike-west-bank-highlights-spread-war-2024-10-04/>> accessed 6 January 2025; Muhammad Ateeq, 'An Israeli Air Strike on a West Bank Cafe Wipes Out Entire Family' *Middle East Eye* (London, 4 October 2024) <<https://www.middleeasteye.net/news/west-bank-israeli-strike-cafe-wipes-out-family>> accessed 6 January 2025.

the raids have been conducted in refugee camps, with some experiencing repeated incursions.<sup>7</sup> In several of these operations, Israeli forces reportedly used bulldozers to damage roads, public utilities, and private property, significantly hampering access for emergency services.<sup>8</sup> For instance, in Nur Shams camp, bulldozers caused severe infrastructure damage, delaying medical evacuation efforts and obstructing timely assistance to those injured during military actions.<sup>9</sup>

These operations have had significant humanitarian consequences, including the loss of lives, displacement, and destruction of infrastructure across the West Bank as well as the infliction of trauma on entire communities. The way in which these operations have been conducted raises serious concerns about a lack of respect for the applicable rules of international law on the use of force. Since 7 October 2023, Israel appears to have increasingly relied on a conduct of hostilities paradigm, using means and methods of warfare not only in Gaza but also in the West Bank. Some commentators have implicitly accepted this view, suggesting that recent operations in the West Bank, such as the undercover military raid on Jenin Hospital, are governed by the rules on the conduct of hostilities rather than those regulating law enforcement operations.<sup>10</sup> Others, including the IHL Centre, have insisted that the law enforcement paradigm should have been applied in those instances and remains applicable throughout the West Bank.<sup>11</sup>

This note outlines considerations in support of the conclusion that Israel's use of force in the West Bank should comply with the law enforcement framework, drawn mainly from international human rights law (IHRL). First, there are insufficient grounds to hold that armed individuals and groups in the West Bank against whom Israel is using force are part of the same organisational hierarchy as the organised armed groups in the Gaza Strip with which Israel is engaged in hostilities. Second, the level of organisation of armed actors in the West Bank and the intensity

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<sup>7</sup> Ameer Makhoul, 'Why Israel is Expanding the Gaza War to the West Bank Refugee Camps' *Middle East Eye* (London, 25 April 2024) <<https://www.middleeasteye.net/opinion/israel-expanding-gaza-war-west-bank-refugee-camps-why>> accessed 6 January 2025.

<sup>8</sup> Amnesty International (n 1).

<sup>9</sup> *ibid.*

<sup>10</sup> See eg Michael N. Schmitt, 'The Ibn Sina Hospital Raid and International Humanitarian Law' (*Articles of War*, 1 February 2024) <<https://lieber.westpoint.edu/ibn-sina-hospital-raid-international-humanitarian-law/>> accessed 6 January 2025; 'Did an Israeli Hospital Raid Breach the Laws of War?' *The Economist* (London, 31 January 2024) <<https://www.economist.com/the-economist-explains/2024/01/31/did-an-israeli-hospital-raid-breach-the-laws-of-war>> accessed 6 January 2025; Abeer Salman and Christian Edwards, 'Undercover Israeli Troops Dressed as Medical Staff Kill Three Militants in West Bank Hospital Raid, Officials Say' *CNN* (Jerusalem, 30 January 2024) <<https://edition.cnn.com/2024/01/30/middleeast/israel-undercover-raid-jenin-west-bank-hamas-intl/index.html>> accessed 6 January 2025.

<sup>11</sup> 'The Legal Framework Regulating the Use of Force in the West Bank, Including East Jerusalem' (*Diakonia IHL Centre*, 12 February 2024) 3 <<https://www.diakonia.se/ihl/news/the-legal-framework-regulating-the-use-of-force-in-the-west-bank-including-east-jerusalem/>> accessed 6 January 2025.

of confrontations between them and Israeli forces do not seem to meet the threshold required to establish a separate non-international armed conflict (NIAC). This conclusion is further supported by the fact that Israel exercises effective control over territory in the West Bank and should thus be able to address perceived threats without recourse to means and methods of warfare.

### The law enforcement and conduct of hostilities paradigms

As the occupying power, Israel is bound by both international humanitarian law (IHL) and IHRL in the occupied Palestinian territory (oPt).<sup>12</sup> These legal frameworks, which apply concurrently during occupation, outline two distinct paradigms for the use of force: the ‘conduct of hostilities’ paradigm derived from IHL, and the ‘law enforcement’ paradigm derived primarily from IHRL.<sup>13</sup> The former governs hostilities, that is, the employment of means and methods of warfare between parties to an armed conflict. It permits the use of force against members of the armed forces of the opposing party to the conflict, civilians who are directly participating in hostilities, and military objectives, as well as the infliction of incidental harm on civilians and civilian objects that is not excessive in relation to the military advantage sought.<sup>14</sup>

Meanwhile, the law enforcement paradigm controls the use of force by State authorities in ensuring public security, law, and order.<sup>15</sup> The law enforcement paradigm is more restrictive with regards to the justifications, scope, and methods for using force, making the application of the

<sup>12</sup> The applicability of IHRL in occupied territory has been affirmed, inter alia, by the International Court of Justice (ICJ). See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 [106]-[113]; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) [2005] ICJ Rep 168 [216]-[220]; *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem* (Advisory Opinion) [2024] [99] <<https://icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-00-en.pdf>> accessed 6 January 2025.

<sup>13</sup> See eg ‘The Use of Force in Law Enforcement Operations in the Occupied Palestinian Territory’ (*Diakonia IHL Centre*, 16 December 2022) 13-14 <<https://www.diakonia.se/ihl/news/the-use-of-force-in-law-enforcement-operations-in-the-occupied-palestinian-territory/>> accessed 6 January 2025; ‘The Use of Force in Law Enforcement in the Occupied Palestinian Territory: Questions and Answers’ (*Diakonia IHL Centre*, 22 December 2021) 4-5 <<https://www.diakonia.se/ihl/news/use-of-force-israel-law-enforcement/>> accessed 6 January 2025; Gloria Gaggioli, ‘The Use of Force in Armed Conflicts: Interplay Between the Conduct of Hostilities and Law Enforcement Paradigms – Report of the Expert Meeting’ (*International Committee of the Red Cross (ICRC)*, 11 June 2020) 4-12 <<https://www.icrc.org/en/publication/4171-use-force-armed-conflicts-expert-meeting>> accessed 6 January 2025.

<sup>14</sup> See eg ‘Conduct of Hostilities: General Principles’ (*Diakonia IHL Centre*) <<https://www.diakonia.se/ihl/resources/international-humanitarian-law/conduct-of-hostilities-general-principles-ihl/>> accessed 6 January 2025.

<sup>15</sup> ‘Easy Guide to International Humanitarian Law’ (*Diakonia IHL Centre*, 16 June 2021) 17 <<https://www.diakonia.se/ihl/news/easy-guide-to-international-humanitarian-law/>> accessed 6 January 2025.

correct paradigm essential to prevent ‘excessive, and unlawful, use of force’.<sup>16</sup> Notably, force may only be employed as a last resort, in compliance with the cumulative requirements of (1) legality; (2) necessity; (3) proportionality; (4) precaution; and (5) non-discrimination.<sup>17</sup> Moreover, under the law enforcement framework, incidents of use of force that result in death or serious injury require prompt, thorough, and transparent investigation by an independent and impartial body, failure of which could in and of itself give rise to a separate breach of IHRL. Victims of unlawful use of force have the right to an effective remedy before the relevant national authorities, which among other things may include compensation.<sup>18</sup>

### **The legal framework applicable in occupied territory**

Situations of belligerent occupation are a form of international armed conflict (IAC) in which, by definition, the occupying power has effective control over the territory of its adversary.<sup>19</sup> Because of that control, there is generally no need or justification for the occupying power to resort to means and methods of warfare in the occupied territory.<sup>20</sup> At the same time, the occupant is required, to the extent possible, to restore and maintain public order and civil life in the occupied territory and is entitled to use force for this purpose if necessary.<sup>21</sup> In the absence of hostilities between parties to an armed conflict, any use of force must adhere to the law enforcement paradigm.

While law enforcement in a State’s own territory is generally performed by the police rather than the military, in occupied territory it is the military forces of the occupying power that are generally charged with maintaining public order. Importantly, however, the involvement of the military in such operations does not justify resorting to the conduct of hostilities paradigm.<sup>22</sup> Indeed, when

<sup>16</sup> *ibid.*

<sup>17</sup> ‘The Use of Force in Law Enforcement Operations in the Occupied Palestinian Territory’ (n 13) 22.

<sup>18</sup> *ibid* 31.

<sup>19</sup> The concept of belligerent occupation falls under the category of IAC, as outlined in Article 2 common to the Geneva Conventions. See *Commentary on the Third Geneva Convention: Convention (III) Relative to the Treatment of Prisoners of War* (2nd ed, ICRC 2020) (2020 Commentary on GC III), common art 2, para 243 <<https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949/article-2/commentary/2020?activeTab=>> accessed 6 January 2025. Occupation entails effective control as per the definition set in the Hague Regulations. See Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) 205 CTS 277 (Hague Regulations) art 42.

<sup>20</sup> Tristan Ferraro, ‘Occupation and Other Forms of Administration of Foreign Territory – Report of the Expert Meeting’ (ICRC, 2012) 120 <<https://www.icrc.org/sites/default/files/external/doc/en/assets/files/publications/icrc-002-4094.pdf>> accessed 6 January 2025.

<sup>21</sup> Hague Regulations art 43. See eg Kenneth Watkin, ‘Use of Force During Occupation: Law Enforcement and Conduct of Hostilities’ (2012) 94 Intl Rev Red Cross 267.

<sup>22</sup> Yoram Dinstein, *Non-International Armed Conflicts in International Law* (2<sup>nd</sup> ed, CUP 2021) para 69.

maintaining public order in occupied territory, soldiers are expected to apply the law enforcement paradigm, and to adhere to its more restrictive rules on the use of force; this also means that they should be equipped and trained for that purpose by the occupying power.<sup>23</sup>

The occupying power may resort to the more permissive conduct of hostilities paradigm only if hostilities break out in the occupied territory between parties to an armed conflict, and only in connection with those hostilities. Given that the law enforcement paradigm is the default in occupied territory, the burden is on the occupying power to demonstrate that a law enforcement approach was inapplicable or inappropriate in the case at hand.<sup>24</sup> Use of force unrelated to the hostilities, such as suppressing a riot or apprehending a criminal offender, would still be subject to the requirements of the law enforcement paradigm.

### Hostilities in occupied territory

Hostilities can arise in occupied territory either in the context of an IAC between the occupant and another State—for instance, if the armed forces of the occupied State clash with the occupying power; or in the context of a NIAC between the occupying power and one or several organised armed groups operating in the occupied territory, or between such groups.

There is broad consensus that organised armed groups belonging to the occupied State are part of its armed forces, and consequently hostilities between them and the occupying power are governed by the law of IAC.<sup>25</sup> Likewise, if the occupied State, or any other State, exercises overall control over the armed group, the situation would be classified as an IAC.<sup>26</sup> The concept of ‘overall control’ should be understood as outlined by the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Tadić* case, whereby ‘overall control’ requires that the State ‘has a

<sup>23</sup> *ibid* paras 69-70; ‘The Use of Force in Law Enforcement Operations in the Occupied Palestinian Territory’ (n 13) 20-21.

<sup>24</sup> Marco Longobardo, *The Use of Armed Force in Occupied Territory* (CUP 2018) 186.

<sup>25</sup> See eg Lindsay Moir, ‘The Concept of Non-International Armed Conflict’ in Andrew Clapham, Paola Gaeta, and Marco Sassoli (eds) *The 1949 Geneva Conventions: A Commentary* (OUP 2015) 397-398.

In this context, the term ‘belonging to’ should be interpreted according to Geneva Convention (III) Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (GC III) art 4(A)(2). This provision applies to groups that, while not formally integrated into a party’s armed forces, maintain a de facto relationship with it. For a group to be considered as ‘belonging to’ a party to a conflict, two conditions must be met: first, the group must actively engage in combat on behalf of that party; and second, the party must acknowledge both the group’s combat role, and that its actions are conducted on the party’s behalf. See 2020 Commentary on GC III, paras 1001, 1004-1005.

<sup>26</sup> *Prosecutor v Tadić* (Appeals Judgment) IT-94-1-A (15 July 1999) [120]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43 [404]; *Prosecutor v Lubanga* (Judgment Pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) [541].

role in organising, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group'.<sup>27</sup>

Conversely, clashes between an occupying power and armed groups that do not belong to, or are not under the overall control of, a State do not constitute an IAC even if the groups claim to be representing a State. Such clashes could form part of a NIAC if certain criteria are met (which are explained in the next section).<sup>28</sup> That NIAC would then be occurring in parallel with the occupation.<sup>29</sup>

Finally, it has been persuasively argued that if hostilities occur in a confined area within the occupied territory, the occupying power may resort to force per the conduct of hostilities paradigm only in that area, while in the rest of the occupied territory it would remain bound by its obligation to ensure public order and to protect the local population in lieu of the ousted sovereign, and would therefore be permitted to use force only pursuant to the law enforcement paradigm.<sup>30</sup> According to this view, even while hostilities are clearly underway between Israel and armed groups in the Gaza Strip, this alone would not suffice to justify Israel resorting to force based on the rules on the conduct of hostilities in the West Bank, including East Jerusalem, if hostilities are not occurring in that part of the oPt as well.

### Threshold for NIAC

It is generally accepted that violence crossing the threshold of a NIAC involves organised parties engaging in confrontations marked by a certain degree of intensity.<sup>31</sup> The presence of the requisite level of organisation and intensity must be ascertained, in each case, based on the facts of the situation.<sup>32</sup>

### *Intensity*

The ICTY has developed 'indicative criteria' for the purpose of ascertaining whether the requisite threshold of intensity has been crossed.<sup>33</sup> Although the ICTY defined a NIAC as 'protracted armed

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<sup>27</sup> *Prosecutor v Tadic* (n 26) [137].

<sup>28</sup> Moir (n 25) 398.

<sup>29</sup> *ibid.*

<sup>30</sup> Longobardo (n 24) 237.

<sup>31</sup> 2020 Commentary on GC III para 421.

<sup>32</sup> *ibid.*

<sup>33</sup> The indicative criteria identified by the ICTY in this regard include the following: the number, duration, and intensity of individual confrontations; the type of weapons and other military equipment used; the number and calibre of munitions fired; the number of persons and type of forces partaking in the fighting; the number of



violence between governmental authorities and organized armed groups or between such groups',<sup>34</sup> it is accepted that the duration of hostilities is not a separate integral element of a NIAC but can be an indicative factor for the intensity of violence. Accordingly, clashes of 'brief duration' may be qualified as a NIAC if 'the nature and level of the violence' is considerable.<sup>35</sup> Conversely, 'prolonged violence may suffice even though the individual confrontations are not destructive'.<sup>36</sup> However, isolated and sporadic acts of violence do not reach a sufficient level of intensity to constitute a NIAC.

An important indicator in determining that clashes have risen to the level of a NIAC is that law enforcement operations of the type typically implemented by police forces is insufficient to respond to the force being deployed by the armed groups involved.<sup>37</sup> Of course, the mere fact that a State decides to deploy its military and engage in military operations rather than deploying its police force and engaging in law enforcement operations is not in itself a reason to conclude that there is a NIAC. What is important is that the intensity of the violence being deployed by the armed group is such that the deployment of the military and use of means and methods of warfare become necessary. The occupying power can therefore not transform a situation into a NIAC, and thereby be entitled to use force according to the conduct of hostilities paradigm, simply by employing means and methods of warfare to unilaterally reach a certain level of intensity if the circumstances do not demand their use.<sup>38</sup>

### **Organisation**

In addition, for violence to be classified as a NIAC, at least one party must be an organised armed group. A 'group' refers to a collective of individuals with identifiable membership.<sup>39</sup> This group must be armed, distinguishing it from non-violent opposition groups aiming, for instance, to

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casualties; the extent of material destruction; the number of civilians fleeing combat zones; and the involvement of the UN Security Council. See *Prosecutor v Haradinaj* (Trial Judgment) IT-04-84-T (3 April 2008) [49]; *Prosecutor v Milosevic* (Decision on Motion for Judgment of Acquittal) IT-02-54-T (16 June 2004) [26]-[32].

<sup>34</sup> *Prosecutor v Tadic* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-AR72 (2 October 1995) [70].

<sup>35</sup> *Juan Carlos Abella v Argentina*, IACHR Case No 11.137, Report No 55/97 (18 November 1997) [155]-[156].

<sup>36</sup> Dapo Akande, 'Classification of Armed Conflicts' in Ben Saul and Dapo Akande (eds) *The Oxford Guide to International Humanitarian Law* (OUP 2020) 41.

<sup>37</sup> The Commentary to the Geneva Conventions clarifies that the required degree of intensity may be reached 'when hostilities are of a collective character or when the government is obliged to use military force against the insurgents, instead of mere police forces'. See 2020 Commentary on GC III para 465 and the references cited therein.

<sup>38</sup> *ibid*; 'The Use of Force in Law Enforcement Operations in the Occupied Palestinian Territory' (n 13) 14, 17.

<sup>39</sup> Dinstein (n 22) para 153.

change the government without force.<sup>40</sup> It is not necessary that ‘each member of the group must individually carry arms’.<sup>41</sup> Additionally, an armed group involved in a NIAC must be ‘organised’. The ICTY has identified a number of indicative factors to determine whether a sufficient level of organisation has been reached.<sup>42</sup>

Without the requisite level of organisation, perpetrators of acts of violence will not constitute members of a ‘party’ to an armed conflict but rather participants in internal disturbances who may or may not be acting criminally under the domestic law of the State. The State’s authority to use force against them is regulated under the law enforcement paradigm, not the IHL rules on the conduct of hostilities.

### ***Situation of violence in the West Bank***

The clashes between Israeli forces and various armed groups or individuals in the West Bank do not constitute an IAC, given that the armed groups do not belong to or fall under the overall control of a State, nor do they seem to meet the threshold for a NIAC.

On the one hand, reports indicate that armed groups have become more active in areas such as Jenin and Tulkarem since 7 October 2023.<sup>43</sup> There have been reports of occasional clashes between Israeli forces and armed actors in the West Bank and of use by the latter of improvised explosive devices and simple surveillance and alert systems.<sup>44</sup> However, hostile acts from non-

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<sup>40</sup> *ibid* para 155.

<sup>41</sup> *ibid* and the references cited therein.

<sup>42</sup> These include an official command structure; headquarters; uniforms; discrete roles and responsibilities of differing entities; the modes of communication used; whether military training is afforded to members of the group; requiring permits to cross checkpoints; the ability to operate within designated zones and to control territory; procuring, transporting, and distributing arms; recruitment of new members and coordination of actions; the existence of internal regulations and disciplinary procedures; the ability to define a unified military strategy and use military tactics; and the ability to speak with one voice and negotiate and conclude agreements such as ceasefires or peace accords. See *Prosecutor v Haradinaj* (n 33) [60]; *Prosecutor v Boskoski* (Trial Judgment) IT-04-82-T (10 July 2008) [199]-[203].

<sup>43</sup> Eg ‘Palestine: Recent Developments in the West Bank’ (ACAPS, 4 July 2024) 4 <[https://www.acaps.org/fileadmin/Data\\_Product/Main\\_media/20240704\\_ACAPS\\_Thematic\\_report\\_Palestine\\_-\\_Recent\\_developments\\_in\\_the\\_West\\_Bank.pdf](https://www.acaps.org/fileadmin/Data_Product/Main_media/20240704_ACAPS_Thematic_report_Palestine_-_Recent_developments_in_the_West_Bank.pdf)> accessed 6 January 2025; Tahani Mustafa, ‘With All Eyes on Gaza, Israel Tightens its Grip on the West Bank’ (*International Crisis Group*, 24 November 2023) <<https://www.crisisgroup.org/middle-east-north-africa/east-mediterranean-mena/israelpalestine/all-eyes-gaza-israel-tightens-its>> accessed 6 January 2025.

<sup>44</sup> Mohammed Abed, ‘Israel Intensifies Crackdown on Armed Resistance in Jenin Following October 7’ *Mondoweiss* (Detroit, 6 November 2023) <<https://mondoweiss.net/2023/11/israel-intensifies-crackdown-on-armed-resistance-in-jenin-following-october-7/>> accessed 6 January 2025.



State actors in the West Bank have remained sporadic, lacking the sustained or coordinated nature indicative of the necessary level of intensity and organisation to establish a NIAC.<sup>45</sup>

The relatively high number of casualties and the extent of material destruction in the West Bank are largely the result of Israel's use of force rather than violent acts by or confrontations with non-State armed groups. As already noted, Israel cannot trigger the applicability of the more permissive legal regime regulating the conduct of hostilities simply by escalating the force that it itself employs.

There are also significant doubts as to the level of organisation of the non-State actors and their ability to carry out large-scale or prolonged operations. Some of the incidents where Israel used military force appear to lack the involvement of any armed group, organised or not, and rather suggest the use of force against unarmed individuals or persons engaged in sporadic acts of sabotage or protest.<sup>46</sup>

The available facts therefore do not support a finding that Israel is engaged in a NIAC with organised armed groups in the West Bank. Consequently, the legal framework governing Israeli operations in the West Bank, including East Jerusalem, is the law enforcement paradigm, not the IHL rules regulating hostilities. Israel's use of heavy weapons and methods of warfare in the West Bank clearly breaches the limits on the use of force set in the applicable law enforcement paradigm, being both excessive and disproportionate.

### **Relevance of the existence of a NIAC in Gaza**

As noted above, it has been persuasively maintained that when hostilities are confined to a specific area of an occupied territory, the conduct of hostilities paradigm may only be applied in that area. According to this view, in the absence of active hostilities in the West Bank, it would not be permissible for Israel to apply the conduct of hostilities paradigm there even though there is an active NIAC in the Gaza Strip. Those who do not accept this view might argue that the conduct of hostilities paradigm can be applied to members of armed groups in the West Bank even in the absence of active hostilities there, for the reason that the groups in question are

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<sup>45</sup> Eg Sufian Taha and Ruth Michaelson, "'Day of Rage' Erupts Across West Bank After Israeli Forces Attack Refugee Camp' *The Guardian* (Tulkarem and Jerusalem, 20 October 2023) <<https://www.theguardian.com/world/2023/oct/20/day-of-rage-erupts-across-west-bank-after-israeli-forces-attack-refugee-camp>> accessed 6 January 2025.

<sup>46</sup> Eg 'West Bank: Israeli Forces' Unlawful Killings of Palestinians' (*Human Rights Watch*, 8 May 2024) <<https://www.hrw.org/news/2024/05/08/west-bank-israeli-forces-unlawful-killings-palestinians>> accessed 6 January 2025.

factions of armed groups in Gaza, which are engaged in a NIAC with Israel involving active hostilities.

There is good reason to call into question the assumption that armed actors in the West Bank fall under the effective command of organised armed groups party to a NIAC in Gaza. In fact, there is little if any indication, based on the scarce information available on the organisational structure of armed groups in the West Bank, that they operate under the command of an armed group engaged in a NIAC with Israel in Gaza. Organised armed groups commonly fragment, often giving rise to new, smaller factions with independent command structures. In such instances, if a splinter faction no longer operates under the hierarchical structure or chain of command of the original non-State party to the conflict, the newly formed group must qualify as an independent party to a conflict according to the criteria set out above for the relations between them to be governed by the conduct of hostilities paradigm.<sup>47</sup>

The emergence of new groups in the occupied territory would not in itself engender a shift from law enforcement to the conduct of hostilities paradigm.<sup>48</sup> If the required elements for classification as an armed conflict are not met, then use of force against members of the group must comply with the law enforcement paradigm.

### **Constraints on the use of force during the conduct of hostilities**

Even if it were the case that Israel's use of force in the West Bank took place in the context of hostilities in an armed conflict, contrary to what has been argued above, the use of force against persons not entitled to protection from direct attack under the IHL rules on the conduct of hostilities would still be subject to legal constraints.

For one thing, the foundational provision of the law of occupation in Article 43 of the Hague Regulations implies that the occupying power's authority to use force in the occupied territory is limited to circumstances where necessary to discharge its duty to restore and maintain public order in the occupied territory, or to ensure its own security. Accordingly, resort to the conduct of hostilities paradigm in occupied territory should be confined to situations in which it is in fact necessary to do so because the intensity of fighting is such that law enforcement means are insufficient. Generally, when effective control is maintained, there will be no real need to resort

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<sup>47</sup> 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Recommitting to Protection in Armed Conflict on the 70th Anniversary of The Geneva Conventions' (ICRC, 16 June 2020) 51 <<https://www.icrc.org/en/publication/4427-international-humanitarian-law-and-challenges-contemporary-armed-conflicts>> accessed 6 January 2025.

<sup>48</sup> 'The Use of Force in Law Enforcement Operations in the Occupied Palestinian Territory' (n 13) 14.

to means and methods of warfare (even against persons who are lawful targets under the IHL rules on the conduct of hostilities) as the occupying power has the capacity to enforce the law and regulate behaviour through less violent means. In such circumstances it can, for example, detain individuals through law enforcement measures and need not, and therefore may not, resort to the use of means and methods of warfare.

More generally, it has been argued that when a party to an armed conflict has the ability to control the circumstances and area in which its military operations are conducted, or when its armed forces operate against specific individuals in situations similar to peacetime policing, the use of force against legitimate military targets may not exceed what is actually necessary to accomplish a legitimate military purpose.<sup>49</sup>

With respect to the West Bank, to the extent that Israel, as an occupying power in effective control over territory, can address threats to its security or public order using less violent law enforcement methods in line with IHRL standards, it should do so—even against persons not protected against direct attack under the conduct of hostilities rules.

## Conclusion

The recent escalation of violence in the West Bank gives rise to significant concerns that Israel is using excessive force in breach of international law, incorrectly applying a conduct of hostilities paradigm.

The default paradigm governing Israel's use of force in the occupied West Bank, including East Jerusalem is the law enforcement paradigm, which requires Israel to adopt a restrained approach, employing minimal and proportionate force as necessary to maintain public order. Force may only be applied under a conduct of hostilities paradigm in connection with hostilities in an armed conflict. Based on the available information, non-State actors engaged by Israel in the West Bank are neither operating under the command of a pre-existing party to an armed conflict in Gaza, nor do they constitute parties to a NIAC in their own right. The necessary thresholds of intensity of violence and organisation have arguably not been met to classify a separate NIAC in the West Bank. Thus, Israel cannot justify its use of force in the West Bank pursuant to the conduct of hostilities paradigm.

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<sup>49</sup> Nils Melzer, 'Interpretative Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law' (ICRC, 2009) 77-82  
<<https://www.icrc.org/sites/default/files/external/doc/en/assets/files/other/icrc-002-0990.pdf>> accessed 6 January 2025.

Even if Israel's use of force in the West Bank were to take place in the context of hostilities in an armed conflict, contrary to the claim made here, the fact that Israel exercises effective control over the territory where force is applied indicates that Israel may be in a position to address perceived threats through less violent law enforcement means. If that is so, Israel has a duty to choose the less violent means while protecting the population of the occupied territory. A shift to the conduct of hostilities paradigm can (arguably) only occur if it is demonstrated that law enforcement methods are insufficient to neutralise the threat and restore public order within the occupied territory.

Israel's actions in the West Bank, including high-casualty raids, air bombardments, and the deployment of heavy weaponry, deviate sharply from the requirements of the law enforcement paradigm, pointing to the conclusion that Israel's use of force in the West Bank is unlawful, and triggering remedial obligations on Israel to remedy the harm inflicted.