



RESURGING VIOLENCE AND HOSTILITIES IN ISRAEL-PALESTINE

An overview of applicable rules of international law

Legal brief

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[Updated 28 May 2021]

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About this brief

This brief provides an overview of rules of international law binding upon actors involved in the escalating tension and resulting violence that has recently erupted in the Palestinian-Israeli context. The brief clarifies relevant legal obligations of the parties involved, as well as those of other actors with influence in the context.

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.

Background

In recent months, and particularly since the beginning of the Ramadan in April 2021, Jerusalem has been at the centre of rising tensions between Israelis and Palestinians. This heightening of tensions has had reverberating effects across the occupied Palestinian territory (oPt) and Israel. By May it had sparked ethnic violence in Israel and the West Bank, including East Jerusalem, as well as an outbreak of a new wave of hostilities between Israel and armed groups in Gaza wreaking devastation and claiming many casualties.

Tensions in Jerusalem were propelled by a confluence of factors. One of these was the Israeli decision to erect crowd control barriers at the Old City's Damascus Gate at the beginning of Ramadan. The barriers, which prevented Palestinians from accessing the Plaza outside the gate where many traditionally gather to break their fasts and pray during Ramadan evenings, prompted protests in Jerusalem and elsewhere. On 22 April, Jewish extremists from the ultra-nationalist Lehava group marched towards the Palestinians gathered near the gate – chanting “Death to Arabs”. Mobs of Israeli Jews and Palestinians then attacked each other.

Tensions continued to rise even after the Israeli authorities eventually removed the barriers on 25 April. The main source of contention was the planned eviction of Palestinian families from their homes in the East Jerusalem neighbourhood of Sheikh Jarrah. For many years now, these families have been waging a battle against Jewish settlers' attempts to evict them from the homes in which they have resided ever since they resettled in them in 1956 after being displaced in 1948. Following Israeli court decisions in favour of the settlers, the evictions are now imminent. As the deadline for the evictions approaches, protests against them have gained momentum and wide support. These protests concern not only the families' impending expulsion from their home, but also the wider phenomenon of dispossession of which the Sheikh Jarrah case is seen to be emblematic; a phenomenon with a history reaching back to the mass displacement of Palestinians following the establishment of the State of Israel in the events known to Palestinians as *al-Nakba* (the catastrophe) and continuing with Israel's settlement enterprise in the Palestinian territory it has occupied since 1967, including East Jerusalem.

The protests at the Damascus Gate, Sheikh Jarrah, Al-Aqsa Mosque compound, and elsewhere, were forcibly repressed by Israeli security forces (ISF) who deployed stun grenades and tear gas canisters, sprayed ‘skunk water’, and fired rubber-coated metal bullets affecting both protestors and bystanders. The use of force by the ISF and settler violence against Palestinians have resulted in hundreds of civilian injuries, some serious.¹ Journalists and medical personnel

¹ At the time of writing, the Office of the UN High Commissioner for Human Rights press briefing note on 11 May 2021 has stated that the Palestinian Red Crescent Society has recorded over a thousand cases of injuries.

have also been injured and many Palestinian protestors were detained. Several Israeli civilians were also injured in clashes with Palestinians.

While the protests were unfolding, armed groups in Gaza launched incendiary balloons and rocket attacks towards towns in the south of Israel.

The violence intensified into full scale hostilities following events of 10 May. On that day, the already combustible environment was made even more volatile as Jewish right-wing extremists prepared to conduct their annual “Flag March” through the Old City to celebrate Jerusalem Day, marking the notional “unification of Jerusalem” (following Israel’s capture of the eastern part of the city in 1967). That morning, citing a need to respond to a threat to the peace, notably concerns about stone throwing at Jewish worshippers gathered at the nearby Wailing/Buraq Wall, Israeli police forced their way into the Al-Aqsa Mosque compound. At least three hundred Palestinians and twenty-one Israeli policemen were wounded in the ensuing clashes. Following an ultimatum to Israel to withdraw its forces from the compound and from Sheikh Jarrah, Hamas then fired rockets towards Jerusalem. Israel soon retaliated with air strikes in Gaza.

In the days since, in what it calls “Operation Sword of Jerusalem”, Hamas and other armed groups in Gaza have fired over a thousand rockets into Israel, some of which struck cities in the centre and south of the country. Hundreds have reportedly been injured and 12 have been killed following these attacks, in Israel. Israel, in turn, has launched hundreds of air strikes in Gaza in what it has dubbed “Operation Guardian of the Walls”. Over a thousand people in Gaza have reportedly been injured so far, over two hundred have been killed and massive destruction has been caused by the Israeli airstrikes, including damage to crucial civilian infrastructure. Over 70,000 people are estimated to have been displaced in search of safety. All this is occurring while the COVID-19 pandemic persists, particularly in Gaza, where the local health system was already severely strained and where the rate of COVID-19 vaccination is low. The numbers of casualties continue to rise.² Access to Gaza from Israel was also restricted, including for humanitarian aid and personnel.³

Protests have not abated in Jerusalem, and more protests and other forms of civil unrest involving racial violence have spread through many parts of the West Bank, as well as in Israel. These incidents have seen at least 20 deaths and thousands of injuries.⁴

² A ceasefire between Israel and armed groups in Gaza have been in effect since 02:00 on 21 May 2021. Reported injuries and deaths are still increasing even after the cessation of hostilities, as the recovery efforts underway are evacuating those trapped under rubble.

³ The numbers presented in this paragraph have been updated on 24 May 2021, following publication.

⁴ The UN Office for the Coordination of Humanitarian Affairs Flash Update #12 has documented 27 deaths and 6794 injuries in the West Bank, since 10 May, in the most recent documentation available at the time of this legal brief’s update.

1. Applicable legal framework

International law applicable to the Israeli occupation of Palestinian territory and to armed conflicts in general consists of international humanitarian law (IHL) and international human rights law (IHRL).

These legal frameworks provide complementary protections for persons affected by armed conflict while they are in the power of a party to the conflict or the occupying power (e.g., Palestinians in Israeli occupied West Bank, including East Jerusalem, or Gaza), as well as from the effects of hostilities (e.g., any person in the oPt or Israel affected by attacks, such as air strikes carried out by Israel or rocket attacks by armed groups in Gaza). Therefore, all parties to an armed conflict, be it States or non-State armed groups, are bound by these rules. In the present case this includes both Israel and armed groups in Gaza. In the case of serious violations of IHL, the individuals responsible for the violations in question may be prosecuted by courts at the national or international level, such as the International Criminal Court (ICC).⁵ Some particularly serious violations of IHL committed during international armed conflicts, constitute grave breaches, which are a type of war crimes.⁶

Israel, as the occupying power, is bound specifically by the IHL rules comprising the law of occupation. Its obligations under this regime are commensurate to the type and degree of control it exercises over the West Bank, including East Jerusalem, and the Gaza Strip, respectively. As the occupying power, Israel is not the sovereign of the oPt and has only provisional and circumscribed authority to discharge certain administrative functions in lieu of the displaced sovereign with a view to ensure public order and civil life, as well as the basic needs and well-being of the civilian population. Since it lacks sovereign authority over the territory and its people, it is obliged to respect the status quo that existed prior to the commencement of the occupation and to refrain from introducing significant structural, legislative, institutional, or demographic changes in the occupied territory. In this same vein, annexation of foreign territory is an internationally wrongful act, and under IHL, Israel as an occupying power has no legal authority to annex any part of the oPt (either formally or in practice). Any such annexation is null and void and does not relieve Israel of its obligations under the law of occupation.⁷ In discharging its obligations, the occupying power is required to balance between its own security on the one hand and the interests of the local population and

⁵ For an overview of the ICC investigation of the Situation in Palestine, see for e.g., this Diakonia Q&A on the ICC's mandate, competence, and legal process in general and specifically for its investigation of the Situation in Palestine, <https://www.diakonia.se/en/IHL/news/israel-palestine-publication/icc-investigation-in-the-palestine-situation/>.

⁶ Rome Statute, Article 8.

⁷ Geneva Convention IV, Article 47.

the displaced sovereign on the other. Israel is not allowed to exercise its authority in the occupied territory for its own benefit or for the benefit of its nationals and territory.

Israel is also obligated to respect, protect, and fulfil the human rights of persons living in its territory and, to the degree it exercises control over their enjoyment of their human rights, also to those living in the occupied territory. This includes the rights to freedom of expression, peaceful assembly, association, freedom of religion, social and cultural rights, and critically, the fundamental guarantees of equality and non-discrimination. In the context of the prolonged Israeli occupation of the Palestinian territory since 1967, where the conflict is not always characterised by active hostilities and Israel performs governmental functions such as law enforcement, IHRL is particularly relevant for regulating the use of force by Israeli officials in the performance of their law enforcement duties.

Guarantees of equality and non-discrimination under applicable IHL and IHRL demand that the occupying power must treat inhabitants of the occupied territory with the same consideration and without any adverse distinction based on grounds, such as race, ethnicity, religion, or political opinion.⁸ This means that any unfavourable treatment of persons by the occupying power in comparison to others in a substantively similar situation that is based on grounds, such as race, ethnicity, religion, or political opinion, and without reasonable and objective justification is prohibited. Application of collective punishments and other detrimental measures to certain segments of the population due to bias against them is also incompatible with international law. Furthermore, guarantees of equality of treatment and non-discrimination imply a remedial role whereby the occupying power is required to prevent and repress practices of private persons that are motivated by hatred. Inciting or otherwise encouraging and supporting such acts would render the occupying power in breach of its international obligations.

Importantly, the International Court of Justice,⁹ the principal judicial organ of the United Nations, confirmed in its 2004 *Wall Advisory Opinion* that Israel is bound by IHL and IHRL in the oPt, and that some of its practices in the occupied territory violated these rules, including those that are discussed in this brief. The Court also underlined Israel's obligations to put an end to the violations of international law, as well as third States' obligation not to recognise as lawful the consequences of those internationally wrongful acts.¹⁰

⁸ Geneva Convention IV, Articles 13, 27, 33; CIHL, Rule 88; ICCPR, Articles 2 and 26; ICESCR, Article 2.

⁹ Unlike the International Criminal Court, which is primarily concerned with individual responsibility of persons for international crimes as enumerated in the Rome Statute, the International Court of Justice deals with responsibility of States and it is competent to decide contentious inter-state disputes and issue advisory opinions.

¹⁰ ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004.

2. Demographic and other changes in the occupied territory

Several Palestinian families living in Sheikh Jarrah,¹¹ a neighbourhood in East Jerusalem, are facing an imminent threat of eviction from their homes, while others have already been evicted and their homes subsequently inhabited by Israeli settlers. These incidents, driven by the lawsuits filed by the Nahalat Shimon settler organisation in Israeli courts, form part of a consistent and generalised practice of evictions and forcible transfer of Palestinian families from their homes to the benefit of Israeli settlers,¹² and are not simply a real estate dispute between private parties. The legal claims brought by Nahalat Shimon rely partly on Israel's 1970 Legal and Administrative Matters Law, pursuant to which Jewish Israelis may reclaim property in East Jerusalem and elsewhere in the West Bank which they owned before it came under Jordanian control in the aftermath of the 1948 Arab-Israeli War. Notably, Palestinians do not have access to an equivalent legal recourse to reclaim land and property that they were dispossessed of in the 1948 War. Effectively, Israel's enactment and application of such legislation allows Jewish Israelis to reclaim their lost property but prevent Palestinians from doing so.

The Israeli policy of evicting or otherwise forcibly transferring Palestinians, whether in East Jerusalem or elsewhere in the oPt, as well as the related practice of (re-)allocating Palestinian property to Israeli settlers, raise various legal concerns:

Maintenance of the status quo that existed prior to the commencement of the occupation: as the temporary administrator of occupied territory, the occupying power is required to respect the status quo ante. As such, it is generally not allowed to make permanent changes in the occupied territory, including the modification of its demographic composition. Accordingly, the occupying power must respect the laws in force in the country, unless absolutely prevented.¹³ Annexation of occupied territory, which is expressly prohibited in international law and the effects of which are null and void, has no bearing on the scope of this rule.

Transfer of persons in and outside of the occupied territory: Individual or mass forcible transfers of the civilian population of the occupied territory is prohibited and constitutes a grave breach

¹¹ These Palestinian families were displaced in 1948 during the Arab-Israeli conflict and subsequently resettled to Sheikh Jarrah in 1956 as part of a rehousing scheme that Jordan implemented with the support of the UN Relief and Works Agency.

¹² Aside from the specific cases of evictions more broadly, the Jerusalem Municipality has also expressed the intention to "maintain a solid Jewish majority in the city", specifically "a ratio of 70% Jews and 30% Arabs", including by drawing residents from other areas, see Municipality of Jerusalem, Jerusalem Outline Plan - No. 2000.

¹³ 1907 Hague Regulations, Article 43; Geneva Convention IV, Article 64.

of the Fourth Geneva Convention and a war crime. Forcible transfers may be affected both by physically removing people from their place of residence or by effectively compelling them to leave, through the creation of a coercive environment or through other forms of coercion. The only exception to this rule is evacuation, which is permitted, if required for the safety of the population or for imperative military reasons, as a temporary measure.¹⁴ Eviction and displacement of the inhabitants of the occupied territory from their homes with the ultimate goal of making those spaces available for the nationals of the occupying power clearly does not fall within this exception. Furthermore, international law specifically prohibits the transfer by the occupying power of its own civilian population into occupied territory. Such transfer, whether done directly or indirectly, is also a war crime.¹⁵

Protection of private property: the occupying power is required to respect private property and refrain from confiscating it.¹⁶ The extensive destruction or appropriation of property, that is not justified by military necessity, and carried out unlawfully or wantonly, also constitutes a grave breach.¹⁷

Equality and non-discrimination: driven by the intention to change the ethnic composition in the occupied territory, policies of eviction and other forcible transfers target specific racial, ethnic or religious groups and have a detrimental effect on them. Lacking any justification that would be deemed objective or reasonable, and manifestly contradicting the spirit and main principles of the law of occupation, these practices are discriminatory and therefore unlawful.¹⁸

As the occupying power, Israel must:

- put an end to discriminatory policies aimed at intentionally changing the demographic composition of the population of East Jerusalem and the rest of the oPt;
- stop evictions and other forms of forcible transfer of Palestinians from the occupied territory, including East Jerusalem;
- respect property rights of Palestinian inhabitants of the occupied territory, including East Jerusalem;
- give effect to the rights of Palestinians, who have been evicted and forcibly transferred, to safely and voluntarily return to places of their habitual residence; and
- stop actively encouraging or otherwise supporting its own population to settle in the occupied territory.

¹⁴ Geneva Convention IV, Articles 49 and 147.

¹⁵ Geneva Convention IV, Article 49(6); Rome Statute, Articles 8(2)(a)(iv), (2)(a)(vii) and (2)(b)(viii).

¹⁶ Hague Regulations, Article 46; CIHL, Rule 51.

¹⁷ Rome Statute, Article 8(2)(a)(iv).

¹⁸ Geneva Convention IV, Articles 13 and 27.

3. Excessive use of force in the context of civil unrest and law enforcement activities in the occupied territory

Demonstrations and protests in East Jerusalem and elsewhere in the West Bank, as well as in Israel escalated with tensions and violence between different ethnic and religious groups. The ISF responded to the situation by forceful means, including the use of live ammunition, that resulted in death and injury of persons, as well as destruction and damage to property, including sites and objects of religious, cultural, and historical significance.

Civil unrest (in the form of demonstrations, protests, and riots) involving violence, as well as the ISF's response to such unrest, are subject to several especially pertinent rules and principles of international law:

The rights to freedom of expression, association, and peaceful assembly: All persons, including those in occupied territory, have the right to express themselves both individually and collectively and to exercise their individual autonomy in solidarity with others. Peaceful assemblies, understood as synonymous with non-violent assemblies, may be used for expression such as challenges to authority or the pursuit of self-determination. Incitement to discrimination, hostility or violence are not protected under these rights and the authorities responsible for maintaining law and order are required to take action to prevent and repress such unlawful conduct. Peaceful assemblies that are organised in advance or spontaneous (such as counter-demonstrations) both fall within the scope of protection and may in principle be conducted at all public places. While these rights are not absolute, they may be subject only to certain limited restrictions that must be provided by law, and must be necessary and proportionate for achieving a legitimate aim that is compatible with international law, and non-discriminatory.¹⁹ Even if some participants in an assembly are not peaceful, this does not affect other participants' exercise of their rights including to peaceful assembly.

Policing assemblies: Officials involved in policing assemblies must respect and ensure the exercise of rights of participants and organisers, and protect bystanders, journalists, and property from harm. They are thus obliged to not prohibit, restrict, block, disperse or disrupt peaceful assemblies, unless there is compelling justification for interference with the exercise of such rights. Restrictions on the exercise of these rights cannot be aimed at discouraging participation in assemblies or generating a chilling effect. They must also be based on an individualised assessment of the conduct of the participants and the assembly; blanket restrictions should thus not be imposed. Since the dispersal of an assembly is likely to entail rights violations and heightens the risk of violent confrontation between the participants and law enforcement personnel, an assembly should only be dispersed in exceptional cases – if it

¹⁹ ICCPR, Articles 1, 2, 19, 20, 21, 22; UN Human Rights Committee, General Comment 37.

incites discrimination, hostilities or violence, becomes violent, or there is imminent risk of serious violence that cannot be mitigated with other less severe measures. Disruption caused by a peaceful assembly does not change the protection afforded to peaceful assemblies, unless such disruption is serious and sustained. Even then, the rules regulating and limiting the use of force continue to apply. Journalists and medical personnel must not be obstructed in their work, regardless of whether an assembly is peaceful or not, and cannot be targeted. Access must be granted to medical personnel to provide first aid and transfer the injured.²⁰

Use of force in the context of law enforcement: The use of force by State officials to maintain or restore public security, law and order is governed by rules regulating law enforcement, which are derived primarily from IHRL. This is distinct from the rules regulating use of force in the conduct of hostilities, derived from IHL, which are not, as such, applicable to law enforcement operations in the occupied territory (see Section 6 of this brief). Under the relevant IHRL rules, State authorities should always exercise restraint when resorting to the use of force and should deploy the minimum kind and degree of force necessary, with a view to minimise the damage and injury they cause. The use of force to police assemblies should be an exceptional measure, and the authorities may only use potentially lethal force as a measure of last resort. Lawful instances of the use of such force are only those that are absolutely necessary to serve limited legitimate aims, such as saving of a human life from an imminent threat, provided that the expected consequences of the use of such potentially lethal force are not excessive in relation to such a threat, and that such measures are not discriminatory. Accordingly, firearms may only be used to protect human life or against serious injury and may be applied only for the purpose of stopping the threat to human life or serious injury. Intentional lethal use of firearms is permissible only if strictly unavoidable to protect life. Firearms, including rubber-coated metal bullets, are not appropriate for policing assemblies and must never be used simply to disperse an assembly.²¹

²⁰ ICCPR, Article 21.

²¹ ICCPR, Article 6; UN Human Rights Committee, General Comment 36; UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

When conducting law enforcement operations either in its own territory or in the oPt, Israel must ensure that:

- the ISF abide by the relevant rules of international law when conducting law enforcement activities, including in the policing of assemblies, and in the planning and execution of operations;
- rules of engagement developed for and implemented in law enforcement include considerations regarding criteria for deploying force; when and where certain weapons and equipment may be used (e.g., the types of weapons and equipment that can be used in closed spaces); and how they should be deployed (e.g., the range from which firearms and rubber-coated metal bullets can be fired from and the height they should aim at);
- law enforcement officials in their decisions regarding the planning, preparation, and execution of law enforcement operations, such as in policing assemblies, seek to de-escalate situations that are or might become violent, consistent with the requirement to prevent and repress harm;
- law enforcement officials employ weapons and tactics that allow for a graduated response and de-escalation of tensions; and
- law enforcement officials take into account all relevant contextual factors in their planning, preparation and execution of law enforcement operations, such as wider tensions and violence, to ensure that due consideration is given to the de-escalation of the incident in a manner that is not otherwise counter-productive to the maintenance or restoration of public security, law and order.

4. Arrests and detention of persons

The ISF have arrested and detained Palestinian protestors, including children, on some occasions deploying considerable physical force when affecting arrests.

While recognising that arrest and detention are permissible when certain conditions are satisfied, international law also establishes legal safeguards to ensure that the deprivation of liberty is not arbitrary or otherwise unlawful. At the same time, in exercising the prerogative to resort to deprivation of liberty as one of the means of ensuring law and order or repressing crime, authorities in charge must make sure that such a prerogative is used in good faith and in a non-discriminatory manner. This means that their decision to detain the person is grounded in objective factors, irrespective of such person's (perceived) belonging to a particular racial, ethnic, or religious group. Practices where for misconduct of the same seriousness and degree persons belonging to one community are detained while persons belonging to another community are not, raise serious concerns regarding the existence of a discriminatory motive. Apart from violating rules on equality of treatment and non-discrimination, such practices can engender an escalation of violence between different communities, and thereby have a detrimental effect on law and order in the occupied territory.

Prohibition on arbitrary deprivation of liberty: Under both IHL and IHRL, arbitrary deprivation of liberty is prohibited. Accordingly, any detention must have a legal ground and follow appropriate procedure.²² Arresting or detaining individuals as a punitive measure for their legitimate exercise of their rights to freedom of expression, association, or peaceful assembly, as well as on discriminatory grounds is in itself arbitrary and therefore in breach of international law. The mass arrests of individuals participating in an assembly, indiscriminately without individualised assessment, also qualify as arbitrary arrests.

Grounds for arrest and detention: Under the legal regimes applicable in an occupied territory, protected persons²³ may be detained only if they individually pose an imperative security threat to the occupying power, or if their detention is required as a measure of restraint pending criminal proceedings. The first category, often referred to as administrative detention, is generally seen as an exceptional measure, as it presents severe risks of arbitrary deprivation of liberty. IHL does not allow collective detentions of non-combatants or detention of individuals on the basis of abstract threats or bias due to their characteristics such as race, ethnicity, religion

²² Geneva Convention IV, Articles 42, 43 and 78; CIHL, Rule 99; ICCPR, Article 9; UN Human Rights Committee, General Comment 35.

²³ In international armed conflicts, civilians who find themselves in the hands of a party to the conflict (including an occupying power) of which they are not nationals, including enemy nationals, stateless persons and certain third country nationals, qualify as "protected persons" and benefit from the substantive protections of Geneva Convention IV, see Article 4. This is the case of civilians living in an occupied territory, and as such, Palestinians living in the oPt qualify as protected persons.

or political opinion; such practices may in themselves amount to discrimination.²⁴ Administrative detention should not last longer than is absolutely necessary; in other words, detainees must be released as soon as the reasons necessitating their detention have ceased to exist.²⁵ As for the detention in relation to criminal proceedings, persons may be detained pending trial or to serve a sentence imposed by a competent court, because they have been accused or convicted of a criminal offence.

Procedural requirements: Detention of persons in occupied territory must comply with procedural safeguards even when there are valid grounds for detention. Decisions on internment, i.e., on administrative detention, must be made in accordance with a regular procedure that is compatible with international law. The person concerned must be accorded the right to a prompt appeal in front of a competent body. If the decision to detain is upheld, there must be a periodic review of the decision as to whether the reasons necessitating their internment still exist. As for arrests and detentions in relation to criminal proceedings, persons must be informed, at the time of their arrest, of the reasons for their arrest, as well as promptly notified of any criminal charges against them.²⁶ In any event, those detained on a criminal charge are entitled to a fair trial within a reasonable time, i.e., without prolonged delay, or to release.²⁷

Method of arrest and protection while in detention: Every person is protected against intentional infliction of bodily or mental injury, which in practice means that State officials prevent and refrain from unjustifiably inflicting bodily injury while conducting arrest operations, consistent with the restraint required in any use of force in performing law enforcement duties. While in detention, the physical and mental integrity and well-being of detainees must be protected.²⁸

Detention of children: The best interests of the child should be the primary consideration in the situation of the detention of children. Special measures must be in place to protect the liberty and security of children. Children should not be detained, unless required as a measure of last resort and only for the shortest appropriate period of time.²⁹

²⁴ Geneva Convention IV, Articles 13 and 27.

²⁵ Geneva Convention IV, Article 132; CIHL, Rule 99.

²⁶ Geneva Convention IV, Articles 42, 43, 73 and 78; CIHL, Rule 99; ICCPR, Article 9; UN Human Rights Committee, General Comment 35.

²⁷ ICCPR, Article 14.

²⁸ See for e.g., Geneva Convention IV, Articles 27, 76, 83, 85, 89-94, 107; CIHL, Rule 87; ICCPR, Articles 7 and 10.

²⁹ Convention on the Rights of the Child, Articles 3 and 37; UN Human Rights Committee, General Comment 35; CIHL, Rules 120 and 135.

Detaining authorities must ensure that State officials engaged in arrest or detention:

- refrain from arresting or detaining an individual unless there are legitimate grounds to do so, and in any event avoid discriminatory and collective arrests and detentions driven by bias against specific segments of the population;
- exercise their prerogative to arrest and detain persons in good faith and treat all persons with the same consideration, without offering preferential treatment to members of certain communities by not responding adequately to their misconduct;
- only resort to arrest or detention of a child if there is no other recourse;
- exercise restraint in their method of arrest, and if force is required, refrain from using excessive force and use only the minimum force necessary;
- do not obstruct the work of journalists and other monitors recording and reporting on arrests or detentions;
- are held accountable for their conduct in the case of unlawful or arbitrary deprivation of liberty, and prevent impunity for police brutality; and
- are investigated for any allegations or reasonable suspicion of unlawful use of force or other violations.

5. Access to consecrated religious sites and other religious freedoms in the occupied territory

Israeli authorities have increasingly impeded access of worshippers from the West Bank and elsewhere to religious sites by withholding permits and otherwise restricting access to places of worship, notably in the case of Muslims seeking access to the Al-Aqsa Mosque during the holy month of Ramadan, on the stated basis of precautionary measures relating to the COVID-19 pandemic.³⁰ The Israeli authorities had, around the same time, approved relaxation measures incrementally, effective also in Jerusalem.³¹ Furthermore, the ISF, purportedly acting to maintain law and order, made repeated incursions on the Al-Aqsa Mosque compound, interrupting worshippers and forcibly dispersing crowds, during prayer. There were, however, conflicting accounts of the trigger for violent disturbances, and specifically, whether the incursions and crowd dispersals were in fact after violent acts and in response to violence, as there were also protests against the Sheikh Jarrah evictions at the Mosque compound around the time of the evening prayers. Some worshippers and protestors were reportedly physically assaulted and the site and its buildings that carry great religious, cultural, and historical significance were reported to have been desecrated in the course of the violence that ensued as the ISF clashed with protesters.

With respect to access to consecrated religious sites; religious freedoms and other rights of worshippers; and respect and protection of sites of religious, cultural, and historical significance, several legal rules and principles are particularly pertinent:

Freedom of access to consecrated religious sites: IHL and IHRL, as well as the 1994 peace treaty between Israel and Jordan and earlier international treaties that apply to the context, affirm the right of worshippers to access consecrated religious sites which cannot be restricted arbitrarily; this right should be guaranteed in a non-discriminatory manner.³² Restrictions on the freedom to manifest religion or belief are legitimate only if they are prescribed by law and necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others. Even when imposed on legitimate grounds such as public safety, order, or health, such limitations must be proportionate, and cannot be imposed for discriminatory purposes or applied in a discriminatory manner.³³

³⁰ These access restrictions affected particularly Palestinians in the West Bank, and especially those without COVID-19 vaccination documents, who require a permit to cross the checkpoint and travel to the Al-Aqsa Mosque in the Old City of Jerusalem.

³¹ See, for example, press releases on the relaxation measures by the Israeli authorities, dated 8, 17, 25 and 27 April 2021.

³² Hague Regulations, Articles 43 and 46; Geneva Convention IV, Article 27; ICCPR, Articles 2, 12 and 18.

³³ UN Human Rights Committee, General Comment 22.

Freedom to practise religion: Worshippers in occupied territory have the right to practise their religion without arbitrary interference. Notably, the freedom to manifest one's religion, i.e., show or display one's religious beliefs in worship, observance, practice, or teaching, includes ritual and ceremonial acts that gives it expression, practices integral to such acts, and the observance of holidays. Similar to the freedom of access to consecrated religious sites, any limitations on the rights that are not provided by law, necessary, and proportionate for achieving a legitimate aim that is compatible with international law, or discriminatory, may amount to arbitrary interference with the right to freedom to practise religion. The occupying power has the duty to give effect to this right not only by refraining from actions that might unduly hinder it, but also by taking positive steps to facilitate its realisation, such as preventing private persons from obstructing it.³⁴

Respect and protection of sites and buildings of religious, cultural, and historical significance: The occupying power has the duty to respect and protect such sites and buildings. This implies the obligation to refrain from practices that could cause damage to them, as well as the remedial role to take active measures to prevent such harm being done by private groups and persons.³⁵

As the occupying power, Israel should:

- review its legislative, administrative, and other barriers restricting worshippers' access to consecrated religious sites, with a view to ensuring that restrictions are imposed only for legitimate aims are prescribed by law, and are necessary, proportionate and non-discriminatory;
- respect and protect the right to freedom of religion, including the manifestation of one's religion such as in prayer and worship at consecrated religious sites;
- investigate instances of use of excessive force against worshippers and other infringements on their physical integrity and dignity;
- review its rules of engagement and their application in practice with respect to the use of force in sites and buildings of great religious, cultural, and historical significance, including considering risks of escalation of violence and infringements upon the dignity and religious beliefs of worshippers; and
- investigate the incidents that have caused damage to sites and buildings of great religious, historical, and cultural significance and if confirmed prosecute and punish those responsible for any intentional damaging of such sites and buildings.

³⁴ Hague Regulations, Article 46; ICCPR, Article 18; UN Human Rights Committee, General Comment 22.

³⁵ CIHL, Rules 38 and 40; CESCR, General Comment 21.

6. Conduct of hostilities and the prohibition of indiscriminate attacks

At least 200 individuals have been killed and more than 1000 injured (as of 24 May 2021), as well as properties and other infrastructure, including a clinic and crucial water infrastructure in Gaza, destroyed, as a result of airstrikes that the Israeli military has conducted in Gaza and rocket and mortar attacks that Hamas and other armed groups in Gaza have launched towards Israel. Given the 14-year-old closure imposed by Israel, with a chronic lack of access to essential goods, erosion of essential services, and exacerbated vulnerability to the effects of COVID-19, the hostilities aggravated the pre-existing humanitarian crisis in Gaza.

All actors that take part in the hostilities are bound by IHL, notably the subset of IHL rules that regulate the conduct of hostilities. These rules are designed to limit the harmful effects of the hostilities and to reduce resulting human suffering. They impose constraints on the parties to the conflict in deciding who and what they can target, as well as which weapons they can use, and how. For instance, the use of heavy explosive weapons with wide-area effects in densely populated areas carry a high risk of causing widespread suffering, including many civilian casualties and destruction of civilian infrastructure with long-term reverberating effects on civilian life. These rules apply equally to the parties to the conflict, regardless of whether in offence or in defence, and must be followed during both the planning and execution phases.³⁶ Attacks that disregard the applicable rules and principles on the conduct of hostilities may amount to war crimes both in international and non-international armed conflict.³⁷

Every attack must respect applicable rules and principles on the conduct of hostilities:

Principle of distinction: Target discrimination is key in ensuring the protection of the civilian population and civilian infrastructure. Only military targets can be the objects of a direct attack. As far as **persons** are concerned, legitimate targets include primarily persons who are part of the fighting force of the enemy with such a status or function; civilians are protected from direct attacks and only exceptionally lose such a protection temporarily, if at the time of the attack they are carrying out activities that amount to direct participation in hostilities. As for **objects**, there is no exhaustive list of which objects qualify as military objectives, and this must be determined case-by-case on the basis of the object's role in the military action. Military objectives are strictly defined as “objects which by their nature, location, purpose or use make an effective contribution to military action” and, as a cumulative requirement, “whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a

³⁶ CIHL, Rules 1-86; ICCPR, Article 6; UN Human Rights Committee, General Comment 36.

³⁷ Rome Statute, Article 8(2)(b)(i), (ii), (iii), (ix) and Article 8(e)(i), (iii), (iv).

definite military advantage”.³⁸ Certain objects, such as military barracks, a weapons cache or a command and control centre, are inherently military, while others may play such a role due to their geographical location or actual or expected future use by the fighting parties.³⁹ This definition, may include military equipment or infrastructure used by the military wing of an armed group, but not those used by the civilian organs of such group. The temporal element of the definition also limits this to objects that have such military advantage at the time of planning and execution of attack. In cases of doubt, a person is presumed to be a civilian and an object is presumed not to be a military objective.⁴⁰ Intentionally directing attacks at civilians not taking direct part in hostilities and at civilian objects also constitute war crimes.⁴¹

Principle of proportionality: While IHL accepts the unfortunate reality that in the context of hostilities, some civilian casualties and destruction or damage of civilian infrastructure may be unavoidable even when attacks are directed against military targets, it nevertheless requires that in such circumstances expected collateral civilian casualties and damage must not be excessive compared to the concrete and direct military advantage anticipated from the attack in question.⁴² An attack that causes no civilian casualty may be disproportionate nonetheless (and thus unlawful) if it causes disproportionate destruction of civilian objects. The attacking side should also consider all reasonably foreseeable reverberating effects of planned attacks, that is, those effects that are not directly caused by the attack, but are nevertheless a product thereof (e.g., when an attack destroying a power line disrupts the functionality of a hospital). This is especially necessary when carrying out attacks in densely populated areas. Intentionally launching an attack that is expected to cause excessive civilian harm in relation to the concrete and direct military advantage anticipated also constitutes war crimes.⁴³

Principle of precautions: Parties to the conflict are obliged to take constant care in their military operations to avoid, and in any event to minimise, incidental loss of civilian life, injury to civilians and damage to civilian objects. This includes both a duty to take precautions in attack, and a duty to take precautions against the effects of attacks. **Precautions in attack** require the party carrying out the attack to take various measures to make sure that the planned attack will comply with principles of distinction and proportionality, to suspend or cancel the attack if it becomes apparent that it would violate the said rules and principles, and to avoid, and in any event to minimise, incidental harm to civilians and civilian objects. Such measures range from the verification of the military nature of the target to timing of the attack or choice of weapons; where practically possible and appropriate to ensure sparing of the civilian population from the

³⁸ CIHL, Rule 8.

³⁹ CIHL, Rules 1-10.

⁴⁰ CIHL, Rules 1, 5 and 7.

⁴¹ Rome Statute, Article 8(2)(b)(i), (ii) and Article 8(e)(i).

⁴² CIHL, Rule 14.

⁴³ Rome Statute, Article 8(2)(b)(iv).

effects of the planned attack, effective advance warning must be given.⁴⁴ Where it may be possible to achieve the same military advantage by means and methods with more precision, and therefore less civilian harm, the party to the conflict is expected to do so. This may be for example neutralising a specific part of the building that qualifies as a military objective, and not the complete destruction of the entire building, which additionally has reverberating effects. Each party should also take necessary **precautions against the effects of attacks** to make sure that the civilian population under their control is not unduly exposed to the dangers of military operations, such as by evacuating the civilian population from the area of hostilities or by avoiding the location of their military infrastructure and other military assets in or near densely populated areas, where feasible.⁴⁵ Failure of one side to discharge its obligation to take precautions against the effects of attacks, as well as its intentional violation of its obligations for instance by use of human shields,⁴⁶ does not relieve the adversary from its obligations to respect the principles of distinction, proportionality, and take all necessary precautions in attack.

Indiscriminate attacks, meaning, all means and methods of warfare that are not or cannot be directed or limited to military targets, or the effects of which cannot be so limited, are specifically prohibited.⁴⁷ **Violence aimed at spreading terror in the civilian population** is absolutely prohibited.⁴⁸ Employing means and methods of warfare that are indiscriminate, inherently or otherwise, also constitutes war crimes.⁴⁹

Medical establishments and other units enjoy special protection from the effects of hostilities and must be respected and protected in all circumstances. They may not be targeted unless they are used outside their humanitarian function to commit acts harmful to the enemy.⁵⁰ In planning and execution of attacks, and specifically in assessing proportionality of planned attacks on military objectives, parties to the conflict must also consider their reverberating effects on medical infrastructure, as well as the provision of medical care to the sick and the wounded at large.⁵¹ For example, the effects on roads affecting access to medical establishments should factor in such consideration.

⁴⁴ CIHL, Rules 15-21.

⁴⁵ CIHL, Rules 22-24.

⁴⁶ The use of human shields, i.e., deliberately utilising the presence of a civilian or other protected person in an attempt to shield military objectives from attacks or to shield, favour or impede military operations, is prohibited and constitutes a war crime. Geneva Convention IV, Article 28; CIHL, Rule 97; Rome Statute, Article 8(2)(b)(xxiii).

⁴⁷ CIHL, Rules 11-12.

⁴⁸ CIHL, Rule 2.

⁴⁹ Rome Statute, Article 8(2)(b)(xx).

⁵⁰ CIHL, Rule 28.

⁵¹ CIHL, Rule 14.

Given its indispensable role in the survival of the civilian population, **water and water-related infrastructure** (such as drinking water installations and supplies) shall be spared from the effects of hostilities, and may not be attacked, destroyed, removed or rendered useless.⁵²

The principles of distinction, proportionality, and of precautions have to be assessed in sequence, i.e., if the object of attack is not a legitimate military target, this attack cannot be carried out in the first place and the party planning the attack therefore cannot proceed to further considerations of proportionality and precautions.

All parties to the conflict must:

- respect applicable rules and principles on the conduct of hostilities, such as the principles of distinction, proportionality, and precautions, and refrain from carrying out indiscriminate attacks, and always consider the devastating effects of hostilities in densely populated areas on the civilian population and civilian infrastructure, including the long-lasting effects of critical infrastructure, such as hospitals, schools, water infrastructure and the like; and
- investigate possible violations of IHL including all allegations of war crimes committed in the course of such activities and prosecute and punish those responsible.

⁵² CIHL, Rule 54; Rome Statute, Article 8(2)(b)(xxv).

Conclusion

This legal brief has focused its analysis on some critical legal issues, arising from a continuum of events that precipitated the resurgence and most serious escalation of violence and hostilities seen in the Palestine-Israel context since 2014, and most recently in April and May 2021. Aside from acute humanitarian concerns stemming from the hostilities between Israel and Gaza and the importance of respect for the law by all parties to the conflict, it addresses other specific areas of concern and the additional obligations of the occupying power. For instance, the brief attended to the use of force by law enforcement authorities in the context of demonstrations and protests triggered by events in Jerusalem from the beginning of Ramadan, including the imminent evictions of Palestinian families in Sheikh Jarrah. The particular rights at risk and the requisite legal obligations must be assessed against the backdrop of a wider pattern of recurring practices that undermine the protections to which Palestinians are entitled, in contravention of the IHL and IHRL obligations of the occupying power. Such practices are not only in violation of specific international legal provisions; they are also incompatible with the essence and spirit of the law of occupation that only permit limited authority of the occupying power. Some of the IHL violations addressed in the brief may also constitute international crimes and, as such, are significant for the Office of the Prosecutor of the ICC's ongoing investigation of the Situation in Palestine. The legal brief outlines an overview of the facts for each issue, elaborates on the relevant legal provisions and how they should be applied, and provides a summary of the obligations of the main actors engaged or of influence in the context.

In addition to the points detailed at the end of each thematic section of this legal brief, in conclusion, attention is called to obligations binding on actors engaged in the conflict or in a position of influence in the context:

For all parties to the conflict:

- fully and unconditionally abide by all applicable rules of international law, including IHL rules on the conduct of hostilities, as well as its rules regarding the treatment of persons in the power of the party to the conflict (for specific obligations relevant to Israel, as the occupying power, see below), and IHRL;
- investigate allegations of violations of international law, and prosecute and punish those responsible;
- provide reparations for those directly affected by the violations of the law; and
- cooperate with the ICC in the investigation of the Situation in Palestine.

Israel, as the occupying power, must:

- put an end to the deliberate and discriminatory policies and practices aimed at introducing demographic and other changes in the oPt, including but not limited to confiscation of property and eviction of Palestinians from their homes, and encouragement and support of Israeli settlers to relocate to the oPt (see detailed points in Section 2);
- give effect to the rights of expression, peaceful assembly and association of Palestinians, and in any event, respect and protect the right to life of those participating in protests and demonstrations by planning, preparing and executing their law enforcement operations in compliance with applicable IHRL, and investigating all instances of misconduct and use of lethal force by its agents (see detailed points in Section 3);
- respect the right to liberty and security of Palestinians, by exercising their prerogative to resort to arrest and detain persons as a means of maintaining and restoring law and order in good faith and without discrimination, and in any event by refraining from detaining individuals without legal grounds and appropriate procedural safeguards and releasing those whose continued detention is no longer justified under international law (see detailed points in Section 4);
- give effect to the right to freedom of religion of Palestinians including their access to consecrated religious sites, by removing legislative, administrative, and other barriers to access those sites, and not to otherwise infringe their religious rights and right to physical integrity and dignity (see detailed points in Section 5);
- lift the closure of Gaza; and
- refrain from arbitrarily blocking or interfering with, and instead immediately facilitate, the passage of relief supplies, as well as supplies necessary for the proper functioning of essential services, such as fuel and electricity.

States that are not parties to the conflict and the international community at large:

- refrain from aiding or assisting violations of international law by the parties to the conflict;
- refrain from recognising or otherwise giving legitimacy to the consequences of violations of international law by the parties to the conflict;
- use their position of influence and take proactive and concrete measures to ensure respect of the law by the parties to the conflict;
- cooperate with the ICC in the investigation of the Situation in Palestine, as required; and
- provide diplomatic and public demonstration of support of the mandate of the ICC and the Office of the Prosecutor's investigation of the Situation in Palestine.

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Cover photo: Destruction in Gaza following Israeli strike 13 May 2021.
Hazem Alabyad/Gaza for OCHA