

International Humanitarian Law Concerns – The Wall and the Disengagement Plan

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In the era of globalized justice and the establishment of the International Criminal Court, one can no longer speak of international politics without referring to the law in general and to International Humanitarian Law (IHL) and human rights law in particular.

Political decisions should and do come under legal scrutiny throughout the world, including the Middle East, and Israel's policies in the occupied Palestinian territory (oPt) are no exception in that regard. Violations of IHL perpetrated in the oPt have been monitored and criticized by many institutions, including the UN Human Rights Committee, General Assembly (GA), Secretary-General, Security Council and recently the International Court of Justice (ICJ), as well as international human rights organizations on the international level; and the Israeli High Court of Justice and local human rights organizations, Israeli and Palestinian, on the national level.

The long-term occupation has brought about the need for constant legal review of various policies, some similar to actions adopted by parties to other conflicts, and others less familiar (assassinations, the extensive destruction of private property including home demolitions, the uprooting of olive trees and the enforcement of a tight closure regime), but all carried out in the name of security and military necessity.

Political Processes and International Humanitarian Law

However, as we have seen from the Oslo period, even peace initiatives, however well-intended, might have indirectly contributed to an increase in violations of IHL, and consequently to upsurges in violence. Today, unfortunately, more and more people are genuinely asking whether or not the two-state solution is indeed feasible. Violations of IHL are a key factor in the minimal level of control which Palestinians exercise over their own land and natural resources – the control over which is a pre-condition for the establishment of a viable independent state.

The Oslo Accords highlight the need for IHL considerations to be taken into account in the preparation of international agreements, and before lending support to similar peace initiatives. As experience has shown, the lack of necessary references to international standards left many aspects of civilian life and governmental functions to the final discretion of the Occupying Power.

One of the clear structural weaknesses of the Oslo Accords, and one which eventually undermined the protection of civilians under IHL, was the division of the territory of the West Bank into three categories, representing various levels of civil and security responsibility: Area A, which falls under the total civil and security responsibility of the Palestinian Authority (PA); Area B, over which the PA has responsibility for civil affairs and Israel for security issues; and Area C, which comprises 60% of the West Bank, and was left under the civil and security control of Israel.

This division of power allowed the regime of closure to impact negatively not only on Areas B and C but also on Area A, in which the majority of the Palestinian population lives. Manned checkpoints, concrete blockades, mounds of earth and ditches were constructed in locations formally separating Areas A, B and C, and effectively encircling Area A. The Wall, essentially a part of the closure policy, follows very closely the route of the western border of Area C, incorporating the settlements established in that area.

The impact of the fragmentation of West Bank land is not limited to the obstruction of movement: while the PA has civil authority in Areas A and B, most of the land in the West Bank remains under

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the authority of the Israeli Civil Administration, in Area C. Thus, while educational responsibilities were given to the PA in Area C as well as in Areas A and B, it has thus far been unable to construct new schools in this area, since, under the agreements, such construction requires Israel's approval. Such approval is granted, if ever, only in exceptional situations. Israel's control over Area C enables it to pursue a policy of illegal administrative home demolitions, employing the lack of a building permit as the pretext, and to continue the expansion of its illegal settlement project.

In the early years of Oslo, much of the international criticism directed at Israel focused on Israel's violations of the Oslo Accords themselves, rather than on its violations of IHL. The Oslo Accords did not incorporate the necessary IHL and human rights benchmarks for guaranteeing that basic legal principles are adhered to, even in times of conflict. Thus, the only option left for war victims was constant reference to legal sources outside of the formal agreements. Although Article 47 of Geneva Convention IV clearly safeguards the rights of protected persons from any possible waiver by international agreements, such as the Oslo Accords, at that stage, the agreements provided an effective distraction from IHL. It was only towards the end of the 1990s that systematic violations of IHL, such as house demolitions, received appropriate international attention, and only after the outbreak of the second Intifada that the full impact of the regime of fragmentation became apparent. In parallel to these illegal policies, significant funds were poured into development projects in the PA Areas A and B, many of which were destroyed during military operations. In Area C, development projects proved problematic throughout the Oslo period and remain so today, due to Israel's control over the land.

Many lessons can be learned from the Oslo Accords, depending on the viewer's political perspective. A humanitarian approach, however, can only lead to one conclusion: disrespect for IHL not only weakens accepted international norms, but also sends a signal to parties to conflicts that the balance of power takes precedence over humanitarian legal safeguards adopted by the international community. This situation is extremely problematic in cases of occupation, and particularly where the occupied population does not have an equal position within the international community, as is the case with the PA, which is not a state. Humanitarian assistance in these cases is regarded by the occupied population as 'lip service' unless accompanied by adherence to basic IHL standards.

The Importance of IHL Enforcement – The Case of the Wall

Thus, the great importance of the principle ICJ Advisory Opinion on the illegality of the Wall lies not only in its affirmation of the 'Palestinian side,' but also in its reinforcement of the crucial nature of the international community's role in laying down safeguards in times of conflict, which will later oil the wheels of the political process, alongside the provision of humanitarian assistance.

In its legal reasoning, the ICJ actually followed a common legal interpretation, shared by Israeli as well as Palestinian and international human rights groups. Reinforcement of the opinion that the route of the Wall is legally problematic is found in the Israeli High Court of Justice's ruling in *Beit Surik*, although the decision was based on a different legal reasoning. In that case, the Court ordered the cancellation of most sections of the Wall that were challenged in the petition.

However, one cannot be satisfied with the High Court's ruling from a legal perspective, and must be careful not to subject the ICJ's Advisory Opinion to the Israeli national courts; the High Court has cancelled many of its initial injunction orders to allow construction of the Wall to continue, while petitions filed against the Wall remain pending before it. In any case, it is unlikely that even the most far-fetched of High Court rulings would invalidate the route of the Wall in East Jerusalem, as evidenced by Chief Justice Aharon Barak's comment of 21 June 2005, reported in *Ha'aretz*. Barak stated that, regardless of the state's declaration that the Wall in East Jerusalem is political, the reason behind the construction is irrelevant since it is built on sovereign Israeli land.

The current route of the Wall leaves many settlements on the 'Israeli' side of the Wall, thus enabling the de facto annexation of land, which was a concern raised by the ICJ itself. The Israeli

High Court's ruling on the legality/illegality of sections of the Wall that incorporate settlements into Israel, expected to be delivered shortly, may well not follow the common interpretation of IHL or the ICJ's ruling and state that the Wall's construction in these areas is illegal. It should be remembered that the Israeli High Court has been de facto approving the establishment of the settlements from 1967 until today.

Most crucially, the Wall continues to be built, in spite of the ICJ's Advisory Opinion. Especially alarming is the construction in the Jerusalem area, which reflects Israel's lack of respect for the Advisory Opinion.

The permit regime that enclaves Palestinians between the Green Line and the Wall is becoming increasingly restrictive, as young farmers who inherited land from their ancestors are refused permits to access their lands and to cultivate it. Some UN-financed projects, primarily meant to ease the humanitarian crisis created by the Wall, are indirectly facilitating the separation of the seam zone from the rest of the West Bank. Projects to construct new infrastructure, such as schools, needed inside the seam zone due to the inappropriate operation of the gates in the Wall, are in fact not encouraging continuous, regular movement from the seam zone to the rest of the West Bank and vice-versa. Therefore, the main concern relating to IHL in the case of the Wall is not the question of its illegality, but that of enforcement of the opinion of the world's highest legal instance.

There are several ways of enforcing the Advisory Opinion:

The ICJ has called upon the UN to guarantee respect for IHL. However, the UN Secretary-General did not call for the implementation of the Advisory Opinion or for the dismantling of the Wall. Does the Secretary-General's inaction on this issue indirectly facilitate the illegal existence of the Wall? The GA issued a resolution on 20 July 2004 calling upon the Secretary-General to set up a register of damages caused by the Wall. However, the register, the establishment of which is extremely time-consuming and requires the cooperation of Israel – which has already declared that it will not cooperate – cannot be regarded as a substitute for working towards ending the illegal existence of the Wall. The Secretary-General has made no recommendation to the various UN agencies operating in the oPt on how to follow up on the Advisory Opinion. As far as we know, no follow-up report is planned on the continuing construction of the Wall, to supplement the two reports written before the Advisory Opinion was granted.

Other potential mechanisms of enforcement are not being taken forward, including the GA's authority to take operative actions within the 10th emergency session on Palestine, based on Resolution 377 (V), "Uniting for Peace" of 1950, if the Security Council fails to act to maintain international peace and security. In addition, it is difficult to determine the probability of whether or not states will call for the convening of another meeting of the High Contracting Parties to the Geneva Conventions.

In its conclusions, the ICJ called upon states to follow their legal obligations under Article 1 of the Geneva Conventions and the "erga omnes" rule. Although the opinion cannot impose a binding obligation on states, the court emphasized that the law upon which its opinion is based is binding. According to Article 1, states have the obligation to respect and ensure respect for the Geneva Conventions. This article, which is commonly considered not to set concrete criteria for ensuring respect for the conventions, was made authoritative with the ICJ's Advisory Opinion.

Section 155 of the Advisory Opinion states that:

The Court would observe that the obligations violated by Israel include certain obligations *erga omnes*. As the Court indicated in the *Barcelona Traction* case, such obligations are by their very nature "the concern of all States" and, "In view of the importance of the rights involved, all States can be held to have a legal interest in their protection."

The ICJ elaborated on the scope of *erga omnes* (Sections 158-9). It called upon states not to support or indirectly facilitate the construction of the Wall, and set a positive duty on states “to see to it that *any impediment*, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to *self determination is brought to an end*.” [Emphasis added]

It should also be mentioned that states have an obligation under the principle of universal jurisdiction to bring perpetrators of war crimes to justice, in case of the failure of their own state to do so. Since the Wall is illegal and its construction entails extensive, unlawful and wanton destruction which cannot be justified under the pretext of military necessity, the Advisory Opinion constitutes, in our opinion, an important additional legal basis for the individual criminal responsibility of the initiators, planners and constructors of the Wall. The corporate responsibility of companies which construct the Wall and provide security for it should also be examined.

Reports by human rights organizations and the UN Office for the Coordination of Humanitarian Affairs (OCHA) in the oPt forecast severe humanitarian, socio-economic consequences for residents of the seam zone, neighbouring villages, and the West Bank as a whole. Periodically, we hear of yet another village which will be caged in due to the Wall. The village of Al-Walaje, south of Jerusalem, for example, the residents of which hold Jerusalem identity cards, will be completely surrounded by the Wall, except for one tunnel planned to connect it to the world beyond the Wall.

The occupation under which Palestinians have been living for almost 40 years has reached another level of illegality with the Wall. It should be remembered that the Wall is not complete, and therefore efforts to stop its construction should continue, focusing attention on Israel's obligations under IHL. Unfortunately, we cannot rule out the analysis that the Wall, alongside continuing closures, threats to residency and family rights, and the disconnection of East Jerusalem from the West Bank, may be the real reason behind recent talk of a third Intifada.

It appears that there is no political will among states to follow up on the Advisory Opinion, and efforts to adopt a strict line on the issue of enforcement are blocked. Could it be that the impending disengagement from Gaza provides the main explanation for the current international self-restraint, and for the failure to adopt a firm stand on the implementation of the ICJ's Advisory Opinion? It is highly probable that today's lack of political will to adhere to IHL will give rise to increased violations of IHL, with the associated political consequences, tomorrow. International law will not be respected if IHL violations are perpetrated without consequence in the international arena.

The Upcoming Opportunity to Prevent Violations

Regardless of its current effect on the enforcement of the ICJ's Advisory Opinion, the disengagement plan provides a good example of the need to integrate IHL into political processes. Insistence on adherence to IHL before, during and after the withdrawal presents an unmissable opportunity to forestall anticipated violations of IHL, at the same time as supporting the withdrawal of military troops from the Gaza Strip.

Although many components of the disengagement plan have yet to be finalized – including control of the border between Gaza and Egypt, the so-called “Philadelphi Road,” and the access of Palestinians from the Gaza Strip to the West Bank and East Jerusalem – certain aspects of the plan already rouse IHL-related concerns, which can be adequately tackled during the current negotiations.

Pre-withdrawal

Our ‘IHL-sensor’ confirms that extensive IHL violations are taking place today. Violence by settlers is increasing, particularly in the Hebron and Nablus areas. For instance, the destruction of homes on privately-owned land in the Hebron area, from which 700 inhabitants were evacuated in 1999, has been resumed, on the administrative pretext of lack of building permits. Plans have been drawn up for the demolition of 88 houses in the neighborhood of Silwan in Jerusalem, which would erase an entire ancient Palestinian neighbourhood, in order to rebuild the area as a Jewish

national park. A bill was recently passed by the Knesset to exempt Israel from state civil liability in tort claims filed by Palestinians for damages caused by Israeli state-agents, which denies Palestinian victims of their basic right to due process and compensation, and subsequently alleviates Israel of its obligations under IHL. These last-minute attempts to amend the law and create facts on the ground are extremely problematic, especially at a time when enthusiasm for a possible peace process is deterring states from drawing attention to IHL violations, for fear that this would create unnecessary obstacles to the withdrawal.

Anticipated agreements between Israel and the Palestinians, such as the "Evacuation-Construction" plan concerning settlement assets should also be scrutinized on the basis of IHL and human rights law. Aspirations that housing projects will close the prolonged discussions over the rights of Palestinian refugees to return to their homeland seem premature.

During Implementation

During the implementation itself, a shut-down phase is envisioned which international NGOs predict will disrupt the lives of Palestinian civilians living in the West Bank and Gaza Strip. The movement of students and medical staff is expected to be hindered and recent statements by Israeli officials regarding the potential re-invasion of Khan Yunis are raising concerns of a new razing operation which, in addition to human casualties, may involve, again, extensive and disproportionate destruction of Palestinian houses.

In the health sector, for example, there is concern over levels of access to primary health care facilities due to the imposition of internal movement restrictions within the Gaza Strip and at external checkpoints inside Israel, such as that in Ashkelon. The need for prior coordination with the Israeli authorities in order to pass through these checkpoints may restrict access to health services.

In the education sector, for example, the August-September 2005 timeframe of closure will affect students at the beginning of the 2005-2006 school year. Foreign educational institutions may need to use diplomatic means to ensure that participants in their programs from the Gaza Strip reach their destinations on time; donors to scholarship programs may be forced to change participants' departure schedules from Gaza in order to make certain that students arrive in time for the start of university programs, which will require additional funding. The international community will again absorb the extra costs of Israel's closure policy.

The question is therefore: what should the international community do in order to ensure that the basic rights of Palestinians under international humanitarian and human rights law will not be breached during the evacuation itself, and to secure their safety from retaliation by the Israeli military or settler violence, as well as during the shut-down period?

It is unclear what conditions have been put to Israel by the international community on issues such as:

- IHL-based limitations on the use of force by Israel
- Israel's IHL-based obligations to assure access for humanitarian assistance not to resemble the past experiences of lengthy delays at the Karni passage
- Israel's IHL-based obligations regarding the protection of Palestinian civilians from settler violence

Post-Disengagement

Core IHL concerns fall within the post-implementation phase, and relate to the long-term impact of the withdrawal on the status of the Gaza Strip as occupied territory and its de facto and de jure contiguity to the other, inseparable, part of the oPt - the West Bank and especially East Jerusalem.

According to IHL, occupation ends when an occupying power no longer exercises effective control over the occupied territory. The revised disengagement plan of 6 June 2004 states that, "The completion of the plan will serve to dispel the claims regarding Israel's responsibility for the Palestinians in the Gaza Strip." However, other articles in the plan reveal that Israel will continue to exercise effective military and administrative control over the Gaza Strip by the following means:

- Controlling or reserving the right to control the airspace
- Controlling or reserving the right to control the sea shore
- Reserving the right to conduct land incursions
- Regulating the entry and exit of persons and goods through international borders or reserving the right to do so
- Retaining authority and control over governmental functions, including migration, trade, and fiscal policies
- Enforcing continued Palestinian infrastructural dependency on Israel, including for water and electricity supplies

The status of the Philadelphi Road is still unclear: will it be handed over completely to the Egyptians, or will any Israeli military control remain? Past experience with the South Lebanon Army (SLA), for example, indicates that the formal separation of military forces does not necessarily relieve one army of substantial responsibility for acts perpetrated by another.

According to some public statements made by Israeli officials, Israel will withdraw in full from the Philadelphi Road. If this step does indeed take place, direct access will become available from the Gaza Strip to Egypt, and Israel will probably adopt the legal stance that the Strip cannot be considered occupied territory.

Clearly, any legal analysis requires that facts on the ground be examined, in real time. Therefore, final legal opinions may be given only after the withdrawal has taken place.

However, any legal interpretation should not relieve Israel of its responsibilities under IHL and human rights law, and a comprehensive approach should be adopted which takes into account Israel's ability to regain control over the Gaza Strip at any time it wishes. This interpretation is especially relevant since the territory is being given to the PA, which is not a recognized sovereign state, and some governmental functions in Gaza are still interlinked to Israel. These two factors make the case of the disengagement plan from Gaza completely different from the withdrawal from Lebanon. It should be highlighted in this regard that no agreement between the PA and Israel may undermine the continuing status of the Gaza Strip as an occupied territory if facts on the ground demonstrate that effective Israeli control is indeed taking place. Reality will be the main test until a full and complete withdrawal actually takes place. Unilateral statements, such as the one contained in the Israeli plan for the end of Israel's responsibility/occupation should not be considered and certainly not adopted. The international community should unite in the struggle for the correct interpretation of IHL, just as it did over the applicability of the Fourth Geneva Convention and the status of East Jerusalem as occupied territory, despite Israel's minority and opposite legal opinion. Hastily-made legal assumptions may result, unintentionally, in the abandonment of an occupied population to the mercy of an occupying power, without the necessary international protection.

Conclusion

As we have seen, IHL is not a theoretical notion; it is relevant to each and every aspect of the armed conflict. IHL sets humanitarian guarantees and restrictions on the use of force – so necessary for the civilian population – for both sides. Adherence to IHL, in spite of its 'soft' characteristics, may provide verification for the phrase 'better safe than sorry.'